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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY JR315 (A MINOR) FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION BY THE BELFAST HEALTH AND SOCIAL CARE TRUST

Mr Turlough Madden (instructed by McCrudden & Trainor Solicitors) for the Applicant
Ms Claire MacKenzie (instructed by the Directorate of Legal Services) for the Respondent

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RULING ON COSTS

ROONEY J

Introduction

[1] JR315 is a minor. On 5 September 2023, he became a Looked After Child (LAC), voluntarily accommodated by the Belfast Health and Social Care Trust (hereinafter 'the respondent'). JR315 was arrested on 9 January 2024 for disorderly behaviour and common assault of two residents at the children's home in which he resided. He was remanded into custody and charged overnight to appear at Belfast Magistrates' Court on 10 January 2024.

[2] Bail was granted to the JR315 (hereinafter the 'applicant'), subject to an address to be approved by the police and social services.

[3] Despite efforts by the respondent to find appropriate accommodation, the applicant remained in custody. On 12 February 2024, pre-action correspondence (PAP) was served on the respondent which, inter alia, requested a response on or before 15 February 2024. The applicant contended that the respondent's ongoing failure to provide the applicant with accommodation was unlawful and that the

respondent had failed to comply with its statutory duty to accommodate the applicant pursuant to Article 21 and/or 27 of the Children (NI) Order 1995. In the alternative, it was argued that the respondent's ongoing failure to provide the applicant with accommodation was unlawful and caused him to remain in custody, thereby constituting a violation of the applicant's Article 8 ECHR rights to a private life, contrary to section 6 of the Human Rights Act 1998.

[4] On 15 February 2024, the respondent's solicitor emailed the applicant's solicitor advising that efforts were ongoing to find appropriate accommodation for the applicant and requested a short extension to file the PAP response.

[5] On 16 February 2024, the respondent's solicitor sent a further email to the applicant's solicitor indicating that efforts were still ongoing to identify suitable accommodation for the applicant and that a referral been sent to a potential provider. A decision was expected on 19 February 2024.

[6] On 16 February 2024, judicial review proceedings were issued and a statement filed pursuant to Order 53 Rule 3(2)(a) of the Rules of the Court of Judicature of Northern Ireland 1980 accompanied by an affidavit from the applicant's solicitor.

[7] The applicant sought the following relief:

(a) An order granting the applicant anonymity.

(b) An order of mandamus requiring the proposed respondent to provide the applicant with accommodation forthwith.

(c) A declaration that the failure to provide the applicant with accommodation was unlawful and/or ultra vires and constituted a violation of the applicant's Article 8 ECHR rights.

(d) Damages.

(e) Costs.

[8] On 19 February 2024, the respondent lodged a PAP response which referred to a proposed placement for the applicant on 26 February 2024. During a hearing before this court on 19 February 2024, it was indicated that the proposed provider had confirmed that a placement was available for the applicant, subject to him engaging in a short assessment process. The court was also advised that the respondent was in the process of sourcing private accommodation to be staffed by social workers as an interim holding position. Leave to apply for judicial review was conceded, although it was anticipated that the proceedings would become academic when the applicant was formally placed in the proposed accommodation.

[9] On 22 February 2024, the judicial review proceedings were dismissed by agreement between the parties on the basis that the matter was academic. At the said hearing, the applicant's legal representative made an application inviting the court to convert the Order 53 Statement into a writ pursuant to Order 53 Rule 9(5). An application was also made for costs of the judicial review proceedings.

[10] At the direction of the court, written submissions were provided by Mr Madden BL on behalf of the applicant, and Ms MacKenzie BL on behalf of the respondent. The court remains grateful to counsel for their comprehensive submissions.

Background circumstances

[11] The relevant background circumstances are as detailed in the respondent's submissions. In summary, the applicant came to the attention of the respondent in September 2023 after he left his family home subsequent to an arrest. Attempts were made to find kinship and foster care placements for the applicant, without success. The applicant was initially accommodated in a number of hotels accompanied by social work staff. He was then transferred to the Intensive Adolescent Support Team before a LAC placement was secured towards the end of September. It is noted that throughout the applicant's placement, there were significant issues with his mental health and his failure to engage with staff in respect of his personal hygiene.

[12] As stated above, the assaults which precipitated the applicant's arrest occurred at the said placement on 9 January 2024. Due to the nature of the assaults and the fact that the applicant was already on a written warning, staff at the said placement refused to allow the applicant to return to his accommodation.

[13] The chronology of the events after the applicant was admitted to Woodlands, reveals that the respondent arranged escalation meetings, attended by senior managers from fostering, residential, family support and LAC, together with Safeguarding and Co-operate parenting. Despite continued efforts, no placement was available. Multi-disciplinary liaison with fostering continued but no placements were identified. During this period, the applicant's attitude towards staff was arrogant, rude, disrespectful and dismissive. Whilst in Woodlands, the applicant was reported to have refused routine engagement, including showering, joining groups for meals, attending education and general participation in activities.

[14] From in or around 9 February 2024, the applicant only left his room to make telephone calls. Although, at this stage, he was polite with staff, he only engaged superficially. Concerning behaviours continued to be noted and the applicant remained resistant to engaging with mental health provision within Woodlands.

[15] Continued efforts were made by the respondent to find a placement for the applicant. The chronology provided by the respondent refers to the multi-disciplinary liaison with potential providers. The history of assaults and

threats made by the applicant plainly had a detrimental impact on finding him appropriate accommodation.

Duty to provide accommodation

[16] The respondent accepts that it has a statutory duty to provide accommodation pursuant to Article 21 and/or Article 27 of the Children (NI) Order 1995.

[17] Ms MacKenzie, on behalf of the respondent, in respect of these duties, refers to the decision of O'Hara J in *SK2 for Judicial Review* [2018] NIQB 104, at paras [32] to [34] in which he stated:

> "[32] Once it is accepted, as it has been, that accommodation has to be suitable and that the duty to provide it is not a duty to provide it immediately, the case for Sean becomes significantly harder to establish. Experience in the Family Division shows that regrettably Sean is not the only looked after child whose own actions have thwarted the best efforts of Trusts to accommodate them. Others have walked out of suitable accommodation or caused mayhem which has led to the receiving organisation or centre terminating the placement. It is entirely unreasonable and unrealistic to demand that suitable alternative accommodation is immediately available in these cases.
> …
>
> [34] In the circumstances of this case I am satisfied that the Trust was not in breach of its duty under Article 27 as that provision is properly understood. There will of course be cases in which Trusts are in breach if they fail to provide acceptable accommodation speedily. But the duty is to provide accommodation which is suitable for the needs of the particular child and to do so as urgently as possible in the circumstances. For the reasons explained above Sean's case is at the extreme end of those involving looked after children. I find that in this case there was no breach of the statutory duty and I therefore dismiss the application for judicial review."

[18] The court was also referred to the decision of Keegan J in *OC & LH* [2018] NIQB 34 at para [37]:

> "[37] I bear in mind that the court is exercising a supervisory function and that a margin of discretion is allowed to the decision maker. In cases such as these the

> decision maker has knowledge and expertise of child protection matters and that should be afforded considerable respect. I recognise the vulnerabilities of the young people involved and their need for support. However, I also recognise the challenges faced by Trusts in many cases of this nature when they are dealing with juveniles who display very troubled and difficult behaviours. For instance, it is hard to criticise placements which refuse to take juveniles back when they have assaulted staff, damaged property, or otherwise behaved in an unruly manner often fuelled by drug and alcohol abuse. So, there has to be a measure of discretion given to a Trust in finding accommodation. The duty cannot exist in a vacuum as it has a correlation to the characteristics of the juvenile involved. The legislation does not define what type of accommodation must be provided; however I accept that consideration should be given to suitability. An assessment of what is suitable will depend on the particular circumstances of a case and in this sphere the issues raised are many and various."

[19] According to Ms MacKenzie BL, the key principles emanating from the decisions in *SK2* and *OC & LH* are:

(a) The Trust's duty under article 21 is absolute;

(b) The duty is to provide accommodation within a reasonable period and not immediately;

(c) Assessment as to what is reasonable will depend upon the facts of each particular case;

(d) The accommodation should be suitable for the child; and

(e) In consideration of the Trust's reasonable efforts to secure a placement, the court may take into consideration the actions of the child and their behaviours.

Continuation of judicial review proceedings as if commenced by writ

[20] Order 53 Rule 9(5) of the Rules of the Court of Judicature (NI) 1980 (hereinafter 'RCJ') provides as follows:

> "(5) Where the relief sought is a declaration, an injunction or damages and the court considers that it should not be granted on an application for judicial

> review but might have been granted if it had been sought in an action begun by writ by the applicant at the time of making his application, the court may, instead of refusing the application, order the proceedings to continue as if they had been begun by writ; and Order 28, rule 8, shall apply as if the application had been made by summons."

[21] Order 53, Rule 9(5) RCJ enables the court to order that judicial review proceedings continue as if commenced by writ where the remedy sought is a declaration, injunction, and/or damages. The applicant invites the court, on the facts of this case, to make such an order and cites *Re Sterret's Application* [2020] NIQB 58 as the relevant authority. I decline to do so. The factual matrix in this case differs from the exceptional nature of the facts in *Re Sterret* where the court granted leave to apply for a declaration that the Northern Ireland Prison Service had acted unlawfully in its delay to allow the applicant temporary compassionate release to visit her dying grandmother. The court also allowed a claim for damages to continue by writ in respect of the said delay founded on Article 8 ECHR.

[22] In my judgment, the facts of this case do not fall within the exceptional category of cases where damages should be considered as an appropriate remedy arising out of judicial review proceedings. The statutory duty imposed on the respondent by virtue of Article 21 of the Children Order (NI) 1995 to provide the applicant with suitable accommodation does not exist in a vacuum. An assessment of suitable accommodation depends upon the particular circumstances of each case and the characteristics of the person involved. The applicant committed assaults and behaved in an unruly manner. It is difficult to criticise an establishment who refused to take him back due to this behaviour. Further attempts at placement were hampered by his arrogant, rude, disrespectful and dismissive attitudes to staff and others. These behaviours, together with his total lack of engagement, clearly presented real obstacles for the respondent in finding suitable accommodation. In my judgment, the factual circumstances of this case, taking into consideration the delay in providing suitable accommodation for the applicant, are not likely to give rise to a claim for damages. Accordingly, I refuse the application to convert the public law proceedings into a writ.

Costs: Legal principles

[23] A summary of the relevant legal principles in relation to an award of costs in judicial review proceedings was recently considered by Scoffield J in the context of a contested application in *Re Glass's Application (Costs Ruling)* [2023] NIKB 22 and also in *RG (Costs Ruling)* [2023] NIKB 48, where the applicant was partially successful. The applicable legal principles were also considered by McCloskey J in *Re YPK and Others' Application* [2018] NIQB 1.

[24] The single overarching principle is that an award of costs remains at the discretion of the court. For this reason, a consideration of the relevant legal

principles by a court is essential in order to ensure the proper exercise of its discretion.

[25] In this case, the judicial review proceedings have been resolved without a full hearing. The position on costs has not been agreed. The applicant argues that, since the respondent failed to provide the applicant with suitable accommodation within a reasonable time pursuant to Article 21 of the Children (Northern Ireland) Order 1995, he is entitled to an award of costs. The respondent submits that there should be no order for costs between the parties.

[26] In *Boxall and another v London Borough of Waltham Forest* [2000] All ER (D) 2445 at para [22], Scott Baker J listed the following guiding principles in a case which has been resolved or compromised:

> "(i) The court has power to make a costs order when the substantive proceedings have been resolved without a trial but the parties have not agreed about costs.
>
> (ii) It will ordinarily be irrelevant that the claimant is legally aided.
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> (iii) The overriding objective is to do justice between the parties without incurring unnecessary court time and consequently additional cost.
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> (iv) At each end of the spectrum there will be cases where it is obvious which side would have won had the substantive issues been fought to a conclusion. In between, the position will, in differing degrees, be less clear. How far the court will be prepared to look into the previously unresolved substantive issues will depend on the circumstances of the particular case, not least the amount of costs at stake and the conduct of the parties.
>
> (v) In the absence of a good reason to make any other order the fall back is to make no order as to costs.
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> (vi) The court should take care to ensure that it does not discourage parties from settling judicial review proceedings for example by a local authority making a concession at an early stage."

[27] In *RG (Costs Ruling)* [2023] NIKB 48, Scoffield J referred to the significance of the *Boxall* principles in light of the introduction of the pre-action protocol for judicial review claims. At para [19], Scoffield J stated as follows:

> "The *Boxall* principles had been considered in the final report of the Jackson Review of Civil Litigation Costs in England & Wales. That review considered that the Boxall approach made "eminently good sense" at the time the case was decided but was in need of modification in light of the pre-action protocol which had been introduced for judicial review claims. It recommended that if the defendant settles a judicial review claim after issue by conceding any material part of the relief sought and the claimant had complied with the protocol, the normal order should be that the defendant pays the claimant's costs. Assuming the issues were fairly set out in the pre-action protocol correspondence, such an approach would tip the balance in favour of an applicant where they were nonetheless required to issue proceedings, and the respondent climbed down at that point."

[28] As further stated by Scoffield J in *RG* at para [25]:

> "McCloskey J cited *M v London Borough of Croydon* with approval at para [18] of his decision in YPK. The Boxall principles continue to be applied in this jurisdiction (see, for instance, *Re JR186's Application* [2022] NIQB 20, at para [28], *per* Colton J); but the courts here also take into account the modifications or adjustment to the *Boxall* principles which are appropriate in light of the additional judicial consideration discussed above (see, for instance, *Re Coleman's Application* [2022] NIQB 25, at para [12], again *per* Colton J; and *Re JR115 and JR116's Application* [2021] NIQB 105, at paras [16]-[19], *per* Sir Declan Morgan)."

Decision on the application of costs

[29] I have carefully considered the submissions provided by both parties. It is most disconcerting that, following the applicant's release from custody subject to the provision of suitable accommodation, there was a delay of almost seven weeks before a placement was found. The purported efforts of the respondent to find a suitable placement have been detailed in the chronology summarised above and in the PAP response. Although, to adopt the words of O'Hara J in *SK2,* that "it is entirely unreasonable and unrealistic to demand that suitable alternative accommodation is immediately available in these cases", I have some reservations as

to whether the respondent acted as urgently as possible in all the circumstances. Without the benefit of affidavit evidence from the relevant witnesses on behalf of the respondent, it would not be appropriate for this court to make particular findings regarding the reasons put forward for the delay.

[30] In *JR282* [2023] NIKB 82, Scoffield J stated as follows at para [22]:

> "The Preface to the Practice Note states that, given the nature of public law proceedings, "The parties and the Court share the common aim of processing every case in a manner which makes the best possible use of the Court's limited resources and brings about an outcome within reasonable timescales…" The Pre-Action Protocol reminds parties that litigation in this field should be a measure of last resort (see paras 4 and 7) and that there are a variety of other measures by which disputes can, and in appropriate cases should, be resolved (see para 5). Engagement in the process of pre-action correspondence is one such means. Indeed, a core purpose of the pre-action correspondence required by the Pre-Action Protocol is to "establish whether litigation can be avoided" (see para 9). That is also the reason why the Protocol requires respondents to be clear as to whether, and the extent to which, they are conceding the proposed application (see paras 16-17)."

[31] On the facts, as detailed above, no contact was made by the applicant's solicitor to the respondent between 10 January 2024 and 9 February 2024. A pre-action protocol letter dated 12 February 2024, was received by the respondent on 13 February 2024. A response was requested by 2pm on 15 February 2024.

[32] By email dated 15 February 2024, the respondent's solicitor stated that efforts were being made to resolve the accommodation situation and requested an extension until 20 February 2024. Further, on 16 February 2024, the respondent's solicitor emailed again to indicate that there was a potential solution in respect of available accommodation for the applicant and that this should be confirmed on 19 February 2024. Nonetheless, judicial review proceedings were instigated.

[33] It is clear from the response to the PAP letter by the respondent on 19 February 2024, that reasonable efforts had been made to resolve the issue of providing accommodation for the applicant. Accordingly, the respondent submits that the initiation of the court proceedings was premature and unnecessary.

[34] The efforts made by the respondent to obtain a placement for the applicant were successful without the need for a full hearing. The practice of encouraging parties to settle or resolve judicial review proceedings must be supported by the

court. Clearly, much will depend upon the facts of each particular case and the stage at which any concessions were made.

[35] With regard to the circumstances of this case, in the exercise of my discretion, it is my decision that the respondents should not be penalised in costs due to the respondent's prompt response to the PAP letter and the expeditious efforts to find a suitable placement of the applicant. Whereas the court can readily understand the frustration of the applicant's solicitors in relation to the delay in finding the applicant appropriate accommodation, it was not reasonable for the PAP letter to allow the respondent only 2 days to respond. Significantly, the respondent's solicitor did respond on 13 February 2024 and again on 15 February 2024, asking for a short extension to file the PAP response on 20 February 2024. This reasonable request was totally ignored by the applicant's solicitors despite the fact that they were advised that efforts to find appropriate accommodation were ongoing and that consultations were taking place. Without prior notice to the respondent, judicial review proceedings were issued close to the end of business on Friday 16 February 2024. The Judicial Review office notified the parties on 16 February 2024 that a hearing had been scheduled for 19 February 2024. The respondent filed its PAP response on the same date.

[36] As stated by McCloskey J in *CC's Application* [2018] NIQB 4, at para [12]:

> "[12] The resolution which ultimately materialised is strongly indicative of a likelihood that compliance with the PAP would have yielded a consensual outcome and obviated the need for these proceedings…I consider this to be a paradigm case for giving full effect to the principle that public authorities should not be dissuaded by the prospect of costs orders at this stage of judicial review proceedings from taking sensible, reasonable and pragmatic steps which bring about consensual resolution. For these reasons an award of costs against EA would be quite inappropriate."

[37] When the pre-action protocol was commenced in this case, a potential placement for the applicant had been identified and the Trust had initiated plans for an interim placement. It is clear that the respondent was actively working on a solution when judicial review proceedings were initiated. I agree with the respondent's submission that upon the facts of this case, a placement would have been achieved by the operation of an appropriate dialogue between the applicant's solicitors and the respondent's legal representatives. As highlighted by Scoffield J in *JR282 [2023] 82* in para [30] above, the pre-action protocol reminds the parties that litigation should be a measure of last resort and that there are a variety other measures by which disputes can, and in appropriate cases should, be resolved. Although the delay in providing the applicant with suitable accommodation gives rise to a cause for concern, the difficulties encountered by the respondent cannot be

overlooked. The background circumstances as discussed above and the response of the respondent's solicitors to the PAP letter demanded discourse between the parties in an effort to find reasonable and pragmatic steps to reach a resolution without the need for judicial review proceedings.

[38] For the reasons given above, I will make no order for costs between the parties. I will, of course, make an order that the applicant's costs shall be taxed as a legally assisted person.