Neutral Citation No: [2023] NIKB 93 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **SIM12266** *ICOS No:* **23/019343/01** *Delivered:* **27/09/2023**

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 JR 262
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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

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Stephen McQuitty (instructed by Phoenix Law, Solicitors) for the Applicant
Andrew Montgomery (instructed by the Directorate of Legal Services) for the Respondent

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SIMPSON J

Introduction

[1] The applicant in this case is a minor and an Eritrean national. He will be 18 in January 2024. He challenges the alleged failure of Belfast Health and Social Care Trust to provide accommodation for him as a 'separated child.' The Committee on the Rights of the Child, in its General Comment No.6 (2005) provides the following definition:

> "Separated children" are defined as children who have been separated from both parents, or from their previous legal or customary primary care-giver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members.

[2] Anonymity was granted to the applicant by Scoffield J. Initially the challenge was brought against both the Trust and the Home Office, but the case proceeded only against the Trust, "the respondent."

[3] The original Order 53 statement relied on wide-ranging and diffuse grounds of challenge: breach of statutory duty under Articles 18, 21 and/or 66 of The

Children (Northern Ireland) Order 1995 ("the 1995 Order"); breach of the relevant policy, including a failure to act in the child's best interests or to make a best interests determination, or to carry out an adequate consultation; irrationality (both as to outcome and leaving relevant matters out of account); breach of the applicant's rights under article 8 of the European Convention on Human Rights ("ECHR") and his rights under article 14 ECHR, in conjunction with article 8. However, as the case opened before me it became clear that the applicant's focus was on the respondent's obligations under, and the interpretation of, Article 21 of the 1995 Order, without the applicant formally abandoning any other ground of challenge.

[4] Scoffield J listed the matter for a rolled-up hearing on 14 September 2023. I was provided with two trial bundles of factual material, skeleton arguments from both counsel and a bundle of authorities comprising statutory provisions and case law. Those bundles included submissions made by the Children's Law Centre, an intervener in the proceedings. I have read and considered all the documentation in the bundles. I do not intend to set out in detail the factual events, but my failure to do so (in an effort to keep this judgment as short as feasible) does not mean that some matter not specifically mentioned was not considered by me.

[5] I am indebted to both counsel for their skeleton arguments and their well-marshalled oral submissions.

[6] There were a number of factual disputes which arose in the affidavits filed in the case — two from the applicant's brother, two from the applicant's solicitor (Sinead Marmion) and one for the respondent, sworn by Joanne Mayes. However, it has long been the case that a judicial review court is not the forum for a fact-finding exercise, and where these disputes have arisen, I have not sought to resolve them.

Background

[7] The application was grounded on an affidavit filed by the applicant's brother, AB (not his actual initials). AB is presently 21, and acts as the applicant's next friend in these proceedings. His affidavit records the history of their joint journey from their home country to Northern Ireland, which I set out in brief compass.

[8] In 2009 the applicant, AB and their mother fled Eritrea for Ethiopia after the boys' father was imprisoned for seeking to escape conscription. Thereafter, they had no contact with their father and do not now know whether he is alive or dead. Around 2017 they left Ethiopia for Sudan, staying there for only some 9 months. The family then attempted to travel from Sudan to Turkey, using what AB believes were false documents. However, their mother was prevented from leaving Sudan, so that only the applicant and his brother travelled to Turkey, being then aged 11 and 15 respectively. Since then, according to AB, they have not seen or had any contact with their mother. The boys then travelled from Turkey to Greece, then to Macedonia, Serbia, Romania and Belgium. From Belgium they travelled to Ireland, before making their way to Belfast, arriving in December 2021.

[9] In his affidavit AB says that they were subject to human trafficking and had to do forced and unpaid work, and were exploited. This happened in Turkey and Greece. From Serbia they made a number of unsuccessful attempts to cross the border into Romania, being caught by Romanian police and sent back into Serbia. Once they managed to cross the border, they were taken to an immigration office in Timisoara, fingerprinted, made to self-isolate and then taken to a refugee camp in Galati, several hundred miles to the east of Timisoara. From there, they made their way to Belgium in a bus, assisted by people smugglers.

[10] The affidavit further states that when they arrived in Dublin they were put in a hotel, treated badly and told that they would be returned to their own country. To avoid this, they took a bus to Belfast.

[11] On arrival in Belfast they claimed asylum. They were provided with accommodation by the Home Office's contracted supplier, the Mears Group, initially in the Ibis Hotel in University Street for about 6 weeks, then in the Park Inn Hotel in central Belfast.

[12] On 17 February 2022 a support worker employed by Mears contacted the respondent's Gateway Team to advise them that she was supporting the applicant and his brother. Thereafter, in the affidavit of Ms Mayes, there is considerable detail about the contact between the applicant, his brother and the respondent, to some of which I will return later in this judgment.

[13] In June 2023 the applicant and his brother were moved from hotel accommodation to a house in the south side of the city, the address of which I will not identify.

[14] In November 2022 pre-action protocol letters were written by the applicant's solicitors to both the Trust and the Home Office. The Trust responded on 10 February 2023. These proceedings were commenced on 3 March 2023, with the Order 53 statement being amended on 5 May 2023. The hearing before me took place on 14 September 2022. There is a degree of urgency in the matter.

[15] The grounding affidavit makes a number of discrete complaints, the following being a non-exhaustive list:

- That it is wrong for the respondent to categorise the relationship of the applicant and his brother as some sort of "private family arrangement";

- Their living conditions in Belfast have been difficult;

- AB only wanted the applicant to stay with him if they could get out of the hotel into a house, but failing that AB wanted the applicant to be accommodated by the Trust;

- No real assessment by a social worker took place and she did not engage directly with the applicant;

- Financial support was patchy;

- When AB was told that he and the applicant would be kept together the social worker did not speak to the applicant on his own;

- The applicant did not like the food in the hotel and repeatedly told AB that he did not want to live in the hotel any longer; he wanted a home for them both;

- The applicant has had three different social workers, with the support being inconsistent, including missed appointments;

- Neither the applicant, nor his brother, were invited to the important meeting held on 19 May 2022 (see infra);

- While the respondent acknowledged some 'complicating factors' around AB's parenting of the applicant, these are not set out in any detail by the Trust;

- By the spring of 2022 AB was struggling to manage caring for the applicant and he agreed with an assessment that he has 'deep-rooted trauma';

- The main reason why the applicant and AB declined the offer of a house in Derry (July 2022) was because they had travelled through a lot of countries and "we needed a chance to get settled in Belfast";

- The applicant is "stressed by the accommodation, the lack of support and routine."

[16] AB's second affidavit contains the following, again non-exhaustive:

- Any meeting with social workers was in the lobby of the hotel, meaning that the social worker did not see the actual accommodation in which the applicant and AB were living;

- AB's decision about wanting the two to stay together was influenced by the lack of alternative options at the material time.

Relevant legislative provisions

[17] The principal provision discussed by the parties is Article 21 of The Children (Northern Ireland) Order 1995 ("the 1995 Order"). I set it out below, together with some other provisions which are relevant to this application.

> **"Provision of accommodation for children: general**

21.—(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—

(a) there being no person who has parental responsibility for him;

(b) his being lost or having been abandoned; or

(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.

(2) Where an authority provides accommodation under paragraph (1) for a child who is ordinarily resident in the area of another authority, that other authority may take over the provision of accommodation for the child within—

(a) three months of being notified in writing that the child is being provided with accommodation; or

(b) such other longer period as may be prescribed.

(3) Every authority shall provide accommodation for any child in need within its area who has reached the age of 16 and whose welfare the authority considers is likely to be seriously prejudiced if it does not provide him with accommodation.

(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.

(5) An authority may provide accommodation for any person who has reached the age of 16 but is under 21 in any home provided under Part VII which takes children who have reached the age of 16 if the authority considers that to do so would safeguard or promote his welfare.

(6) Before providing accommodation under this Article, an authority shall, so far as is reasonably practicable and consistent with the child's welfare—

(a) ascertain the child's wishes regarding the provision of accommodation; and

(b) give due consideration (having regard to his age and understanding) to such wishes of the child as the authority has been able to ascertain."

[18] Article 17 defines a "child in need":

"17. For the purposes of this Part a child shall be taken to be in need if—

(a) he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by an authority under this Part;

(b) his health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services; or

(c) he is disabled,

and "family", in relation to such a child, includes any person who has parental responsibility for the child and any other person with whom he has been living."

[19] Article 18 appears under the rubric "General duty of authority to provide social care for children in need, their families and others." Where material it states:

"18.(1) It shall be the general duty of every authority (in addition to the other duties imposed by this Part)—

(a) to safeguard and promote the welfare of children within its area who are in need; and

(b) so far as is consistent with that duty, to promote the upbringing of such children by their families,

by providing a range and level of personal social services appropriate to those children's needs…"

[20] The applicant also referred to Article 25, which provides:

> "25.(1) In this Order any reference to a child who is looked after by an authority is a reference to a child who is—
>
> (a) in the care of the authority; or
>
> (b) provided with accommodation by the authority.
>
> (2) In paragraph (1)(b) "accommodation" means accommodation which is provided for a continuous period of more than 24 hours…"

[21] The applicant also relied on Articles 26 and 27, the detail of which I do not need to set out here.

Events following the involvement of the respondent Trust

[22] The respondent's deponent is Joanne Mayes, Principal Social Worker. She deals with the narrative of events following the respondent becoming involved in the matter. Exhibited to her affidavit were documents which came into existence contemporaneously and following the respondent's involvement in the case from February 2022, including documents carrying the acronym UNOCINI — "Understanding the Needs of Children in Northern Ireland."

[23] As with other material in the trial bundles, I do not intend to rehearse long excerpts of the documents, merely to identify relevant milestones.

[24] The initial assessment was carried out on 28 February 2022 and the applicant, who was treated as a separated child (Mayes, paragraph 18), was deemed to be a child in need, and a family support plan was put into place, pursuant to the respondent's general duty in Article 18. The details of the subsequent steps taken are set out in Ms Mayes's affidavit. They included the allocation of a social worker, visits to the family, UNOCINI assessments and the updating of the family support plan.

[25] It is clear from the documentation arising from the first UNOCINI assessment that those involved considered both foster care and a potential placement in accommodation at Slemish House. AB had expressed doubts about his ability to care for the applicant. Foster care was not immediately available, and there was some confusion about availability of space in Slemish House, but there was concern that separating the brothers (AB was over 18 and could not be placed in foster care or in children's accommodation) would have a detrimental emotional impact on the applicant. Under the rubric "Danger Statement" the author said: "I am worried about the emotional impact on [the applicant] of potentially having to be placed in foster care."

[26] Those involved were of the view that "with supports in place and [if AB] is given the tools to parent effectively then the likelihood for [the applicant] to come into care will be diminished." The document records that while AB doubted his ability to continue to care, he was "open to supports being put in place which will help support [AB] to continue to care for his brother." The decision was to transfer the applicant to the Intensive Adolescent Support Team due to the potential for breakdown of the relationship between the applicant and AB if the applicant was placed in Trust care. The matter was also referred to the Independent Guardian Service ("IGS").

[27] A further UNOCINI document dated 3 May 2022 records the continuing supervision of the case. It notes that AB "has stated that whilst he thinks [the applicant] would be better off 'placed in care' he has also stated that he would prefer that his brother remained with him." There were no concerns about the applicant's care and well-being.

[28] A meeting took place between a number of professionals on 19 May 2022. It is important to understand who took part in the meeting. It was chaired by Joanne Mayes (the respondent's deponent) who, as I have already noted, is a Principal Social Worker. The other participants were:

- Shirley Keast, Senior Social Worker,
- Irene McGettigan, Social Worker,
- Dara Toal, of Barnardos IGS (who has a social work background), and
- Steve Mack, the Regional Lead for UASC (Unaccompanied Asylum-Seeking Child), also with a background in social work.

Thus, it is clear that a significant degree of experience and expertise was brought to bear in the assessments of what was suitable for the applicant in his particular circumstances. The decision was to continue with the family support services for the applicant and his brother.

[29] In July 2022 the applicant and AB were offered housing in Derry. This was refused. I have noted above what AB says about the reason for not accepting this offer. As submitted by Mr Montgomery, the fact of the offer and refusal is relevant to any consideration of the time taken to find housing for the applicant and his brother.

[30] Further UNOCINI documents relate to an assessment in August 2022. This notes that the applicant had started a general English class. Again, there were no welfare concerns.

[31] Eventually, in June 2023, the applicant and his brother moved to a house in south Belfast provided by the Home Office.

[32] Paragraph 23 of the respondent's affidavit deals in detail with the range of health and social care supports provided to the applicant and his brother. These were:

1. Social work support, visiting, emotional support, advice and guidance;

2. Access to legal representation, health services and education;

3. Referral to IGS;

4. Sourcing of education provision for the applicant and his brother;

5. Financial support by way of ad hoc payments, as follows:

    - Laptop £200, to access online education;
    - Safety phone £24.99 to enable phone contact;
    - Regular mobile phone top ups amounting (at date of affidavit) to £400;
    - Clothing – £620;
    - Toiletries/care and maintenance £700
    - Christmas money – £50
    - Football boots – £32.99
    - Activity – £25

    (Total, as at date of affidavit, (£2,052.98)

6. Mears had previously registered both and referred them to medical services for new entrants to the country;

7. Support and transport to attend medical and legal appointments;

8. £60 registration fee for dentist, and facilitation of some appointments;

9. Liaison with Mears and Home Office on a regular basis to enquire about the case and to advocate for more suitable long-term accommodation;

10. Visit to the house (in south Belfast) to ensure suitability;

11. Support with asylum application, which has now been granted.

[33] Paragraph 46 notes that the respondent had undertaken a total of 24 visits to the applicant and his brother, during which both were consulted. The case for the respondent also includes the facts that when the respondent first became involved, at a time when the applicant would have been in accommodation provided by the Home Office for some 10 weeks or so, no welfare or other relevant concerns were noted by experienced professionals. Further, in the period from 28 February 2022 to now, no welfare or other relevant concerns have been noted by experienced professionals.

[34] A number of other matters emerge from the respondent's affidavit, as follows:

- Paragraph 62 — "The Home Office placed the applicant and his brother together as a family unit. A close bond has been observed. The Trust consider that the applicant's brother has been his primary carer for over four years and although he initially was worried that he could not care for him, he changed his mind and has been providing excellent care to date." (ie August 2023)

- Paragraph 64 — "The Trust has carefully and comprehensively assessed the applicant's circumstances and needs. It is the Trust assessment that the applicant's best interests are met by means of his continuing to reside with his older brother in suitable accommodation (which has now been provided to him by the Home Office). This is assessed as greatly preferable to any other arrangement such as placing him in stranger foster care."

- Paragraph 67 — "The Trust believe it is in the applicant's best interests to reside with his adult sibling with supports in place. This promotes his welfare and has led to positive outcomes for him. The Trust wish to reassure that if there had been indications that this arrangement was unsafe, measures would have been taken to safeguard the applicant."

- Paragraph 75 — "… The Trust have assessed the needs of the applicant and considered that accommodation provided by the Home Office was adequate but lobbied successfully for alternative, improved accommodation. It was not necessary for the Trust to provide accommodation in these circumstances. Similarly, the welfare of the applicant was not being prejudiced so as to require the Trust to provide accommodation. If the Trust had considered that accommodation was inadequate it would have insisted that Mears and the Home Office make necessary improvements. If this had not occurred, the Trust would have taken relevant steps pursuant to art. 21."

- Paragraph 80 — "The Trust are satisfied that the applicant and [AB] have been provided with adequate supports in line with their assessed needs and

that they have achieved positive outcomes in terms of health, education, accommodation and for the applicant."

The parties' submissions on Article 21 of the 1995 Order

[35] The applicant's principal submission is neatly encapsulated in the applicant's skeleton argument at paragraph 23 in the following terms:

> "… the Trust were under an absolute duty to provide [the applicant] with accommodation under Article 21(1)(a), Article 21(1)(c) or Article 21(3). This was because no person with parental responsibility for the applicant (Art. 21(1)(a)) and/or because the applicant's brother was effectively prevented from providing the applicant with suitable accommodation and/or care (Art. 21(1)(c)) and/or because the applicant's welfare was likely to be seriously prejudiced absent provision of Trust accommodation (Art. 21(3))."

[36] At paragraph 24 it is submitted that "Art. 21(1)(a) was breached because the applicant required accommodation as a result of there being no person with parental responsibility for him. This breach was occasioned from the outset of the Trust's engagement with the applicant."

[37] Thus, the applicant's position is that the duty of the respondent to provide accommodation under Article 21(1) for the applicant arose <u>because</u> there was no person with parental responsibility for him; and/or <u>because</u> his brother was prevented from providing him with accommodation.

[38] Mr McQuitty makes the case that since, for the reasons stated, the respondent was under an absolute duty pursuant to Article 21 to provide accommodation for the applicant, the fact that the applicant was in hotel accommodation, and is now in a house in south Belfast provided by the Home Office's contractors, did not and does not absolve the respondent from its duty. If the applicant was to be provided with accommodation, then by virtue of Article 25(2), the applicant would become a 'looked after child' after 24 hours, with all the advantages that entails, including certain duties which fall upon a Trust when the child reaches 18 and ceases to be a looked after child.

[39] In order for Article 21 to have appropriate effect, Mr McQuitty says that the word "accommodation" needs to be qualified by some adjective such as 'suitable.' Hotel accommodation could not be regarded as suitable and even the house, in which the application now lives, is not suitable.

[40] Mr McQuitty also submits that the respondent has imposed an additional eligibility criterion for the provision of accommodation over and above those in

Article 21 – namely that he must be an unaccompanied child. Unaccompanied children are defined by the Committee on the Rights of the Child as: children "who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so."

[41] Further, when the respondent carried out its original assessment in February 2022 Mr McQuitty says that it was wrong in principle to deal with the case pursuant to its general duty in Article 18 of the 1995 Order, rather than in accordance with its duty in Article 21.

[42] On behalf of the respondent Mr Montgomery submitted that arising from its assessments of the applicant and his circumstances the applicant was not a person who appeared to require accommodation. The respondent, having carried out an assessment of the accommodation, and taking into account all the circumstances relevant to the applicant, was satisfied with the accommodation provided to the applicant and his brother and was satisfied that it was better for the applicant to remain with his brother with the help of support services provided pursuant to Article 18 of the1995 Order. In such circumstances, the duty under Article 21 was not triggered. This was a decision which was within the proper range of decisions open to it, and it was based on the assessments made by experienced professionals in the field of child protection.

[43] The CLC, as intervener, provided written submissions, which I have read. In the conclusion to those submissions the following is stated (where material):

> "In the view of CLC it simply does not matter if a child is a separated child or an unaccompanied child. The process which should be followed in each case must be the same. There must be a UNOCINI assessment carried out in relation to the child, this UNOCINI assessment must follow the process set out I the regional good practice guidance. If the seven-step test contained within that guidance is satisfied then the child is Article 21 entitled and as a result will be entitled to be accommodated by the Health Trust and as a result will automatically become a looked after child. Depending on the length of time the child spends as a looked after child there will be different long-term responsibilities for the Trust through the leaving and aftercare scheme. A Health Trust must not classify a child as separated rather than unaccompanied and deem that they have no responsibility under Article 21…as a means of side stepping their long-term duties and responsibilities, and in each and every case the regional good practice guidance must be applied to each child as an individual. It is difficult to envision a circumstance where a separated

> child, although they are accompanied by an adult (who does not have parental responsibility) will not be Article 21 entitled, as even if it is for a short period of time … they will be in Northern Ireland with no person with parental responsibility present, and at the very least the person with parental responsibility will be prevented from providing the child with suitable and appropriate accommodation by virtue of the separation."

The authorities relied on by the applicant

[44] In support of his contentions in relation to Article 21(1) Mr McQuitty relied on a number of authorities, which I will deal with in this section.

[45] In JR 66's Application [2012] NIQB 5 Treacy J was dealing with a case of a 17-year-old who, it was conceded by the Trust, was "an Article 21-entitled child." The Trust conceded, further, that it had failed to classify the applicant as a 'child in need', to whom its Article 21 duty arose.

[46] At paragraph [4] of the judgment Treacy J said:

> "[4] The law in regard to the implementation of the duty contained in Article 21 is clear, following the House of Lords' decision in *R (G) v London Borough of Southwark* [2009] UKHL 26. The approach when assessing whether a child is an 'Article 21-entitled' child is succinctly encapsulated by a sequential list of questions contained at paragraph 28 of Lady Hale's speech in that case, an approach more recently summarized by the English High Court in *R (AH) v Cornwall County Council* [2010] EWHC 3192 (Admin) in the following way:
>
> 1. Is the applicant a child?
>
> 2. Is the applicant a child in need?
>
> 3. Is he within the Local Authority's area?
>
> 4. Does he appear to the Local Authority to require accommodation?
>
> 5. Is that need the result of:
>
> (a) There being no person who has parental responsibility for him;

(b) His being lost or having been abandoned; or

(c) The person who has been caring for him being prevented from providing him with suitable accommodation or care?

6. What are the child's wishes and feeling regarding the provision of accommodation for him?

7. What consideration (having regard to his age and understanding) is duly to be given to those wishes and feelings?"[1]

[47] Having read the speech of Lady Hale in the Southwark case I think that, to avoid any potential confusion about the use of the word 'need' in two different contexts in the above list of questions, question 4 should be approached as reading "Is the requirement for accommodation the result of…" I note that this was also the approach of Keegan J in paragraph [10] of her decision in *OC and others* (see infra). Further, since in Northern Ireland the relevant Trust, rather than a local authority (ie a council), is the responsible authority, question 3 could read "is he within the Trust's area?"

[48] In my view the important word in paragraph [4] of the judgment of Treacy J is "sequential." This word seems to have been overlooked in the applicant's submission which, in my judgment, effectively puts the cart before the horse and, in addition, infects the approach to submissions on authorities on which the applicant seeks to rely. The word also seems to have been overlooked in the submissions of the CLC.

[49] In support of Treacy J's judgment that the approach is a sequential one, I note that in the *Southwark* case, when dealing with question 4, Lady Hale said: "In this case it is quite obvious that a sofa-surfing child requires accommodation. But there may be cases where the child does have a home to go to…" The clear implication of this is that if the child has a home to go to, the child does not require accommodation, and the consideration stops there.

[50] Further, in *R(G) v Barnet London Borough Council* [2003] UKHL 57, section 20 of the Children Act 1989 (the equivalent to Article 21) was considered both by Lord Nicholls and Lord Hope. Immediately prior to setting out the wording of section 20, Lord Nicholls said: "Section 20 obliges every local authority to provide accommodation for children in need <u>who appear to need accommodation</u>." (para [23] — emphasis added). At paragraph [81] Lord Hope said:

[1] The reference by the CLC to the "seven step test" appears to refer to these questions

> "Section 20(1), which imposes a duty to provide accommodation for a child for whom no person has parental responsibility, who is lost or abandoned or whose carer has been prevented from providing him with suitable accommodation or care, and section 20(3), which imposes a duty to provide accommodation for children over sixteen, leave important matters to the judgment of the local authority: 'appears to them to require accommodation' in section 20(1)…"

Clearly, there would be no room for the discretion identified by Lord Hope if Mr McQuitty's submission (paragraph [35] above) was correct ie if the requirement for accommodation was automatically triggered by factual circumstances described in sub-paragraphs (a), (b) or (c).

[51] So, dealing sequentially with the questions — if the applicant is not a child (question 1), the absolute duty to provide accommodation does not arise. If the applicant is not a child in need (question 2), the duty does not arise. If the applicant is not within the Trust's area, the duty does not arise, at least as far as that Trust is concerned. In this case it is accepted that questions 1, 2 and 3 are to be answered in the affirmative.

[52] Continuing the sequence, it is necessary then to ask (question 4) does the applicant appear to the Trust to require accommodation? Again, if the answer is no, the duty does not arise.

[53] It is only if one answers question 4 in the affirmative, that one moves to consider question 5 and the reasons why the child requires accommodation — ie does the reason why the child requires accommodation fall within sub-paragraphs (a), (b) or (c). If not, again the duty does not arise. So, in the *Southwark* case Lady Hale (paragraph 28) said:

> "… it is possible to envisage circumstances in which a 16 or 17-year-old requires accommodation for reasons which do not fall within (a), (b) or (c) above. For example, he may have been living independently for some time, with a job and somewhere to live, and without anyone caring for him at all; he may then lose his accommodation and become homeless; such a child would not fall within section 20(1)…"

[54] Accordingly, I reject the applicant's submission that the duty is engaged because there is no one with parental responsibility for the applicant or because AB is prevented from providing the applicant with accommodation.

[55] Mr McQuitty cited a number of decisions in support of his proposition that hotel accommodation was wholly unsuitable and that, therefore, the applicant should have appeared to the respondent as requiring accommodation. He submits that the presence of an adult sibling does not render suitable, for the purposes of the 1995 Order, accommodation which would otherwise be regarded as unsuitable.

[56] I examine those cases below to see how, if at all they inform the decision in this case.

[57] Mr McQuitty said that the decision of Keegan J in *Re OC (A Minor) and ors* [2018] NIQB 34 (paragraph 17 of the skeleton argument) "is authority for the proposition that hotel accommodation will generally not be suitable for young people, such as the applicant." [emphasis in the original]

[58] In my judgment *OC and others* is not authority for the stated proposition.

[59] The facts of *OC and others* are important. OC became a looked after child in 2017 and thereafter was in the care of social services. Unsuccessful attempts were made to accommodate him in various bed and breakfast establishments and in hotels. OC was subsequently remanded in custody for offences of possession of drugs, disorderly behaviour and theft, and a suitable bail address could not be found for him. The other applicant, LH, had been in care since age three and it had proved problematic to place her. For various issues she was remanded in custody and, again, it proved impossible to find a suitable address for bail. A theme in each case was the historical difficulties which the Trusts had in managing both applicants and in providing accommodation which did not break down.

[60] Unlike the present case, the Trusts in *OC and others* were already subject to duties to provide accommodation in relation to each applicant; the debate was not whether a duty was owed, but how that duty was to be performed. Unlike this case, both applicants were unaccompanied, being housed alone, with no other family member, in particular no adult family member. It was in those circumstances that Keegan J, in paragraph [1] of her judgment, identified the issues as "the extent and nature of the duty [to provide accommodation], the timeframe within which it must be discharged, and how it must be fulfilled with particular emphasis on the issue of suitability of accommodation that is provided by the Trusts." It is also within the factual matrix surrounding each of those applicants that Keegan J expressed reservations about the suitability for those two applicants of bed and breakfast or hotel accommodation. (My emphasis)

[61] At paragraph [35] she said that the real issue "is whether the court should declare that there should be an absolute prohibition on the use of hotel/bed and breakfast accommodation by social services in cases such as these." [Emphasis added]. She declined to do so.

[62] Keegan J further noted at paragraph [37]

> "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."

[63] Accordingly, it is clear that the exercise of assessing what is suitable, even when a duty already exists, is a case-specific and fact-specific exercise.

[64] Comparing the factual circumstances in the *OC and others* case with those in the present case, I derive little help from the case. First, as noted above, the Trusts in that case were already under a duty to provide accommodation. Secondly, in my view there is no proper comparison between the cases of unaccompanied juveniles being placed alone in bed and breakfast or hotel accommodation, and the case of this applicant accompanied as he was at all times by his adult brother, and supported by the respondent's provision of family support services.

[65] Mr McQuitty also relied on observations by Lady Hale in *R(M) v Hammersmith and Fulham LBC* [2008] UKHL 14, a case involving the suitability of bed and breakfast accommodation for children in need, aged 16 and 17. Again, the facts are relevant. M was from a deeply troubled background and became involved with the criminal justice system. She was on bail. The relationship with her mother broke down and M was effectively put out of her home by her mother. She was provided with temporary accommodation in a hotel by the local authority. It was unsuitable, not least because she required a settled address for electronic tagging. It appears that she was never referred to the appropriate children's services. After she was aged 18, she brought proceedings against the local authority for judicial review, claiming, inter alia, that she was a 'former relevant child' and therefore was owed duties by its children's services department under the English equivalent of the 1995 Order. The judicial review was dismissed, but the House noted that she should have been referred to the children's service department.

[66] It will be immediately apparent that the factual background in that case is different from the instant case. It was against that factual background that the House of Lords was considering the single question: what is meant by 'a child who is looked after by a local authority.' However, Mr McQuitty also relies on the case to support the proposition that the respondent cannot abdicate its responsibilities by "deferring to asylum support from the Home Office", and he further relies on it to demonstrate the unsuitability of hotel accommodation, in particular paragraph [27].

[67] Having referred to the *Homelessness Code of Guidance for Local Authorities* (Office of the Deputy Prime Minister, 2002) Lady Hale said, at paragraph [27]:

> "The 2006 code spells out some points in more detail. It emphasises that 16 and 17 year olds who are homeless

> and estranged from their family will be particularly vulnerable and in need of support (para 12.12); that housing solutions are likely to be unsuccessful if the necessary support is not provided, so close liaison with social services and other support agencies 'will be essential' (para 12.13); and that bed and breakfast accommodation is unlikely to be suitable for 16 and 17 year olds who are in need of support (para 12.14). This case is a good illustration of the wisdom of this guidance. One of the reasons that M was evicted from the hostel for 16 and 17-year-olds in October 2005 was her failure to co-operate with her support worker."

[68] In the event, there is nothing controversial about the decision. However, the present case does not involve a child "estranged from their family"; the applicant lives with his adult brother. I am satisfied from the material in the trial bundles that the respondent does not seek, nor has not sought, to abdicate its responsibility; rather the respondent contends that the nature of the accommodation provided to the applicant and his brother by the Home Office's contractor was such that the duty under Article 21(1) was not triggered.

[69] Reliance is also placed on the decision in *R(ECPAT[2] UK) v Kent County Council and others* [2023] EWHC 1953 (Admin) for the proposition that duties imposed on Trusts by the 1995 Order relate to all children equally, regardless of immigration status. That is an unassailable proposition, but it does nothing to answer the fundamental question in this case, namely whether the duty under Article 21(1) is triggered in the factual circumstances of this case.

[70] Mr McQuitty also cited (paragraph 21 of the skeleton argument) a response by the Children's Law Centre to proposals for a new regional model of services for separated and unaccompanied asylum-seeking children.

> "CLC considers that the vast majority of young people under the age of 18 require care, rather than support. In CLC's experience we consider that 16 and 17-year-olds being placed in (what effectively is) independent living ie for example, a flat-share with another young person in a similar situation, with a social worker visiting on a weekly basis, in not appropriate. When we have had 16 and 17-year-old clients who are placed in foster care, we have seen much more positive impacts on their emotional and mental well-being and overall development and integration."

[2] Every Child Protected Against Trafficking

[71] I have no doubt that this is so, but that does not describe the factual circumstances of this applicant and his brother; nor is the assertion in the skeleton argument, that the Children's Commissioner in England & Wales considers that there "should be a general assumption that 16 and 17-year-olds are not yet ready for independent or semi-independent living", relevant to the factual circumstances of this case.

Conclusion

[72] Having taken into account all the material in this case I am satisfied that the respondent was entitled to exercise its discretion in assessing whether the accommodation provided to the applicant, in the particular circumstances of this case, was suitable. I am satisfied from the evidence that the respondent exercised this discretion appropriately, with the necessary input from experienced professionals in the assessment of accommodation coupled with the provision of family support services. I am satisfied, therefore, that the respondent was entitled to come to the decision that the applicant did not appear to require accommodation. In the circumstances I reject the applicant's case that the duty to provide accommodation under Article 21(1) was engaged in this case.

Article 21(3) of the 1995 Order

[73] Mr McQuitty also asserted that the respondent was in breach of its duty under Article 21(3) — "Every authority shall provide accommodation for any child in need within its area who has reached the age of 16 and whose welfare the authority considers is likely to be seriously prejudiced if it does not provide him with accommodation."

[74] In light of the factual circumstances which I have set out above, I reject this aspect of the applicant's case. I am satisfied from all the papers which I have seen that at no time did the respondent consider that the applicant's welfare was likely to be seriously prejudiced if the respondent did not provide him with accommodation. On the contrary, all the assessments carried out by the respondent led it to the conclusion, which I consider to be reasonable, that his welfare was best served by being with his brother and by being provided with appropriate support.

Disposition

[75] In the circumstances of this case I consider that it is appropriate to grant leave to apply for judicial review in relation to the applicant's case in respect of the Trust's duties under Article 21(1) and 21(3). I do so, but I refuse the application for judicial review on those grounds.

The remaining grounds of challenge

[76] In considering the other grounds of challenge, and whether leave to apply for judicial review should be granted, I bear in mind the test, namely whether the applicant has crossed the threshold of "an arguable case having a realistic prospect of success" — see McCloskey LJ in *Ni Chuinneagain's Application for Judicial Review* [2022] NICA 56, paragraph [42]. Where, in the remainder of this judgment, I use the word arguable or unarguable, I mean it in this sense.

[77] The applicant submits that there has been a breach of Article 21(4) of the 1995 Order. This provision gives the respondent a discretion to provide accommodation "if the [Trust] considers that to do so would safeguard or promote the child's welfare." In my view, in the light of the respondent's assessments in this case, which related to the welfare of the applicant, there was no need for the respondent to exercise its discretion in this Article. I refuse leave on this ground of challenge.

[78] The applicant submits that the respondent is in breach of its duties under Article 18, because the range of personal social services provided was not appropriate to his needs. I do not consider, in light of all that is set out above, that this is an arguable ground. I refuse leave on this ground.

[79] Further, the applicant alleges a breach of the respondent's Working Arrangements Policy and, in his skeleton argument, identifies what he describes are the most egregious examples of breach. In relation to (a) and (b) I am satisfied that the applicant's best interests have been considered and have informed the respondent's actions and I am satisfied that there has been consultation with the applicant, and AB. As to (c) I have identified no evidence from which it could be contended that the applicant has not enjoyed the same rights as national children, and I refer also to what I say in paragraph [88]. I refuse leave on this ground.

[80] In addition the applicant submits that it was "irrational as Wednesbury unreasonable for the Trust to classify the applicant's care by his older brother as a 'private family arrangement', since the fact that AB became, effectively, his brother's carer was brought about by circumstances, and was not a voluntary arrangement. In my view this is not an arguable proposition. Whatever the description of the factual circumstances does not change what the respondent has done in relation to assessing accommodation and welfare issues. I refuse leave on this ground of challenge.

[81] The applicant relies on a breach of his rights pursuant to article 8 ECHR. Having found that the respondent was entitled to act as it did, and that it has acted in accordance with domestic law, I see no basis on which a challenge under article 8 could succeed, and I refuse leave on this ground.

[82] The applicant also relies on breach of article 14 ECHR, in association with article 8 ECHR.

[83] Article 14 provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

[84] As is obvious from its wording, article 14 can only be considered in conjunction with one or more of the substantive rights or freedoms set forth in the Convention; in this case article 8.

[85] In *R(SC and others) v Secretary of State for Work and Pensions and others* [2021] UKSC 26, at paragraph [37] Lord Reed (with whom the other 6 members of the panel agreed) said:

> "The general approach adopted to article 14 by the European court has been stated in similar terms on many occasions, and was summarised by the Grand Chamber in the case of *Carson v United Kingdom* 51 EHRR 13, para 61. For the sake of clarity, it is worth breaking down that paragraph into four propositions:
>
> (1) The court has established in its case law that only differences in treatment based on an identifiable characteristic, or 'status', are capable of amounting to discrimination within the meaning of article 14.
>
> (2) Moreover, in order for an issue to arise under article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations.
>
> (3) Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.
>
> (4) The contracting state enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin will vary according to the circumstances, the subject matter and the background.

[86] Paragraph 46 of the applicant's skeleton argument begins:

> "Had the applicant been alone, when encountered by the Trust, he would have been accommodated by them and, by virtue of that accommodation, would have became a [looked after child] shortly after" and paragraph 49:
>
> "The difference in treatment arises due to the applicant's 'other status' — namely that he has an older, adult sibling and/or is a separated child."

[87] Insofar as the submission is to the effect that there is discrimination because the applicant (a separated child) has not been treated in the same way as an unaccompanied child, I consider this not to be arguable. I am satisfied that treating separated children differently to unaccompanied children is entirely appropriate — there is a fundamental difference in status between the two categories, as recognised by the Committee on the Rights of the Child.

[88] The second limb of this challenge is that the applicant (as a separated child) is treated differently with respect to hotel accommodation from British or Irish children living in Northern Ireland. At paragraph 72 of her affidavit Ms Mayes says that "a national child would be treated in substantively the same way [as was the applicant] and would not have been categorised as anything other than a child in need in equivalent circumstances." I have seen nothing in the evidence to gainsay this.

[89] Accordingly, I refuse leave on this ground of challenge.

[90] A further challenge relates to a Trust policy, identified in the respondent's response to the applicant's pre-action protocol letter under the heading: "The Belfast Trust's agreed position and process for all separated children going forward is as follows." It is submitted that for a number of identified reasons this is contrary to Article 21 of the 1995 Order.

[91] In her affidavit Ms Mayes (paragraph 36) describes this as an "Interim Framework" which is yet to be reduced to writing or [put into] any policy document. In any event, the Interim Framework provides:

> "If there are safeguarding concerns consideration will be given to alternative pathways such as Child Protection processes or Looked After Child status."

[92] In the circumstances of this case I am not satisfied that this challenge is arguable, and I refuse leave on this ground.

Overall conclusion

[93] Leave to apply for judicial review is granted in relation to the applicant's challenges insofar as they are based on Articles 21(1) and 21(3) of the 1995 Order. For the reasons set out above, I refuse the application for judicial review.

[94] I refuse leave to apply for judicial review in relation to the other identified challenges.

[95] I will hear the parties on the issue of costs.