

Neutral Citation No: [2023] NIKB 79

Ref: COL12217

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

ICOS No: 22/073631/01

Delivered: 24/07/2023

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

**KING'S BENCH DIVISION
(JUDICIAL REVIEW)**

**IN THE MATTER OF AN APPLICATION BY JR233 (A MINOR)
ACTING BY HIS MOTHER AND NEXT FRIEND FOR JUDICIAL REVIEW**

**IN THE MATTER OF DECISIONS BY THE SOUTH EASTERN HEALTH
AND SOCIAL CARE TRUST**

**Mr Ronan Lavery KC with Ms Sinead Kyle (instructed by Nicholas Quinn Solicitors) for
the Applicant**

**Mr Philip Henry (instructed by the Directorate of Legal Services)
for the Respondent**

COLTON J

Introduction

[1] The Judicial Review court is again compelled to grapple with a clash between a child who has complex needs and a caring parent on the one side and a health trust under immense pressure, facing huge demands with limited resources on the other. The court has become all too familiar with such cases and struggles to find a satisfactory resolution to the conflict.

[2] JR233 was born in May 2012. He lives with his mother. His father tragically died of cancer in April 2022.

[3] He has diagnoses of autism spectrum disorder, severe learning disability, neurodevelopment disorder with associated behaviour disturbance, Global development delay, severe obstructive sleep apnoea, significant sleep disturbance, overgrowth, anxiety and aggression.

[4] He has emotional and behavioural difficulties which leads to severe anxiety, hyperactivity and challenging and aggressive behaviours. When he is distressed, he

can scream and cry unconsolably, nip, bite, pull hair, headbutt, grab clothes and lash out. His behaviour can cause harm to himself and others around him.

[5] The applicant's mother's difficulties in caring for her son, particularly after the death of her husband, are compounded by her own ill-health. She has a history of depression and more recently has developed peroneal palsy in one of her legs.

[6] Unsurprisingly the Trust has been involved in the provision of assistance to the applicant and his mother. The care provided by the Trust has involved multi-disciplinary teams dealing with both care and medical issues. In terms of care the primary provision has been by way of direct payments to the applicant's mother so that she can make arrangements for the applicant's care. Central to the dispute in this case is the issue of the provision of respite care.

[7] The history of the care provided is set out in the affidavits of Noelle Sloan, who is a principal social worker in the Trust's Children's Disability Team. From these affidavits and the voluminous documents exhibited thereto it emerges that JR233 was first introduced to the Children's Disability Team in 2014 and assessed thereafter. His needs include medical and social care.

[8] In respect of social care, the family opted into the Direct Payments Scheme which involves providing the family with a budget that they use to make the arrangements for the care required for JR233.

[9] In 2019 the applicant received the following social care package:

- (a) Two hours per week during term-time when at school;
- (b) Those two hours were increased to 9 hours per week during school holiday periods;
- (c) No overnight short breaks (respite) were provided.

[10] At that time the family was asked by the Trust whether they wished to avail of respite care but indicated they did not. They did agree to visit a Trust facility in April 2019, namely Lindsay House, but they did not agree to provision of respite there. The family expressed a concern about abuse of vulnerable service users in Trust facilities, stemming from publicity arising from events at Muckamore Abbey Hospital.

[11] During the initial acute periods of the Covid-19 pandemic the assigned social worker was in regular contact with the family. The number of hours provided in the applicant's budget were increased.

[12] As is often the case there were some difficulties in identifying a carer from the private sector to be funded by the Direct Payments budget. The family were able to

identify a Mr McC who has been working as a Direct Payments carer for the applicant. He works for the Northern Ireland Ambulance Service and provides care to the applicant outwith that employment.

[13] The Trust had concerns about an over-reliance on Mr McC and explored alternative supports with the applicant's mother, including speech and language therapy input and Trust childcare.

[14] The family are clearly very happy with Mr McC's care. He has known the applicant since his time at school and has a very good rapport with him.

[15] At a multi-disciplinary meeting on 17 July 2020 a range of additional supports were discussed with the applicant's family, including overnight respite opportunities. Again, an offer was made to arrange for a visit to Lindsay House.

[16] In or around this time the applicant's Direct Payments budget was increased to 22.5 hours per week to reflect the fact that his school was closed, and most activities were restricted as a result of restrictions imposed by the Covid-19 pandemic.

[17] A dispute arose between the applicant's mother and the Trust about the hourly rate paid under the Direct Payments budget. Judicial review proceedings were issued seeking leave to challenge the rate, but leave was refused by this court.

[18] The applicant's school reopened on 1 September 2020 and thereafter his Direct Payments budget was adjusted to:

- (a) 16 hours per week during term-time;
- (b) 51 hours per week during holidays.

[19] It can be seen that this represented a significant increase from the previous social care package.

[20] The Trust later completed a UNOCINI Family Support Review Plan on 13 January 2021. His social care package was as follows:

- (a) Direct Payments of 16 hours per week, during term-time, 51 hours per week during school holidays.
- (b) His medications were to be reviewed by the Trust's psychiatrist.
- (c) An appointment had been made for him to attend with the Endocrine and Genetics Clinic.

- (d) He was to continue to receive assistance from the Behavioural Support Team within the Trust.
- (e) A referral was made to the Beds Panel to a facility in Greenhill for overnight respite care.
- (f) The family asked that Mr McC be permitted to provide overnight care in his home. This required an assessment by the Trust, but Mr McC declined to undergo such an assessment.
- (g) The family had received recommendations from the Trust's Occupational Therapy Team and were living in rented accommodation while their property was adapted according to those recommendations.

[21] As agreed the applicant's mother visited Greenhill and spoke with the co-ordinator at the facility. This is denied by the applicant who says that the first occasion upon which she visited Greenhill was in July 2022 when she was collecting her son following a period of emergency residential care (see below). On 30 March 2021 she advised the applicant's social worker that she had been considering overnight respite but did not feel comfortable with it and would prefer a day centre setting. This care was not available at Greenhill and in accordance with his mother's wishes the applicant was not placed on the Beds Panel for Greenhill.

[22] The affidavit evidence confirms that there was ongoing engagement between the applicant and the Trust. Much of this engagement concerned Direct Payments provision.

[23] On 10 December 2021 social workers again discussed the possibility of respite care at Lindsay House. This is a Trust facility which provides overnight care to children with complex needs. It is shared with the South Eastern Trust and the Belfast Trust. The applicant's mother was not keen but agreed to consider it. She remained reluctant to the use of respite care provided in the Greenhill facility.

[24] Lindsay House is situated in Dunmurry and is long-established. Greenhill is a new facility set up on the site of a YMCA in Newcastle, Co Down.

[25] The early months of 2022 were particularly difficult for the family as the applicant's father was coming towards the end of his life. The applicant's mother did visit Lindsay House on 25 January 2022 to view the facility. She reported to the Trust that Lindsay House was not what she expected, although some of the issues she raised were due to mitigation measures related to the Covid-19 pandemic. She did not provide her agreement subsequently to overnight respite care in Lindsay House. However, as will be seen after the death of her husband the applicant's approach to overnight respite care changed.

[26] After the applicant's father's death in April 2022 the Trust arranged for two weeks care for the applicant. The mother preferred to avail of Mr McC's services and therefore only required one of the two weeks offered.

[27] In May 2022 Ms Caroline Wright, social worker, was allocated to the applicant's case. She started making inquiries with summer scheme providers and secured a place for the applicant on the school's summer scheme.

[28] In the aftermath of the applicant's father's death his behaviours became more challenging, and his mother was understandably under severe stress. She pressed for more hours to be allocated to Mr McC but for the first time she specifically requested respite care.

[29] The Trust arranged a meeting on 25 May 2022. It was attended by the Trust's Interim Head of Service, a principal social worker, the manager from Lindsay House and the applicant's social worker and the applicant's mother.

[30] At that stage there were no beds available in Lindsay House because it was operating at reduced capacity. He was placed on the waiting list for the facility. It was explained that Lindsay House allocates respite on an eight weekly cycle. Plans were put in place for the summer. A calendar was created setting out Mr McC's hours (which unbeknown to the Trust included regular weekend overnight care through an arrangement between him and the applicant's mother). The Trust, through the allocated social worker, then sought to provide additional support.

[31] Approaches were made to a private sector recruitment agency seeking carers to provide day care.

[32] An additional 35 hours were provided through the Direct Payments office. The Trust indicated it was going to provide further hours on top of the 35 hours per week as holiday time payment, but this broke down due to a failure by the applicant's mother to provide details on the specifics of what the money was being used for.

[33] A referral was made to the Arches Family Support Service. Contact was with Domcare, a Trust service to inquire whether they could provide any carers, but they were unable to source any care package.

[34] On 15 June 2022 the social worker contacted Mr McC who agreed to provide additional hours care.

[35] On the same date the applicant's mother asked for an urgent call with the Trust's psychiatrist Dr McKenna because she was struggling. Arrangements were made for a Zoom meeting on 20 June 2022.

[36] On 20 June 2022 the applicant's mother called the social worker on the same day as the meeting with Dr McKenna and had a long conversation during which the ongoing efforts to find alternative support were explained.

[37] A Beds Panel was convened on 16 June 2022. The applicant's request at that stage was for Mr McC to provide overnight respite at a cost of £22 hour. However, this could not be approved unless Mr McC was assessed for providing care to a vulnerable child overnight in his own home. A referral was made to the Intensive Fostering Service, as the applicant's mother had indicated that she would be prepared to share care with the Trust.

[38] On 20 June 2022 multi-disciplinary team meetings were held. The first of these was chaired by the psychiatrist and attended by the applicant's social worker, two of the Trust's Learning Disability Nurse Team who had been working with the applicant, a member of the Intensive Support Service, a teacher from the school and the applicant's mother. The focus of the meeting was the applicant's behaviours of concern. A number of significant actions were outlined at the end of the meeting.

[39] On 21 June 2022 the Trust's Head of Service had a call with the applicant's mother about her situation generally. The focus was on Mr McC, Direct Payments and the possibility of him being able to provide overnight care.

[40] On 22 June 2022 the applicant's mother asked if the summer scheme dates could be changed to facilitate Mr McC.

[41] On 23 June 2022 the applicant's social worker made contact with the Centre for Independent Living and an appointment via Zoom was set up for 27 June 2022. This was for the social worker and mother to attend.

[42] A home visit was arranged with Mr McC for 28 June 2022 but was cancelled because he tested positive for Covid-19. This was obviously a significant blow to the family as he was not able to provide the support upon which the applicant had become dependent.

[43] On 29 June 2022 a second multi-disciplinary team meeting was arranged to review the situation. At this meeting respite was discussed. There were detailed discussions about the applicant's medical condition and the support required at school. There was significant discussion about the appropriate medication for the applicant.

[44] At the meeting the applicant's social worker explained that she had secured a chalet in which respite could be provided but had been unable to source staff. There was a discussion about possible support from the applicant's extended family, but the applicant's mother felt that this would not be suitable. There were discussions about Direct Payments. It was confirmed that the normal summer increase of 35 hours would be extended to 51 hours per week. The issue was sourcing people to

provide the care so that a proposal could be made. Ultimately, these were not approved because there was no explanation as to the specific use to which the payments would be put.

[45] A crisis developed on 30 June 2022 and the applicant was taken into Greenhill from 1 July 2002 to 4 July 2022 for emergency care. The applicant's mother was directed to her general practitioner for help with her mental health.

[46] Ongoing extensive efforts were made to source staff to care for the applicant.

[47] On 4 July 2022 there was a further multi-disciplinary team meeting. The meeting was attended by the principal social worker, the applicant's social worker, a community nurse, the manager of Lindsay House, the principal social worker for residential care (permanent placements), the applicant's mother, her solicitor and two of the applicant's grandparents.

[48] There was an understandable concern for the applicant's well-being and his mother's mental health.

[49] The applicant's grandparents explained that they were not in a position to assist the applicant.

[50] There was a discussion about the applicant's medication. There was a further discussion about extra hours for Mr McC.

[51] After the meeting it appears that things settled somewhat over the summer, primarily as a result of Mr McC's availability, his increased hours and the applicant's attendance at two summer schemes. The Trust understands that the applicant was in fact staying overnight with Mr McC during the summer as frequently as every weekend.

[52] The Trust remained frustrated that Mr McC did not agree to be assessed for overnight care. Subject to there being no issues arising from this assessment the Trust avers that it was prepared to pay him for overnight respite. He has informed the applicant's social worker on 22 September 2022 that he is content to provide daytime care through Direct Payments but will not provide overnight care because he will not be paid his "going rate" for this overnight respite. He is willing to provide overnight respite in an emergency.

[53] On 16 September 2022 the applicant tested positive for Covid-19. Mr McC cared for him during that period rather than return him to the applicant's mother's home and risk spreading the infection.

[54] The applicant was allocated a new social worker on 31 August 2022.

[55] From the applicant's mother's perspective she feels she has been given insufficient assistance to cope with the applicant's needs.

[56] The documents make it clear that the focus of her request has been to increase Direct Payments so that she can engage Mr McC to provide care to the applicant. Given that Mr McC has developed a good relationship with the applicant it is entirely understandable that the applicant relies heavily on him. She wishes that the care he provides should continue and if possible be increased.

[57] However there are obvious difficulties with such an arrangement.

[58] Turning to overnight respite care, whilst this was identified on 13 January 2021 as being suitable, it was clear that this was not supported by the applicant, as confirmed at paragraph 15 of her own affidavit. She has explained her concerns about that.

[59] However after the crisis at the end of June 2022 and the difficulties encountered over the summer period the applicant now supports overnight respite care. Her complaint which ultimately resulted in these proceedings being initiated relates to the Trust's failure to provide respite care which she described as being as an "assessed need."

History of proceedings

[60] Pre-action protocol correspondence was sent by the applicant's solicitor on 5 July 2022. It will be seen that this was at a time when things were very difficult for the applicant and his family. The correspondence sought urgent action because of the applicant's "unmet needs."

[61] These proceedings were issued on 25 August 2022.

[62] In the Order 53 statement the applicant has challenged:

“3.1.1 The continuing failure of the proposed respondent to provide for the assessed needs of the applicant (and indeed the family as a whole).

3.1.2 The failure to adequately assess the needs of the applicant, and indeed the family as a whole by appropriately identify [sic] and clarify [sic] the applicant's needs and the service required to meet those needs.”

[63] Specifically the applicant sought:

“4.1 ...

- (vi) A declaration that the impugned UNOCINI Family Support Pathway Assessment received by the applicant's mother on 29 June 2022 is unlawful in failing to appropriately identify and clarify the applicant's needs and the services required to meet those needs in accordance with the relevant policy guidance (Department of Health UNOCINI Guidance, revised June 2011).
- (vii) An Order of Certiorari, quashing the Proposed Respondent's Impugned UNOCINI Family Support Pathway Assessment received on 29 June 2022, as an unlawful assessment of the applicant's needs.
- (viii) An Order of Mandamus requiring the Proposed Respondent to provide for the appropriately assessed social care needs of the applicant and his family."

[64] Leave was granted in chambers by this court on 7 September 2022.

[65] The court gave case management directions in terms of the service of affidavits, and it did so on an expedited basis.

[66] In accordance with those directions the court received a detailed affidavit from Ms Sloan on 11 October 2022 which is referred to at para [7] above.

[67] The applicant's mother filed a replying affidavit on 18 October 2022.

[68] The substantial hearing was listed for Wednesday 9 November 2022.

[69] When the application came before the court on 9 November 2022 it was adjourned by consent of the parties. As is typical of this type of application there had been ongoing engagement as one would expect between the parties. Importantly, a comprehensive UNOCINI Family Support Plan was adopted by the Trust which resulted in the provision of overnight respite care. The application was adjourned to see how the plan would work out for the applicant.

[70] In the interim further affidavits were served as follows. An affidavit from Ms Sloan dated 21 February 2023, an affidavit from the applicant's mother (undated) and a third affidavit from Ms Sloan dated 3 March 2023.

[71] There was no resolution between the parties and a full hearing proceeded on 6 March 2023.

The applicable statutory provisions

[72] The duties and powers of the Trust to provide social care to disabled persons is the subject matter of a number of interlinking statutory provisions which have been analysed on many occasions by the courts. See for example – *Re LW's (Acting by her Mother JB) Application* [2010] NIQB 62; *Re PH* [2014] NIQB 60; *JR47 (Resettlement of Hospital Patient) (No 2)* [2013] NIQB 7; *JR127's Application (A Person under Disability)* [2021] NIQB 23; *JR139* [2021] NIQB 76 and *JR138* [2022] NIQB 46.

[73] Properly analysed, the applicant's case resolves to an allegation of breaches of obligations imposed under the relevant statutory provisions. I propose to analyse the statutory provisions relied upon by the applicant in light of the authorities referred to above.

The Chronically Sick and Disabled Persons (Northern Ireland) Act 1978 ("the 1978 Act")

[74] Section 1 of the 1978 Act provides that persons embraced by the Act include those who are:

“Blind, deaf or dumb, and other persons who are substantially handicapped by illness, injury or congenital deformity and whose handicap is of a permanent or lasting nature or suffering from a mental disorder within the meaning of the Mental Health (Northern Ireland) Order 1986.”

[75] There is no dispute that JR233 falls within this category.

[76] Section 2 provides:

“Where an authorised HSC trust is satisfied in the case of any person who resides in its operational area and to whom section 1 above applies that it is necessary in order to meet the needs of that person for the trust to make arrangements under Article 15 of the Health and Social Services (Reform) Act (Northern Ireland) 2009 and Article 15 of the Health and Personal Social Services (Northern Ireland) Order 1972 for all or any of the following matters namely -

- (a) the provision of practical assistance for that person in his home;

- (b) the provision for that person of, or assistance to that person in obtaining, wireless, television, library or similar recreational facilities;
- (c) the provision for that person of lectures, games, outings or other recreational facilities outside his home or assistance to that person in taking advantage of educational facilities available to him;
- (d) the provision for that person of facilities for, or assistance in, travelling to and from his home for the purpose of participating in, any services provided under arrangements made under section 2(1)(b) of the Health and Social Care (Reform) Act (Northern Ireland) 2009 or Article 15 of the Health and Personal Social Services (Northern Ireland) Order 1972 for promoting the social welfare of such persons or, with the approval of the trust, in any services provided otherwise than as aforesaid which are similar to services which could be provided under such arrangements;
- (e) the provision of assistance for that person in arranging for the carrying out of any works of adaptation in his home or the provision of any additional facilities designed to secure his greater safety, comfort or convenience;
- (f) facilitating the taking of holidays by that person, whether at holiday homes or otherwise and whether provided under arrangements made by the trust or otherwise ...

then, the trust shall make those arrangements.”

[77] Before considering the extent of any enforceable duty section 2 provides in respect of the applicant it is necessary to consider the scope of section 2. The scope relates to the social care provision listed in sections 2(a)-(h) which have been assessed as necessary to meet his needs.

[78] The issue of whether or not respite care comes within the scope of section 2 was considered by this court in *JR127*. Mr Lavery argues on behalf of the applicant that overnight respite care comes within section 2(c):

“the provision for that person of lectures, games, outings or other recreational facilities outside his home or

assistance to that person in taking advantage of educational facilities available to him;"

and also comes within the scope of 2(f):

"facilitating the taking of holidays by that person, whether at holiday homes or otherwise."

[79] Consistent with the court's analysis in *JR127* I do not consider that respite care of this type could be interpreted as within the scope of either 2(c) or 2(f) as the court said in para [27] of the judgment in *JR127*:

"... it would unduly stretch the plain meaning of the words in section 2 to suggest that these respite breaks could be considered "holidays" or the provision of "recreation facilities" outside the home."

[80] Nor do I consider that the supply of Direct Provision Payments comes within the scope of section 2. The care provided by Mr McC is always outside of the family home which eliminates it from several of the services listed in section 2. The applicant argues that it falls within 2(c).

[81] However, it seems to me that the care provided by Mr McC is not recreational nor does it relate to taking advantage of education facilities available to him. In effect, it is care that is provided so that the applicant's mother does not have to provide the care at that time.

[82] Therefore, I conclude that section 2 of the 1978 Act does not apply to either element of the care package under challenge in this case.

[83] Section 2, of course, does include the applicant taking advantage of educational facilities and arrangements during the holiday period but in the court's view there is no evidence that there has been a failure on behalf of the Trust in respect of such provision.

Section 2(1)(b) of the Health and Social Care (Reform) (Northern Ireland) 2009 and Article 15 of the Health and Personal Services (Northern Ireland) Order 1972

[84] The court said in *JR127* at para [28]:

"[28] The fact that the respite care in question does not come within the scope of section 2 is not the end of the matter. The court is not precluded from holding that the respondent is under a duty in law to provide this service by virtue of its obligations under section 2(1)(b) of the Health and Social Care (Reform) Act (Northern Ireland) 2009 and Article 15 of the Health and Personal Services

(Northern Ireland) Order 1972. Article 15(1) of the 1972 Order provides:

'(1) In the exercise of its functions under section 2(1)(b) of the 2009 Act [the Department] shall make available advice, guidance and assistance, to such extent as it considers necessary, and for that purpose shall make such arrangements and provide or secure the provision of such facilities (including the provision of arranging for the provision of residential or other accommodation, home help and laundry facilities) as it considers suitable and adequate.

(1A) Arrangements ... may include ... arrangement for the provision by any other body or person of any of the social care in such terms and conditions as may be agreed between the trust and that other body or person.'"

[85] Section 2(1)(b) of the Health and Social Care (Reform) Act (Northern Ireland) 2009 states that:

"2. – (1) The Department shall promote in Northern Ireland an integrated system of –

- (a) health care designed to secure improvement –
 - (i) in the physical and mental health of people in Northern Ireland, and
 - (ii) in the prevention, diagnosis and treatment of illness; and
- (b) social care designed to secure improvement in the social well-being of people in Northern Ireland.

[86] In *LW McCloskey J* analysed Article 15 of the 1972 order as providing a general power to provide health facilities and section 2(1)(b) of the 2009 Act as requiring the promotion of an integrated system. In relation to Article 15 he says at para [45]:

"[45] In my opinion, Article 15 of the 1972 Order is to be analysed in the following way:

- (a) It constitutes the more detailed outworkings of the general, unparticularised duty enshrined in section 2(b) of the 2009 Act ... which is to be construed as a 'macro' or 'target' duty, akin to a general principle (per Lord Hope in *Barnett LBC*).
- (b) It is for the authority concerned to make available advice, guidance and assistance to such extent as it considers necessary. This plainly invests the authority with a *discretion*, to be exercised in accordance with well-established principles.
- (c) For the purpose of making available advice, guidance and assistance to such extent as it considers necessary, the authority shall make such arrangements and provide or secure the provision of such facilities as it considers suitable and adequate. This language also clearly confers *a discretion on the authority*.
- (d) Bearing in mind the present context, it is expressly provided that such 'facilities' may include the provision or arranging for the provision of residential or other accommodation.
- (e) Once a decision on what the authority considers 'necessary' and/or 'suitable and adequate' has been made, the discretion in play is exhausted. The assessment having been made, a duty of provision arises.

This analysis accommodates the proposition that, in making the assessment in each individual case, the authority can properly take into account factors such as available resources, the demands on its budget, the particular circumstances of the individual concerned and their family, including their resources, the availability of facilities and its responsibilities to other members of the population. ... Thus factors of this kind can properly influence the assessment to be made in an individual case. However, when the assessment has been made, I consider that discretion is supplanted by duty."

[87] The court therefore concludes, in accordance with its decision in *JR127* that Article 15 encompasses the aspects of social care in issue in this case, namely overnight respite and direct provision.

Article 18 of the Children (Northern Ireland) Order 1995

[88] Article 18 of the Children (Northern Ireland) Order 1995 (“the 1995 Order”) provides as follows:

“18. – (1) It shall be the general duty of every authority (in addition to the other duties imposed by this Part) –

- (a) to safeguard and promote the welfare of children within its area who are in need; and
- (b) so far as is consistent with that duty, to promote the upbringing of such children by their families,

by providing a range and level of social care appropriate to those children’s needs.

(2) For the purpose principally of facilitating its general duty under this Article, every authority shall have the specific powers and duties set out in Schedule 2.”

[89] It will be seen that this is expressly described as a general duty. Such duties are well-recognised as not creating enforceable rights on individuals. They are variously described as “macro” duties or “target” duties. However, Schedule 2 of the 1995 Order is important. The applicant relies on paragraphs 7 through to 9 of Schedule 2 which provide as follows:

“Services for disabled children

7. Every authority shall provide services designed –
- (a) to minimise the effect on disabled children within the authority’s area of their disabilities; and
 - (b) to give such children the opportunity to lead lives which are as normal as possible.

Steps to reduce need for care proceedings, etc

8. Every authority shall take reasonable steps designed –

- (a) to reduce the need to bring –
 - (i) proceedings for care or supervision orders with respect to children within the authority's area;
 - (ii) criminal proceedings against such children;
 - (iii) any family or other proceedings with respect to such children which might lead to them being placed in the authority's care; or
 - (iv) proceedings under the inherent jurisdiction of the High Court with respect to children;
- (b) to encourage children within the authority's area not to commit criminal offences; and
- (c) to avoid the need for children within the authority's area to be placed in secure accommodation."

Provision for children living with their families

9. Every authority shall make such provision as the authority considers appropriate for the following services to be available with respect to children in need within the authority's area while they are living with their families –

- (a) advice, guidance and counselling;
- (b) occupational, social, cultural or recreational activities;
- (c) home help (which may include laundry facilities);
- (d) facilities for, or assistance with, travelling to and from home for the purpose of taking advantage of any other service provided under this Order or of any similar service;
- (e) assistance to enable the child concerned and his family to have a holiday."

[90] The applicant clearly falls within the definition of a "child in need" which under Article 17 of the 1995 Order includes a disabled child and a child whose

“health or development is likely to be significantly impaired or further impaired without the provision for him of such services.” The court concludes that, depending on the circumstances of the case, these provisions do have the potential to create enforceable duties on behalf of the applicant. The court will consider its applicability to this case further below.

Article 21 of the Children (Northern Ireland) Order 1995

[91] The applicant argues that Article 21 of the 1995 Order applies in this case. Article 21 provides:

“Provision of accommodation for children: general

21. – (1) Every authority shall provide accommodation for any child in need within its area who appears to the authority to require accommodation as a result of –

- (a) there being no person who has parental responsibility for him;
- (b) his being lost or having been abandoned; or
- (c) the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care.”

[92] It is well-established that Article 21(1) creates an absolute duty to provide accommodation for a child in need – see *Re LH (A minor)* [2018] NIQB 34. However, I do not consider that this applies to the circumstances of this case. Black J analysed the mirror legislative provisions in the Children Act 1989 in *Re L (A child)* [2009] EWHC 458 and concluded that the relevant provision “is designed to cope with actual crises and not with possible or prospective ones.”

[93] The court concludes that neither respite care nor direct provision care fall within the parameters of Article 21(a)-(c) above. The clear objective of the respondent has been to ensure that the applicant resides within the family home. There was an acute period of crisis in the applicant’s family at the start of July 2022 in which emergency accommodation was provided in compliance with this obligation. This was to ensure the safety of the applicant. It was not respite care.

[94] The whole essence of respite care is provision of short overnight breaks (normally two nights at a time, but not limited to two nights) to give the main carer a break. This is not a situation where the parent is “prevented ... from providing ... suitable accommodation or care.”

The Human Rights Act 1998

[95] The applicant alleges a breach of the applicant's rights under articles 3, 8 and 14 (in conjunction with article 8) of the European Convention on Human Rights ("ECHR") as enshrined in the Human Rights Act 1998.

[96] The court acknowledges that in analysing article 3 rights it must take into account the vulnerability of this particular applicant. However, that said, I do not see how the minimum threshold of severity necessary to establish a violation of the applicant's article 3 rights has been met in the case. Any review of the leading authorities in this field provides no support or precedent for the suggestion that anything JR233 has endured or anything the Trust has done in this case comes close to the threshold of constituting torture or inhumane and degrading treatment. I consider that it is clear that the minimum threshold of severity has not been met in this case.

[97] In respect of article 8, as Mr Henry observes, it has been relied upon in every recent respite care case litigated in this jurisdiction in recent years. He is also correct in his submission that the court has repeatedly held that it was not engaged and/or adds nothing to the more specific social care statutory duties (see *JR127*, *JR138* and *JR139*).

[98] The applicant submits that the shortcomings alleged against the Trust are not "in accordance with law", for the purposes of article 8 because they fail to comply with the various statutes outlined above. This exposes the fact that even if article 8 is engaged in this case it adds nothing to the more specific strategy duties in play. In *JR127* and *JR139* the respective courts took the view that article 8 added nothing to the potential breaches of statutory duty.

[99] In *JR138* Scoffield J found that article 8 of the ECHR was not engaged in a claim of this kind and even if it was, in a positive obligation sense, the Trust would be given a wide margin of discretion when balancing competing needs; at para [84] he says:

"[84] In the present case, I also consider that article 8 does not add materially to the applicant's claims under statute. I am not persuaded that the applicant's case – that the Trust has not provided adequate care – is a case of interference with the applicant's article 8 rights at all (or those of her mother or brother, even assuming it is permissible for her to rely on their rights for this purpose). It is, in reality, a claim that the Trust is under a positive obligation to provide a certain level of care. In assessing any such claim, I have to bear in mind that article 8 does not impose a positive obligation to provide any particular defined level of care provision. Even

assuming that it does impose some positive obligation to this effect, whether a correct balance had been struck between the needs of the applicant and the needs of the community is a matter on which the Trust would enjoy a wide margin of discretion. I do not consider the applicant's reliance on her article 8 rights to assist her in light of my conclusions on the other aspects of the case set out above."

[100] Article 14 prohibits discrimination in conjunction with other Convention rights. There is simply no basis to rely on article 14 in the conventional sense of discriminatory treatment between the applicant and other persons in a similar situation. The applicant is compelled to rely on an alleged failure to positively discriminate in favour of a minority group or a failure to provide accommodation to secure substantive equality for persons otherwise disadvantaged in accordance with *Thlimmenos v Greece* (Application No.3436/97).

[101] In my view such an argument adds nothing to the applicant's case. The statutory provisions to which I have referred clearly provide for obligations on the Trust in respect of disabled children such as the applicant. As is the case with Article 8 this case turns on whether the Trust has complied with those statutory obligations.

Conclusion on statutory duties

[102] I, therefore, conclude that this case should be analysed through the prism of Article 15 of the 1972 Order. I also conclude that para 9 of Schedule 2 to the 1995 Order pursuant to Article 18 of that order is also applicable.

Consideration of the applicant's case

[103] As will be seen from the history of the proceedings, the situation on the ground changes, depending on the specific circumstances of the applicant and his family. This is a common feature of these types of cases. It is a factor pointing to the unsuitability of judicial review for this type of scenario.

[104] It is clear from the applicant's affidavit that her particular focus is on the alleged failure of the Trust to provide her with respite care for her son. Her evidence and that of the Order 53 statement focuses on the assertion that the Trust assessed that respite should be provided once per month as far back as July 2020 and that it has failed thereafter to provide it.

[105] However, it is clear from the documentation that this is simply inaccurate. It is correct that in July 2020 a suggestion was made that the family be offered respite in Lindsay House one weekend a month at a time when the Trust had a greater bed capacity in Lindsay House. However, this offer was declined by the family. The

reference to this suggestion could not be characterised, as the applicant portrays, it as a contemporaneous and enforceable decision that the family should be provided with one weekend respite care per month.

[106] The affidavit evidence and the contemporaneous document demonstrates that the Trust over a period of time was encouraging the applicant to consider the issue of overnight respite care. The applicant was clearly not supportive of this, and her focus was on an increase in direct payments so that Mr McC could provide increasing care, including overnight respite care.

[107] As her and her son's circumstances have changed, she now supports the provision of overnight respite care. The extent of the provision of this care has been a focus of these proceedings.

[108] Thus, in para 1.3 of the amended Order 53 statement it is said:

"The South Eastern Health and Social Care Trust ("the Trust") assessed that (JR233) requires social care to meet his needs to include Direct Payments and overnight respite. While (JR233) has been assessed as requiring overnight respite, once a month, the minutes of a Trust meeting on 25 May 2022 record that:

'Currently due to reduced capacity, overnight short breaks are usually on an eight week cycle.'

The minutes also state that:

'(JR233) remains on the waiting list for short breaks in Lindsay House. There is currently no available bed in Lindsay House given the current reduced capacity.'

The minutes of the meeting state the manager of Lindsay stated that no timescale for (JR233) to start respite care could be given 'due to the multiple factors involved.'"

[109] The Order 53 statement then goes on to set out the assessment arising from the UNOCINI Family Support Review which also referred to short breaks in Lindsay House or an equivalent facility in the community.

[110] I pause here to point out that the assertion that an assessment was made that the applicant required overnight respite once a month is simply unsustainable.

[111] The challenge in this case has been extremely wide ranging. In the Order 53 statement the applicant challenges:

“The continuing failure of the proposed respondent to provide for the assessed needs of the applicant (and, indeed, the family as a whole) and the failure to adequately assess the needs of the applicant, and, indeed, the family as a whole by appropriately identify (sic) and clarify (sic) the applicant’s needs and the services required to meet those needs.”

[112] In oral submissions Mr Lavery goes further and suggests that the facts of this case demonstrate a systemic issue in relation to the provision of respite care for persons such as the applicant. Akin to the arguments in relation to Health Service waiting lists he submits that the Trust is in breach of its general obligations.

[113] In considering the applicant’s challenge it is important to recognise at the outset the limits of the court’s role in this general area.

[114] It is beyond dispute that the relevant statutory provisions provide a wide discretion to the respondent. In general terms the court is dealing with “macro” or “target” duties which are not amenable to judicial review.

[115] The high point of the duty is that explained by McCloskey J in *LW* in his identification of a three-stage process, namely diagnosis, prescription and thereafter provision.

[116] In the first two steps of the process in each individual case the authority can properly take into account factors such as available resources, the demands on its budget, the particular circumstances of the individual concerned and their family, including their resources, the availability of facilities and its responsibilities to other members of the population. Factors of that kind can properly influence the assessment to be made in the individual case.

[117] In this case it seems to the court that the applicant seeks to run a number of cases. Firstly, it is argued that there has not been an assessment of the applicant’s needs. Secondly, it is argued that even if there has been an assessment it is inadequate. Finally, it is argued that the assessed needs have not been provided for.

[118] The means by which the needs of persons such as the applicant are assessed is by way of what are referred to as UNOCINI reviews. These were established pursuant to the introduction in 2011 by the Department of Health, Social Services and Public Safety of Guidance on Understanding the Needs of Children in Northern Ireland (“UNOCINI”). This provides an assessment framework, where the needs of a child can be assessed on a multi-disciplinary basis.

[119] As is apparent from the papers there have been a series of such assessments for JR233 over the years since 16 June 2014.

[120] For the purposes of this application the court must look at the most recent assessment in October 2022. The review commenced on 11 October 2022 and there were further meetings in October and November in respect of the care plan for the applicant. The care plan is comprehensive, running to 24 pages. It sets out initially the current plan setting out the identified need, the actions agreed, the desired outcome and identifies the person within the Trust responsible for dealing with the issue. It goes on to set out a proposed plan and finally it sets out an agreed plan for the future.

[121] Focusing on the issue of respite care the need is identified in the following way:

“Extended family and social community resources

Assessment agreed to be completed to look at the suitability of Greenhill.”

[122] The planned actions described as “assessment agreed to be completed to assess suitability of Greenhill.” The desired outcome is described as “explore other sources of support for JR233” and the lead is identified as Ms McEvoy.

[123] The text of the assessment update contains the following:

“(The mother) requires additional support with (JR233), particularly during school holiday times. (The mother) has advised the social worker that when (JR233) is not at school she needs support during the day, (the mother) said that she would ideally like extra support during the hours of 10-3/4. (The mother) receives 12 hours of respite during the weekend when (JR233’s) direct payment worker, [Mr McC], cares for him. Until recently, (JR233) was spending overnights with [Mr McC] at the weekends also. (The mother) has stated to the social worker that she does not need extra support in the evenings when (JR233) is at school as she enjoys this time with her son and looks forward to seeing him when he is home.”

[124] Later it is recorded:

“(The mother) is aware that should she need further support she can contact the social worker.

It is specifically noted that (the mother) has recently agreed to an assessment being completed to assess the suitability of Greenhill for overnight respite for (JR233). An assessment will take place on 26 October between residential community services to assess the physical environment of Greenhill to meet (JR233's) needs."

[125] That assessment did take place on 26 October where the outcome was a positive one and it was noted that when the applicant had been there as a result of the crisis in July he had done well.

[126] On 14 November 2022, a formal request was made by Ms McEvoy on behalf of the applicant for overnight respite. The request was set out as follows:

"Overnight respite in Greenhill; a risk assessment was completed on 26 October that concluded Greenhill would be suitable to offer (JR233) overnight respite. It is requested that (JR233) is able to receive two nights at Greenhill on the current eight-week cycle."

[127] The matter was considered by the Beds and Family Support Panel on 17 November 2022. This panel is responsible for the consideration of requests for respite care for children in need.

[128] In relation to the applicant the following is included in consideration of the request:

"The potential risk is that (the mother) is unable to continue caring for (JR233) at home on a full-time basis and the family unit breaks down and (JR233) will need a full-time placement during a crisis. The Panel agreed (JR233) does meet the criteria for needing overnight short breaks. This is a service under pressure and its availability is determined by the greatest need across the service.

Mum is asking for overnight short breaks in Greenhill. Preferably two overnight stays per week. This is not an option due to the demands on the service. Even if short breaks were fully operational again this level could not be achieved and would be more likely to be two nights per month, if this is ever possible, with a demand for short breaks across all the teams in normal times. There was then some discussion about direct payments."

[129] It appears from the affidavit evidence the applicant attended for his first short break on 1 December 2022. It appears that the short break went well and that reports from staff were positive.

[130] Since then short breaks are currently being allocated on a cycle of twelve weeks, rather than the eight weeks which was hoped for.

[131] In her second affidavit Ms Sloan avers at para 6:

- “6. Short breaks are currently being allocated on a rolling basis. The cycles are every 12 weeks. The Trust is not currently able to offer any shorter cycle. Every family that has been prioritised and is therefore receiving short break care in one of the facilities which can deal with complex care needs is on the same 12-week cycle.
7. The applicant and his family were given their second short break from 11/2/23 to 13/2/23.
8. The next short break will be for two nights in April. The precise dates have not been allocated at the time of swearing this affidavit but will be finalised in the next few weeks.
9. The applicant can expect that short breaks will continue to be provided with the same frequency moving forward, subject to unforeseen events relating to the applicant and/or external factors, but the Trust’s plan is to continue providing short breaks to the applicant and his family every 12 weeks.
10. The Trust is aiming to increase its short break capacity. When that is achieved, frequency may be increased following re-assessment.”

[132] Ms Sloan also points out that the applicant receives the following additional support:

- “(a) He is given a direct payment budget of 16 hours per week during term time when he is at school (£236.00 per week, and 51 hours per week during holidays (£752.25 per week).

- (b) The applicant and his family have regular contact with the applicant's social worker.
- (c) He has multi-disciplinary support, including medical, psychiatry, nursing, social care, occupational therapy and behavioural support from the Intensive Support Team."

[133] Returning to the applicant's complaints, I do not consider that it could reasonably be said that the UNOCINI Plan of October 2022 is not an assessment of the applicant's needs. Nor, in my view, can it be sustained that from a legal perspective this is in some way inadequate. It is for the Trust to make the assessment of what needs are necessary and I see no basis for the court to intervene in that regard.

[134] The applicant's primary complaint is that the assessment is essentially "resource driven" and he points out that the request from the social worker to Greenhill was for respite two nights per month. He points out that the initial expectation was that he would be provided respite care on an eight-week cycle, but this has turned out to be a 12-week cycle. He points out that the applicant appears to remain on the waiting list for Lindsay House. He says that there is a lack of clarity about the care that will be provided to the applicant. He says that, in effect, there therefore has been no individual assessment of the applicant's needs but rather respite care will be dependent on availability.

[135] Mr Lavery is undoubtedly correct in his assertion that available resources have had a direct impact on the provision of care to the applicant. However, in my view, there is nothing unlawful about this. As was well-recognised in *LW* in deciding what is necessary for the applicant the Trust can take into account resource issues. This is part of the three-stage process identified by McCloskey J.

[136] After the initial hearing was adjourned to allow the parties to engage in relation to ongoing respite care the Trust wrote to the applicant's solicitors on 14 December 2022 in the following terms:

"Re: JR233

I refer to the above matter and to your letter dated 14 November 2022.

1. The applicant has been considered by Bed and Family Support Panel and approved for overnight short breaks in Greenhill. The current allocations at this facility are running on a 12-week cycle and the applicant can expect to get a two-night short break per cycle, unless there are unforeseen events. If

there are such events the parent(s) of any affected family will be notified. The applicant last had a short break on 1-3 December 2022 and has been allocated his next short break for 11-13 February 2023.

2. A risk assessment for overnight respite at Greenhill YMCA was completed on 26th October 2022; a copy is enclosed herewith. The latest panel minutes are also attached.
3. You have asked about alternative supports. As stated above, the applicant has had and will continue to have overnight short breaks. The social work team are in regular contact with his family. He will remain supported by the multi-disciplinary team, which caters to his medical and social care needs. The Intensive Support Team also works closely with the family to provide behavioural support. The applicant will continue to be paid his direct payments (DP) 16 hours per week during term time and 51 hours per week during all the school holidays at a rate of £13.18 per hour. The Applicant's mother has been referred to the Centre for Independent Living with a view to helping her manage her DP Budget effectively. It has also been suggested that the Applicant's mother expand her range of direct payment workers' support by trying to identify another worker rather than always relying solely on the one she currently has, particularly as he has informed the Trust that he has plans to further his own education and training. Other additional supports are offered during the longer school holidays, such as summer scheme. The social work team also proposed contacting the extended family to explore what informal support could be provided, although the Applicant's mother declined to pass on their contact details. The Trust is willing to work with the applicant's DP carer, Ron, with a view to enabling him to provide regular, planned overnight short breaks, this requires a fostering assessment of him and his partner to be undertaken by the Trust, which he has been offered and has not previously been agreeable to. The Trust would extend the same approach to any other DP carers or family members willing to be considered to

provide regular overnight short breaks to the applicant to support his mother.

4. The Trust is satisfied adequate support has been provided to this case.”

[137] This correspondence reflects the affidavit from Ms Sloan to which I have already referred.

[138] At the outset I referred to the tension between the applicant’s mother and the Trust. The mother is clearly a caring devoted parent who has had to carry a heavy burden, particularly since the death of her husband.

[139] As is noted in the minute of the meeting on 18 October 2022 as part of the most recent UNOCINI assessment she has managed JR233 very well. There is a strong bond and secure attachment between them. From my consideration of the papers those involved in the care of the applicant by the Trust are committed to provide the best care possible within the resources available. It is essential for the applicant’s well-being that his mother and the Trust work together to ensure his ongoing and developing needs are met. As is anticipated in the affidavit evidence in future years the needs of the applicant are likely to change and the requirements for increased support are inevitable. The best outcome will be achieved if the Trust and the applicant’s mother work together.

[140] Returning to the legal issues in this case, I am satisfied that the Trust has complied with its legal and statutory obligations.

[141] I am satisfied that the Trust has exercised its professional judgment in making an assessment of what is necessary for the applicant’s needs. I accept that in making that assessment the Trust has taken into account resource issues, which, in my view, as a matter of law it is entitled and, indeed, is obliged to do.

[142] As a result of these proceedings it has been possible to conduct an audit of the legality of the Trust’s action. Bearing in mind the respective roles of the Trust and the court, I am satisfied that there has been no breach of statutory duty or other public law principles in this case.

[143] Accordingly, the application for judicial review is dismissed.