Neutral Citation No: [2020] NIFam 20	*Ref:*	KEE11319
	ICOS No:	20/051811
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:*	05/10/2020

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

IN A MATTER OF AN APPLICATION UNDER THE HUMAN RIGHTS ACT 1998

BETWEEN:

Mr S

Applicant;

-and-

A HEALTH AND SOCIAL CARE TRUST

and

Ms T

Respondents.

IN THE MATTER OF JOSEF (A MINOR: BREACH OF HUMAN RIGHTS: DECLARATION: DAMAGES: COSTS)

Ms McCaffrey BL (instructed by Fisher and Fisher Solicitors) for the Applicant
Ms Sholdis BL (instructed by DLS) for the Respondent Trust
Ms Kelly BL (instructed by Tiernans Solicitors) for the Respondent Mother

KEEGAN J

Nothing must be published which would identify the child or his family. The name given to the child is not his real name.

Introduction

[1] This case relates to a child who I have called Josef who is now nine years and five months old having been born in May 2011. The application centres around the events of 5 and 6 August 2020 when for a period of some 27.5 hours the child was

placed in foster care. The applicant maintains that this was both unlawful and in breach of human rights. This application pursuant to the Human Rights Act 1998 ("the Human Rights Act") is brought by the father of the child Mr S. A further application has been made to join the child as a plaintiff (as a cost saving measure rather than issue separate proceedings) which I accede to. The relief sought in this case is set out by the applicant as follows:

(1) A declaration that the detention of the child Josef in stranger foster care from 11.30 pm on 5 August 2020 until 8.30 pm on 6 August 2020 was unlawful.

(2) A declaration that the removal and retention of the child Josef in stranger foster care from 5.00 pm on 5 August 2020 until 8.30 pm on 6 August 2020 was in breach of the Article 8 rights of the child and the father and an unnecessary and disproportionate interference in their rights to private and family life.

(3) Damages in favour of both the father and child in the sum of £3,000 for the child and £1,500 for the father and costs of these proceedings.

Background Facts

[2] The child with whom these proceedings are concerned has had a rather unsettled life due to the problematic presentation of both the parents Ms S and Mr T. They were married but separated in 2017. The relationship was characterised by domestic violence and alcohol abuse. The child has two adult siblings namely V who is aged 26 years of age and VA who is aged 18 years of age. On 14 February 2012 V was convicted of a rape which occurred in 2010 when he was 16. The victim was a 17 year old girl who was unable to give consent to the sexual act. V spent 30 months in prison and a further 30 months on licence. V was released from custody in September 2014 and was subject to a sexual offences prevention order for five years. He was also made the subject of notification requirements indefinitely. The judge was asked to consider whether V posed a risk to children as that would be a gateway to making further orders. However, he found that there was no evidence of this. As such upon his release from prison V returned to the family home to live with his parents and siblings and the family worked with Social Services to ensure there were no issues or concerns arising. It is common case that V has not breached any of the orders made in relation to him and he has co-operated with professionals.

[3] After the separation of the parents in 2017 the three children remained in the care of Ms T. It is common case that from in and around 2016/2017 Mr S had no contact with this family and at the date of this hearing he accepts that he has not engaged with Josef for some years and lives outside the jurisdiction in Dublin. So the second named respondent Ms T looked after Josef in the recent past. However, this was not without its difficulties.

[4] Problems arose for Josef in March 2020 when he made very serious allegations that he was mistreated by his mother and partner and that his mother was abusing

alcohol. The Trust were involved at this stage and between March and July 2020 the two elder siblings provided care for Josef with the approval of the Trust. During the course of these proceedings the Trust sought to minimise the role that V played in this and asserted that it was VA, the sister, who was looking after the child. However, there is a letter which has been provided as part of the discovery in these proceedings from the responsible social worker which states as follows:

> "Please be advised the above named child has been residing in the care of VA and V his adult brother and sister since 12 April 2020. This has been a family arrangement due to concerns regarding the mother's alcohol misuse, and allegations in respect of the mother's partner being verbally aggressive towards the child."

[5] Whilst there may be a dispute about the exact arrangements it is clear that both V and VA were assisting in looking after this child.

[6] Josef was returned to the care of his mother in July 2020. This in itself was short-lived which may not have been a surprise given the issues that were previously raised. I have not seen any evidence as to why the child was returned in July 2020 but I assume it was on the basis of full assessment of the mother and her partner. If not, another major concern is raised in my mind about Trust planning in this case. In any event, on Sunday 2 August 2020, the child himself left his mother's home and made contact with his sister VA who in turn contacted V because of what the child said had happened to him when he was back in the care of his mother. In the Trust submissions some more detail is given in relation to this. The Trust report is that the child Josef had been assaulted by the mother's partner and that he had been grabbed by the throat. The brother V stepped in and the child presented with V at the police station during which the Trust say that marks were noted on the child's throat and that Josef reported that his mother and her partner were drunk.

[7] These events led to the PSNI obtaining a police protection order for the child. There is no issue in relation to that order. However, this crisis obviously triggered a quest to find a safe placement for the child as the mother was no longer an option. There was an issue raised by the police in relation to V given that he had a previous conviction. The police were not aware of V's circumstances since being released from prison. In any event the Trust were content with V's partner Ms C looking after the child on the basis that V would not reside in the home or be part of the primary care arrangements for the child until there was further assessment.

[8] On 3 August V and his partner Ms C brought the child for an ABE interview in relation to the allegations he had made against his mother and her partner. They also spoke to the social worker. Then, on 4 August the social worker contacted Ms C and advised that whilst there was no issue with V having contact with the child he should not be staying in their home. This was accepted by V and Ms C and an

undertaking was given without prejudice. It appears that at this time the mother, Ms T, had raised some issues with the Trust about V and his ability to look after the child.

[9] Given the issues that had been raised about him V obtained legal advice and made an application for an interim residence order on an ex parte basis. This was on 5 August. Leave was granted to bring the proceedings and they were adjourned for an inter partes hearing.

[10] Meanwhile the Trust position changed in the late afternoon of 5 August in that V and Ms C were advised that the child would be removed into foster care irrespective of whether or not V was staying in the home. This was on the basis of the consent given by the child's mother, Ms T, to Josef being placed in foster care. At 5.00 pm on Wednesday 5 August the child was removed under the authority of the police protection order and placed in foster care. The father of the child raised an objection, but nonetheless the child was retained in foster care.

[11] Mr S heard about these events from V and he then made contact with his solicitor and gave instructions that he was opposed to the removal of the child from the family placement to foster care. This position was relayed to Social Services both by Mr S himself and Ms Moley who was the solicitor acting for him. The discovery provided in these proceedings makes this clear. Ms Moley was in constant contact with social services from early evening until late evening and she summarised the position in a detailed email on 5 August at 22.37 which I set out as follows:

> "I refer to the above named child and to the several telephone discussions which have taken place between us and the Emergency Unit this evening concerning this child. You will be aware that we represent the child's father Mr S and the child's brother V. You have advised us that this child was made the subject of a police protection order on Sunday 2 August 2020 at 11.30 pm. You have correctly observed that the PPO lasts for 72 hours and thus expires at 11.30 pm tonight (Wednesday 5 August 2020). Article 65(8) of the Children (Northern Ireland) Order states that no child may be kept in police protection for more than 72 hours. Thus, any authority to retain this child in foster care under any such order expires at 11.30 pm. We have reiterated this point to you throughout the course of the evening and we understand that the Trust do accept that. Despite our enquiries, the Trust have failed to advise of the correct legal authority under which they would propose to retain this child in foster care beyond that time. You have suggested that

the mother of the child has consented to the placement and that this thus gives rise to a valid voluntary placement. Under Article 22 of the 1995 Order, it is clearly stated that an authority may not provide accommodation under Article 21 if a person with parental responsibility for him is either willing or able to provide accommodation for him or arrange to provide accommodation for him, objects to the voluntary placement. The father has parental responsibility for the child and I have clearly advised that the father does indeed object. The father has also communicated this to the social worker who removed this child this evening via text when she failed to answer his calls, as she also failed to answer or return my calls. The father further will arrange to provide accommodation for the child with Ms C, being satisfied that Ms C can provide appropriate care for the child. On a without prejudice basis, the brother V would agree to stay elsewhere until such times as his application for a residence order is considered by the court. The Trust thus have no legal authority to retain this child in foster care beyond 11.30 pm and we confirm that we seek the immediate return of the child to Ms C, the person with whom the father is arranging to accommodate this child. If the Trust do retain this child in foster care beyond 11.30 pm, this is unlawful and we have put you on notice that we would intend to bring proceedings for declaratory and injunctive relief before the High Court, as well as damages given the unlawful nature of the proposed actions of the Trust and the resulting unnecessary distress to this nine year old boy. We reiterate that our client V has provided care for this child for extended periods of time whilst the child's mother was not protecting him. The child also stayed with Ms C since Sunday in light of the concerns in relation to the mother. The steps taken by the Trust tonight thus appear to have no foundation on the facts, in addition to being unlawful. We would confirm that if the Trust unlawfully retains this child, we will be forced to contact the PSNI, a step which we would really not want to take. We will also be bringing emergency proceedings before the High Court Judge for injunctive and declaratory relief and damages. We would further confirm that we have authority to accept service of any proceedings you may consider

> bringing, on behalf of the father and we trust that any such application would be brought on notice. We would urge you to consult with your legal advisors immediately and we expect to hear back from you before 11.30 pm to confirm arrangements for the return of the child."

[12] The father's text to the social worker has also been provided in discovery was sent at 18.03 on 5 August and reads as follows:

> "Hello social worker
>
> I am Josef's father Mr S and I heard what happened this evening. I don't agree or give permission child to be taken into care as I can and want the child to come lived with me or with another family members."

[13] From the above it is apparent that there were further discussions between the parties during the evening and that the Trust obtained legal advice from DLS which advised of the need to obtain an Emergency Protection Order if the child was to be kept in care but there was a query about the grounds for an order. Advice was also obtained from a senior social worker along the same lines. From the discovery it is also clear that two different sets of social workers were dealing with the case because it was out of hours. At one point an assertion is made that there was no one available to bring the necessary application out of hours but I am told that applied to the regional service rather than the local service. Whatever the logistical issues, it is clear from the discovery that there was no impetus to regularise the situation on the evening of 5 August. As the evening wore on the child could not be moved because he was sleeping and so he remained in foster care.

[14] By the morning of 6 August an emergency application could have been brought to court. However, it was not the Trust who took the initiative. Rather, Mr S brought proceedings under the Human Rights Act to the High Court. His application was heard on an emergency basis before the Lord Chief Justice at 3.00pm. At this stage the court enquired under what powers the Trust were acting in relation to the removal of the child and the case was adjourned as the Trust advised that they were applying for an emergency protection order. I am informed that an application was lodged and after this hearing it was by the Trust.

[15] At 5.00 pm on 6 August an application for an emergency protection order was heard by District Judge Broderick. I am told that this was a three hour contested hearing during which oral evidence was heard from the social worker and V and legal submissions were advanced. Having heard the evidence District Judge Broderick ruled that the grounds for the making of an emergency protection order were not met and further that there was no reason to restrict contact between V and the child. The District Judge therefore granted an interim residence order in favour

of V and Ms C and interim contact orders were made which were to permit supervised contact under the guidance and support of Social Services. I am told that the District Judge ruled that the child could not be placed in the care of either parent. I am told that subsequent to that order Social Services have not had active involvement. In any event this all meant that the child was returned to the care of V and Ms C at 8.30pm on 6 August. He has remained in that placement to date and I am told that it is very settled and has started school.

[16] The family proceedings will continue to be heard in the Family Proceedings Court. However I have to deal with the human rights application which is a discrete issue relating to the lawfulness of actions in the period of the child's removal and retention in foster care.

[17] The matter came to me on 11 September 2020 at which stage I timetabled arguments and I heard the case by agreement by Sightlink on 23 September 2020. Ms McCaffrey BL appeared on behalf of the applicant. Ms Maire Kelly BL appeared on behalf of the respondent mother. Ms Sholdis BL appeared on behalf of the respondent Trust. All parties have filed very helpful written arguments and they also made oral submissions to me.

Legal Context

[18] The starting point in this case is the provisions of The Children (Northern Ireland) Order 1995 ("the Children Order"). The relevant provisions are found in Article 21 and Article 22 of the Children Order as follows:

> "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."

[19] Article 22 deals with powers of persons with parental responsibility:

"22.—(1) An authority may not provide accommodation under Article 21 for any child if any person who—

(a) has parental responsibility for him; and

(b) is willing and able to—
(i) provide accommodation for him; or

(ii) arrange for accommodation to be provided for him,

objects.

(2) Any person who has parental responsibility for a child may at any time remove the child from accommodation provided by or on behalf of the authority under Article 21.

(3) Paragraphs (1) and (2) do not apply while any person—

(a) in whose favour a residence order is in force with respect to the child; or

(b) who has care of the child by virtue of an order made in the exercise of the High Court's inherent jurisdiction with respect to children,

agrees to the child being looked after in accommodation provided by or on behalf of the authority.

(4) Where there is more than one such person as is mentioned in paragraph (3), all of them must agree.

(5) Paragraphs (1) and (2) do not apply where a child who has reached the age of 16 agrees to being provided with accommodation under Article 21."

[20] Article 8 of the European Convention on Human Rights reads as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[21] The Human Rights Act also governs applications of this nature as follows: Section 6(1) deals with acts of public authorities:

"**6. Acts of public authorities**

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right."

[22] Section 7 deals with proceedings:

"**7. Proceedings**

(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—

(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or

(b) rely on the Convention right or rights concerned in any legal proceedings,

but only if he is (or would be) a victim of the unlawful act.

…

(5) Proceedings under subsection (1)(a) must be brought before the end of—

(a) the period of one year beginning with the date on which the act complained of took place; or

(b) such longer period as the court or tribunal considers equitable having regard to all the circumstances."

[23] Also relevant is Section 8 which deals with judicial remedies:

"**8. Judicial remedies**

(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

(2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.

(3) No award of damages is to be made unless, taking account of all the circumstances of the case, including—

(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and

(b) the consequences of any decision (of that or any other court) in respect of that act,

the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

(4) In determining—

(a) whether to award damages, or

(b) the amount of an award,

the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention."

[24] The law in this area is summarised by a Supreme Court case of *Williams and another v London Borough of Hackney* [2018] UKSC 37. This case deals with the relevant provisions in England and Wales, namely section 20 of the Children Act 1989 which replicates our Article 21 and 22. The facts of the case are different and ultimately relief was not granted to the parents under the Human Rights Act in that case principally because of their own circumstances, bail conditions and issues of delay in bringing proceedings. However, the issue for the Supreme Court mirrors what I am being asked to determine in relation to the application of the provisions relating to accommodation of children and what a local authority is to do if the parents ask for their accommodated children to be returned to them but the local authority perceive that there are obstacles in doing so.

[25] Lady Hale gave the leading judgment in *Williams* and in paragraphs [38]-[49] she reiterates a number of principles which counsel has helpfully summarised as follows:

(i) A local authority cannot interfere with a person's exercise of their parental responsibility, against their will, unless they have first obtained a court order (or if a police protection order is made).

(ii) The use of the word consent can be confusing - section 20 involves the delegation of parental responsibility to a local authority. In seeking this delegation the local authority should fully inform the parents of their rights under section 20.

(iii) Removing a child from the care of a parent is very different from stepping into the breach, when a parent is not looking after a child, however the powers and duties of the local authority are subject to the latter provisions in section 20(7)(11) (equivalent to Articles 22(1)-(5) of the 1995 Order.

(iv) As a matter of good practice, parents should be given clear information about their rights and the local authority responsibilities. The duties and powers of the local authority are subject to section 20(7)-(11) as above.

(v) The local authority cannot accommodate a child if a parent with parental responsibility is willing and able to accommodate the child or to arrange for someone else to do, objects. If the local authority considers the proposed arrangements not merely unsuitable, but likely to cause the child significant harm, they should apply for an emergency protection order.

(vi) Section 20(8) (Article 22(2)) makes it absolutely clear that a parent with parental responsibility may remove the child from accommodation provided by the local authority at any time, without any requirement to give notice in writing or otherwise. If the request is denied, the options for the parent are to remove the child or to issue *habeus corpus* proceedings. It is also an offence for a person to, without lawful authority or excuse, take or detain a child under the age of 16 from a person having lawful control of such a person. The most preferable course of action is for the local authority to promptly honour an unequivocal request from the parents for the child's immediate or timed return.

(vii) The right to object (Article 22(1)) and the right to remove (Article 22(2)) are subject to Articles 22(3) and (4) where a residence order is in favour of the other parent.

(viii) There is special provision for children who have reached the age of 16.

(ix) There are no time limits in relation to section 20 accommodation.

[26] This case examines the development of the law in this area from previous decisions of Munby J in *R(G) v Nottingham City Council* [2008] EWHC 152 and *R(G) v Nottingham City Council and Nottingham University Hospital* [2008] EWHC 400. However, I consider that the Supreme Court decision is very clear on the facts and has direct application to this case and I need go no further in analysing any of the other cases.

The Arguments

[27] Ms McCaffrey in her impressive written and oral legal arguments essentially made the case that there was no basis in law to retain the child in foster care after the expiration of the police protection order at 11:30pm. She further made the case that

in the circumstances of this family the actions of the Trust in removing the child into care albeit under a lawful police protection order were in breach of Article 8 rights. Ms McCaffrey accepted that the father's family life was limited with this child but he was a father with parental responsibility who maintained an interest and once he heard that the child was being removed in to foster care, he made contact with a solicitor and social workers and objected to the placement in foster care. Ms McCaffrey reminded me that this case resulted in a residence order being made. She also maintained that the Trust could have applied for an emergency protection order at any stage on the evening of 5 August 2020 or in the early morning of 6 August 2020. Rather, the father had to make the running by bringing a human rights application which was necessary to bring this matter to a conclusion.

[28] Ms McCaffrey pointed out that this young child had already been subjected to alleged abuse in his mother's care and was subsequently removed from his brother and partner for a total period of 27½ hours which she said is significant in the life of a child. Ms McCaffrey effectively utilised the discovery to demonstrate that her instructing solicitor was making every effort from early in the evening to tell the Trust they were acting unlawfully and to resolve this matter right through to the early hours of the next morning. During that time Ms McCaffrey pointed out that the Trust took legal advice which they decided not to follow. Ms McCaffrey also relied on the fact that the Trust did not take corrective action the next morning and so the human rights application was necessary. Finally, Ms McCaffrey argued that the terms of Article 22 are very clear and were breached by the Trust.

[29] On behalf of the mother, Ms Kelly maintained a neutral position in relation to the application but she filed a skeleton argument which did not depart from the legal submissions made by Ms McCaffrey.

[30] It was therefore Ms Sholdis who raised the main objections in a comprehensive written argument which she augmented with skilful oral submissions. In essence Ms Sholdis argued that the Trust had to act as it did due to the emergency situation that arose. Ms Sholdis maintained that the Trust was entitled to take protective steps given V's conviction and the mother's objections to V and Ms C. Ms Sholdis accepted that Mr S's solicitor had been in regular contact with the Trust but she made the case that the father was unavailable to the social workers. Ms Sholdis also made the case that the Trust acted quickly on 6 August to bring proceedings for an emergency protection order. She argued that the father is not a victim within section 7 of the Human Rights Act due to the fact that he has not exercised his parental responsibility for the child for the past 4-5 years. Ms Sholdis therefore queried the existence of rights to family life on the part of the father and if there were rights to family life whether there had been an interference with his family life. Ms Sholdis said that any interference with Article 8 was justified on the basis of protection of the child from harm.

[31] Ms Sholdis maintained that there was no breach of Article 22. She relied on Article 21 of the Children Order which she said provided a mandatory direction that

every authority shall provide accommodation for a child in need. She also relied on Article 21(4). She then argued that pursuant to Article 22 there was no breach given that Article 22(1) is framed in discretionary terms. Ms Sholdis also argued that the mother had primary care for the child and that this equated to a residence order which meant that her consent was sufficient pursuant to Article 22(3). Therefore, Ms Sholdis invited me to dismiss the application. In the alternative Ms Sholdis highlighted the fact that the grant of relief is discretionary and also that by section 8(3) of the Human Rights Act the court had to be satisfied if there was an interference and a breach of human rights that damages were required to afford just satisfaction.

Consideration

[32] In assessing the competing arguments I look to the legislation in the first place. Having done so I am quite clear that the Trust had no lawful authority to keep the child in foster care once the police protection order expired. It was clear that voluntary accommodation was not agreed and so further accommodation was not lawful under Article 22. In *Williams* the Supreme Court is quite clear that the Trust duties and powers in Article 21 are subject to Article 22 which allows for delegation of parental responsibility. Article 22 is also very clear in terms of the entitlement a person with parental responsibility to raise an objection to voluntary care. The Trust cannot accommodate if a parent with parental responsibility is willing and able to accommodate the child or to arrange for someone else to do so. If a Trust considers the proposed arrangements not merely unsuitable, but likely to cause significant harm, it should apply for an emergency protection order. This provision dictates when an authority must provide accommodation. In this case the mother did not have a residence order and so it is quite clear that Article 22(3) is not an answer.

[33] I take into account that the Trust had to react quickly in an unfolding situation and I allow some latitude for that. I am also prepared to accept that the Trust's failings were not as a result of a lack of social work resource. However, that does not solve the problem. In fact social work availability makes the situation appear just as bad because the Trust had all the facts about this family. It was also fully informed by Ms Moley and its own legal advisers as to the legal position. In those circumstances I do not think that the relatively modest time period during which these events occurred absolves the Trust of responsibility.

[34] It is quite clear to me that the actions of the Trust in removing the child from V and his partner in the early evening was not a proportionate response. The letter from the social worker validates the fact that there was a family arrangement between V and VA which was mandated by the Trust. In those circumstances, I cannot for one moment see why the Trust moved Josef to a foster placement on 5 August and took the child out of this family arrangement. The fact of the matter is that nothing had changed. The Trust knew about the conviction of V and had been managing this situation. Even if the Trust was not aware of V's exact role, there was

no need to remove the child into foster care when he was willing to step aside and his partner was available. The *de facto* situation on the ground militates against the argument that there was so high a risk that a family placement could not be maintained in this emergency until a longer term solution was found or a court adjudicated on arrangements. It is not enough to say that the mother had raised some objections about V particularly given her unreliability. I have also seen no evidence that the child's wishes and feelings were considered in accordance with Article 21.

[35] In my view this was poor decision making which was not child centred. I consider that the Trust acted unlawfully on two fronts, first in terms of how this child was removed into foster care and, second, how this child was retained in foster care without lawful order. It follows that there is merit in making the declarations requested. Given this inevitable conclusion about declaratory relief the next question is whether I should award damages and/or costs in these proceedings.

[36] *Hershman & McFarlane Children Law & Practice* at Volume 1 Section E 746-749 contains some useful guidance on the question of damages. In particular, reference is made to the case of *Anufrijeva v Southwark London Borough Council* 2003 EWCA Civ 1406 which states:

> "(a) The award of damages under the HRA 1998 is confined to the class of unlawful acts of public authorities identified by s6 (1) - see s 8(1) and (6).
>
> (b) The court has a discretion as to whether to make an award (it must be "just and appropriate" to do so) by contrast to the position in relation to common law claims where there is a right to damages - see s8(1).
>
> (c) The award must be necessary to achieve "just satisfaction"; language that is distinct from the approach at common law where a claimant is invariably entitled, so far as money can achieve this, to be restored in the position he would have been in if he had not suffered the injury of which complaint is made. The concept of damages being "necessary to afford just satisfaction" provides a link with the approach to compensation of the European Court of Human Rights under Art 41.
>
> (d) The court is required to take into account in determining whether damages are payable and the amount of damages payable the different

principles applied by the European Court of Human Rights in awarding compensation.

(e) Exemplary damages are not awarded."

[37] In the case of *Re C (Breach of Human Rights: Damages)* [2007] 1 FLR 1957 at paragraph [62] Wilson LJ says this:

> "In determining whether to award damages for infringement by a public authority of a person's rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the European Convention) and, if so, the amount of the award, the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41: section 4 of the 1998 Act, set out by Thorpe LJ at paragraph 30 above. … The kernel of both is that satisfaction to the person whose right has been infringed must be just and that, if but only if, such be necessary in order to afford just satisfaction, an award of damages should be made."

[38] At paragraph [64] Wilson LJ also states:

> "In general the principles applied by the European Court, which we are thus enjoined to take into account are not clear or coherent see Anufrijeva at paras [57] and [58]. What is clear, however, is that the European Court generally favours an award of damages in cases in which local authorities have infringed the rights of parents under Article 8 to respect for their family life by shortcomings in the procedures by which they have taken children into care or kept them in care, whether temporarily or permanently: see the report of the Law Commission on Damages under the Human Rights Act 1998 Law Comm No: 266 Command 4853 at para 6.159 and 6.160 set out at paragraph [37] above. *W v The United Kingdom* [1987] 10 EHRR 29 and *R v United Kingdom* [1987] 10 EHRR 74, [1988] 2 FLR 445 are two of a batch of three cases (a fourth and a fifth being rather different) in which on 8 July 1987, i.e. prior to the coming into force of the Children Act 1989, the European Court of Human Rights held that determinations by our local authorities to take children into care, or make their care of them permanent, infringed the rights of the parents under

> Article 8 by virtue of a failure to consult them in advance."

[39] There is of course a spectrum of cases and each is fact specific. To illustrate the point I have been referred to a range of cases some of which are startling in terms of the extent of unlawfulness and the duration of unlawfulness which have led to awards of damages. There is a helpful table at Volume 1 Section E 747 of *Hershman & McFarlane*. This flows from a case of *Medway County Council v M & T* 2015 EWFC B 164. *In X, Y, Z (re damages: inordinate delay in issuing proceedings*) [2016] EWFC B44 certain relevant factors are also highlighted which may be relevant to a consideration of quantum namely the length of proceedings, the length of the breach, the severity of the breach, distress caused, insufficient involvement of the parent or child in the decision making process, other procedural failures. In *CZ v Kirklees County Council* [2017] EWFC 11 Cobb J confirmed that there is no specific formula or prescription for what amounts to just satisfaction but that the court was required to consider all the circumstances of the case.

[40] So, having decided that a declaration is entirely merited in this case on two fronts I am to decide whether I should grant damages in this case to the father and the child. I should say that during the course of argument Ms Sholdis had no objection to the child being added as a plaintiff with an appropriate next friend to avoid further litigation and costs. This was a characteristically sensible approach by Ms Sholdis. Ms McCaffrey also realistically conceded that the father is in a different position due to his limited family ties with the child. Nonetheless, he retains parental responsibility and I think it is hard to make the case that he has entirely relinquished his rights to family life. However, the factual circumstances pertaining to him are relevant in relation to whether or not he should obtain damages for what happened. In all of the circumstances I consider that the declarations are enough in his case and that it would not be just to award damages in his favour.

[41] However, the child is in a different position and Ms McCaffrey can obviously make a stronger case for him. He is a child aged 9 who has been placed unlawfully in foster care albeit for a very short period of time. I note that District Judge Broderick who heard the emergency protection order application referred to the effects of being removed into foster care for this boy. That is self-evident and enough to found an award. The proceedings have been brought promptly and so there is no issue with that. It is not suggested that I adjourn for further evidence. Overall, I consider that it is just and appropriate that the child should obtain a modest level of damages of £500 to reflect the breach of Article 8.

[42] The final application is in relation to costs. Of course I bear in mind that costs do not simply follow the event in family proceedings. Against that these are proceedings under the Human Rights Act which are distinct from those within the welfare jurisdiction. In truth these proceedings would not have been necessary if the Trust had acted lawfully. The proceedings were brought expeditiously and with

cost savings in mind. In all of the circumstances, I consider that the applicants are entitled to the reasonable costs of the application (one set).

[43] Accordingly, I will make the orders as I have said. I ask Counsel to draft an order within 1 week. I will hear from Counsel in relation to any issues that arise. Finally, I must say that this case has been presented in an economical fashion and it has benefited from the skill and expertise of all counsel. I hope that this case also clarifies some issues about practice and procedure in relation to voluntary accommodation in the context of Convention obligations. Going forward, I suggest that these cases would benefit from early discussion on issues of liability and quantum.