Neutral Citation No: [2020] NICA 50 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* McC11333 *ICOS No* *Delivered:*19 /10 /2020

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY JR97 (APPELLANT)

FOR JUDICIAL REVIEW

-v-

THE SOUTH EASTERN HEALTH AND SOCIAL CARE TRUST (RESPONDENT)

____

Before: Treacy LJ, McCloskey LJ and Maguire J

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Representation

Appellant: Mr David Scoffield QC and Mr Steven McQuitty, of counsel, instructed by Phoenix Law
Respondent: Mr Andrew Montgomery, of counsel, instructed by Directorate of Legal Services, BSO

McCLOSKEY LJ (delivering the judgment of the court)

[1] This appeal against the dismissal of the Appellant's judicial review application by the High Court was ultimately resolved, with some judicial encouragement, following a hearing, in the terms of a declaration agreed between the parties and sanctioned by the court in the following terms (insofar as material):

> " ***AND WHEREAS*** *the Appellant was, at the material time, a child aged eight years with a range of severe difficulties related to autism, ADHD, speech and language delays and challenging behaviours which presented a risk of serious harm to himself and to others,*
>
> ***AND WHEREAS*** *the Appellant was a child in need within the Trust's area who, from 30 September 2019,*

appeared to the Trust to require accommodation for a period of respite care as a result of the person who had been caring for him being prevented from providing him with suitable care (all of the foregoing in the relevant statutory language),*

***AND UPON** the judge at first instance holding that the Trust had been mandated to provide accommodation in the foregoing circumstances but having made no finding that the Trust had failed to do so in breach of its statutory duty,*

AND this court being satisfied that the Trust was in breach of its statutory duty to the Appellant in the foregoing circumstances,

The Court hereby:

*(1) **ALLOWS** the appeal on the basis set forth in the operative part of this Order below;*

*(2) **SETS ASIDE** the order of the Honourable Sir Ronald Weatherup dated 2 March 2020, whereby he dismissed the Applicant's application for judicial review; **AND***

*(3) **DECLARES** that the Trust, in failing to provide the Appellant with accommodation from 30 September 2019 until an offer was made on 31 October 2019 was in breach of its duty to the Appellant under *article 21(1) of the Children (Northern Ireland) Order 1995."*

It will be noted that this declaration is of narrow and focused compass, a matter upon which I shall comment briefly *intra*.

[2] I confess that at the outset of the hearing of this appeal I entertained reservations about its utility, for reasons which will become apparent. The briefest summary of the Appellant's circumstances, the impugned decision of the Respondent (*"the Trust")* and the apparent contours of the judicial review challenge will suffice. I shall describe the Applicant/Appellant as JR97. His entitlement to anonymity, with the consequences which flow, is emphasised.

[3] JR97, a child now aged nine years, (adopting his mother's description) has a range of severe difficulties regarding his emotional state, mental health and behaviours. He has autism, ADHD and speech and language delays. He is prone to very challenging behaviours. When his mother swore her initial affidavit at the outset of these proceedings in November 2019, she deposed *inter alia* that the child's difficulties and challenging behaviours –

> "*… have escalated in recent times to the point of being unmanageable in terms of the risk that* [he] *presents to himself and others.*"

In a later passage she averred:

> "*As noted by the social workers there is a risk of fatality in this case. This is, in my view, a tragedy waiting to happen.*"

She advocated an urgent admission to a Trust facility known as Lindsay House in the circumstances prevailing, which she described as "*this time of acute family crisis*".

[4] Proceedings were commenced almost two months after the date of the impugned decision of the Trust, which was that JR97 should not be admitted to the aforementioned Lindsay House. The date of this decision was 03/04 October 2019. It was common case that Lindsay House was <u>then</u> the only Trust facility potentially available which could have catered adequately for JR97's needs. The admission, had it materialised, would have been designed to provide respite to the child's carers, namely his mother and grandparents and would have entailed an initial period of assessment in a context wherein, by virtue of his challenging behaviours, no other children would have been permitted to avail of the facility.

[5] While, with the benefit of retrospect, this is a case which would appear to have merited very urgent judicial determination indeed this, for whatever reason, did not occur. Some three months elapsed between the initiation of the proceedings and the final hearing, on 02 March 2020. The court gave judgment on the latter date. During the intervening period the Trust, in the usual way, provided affidavit evidence. Its initial affidavit was sworn over three months following the impugned decision. The deponent averred, based on information forthcoming from JR97's grandparents and other professionals involved, that while aspects of the child's behaviour remained very challenging it had "*settled over the previous few weeks*" with longer "*settled periods*". No recent incidents of physical aggression had been reported. The Trust continued to provide what the deponent described as "*intensive social work involvement*", while periodic multi-disciplinary meetings were maintained. Notably, when JR97's mother swore her second affidavit some four weeks later she was describing the circumstances surrounding the impugned decision of 03 October 2019 in the past tense –

> "*… my child (and my family)* <u>*were*</u> *in an acute crisis situation …*"

[emphasis added]

Simultaneously the mother described her acceptance, albeit reluctant, of a placement in an alternative facility other than Lindsay House.

[6] Pausing, it is not clear – again in retrospect – that when at first instance the court completed its hearing of this case and gave judgment any practical or effective relief would have been ordered in the event of the challenge succeeding. The order of the court was, of course, a dismiss of the judicial review application.

[7] If there were any force in the tentative analysis mooted in the immediately preceding paragraph it would, inevitably, apply *a fortiori* at the stage when JR97's appeal came on for hearing in this court, on 01 October 2020, that is to say fully one year following the impugned decision of the Trust. At this stage a chronology of events provided at the request of the court demonstrated beyond argument that there had been significant developments in the interaction between JR97's family and the Trust during the intervening 12 month period. Two illustrations will suffice. First, on 20 May 2020 JR97 was discharged from the "*Intensive Support Service*", his carers (his grandparents) reporting that "*… things at home were positive and a Positive Behaviour Support Plan was in place*". Second, on 05 September 2020 the child's grandparents were granted an interim residence order, on the basis of *inter alia* their clearly demonstrated commitment to providing long term love and care to him.

[8] The resume provided at [3] – [7] above should illuminate my initial reservations about the utility of perpetuating this appeal. Notwithstanding two features in particular of the hearing conducted on 01 October 2020 persuaded me otherwise. First, on behalf of JR97 Mr David Scoffield QC (appearing with Mr Steven McQuitty of counsel) very sensibly and properly acknowledged, in response to the court's probing, that at this remove the only relief being sought was declaratory in nature. Second, a series of fruitful exchanges with the bench exposed that a declaration framed in certain terms would be of some value. I elaborate briefly on this as follows.

[9] As the hearing unfolded, one stand out feature of the legal framework, namely that the Trust's refusal to place JR97 in Lindsay House at the material time was in breach of its express statutory duty to him, emerged. This duty is found in Article 21(1) (c) of the Children (NI) Order 1995 (the "*1995 Order*"), which provides in material terms, under the rubric "Provision of Accommodation for Children: General":

> "*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 ….*
>
> *The person who has been caring for him being prevented (whether or not parentally, and for whatever reason) from providing him with suitable accommodation or care.*"

It is common case that the Trust is the "*authority*" to which Article 21 has at all material times applied vis-à-vis JR97. Article 21(4) is also to be noted:

> "*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.*"

[my emphasis]

[10] What is the import and scope of this statutory provision? In the broad field of social welfare the exercise of reading across between Northern Ireland's statutory provisions and their apparent counterparts in legislation applying in England and Wales is invariably one to be undertaken with caution since the two jurisdictions have, since the foundation of the welfare state, followed different paths. This is one of the consequences of social and child welfare not having been a matter reserved to Westminster following the creation of the Northern Ireland state almost a century ago.

[11] Somewhat unusually, however, there is a direct correlation in the present context. Article 21(1)(c) of the 1995 Order is mirrored *verbatim* in section 20(1)(c) of the Children Act 1989 (the "*1989 Act*"). Furthermore, section 20(4) of the 1989 Act replicates precisely Article 21(4) of the 1995 Order. This is not altogether surprising given that, in general terms, the 1995 Order closely mirrors the 1989 Act.

[12] In *R (JL) v Islington London Borough Council* [2009] EWHC 458 (Admin) 515 Black J analysed the relevant provisions of the 1989 Act in these terms:

> "*Section 20(1) and section 20(4) are in clearly contrasting terms. Under section 20(1) a local authority **shall** provide accommodation whereas under section 20(4) it **may** provide accommodation. Not surprisingly, therefore, the group of children covered by section 20(1) is more stringently circumscribed than those covered by section 20(4) …* [which] *… is merely a permissive section, giving the local authority power to provide* [etc] *…*

*In contrast ... **section 20(1) gives rise to an absolute duty.** To come within it, the child must not only be in the local authority's area. He must also (a) be in need and (b) require accommodation as a result of one of the three conditions set out in the subsection."*

[emphasis added]

In the present case at first instance the court adopted this analysis fully. We consider that it was correct to do so. There is a consistent stream of jurisprudence in this jurisdiction to like effect: see *Re JR66* [2012] NIQB 5, *Re MP* [2014] NIQB 52 at [71] especially and *Re OC* [2018] NIQB 34.To this we would add that there is no dispute that at the time when the impugned decision was made the qualifying conditions triggering the Trust's absolute duty to JR97 were satisfied.

[13] At this remove and with the benefit of the retroscope, it is apparent that Article 21(1) (c) should really have formed the centrepiece of JR97's legal challenge. In truth it is all that was required. Having reviewed the formulation of the grounds of challenge and the parties' written submissions it is clear that it did not do so. Rather a series of other familiar public law misdemeanours, in particular the contentions that the Trust had fettered its discretion and had taken into account immaterial considerations, lay at the heart of the challenge. This could explain why the judge, having identified these statutory provisions <u>and</u> the decision in *JL*, did not extend his analysis to include the consequences arising therefrom in the present case.

[14] The foregoing observations are made for the purpose of illuminating rather than criticising. As decisions in this jurisdiction such as *Re McClean's Application* [2011] NIQB 42 and *Re JR47's Application* [2013] 7 illustrate, social/child welfare statutory provisions giving rise to an absolute duty on the part of the public authority concerned are rare. Furthermore, the preoccupation with <u>other</u> public law grounds of challenge in the present case is unsurprising having regard to certain features of the factual matrix which it has not been necessary to rehearse in this judgment.

[15] I revert to what is said at the outset of this judgment. It is trite that public law remedies are discretionary. Thus a successful judicial review litigant can lay claim to no right to a corresponding remedy of any kind. In the context of the present appeal the focus is exclusively on declaratory relief. Given the central element of discretion there are no hard and fast rules to be applied. The cases show, however, that in appropriate instances the court may be minded to grant a declaration where this will provide a benefit transcending the boundaries of the proceedings in question, for example where it will provide education and guidance to the public authority concerned and others, including putative litigants and the legal profession.

[16] This we consider to be such a case. A declaration will draw desired attention to Art 21 of the 1995 Order and contribute to fortifying the protection of one of society's most vulnerable cohorts namely children. Furthermore, there is no indication in what was a heavily documented decision making process that the social care and other professionals involved in JR97's case were alert to the statutory duty to which the Trust was subject. We take into account finally that declaratory relief will provide a measure of vindication for JR97 and his mother in circumstances where the decision making of the Trust was, to say the least, unsatisfactory.

Conclusion and disposal

[17] Giving effect to the foregoing reasoning, it is clear that any reservations that this appeal should be dismissed *in limine* on the ground that it is in substance academic, having regard to the leading decision in *R v Secretary of State for the Home Department, ex parte Salem* [[1999] 1 AC 450, should not prevail. The appeal is allowed and the court makes a declaration in the terms set out at [1] above.

Costs

[18] Having considered the parties' written submissions, we exercise our discretion by awarding costs to JR97 both above and below, to be taxed in default of agreement. This will be coupled with a legal aid taxation order.