OUTER HOUSE, COURT OF SESSION

[2017] CSOH 139

P193/17

OPINION OF LORD BRAILSFORD

In the Petition

TM and PM

Petitioners

for

Judicial Review of a decision to refuse to grant the petitioners' application to be kinship carers

by

THE HIGHLAND COUNCIL

Respondents

Petitioners: Cartwright; Thorley Stephenson SSC
Respondents: Brabender; Harper Macleod LLP

31 October 2017

[1] This is a petition for Judicial Review in which, as originally presented, the petitioners sought reduction of a decision by The Highland Council dated 1 December 2016 refusing their application to be kinship carers of their two grandchildren, PTM born on 11 October 2011 and E, a female child whose full name and date of birth are unknown to the petitioners. At a procedural hearing on 1 June 2017 Lord Ericht reduced the respondents' decision dated 1 December 2016 in respect of the child E. In respect of the decision insofar as it related to the child PTM the matter proceeded to a substantive hearing on 21 June 2017.

[2] As originally presented the petition deployed a number of arguments alleging *ultra vires* actings of the petitioners in respect of their own procedures and, additionally a number of alleged breaches of natural justice and an infringement of Article 8 ECHR by the respondents, in relation to their handling of the application. The width of the petitioners' case narrowed in terms of written submissions lodged in June 2017 and revised written submissions lodged on the date of the substantive hearing. By the time of the substantive hearing the grounds of challenge to the decision of 1 December had narrowed to two, namely that the respondents had acted *ultra vires* in the conduct of an appeal against a refusal to recommend the petitioners as kinship carers of PTM, which failing they had acted in a manner which was procedurally unfair and as a consequence reached a decision that was unlawful. The second ground of challenge was that the decision of 1 December 2016 did not provide adequate reasons.

Factual Background

[3] The background facts giving rise to this application may be stated relatively briefly. LM is the daughter of the petitioners. She has two children, the aforesaid PTM and E. LM was convicted of assaulting PTM and was sentenced on 11 July 2015 to a period of imprisonment of 3 years and 4 months in respect of the conviction. Prior to that the female petitioner had reported an assault on the child PTM. As a consequence of that report PTM was removed from the care of LM and placed in local authority care. The child was thereafter made the subject of a Compulsory Supervision Order in terms of section 83 of the Children's Hearings (Scotland) Act 2011. The child E was born in or around July or August 2016 and was placed in local authority care shortly after her birth. She was also made the subject of a Compulsory Supervision Order.

[4] After PTM's placement in local authority care the petitioners made an application to the respondents' social work department to be considered as kinship carers for the child. By letter dated 11 April 2016 the respondents advised the petitioners that they would not be considered as kinship carers for PTM but that a final decision rested with the Kinship Care Panel maintained by the respondents[1]. On 20 September 2016 the petitioners were formally informed that the Kinship Care Panel had not recommended that they should be kinship carers for PTM, albeit that before that date and by at least 24 August 2016 the petitioners were aware of the decision of the Kinship Care Panel and had submitted comments on that decision which had been accepted as the basis of the appeal held on 20 September 2016[2]. This decision was the subject of an appeal. By letter dated 1 December 2016 the petitioners were advised that their appeal in respect of the decision of the Kinship Care Panel had been refused.

Legislative Framework

[5] There was no material dispute between parties as to the applicable legal framework. It is a matter of agreement between the parties to this petition that PTM is subject to a Compulsory Supervision Order made under and in terms of section 83 of the Children's Hearings (Scotland) Act 2011. As a consequence PTM is in terms of section 17(6)(b) of the Children (Scotland) Act 1995 ("the 1995 Act") a "looked after" child. Section 17 of the 1995 Act imposes obligations upon local authorities in respect of looked after children. For present purposes the relevant provisions are as follows:

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[1] The Kinship Care Panel met to discuss the petitioner's application on the assessment on 21 April 2016. The Minute of that meeting was produced as No 7/7 of process. The recommendation was that the petitioners were not approved as kinship carers of PTM. That decision was subsequently signed indicating acceptance, by the agency decision maker on 5 May 2016. The Minute records that "a copy of the minute would be sent with the decision letter" to the petitioner.

[2] See No 6/1/9 of process, fifth paragraph.

"17(1) Where a child is looked after by a local authority they shall …—

(a) safeguard and promote his welfare (which shall, in the exercise of their duty to him be their paramount concern);

…

(c) take such steps to promote, on a regular basis, personal relations and direct contact between the child and any person with parental responsibilities in relation to him as appear to them to be, having regard to their duty to him under paragraph (a) above, both practicable and appropriate.

(3) Before making any decision with respect to a child whom they are looking after, ..., a local authority shall, so far as is reasonably practicable, ascertain the views of - ...

(d) any other person whose views the authority consider to be relevant."

The Looked After Children (Scotland) Regulations 2009 (2009/2010) (Scottish SI) ("the 2009 Regulations") impose obligations on local authorities in respect of looked after children in their care. Regulation 10 relates to Kinship Carers and provides:

"(1) A local authority may make a decision to approve a person mentioned in paragraph (2) as a suitable carer for a child … which carer shall be known as a 'kinship carer'.

(2) The persons referred to in paragraph (1) are–

(a) a person who is related to the child; or

(b) a person who is known to the child and with whom the child has a pre-existing relationship.

(3) Before making a decision under paragraph (1) the authority must–

…

(b) … carry out an assessment of that person's suitability to care for the child.

…"

It was accepted by both competing parties that the petitioners fell within the category of persons specified in Regulation 10(2)(a) of the 2009 Regulations.

The Respondents' Kinship Procedure and Guidance

[6] The 2009 Regulations allow a local authority to make a decision to approve a kinship carer. Those regulations require authorities before approving kinship carers to obtain information relative to the child and assess applicants who wish to be kinship carers. The 2009 Regulations provide no details of the process by which the decision making required of the local authority is to be undertaken. The Scottish Government has promulgated guidance in relation to the 2009 Regulations.[3] Under the heading "Approving Kinship Carers and Reviewing non-approval decisions" the guidance provides that:

> "(3) Regulation 10 refers to the local authority making an approval decision. It does not define the process. The local authority may decide to use their existing Fostering Panel, the sub-group of that panel focusing on making recommendations about kinship carer assessments, or a small group including a manager set up for the purpose. Whatever decision-making process is established, the individual should be well supported and trained in the distinctive aspects of kinship placements. Although the pattern of a panel discussion, recommendation and then endorsement by an agency decision-maker which is familiar in foster care is not specified, local authorities should consider a form of this process in order to be accountable for these placements. There is no provision in the regulations for review if a kinship carer is not approved but good practice indicates that local authorities should make provision for a similar review of the decision as may be available to fostering applicants."[4]

The respondents adhered to that advice in making administrative arrangements to ensure the fulfilment of their obligations under the 2009 Regulations. They established an independent kinship panel modelled on fostering panels within their authority. They issued "Kinship Care Procedures and Guidance" initially in July 2015 and revised in April 2016.[5]

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[3] Guidance on the Looked After Children (Scotland) Regulations 2009 and the Adoption and Children (Scotland) Act 2007, March 2011, published by the Scottish Government, produced as No 7/4 of process.

[4] No 7/4 of process, paragraph numbered 7 on page 55.

[5] "Kinship Care Procedures and Guidance" published by The Highland Council and dated July 2015, produced as no 7/2 of process, "Kinship Care Procedures and Guidance", published by The Highland Council and dated April 2016, produced as No 7/3 of process.

Petitioners' Arguments

[7] The petitioners' first argument was that the decision dated 1 December 2016 had been reached in breach of the respondents' own kinship care procedures.

[8] This argument was developed initially by stating that there were two sets of kinship care procedures promulgated by the respondents, the first dated July 2015, the second April 2016. It was submitted that the petitioners had never been advised which set of procedures applied to their application. Beyond that it was argued that in any event the respondents in determining the petitioners' application had acted in contravention of provisions which were contained in both sets of procedures.

[9] The respondents were said to have acted in breach of these procedures in three respects. First, they failed to notify the petitioners of the decision of the Kinship Care Panel until the date of a hearing on the appeal on 20 September 2016. Second, they did not allow the petitioners the time stipulated in the procedure to consider whether they wished to appeal the decision of the Kinship Care Panel by providing the petitioners with a copy of the decision they were appealing against only on the day of the appeal. Third, the respondents did not determine the petitioners' appeal in accordance with the Kinship Care Procedure.

[10] In relation to these arguments it was submitted that a Kinship Care Panel decision to decline to recommend the petitioners as kinship carers was made at a meeting of the panel on 21 April 2016, confirmed by the chair of the panel on 3 May 2016 and confirmed by the agency decision-maker on 5 May 2016.[6] This decision was not formally notified to the petitioners until 20 September 2016. In terms of paragraph 8.2 of the July 2015 Kinship Care Procedures and Guidelines the petitioners should have received intimation of the decision of the panel within ten working days of that decision being confirmed by the agency

[6] The Highland Council - Care & Learning Service Kinship Care Panel; Minute of Meeting held on 21 April 2016 produced as No 7/7 of process.

decision-maker.[7] The same time limit applied in the April 2016 Kinship Care Procedures and Guidance.[8] In terms of paragraph 9.1 of the July 2015 Kinship Care Procedures and Guidelines if a kinship carer was not approved that person had a right of appeal to the Director of Care and Learning within 21 days of notification of the decision. The time limit for appealing was extended to 28 days in the April 2016 edition of the Guidelines.[9]

[11] The petitioners' submission was that the failure to intimate this decision, made by the agency decision-maker on 5 May 2016, to them until 20 September 2016 was prejudicial to their interests. 20 September 2016 was the date when their appeal against the decision was due to be held. Although they were present at the hearing of the appeal and made submissions it was submitted that because of failure to intimate timeously they were denied the opportunity to take independent advice and be separately represented. They were denied the opportunity to present written submissions prepared with the benefit of independent advice.

[12] A second departure by the respondents from their written Kinship Care Procedure and Guidance was identified, this being in relation to the appeal decision made following the hearing on 20 September 2016. The official who heard that appeal was Bill Alexander, then the Director of Care and Learning for the respondents. Following the hearing of the appeal he wrote to the petitioners by letter dated 26 September 2016.[10] The letter narrated Mr Alexander's account on a number of matters raised at the hearing and concluded in the penultimate paragraph:

> "I am aware that you are presently starting a further assessment, with regard to providing care for your granddaughter, [E]. My decision is, therefore, not to come to a conclusion on your appeal at the current time, but to reflect further on this matter after the second assessment is received. I shall alert the social worker who is

[7] No 7/2 of process at paragraph 8.2 on page 5
[8] No 7/3 of process at paragraph 10.2 on page 7
[9] No 7/3 of process at paragraph 11.1 at page 8
[10] No 7/1 of process

> undertaking that assessment of this fact and ask her to ensure that you both have every opportunity to be fully involved and engaged in that process."

The petitioners' submission was that by so acting Mr Alexander breached the relevant parts of the respondents' Kinship Care and Guidance Procedures. The relevant provision in the guidance provided:

> "The Director of Care and Learning will make arrangements for the appeal to be considered and identify someone to hear the appeal and provide feedback on the circumstances. The person hearing the appeal can then either, make an agency decision, uphold the decision of the placement confirmation meeting or refer it back to the placement confirmation meeting for further consideration."[11]

It was submitted that having regard to the terms of Mr Alexander's said letter of 26 September 2016 he did not comply with the guidance in relation to the hearing of appeals. He did none of the things he should have done in terms of the guidance. He neither reached a decision or referred it back to the placement confirmation meeting for further consideration. His decision to "reflect further" was *ultra vires* the power conferred on him in terms of the guidance.

[13] A further complaint was advanced by the petitioners. This was that the respondents had displayed bias in their handling of the petitioners' application. The argument rested upon a letter dated 10 August 2016 from the respondents to the petitioners.[12] The part of the letter founded upon was in the following terms:

> "My view is that having read both the Independent Report and the Minute I doubt that doing another assessment would come to a different recommendation."

The argument was that it was clear from this comment that the respondents' employee who wrote the letter considered that another assessment of the petitioners as kinship carers would reach the same conclusion as the earlier one in respect of the child PTM. It was submitted further that on that basis the fair minded and well-informed observer with

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[11] The wording of this provision is identical in both versions of the Kinship Care Procedures and Guidance paragraph 11.2 of No 7/3 of process and paragraph 9.2 of No 7/2 of process.
[12] No 6/1/8 of process

knowledge of the circumstances would be likely to conclude that on a balance of probabilities any further assessment had a pre-determined conclusion. This would lead the fair minded and informed observer to the view that there was a real possibility that the respondent was biased in relation to the kinship assessment process, reliance was placed upon *Porter* v *Magill* [2002] 2 AC 357 at paragraph 103.[13]

Respondents' Arguments

[14] The respondents' first proposition was that in terms of section 17(1)(a) of the 1995 Act it was their duty to make the looked after child's welfare their paramount consideration. In the context of kinship care they required to determine whether a person was or was not approved as a suitable carer for a looked after child. In order to fulfil this obligation the respondents had, in accordance with Government guidelines, instituted "Kinship Care Procedures and Guidance". This was published on their website and, in addition, a hard copy of the document had been forwarded to the petitioners in or around September 2016. It was also noted that the petitioners had had the benefit of legal assistance and representation since at least December 2015.[14]

[15] In relation to their published Kinship Procedure and Guidance, it was submitted that the respondents had regard to their obligations under the 2009 Regulations. Reference was made in particular to Regulation 10. It was acknowledged that Regulation 10(1) allowed a local authority to make a decision to approve a "kinship carer". The petitioners fell within the class of persons who qualified as potential kinship carers. The 2009 Regulations made no provision or provided no specific details as to the process by which the assessment of

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[13] *Per* Lord Hope of Craighead: "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

[14] No 6/1/2 of process

kinship carers was to be undertaken. Guidance issued by the Scottish Government sanctioned, but did not require, the local authority to make use in this process of their existing fostering panel or base their method of assessment upon that model. That guidance was followed by the respondents in establishing an independent Kinship Panel. The model followed in their published guidelines was based upon fostering panels in terms of Regulation 17 of the 2009 Regulations.

[16] On the basis of their guidance, in order to consider an application such as that made by the petitioners and make recommendations in respect thereof, the Kinship Panel would require to have before it an assessment. In the case of the child PTM the assessment was undertaken by a social worker who followed the respondents' guidance and reported to the Kinship Care Panel. The petitioners received a copy of this assessment prior to it being forwarded to the Kinship Panel. The Kinship Panel did not recommend the approval of the petitioners' kinship carer application relative to PTM. This recommendation was forwarded to the agency decision maker with whom in terms of the respondents' Kinship Procedures and Guidance, a decision to approve the petitioners' application lay. The agency decision maker did not approve the petitioners' application. This decision was intimated to the petitioners by the chair of the Kinship Panel by letter dated 6 May 2016[15].

[17] The respondents' Kinship Procedures and Guidance set out an appeal process following a decision not to approve an application. This provided for a time limit within which, following notification of the decision, an appeal could be made. The time limit was either 21 or 28 days depending on which version of the guidance was followed. The petitioners did not adhere to the 28 day time limit and did not seek to appeal the decision intimated to them by letter dated 6 May 2016 until 22 August 2016. Notwithstanding the fact that the request for an appeal was made outwith the 28 day time limit, the respondents

[15] See No 7/7 of process and 6/1/9 of process

exercised their discretion to allow an appeal. Consistently with their practice in other cases, the respondents determined that the appeal was to be heard by the then Director of Care and Learning. The appeal review was heard by this person on 20 September 2016. The petitioners were present at the review. The petitioners made both written and oral submissions. The chair of the appeal panel considered that the petitioners had made a "strong presentation"[16]. His decision was intimated to the petitioners by letter dated 1 December 2016. His decision was that he did "... not agree your application to provide kinship care for either child."[17] Reasons for this decision were provided.

[18] In relation to the second argument advanced by the petitioners, that is bias, the respondents' position was that throughout the assessment of the petitioners' application and its determination, they followed their published "Kinship Procedures and Guidance". They permitted the petitioners a review of the decision where there was no requirement in their guidance to so do but with the purpose of giving the petitioners a further opportunity within a new assessment process. No bias was displayed.

Conclusion

[19] The petitioners' submission rests primarily upon the procedures implemented by the respondents in fulfilment of obligations incumbent upon them under Regulation 10 of the 2009 Regulations and alleged failures to comply with those procedures. There was no dispute between the parties that the petitioners fell within the category of person who fell to be considered as potential kinship carers. There was, further, no dispute that when a person entitled to be considered as a kinship carer made an application to be so considered the relevant authority must, before making a decision, carry out an assessment of that person's

[16] See affidavit by Bill Alexander, dated 26 April 2017, No 12 of process on page 3
[17] No 6/1/12 of process

suitability to care for the child (Regulations 10(3)(b) of the 2009 Regulations). Beyond that, there was agreement between the parties that the regulations provided no mechanism nor set down a scheme stipulating how that assessment process required to be carried out. Such advice as was available was to be found in guidance issued by the Scottish Government in 2009. There was no dispute that the respondents had, following advice in the Scottish Government's guidance, published their own Kinship Care Procedures and Guidance, posted the same on their website and, in the context of the present petition, provided hard copies of the same to the petitioners at the time they made application to be considered as kinship carers of the two children.

[20] The complaint of the petitioners in the end of the day narrowed to one of procedural irregularity and, in addition, a complaint of bias by one member of the respondents' staff.

[21] In so far as the case of procedural irregularity was concerned, in order to succeed the petitioners would require to establish both that the respondents departed from their own published guidelines as to how in a procedural sense such an assessment should be carried out and, in addition, that such departure from procedure defeated a legitimate expectation of the petitioners and, further, resulted in prejudice to them.

[22] There is in my opinion no merit in so far as the first of those arguments is concerned. The issue where a difference in the two versions of the guidance was identified concerned the time limits for appeal from a decision of a Kinship Care Panel. It is correct that the July 2015 Guidance stipulated 21 days and the April 2016 Guidance stipulated 28 days. However in the context of the facts of this petition there was no practical consequence arising out of this difference. Nothing turns on whether the time limit for appeal was 21 or 28 days as, regardless of which period applied, an appeal outwith these limits was allowed by the respondents as an exercise of discretion. The development of this, that the petitioner did not know of the appeal until the date it occurred, is demonstrated to be incorrect on the

known facts. In the Note of Argument counsel for the petitioners conceded that "formal" intimation was made on the date of the hearing of the appeal. However the Minute of the Kinship Care Panel recording the decision complained of records that a copy thereof "would be sent" to the petitioners[18]. That this in fact happened is clear from the terms of a letter from the respondents to the petitioners dated 24 August 2016[19]. It is also clear, not least from the affidavit provided by the chair of the appeal panel, that the petitioners participated in the appeal and made a "strong presentation"[20].

[23] The development of the argument was that in terms of the rules, the ultimate decision maker, in the context of this petition the chair of the appeal panel, required to make a determination. It was argued that in the present case that procedure had not been followed, the decision maker had sought further advice from a social worker who was about to commence an assessment in respect of the child E, before making a decision. The reasons for deciding to delay making his decision in respect of the appeal against the Kinship Care Panel decision relative to PTM until after an assessment of the petitioners as potential kinship carers of E was available are explained in the affidavit of the chairperson[21].

[24] Having regard to the terms of the relevant guidance, I am of the view that this complaint has no merit. The procedure followed, whilst not expressly provided for in the guidance did not, in my view, derogate from the purpose of the published guidelines. Moreover, and importantly, in affording the petitioners the opportunity to avail themselves of a further assessment, it did not detract from, or remove, rights of the petitioners. On the contrary, it provided them more protection in that both further consideration and additional assessment was given to augment representations they made at the review hearing.

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[18] No 7/7 of process, final page
[19] No 6/1/9 of process, fifth paragraph
[20] No 12 of process
[21] No 12 of process, page 3, fourth paragraph.

[25] In so far as the allegation of bias is concerned, it rested upon one sentence in one letter written to the petitioners by an employee of the respondents[22]. In the first place the sentence complained of requires to be read and considered in the context of the whole letter. Read as a whole the letter cannot, in my opinion, be said to have expressed any partiality or have been influenced by any outside source in a manner which was detrimental to the interests of the petitioners. Moreover, the part of the letter complained of, properly construed, can be no more than an expression of opinion in relation to the likely outcome of a further assessment in relation to the child E. The opinion was based upon material the author of the letter had seen and which, moreover, had been seen by the petitioners. The author of the letter was a person who was not charged with any responsibility for the determination of the appeal relative to PTM. There is no suggestion that the author had any influence upon the person charged with responsibility of determination of the appeal. Moreover the letter was plainly written at a time which was outwith the period for appealing the decision regarding PTM and, in any event it is plain from the letter that the author believed there was to be no appeal. Having regard to those considerations in a practical sense, the letter cannot be said to have had any influence upon the appeal process. I am satisfied that the letter cannot be construed in a way which would cause it to fall within the ambit of Lord Hope's *dicta Porter* v *Magill* (*supra*). It follows that the letter cannot constitute the basis for a challenge to the decision on the grounds of bias.

[26] For all the foregoing reasons, I am not satisfied that the complaints set forth in this petition have been established. I will sustain the respondents' second plea-in-law and refuse the prayer of the petition. I will reserve all question of expenses meantime.

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[22] No 6/1/8 of process