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*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

AN APPLICATION BY JR97 FOR JUDICIAL REVIEW

SIR RONALD WEATHERUP

[1] The applicant is a child and claims by his mother for judicial review of a decision of the South Eastern Health and Social Care Trust made in October 2019 not to admit the applicant to Lindsay House for residential respite care, the applicant being a child with behavioural difficulties. Mr McQuitty appeared for the applicant and Mr Montgomery for the respondent.

[2] Lindsay House is an 8 bedded unit providing short term breaks for 15-18 year olds with a diagnosed learning disability and associated challenging behaviour. Lindsay House provides respite on a monthly basis to 40 children who use the service with an average 70 admissions on a monthly basis. Admission criteria for Lindsay House include the child having a learning disability.

[3] The grounding affidavit of the applicant's mother outlines that the applicant was 9 years old on 2 December 2019. He resides with his mother's parents. The mother resides with another son who is aged 15. The applicant was suspended from school on 19 November 2019 due to his behaviour. The mother's background was in nursing and she qualified in the year 2000. The applicant is described as having a range of severe difficulties regarding his emotional state, mental health and behaviours. He has autism, ADHD, speech and language delays and exhibits very challenging behaviours. In the latter part of 2019 these difficulties escalated to become unmanageable in terms of the risk that the applicant presented to himself and to others and he could be violent towards other children and adults.

[4] The applicant was Statemented in September 2014 and received a full-time classroom assistant. In May 2015 a diagnosis of ADHD was made and the Statement

had to be reviewed. He was admitted to a primary school in September 2015 and remained until June 2016. In September 2016 he was admitted to a Special School. He could not cope in that environment and he began hitting and kicking out and the school requested a full-time one-to-one teacher and a classroom assistant which was provided. In June 2018 the school advised that the Education Authority had no more funds to maintain the provision of extra staff. The mother states that the applicant was first diagnosed with a learning disability by an educational psychologist around March 2015.

[5] The mother attended a family support plan meeting on 17 September 2019 and some doubts were raised about the applicant's learning disability by Dr Creegan, a Clinical Psychologist. Dr Creegan arranged to assess the applicant in school on 26 September. The psychologist concluded that the applicant had an unusual cognitive profile but his scores placed him outside the learning disability range. However, Dr Creegan went on to state her opinion that the applicant's needs may well be best met within learning disability services, although it was stated to be important that this was a multi-disciplinary decision.

[6] The mother's affidavit then recounts that Lindsay House was put forward by the Trust for a residential respite placement for the applicant. At Lindsay House the applicant would have had one-to-one staff support 24 hours a day. The applicant's mother states that this placement was approved by the Trust on 2 October 2019. It transpires that that is not correct. There was a child protection case conference on 3 October and the applicant's mother exhibited a copy of the minutes of that meeting. The minutes included a section considering what should be next for the applicant which stated that a psychiatry assessment was urgent, that CAMHS was to be contacted that day, that fostering was to be revisited as Lindsay House was said not to be an option, that the Chair was to speak to senior management about the use of Lindsay House in the crisis situation, that while Lindsay House might not have been an option it was stated that the applicant needed alternative safe accommodation and possible hospital admission.

[7] The mother's affidavit states that on 21 October she was asked to attend a multi-disciplinary meeting with the Trust and she was told that Lindsay House was not suitable due to safeguarding concerns for other children. However, Lindsay House remained her strong preference for the applicant. The contention made on behalf of the applicant is that the Trust rejected Lindsay House by a strict application of the admissions criterion relating to learning disability.

[8] A responding affidavit from the Trust by Alison O'Boyle, a Principal Social Worker, stated that the Children's Disability Team had been providing family support since October 2015. She referred to the Child Protection Case Conference on 3 October 2019 which was attended by about a dozen people including the applicant's mother and her partner together with social workers, school representatives, Ms O'Boyle, Dr Creegan the Clinical Psychologist and Michelle Bradley, the Manager of Lindsay House. Dr Creegan had advised that the

applicant did not fall within the category of having a learning disability. All the professionals at the meeting agreed that an approach would be made to the Senior Manager of the Trust by the Principal Social Worker and the Chair of the case conference to consider Lindsay House as an option. On 4 October 2019 Ms O'Boyle attended a meeting that completed a proposed care plan and exit strategy for the applicant in respect of Lindsay House. It was identified that it would be necessary to close Lindsay House to other children during the applicant's stay.

[9] The proposed care plan was sent to Maurice Largey, the Assistant Director of Residential Facilities for decision. Mr Largey advised Ms O'Boyle on 4 October that closing down Lindsay House could not be approved at that time as the impact on the service as a whole would be significant. Ms O'Boyle stated that Mr Largey was the Trust decision maker and his decision was predicated not only upon the determination of Dr Creegan with respect to the applicant's absence of learning disability but upon the serious adverse effect on other service users.

[10] There was a further meeting on 7 October and the Child Disciplinary Team explored MACs as a possible option, this being a therapeutic residential facility for children aged 6 to 12. A meeting was held with MACs on 14 October 2019 but they were not in a position to offer a residential placement at that time but they continued to offer family support. A further multi-disciplinary meeting was convened on 28 October and it was attended by three consultant psychiatrists. The medical staff collectively advised that the applicant did not require in-patient admission at that time, that the applicant did not have a mental illness and they concluded that he required a bespoke community placement to offer family respite. He was offered a placement with Queen's Quarter on 31 October 2019 but the applicant's mother hesitated about agreeing to that provision and eventually it was no longer available.

[11] Ms O'Boyle's affidavit concluded by stating that the applicant could not be accommodated in Lindsay House due to the dual issues of not meeting the criteria, that is not having a learning disability, and the significant impact upon the service as a significant proportion of respite for others would need to be cancelled. It was stated that the applicant had been residing with his grandparents since 1 October 2019, that his behaviour had settled, that there was an intense supportive child protection plan in place and that the current monthly disciplinary team offered ongoing support to the family.

[12] By an Amended Order 53 Statement the essential challenge of the application for judicial review concerns the decision to refuse the applicant a place at Lindsay House and there are four grounds relied on to advance that challenge. The first is that the Trust had fettered its discretion in not being prepared to consider the individual circumstances of the applicant in the light of their policy about no admission for those without learning disability. The second is the irrationality of the decision where it is said that there was to be admission to Lindsay House and then later there was said to be a rejection of admission to Lindsay House. Thirdly, the failure to take account of relevant factors, namely that Dr Creegan had stated that

the applicant's needs would be best met within a learning disability service. Fourthly, complaints under the European Convention of Human Rights concerning the right to respect for private and family life under Article 8 and discriminatory treatment under Article 14 in that the decision to refuse admission to Lindsay House was said to engage the applicant's mental health, integrity, welfare and best interests an involved differential treatment on the ground of disability.

[13] The relevant statutory provisions are contained in the Children (Northern Ireland) Order 1995 Article 21 which deal with the provision of accommodation for children in general under two schemes as follows:

“(1) Every authority shall provide accommodation for any child in need within its area who appears to the authority to require accommodation as a result of:

.....

(c) the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care.

.....

(4) An authority may provide accommodation for any child within the authority's area (even though a person who has parental responsibility for him is able to provide him with accommodation) if the authority considers that to do so would safeguard or promote the child's welfare.”

[14] Under paragraph (1) the Trust is mandated to provide accommodation. First of all that is for any child in need and it is agreed that this applicant is a child in need. Secondly, this applies to a child who appears to the authority to require accommodation and while the applicant is in accommodation at present with his grandparents it was considered necessary because of his behaviour at that time that he should be provided with temporary accommodation elsewhere. Thirdly, the person who has been caring for the child in need is being prevented from providing him with suitable accommodation or care. In the case of the applicant a point of crisis had arisen in October when this decision was made as to suitable accommodation and care to meet the applicant's needs and at that time it was apparent, considering his conduct, that the persons who had been caring for him, namely his grandparents, were being prevented, if only temporarily, from providing him with suitable care because of his own conduct at that time. It seems to me therefore that Article 21(1) applied.

[15]] Article 4 of the Order, on the other hand, is a discretionary provision where a child may be provided with accommodation and services if it is considered necessary to safeguard or promote that child's welfare. This is an alternative ground on which the provision of this respite care could have been provided.

[16] In *JL v Islington London Borough Council* [2009] EWHC 458, a child of 14 with learning difficulties and disability was receiving care. The local authority introduced new eligibility criteria and the care plan for *JL* resulted in reduced support. The mother sought judicial review of the introduction of the new eligibility criteria arguing that the authority was no longer identifying the child's actual needs but was instead merely applying the criteria. The application was successful and the local authority was required to reassess the child's needs.

[17] Black J at paragraph 64 referred to the equivalent statutory provisions in England, namely section 20(1) and (4) of the Children's Act 1989 and the requirement under section 20(1) that a local authority "shall" provide accommodation whereas under section 20(4) it "may" provide accommodation. Black J continued:

"Not surprisingly, therefore, the group of children covered by section 20(1) is more stringently circumscribed than those covered by section 20(4). Section 20(4) is merely a permissive section, giving the local authority power to provide accommodation for *any* child in the local authority's area, provided the local authority is satisfied that providing accommodation for him would safeguard or promote his welfare. In contrast section 20(1) gives rise to an absolute duty, to come within it, the child must not only be in the local authority's area. He must also (a) be in need and (b) require accommodation as a result of one of the three conditions set out in the sub-section."

[18] In the present case the applicant was a child in need and a duty fell on the Trust. As in *JL v Islington LBC* the duty relates to the needs of the applicant and should not be governed by alternative eligibility criteria. The applicant contends that this is a case that was determined or at least improperly influenced by an eligibility criterion relating to learning disability rather than the applicant's need.

[19] The present application proceeded to hearing without an affidavit from the decision maker. In the light of issues raised during argument about the nature of the decision making the hearing was adjourned to enable the decision maker to file an affidavit. Such an affidavit was sworn by Maurice Largey as Assistant Director of Residential Facilities within the Trust. In his affidavit he states that a child protection meeting was convened on 3 October 2019 and that the issue of the applicant not having a learning disability was raised by the psychologist. Mr Largey

states that the provision of a place at Lindsay House would not have been, and was not, ruled out based upon prescriptive admissions criteria. On 4 October 2019 a meeting was convened to consider what would be involved in a plan for the applicant entering Lindsay House. On that date Ms O'Boyle sent to Esther Taggart, Head of Services for Lindsay House, an email which summarised the conclusions of the meeting. The email was not sent to Mr Largey. That email referred to a current proposed care plan for the applicant to be placed in Lindsay House with rehabilitation to his mother's care after a period of respite. The email anticipated that within the period of respite care the applicant would be afforded attention to various needs. It recommended that the applicant be placed without other children whilst risk was further assessed by Lindsay House staff. It was stated that it was not possible to give a definitive view on a timescale but that the placement would be a number of weeks in the first instance. The concluding remarks in the email indicated the serious nature of the applicant's position at that time. It acknowledged and regretted the impact that the applicant's admission would have on the families and children who availed of respite at Lindsay House but stated that there were no current alternatives for the applicant and that he posed a significant risk to life within his family home. It was clearly recommended that his placement at home had temporarily broken down.

[20] Ms Taggart phoned Mr Largey on 4 October to advise him about the meeting that had taken place and they discussed the case and the contents of the email. Ms Taggart indicated to Mr Largey that the professionals at the meeting considered the applicant's violent behaviour and his degree of emotional misregulation to be too high to allow him to be placed with other children. It is said that while an exact duration of the applicant's admission could not be set it was clear that the duration of the applicant's stay would be measured in weeks in the first instance. The placement would have been indeterminate given his complex needs and the further assessments required.

[21] Mr Largey concluded that the applicant's stay in Lindsay House was going to be for a significant period of time and it was clear that Lindsay House would have to be closed to all the other young people who used the facility in order to accommodate the applicant. This course of action, stated Mr Largey, would have elevated the needs of one child over the needs of approximately 50 other children who had an assessed need for the service.

[22] The applicant's Counsel took particular exception to paragraph 10 of Mr Largey's affidavit where he stated:

"I made the informed decision that [the applicant] could not be admitted to Lindsay House due to the impact on multiple other service users who would be deprived of short breaks. I did not make the decision on admission because he had been diagnosed with not having a Learning Disability. It can be seen from the email that all

manner of practical issues were involved. These meetings, discussions and deliberations all took place after the diagnosis of Dr Creegan was known. I feel it is important to point out that had the decision been made based on Learning Disability diagnosis, none of these meetings would have taken place.”

[23] The basis of the applicant’s rejection of this paragraph is that it offers a basis for the decision that relies on the impact of the applicant’s admission to Lindsay House whereas the earlier affidavit of Ms O’Boyle relies on the admission criterion as to learning disability as well as the impact issue.

[24] I refer to three other affidavits that were filed. First, the applicant’s mother filed a further affidavit that addressed certain criticisms made by the Trust. These are collateral issues that it is not proposed to consider further. Second, an affidavit was filed from John Anthony Donaldson, Solicitor for the Trust, dealing with an issue about the drafting of the pre-action protocol response letter and the reasons for the decision in question. Mr Donaldson explains his drafting of the pre-action protocol response letter and again this is a collateral matter that it is not proposed to consider further. Third, a further affidavit was filed from Ms O’Boyle in which she exhibited various papers and I shall refer to two of those papers.

[25] One paper is the minute of the meeting of 21 October 2019, a multi-disciplinary meeting that includes a reference to the need for a best fit for the applicant because of his special needs. At the meeting Ms Irvine, Head of Clinical Psychology Services, is recorded as stating that she has had discussions around best fit and that senior managers felt that the best fit for the applicant was within the learning disability category. It is also recorded that Maurice Largey had made the decision that Lindsay House needed to be ruled out as an option due to the impact on other service users and taking into consideration regulations around the facility. Further Esther Taggart is recorded as being in agreement with concerns expressed, that she would be against respite in Lindsay House due to the impact this would have on the unit and that, while the applicant was not deemed to have a learning disability, regulations can be breached and “it is not about regulations but best fit”.

[26] The other paper is the minute of a multi-disciplinary meeting held on 24 October 2019 where it is recorded that those present had looked at Lindsay House in conjunction with senior managers within the Trust and that the implications for services were great as a significant amount of families would have to be declined the respite that they avail of at Lindsay House. This was stated to involve in or around 60 to 70 families. The meeting recorded the view that there should not be any other children within Lindsay House until the applicant had been assessed because he posed a risk to other children.

[27] Counsel for the applicant submits that the Court should reject Mr Largey’s affidavit and that he should be subject to cross-examination. The reason for this

position is because of the inconsistency which is said to arise in relation to the evidence as to the reasons given for the decision made by the Trust in relation to the applicant. Those inconsistencies concern the application of the admissions criterion as to a finding of learning disability on the part of the applicant in the decision to refuse the applicant admission to Lindsay House.

[28] Lindsay House had a criterion that required learning disability for admission. There are different accounts as to the effect of this criterion on the decision not to admit the applicant to Lindsay House. Examples include the meeting attended by the applicant's mother on 3 October, when Dr Creegan's assessment was made known, where Dr Creegan was recorded as stating that as a result Lindsay House was not an option. However, it was agreed at that meeting that an approach would nevertheless be made to Lindsay House. No written record was made of Mr Largey's discussions or of his decision. The minute of the meeting of 21 October states that Mr Largey's decision was based on both the impact on others and the regulations. The minute of the meeting of 28 October discusses the impact on others of the admission of the applicant. The pre-action protocol response letter from the Trust's solicitors relied on the admissions criteria although the briefing note also relied on impact. The affidavit of Ms O'Boyle referred to both the admissions criteria and impact. The deciding factor stated by Mr Largey in his affidavit was the impact of the applicant's admission on other users and not the learning disability criterion.

[29] The two factors of the learning disability criterion and the impact of admission are intertwined in the papers and there is no articulation in the minutes of meetings or more particularly in the Trust's responses as to the distinction between the two factors. That is understandable as far as the internal discussions by the professionals is concerned as they are not to appreciate that it may be of significance or that a challenge might be mounted based on the purity of decision making. All that changed when the nature of the applicant's challenge was set out.

[30] What is clear is that despite the existence of admissions criteria for Lindsay House that included reference to a learning disability, the proposal submitted by the care professionals to the decision maker was for admission to Lindsay House, albeit with conditions about closure of the facility to others. I am satisfied that the applicant's admission to Lindsay House was being considered despite the presence of a learning disability criterion and therefore am satisfied that he was not being excluded because of the existence of the learning disability criterion. As Mr Largey states in his affidavit, had the applicant been rejected because of the absence of a learning disability then any proposal for admission to Lindsay House would not have been considered at all. Having considered all the available material I accept Mr Largey's account of the decision making process as set out in his affidavit. Accordingly, I am satisfied that the reason for the decision was the impact on others. I am not satisfied that there is such inconsistency in the materials before the Court as warrants the cross-examination of any witness. Therefore, I refuse the application for cross-examination of Mr Largey.

[31] That conclusion goes some way towards addressing the overall case. I look at the four grounds in turn. The first ground is that Mr Largey fettered his decision by not being prepared to look at the individual circumstances of the applicant. I am satisfied that he did not fetter his discretion. He did not exclude the applicant because there was a finding of no learning disability. He was prepared to consider whether the applicant should be admitted despite the finding by Dr Creegan and he made a decision that the applicant should not be admitted to Lindsay House based on the impact of the proposed admission. I am not making any finding that the absence of a learning disability may not be a ground for exclusion from the facility at Lindsay House. The duty of the Trust relates to the needs of the children for whom the Trust is responsible. Dealing with children with learning disability or those whose needs could best be addressed in a learning disability setting need not impose a duty to provide specific accommodation. However, the applicant's case was considered in any event and I do not accept the fettering of discretion.

[32] Secondly, it is said that there was irrationality in making a decision and then revoking it. I am satisfied that that did not happen. There was no decision to admit the applicant to Lindsay House on 2 October or on any date. There was a proposal for admission to Lindsay House. There may have been those within the committee who would not have admitted the applicant to Lindsay House in any event and there may have been others on the committee who took a different position but the committee members were not the decision makers. No decision was made until 4 October when the proposal came before Mr Largey and that decision was against admission because of the potential impact on others. Therefore, I am satisfied there is no basis for a claim of irrationality in making contradictory decisions or in revoking an earlier decision.

[33] The third ground is that a relevant factor was not taken into account, namely Dr Creegan's view that despite her assessment in relation to learning disability the applicant's needs would be best met within a learning disability service setting. I am satisfied that the potential for admission to the learning disability facility at Lindsay House was considered. However, it was decided that the applicant should not be admitted because of the impact on others. The applicant's skeleton argument also contends that there was a failure to take into account the borderline nature of Dr Creegan's finding and the time required for risk assessment on admission to Lindsay House. It is apparent from the evidence available that the decision involved consideration of admission despite Dr Creegan's finding and that the timeframe was discussed.

[34] Finally, there are grounds relied on under Article 8 and Article 14 being challenges based on the applicant's right to respect for private and family life and alleged discriminatory treatment. If the refusal of accommodation in Lindsay House amounted to an interference with the applicant's right to respect for private and family life, then ultimately this challenge involves a balance of the private interests of the applicant and the interests of others. That balance cannot but fall against the

applicant because of the significant impact that his admission to Lindsay House, even for a temporary period, would have had on the other users of that facility.

[35] The alleged discriminatory treatment concerns the applicant's disability and the different treatment said to be accorded to him when compared with those found to have a learning disability. The reason for the decision to refuse the applicant a placement in Lindsay House, namely the impact on other users, might be said not to put the applicant in an analogous situation with those found to have a learning disability but in any event would justify the different treatment of the applicant.

[36] It will be noted that the nature of the challenge in this case was limited to the refusal of admission to Lindsay House and not with the wider responsibilities of the Trust in relation to the applicant. The impugned decision of 4 October 2019 was made for a justifiable reason relating to the disproportionate impact that the applicants admission to Lindsay House would have on the overall provision of services at that facility. Further, alternatives were considered but could not be accessed on time or were not availed of. In October 2019 the applicant was considered to be a child in need for whom provision should be made for alternative accommodation. The applicant's circumstances subsequently changed. The crisis in his conduct in October 2019 was judged to have passed and the applicant became more settled. However, the applicant's needs are subject to ongoing review.

[37] I am not satisfied on any of the applicant's grounds and I dismiss the application for judicial review.