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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY JR290 (A MINOR) BY HIS MOTHER AND NEXT FRIEND FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS OF THE BELFAST HEALTH AND SOCIAL CARE TRUST AND

THE DEPARTMENT OF HEALTH (NOTICE PARTY)

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Ciaran White (instructed by the Children's Law Centre) for the Applicant
Philip Henry (instructed by the Directorate of Legal Services) for the First Respondent
Michael Neeson (instructed by the Departmental Solicitors Office) for the Notice Party

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KINNEY J

Introduction

[1] This is an application for leave to apply for judicial review. The subject child, (who I will call BN), is 10 years old and has a range of complex health and care needs. He argues, through his mother and next friend (the applicant), that the proposed respondent (the Trust) has failed to provide certain services which it is under a duty to provide.

[2] The applicant's argument is that the Trust assessed BN as requiring respite or short break facilities with a frequency of two overnights per month, but has not provided that level of short breaks since September 2022. The applicant contends that the Trust 's actions or omissions breach its statutory duty under article 15 of the Health and Social Care (Northern Ireland) Order 1972. The impugned decision is further in breach of BN's legitimate expectations in relation to the short break services and also interferes with his article 8 and article 3 rights.

[3] As a result of this failure it is contended that BN's presentation has deteriorated, and his behaviour is now too complex to be managed in the family home. He requires to be placed in a specialist long-term residential facility with shared care with his parents. The Trust has failed to take the appropriate steps to arrange and secure such a long-term residential placement. The applicant contends that this second impugned decision is in breach of the Trust's statutory duty under article 15 of the 1972 Order, in breach of BN's substantive legitimate expectations and that it interferes with his article 8 and article 3 rights.

Background

[4] BN has been known to the Trust since he was three years old. In February 2022 an assessment of BN's needs was conducted and a UNOCINI report was compiled. Amongst other things the requirement for respite breaks was considered. In the review family support plan under the heading "Extended family and social community resource" the following was recorded:

> "Panel approved 2 nights of overnight respite per month. BN has been added to the waiting list. SW continues to raise that there is an urgent need for this to senior management."

[5] It was anticipated that the respite provision would take place in Lindsay House. This is a facility that the Trust shares with another Trust. It is a facility which is heavily oversubscribed and under considerable pressure. It had suspended overnight short breaks because the other Trust had placed a child to reside temporarily in the facility. The Trust is proposing to open a new short break facility in 2024 and also hopes to reopen a short break facility at Willow Lodge, which will require reregistration with RQIA before it can accept referrals.

[6] A further assessment and UNOCINI report was completed in March 2023, as part of the applicant's annual review. This report reflected the discussions that took place at the LAC review which was attended by a full range of the professionals involved with BN. The applicant was also present and participated in those discussions. The notes of the meeting included an update from Lindsay House which noted that BN had had a short visit and two overnights by the date of the review. It was reported that BN struggled when he first came to Lindsay House but that he became more settled. The meeting noted the changes that had occurred in Lindsay House since the earlier assessment of the applicant in February 2022. The chair of the meeting, a principal social worker, advised:

> "that from her discussions with Lindsay House management, Lindsay House have been working with RQIA to allow short breaks for the Belfast Trust short break users although this has been at a reduced capacity which is currently being split between the Belfast Trust

> and the South-Eastern Trust. Ms McNally advised that Belfast Trust get two sets of overnights per month and that the seniors are tasked with deciding who can avail of these overnights based on risks and needs."

[7] In this report, under the heading "Extended family and social community resource", BN's need is assessed as "short break support with Lindsay House" and the planned action is "The family will continue to be considered for overnight respite with Lindsay house."

[8] The assessment made in March 2023 did not specify a particular number of nights per month. A range of alternative supports in relation to BN are also in place. BN has a direct payment budget to fund 40 hours of care a week during the school holidays and 22 hours per week in term time. The Trust had also arranged for BN to attend Solas after school (although that service has been stopped by the provider). The Trust then engaged Kids Together and facilitated BN's attendance, providing transport by taxi with an escort. The parents of BN terminated the Kids Together service as they felt it was not capable of meeting his needs. The Trust then provided an "in reach" service. Trust carers go to the family home in the afternoons. Two carers attend the home for three hours after school, two or three times a week. Efforts are being made to locate a suitable community location so that this care can take place outside the family home. The Trust has also provided a range of other support such as art therapy sessions and swimming sessions along with assistance for the purchase or replacement of various items in the family home. The Trust has funded a short holiday for the applicant and his parents in England and a young carer grant to assist the applicant's older sibling.

[9] There was a multi-disciplinary team meeting held on 23 August 2023. At that meeting a residential placement was considered. The parents had requested this due to the increasing pressures on their caring role. The parents did not want a placement outside Northern Ireland. The social worker is recorded as saying of BN;

> "He is very young and if he goes into a residential placement, it will impact badly on him as he seeks reassurance from his family. Parents need to engage in more services with us. It is more about parental burnout rather than BN's behaviour."

[10] A senior social worker at the meeting is recorded as saying:

> "A residential placement would really distress BN. He needs constant reassurance in Lindsay House about when he is going to see his mum again."

[11] The principal social worker is recorded as saying:

> "Residential is quite far down the tracks and we need to approach all the family members before moving onto a placement. We have foster carers who could provide a placement. Parents have not consented to his picture being shared with foster placement… There is nothing (the principal social worker) has heard today to suggest BN needs a residential placement. If we look at out of the jurisdiction it is because he needs treatment or there is nothing in Northern Ireland."

[12] One of the actions arising from this meeting was to prioritise BN for Lindsay House.

[13] An independent social work consultant (ISW) was instructed to provide a report on the assessment on behalf of the applicant. That report became available shortly before the hearing of this matter. The ISW carried out interviews with a range of individuals. The ISW reported:

> "The parents believe that the lack of short breaks contributed significantly to deterioration in BN's behaviour, which continues to be traumatising to him, themselves and their daughter. Their only opportunity for a break is when he goes to school or when sleeping. When at home he demands instant attention and vigilance is required to try to prevent meltdowns and violence.
>
> The parents made it clear that they do not want BN to be placed in full-time residential care. Their preferences are for shared care arrangement, phased over a period of time in a placement in Northern Ireland conducive to BN's needs, such as Glencraig."

[14] The ISW also spoke to BN's treating psychiatrist, Dr Y. The ISW reported that Dr Y "described BN's behaviour as being challenging but not as challenging compared to other children her team are involved with." The report went on to say:

> "Dr Y agreed that being placed in residential care, at this time, could impact adversely on BN's emotional and mental well-being. He loves his parents and will feel abandoned and traumatised if he were removed from them and his home."

[15] The ISW also spoke to the family GP, Dr Z and noted "Dr Z does not believe that being placed in residential care would be conducive to BN's emotional and mental well-being. Although this might be a safer option for the parents, it would

not be for BN. If removed and placed in care, he will be traumatised and feel abandoned."

[16] In his conclusion, the ISW stated:

> "In my view frequent consistent short-term breaks and provision of a robust home support package, alongside medication regime could have a more positive outcome for BN and his family, than him being placed in residential care, at this time."

The law

[17] Article 15 of the 1972 Order states:

> "15(1) In the exercise of its functions under section 2(1)(b) of the 2009 Act the Ministry shall make available advice, guidance and assistance, to such extent as it considers necessary, and for that purpose shall make such arrangements and provide or secure the provision of such facilities (including the provision or arranging for the provision of residential or other accommodation, home help and laundry facilities) as it considers suitable and adequate."

[18] Cases of this nature have come before the court frequently in recent years. In *Re LW* [2010] NIQB 62 the court said:

> "[43] In Re Hanna's Application [2003] NIQB 79, Coghlin J considered the question of the proper construction of Article 15 of the 1972 Order. On this occasion, in contrast with Judge, Article 15 arose for consideration in isolation, on its own merits. Coghlin J concluded:
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> > '… I do not think that it is appropriate to conceive of Article 15 placing the Department or, in this case, its agent the respondent Trust under a mandatory duty to fulfil any specific need once that need has been assessed. In my view, in the context of this application, the duty imposed upon the Department and its agencies by Article 15, is to provide such facilities by way of residential nursing accommodation as it considers suitable and adequate to meet the needs of the applicant,

consistent with its overall duty to promote the physical and mental heath and social welfare of all of the people of Northern Ireland, including those whose needs may, depending on the circumstances, be more urgent and pressing than those of the applicant. In achieving this goal it seems to be inevitable that it will be necessary to take into account available resources and, in my view, this has been practically achieved in a reasonable manner by the scheme administered by the defendant Trust. It is important to bear in mind that the respondent Trust has not refused to meet the applicant's assessed needs, it has recognised those needs but has been compelled by the resources available to it to adopt a system which seeks to balance the fulfilment of those needs with the needs of others.'

Thus, for Coghlin J, the hallmark of Article 15 of the 1972 Order is discretion, rather than duty."

[19] The court went on to say at paragraph 45:

"[45] In my opinion, Article 15 of the 1972 Order is to be analysed in the following way:

(a) It constitutes the more detailed outworkings of the general, unparticularised duty enshrined in Section 2(b) of the 2009 Act (formerly Article 4(b) of the 1972 Order), which is to be construed as a "macro" or "target" duty, akin to a general principle (per Lord Hope in Barnett LBC, supra.

(b) It is for the authority concerned to make available advice, guidance and assistance to such extent as it considers necessary. This plainly invests the authority with a discretion, to be exercised in accordance with well-established principles.

(c) For the purpose of making available advice, guidance and assistance to such extent as it considers necessary, the authority shall make such arrangements and provide or secure the provision of such facilities as it considers suitable and

adequate. This language also clearly confers a discretion on the authority.

(d) Bearing in mind the present context, it is expressly provided that such "facilities" may include the provision or arranging for the provision of residential or other accommodation.

(e) Once a decision on what the authority considers "necessary" and/or "suitable and adequate" has been made, the discretion in play is exhausted. The assessment having been made, a duty of provision arises."

[20] This analysis accommodates the proposition that, in making the assessment in each individual case, the authority can properly take into account factors such as available resources, the demands on its budget, the particular circumstances of the individual concerned and their family, including their resources, the availability of facilities and its responsibilities to other members of the population. The ingredients of this proposition are a process of reasoning by analogy with the decision in Barry and the well-established principles of public law summarised in Administrative Law (Wade and Forsyth, 10th Edition) pp. 321-322. Thus, factors of this kind can properly influence the assessment to be made in an individual case. However, when the assessment has been made, I consider that discretion is supplanted by duty. This, in my view, is the effect of the presumptively mandatory "shall", which contra indicates any suggestion that discretion should prevail from beginning to end. Had the latter been the legislative intention, one would expect to find its expression in the discretionary "may."

[21] *JR139* [2021] NIQB emphasises the need for an assessment under article 15 or a reassessment of an original determination. The court said:

> "[40] However, in JR47 [2011] NIQB 42, McCloskey J held that for the Article 15 statutory duty to crystallise, it was necessary that an assessment be carried out:
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> > 'In any event, I find that no Article 15 assessment of Mr E's residential needs was carried out, in the terms asserted or at all, until late 2009 at the earliest. Taking into account the intensively fact sensitive nature of the situation and circumstances of every member of the cohort to which Mr E belongs, I reject the submission that the various statements of Government policy were tantamount to an assessment in the terms advanced. Since late

> 2009, two concrete attempts to resettle Mr E in the community have been unsuccessful. In accordance with the governing policies, he has exercised his right of refusal. In my view, no duty of provision under Article 15 of the 1972 Order can properly arise until, taking into account all of the factors in play, including individual choice, a specific proposed resettlement option acceptable to the individual materialises. I find that this factual matrix does not exist and has at no time existed in the present case.'

[41] By extension of this line of reasoning, it must be the case that an actual reassessment is required in order to vary or discharge the statutory duty owed pursuant to Article 15. If statements of Government policy cannot amount to an assessment, then the occurrence of events, whether the pandemic or the problems faced by other children, cannot amount to a reassessment of the applicant's needs. On the evidence before me, there was no such reassessment. Rather, the UNOCINI assessment in July 2020 confirmed both the needs of the applicant and the arrangements and facilities which were considered suitable and adequate.

[42] This echoes the position set out by McCloskey J in Re LW at paragraph [48]:

> 'It seems to me that the legislation - both the 1978 Act and the 1972 Order - must contemplate revised social care assessments from time to time, in response to changing circumstances. However, there has been no revised assessment in the present case and the court must obviously proceed on the basis of the existing assessment.'

[43] The proper analysis of the evidence in this case is inescapable. The needs of the applicant and the arrangements and facilities had been assessed and identified and a duty to provide them thereby crystallised. In March 2020 when Covid struck a decision was made to temporarily suspend the provision of those services. This decision is not the subject of judicial review. When SH was reopened, a decision was made to

> admit other children, with different needs, and to repurpose the facility. There was no reassessment of the needs of DF nor the arrangements and facilities which were suitable and adequate. The failure to provide these placed the Trust in breach of statutory duty."

Consideration

[22] The applicants challenge is based on two grounds.

[23] The first is that the Trust assessed BN as needing respite or short break facilities of two overnights per month. This assessment was made in February 2022 and was set out in a UNOCINI report. The applicant asserts that the Trust has not provided this service to BN at the statutorily required level.

[24] At hearing it became clear that there was a dispute as to the appropriate assessment.

[25] The Trust pointed to a further UNOCINI dated 14 March 2023 which it said was the basis of the most recent assessment of need.

[26] The first assessment is dated 7 February 2022. That assessment under the heading "Extended family and social community resource" recorded that the panel approved two nights of overnight respite per month. It further recorded that BN had been added to the waiting list. The social worker continued to urge senior management that there was an urgent need for this overnight respite. The applicant relies on this assessment as the basis for the first limb of challenge.

[27] The Trust said this is an erroneous starting point. There was a further assessment carried out and the outcome of that assessment is dated 14 March 2023. Under the same heading in the report it is recorded:

> "The family will continue to be considered for overnight respite with Lindsay House."

[28] The first question that must be answered, therefore, is which is the correct basis of the assessed need.

[29] The applicant contended that the March 2023 report was not a formal reassessment of the applicant. Mr White on behalf of the applicant argued that there was no reassessment at the LAC meeting of BN's need for respite and no change to the assessment that two overnights per month were still required. There was no evidence that there was an actual reassessment at this time, and it was nothing more than a reliance on external factors. The applicant also argued that if there was going to be a change to an assessed need then she should have been aware of that and in her grounding affidavit she makes it clear that she was not aware. Mr White further

argued that a parent should have a meaningful opportunity to participate in any assessment process. The issue of any reduction in the short break provision should have been flagged and there was a requirement for a clear signalling that a reassessment of the short break provision was about to take place. Mr White also placed reliance on the guidance relating to UNOCINI reports and said that parents were to be encouraged to participate in the process.

[30] The Trust however made the case that there was a holistic reassessment of the applicant's requirements at a formal review in March 2023. Mr Henry argued that the first stage of the process required of the Trust was to assess the need. Mr Henry in his submissions confirmed that there was no change in the assessed needs of BN. What had changed by March 2023 was a decision taken by the Trust as to the services to be provided. At this stage the Trust was entitled to take into account both resources and the needs of other service users before deciding what services can be provided. This was not inflexible and there was an opportunity to change the provision of services when there is a change in circumstances. It is this provision of services which is subject to a Wednesbury unreasonableness challenge. There is a duty on the Trust to deliver on the resource and the service it has identified. In this case, whilst acknowledging that the wording on the report could have been improved upon, the identified provision of service was to continue to consider this case for overnight respite with Lindsay House.

[31] The Trust also argued that there was a full discussion in March 2023 regarding Lindsay House and the possibility of respite breaks. In fact BN was only able to avail of Lindsay house from November 2022 with a series of introductory visits and then a first stay for three nights which was referenced at the March 2023 meeting. There is reference in the UNOCINI report to the conduct of the LAC review. On opening the meeting, the principal practitioner social worker advised that the review would be guided by the LAC 3 report. Various headings were then addressed by those at the meeting which included the applicant who was fully involved in the discussions. There were specific references to BN's initial difficulties in arriving at Lindsay House and how he subsequently coped. The applicant specifically referred to the low level of respite provided and said that BN's overnights at Lindsay House were not regular enough for him to become comfortable within the environment. It was explained at the meeting that although there were plans to try and increase the short break capacity of Lindsay House three children have been placed there on an emergency placement which impacted substantially in the short break capacity.

[32] It is clear there was detailed consideration of the issue of short break respite provision at the meeting. I am satisfied that there was a formal and holistic review of BN's needs in March 2023. I am satisfied that this was an appropriate assessment of BNs needs and superseded the earlier assessment made in February 2022.

[33] The applicant's case relies on the February 2022 assessment which is plainly unfounded.

[34] In light of the difficulties faced by the Trust in providing resources and also in the prioritisation of the needs of others, it's assessment of how best to meet BN's needs in relation to short respite breaks cannot be described as Wednesbury unreasonable or irrational. There is no arguable prospect of success on this limb.

[35] The applicant also argued that the impugned decision was in breach of BN's legitimate expectations in relation to short break services. In light of the findings above this point is also unarguable.

[36] The applicant contends that BN has a separate and freestanding article 8 claim. She asserts that the Trust unlawfully interfered with his rights in a manner which were not in his best interests as a short break provision was a necessary element in the maintenance of his family life. The applicant asserted that the Trust had positive obligations in his case under article 8. The applicant argued that there was an inevitable conclusion that article 8 was both engaged and breached if the statutory duty owed by the trust had not been observed.

[37] The applicant as part of this ground relied on the assertion that BN's dysregulated behaviour had increased because of a failure to provide short break respite. However, during the hearing the applicant was unable to point to any evidential basis on which this assertion was based other than the perception of the applicant.

[38] There is no arguable case in this respect.

[39] The applicant further argued that BN's article 3 rights were engaged in that there was humiliating or degrading treatment of him. This, it would appear on the applicant's argument, was because the failure to provide short breaks was a contributory factor to the deterioration of his behaviour, causing him to cause harm to his family members in the family home and put himself in physical danger. However, as noted above the applicant was unable to provide any evidential basis for the assertion of the connection between the lack of short break provision and the deteriorating behaviour. BN is already the recipient of a wide range of supports and is a complex and vulnerable young child. There is no doubt that BN's behaviour is most challenging and most stressful for his carers. The applicant argues that the Trust is under a positive obligation to relieve or ameliorate the severity of the conditions to which BN is subject.

[40] Although the applicant makes the case in this form there is no evidence to support the underlying thesis that the lack of provision of short breaks caused the deterioration in BN's behaviour. This falls far short of the level of ill-treatment necessary to engage article 3 rights. An independent social work report was sought by the applicant provided to the court. As part of that report the author also spoke to the consultant psychiatrist dealing with BN. The report records

> "Dr Y described BN's behaviour as being challenging but not as challenging compared to other children her team were involved with."

[41] I am satisfied that there is no arguable prospect of success on this point.

[42] The other ground on which the application is based is set out in the amended Order 53 statement. This asserts that the trust was in breach of its duties to BN in its failure to provide him with a "specialist residential placement."

[43] Mr White argued that there had been no appropriate assessment of the need for a residential placement. In his oral submissions he refined this argument. He conceded that his submissions on long-term residential placement BN "might be said to have fallen away."

[44] This was in essence because there was evidence of the consideration of a residential placement for BN. One example of this consideration was at the multidisciplinary team meeting on 23 August 2023 when the professionals involved in BN's care had a wide-ranging discussion about the merits of a residential placement. The record shows that the professionals involved did not consider that a residential placement was appropriate for BN. The independent social work report provided by the applicant reaches the same conclusion. The conclusion of the author was that consistent short-term breaks and provision of a robust home support package alongside medication regime could have a more positive outcome for BN and his family than him being placed in residential care at this time.

[45] In those circumstances Mr White refined his arguments to say that what was in fact sought was some form of shared care arrangement. This was described as a form of split care where BN would spend time at home and time at another facility. It would be more extended than simply short respite breaks.

[46] It is clear that the Trust has engaged in an assessment of the appropriate plan for BN and that plan is currently that he should stay with his parents. A residential placement appears as a long-term goal, but it is not something anticipated as being in the best interests of BN as this time. It is fair to say that the Trust view is clearly reflected in the report and opinion of the ISW provided by the applicant. The shared care model suggested at hearing is not premised in any way in the Order 53 statement and it is in my view a late construct by the applicant to address the weakness in this ground of challenge. I am satisfied that none of these points have an arguable prospect of success.

[47] The article 8 arguments mounted by the applicant have no traction in the circumstances and I am satisfied that they are not engaged. The article 3 arguments are even less attractive.

[48] I am satisfied that there is little merit in the application mounted in this case and there is no arguable prospect of success. There are further difficulties for the applicant in light of the stance taken by the Trust in terms of the flexible and ever-changing nature of resources in the assessment of BN's needs. There is clearly a substantial issue about the utility of these proceedings continuing and whether any remedy provided would be other than academic.

[49] Although it is probably cold comfort to the parents at this time there are some optimistic aspects to this case. The Trust have identified new facilities which should become available early this year. Not only is it hoped that BN will be in a position to avail of some of these facilities, and that is the clear intention of the Trust at this stage, but by the time any final hearing is completed and even should the applicant be successful the factual situation on the ground would be significantly different and there is little benefit in any outcome to these proceedings.

[50] At an early stage I did invite the parties to see if there was a way forward by mediation or some other form of discussion. Sadly, that was not possible. I am told that relationships between the Trust and the parents are generally good, and I certainly hope that relationship can be maintained. I will not repeat what Scoffield J has said in *JR138* [2022] NIQB 46 about the inherent sadness of the nature of proceedings of this type and how there is a very negative aspect to them. However, I must say that I share that sentiment. I hope the parties now find a way to work together in the best interests of BN and try and provide him with the best support that it is possible to provide, as his best interest should be the centre of everyone's focus.