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(subject to editorial corrections)\**

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

2017/085786/01

IN THE MATTER OF AN APPLICATION BY SK2 FOR JUDICIAL REVIEW

**O'HARA J**

**Introduction**

[1] In this judgment the teenage boy to whom the case relates is identified as Sean. This has been done in order to protect his anonymity and his welfare. He must not be identified directly or indirectly without the prior leave of the court.

[2] Sean is a deeply troubled teenager who has extremely complex care needs. At the time of the hearing he was 16 years old. It is accepted by the relevant Health and Social Care Trust (the Trust) that he is "a child in need" within the meaning of Article 17 of the Children (NI) Order 1995. He then became a "looked after child" within the meaning of Article 25 of the same Order. Since he is a "looked after child" the Trust has a duty under Article 27 of the Order to provide accommodation for him. The question is around the nature and extent of that duty in circumstances where largely as a result of Sean's own actions the Trust could not provide him with accommodation when he was given bail despite having made protracted efforts to do so over a much longer period.

**Background**

[3] Four months after Sean's birth his father was arrested and imprisoned for head butting his mother. The father has played no subsequent part in Sean's life. Sean's mother has been engaged with Social Services since 1991, long before his birth. Concerns about her include her choice of partners, domestic violence, neglect and mental health difficulties including depression, anxiety and self-harm. From 2005 Sean was voluntarily accommodated i.e. placed with foster carers with the agreement of his mother but without any court order.

[4] While in care Sean showed signs of neglect and trauma. He had developmental delay, issues about attachment to adults and was diagnosed with ADHD. Extensive support services were put in place to assist Sean and his foster carers but the placement with them broke down in autumn 2015 when they could no longer cope with him. At that time, aged 14, he was urinating around their home, he was excluded from clubs and activities due to his conduct and he was both verbally aggressive and defiant.

[5] The difficulties in finding new foster carers for Sean were insuperable. During the next six months he lived in two residential homes. They also housed other children with complex needs so they were far from ideal for him. In March 2016 Sean was transferred to another residential home but one which had fewer children in it. It was hoped that this would ease his behaviour. That move achieved only limited success. The Trust staff who looked after him had to be hypervigilant. In part this was because Sean struggles in group living to understand or read social cues i.e. what is and is not acceptable to others living with him. This puts him at risk of inadvertently approaching them in a manner which provokes a hostile response from them.

[6] Two psychologists were engaged to report on Sean in order to help the Trust devise a plan for his care. The reports make depressing reading. His skills and understanding exceed only approximately 0.2% of his peers. The analysis of him included the following:

- Sean would experience significant difficulties across all areas of social functioning and adaptive behaviour.
- He does not obey common signages in the community, is unable to tell the time, cannot make reminder notes, follow simple instructions or read menus without considerable support from staff around him.
- He is unable to work independently, regulate his emotions effectively, budget, complete school work on time or go out unsupervised in the community (though he does so anyway).
- He does not integrate well as part of a group and struggles significantly to follow social cues independently in any type of structured or group activity. He does not plan ahead for free time, has no obvious interests or hobbies, but does have an excessive interest in emergency services.
- His health and safety awareness is very poor and he is often unable to foresee potential consequences of a lack of caution both at home and within the community.

- He is experiencing significant difficulties across all areas of adaptive and behavioural functioning. He is unable to display the various functional skills necessary for daily living without the assistance of others.
- His levels of impulsivity and risk taking behaviour during the night may reflect his high levels of anxiety – likely mirroring the fear he felt during early childhood. His absconding activity often takes place after confrontation with other residents and also around times of transition or endings – when the fun activity is finished or when he has to go to bed for the night.
- Given Sean’s background of abuse and neglect he may struggle to regulate his emotions in other more effective ways.
- He has a complex history of neglect which is reflected in an all pervasive attachment disorder. His profound deprivation has negatively affected his emotional, social and cognitive development to such an extent that an extended foster placement was perhaps doomed to failure. He is significantly under socialised.
- The type of package required to manage Sean is thus likely to be bespoke, requiring highly trained staff across a number of domains, highly structured and tuned into his specific cognitive and emotional needs. Such an environment must also be free from extraneous variables as much as possible.

[7] In June 2016 he was examined by Dr Leddy, a child psychiatrist, whose assessment of him included the following:

“The early abuse and neglect which Sean suffered resulted in disordered early attachment relationships. This has reduced his ability to regulate his emotions, to concentrate and pay attention, and his memory is poor. He cannot defer gratification or form trusting relationships and fulfil his potential. Sean’s model of how relationships work is defective because he did not benefit from positive, secure, safe early relationships. He was exposed to a frightening environment and he finds it difficult to understand himself and other people, is easily irritated and he is difficult to reach emotionally. It is difficult for those around him to soothe him when he is under stress.”

[8] In April 2017, on an application by the Trust, I made a declaratory order to provide for Sean’s care and protection. This order allowed for him to be locked in

the children's home (Home X) in which he was staying if needs be and to be restrained by staff so as to prevent him from absconding and/or to allow him to be returned if he had absconded. At that point he was the only child being cared for in Home X - all the others had been moved on to other places in order to allow Sean's needs to be met exclusively. That course of action was appropriate but it meant that a home which was badly needed to cater for a number of teenagers was devoted only to the needs of Sean.

[9] The plan at that stage was to keep Sean in that situation only until an annex had been adapted in another home, Home Y. The idea was for Sean to move to that annex in which he would be cared for but also confined. A consequence would be to allow Home X to become available again to others.

[10] It is worth recording why it was necessary for the Trust to seek a declaratory order, a rare event in the case of children. When children are in residential homes social work staff have no legal power to lock them in. A constant problem in these homes, which by definition accommodate children who cannot live in their own home or in foster care, is that the children are troubled and challenging. Their responses to authority are often hostile and they regularly leave the units. When they do so, they are vulnerable and may be preyed upon. Typically however they have not been convicted of criminal offences so they cannot be deprived of their liberty by a custodial sentence. In these rare cases the declaratory order is made because it is necessary and in their own interests to have their freedom curtailed. In Sean's case it was necessary to make that order, partly because when he absconded he would approach other troubled people in the street and the manner of his approach put his safety at risk from them. When such orders are made they have to be reviewed with the court being updated at regular intervals on the progress of the child and developments in his/her care plan.

[11] On 10 May 2017 I made an interim care order, giving the Trust parental responsibility for Sean which it shares with his mother. In reality, given the mother's own continuing problems, it is the Trust which leads on all aspects of Sean's care.

[12] The next development came in July 2017 when Sean moved from Home X to Home Y. At the time of his move he was accompanied by a team of no fewer than ten Trust staff to look after and help him. It had been intended that Sean would only move to Home Y on or about 31 August 2017 but Home Y was prevailed upon by the Trust to accept Sean earlier because Home X could no longer keep him safe. Unfortunately on 8 August 2017 Sean was arrested due to a series of assaults and other offences following his admission to Home Y. Many of the staff who had been assigned to his care had been injured by him. Those injuries included a broken collar bone, a wrist fracture, cuts and bruises as well as stress and anxiety. On a regular basis he abused staff verbally, with the abuse often being explicit or sexual, especially towards female staff. He was also threatening and spat in the faces of staff.

[13] On 30 August 2017 Sean was granted bail subject to a suitable address being found. Home Y declined to accept him being returned there in light of the behaviours which had injured staff and led to the criminal charges. That is regrettable but understandable. The intention had been that the staff in Home Y (which is independent of the Trust) would take over Sean's primary care from Trust staff. Having seen what happened to them, Home Y decided not to take that risk. In those circumstances the Trust could not as of August 2017 provide Sean with accommodation which would give him the suitable address to which he would be released on bail.

### **Current proceedings**

[14] The application for judicial review was issued on 7 September 2017. On 14 September the Trust conceded that it was appropriate to grant leave. As a result directions were issued which led to a hearing on 2 October.

[15] The submissions advanced by Mr Michael Ward of counsel on behalf of the applicant were as follows:

- Sean has remained in custody due to the inability of the Trust to source and provide suitable accommodation to him following the breakdown of the placement at Home Y.
- It is accepted that this is a challenging situation for the Trust and that significant time and resources have been directed towards this issue.
- Notwithstanding the obvious difficulties the applicant had been in custody for approximately seven weeks without an appropriate short or long term placement being identified. As a result there was an ongoing failure of the Trust to provide him with suitable accommodation since his arrest by the police on 9 August 2017.
- The duty to provide accommodation contained in Article 27(1)(a) of the Children (Northern Ireland) Order 1995 is an absolute duty which the Trust had breached and continued to breach.
- The absolute nature of the duty arising from Article 27 places an immediate obligation on the Trust to do what is required.
- It is impermissible to read into the duty any concept of allowing "reasonable time" to find accommodation because that is contrary to the duty being absolute and immediate.
- Arguments to that effect by a Trust were rejected by Treacy LJ in *Re MP* [2014] NIQB 52.

- That even if some time should be allowed to the Trust in this challenging case, that time had already passed.
- That it would be wrong for the court to have any regard to general resourcing issues, including money, staff or lack of suitable facilities and thereby to circumvent its statutory duties.

[17] For the Trust Ms Martina Connolly of counsel submitted as follows:

- That there is a duty on the Trust under Article 27 to provide accommodation.
- That the duty must be to provide accommodation which is suitable for that particular child in need.
- That the duty to accommodate under Article 27 also incorporates the obligation under Article 3 of the Children Order to have the child's welfare as the paramount consideration.
- That it is accepted by all parties in the declaratory and care proceedings that despite the Trust's extensive and expensive best efforts no suitable accommodation had yet been created, adapted or identified.
- That "suitable accommodation" must mean more than a roof over the head of the child in need – it must also provide protection, safety and much more.
- That an absolute duty to accommodate does not inevitably amount to an immediate duty to accommodate.
- That in *Re MP Treacy* LJ did not equate "absolute" with "immediate" and that the Children's Commissioner who intervened in the case specifically acknowledged the concept of "a reasonable period" being allowed.
- That no authorities provided to the court support the concept of the duty being absolute in the sense of immediate.
- That an analogous decision is instead that of McCloskey J in *JR47's Application* [2013] NIQB 7, a case which involved the settlement in the community of adults with mental health issues who had lived for some years in Muckamore Hospital.

[18] In the course of her submissions Ms Connolly suggested that the relevant issues before the court could be distilled into four questions:

- (1) Did the Trust owe a duty to accommodate Sean pursuant to Article 27 of the Children (NI) Order 1995?
- (2) Is the Article 27 duty, a duty to provide **any** accommodation or rather **suitable/appropriate** accommodation?
- (3) On the basis that the Article 27 duty to provide accommodation is accepted as being mandatory and has been described as an “absolute” duty, does it then equate to an **immediate duty** as per the applicant’s submissions?
- (4) What, if any, relevance does the issue of resources have to the issue of the discharge of the Article 27 duty on the current facts of **this** case?

[19] On behalf of the Trust it was accepted that Article 27 did in fact impose a duty on the Trust to accommodate Sean. In turn it was accepted on behalf of Sean that the duty was to provide suitable accommodation and to do so within a reasonable time though, depending on the circumstances of each case, not necessarily immediately.

[20] Ms Connolly’s concession was entirely correct. Article 27(1) provides as follows:

“Every authority looking after its child shall –

- (a) when he is in the care of the authority, provide accommodation for him; and
- (b) maintain him in other respects apart from providing accommodation for him.”

[21] The fact that Sean was in custody did not negate the fact that he remained in the care of the Trust on foot of the interim care order. In fact as Ms Connolly acknowledged he had in reality been accommodated by the Trust for more than ten years and its duties to him are likely to be lifelong.

[22] Similarly Mr Ward’s concessions were correctly made. He accepted that some time must be allowed to the Trust to find accommodation and that the accommodation so found had to be suitable. However, Mr Ward continued that by the time of hearing the “reasonable time” allowable had comfortably expired. In that context he emphasised that Sean had already been found unfit to plead on the criminal charges, was unlikely to face detention under mental health legislation and faced no risk of a custodial sentence after any finding of fact. In those circumstances,

or if the charges were dropped entirely, the Trust would have to find some accommodation for him.

[23] In short Mr Ward contended that the Trust was using the juvenile justice system, specifically the refusal of bail until an address was found, as a means of circumventing its duty under Article 27.

[24] In reply Ms Connolly submitted that if the charges were dropped the Trust would be forced to apply for a secure accommodation order which would take Sean into the unit at Lakewood. However that would expose him to group living with other exceptionally troubled teenagers. On all the available evidence he could not cope with that and it would resurrect all the earlier problems.

[25] She further submitted that suitable accommodation must necessarily mean something significantly more than a roof over Sean's head. It had to be suitable for him - and for Sean very little accommodation is in fact suitable. The Trust's position was that it was adapting a flat, a unit for Sean alone, in Lakewood. It would have to be staffed with people who were trained specifically for his needs but would have to be advised of the injuries he had inflicted on others. That process would be complete within approximately two weeks of the hearing of the application for judicial review following which a secure accommodation order could be sought.

[26] Ms Connolly also challenged the purpose or value of the declaration which the court was invited to make, a declaration that the Trust was in breach of its duty under Article 27 by failing to provide accommodation for Sean since his arrest and/or since his release on bail subject to a suitable address. Mr Ward's proposition on the value of a declaration was that it would give clarity on what amounts to "a reasonable time".

## **Discussion**

[27] It is necessary to be comparatively strict when interpreting and applying the stark terms of Article 27 because its purpose is to protect those children who are most vulnerable, challenging and damaged. In this context it is also necessary to have regard to obligations and standards derived from international treaties, agreements and rules and the rights of children and the protection of juveniles in the criminal justice system. These were considered by Treacy LJ in *Re MP* but seem to me not to add anything of substance to what domestic law requires through Article 27.

[28] *Re MP* was a case in which a 14 year old boy was charged with raping and sexually assaulting his mother on 10 December 2013. He was unable to secure his release on bail because the Trust in that case was extremely reluctant to provide accommodation for him. As already noted the Children's Commissioner, as an intervener, argued that implicit in the duty to accommodate is the requirement to do



so within a reasonable period. The court made a declaration that the Trust was in breach of its duty.

[29] In *JR47* [2013] NIQB 7 McCloskey J dealt with various issues surrounding what, if any time conditions are to be interpreted into the discharge of duties to provide long term accommodation and other services to vulnerable adults who were otherwise remaining in the detained setting in Muckamore Hospital. The relevant statutory duty was to provide or secure the provision of such facilities as were considered suitable and adequate including the provision or arranging for the provision of residential or other accommodation. In his judgment, and in particular at paragraphs [79] to [82], the judge held that every case would be “unavoidably fact sensitive governed by the omnipresent shadow of the policy and objectives of the statute”. Accordingly in some cases the need would have to be met immediately while in other cases swift but not immediate provision would be appropriate.

[30] In Sean’s case the Trust has accepted the existence of the duty as it was bound to do but contends, in effect, that it has made extraordinary efforts to fulfil that duty through foster carers and then through various residential units culminating in Home X and Home Y. The problem in these extreme circumstances is that while the Trust has gone to exceptional lengths to fulfil its duty, these efforts were thwarted (temporarily) not because of anything the Trust did or failed to do but because of what Sean did. His assaults on staff, the injuries he inflicted and the abuse he gave all brought to an end the plan for Home Y. This was after Home X had been reduced to a unit for his exclusive occupation. As the experts’ reports show this is not Sean’s fault in the normal sense – he committed these acts because he is so very damaged by his early childhood. However, the inevitable consequence of his acts was that the plan for Home Y, which was in itself plan B or even plan C, failed and it took time to devise the next plan. That plan required yet more exclusive and unique treatment of Sean – his own designated unit within Lakewood and new dedicated trained staff. On any view this takes time to achieve.

[31] This is not a case where the issue of resources has any relevance. At no point has the Trust done or failed to do anything by reference to limits on its resources. On the contrary it has devoted very considerable resources to a teenager whose needs require them in an effort to fulfil its statutory obligations.

[32] Once it is accepted, as it has been, that accommodation has to be suitable and that the duty to provide it is not a duty to provide it immediately, the case for Sean becomes significantly harder to establish. Experience in the Family Division shows that regrettably Sean is not the only looked after child whose own actions have thwarted the best efforts of Trusts to accommodate them. Others have walked out of suitable accommodation or caused mayhem which has led to the receiving organisation or centre terminating the placement. It is entirely unreasonable and unrealistic to demand that suitable alternative accommodation is immediately available in these cases.

[33] In Sean's case the duty under Article 27 did not in my judgment arise until he applied for bail on 30 August 2017. Coincidentally that was almost exactly the time at which he was originally due to begin his placement in Home Y. That placement was brought forward to July because he could not still be protected and managed in Home X. So the fact that the Trust had nowhere immediately available after Home Y disengaged was unfortunate but not due to lack of effort or foresight or planning on its part.

[34] In the circumstances of this case I am satisfied that the Trust was not in breach of its duty under Article 27 as that provision is properly understood. There will of course be cases in which Trusts are in breach if they fail to provide acceptable accommodation speedily. But the duty is to provide accommodation which is suitable for the needs of the particular child and to do so as urgently as possible in the circumstances. For the reasons explained above Sean's case is at the extreme end of those involving looked after children. I find that in this case there was no breach of the statutory duty and I therefore dismiss the application for judicial review.