Neutral Citation No: [2023] NIKB 32	*Ref:* **McF12104**
	ICOS No: **22/093740**
Judgment: approved by the court for handing down (subject to editorial corrections)*	*Delivered:* **16/03/2023**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

_____

IN THE MATTER OF AN APPLICATION BY JR245

_____

Mr R Lavery KC with Mr A Higgins (instructed by Terence McCourt Solicitors) for the Applicant
Mr A Montgomery (instructed by the Directorate of Legal Services) for the Respondents, the Belfast Health and Social Care Trust and the Department of Health

_____

McFARLAND J

Introduction

[1] In October 2022 the applicant, who is 13 years of age, was in the care of the Trust (under a care order granted in 2014) and had been placed in a residential home in the Belfast area. On 17 October 2022 he was arrested in respect of offences that were alleged to have occurred within that home, namely four common assaults, two offences of criminal damage, a sexual assault and an indecent exposure, the victims of his alleged conduct being Trust staff.

[2] There was a delay in obtaining a registered intermediary to facilitate the interview of the applicant and the applicant was not charged until 18 October 2023, and then produced before Belfast Youth Court on 19 October 2023. At that hearing bail was granted with a condition that the applicant reside at an address to be approved by the police. The difficulty in this case was that the Trust indicated that it would provide suitable accommodation for the applicant, but it was back in the residential home from which he had been removed on arrest and where the alleged victims of his conduct worked. The police would not approve this address as a suitable one.

[3] In the circumstances bail could not be perfected and the applicant was remanded into, and remained in, custody. Although it was likely that the applicant met the criteria for a secure accommodation order (see Article 44(2)(b) of the Children

(NI) Order 1995 ("the 1995 Order") – "he is likely to injure himself or other persons") there was no bed availability within the Lakewood facility. In the circumstances he was detained at the juvenile justice centre facility at Woodlands.

[4] An ex parte docket seeking leave to apply for judicial review of the respondents' failure to provide the applicant with suitable accommodation to meet his needs was lodged with the court on 28 October 2022.

[5] By order of 2 November 2022 Colton J granted leave on the papers to apply for judicial review.

[6] By application dated 16 November 2022 the applicant lodged his notice of motion seeking the following relief:

(i) An order for mandamus compelling the respondents to release the applicant from custody and provide him with suitable accommodation without any further delay;

(ii) A declaration that the respondents acted unlawfully in not providing the applicant with alternative accommodation;

(iii) Further relief;

(iv) Damages;

(v) Costs.

(The order for mandamus compelling the respondents to release the applicant from custody was misdirected as neither the Trust nor the Department of Health were detaining the applicant.)

[7] On 28 November 2022 criminal proceedings against the applicant were withdrawn, he was discharged by the Youth Court, released from Woodlands and returned to live in the residential home in Belfast, where he has continued to live without any further significant incident.

[8] The matter was listed before me for determination of a preliminary point, namely whether the proceedings are now of historic or academic interest only and are therefore not deserving of any further court time.

Legal principles

[9] Article 27(1)(a) of the 1995 Order contains a clear and unequivocal provision that a Trust with responsibility for looking after a child shall "when he is in the care of the [Trust] provide accommodation for him." Treacy J in *Re CM* [2013] NIQB 84 dealt with the almost identical circumstances of another 13 year old boy, the subject

of a care order, being arrested for alleged offences committed within a residential home. Bail was not granted as no alternative accommodation was available. An alternative was provided after six days of detention, although that address was not considered suitable by the court. Treacy J granted the relief sought on the basis that the applicant was at all times material to the action a child in the care of the Trust and that the Trust therefore had a duty to provide accommodation to the applicant. The Trust breached its duty under Article 27 of the 1995 Order in failing to accommodate the applicant during the six day period (but not for the period after the court had refused bail when it did not regard the Trust's accommodation as suitable.)

[10] In *Re MP* [2014] NIQB 52, Treacy J ruled that a similar provision in the 1995 Order at Article 21 – "Every [Trust] shall provide accommodation for any child in need within its area" – also created an absolute duty on the Trust. *MP* was a 14 year old boy who had been charged with raping and sexually assaulting his mother and similar problems arose concerning the provision by the Trust of accommodation. Although *MP* was not a child in care, there being no care order, he was considered to be a child in need as defined by Article 17 and Article 2 of the 1995 Order.

[11] Two further decisions in 2018 added clarity to the requirements of Article 21 and 27 of the 1995 Order. Keegan J in *Re OC and LH* [2018] NIQB 34 at [50] confirmed that the duty to accommodate under Article 21 is absolute, it must be provided within a reasonable time, if liberty is at stake, then it must be provided as a matter of urgency, and it must be suitable.

[12] O'Hara J in *re SK2* [2018] NIQB 104 again affirmed the absolute nature of the duty to provide accommodation.

[13] As to whether the court should continue to entertain the hearing of a case which has become, to all intents and purpose, theoretical or academic, the starting point is the speech of Viscount Simon in *Sun Life Assurance Company of Canada v Jervis* [1944] AC 111 when he stated at 113 that:

> "I do not think that it would be a proper exercise of the authority which this House possesses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent in any way."

Lord MacDermott when dealing with a certiorari application in *McPherson v The Department of Education* (NIJB 22 June 1973) stated at page 16 that an order of the court "does not usually issue if it will beat the air and confer no benefit on the person seeking it."

[14] Lord Slynn in his speech in *R v S of S for the Home Department (ex parte Salem)* [1999] 1 AC 450 at 456 referred to the application of the *Sun Life* case to the area of public law:

> "My Lords, I accept, as both counsel agree, that in a cause where there is an issue involving a public authority as to a question of public law, your Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a lis to be decided which will directly affect the rights and obligations of the parties inter se. [T]he *Sun Life* case … must be read accordingly as limited to disputes concerning private law rights between the parties to the case.
>
> The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future."

[15] The *Salem* approach was applied and followed in this jurisdiction by Carswell LCJ in *Re McConnell's application* [2000] NIJB 116 and by Girvan LJ in *Re C* [2009] NICA 23.

[16] It would be useful to clarify one discrete issue relating to what is an 'academic' dispute. Sir John Laws explored this in more detail in his article *Judicial Remedies and the Constitution* (1994) 57 MLR 213 when he criticised the lax use of the phrases 'academic question' and 'hypothetical question.' An academic question does not need to be answered for any visible practical purpose at all. The answer to a hypothetical question can provide a practical purpose should a set of circumstances arise in the future. Hypothetic questions can be subdivided into two classes – if, as a matter of chance, events will happen which will turn the hypothesis into a reality and if, as a matter of inevitability or highly probability, the events will happen. Sir John gives, as an example of the latter class, trustees needing to know how to perform their duties in the future.

[17] Hickinbottom J in *R (Williams) v S of S for the Home Department* [2015] EWHC 1268 provided a concise summary on the issue at [55]:

> "However:
>
> (i) A distinction can be drawn between an issue which is "academic" and one that is "hypothetical" … An academic question is one which does not need to be

answered for any practical purpose at all. A hypothetical question is one which may need to be answered for real practical purposes at some stage, although the answer may not have immediate practical consequences for the particular parties in respect of the extant matter before the court.

(ii) The courts will not determine academic issues. However, in a public law claim, it has a discretion to hear a matter which raises a hypothetical question, even when the determination of that question will not directly affect the rights and obligations of the parties inter se in an extant cause …

(iii) Nevertheless, the court will only do so if there is good reason in the public interest, and then only after exercising considerable caution ...

(iv) Whether it is in the public interest for the court to proceed to determine an issue which has become hypothetical will, of course, depend upon all the circumstances of the particular case. In *R v BBC ex parte Quintavelle* (1998) 10 Admin LR 425, Lord Woolf MR (with whom Aldous and Chadwick LJ agreed) said that the exercise of the court's discretion should be informed by two considerations: (i) whether there was any relief that could be granted "which would be of value to those who have to decide matters such as this", and (ii) whether the particular case was an appropriate vehicle for providing that guidance. If an issue is necessarily fact-sensitive, it is unlikely to be in the public interest to proceed. If it is likely that the courts will be required to determine the issue in the near future, it may be more likely to be in the public interest for the issue to be determined now, especially if it affects a substantial number of people and/or the costs of preparing the issue for hearing have already been expended by the parties."

The legal submissions

[18] The applicant sought to argue that the matter was neither academic or hypothetical, as the lis, ie the controversy between the parties, had yet to be decided and remained a live issue. As a secondary argument, the applicant asserted that it was an area that would benefit from guidance , and the provision of accommodation for looked after children and children in need, particularly those children who may be detained in similar circumstances as JR245, is a matter of public interest.

[19] The respondents argued that the issue between the parties had been resolved with the discharge of the applicant by the courts as he was no longer detained in Woodlands, having been returned to the residential home. The law in respect of Articles 21 and 27 of the 1995 Order was very well established and required no further clarification from the court.

Consideration

[20] I reject the applicant's proposition that there is a controversy to be decided. The order sought was for mandamus compelling the respondents to release the applicant from custody and provide him with suitable accommodation without any further delay. As the respondents had never detained the applicant the court was never going to grant the first part of that order. The second part was complied with on the 28 November 2022 when suitable accommodation was provided, and the Trust complied with its Article 27 1995 Order duty. The matter is now concluded. There is no longer a controversy.

[21] The applicant also seeks a declaration that the Trust acted unlawfully in not providing the accommodation at the time. Such a declaration could be seen as a determination concerning future hypothetical situations. It is not technically an academic question as the provision remains on the statute book. I accept that there is a high probability that such a situation could arise in the future. The sad reality is that some children may be suspected of committing serious crime leading to their arrest and being brought into the criminal justice system. Some may already be looked after children, others may be children in need or may fall into that latter category by virtue of their arrest. However, the law relating to the provision of accommodation and in respect of the interpretation of Articles 21 and 27 of the 1995 Order is very settled and abundantly clear. In recent times there have been four judgments all setting out in clear and unequivocal terms the duty placed on a Trust to provide suitable accommodation. No further clarification is required from this court.

[22] It is of course in the public interest that the detention of children within the criminal justice system is kept to an absolute minimum, but there is little point proceeding with this case to hearing with the inevitable result of the court reaffirming the principles set out in *re CM, re MP, Re OC and LH,* and *Re SK2* and applying the specific facts of this case to those principles.

[23] Both limbs of the guidance from Lord Wolff in *Re BBC* (see [17] above) are in play and the second limb is clearly engaged as this particular case could never be seen as an appropriate vehicle for the provision of guidance, or the repetition, for the fifth time, by this court, of the guidance.

Conclusion

[24] For the reasons given I rule that it is not necessary for the court to proceed to a full hearing of this application. I will hear the parties as to what final order should issue.