

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

MP's (a minor) Application [2014] NIQB 52

**AN APPLICATION BY MP (A MINOR) ACTING BY HIS NEXT FRIEND, THE
OFFICIAL SOLICITOR, FOR JUDICIAL REVIEW**

**AND IN THE MATTER OF A DECISION BY THE BELFAST HEALTH AND
SOCIAL CARE TRUST DATED 12 DECEMBER 2013**

TREACY J

Introduction

[1] This is a challenge to a decision of the Belfast Health & Social Care Trust whereby the Trust failed to provide accommodation for MP who is currently detained in Woodlands.

Relief Sought

[2] The Applicant seeks the following relief:

- (a) An order of certiorari quashing a decision of Belfast Health and Social Care Trust made on the 12th day of December 2013 and which said decision continues whereby the Respondent failed to provide the Applicant with accommodation.
- (b) An order of mandamus requiring that the Respondent shall provide the Applicant with accommodation pursuant to the duty contained within Article 21(1) (c) of the Children (Northern Ireland) Order 1995 or otherwise.
- (c) A declaration that the decision of the Belfast Health and Social Care Trust made on the 12th day of December 2013 and which said decision

continues whereby the Respondent failed to provide the Applicant with accommodation was unlawful, ultra vires and of no force or effect.

Grounds upon which Relief is Sought

[3] The grounds on which the relief is sought are as follows:

- (a) In failing to provide the Applicant with accommodation the Respondent acted in a manner that was procedurally unfair, ultra vires, in breach of the Applicant's procedural legitimate expectation and Wednesbury unreasonable in that the Respondent, by failing to provide the Applicant with accommodation, followed a procedure which no reasonable Trust, properly directing itself in relation to the law, could have followed and did so, in particular, by:
 - (i) Failing to consider that the Applicant is a child in need within the meaning of Article 17 of the Children (Northern Ireland) Order 1995.
 - (ii) Failing to consider that the Applicant resided within the area of the Belfast Health and Social Care Trust.
 - (iii) Failing to consider that the Applicant requires immediate accommodation.
 - (iv) Failing to consider that need for accommodation is the result of the person who has been caring for him being prevented from providing him with suitable accommodation or care.
 - (v) Failing to comply with duty imposed by Article 21(1)(c) of the Children (Northern Ireland) Order 1995 to provide accommodation to the Applicant.
 - (vi) Taking into account the irrelevant and incorrect consideration that remand in custody relieved the Respondent of the duty imposed by Article 21(1)(c) of the Children (Northern Ireland) Order 1995.
 - (vii) Taking into account the irrelevant and incorrect consideration that the Applicant's perceived risk level relieved the Respondent of the duty imposed by Article 21(1)(c) of the Children (Northern Ireland) Order 1995.
- (b) The Applicant repeats the acts and omissions on the part of the Respondent referred to at paragraph 3(a) (i) - (vii) and states that said acts and omissions constitute the Respondent acting in a manner

contrary to its obligations under section 6 of the Human Rights Act 1998 and acting incompatibly with the Applicant's rights under Articles 5 and 8 of the European Convention on Human Rights and Fundamental Freedoms in a manner which is not proportionate.

Factual Background / Sequence of Events

[4] The Applicant is a fourteen year old boy who has been charged with rape and sexual assault of his mother on 10 December 2013.

[5] He appeared before Newtownards Magistrates Court on 13 December 2013. He applied for bail which was objected to by police. One of the grounds of objection was the fact that the Respondent indicated that they were unable to provide him with a placement within Children's Services.

[6] A High Court Bail application was listed on 20 December 2013. The Respondent proffered one address which it did so with 'grave reservations'. The High Court Judge indicated that if the Trust was to offer alternative accommodation the matter should be brought back before him.

Statutory Framework and International Instruments

Article 17 Children (Northern Ireland) Order 1995

"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."

Article 2(2) Children (Northern Ireland) Order 1995

Definition of 'development': 'physical, intellectual, emotional, social or behavioural development'

Definition of 'health': 'physical or mental health'

Article 21 Children (Northern Ireland) Order 1995

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

Article 37 United Nations Convention on the Rights of the Child

Article 37:

States Parties shall ensure that:

...

- (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.'

United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('the Beijing Rules')

Rule 13: Detention Pending Trial

13.1 Detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time.

13.2 Whenever possible, detention pending trial shall be replaced by alternative measures, such as close supervision, intensive care or placement with a family or in an educational setting or home.

...

Rule 19: Least possible use of institutionalization

19.1 The placement of a juvenile in an institution shall always be a disposition of the last resort and for the minimum necessary period.

United Nations Rules for the Protection of Juveniles Deprived of their Liberty ('the Havana Rules')

Rule 1: The juvenile justice system should uphold the rights and safety and promote the physical and mental well-being of juveniles. Imprisonment should be used as a last resort.

Rule 2: Juveniles should only be deprived of their liberty in accordance with the principles and procedures set forth in these Rules and in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules). Deprivation of the liberty of a juvenile should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases. The length of the sanction should be determined by the judicial authority, without precluding the possibility of his or her early release.

...

Rule 17: Juveniles who are detained under arrest or awaiting trial ('untried') are presumed innocent and shall be treated as such. Detention before trial shall be avoided to the extent possible and limited to exceptional circumstances. Therefore, all efforts shall be made to apply alternative measures.

United Nations Committee on the Rights of the Child - General Comment No. 10 (2007)

[11] The use of deprivation of liberty has very negative consequences for the child's harmonious development and seriously hampers his/her reintegration in society. In this regard, article 37(b) explicitly provides that deprivation of liberty, including arrest, detention and imprisonment, should be used only as a measure of last resort and for the shortest appropriate period of time so that the child's right to development is fully respected and ensured.

...

[80] The Committee notes with concern that, in many countries, children languish in pre-trial detention for months or even years, which constitutes a grave violation of article 37(b) of CRC. An effective package of alternatives must be available ... for the states parties to realize their obligation under 37(b) of CRC to use deprivation of liberty only as a measure of last resort. The use of these alternatives must be carefully structured to reduce the use of pre-trial detention as well ... In addition, the States parties should take adequate legislative and other measures to reduce the use of pre-trial detention. Use of pre-trial detention as a punishment violates the presumption of innocence ... the duration of pre-trial detention should be limited by law and be subject to regular review.

[81] The Committee recommends that the States parties ensure that a child can be released from pre-trial detention as soon as possible, and if necessary under certain conditions..."

Arguments

Applicant's Arguments

[7] The Applicant argues that MP is a child in need within the meaning of the statutory provision.

[8] The Applicant argues that the Trust is under an absolute duty to provide accommodation to the applicant child.

[9] The Applicant argues that the Respondent took into account their perception of MP's risk when making the decision about whether or not to provide him with accommodation and that there is no legal authority for same when considering its duties under the 1995 Order.

[10] The Applicant argues that the Respondent based their finding in relation to MP's level of risk upon an evidential basis which does not suggest that conclusion to the extent that the Respondent would seem to suggest.

[11] The Applicant argues that as the Respondent was aware that the result of failing to provide MP with accommodation would result in the loss of his liberty and

as a consequence should have subjected the evidence upon which they based their decision to the strictest scrutiny.

[12] The Applicant submits that the decision evident in the email of 12 December 2013 was made prior to MP being charged and thus necessarily was made in the absence of relevant facts.

[13] The Applicant refutes that it can be the case that the Applicant child's loss of home, sole parental carer and remand to prison has made him less in need particularly where his remand is as a result of the Respondent's failings.

[14] The Applicant argues that the various meetings concerning accommodation for MP were not independent and that the extent of PSNI involvement had the potential to unfairly influence the independence of the Respondent's decision making regarding their statutory duties.

[15] The Applicant argues that the Respondent should have undertaken a process whereby it first considered its duties under the 1995 Order and then deciding how to comply with those duties regardless of the resources available, rather than the process which was undertaken which the Applicant avers involved first considering the resources available and then trying to position the Applicant child into one of those resources.

[16] The Applicant argues that prison cannot be regarded as a home.

[17] The Applicant argues that deprivation of liberty has a negative effect on a child's development.

[18] The Applicant argues that the Respondent has created an additional hurdle for MP in order to regain his liberty in that not only does he have to satisfy a judicial authority in the normal way that bail should be granted but he also has to endeavour to do so in the absence of any address. The Respondent is aware that the Applicant is unable to be able to do this.

[19] The Applicant argues that in advocating that MP remains in the detention facility the Respondent is acting outside their remit.

[20] The Applicant argues that the Respondent has breached its international obligations.

[21] The Applicant argues that the Respondent has failed to take proper account of the rights of the Applicant child pursuant to Articles 5 and 8 ECHR.

[22] The Applicant argues that a lack of resources in the jurisdiction is no defence to a mandatory obligation to provide services.

[23] The Applicant argues that the relevant issue in this case is whether the Respondent has a duty to accommodate the Applicant child. The Applicant argues that the Respondent's perception of the level of risk presented by MP is not relevant.

[24] The Applicant argues that while the Respondent has a discretion as to what accommodation to give to the Applicant child they do not have the discretion not to accommodate him at all.

[25] The Applicant argues that even where MP is perceived to present too high of a risk to be accommodated in any of the 'ordinary' facilities of the Trust the duty to accommodate the Applicant remains.

[26] The Applicant submits that the reference to 'reasonable standard' in Article 17(a) must mean the standard that would be expected of one of his peers. Further, the Applicant submits that deprivation of liberty denies the Applicant the opportunity to develop in the same manner as his peers.

[27] The Applicant argues that Articles 5 & 8 ECHR prevent the Respondent from regarding a detention facility as the Applicant child's home.

Respondent's Arguments

[28] The Respondent accepts that prior to the child's first remand in custody on 12 December he was a child in need pursuant to Article 17(a) of the Children (Northern Ireland) Order 1995.

[29] The Respondent does not accept that the fact that the child is unable to return to his mother's care and the lack of an alternative potential address as at 12 December 2013 satisfied the Article 17 test.

[30] The Respondent does not accept that any duty to provide accommodation arose purely because of MP's arrest and restriction on returning home.

[31] The Respondent argues that it is an improper and unreasonable argument to make that the duty to accommodate in every case leads to an immediate placement.

[32] The Respondent argues that it would be wholly illogical for the issue of suitability of placement not to be a factor in the exercise of a duty to accommodate.

[33] The Respondent argues that the duty to be exercised is that of a body dealing solely with Children's Services. The argument that an assessment of a particular placement with a particular child is a legal breach or failing of the duty is not accepted. It is submitted that to fail to assess appropriateness of risk, particularly in the circumstances of this case, would be an improper exercise of duty.

[34] The Respondent argues that all of its actions prior to 20 December were appropriate and in keeping with a proportionate and appropriate exercise of duty to accommodate.

[35] The Respondent argues that the actions prior to 12 December did not amount to a breach of duty.

[36] The Respondent argues that various issues of risk were known to the Respondent at the time of the child's arrest and remand.

[37] The Respondent argues that the reasons for MP being a child in need prior to arrest no longer exist. The unavailability of the services referred by the Trust before his remand do not have a bearing on his current health and development.

[38] The Respondent argues that if the case is being made by the Applicant that the very fact of remand into custody prior to plea or conviction renders a child a 'child in need', then logically the argument must follow that as a matter of law, no child would ever be remanded to custody as the Trust would be obliged to accommodate them come what may. This circular argument is illogical.

[39] The Respondent argues that there are no concerns which would lead to the Article 17 test being satisfied.

[40] The Respondent argues that, as the child is engaging well in the detention facility and that as there have been some positives from staying in the detention facility, this mitigates against the fulfilment of Article 17.

[41] The Respondent argues that the speculative conclusions in Dr McCartan's report in relation to what may happen at a future point in time do not address specifically impairment of health and development and cannot be equated to the Article 17 test.

[42] The Respondent argues that the fact of the current complaint by MP's mother will restrict his opportunities wherever he is residing.

[43] The Respondent argues that the restrictions complained of by Dr McCartan would apply to all children on remand and that the logic of the Applicant's case must therefore be that all such young people are therefore 'children in need' who do not have a bail address should be provided with Trust accommodation as of right. The net effect of this would be that all decisions of a competent court to remand a young person into custody in those circumstances would be subject to an application such as this.

[44] The Respondent submits that MP's views about the curtailment of his liberty do not meet the threshold test in Article 17.

[45] The Respondent argues that there is a strong potential case against MP and this fact must factor into how the duty can be exercised.

[46] The Respondent argues that resources do not play a part in the decision making process relating to this case and that instead risk factors are at the heart of this case from the perspective of the Trust in considering their role.

[47] The Respondent argues that the Applicant is not a child in need at present and that all of his health and development needs are met adequately and most appropriately in detention.

[48] The Respondent does not accept that it failed to consider that the Applicant resided within the area of the Belfast Health and Social Care Trust.

[49] The Respondent does not accept that it failed to consider that the Applicant required immediate accommodation.

[50] The Respondent does not accept that it has a duty to the Applicant under Article 21(1)(c) at this time. In the event that the court deems that such duty has existed, the Trust submits that it has appropriately discharged its duty as part of an ongoing process.

[51] The Respondent does not accept that it failed to conduct a risk assessment and cites several factors which raise a prima facie case of risk.

[52] The Respondent submits that the remand in custody to detention renders the Applicant outside the definition of a 'child in need'.

[53] The Respondent does not accept that the Applicant's perceived risk level relieved the Trust of an Article 21(1)(c) duty. In the context of the duty that arose prior to remand, and even if determined that a duty still exists, the level of risk applicable would have a direct bearing on the manner in which the duty can be discharged.

Submissions on Behalf of Intervening Party (Northern Ireland Commissioner for Children and Young People)

[54] The Commission submits that Articles 17 and 21 of the Children (Northern Ireland) Order 1995 must be read in a manner that is compatible with the United Kingdom's international obligations in respect of children detained on remand in the juvenile justice system.

[55] The Commission submits that the logic of the Trust's argument is that a child on remand is presumptively deemed not to be 'a child in need' because of the engagement of the youth justice system and if that analysis is correct then such a child would not be subject to the duty of the Trust to provide accommodation. The

commission submits that such an interpretation could have the deleterious effect of creating a presumption of protracted or indefinite detention for children who because of the circumstances of the alleged offending have no alternative source of care or accommodation.

[56] The Commission submits that Article 17 must be read in accordance with the UNCRC principles in order to ensure that the detention of children remains an option of last resort.

[57] The Commission submits that the duty to provide accommodation implies that it should be discharged within a reasonable period.

[58] The Commission submits that there is a well-established principle that the courts should seek to interpret domestic legislation consistently with binding international conventions even where not incorporated.

[59] The Commission submits that by virtue of the ECtHR reliance on the UNHRC to interpret the Convention a secondary duty has now been acknowledged in our domestic legal system, that is, domestic courts should seek to replicate Convention compliant interpretations. UK courts therefore have a secondary duty to take the UNCRC and relevant international rights into account when considering Convention rights and ensuring compatibility with Section 6 HRA.

[60] The Commission also submits that there is authority for using the Beijing Rules in interpreting convention rights and considering General Comments of the Committee to have persuasive weight.

[61] The Commission submits that administrative decisions, such as the impugned decision in the instant case, ought to be taken in a manner that is, in so far as possible, consistent with the UNHRC. A public authority should give consideration to any relevant rules, general comments and concluding observations when carrying out its functions.

[62] The Commission argues that in certain circumstance the UNCRC could found a legitimate expectation.

[63] The Commission argues that under Article 37 (b) of the UNCRC in order for a detention to be lawful and not arbitrary, it must fulfil the minimum requirements set out in that article. It must:

- (i) be in conformity with the law;
- (ii) be a measure of last resort and (iii) be imposed for the shortest possible period of time.

[64] If the interpretation of Article 17 of the 1995 order contended for by the Respondent is correct a practice arises whereby children detained on remand are presumptively considered not to be 'children in need'. The Commission submits that such an interpretation must be at odds with the fundamental principles of detention as a measure of last resort because it could have the effect where a child with no alternative source of accommodation is remanded in custody for unduly protracted periods.

[65] The Commission further submits that such an interpretation fails to take into account the repeated advice of the UNCRC that detention is exceptionally detrimental to the development of a child.

Discussion

Is MP a 'Child in Need' for the purposes of Article 17 of the Children (Northern Ireland) Order 1995?

[66] In the 1995 Order the following two definitions at Article 2(2) are relevant:

Definition of 'development': 'physical, intellectual, emotional, social or behavioural development'

Definition of 'health': 'physical or mental health'

[67] A child is a child 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.

[68] MP currently resides in a detention facility. His lack of a suitable address outside this facility has frustrated his opportunity to be released on bail and resulted in his loss of liberty. This 14 year old boy is being deprived of his right to liberty while he still enjoys the presumption of innocence. One's liberty and one's enjoyment of the presumption of innocence are fundamental rights which go to the very dignity of the human being. Therefore, on the basis of respect for the dignity of the individual and as a matter of public policy, it is not open to the Respondent to consider that these deprivations will not at a minimum significantly impair his health or development, regardless of the quality of that institution or his engagement with that institution. In the most fundamental sense the Applicant child's human development is being necessarily retarded by the deprivation of these basic rights.

[69] There is as a result no need to consider the UNCRC and associated documents because as a matter of domestic law the Article 17 test is satisfied.

Does a duty arise under Article 21 of the 1995 Order?

[70] Article 21 Reads:

“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.”

[71] It is clear that the circumstances by which the Applicant was arrested and charged have created a situation whereby the Applicant’s mother is prevented from providing him with suitable accommodation or care. Therefore, there is a duty (an ‘*absolute duty*’ per Dyson LJ in Regina (M) v Gateshead MBC [2006] EWCA Civ 221) on the Respondent to provide accommodation for him.

[72] The Respondent has not done so and there is therefore in breach of this duty.

Conclusion

[73] For the above reasons I allow the judicial review and grant the relief sought.