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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION
(OFFICE OF CARE AND PROTECTION)

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IN THE MATTER OF AN APPEAL BY WAY OF CASE STATED FROM THE SPECIAL EDUCATIONAL NEEDS AND DISABILITY TRIBUNAL PURSUANT TO ARTICLE 24 OF THE EDUCATION (NORTHERN IRELAND) ORDER 1996 AND ORDER 56 OF THE RULES OF THE COURT OF JUDICATURE (NORTHERN IRELAND) 1980

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Between:

ML

Appellant

and

(1) THE SPECIAL NEEDS AND DISABILITY TRIBUNAL
(2) THE EDUCATION AUTHORITY

Respondents

and

(1) NORTHERN IRELAND COMMISSIONER FOR CHILDREN AND YOUNG PEOPLE
(2) THE ATTORNEY GENERAL FOR NORTHERN IRELAND

Intervenors

and

A HEALTH AND SOCIAL CARE TRUST

First Notice Party

and

THE DEPARTMENT OF EDUCATION FOR NORTHERN IRELAND

Second Notice Party

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Mr McQuitty (instructed by Worthingtons Solicitors) for the Applicant
Mr Sands for the Tribunal

Mrs McCartan for the Education Authority
Dr Treanor for the Department of Education
Mr Potter for the Health Trust
Mr Morgan for the NI Children's Commissioner
The Attorney General intervened by way of written submissions

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KEEGAN J

Introduction

[1] This case has been anonymised as it involves a young person who has a disability and special educational needs. Nothing must be published which would identify him or his family.

[2] The case comes to the court by way of requisition of Case Stated sent by the Special Educational Needs and Disability Tribunal (SENDIST) (also referred to as "The Tribunal"). This relates to a decision dated 21 January 2020 which dismissed the appellant's appeal under the Education (Northern Ireland) Order 1996 ("the 1996 Order") in respect of the Special Educational Provision/Placement in Part IV of the Young Person's Amended Statement of Special Educational Needs, which is dated 6 September 2019. In summary that special educational provision provided for the young person returning to a special school ('the school') with a bespoke unit to deal with behaviour management instead of a recommendation for home tuition which was his mother's preference. The mother is the appellant.

The Case Stated

[3] The Tribunal were furnished with a draft requisition and asked to state a case as follows:

(i) Did the Tribunal err in law by failing to determine whether the placement provided for in the Statement was "appropriate" within the meaning of Article 16(4)(a) of the 1996 Order, properly construed by reference to sections 3 and 6 of the Human Rights Act 1998?

(ii) Insofar as the Tribunal did, implicitly, rule that the proposed placement was appropriate did that decision amount to an error of law?

(iii) In particular, did the Tribunal err in law by failing to conclude that appropriate in this context must include that the proposed placement is lawful by reference to section 3 and 6 of the Human Rights Act 1998, noting that it was common case between the parties that the placement proposed amounted to a deprivation of liberty wherein no lawful authorisation has been sought by the school or by the respondent, in accordance with a procedure prescribed by law, whether by way of declaratory order or, if applicable, under the terms of the Mental Capacity Act (Northern Ireland) 2016 (the MCA 2016)?

(iv) Did the Tribunal err in law by taking the view that the role of the Tribunal was to hear the evidence submitted by the parties and determine whether the young person's needs can best be met by his reintegration into the special school or by home tuition, without having to determine whether the placement proposed was (as a necessary and foundational step) lawful by reference to sections 3 and 6 of the Human Rights Act 1998?

(v) By dismissing the appeal and thereby endorsing the placement, did the Tribunal itself breach section 3 and/or 6 of the Human Rights Act 1998, as a contravention of the young person's rights under Article 5 ECHR, given that the placement proposed amounts to a deprivation of his liberty which had (and has) no lawful authorisation?

(vi) If prior authorisation for the proposed deprivation of liberty was required, should this have been sought under the terms of the MCA 2016 or by way of declaratory order?

(vii) Should the Tribunal have allowed the appeal on the basis that the placement set out in Part IV of the amended Statement of Special Educational Needs could not – in law – ever be considered appropriate (properly construed by reference to Section 3 of the Human Rights Act 1998) given that it would amount to an unauthorised deprivation of liberty, in breach of the young person's rights under Article 5 ECHR?

(viii) Should the Tribunal have adjourned the appeal to await confirmation that the deprivation of liberty proposed had been authorised in accordance with the procedure prescribed by law?

(ix) Did the Tribunal otherwise err in law by their decision to dismiss the appeal?

[4] The requisition by the Tribunal was:

(1) Did the conditions of placement at [the school] amount to a deprivation of liberty for the purposes of Article 5 ECHR;

(2) If the placement at [the school] did amount to a deprivation of liberty to which the child was not capable of giving his consent then were we required to consider how any such deprivation of liberty should be authorised, whether by way of Declaratory Order of the High Court, under the Mental Capacity Act (Northern Ireland) 2016 or otherwise?

The decisions in this case

[5] I have previously been involved in this case and I provided a judgment in a judicial review in relation to this young person which is reported at *Re JR94's Application (Leave Stage)* [2019] NIQB 112. In that case the applicant asked for leave

to be granted to apply for judicial review of the decision by the Education Authority ("EA") to discontinue home tuition for the applicant. I set out the history in that judicial review and I declined to grant leave because I considered that the matter should be heard by the Specialist Tribunal. At paragraph [30] I said this:

> "I conclude this judgment by saying that I have great sympathy for the applicant and his family. It is not an easy task to care for this child or to see the way forward for him and as I have said I appreciate the mother's concerns which should be fully ventilated at the specialist tribunal. There is an imperative to have a swift decision for this family. The mother should be entitled to make her case which is that home tuition is the best for this child. I note that Mrs McCartan in her argument says that the EA has never challenged a SENDIST decision. If this is not the preferred option and the decision of the tribunal is that the school is the proper placement the mother can obviously consider that in the round. However, I do hope that there is respectful and proper engagement between the two parties in this case both before the tribunal and thereafter in trying to come up with what is the best solution in a very difficult situation for this child."

That decision was delivered on 3 December 2019.

[6] I must commend all parties for swiftly proceeding to SENDIST, which heard the case on 17 December 2019 and issued a written decision dated 20 January 2020. This is commendable and proper practice, which I am sure is adopted across the board and is a model of how these cases should be progressed swiftly taking into account the young person at the heart of them.

[7] In the Tribunal decision the facts are set out as follows. Reference is made to the fact that the young person is 17 years old and has special educational needs as a result of severe learning difficulties, social, behaviour and emotional wellbeing difficulties and his medical diagnosis of Autistic Spectrum Disorder. The facts also highlight that medical advice is that in addition to his diagnosis of Autistic Spectrum Disorder and severe learning difficulties the young person also has epilepsy, challenging behaviour, fluctuating tic disorder, habitual air swallowing and vomiting and nocturnal enuresis with some daytime incontinence. The young person is reported to have had a Statement of Special Educational Needs since 2008 and has attended a special school since that date until 2018 when following an incident at the school they had to accept that they could no longer meet the young person's needs without the provision of additional accommodation.

[8] The facts cited state that the young person has always had challenging behaviour but as he got older his behaviour became more difficult to manage as he

became bigger and stronger. The evidence from the school was that they had become aware that they did not have sufficient space for the young person to "chill" which was big enough for him as a grown man. Therefore, in February 2018 the principal of the school had formally requested additional accommodation from the EA. From October 2018 the young person was out of school as the school were not able to guarantee the safety of other pupils and staff. It is apparent from the papers that the young person assaulted a staff member in October 2018. From December 2018, following a pre-action letter issued by the applicant's solicitor to the Education Authority the young person was provided with 4.5 hours home tuition per week as an interim measure. The EA in their response to the applicant's solicitor also explained that a bespoke modular unit was being built to meet the young person's needs which would contain a classroom, bathroom facilities, and most importantly, a safe area for the young person to go when experiencing a challenging episode, with facilities for staff to remain in a safe place during such time. The EA also advised that the young person would not be able to return to the school until this unit was ready. Therefore, home tuition continued until the end of June 2019.

[9] In anticipation of the young person's return to school a Positive Behaviour Support Plan was put in place from March 2019, which was subject to revisions in May 2019 and June 2019. The Tribunal flagged a particular concern, which was also part of the judicial review case that I heard, that the young person's mother had in relation to the first and second drafts of the plan, which was the recommendation that social services or the Police Service of Northern Ireland ("PSNI") might be called into school if neither the young person's mother or father could be contacted. This was removed from the third version of the plan, however the young person's mother remained concerned that the school might still contact social services or the PSNI, if neither she nor the young person's father could be contacted as the plan still provided for the school to take "whatever steps are necessary to render the situation safe."

[10] The Tribunal then records that the young person's mother visited the school on 11 June 2019 and viewed the bespoke classroom, which had been built specifically for him. She agreed that this was contained within a nice modern building. However, it is reported that the mother was also concerned that in her view it resembled "a prison cell" with key fobs/code pads to allow access to and exit from the unit, and that it is also fenced off right around with gates on each side. She felt it would not work for the young person as he would be isolated from peers and the curriculum.

[11] The Tribunal then sets out the submissions made by each party. The Tribunal heard from the principal of the school. The Tribunal also heard from the Acting Vice Principal and from a Consultant Clinical Psychologist who advised that in her view the facility was a wonderful opportunity for this young person as the unit had been designed to positively and proactively promote his learning opportunity. The decision records that in relation to this the Consultant Clinical Psychologist said, "she was involved in the drawing up of the Behaviour Support Plan which sets out recommendations which are designed to pro-actively decrease the likelihood of

challenging behaviour occurring." In the event that this does occur the plan also set out the strategies which might be used by staff.

[12] In the course of the assessment it was agreed that to be transparent, the professionals should document all strategies which might be used. The young person's mother had strong objections to any suggestion that either social services or the PSNI might be called. The doctor emphasised that this strategy would not be specific to this young person but that it could apply where appropriate to any pupil in the school.

[13] At this point in the hearing it is clear that the principal advised that this mechanism of calling social services or the PSNI would be avoided at all costs and that PSNI have never been contacted in relation to this young person not even during the incident on 8 October 2018. In evidence the principal also described the unit and advised that access is by keypad for child protection purposes and that staff also have a key fob for ease of access. She noted that there is a fire door at the back of the classroom which can be pushed to exit. The door into the bathroom swings both ways for ease of access so that if, for example, the young person falls against the door it can still be opened. She also pointed out there is no lock either on the bathroom or the chill-out room. In response to questions from counsel the principal also clarified that the unit is designed for use at specific times and not for the whole school day. It is intended to assist the young person's transition from home tuition back into the classroom with his peers and provides a place where staff can withdraw and allow the young person his own space.

[14] The Tribunal also records the parents' submissions in that the young person's mother advised he now has a good routine at home, he has his own jobs around the house and goes to the shops with her and also goes swimming. The mother said that she was very impressed with the tutor's work with the young person and the progress he had made during the period when home tuition was provided. She said that the young person will think that he is going back to school but that he will be going through a different entrance and he will be going to the unit not the school. She also advised that she had been working with Adult Services who have done a care assessment. She has discussed with them placement in an adult centre but will need to see if they can cope with this young person.

[15] I should say that during the course of the judicial review I was made aware that the mother has her own difficulties. She is separated from the young person's father and she has her own care needs. It is also apparent that the young person spends time between each parent.

[16] I was also informed that the Tribunal was also asked to adjourn however that application was refused.

[17] The Tribunal gave a statement of reasons for its decision as follows:

"Having carefully considered all the evidence at the hearing and the papers which the parties submitted in evidence together with the relevant legislation and the Code of Practice, the Tribunal has decided to dismiss the appeal for the following reasons:

(i) The Panel were very impressed with the evidence given by the school at the hearing in relation to their knowledge of this young person and his needs and the planning that had gone into the design of the new unit to meet his needs and assist in his reintegration back into the classroom;

(ii) The Panel note the evidence given by the school that the unit has not been designed as a secure unit as only the front door, store and staff backroom can be locked;

(iii) The Panel have come to the view that it would be in the young person's best interests to have the opportunity to reintegrate back into school and to benefit from social interaction at school as this will give him a much better chance with a smooth transition to adult services;

(iv) The Panel hope that the young person's mother will have been reassured by the evidence given by the school at the hearing that the unit is not intended to be a permanent solution but that it is intended to assist the wrong person's reintegration to school and to be able as a retreat either for him or for his classmates if he has a challenging episode; and

(v) The Panel also hope that the young person's mother will be reassured by the evidence given by the school, that when the PSNI could become involved with any child in any school or in the community, the school have acquired a lot of knowledge of this young person and his needs and how to manage his behaviours which has been built up over all the years he has been attending the school, and that with the right environment challenging behaviour is less likely to occur, but if it does occur the school now has the space to allow this young person to de-escalate."

Accordingly, the Tribunal dismissed the appeal.

Legal Context

[18] I start with the Education (Northern Ireland) Order 1996. Article 10 provides for Special Educational provision otherwise than in a grant aided school and reads as follows:

> "10.—(1) Subject to paragraphs (2) and (3) and to Articles 11 and 12, the Authority may arrange for the special educational provision (or any part of it) which any learning difficulty of a child calls for to be made—
>
> (a) in an institution outside Northern Ireland, or
>
> (b) in Northern Ireland otherwise than in a grant-aided school.
>
> (2) A board shall not make any arrangements under paragraph (1) unless it is satisfied that—
>
> (a) the interests of the child require such arrangements to be made; and
>
> (b) those arrangements are compatible with the efficient use of resources.
>
> (3) Before making any arrangements under this Article, the Authority shall consult the child's parent.
>
> (4) This Article is without prejudice to any other powers of the Authority."

[19] Article 16 is the provision in relation to Statements of Special Educational Needs and reads as follows:

> "16.—(1) If, in the light of an assessment under Article 15 of any child's educational needs and of any representations made by the child's parent, it is necessary for the Authority to determine the special educational provision which any learning difficulty he may have calls for, the Authority shall make and maintain a statement of his special educational needs.
>
> (2) The statement shall be in such form and contain such information as may be prescribed.

(3) In particular, the statement shall—

(a) give details of the Authority's assessment of the child's special educational needs, and

(b) specify the special educational provision to be made for the purpose of meeting those needs, including the particulars required by paragraph (4).

(4) The statement shall—

(a) specify the type of school or other institution which the Authority considers would be appropriate for the child,

(b) if the Authority is not required under Schedule 2 to specify the name of any grant-aided school in the statement, specify the name of any school or institution (whether in Northern Ireland or elsewhere) which it considers would be appropriate for the child and should be specified in the statement, and

(c) indicate any provision for the child for which it makes arrangements under Article 10(1)(b) otherwise than in a school or institution and which it considers should be indicated in the statement.

(4A) Paragraph (4)(b) does not require the name of a school or institution to be specified if the child's parent has made suitable arrangements for the special educational provision specified in the statement to be made for the child.

(5) Where the Authority maintains a statement under this Article—

(a) unless the child's parent has made suitable arrangements, the Authority—

(i) shall arrange that the special educational provision indicated in the statement is made for the child, and

(ii) may arrange that any non-educational provision indicated in the statement is made

for him in such manner as it considers appropriate, and

(b) if the name of a grant-aided school is specified in the statement, the Board of Governors of the school shall admit the child to the school."

[20] Article 18 provides for an appeal against the contents of the statement and reads:

"18.—(1) The parent of a child for whom the Authority maintains a statement under Article 16 may appeal to the Tribunal—

(a) when the statement is first made,

(b) if an amendment is made to the statement, or

(c) if, after conducting an assessment under Article 15, the Authority determines not to amend the statement.

(1A) An appeal under this Article may be against any of the following—

(a) the description in the statement of the Authority's assessment of the child's special educational needs,

(b) the special educational provision specified in the statement (including the name of a school so specified),

(c) if no school is specified in the statement, that fact

…

(3) On an appeal under this Article, the Tribunal may—

(a) dismiss the appeal,

(b) order the Authority to amend the statement, so far as it describes the Authority's assessment of the child's special educational needs or specifies the special educational provision, and make such other consequential amendments to the statement as the Tribunal thinks fit, or

(c) order the Authority to cease to maintain the statement."

[21] Article 24 also reads as follows:

> "24. Where a party to an appeal to the Tribunal is dissatisfied in point of law with a decision of the Tribunal, that party may, according as rules of court may provide, either appeal therefrom to the High Court or require the Tribunal to state and sign a case for the opinion of the High Court."

[22] The next piece of legislation of relevance is the Mental Capacity Act (Northern Ireland) 2016. This Act applies to persons aged 16 or over. In Northern Ireland it is only partially implemented but the deprivation of liberty authorisation system is now in force. Statutory responsibility within this legislative scheme is given to the health and social care trusts to supervise the authorisation of deprivation of liberty under Schedule 1, which provides for Trust Panels. The Deprivation of Liberty Regulations according to Schedule 1 paragraph 10 apply in a health and social care setting where "appropriate care or treatment" is available in the place in question. The grounding statutory provisions in relation to the deprivation of liberty are at Sections 24-27 of the Act mirrored in the Schedules and the Regulations which are the Mental Capacity and Deprivation of Liberty (No.2) Regulations (Northern Ireland) 2019.

[23] It has been pointed out that the Northern Irish legislation does not prescribe the place of the deprivation of liberty either in the Act or the Regulations. Section 24 deals with deprivation of liberty as follows:

> "24.—(1) This section applies where the act mentioned in section 9(1) amounts to, or is one of a number of acts that together amount to, a deprivation of P's liberty.
>
> (2) Section 9(2) (protection from liability) applies to the act only if—
>
> (a) the deprivation of P's liberty consists of—
>
> (i) the detention of P, in circumstances amounting to a deprivation of liberty, in a place in which care or treatment is available for P; or
>
> (ii) related detention;
>
> (b) the detention in question is authorised; and

(c) the prevention of serious harm condition (as well as the conditions of section 9(1)(c) and (d), and any other conditions that apply under this Part) is met."

(5) In this Part any reference to an act which is one of a number of acts that together amount to a deprivation of P's liberty includes (in particular) where P is detained in circumstances amounting to a deprivation of liberty, instructing another person to carry out or continue the detention."

[24] Section 25(2) states as follows:

"(2) "Related detention" means—

(a) the detention of P in circumstances amounting to a deprivation of liberty while P is being taken to a place in which care or treatment is available for P; or

(b) the detention of P in circumstances amounting to a deprivation of liberty in pursuance of a condition imposed on P that relates to permission given to P to be absent from a relevant place (as defined by section 27).

(3) Detention is "authorised" if, at the time the act is done, there is in force an authorisation granted—

(a) by a panel under Schedule 1, or

(b) by the making of a report under paragraph 2 of Schedule 2 (authorisation of short-term detention for examination etc),

which authorises that detention.

(4) See paragraph 22 of Schedule 1 or paragraph 18 of Schedule 2 (as the case may be) for provisions about the scope of an authorisation.

(5) The prevention of serious harm condition is that at the time the act is done D reasonably believes—

(a) that failure to detain P in circumstances amounting to a deprivation of liberty would create a risk of serious harm to P or of serious physical harm to other persons; and

(b) that the detention in question is a proportionate response to—

(i) the likelihood of harm to P, or of physical harm to other persons; and

(ii) the seriousness of the harm concerned."

[25] The Mental Capacity (Deprivation of Liberty) No.2 Regulations (Northern Ireland) 2009 and Form 5 thereof state:

> "A deprivation of liberty authorisation must specify the place of the deprivation. The authorisation can cover deprivation of liberty in more than one place, for example in the place of residence of the person and in the day care centre or the ordinary place of residence of the person and in a named place of respite."

[26] Article 5 of the European Convention on Human Rights ("ECHR") applies which is the right to liberty and security and reads as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court; (b) the lawful arrest or detention of a person for non- compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

[27] The Human Rights Act 1998 also provides at Section 3(1):

"3(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section—

(a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility."

[28] Section 6 of the Human Rights Act 1998 refers to the acts of public authorities:

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

(2) Subsection (1) does not apply to an act if—

(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

(3) In this section "public authority" includes—

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature,

but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament."

The Arguments

[29] Mr McQuitty appeared on behalf of the appellant and in his comprehensive written arguments which he augmented with oral submissions he made the following points:

(i) Mr McQuitty argued that the Tribunal has a duty to apply common law and Convention obligations as a public authority and given these obligations the Tribunal could not simply ignore the deprivation of liberty/need for authorisation in this case. He therefore argued that the Tribunal fell into error in its approach as it could not conclude that the placement proposed by the Education Authority was appropriate where it would give rise to a deprivation of liberty and where there was no authorisation in place at the time of the finding by the Tribunal.

(ii) Mr McQuitty said that such an approach is inconsistent with the requirements of Article 5 of the ECHR as the key purpose of Article 5 is to prevent arbitrary and unjustified deprivations of liberty and there is a positive obligation to do that.

(iii) In light of the legal principles the appellant submitted that as a matter of statutory construction the Tribunal was required in assessing whether the proposed placement was appropriate to expressly take into account that this

(i) amounted to a prima facie deprivation of liberty and/or that the parties agreed that such a deprivation of liberty would arise; and (ii) that there was no authorisation in place.

(iv) Mr McQuitty therefore argued that appropriate also meant legal and could not comprise educational provision which would be unlawful.

(v) Mr McQuitty argued that the Tribunal's decision had to stand as it was and there could be no *ex post facto* reasoning in relation to this.

(vi) Mr McQuitty also argued that in terms of sequencing it was not right to say that the Tribunal should simply decide and then if an authorisation is needed it could go under the Mental Capacity Act. He made an argument that the Statement itself was part of a process and that the Statement is binding from the point of issue. Mr McQuitty made the point that the process of authorisation of a deprivation of liberty is not an onerous task. He therefore argued that the appeal should either have been allowed before the Tribunal or adjourned for a deprivation of liberty authorisation. Mr McQuitty also referred to a middle ground argument that if I was not with him on the substantive argument that the Tribunal erred in not considering a potential deprivation of liberty not yet authorised.

[30] The Tribunal was represented in this case by Mr Sands who filed a skeleton argument and supplemented that with oral submissions during which he essentially made the following points.

(i) Firstly, he said that whilst the proposed placement in the Statement refers to special educational needs the Tribunal's task is to consider whether that is appropriate. He maintained that the Tribunal did not consider that deprivation of liberty was a live issue on the basis that the proposed placement did not give rise to a deprivation of liberty.

(ii) Secondly, Mr Sands also said that in circumstances where a proposed placement would amount to a deprivation of liberty this does not prevent a Tribunal from adjudicating on whether the placement is appropriate for the purposes of Article 16 as appropriate means to meet the special educational needs of the young person.

(iii) Thirdly, Mr Sands maintained that any such placement could not be commenced until the necessary authorisation was obtained in any event.

(iv) Mr Sands also referred me to some of the authorities in relation to deprivation of liberty and queried whether or not this truly applied in a school situation and whether or not this was a restriction rather than a deprivation of liberty in any event given that the school is not a residential school, it is a day school for children with severe learning difficulties. The proposed placement is a bespoke modular unit in the grounds of the school but separate from it, with a

teaching kitchen and teaching bathroom. It was planned that the unit would be used to gradually reintegrate the young person into the main classroom and the unit was to be used for specific times of the day and not the whole day.

(v) In the alternative Mr Sands said that if the placement does amount to a deprivation of liberty then it must be authorised but this is effectively a separate process.

[31] Mrs McCartan then made her submissions on behalf of the Education Authority as follows:

(i) In broad terms she said that SENDIST were right to proceed and that any issue is addressed by Article 16 of the 1996 Order which refers to the appropriateness of education provision. She referred to the fact that this was a specialist tribunal who had to deal with that and that there was absolutely nothing wrong in the process.

(ii) Mrs McCartan argued that the concern here was a usurping of the statutory panel which makes the deprivation of liberty authorisations if SENDIST were to look at that.

(iii) She was also quite clear that the sequencing of this had to be an assessment of the special educational provision and then an assessment of whether or not a deprivation of liberty would be required.

(iv) Mrs McCartan referred me to the Mental Capacity Act which looked at prospective authorisations. Mrs McCartan also referred to the fact that in the course of training the Education Authority had been advised that the deprivation authorisation would be sought by the social work representatives and that there was an obvious need to work on a multi-disciplinary basis in this type of case.

[32] The Attorney General filed a very helpful written argument in which she said as follows:

(i) Following the decisions of the UK Supreme Court in *Cheshire West* [2014] UKSC 19 and *D (A Child)* [2019] UKSC 42 the day to day care arrangements for a number of young people are now considered to amount to a deprivation of liberty for the purposes of Article 5 of the ECHR.

(ii) The Attorney however said that the Special Educational Needs and Disability Tribunal did not err in failing to consider how a deprivation of this young person's liberty should be authorised as there is no statutory obligation on it to do so, whether on an ordinary reading of the Education (Northern Ireland) Order 1996 or taking into account section 3 or 6 of the Human Rights Act.

(iii) The Attorney General referred to the specific duty on the Tribunal. She referenced the judgment of O'Hara J in *MB v SEMT and WELB* [2014] in which the judge said that:

> "in order to determine whether the school was appropriate for D, an assessment had to be made by the Tribunal of what the school offered and of D's needs. Authorisation of the deprivation of liberty is not called for by the young person's learning difficulty."

The Attorney General argued that it is not relevant to whether what the school offers matches his educational needs. She further says, "it is of course an element of the protection of his right to liberty."

(iv) The Attorney General said that the Tribunal on the appellant's reasoning is required to read 'appropriate' in a way which engages consideration of the wider legal environment impacting the proposed child. She says that this approach to what is appropriate would go far beyond the current consideration of whether there is a match between what the school offers and what the school needs. In this regard the Attorney General referred to the case of *Re S (FC v In Re S and others) in relation to starred care planning* [2002] UKHL 10 and the words of Lord Nicholls that:

> "A meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment. This is especially so where the departure has important practical repercussions which the court is not equipped to evaluate."

(v) The Attorney General also says there was no indication at the time of hearing that the Education Authority did not intend to secure authorisation for any deprivation of liberty. If at a future point the relevant Trust refused to authorise either care arrangements at home or specifically the care arrangements at the school then the legal consequences arising from that decision fall to be addressed at that point. Overall, the Attorney General therefore supported the Education Authority in defence of the procedure undertaken at the Tribunal.

[33] Dr Treanor also appeared for the Department of Education and she provided a helpful skeleton argument in this matter. In assisting, Dr Treanor said:

(i) There is no departmental policy in existence in relation to deprivation of liberty applications made for education settings. The Department is however currently in the process of reviewing guidance in relation to the use of

restraint and seclusion. Dr Treanor provided a supplementary argument setting out the details of this.

(ii) The Department also informed the court that it is aware of approximately 12 applications for deprivation of liberty authorisation for children who attend special schools in a similar position. There is no information held for children in mainstream schools.

[34] Mr Morgan appeared on behalf of the Northern Ireland Commissioner for Children and he provided a very helpful skeleton argument which he supplemented with some submissions which I summarise as follows:

(i) Firstly, Mr Morgan submitted that there was guidance required as to when authority was needed for this type of authorisation if there was a query of deprivation of liberty should that be prior to or after the Statement.

(ii) Secondly, he referred to the sequencing issue, which he suggested should involve timely co-ordination to avoid delay.

(iii) Thirdly, he said there was a question mark as to who makes the application for authorisation and that it may be a Trust at the request of the Education Authority.

(iv) Fourthly, he raised the point that this is a very important area for the Commissioner in relation to the potential deprivation of liberty of young persons and that it needs effective oversight. Mr Morgan reiterated this and said that the Commissioner believes that there is a need for young people, parents, Department of Education and Department of Health to be fully informed in this.

[35] Mr Potter also appeared on behalf of the Trust and assisted in relation to the Mental Capacity legislation as follows:

(i) Firstly, he said in the Mental Capacity Act sections 24 and 27 and Schedule 1 in the Regulations the word 'place' is not restrictively defined which means that unlike the equivalent legislation in England and Wales a deprivation of liberty can be regarding a residential placement, a care home, a hostel or a private home or a day facility such as a school.

(ii) Secondly, he referred to training last year which did refer to deprivation of liberty authorisations potentially being sought in relation to special schools.

(iii) Thirdly, he informed me that from 9 April this year there is a deprivation of liberty authorisation in place in relation to this young person's two homes (being his mother's and father's homes) which enables them to provide lawful detention.

(iv) Fourthly, he referred to the fact that if there was any question in this type of situation about authorisation of deprivation of liberty it would be brought under the Mental Capacity Act rather than by way of declaratory relief now that the statutory scheme is up and running.

Consideration

[36] This case obviously involves important issues within the setting of special education. As far as this young person goes the point may become academic as he finishes education in June 2021. However, the case raises wider issues in relation to the inter-play between special educational provision and Convention rights given the potential deprivation of liberty. I have been greatly assisted by all of the arguments made and whilst I have been asked to give guidance in this area I am conscious that there is an ongoing process being undertaken by the Department of Education and that, as a result, the statutory agencies who have responsibility in this area are rightly looking at processes. This case has highlighted the need for this work to continue on a multidisciplinary basis in order that children are protected in a school setting and that procedures are Convention compliant. To that end I will start by setting out where the consultation stands from the information I have been given.

[37] The Department of Education has informed me that in 2019 it identified a need to update extant guidance on the use of reasonable force or control of pupils in schools. I also set out the details provided by Dr Treanor in her supplementary argument as follows. In early 2020, following the restoration of the Northern Ireland Assembly and the Northern Ireland Executive, the Minister for Education asked Department officials to review the use of restraint and seclusion. This review was to be undertaken in collaboration with relevant partners, with the aim of developing updated guidance for educational settings to ensure that any seclusion and/or restraint is reasonable, proportionate and justifiable in the circumstances and, further, that appropriate documentation is completed. Work on this review was subsequently hindered by the ongoing COVID-19 pandemic, however a Working Group was formed in October 2020. The Working Group has membership from the Education Authority, the Departments of Justice and Health and other policy areas within the Department of Education. The Education and Training Inspectorate sit on the Working Group in an advisory capacity.

[38] I am told that The Working Group has met on a number of occasions and is being supported by a Reference Group (RSRG) of key stakeholders such as the NI Human Rights Commission, Children's Law Centre, Children with Disabilities Strategic Alliance, Chief Allied Health Professions Office, NI Commissioner for Children and Young People and the Equality Commission for NI. Barnardo's, The British Red Cross and the British Association of Social Workers (NI) are also represented on the Reference Group.

[39] In addition to reviewing extant guidance on the practice of restraint in schools, the Department has further identified a need to develop guidance on the use

of seclusion and the management of deprivation of liberty authorisations in educational settings. In terms of policy development regarding the specific issue of deprivation of liberty authorisations in educational settings, the Department's work is at a nascent stage, with consideration presently being given to the appropriate nature and format of the process itself. I am informed that the Department considers that, by necessity, a multi-disciplinary approach to this issue, involving input from the Department of Health, is required. As such, the Department has engaged initially with the Department of Health in relation to the implications of the Mental Capacity Act (2016) and the use of deprivation of liberty authorisations in educational settings for children, aged 16 and over, who do not have the mental capacity to make a decision about continuing at school. Further engagement is planned. This engagement is being urgently prioritised and the Department has requested, and presently awaits, legal advice in order to support this engagement.

[40] In terms of an indicative timeframe, the Department has said that officials are currently engaging with a range of stakeholders to inform development of the revised guidance concerning the use of restraint and seclusion. The Department has informed me that it is hoped that this guidance will be published during 2021. Also, whilst the issue of restraint and seclusion is distinct from that of deprivation of liberty, it is submitted that they are nevertheless linked in the sense that there is a commonality in the legal issues which may arise in respect of both. Consideration is, therefore, presently being given as to whether consolidated guidance addressing both issues should be formulated or, in the alternative, whether discrete guidance is more appropriate.

[41] It is obviously imperative that priority is given to this multi-disciplinary work to support and protect children in the special educational field. I can add my voice to the need for comprehensive guidance and whilst it is not for me to draft this guidance I can deal with some of the important legal issues raised in this case which may be of assistance going forward. My views are as follows.

[42] I consider that there is a strength in the argument made by the Education Authority supported by others that SENDIST is a Specialist Tribunal tasked under law to deal with a particular issue which is whether educational provision is appropriate. It is not tasked to authorise deprivations of liberty. In my view the Tribunal is capable of making a determination on whether educational provision is appropriate otherwise the statutory scheme would be frustrated and also delayed. This also applies to the issue of a Statement itself.

[43] In this case the core issue was whether home tuition or educational provision at school was appropriate. That is what parliament has asked the specialist tribunal to decide by virtue of Article 16 of the Education (Northern Ireland) Order 1996. There is some confusion about whether or not the Tribunal actually addressed deprivation of liberty as well. I do not think it is particularly purposeful to dissect this but suffice to say that there is nothing wrong with a Tribunal being alive to the issue and in fact that is preferable. However what it actually has to decide is the appropriateness of the educational provision on offer.

[44] The meaning of appropriate has been explained in the cases put before me particularly *C v Buckinghamshire County Council and the Special Educational Needs Tribunal* [1999] ELR 179 and *BM v Special Educational Needs Tribunal & Western Educational and Library Board* [2014] OHA9361. In that case O Hara J said:

> "There is no doubt that in order to determine whether the school was appropriate for D, an assessment had to be made by the Tribunal of what the school offered and what D needs. Unless there is a sufficient match between these two the school would not be appropriate for D for the purposes of Article 16(4)(b). That requirement is clear from the statute and from the decision of the Court of Appeal in England and Wales in *C v Buckinghamshire County Council and the Special Educational Needs Tribunal* [1999] ELR 179."

That is what the Tribunal is tasked to decide and in this case it did so by weighing up parental preference and the evidence provided by the Education Authority.

[45] It is clear that Article 5 may be engaged in these cases. Since the Supreme Court decided the case of *Surrey County Council v P and Cheshire West and Chester Council v P* [2014] UKSC 19 there is a greater appreciation of this. *Cheshire West* also illustrates the point that placements may be entirely appropriate and indeed benign but nonetheless require authorisation to comply with Article 5. This principle also applies in the educational sphere and means that there must be a parallel consideration of Article 5 issues by the respective authorities.

[46] I do not accept the argument that the Tribunal was required to interpret the legislation in such a way as to consider authorisation of deprivation of liberty. In my view that is a different consideration which forms part of a parallel process and it is not the function of SENDIST to deal with it under the relevant legislation. I agree with the Attorney General's arguments on this point and I consider that this approach is Convention compliant.

[47] This means that there has to be multidisciplinary joined up thinking in relation to these issues. It does appear clear to me that deprivation of liberty may be required in a school setting. It is not the function of SENDIST to determine whether there is a deprivation of liberty on the facts of any case or a restriction of liberty. That would usurp the statutory scheme which Parliament has put in place under the Mental Capacity Act 2016. I am informed by Mr Potter that the legislation in Northern Ireland allows for applications to be made in school settings. There have been some 12 applications of this nature and it appears that training has taken place. If the mental capacity legislation does not so provide there can be recourse to the inherent jurisdiction. Either way authorisation has to be sought to satisfy Article 5.

[48] Although there were arguments made before me about whether or not this is a deprivation or a restriction of liberty it is not a function of this court to decide on that substantive issue in this Case Stated. However, I note that authorisation has now been sought in relation to this young person's placement at home with his mother and father. If this special educational provision is a deprivation of liberty or if it is thought to be a deprivation of liberty I agree that the statutory authorities need to take a cautious approach and consider authorisation.

[49] As regards sequencing there is no difficulty in SENDIST operating and determining cases whilst this other parallel process occurs. It seems to me that the application for authorisation should be made by the relevant Trust in liaison with the Education Authority.

[50] I consider that it would be useful if the Department of Education in liaison with the Department of Health now issued a joint protocol which reflects what I have said even on an interim basis whilst the consultation is ongoing.

[51] Finally, I wish to state that this judgment in no way detracts from the positive obligation imposed upon State authorities under Article 5. All public authorities need to be aware of this and even if the special educational provision is deemed to be appropriate there is a lawfulness issue if it is thought to be a deprivation of liberty and not authorised. I am quite confident that the public authorities who have engaged in this case are well aware of this obligation. This judgment should be shared with all relevant authorities as the matter needs urgent attention in terms of guidance and protocols.

Conclusion and answer to the Case Stated

[52] The conclusion that I have reached in answer to the Case Stated is therefore as follows using the numbering in the Case Stated:

(i) This is not for this court.

(ii) Any authorisation should be brought under the terms of the Mental Capacity Act 2016 or the inherent jurisdiction if the legislation is unavailable.

[53] Accordingly, the Tribunal was entitled to dismiss the appeal. The Tribunal was entitled to reject an application to adjourn. I do not consider that the Tribunal otherwise erred in law by reason of their decision to dismiss the appeal.