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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

OFFICE OF CARE AND PROTECTION

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTIONS 7 AND 8
OF THE HUMAN RIGHTS ACT 1998

Between:

A MOTHER

Applicant

v

A HEALTH AND SOCIAL CARE TRUST

Respondent

Ms S Simpson QC with Ms K Downey BL (instructed by Emma Lyons solicitor) for the
Mother
Mr T Ritchie BL (instructed by the Directorate of Legal Services) for the Health and Social
Care Trust

McFARLAND J

Introduction

[1] This application is pursuant to sections 7 and 8 of the Human Rights Act 1998 and concerns a series of decisions of the Trust relating to contact between the mother and OS, her new-born child.

[2] The child was born in January 2020 and was the second child of the mother. This court dealt with care order proceedings in respect of both children and care orders were made on 22 September 2021 with care plans of adoption. The background to the care proceedings is set out in my judgment *Re CW and OS* [2021] NIFam 37. OS was the cipher used in that judgment for the child. I will continue to use the cipher in this judgment. Nothing can be published that will lead to the

identification of the child.

Background

[3] Several days after OS's birth the Trust issued care order proceedings, and the case was transferred immediately by the Family Proceedings Court to the High Court for the purposes of consolidation with the proceedings relating to the older sister. The matter came before the court on 15 January 2020 and Mr Justice O'Hara made an interim care order placing OS in the care of the Trust. This order approved an interim care plan for the removal of OS from the care of the parents and into the care of a foster carer who was also looking after the older child. The court granted a contact order between OS and his parents "5 times per week for 2 hours on dates and times to be agreed by the ... Trust."

[4] Despite separation from OS the mother continued to breastfeed the child, not only when she was able to do so when having physical contact with the baby, but by expressing her milk, with the Trust providing storage and transport to allow the milk to be fed to the child by the foster carer.

[5] On 24 March 2020 because of the very stringent restrictions being placed on existing practices for all walks of life as a result of the Covid-19 pandemic, the Trust ceased direct contact between the mother and OS.

[6] The Trust put in place a substitute indirect contact regime. Both children were living with the foster carer, and the parents had live-link indirect visual contact with each child five days a week for approximately 15 minutes each. The foster carer informally facilitated additional weekend contact but this was stopped by the Trust. Text message communication continued between the mother and the foster carer.

[7] The mother continued to provide her milk under the existing arrangement. Recordings of OS crying were made and provided to the mother to facilitate lactation. The milk was frozen, stored and transported to the foster carer by the Trust. It is reported that this provided for two to three feeds per day of approximately six fluid ounces each. The mother has a long history of very poor mental health and she has limited cognitive ability. Her commitment to feeding the child was nothing short of remarkable, and it must be recognised that her efforts would have taken a physical and emotional toll on her.

[8] On 26 May 2020 the mother issued a C2 seeking a review of the contact arrangements by the court. Keegan J reviewed the arrangements and directed position papers. A number of reviews were undertaken by the court and on 28 June 2020 Keegan J approved contact arrangements that permitted direct contact (which included physical touching and skin to skin breastfeeding) between the mother and OS.

[9] On 15 June 2020 the mother issued a pre-action letter intimating an intention to commence judicial review proceedings complaining about the Trust's failure to

identify a dialectical behaviour therapist, to fund therapy and, as a consequence, to meet its duty towards rehabilitation of the child into the care of the mother. The pre-action letter did not mention any issue concerning contact or breastfeeding. Judicial review proceedings never materialised.

[10] On 18 June 2020 the mother issued her human rights notice which referred to the matters raised in the pre-action letter and the matters relating to contact. With the care order applications for the children still ongoing, the human rights notice was not the main focus of attention for the parties or the court, particularly as the rehabilitation issue became a matter for the court to resolve in the care order proceedings and the issue regarding the return of face to face and skin to skin physical contact had been resolved. However, after the conclusion of the care order proceedings, the court directed that the human rights notice proceedings should be listed for hearing.

The Mother's Human Rights Notice

[11] The mother, through her notice, claimed her right to a fair trial, her right to respect for her private and family life and her right to marry and found a family had been infringed by the Trust. These rights are protected, respectively, by articles 6, 8 and 12 of the European Convention on Human Rights ("ECHR"). The mother in her notice failed to reference article 12. The Article 6 issue related to the alleged failure to fund the further therapeutic work with the mother. This was not pursued at the hearing. The article 12 issue was also not pursued at the hearing, presumably because the mother had married in 2019 and had not been prevented from founding a family. The article 8 issue related to the alleged infringement by the Trust in connection with the contact arrangements between 24 March 2020 and 24 June 2020.

[12] The main issues were therefore the decision making of the Trust in relation to the termination of direct contact, a failure to reinstate it, and once reinstated the failure to permit physical skin to skin contact. A revised schedule of alleged breaches of the mother's article 8 rights was provided to the court. It stated:

"The Trust unlawfully breached the Article 8 rights of [the mother] and [OS] by:

- a) Failing to perform an appropriate welfare analysis when considering whether direct contact was in the best interests of [OS];
- b) Refusing to permit ongoing direct contact from March 2020 which prevented [the mother] from directly breastfeeding [OS];
- c) Refusing to allow physical touch between [OS] and [the mother] when reversing its stance on direct contact between 15 June 2020 and 24 June 2020."

[13] The mother sought a declaration that her article 8 rights had been infringed. She also claimed damages. Although further claims were made, given the developments in the case these claims are no longer relevant.

The Trust's decision making

[14] At the start of the Covid-19 pandemic the Trust was required to react to the worsening public health situation, with the implementation of what were unique and unprecedented restrictions on general social life, social distancing, movement, mandatory isolation in certain circumstances, and the wearing of suitable personal protection equipment ("PPE") if contact was unavoidable. This was clearly going to impact on how social workers were having to operate within their work environment as well as their interaction with, as in this case, parents, children and foster carers. On 23 March 2020 the national 'lockdown' was put in place by both national and local government. There was a 'stay at home' direction except in very limited circumstances - purchasing necessary items, taking daily exercise (alone or with householders), medical needs, caring for vulnerable relatives and 'essential' work. Both parents were advised by the Trust on 23 March 2020 that it was unlikely direct contact could continue and they would be advised about how best indirect contact arrangements would be established.

[15] On 24 March 2020 the Trust's 'Action Card' was issued in line with regional guidance issued to all Trusts. That document stated that all direct face to face contact was to be suspended with immediate effect; parents and children would be advised by their social worker; and that social workers would agree a form of non-face to face video conferencing indirect contact in consultation with parents and carers.

[16] On 25 March 2020 the Trust agreed a flexible indirect contact regime with the parents and the carer. This is set out at [6] above. The additional informal weekend contact ceased on 1 April 2020. The carer was asthmatic although had not been issued with a 'shielding' letter, she lived with her family which included her own children and she was also caring for a third child.

[17] Problems arose in connection with the father's indirect contact with the elder child over April and May 2020. In addition concerns were expressed by the carer that the mother was having difficulty maintaining an appropriate relationship with the carer, with the mother contacting the carer seeking emotional support generally, and advice and guidance about the Trust's care planning and other matters. In this regard it should be noted that the mother was an extremely vulnerable young adult suffering from a diagnosed emotionally unstable personality disorder, she had been separated from her children and her domestic circumstances were far from satisfactory with a separation from her husband as a result of domestic violence.

[18] During this period two child immunisation appointments were conducted with a general practitioner and the mother was permitted to attend with the carer

and was able when wearing PPE to have physical contact with the child. These were regarded as exceptional circumstances and not without difficulties as the social worker was required to remain outside the building and the mother breached the general practitioner's practice guidelines by not maintaining social distancing and by holding the child.

[19] The mother issued a C2 application to the court on 26 May 2020 seeking contact with OS on the basis of the pre-pandemic arrangements "so as to facilitate breastfeeding and skin to skin contact."

[20] On 29 May 2020 a social work report was prepared for the court. It recognised that this remained a complex situation but the Northern Ireland Executive's guidance and the Department of Health's guidance remained unchanged and as a consequence it was unable to facilitate direct contact. It was noted that the Trust's Action Plan continued to be reviewed on a weekly basis, but remained unchanged in light of the continuing public health situation. At or about this time in late May 2020 the Trust had become aware of reports that both the mother and the father were not complying with social distancing requirements in respect of their own lives. Although living in separate households they were meeting each other, and both were meeting other people with an absence of social distancing.

[21] On 12 June 2020 the Trust at Director and Assistant Director level considered updated Public Health Agency advice and fresh guidance was issued which in general terms permitted social workers to facilitate face to face contact after a suitable review and risk assessment. On the same day a risk assessment was carried out in relation to face to face contact between the mother, father and both children. This assessment included consultation with three relevant nursing practitioners – EH, the Infant Feeding Lead at the Trust, NT, the Divisional Nurse for Children's Community Services and JD, the named Nurse for Safeguarding Children.

[22] Following that risk assessment, on 15 June 2020 the Trust, in light of the guidance and taking into account the risk assessment, proposed contact between the mother, the father, and OS for 45 minutes at noon on the Friday (19 June 2020) in a public park, with a social worker and the carer in attendance, with all adults wearing PPE. EH, the Infant Feeding Lead was to meet the mother prior to contact taking place to offer guidance and was to be available to attend some contact sessions to support the mother and assist in the re-establishing of breastfeeding. Although the father availed of contact with the child (and a similar contact with the older child on 18 June 2020), the mother declined to attend both of the contacts. Her stated reason was that she wished to await the outcome of the court hearing scheduled for 22 June 2020.

[23] The advice at that stage from the Public Health Agency was that social distancing should be adhered to and if face to face contact was to take place with the child it should not involve physical touching and be at a suitable distance, thus preventing breastfeeding.

[24] The court convened a hearing on 22 June 2020 and the matter was adjourned overnight. The solicitor for the guardian ad litem took the lead in addressing a question to the Chief Medical Officer which was formulated in a letter of that date. After setting out in brief form the history of the case, the question was stated as:

“Is there a policy that any direct contact including physical touch and also specifically breastfeeding between a parent and a child in foster care would be in contravention of public health guidance/advice (social distancing) or can such physical touch contact happen if the Trust carries out a risk assessment and deems it appropriate.”

[25] The Chief Medical Officer responded overnight in the following terms:

“In my professional view, and in that of the Chief Scientific Advisor for the Department, the physical contact as described in your letter represents low risk, provided that none of the parties are experiencing any symptoms of Covid-19. There is no impediment to this in either guidance or regulations, and it is in line with current relaxations agreed by the Executive.”

[26] The matter returned to court and after a further short adjournment primarily to enable the parties to reach an agreed resolution concerning regularity of contact, the issue was resolved on 28 June 2020.

[27] The applicant’s representatives have referred me to two World Health Organisation (“WHO”) documents. Neither is specifically mentioned in any report or evaluation of the Trust (or the Chief Medical Officer). The first is the Clinical management of Covid-19: Interim guidance of 27 May 2020. Section 19 of this guidance refers to feeding and caring for infants and young children of mothers with Covid-19. The other is Scientific Brief – Breastfeeding and Covid-19 dated 23 June 2020. I will refer to potentially relevant extracts below.

Government action between March – June 2020

[28] To put the Trust’s decision making into context a brief summary of the development of government intervention between March and June 2020 is necessary. As referred to below, a general challenge to these restrictions in connection with various ECHR rights, including article 8, was rejected by the English Court of Appeal on the basis of the need to protect public health. The Prime Minister announced the commencement of restrictions on 23 March 2020. This was followed by the rapid passing into law of the Coronavirus Act 2020 which received Royal Assent on 25 March 2020. This Act, at Schedule 18, made sweeping amendments to the Public Health Act (NI) 1967 and put in place the ‘lockdown’ provisions. Government intervention remained a devolved matter and local government

commenced even stricter restrictions on 28 March 2020 with greater enforcement powers. By late April 2020 scientific advice was that the rise in Covid-19 cases was flattening with an indication that maintaining the restrictions could give rise to a low level of infection by mid-May 2020. On 12 May 2020 local government announced a 'road map' for recovery with five stages with no dates for activation of the stages. Limited activation commenced on 18 and 19 May 2020 to include six people from different households being permitted to meet outdoors with social distancing.

[29] 12 June 2020 saw the commencement of a further series of relaxations with the opening of non-essential retail shops with further future relaxations announced – hospitality (3 July 2020) and hairdressers (6 July 2020).

The Law

[30] Section 6(1) of the Human Rights Act 1998 states that it is unlawful for a public authority (such as a Health and Social Care Trust) to act in a way which is incompatible with a Convention right. Article 8 of the ECHR provides as follows:

“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 wellbeing 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.”

When a court is considering decision-making it is adopting a supervisory role of a discretionary area of judgment. Laws LJ in *Mahmood v Secretary of State for the Home Department* [2001] 1 WLR 840 spoke of a “margin of discretion” to be allowed to the decision-maker (at [33]) and Lord Phillips MR identified three relevant principles at [37]:

“(1) Even where human rights were at stake, the role of the Court was supervisory. The Court would only intervene where the decision fell outside the range of responses open to a reasonable decision-maker.

(2) In conducting a review of a decision affecting human rights, the Court would subject the decision to the most anxious scrutiny.

(3) Where the decision interfered with human rights, the Court would require substantial justification for the

interference in order to be satisfied that the response fell within the range of responses open to a reasonable decision-maker. The more substantial the interference, the more that was required to justify it.”

[31] Article 8 is clearly engaged when a child is made the subject of an interim care order with an interim care plan of separation from its parents. The younger the child the greater the engagement. The decision of O’Hara J in making the interim care order in this case was not challenged. He had determined that it was both necessary and proportionate to separate the child from her mother immediately after the birth. The contact order recognised the importance of contact between the new born child and its mother.

[32] Contact between a child in care (irrespective of the age) and its parents has been recognised as of critical importance not least to maintain a relationship upon which will be foundations for any attempts of reunification of the family. Article 53 of the Children (NI) Order 1995 (“the 1995 Order”) specifically deals with the duty placed upon a Trust and the courts. The relevant sub-sections of Article 53 are:

“(1) Where a child is in the care of an authority, the authority shall (subject to the provisions of this Article) allow the child reasonable contact with (a) his parents ...;

(2) On an application made by the authority or the child, the court may make such order as it considers appropriate with respect to the contact which is to be allowed between the child and any named person.

(3) On an application made by –

(a) any person mentioned in sub-paragraphs (a) to (d) of paragraph (1) ... the court may make such order as it considers appropriate with respect to the contact which is to be allowed between the child and that person.”

[33] The ECtHR considered the position in relation to contact between parents and children in *Scozzari and Giunta v Italy* [2000] ECHR 372. The court reiterated at [148] that “it is an interference of a very serious order to split up a family. Such a step must be supported by sufficiently sound and weighty considerations in the interests of the child” and therefore “regard must be had to the fair balance that has to be struck between the competing interests of the individual and the community as a whole.” In this context guidance was given concerning the relevance and importance of contact between a child in care and its parents:

“[169] The Court reiterates, firstly: “the mutual enjoyment by parent and child of each other's company

constitutes a fundamental element of family life; furthermore, the natural family relationship is not terminated by reason of the fact that the child has been taken into public care ..." (see the *Eriksson v. Sweden* judgment ...). As the Court has previously observed, "... taking a child into care should normally be regarded as a temporary measure to be discontinued as soon as circumstances permit and ... any measures of implementation of temporary care should be consistent with the ultimate aim of reuniting the natural parent and the child ... In this regard, a fair balance has to be struck between the interests of the child in remaining in public care and those of the parent in being reunited with the child ... In carrying out this balancing exercise, the Court will attach particular importance to the best interests of the child, which, depending on their nature and seriousness, may override those of the parent. In particular, ... the parent cannot be entitled under Article 8 of the Convention to have such measures taken as would harm the child's health and development. (see the *Johansen v. Norway* judgment ...)."

At [170] it was emphasised that to prohibit any contact between a parent and a child had to be based on "sufficiently valid reasons."

[34] The court further stated at [181] that when contact between parent and child was being considered, article 8 demanded that decisions aimed at facilitating visits between parents and their children had to be implemented in an effective and coherent manner. The court also stated that no logical purpose would be served in deciding that visits may take place if the manner in which the decision is implemented means that de facto the child is irreversibly separated from its natural parent. This required, in the words of the court, that the relevant authorities have a duty to exercise constant vigilance.

[35] Much of the national jurisprudence in respect of the granting of interim care orders for very young children and any resultant separation of the child from its parents has emphasised the importance of the parent-child bond. Recently, Jackson LJ in *Re C* [2019] EWCA Civ 1998 at [2] set out several consistent propositions which had emerged from the jurisprudence:

"(2) The removal of a child from a parent is an interference with their right to respect for family life under Art. 8. Removal at an interim stage is a particularly sharp interference, which is compounded in the case of a baby when removal will affect the formation and development of the parent-child bond.

(3) Accordingly, in all cases an order for separation under an interim care order will only be justified where it is both necessary and proportionate. The lower ('reasonable grounds') threshold for an interim care order is not an invitation to make an order that does not satisfy these exacting criteria.

(4) A plan for immediate separation is therefore only to be sanctioned by the court where the child's physical safety or psychological or emotional welfare demands it and where the length and likely consequences of the separation are a proportionate response to the risks that would arise if it did not occur.

(5) The high standard of justification that must be shown by a local authority seeking an order for separation requires it to inform the court of all available resources that might remove the need for separation."

[36] This is particularly the case in relation to a mother-baby bond as Pauffley J highlighted in *Re: NL* [2014] EWHC 270 at [53]:

"There is, after all, an elemental as well as a physiological need to keep mothers and new born babies together wherever possible, so long as the child will not be endangered."

[37] Munby J in his judgment in *Re: MR* (a judicial review application) set out some concluding thoughts at [44], including at (iv) the following:

"If a baby is to be removed from his mother one would normally expect arrangements to be made by the local authority to facilitate contact on a regular and generous basis. It is a dreadful thing to take a baby away from his mother: dreadful for mother, dreadful for father and dreadful for the baby. If the state, in the guise of a local authority, seeks to intervene so drastically in a family's life - and at a time when, ex hypothesi, its case against the parents has not yet even been established - then the very least the state can do is to make generous arrangements for contact. And those arrangements must be driven by the needs of the family, not stunted by lack of resources. Typically, if this is what the parents want, one will be looking to contact most days of the week and for lengthy periods. And local authorities must be sensitive to the wishes of a mother who wants to breast-feed and must make suitable arrangements to enable her to do so - and

when I say breast-feed I mean just that, I do not mean merely bottle-feeding expressed breast milk. Nothing less will meet the imperative demands of the Convention. Contact two or three times a week for a couple of hours a time is simply not enough if parents reasonably want more.”

[38] Turning now to relevant case-law relating to the Covid-19 pandemic, the Court of Appeal recently heard an appeal against a judgment of Keegan J which concerned a decision by a Trust to deny a mother physical contact (skin to skin contact) with a new-born baby - *SB v A Trust* [2021] NICA 50 and at first instance *Re Florence* [2020] NIFam 17. Breastfeeding was not a specific issue in this case. The case is of additional relevance as the separation occurred in late June 2020, when the country was emerging from the initial phase of restrictions imposed at the start of the Covid-19 pandemic. At first instance, Keegan J declined to make a declaration primarily as she considered that the interference was justified in the context of the pandemic and the need to protect public health. The Trust had acted proportionately in looking at its risk assessment and reviewing the matter on an ongoing basis, with the review taking into account the Chief Medical Officer’s advice. Any delay in reaching a resumption of skin to skin contact had been adequately explained by the Trust and that disruption to contact was experienced by many families but the interference was short lived and not extreme.

[39] On appeal, Morgan LCJ at [11] emphasised that the interference in the article 8 right had a legitimate aim which was the protection of health. The issue was whether the interference struck a fair balance between the Trust’s interest in the protection of health and the interests of the mother and the child. The Trust, having carried out several evaluations of risk both before and after receiving specific advice from the Chief Medical Officer, reached a decision that fell within the range of discretionary judgment.

[40] Some guidance relating to the forced cessation of contact during the Covid-19 pandemic is available in *Re D-S* [2020] EWCA Civ 1031, when the English Court of Appeal allowed a mother’s appeal against a dismissal of her contact application. The children were much older than OS and like in *Re Florence/SB* breastfeeding was not an issue. The mother’s direct contact was terminated in March 2020 for pandemic related reasons with the closure of contact centres and the lower court’s decision was on 22 June 2020. Live link video contact was set in place, but the mother sought direct physical contact. At [15] Jackson LJ summarised the issues in the appeal:

“In this case, as in others like it, there is no doubt that face to face contact would be in the children's interests if it could be achieved. In order to form a view about that, the court needed basic information about the children's situation, the local authority's resources and the current Government guidance. Unfortunately, the decision in this

case did not grapple with these matters except at a general level. The judge was of course right to say that regard must be had to fluctuating Government guidance, including as to social distancing, but at the time he came to make his decision, social distancing was not an absolute obstacle to contact. He was also obviously bound to acknowledge the finite resources of the authority and its need to prioritise, but he had been given no evidence about that either. Clearly, the practical challenges might mean that less contact was appropriate than before – as the outcome of this case shows – but the evidence before the court did not support the conclusion that no face to face contact at all was possible. Accordingly, if the judge did not feel able to approve the proposal made by the mother, he should have adjourned for a short time for the local authority to provide better evidence. What he was not in my view right to do was to dismiss her application for the reasons he gave.”

[41] A broader attack on the implementation by the government of the wider and general restrictions at the start of the pandemic did not gain much traction with the English Court of Appeal in *Dolan and others v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605. The regulations under consideration were largely replicated in Northern Ireland. Lord Burnett CJ gave the judgment of the court and at [96] and [97] dealt with the general interference with article 8 rights:

“96. There can be no doubt that the regulations did constitute an interference with article 8 but it is clear that such interference was justified under article 8(2). It was clearly in accordance with law. It pursued a legitimate aim: the protection of health. The interference was unarguably proportionate.

97. In this context, as in the case of the other qualified rights, we consider that a wide margin of judgement must be afforded to the Government and to Parliament. This is on the well-established grounds both of democratic accountability and institutional competence. We bear in mind that the Secretary of State had access to expert advice which was particularly important in the context of a new virus and where scientific knowledge was inevitably developing at a fast pace. The fact that others may disagree with some of those expert views is neither here nor there. The Government was entitled to proceed on the basis of the advice which it was receiving and balance the public health advice with other matters.”

Although clearly relevant to the issues in this case, it must be recognised that the interference with family life complained of in *Dolan* related to a prohibition of general family social engagement, and not specifically to the issue of contact between a parent with a child in care. In any event, in *Dolan*, the challenge was to the regulations themselves, as opposed to the decision making by a public authority.

[42] Such a challenge was dealt with in England in the case of *Leigh & others v The Commissioner of Police of the Metropolis* [2022] EWHC 527, the case relating to the vigil on Clapham Common. It raised issues about article 10 (freedom of expression) and article 11 (freedom of peaceful assembly) rights. Both these rights are qualified in similar terms to article 8 rights. In analysing the duties of the police in applying the Covid-19 restrictions in the context of these qualified rights, Warby LJ at [78] to [82] set out some useful propositions for conducting any proportionality assessment. These can be read across to this case, notwithstanding the completely different background and the fact that the police in *Leigh* were exercising powers of arrest.

[43] The propositions are:

- a) Factors relevant to the proportionality assessment include the importance of the subject-matter and how close it was to the core of the right and the existence or otherwise of a robust risk assessment (see [70] and [78]);
- b) The greater the health risks then the greater weight to be attached to the protection of health and less to the ECHR right (see [80]);
- c) Decision makers had a duty to inform themselves about relevant considerations and not by merely noting the purpose of the Regulations. The seriousness of any health risk had to be considered and balanced against the rights engaged (see [81])

Discussion

[44] The starting point for the consideration of this matter is that on 15 January 2020 O'Hara J ordered the separation of the new-born child from its mother. In doing so he must have considered that the child's physical safety and/or its psychological or emotional welfare demanded it.

[45] No challenge was made to the contact arrangements between 15 January 2020 and 23 March 2020. Those arrangements are therefore the base line for any consideration – the provision for the storage, collection and feeding to the baby of the mother's breast milk, contact each week day (five days a week) of approximately two hours at a Trust contact centre supervised by Trust staff which permitted breastfeeding and general skin to skin contact.

[46] The challenge relates to the decision-making between 23 March 2020 and 15 June 2020 with the stopping and the refusing to re-commence contact, and then after 15 June 2020 up to 24 June 2020 in not permitting close contact and

breastfeeding.

[47] The Trust concede that throughout this period there was an interference with the mother's article 8 rights but contend that it carried out proper evaluations and that the interference was justified in the context of the threat to both public health generally and the health of the individuals who would have been directly involved in any contact arrangements and other individuals who would be likely to come into contact with them.

[48] Consideration of the Article 3(3) (1995 Order) welfare checklist would suggest that there were positive welfare benefits for OS of breastfeeding generally. A baby's physical and emotional needs have been clearly recognised by the medical profession and by public health professionals by the provision of its mother's breast milk (Article 3(3)(a)). Removal of a child from a breast-feeding environment is a change in a baby's circumstances that will impact on the baby on a physical and emotional level. There is also a potential for indirect harm to the baby through the physical and emotional harm that separation can cause the mother (Article 3(3)(b)). The age of the child is clearly a relevant issue (Article 3(3)(c)) as is the potential harm arising from preventing or curtailing breastfeeding (Article 3(3)(d)). The impact on OS's welfare will have been mitigated to an extent by the provision of the mother's breastmilk through the arrangement put in place by the mother and the Trust.

[49] In hindsight it is easy to cast a critical eye over some of the decision making of March 2020 at both a macro and micro level, but it has to be borne in mind that the situation faced at the time was unique in terms of world history. In essence what was being proposed by government was a 24 hour curfew save for certain exceptions. Although there was a basic understanding of the nature of the Covid-19 virus, the appreciation of the symptomology was at an early stage as was the treatment for its symptoms. The treatment was largely untested and developmental. Panic is perhaps an inappropriate word to describe the general approach at that time, but there was a wide-spread high degree of concern about a potential public health disaster both within the various arms of government and by the public at large.

[50] I consider that a proper evaluation was carried out by the Trust on 24 March 2020 taking into account the relevant advice at that time. It is correct to state that there was no apparent consideration of the positive value to both the mother and the child of continuing the limited breastfeeding arrangement then in place, but the Trust were faced with content of the 'Action Card.' The public health risk at that time could be properly regarded as at a critical level and it was correct to place greater weight to this risk, thus diminishing the importance of the article 8 right. The Trust had agreed to maintain the system whereby the mother's breastmilk would continue to be provided to the child thus providing for appropriate nourishment for the child. In essence what was being restricted and denied was the opportunity of bonding between the mother and the child for five short periods per week of approximately two hours and any breastfeeding that could occur during those periods.

[51] I also consider that the actions of the Trust for the next two months was appropriate and proportionate. Its approach to this case has to be seen in light of the wider picture of the pandemic in Northern Ireland and the national and local government response.

[52] The evolving approach of national and local government to relaxation of the restrictions is an important backdrop for the decision making of the Trust at this time. The mother's C2 on 26 May 2020 obviously focussed the Trust's attention on the issue, but I consider that there was nothing happening during May that would have required the Trust to conduct an updated evaluation. It was continuing to maintain the provision of breastmilk to the child, and had facilitated the mother to attend two immunisations.

[53] This brings us to the risk assessment carried out on 12 June 2020. The Trust did consult widely for this assessment. Again, the written record does not note the positive benefits of breastfeeding, but having consulted with EH, the Infant Feeding Lead for the Trust, it is inconceivable that breastfeeding and its value was not a factor being considered. The Trust were faced with a picture of society emerging from the restrictions, but with many still in place. It sought advice from professionals and weighing up the risks to all individuals concerned and the risk of the spread of Covid-19 to them, and by them to others, it concluded that PPE protected and socially distant contact would be permissible. A reintroduction of breastfeeding was clearly considered as EH was tasked to become directly involved with the mother.

[54] The mother's refusal to take part in the contact with her child is not of particular significance in relation to the Trust decision-making. It was, no doubt, highly frustrating for the social workers as the Trust had clearly invested some time in its assessment, Trust employees and the carer had prepared themselves for the contact visit only for the mother to refuse to attend. This approach by the mother may have resulted in the Trust not being required to re-visit the issue had the situation remained static for some time, but given the rapid developments over the next week it is of little relevance.

[55] The WHO guidance has been mentioned, and is not specifically referred to in the Trust's evaluation and risk assessment. The only document relevant to the decision-making in this case was the Guidance of 27 May 2020. The focus of this guidance was whether a Covid-19 positive mother should continue breastfeeding her child, or whether she should cease and be separated from the child. The advice, based on modest research data, was for mothers in this situation to initiate and continue breast-feeding as the benefits of breastfeeding substantially outweighed the potential risks of transmission of the disease to the child. The guidance also noted that infection rates in babies was very low and the infection was typically mild or asymptomatic. I consider that this guidance was of little or modest relevance to this situation. The WHO was dealing with advice for an existing family unit in its own 'bubble.' It was not advice for a case such as this of the mother living apart from the

child and wanting to have supervised contact with the child. It was, in effect, members of three family 'bubbles' (the mother's, the carer's and the social worker's) coming together and then separating. The risk to OS in any proposed skin to skin contact session was going to be low, but the feature in this case was that the adults were going to have to travel to facilitate the contact, would be potentially exposed, and could catch the virus themselves and/or infect others.

[56] The WHO Scientific Brief of 23 June 2020 adds more substance to the earlier guidance, although its timing meant that even if considered it would have added nothing to the advice promulgated that day by the Chief Medical Officer. The Brief confirmed that available data was not sufficient to conclude that there was vertical transmission of Covid-19 through breastmilk. It re-emphasised the well-known and previously published benefits of breastfeeding for both mother and child and concluded that breastfeeding should be initiated and continued for all children, even when the mothers have suspected or confirmed Covid-19. Again, there is no mention of the type of scenario faced by the Trust in this case.

[57] I consider that this case has similarities to the *Re Florence/SB* case. In fact the dates in that case were 20 June 2020 (child's birth) and 21 July 2020 (introduction of contact). This period was the month after contact had been re-introduced for OS and therefore the impugned decision making in OS's case was during a period of much more uncertainty about the easing of 'lockdown.' The Trust was faced with a dynamic situation between late May and mid-June 2020. It carried out a proper evaluation of the risks involved in resuming skin to skin contact. It weighed up the evaluation of the identified risks with the undoubted benefits of resuming the previously limited contact. It put in place contact on 19 June 2020 which the mother declined to attend, and then relying on the advice of the Chief Medical Officer, reintroduced the contact. Arguably it could have initiated the correspondence with the Chief Medical Officer at an earlier date without the need for court intervention, but leaving that aside, I consider that the decision making at that time fell well within the range of discretionary judgment.

[58] The evaluation involved assessment of a very serious public health emergency, government imposed regulations the type and extent of which had never been imposed in the history of the country, the risk of exposure to the virus of the child and all the adults who would have been involved - the parents, the carers and the social workers, against the interference with the article 8 rights of the child and the mother. The court had already concluded in January 2020 that the child, then a few days old, could not safely be cared for by the mother and contact would have to be supervised and for a limited period of five days a week and for two hours each day. Actual breastfeeding and skin to skin contact was an important consideration but when placed against the other factors, it could not be said that the Trust's decisions were wrong in principle, were disproportionate or outside the 'margin of discretion' as described by Law LJ in *Mahmood*.

[59] As Morgan LCJ stated in *SB* at [15] and [16]:

“[I]t is also important to recognise that all parties were seeking to understand and give effect to the public health requirements which were evolving in response to the unprecedented health pandemic. The learned trial judge was satisfied that the Trust, the social workers and the appellant’s advisers were faced with a very difficult situation and were acting under trying circumstances in an effort to balance issues of public protection and health against individual parental rights.”

Bearing this in mind I consider that the Trust, in the most trying of circumstances, was attempting to maximise the potential available to the mother (and father) and the child taking into account not just the benefits of contact generally, but specifically in the context of the mother breastfeeding the child. The Trust is to be commended, as is the mother, that the child continued to receive the mother’s milk throughout this period. Physical face to face and skin to skin contact proved to be impossible to reinstate within a safe environment and the decision making of the Trust was appropriate and correct.

[60] Accordingly, this application will be dismissed. I will hear the parties on any other issues arising.