Neutral Citation No: [2022] NIQB 46	*Ref:*	SCO11874
	ICOS No:	21/007977/01
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:*	13/06/2022

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

_____

IN THE MATTER OF APPLICATION BY JR138
(ACTING BY HER MOTHER AND NEXT FRIEND) FOR JUDICIAL REVIEW

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

_____

Ciaran White BL (instructed by the Children's Law Centre) for the applicant
Philip Henry BL (instructed by the Directorate of Legal Services) for the respondent

_____

SCOFFIELD J

Introduction

[1] This is an application for judicial review by which the applicant, a now 15 year old girl with complex health and care needs, seeks to challenge the non-provision to her of certain services which she contends the respondent, the South Eastern Health and Social Care Trust ("the Trust"), is required to provide to her in compliance with a number of statutory duties. The applicant's case was split down into four separate areas of challenge, which she categorised as (a) the 'failure to deliver' issue; (b) the 'failure to reassess' issue; (c) the inadequacy issue; and (d) the direct payments issue. What is meant by each of these terms is discussed in further detail below. In light of the applicant's age and vulnerability, I acceded to an application that she be anonymised in these proceedings.

[2] This case represents an example of a now depressingly familiar species of litigation which is coming before the Judicial Review Court with increasing frequency, namely cases where a person (often a child) in need contends that a health and social care trust is not providing them with the services to which they are entitled and which they desperately need. There are a variety of reasons for such cases. In recent times, the Covid-19 pandemic has had an undoubted effect on the

availability of social and nursing care provision and services, partly through staff shortages and partly through reduced capacity owing to public health measures implemented to combat the spread of coronavirus. In other cases, however, there is simply a lack of facilities or staff to meet the demand of the number of individuals with complex needs at any one time. Often, despite the very best efforts and intentions of those professionals involved, families are not receiving the level of help they need and deserve. This can understandably lead to desperation and despair. At the same time, the court not infrequently detects an unwillingness or inability to recognise the constraints under which trust officials and carers are working. Litigation is often thought to be an effective means of increasing pressure on trusts to provide or improve services, or to secure some degree of priority in the allocation of scarce resources or placements. For a variety of reasons, some of which are discussed further below, this is often unsatisfactory for pretty much everyone involved.

[3] In this case, Mr White appeared for the applicant; and Mr Henry appeared for the respondent. I am grateful to both counsel for their helpful written and oral submissions.

Factual Background

[4] The applicant was born with a chromosome disorder and was later diagnosed with Pitt-Hopkins syndrome. She is non-verbal and has a variety of health conditions including chronic lung disease, scoliosis, epilepsy and oesophageal disconnection.

[5] The applicant underwent spinal surgery in early September 2019. She was discharged from hospital only in November 2019. Unfortunately, after this surgery, there was a significant escalation in the applicant's needs as she now has a significant degree of paralysis, very serious seizures and a life-threatening condition called autonomic dysreflexia. The grounding affidavit of the applicant's mother and next friend explains her care needs, which are both constant and intensive. It is unnecessary to set these out for the purposes of this judgment. However, the applicant requires supervision or assistance with virtually all aspects of her personal care and daily living, as well as regular administration of medicines and overnight ventilation.

[6] Over the months following her surgery, there were a number of adjustments to the applicant's package of care in the home, culminating in a multi-disciplinary assessment in July 2020 which resulted in the current care package which the Trust has assessed as appropriate for her ("the July 2020 package"). The applicant's mother's evidence describes this package as requiring four staff to be working consistently (with two assigned to night duty and two assigned to day duty), although with only one person on duty at any one time. The applicant's mother's evidence is that, when a carer is on duty, the expectation is that she will be on hand to give assistance in carrying out some tasks which require two people (such as

operating a hoist which the applicant uses and certain washing, dressing and hygiene tasks). For this reason, the applicant's mother contends that she is regularly required to assist with the applicant's care even when a carer is on duty. Her position is that she is required to provide constant, or near constant, care for the applicant. Even where a care assistant is present, her evidence is to the effect that she is still required to be on hand at least six times in each shift to assist the carer with placing the applicant into the hoist which is used to move her.

[7] The respondent's evidence takes issue with the suggestion that two persons are regularly required. The Trust says the only task requiring two carers is the use of the hoist; and that this operation is not regularly required, takes only several minutes, and "is not considered to be a significant commitment of time." The applicant's mother's rejoining affidavit says that she is "particularly dismayed" at the respondent's evidence in this regard and that she thinks "it shows the trust's lack of real knowledge" of the applicant's care. She then gives details of a variety of additional tasks or operations which require hoisting. This clear conflict of evidence in relation to the demands on the applicant's mother is a matter of concern. In light of it, it is hard for me to understand precisely how onerous, if at all, the applicant's mother's responsibilities are when a carer is present in her home to provide care to the applicant. I proceed on the basis that these responsibilities are sporadic rather than constant; that they are more frequent during the day than during the night; and that they are greater than the respondent's evidence (referred to above) suggests, but also less onerous than the applicant's initial evidence may have presented: that is to say, that the truth lies somewhere in the middle.

[8] The applicant has both medical needs and social care needs. Some of her medical needs can be met at home. It has been assessed by the respondent that they can be met by a Band 3 carer (i.e. a carer who is not a nurse), provided they have a certain degree of training and competence (which is assessed by a nurse). The applicant's mother disagrees with this assessment and would wish the care to be provided by qualified nurses; but those responsible for the applicant's medical care consider that a nurse is not required to provide this care.

[9] The July 2020 package includes a carer coming into the applicant's home seven nights per week from either 7.30 pm (in the case of agency staff) or 8.30 pm (in the case of Trust staff) who then care for the applicant through the night until 6.30 am. This is designed to allow the applicant's mother to sleep seven nights per week.

[10] The July 2020 package was put together at a time when the applicant was not attending school and was therefore generally in the family home during the day. It also made provision for a carer to attend the applicant's home five days per week to look after the applicant from 8.30 am to 4.00 pm on those days. This was to allow the applicant's mother to do the school run with the applicant's brother, to undertake her other domestic and additional responsibilities and to enjoy some time to herself. The five days when daytime care was provided were originally Monday to Friday; but the Trust agreed to change one of these days to the weekend at the request of the

applicant's mother. It permits fluctuation between the weekend day (Saturday or Sunday) according to the family's preference. This is so that the applicant's mother has time at the weekend to spend with her other child, the applicant's brother. However, this arrangement has then given rise to a new issue of concern on the part of the applicant's mother, since it leaves her without assistance to get the applicant to school on one weekday (when the applicant is attending school), which is said to require two persons.

[11] As already mentioned in the discussion above, the applicant's mother also has a son, the applicant's brother. He was 10 years old when these proceedings commenced and lives with the applicant and his mother. He has special educational needs of his own, which necessitates a dedicated classroom assistant for him for 25 hours per week.

[12] Generally speaking, the applicant's mother is considered by the Trust to be fit and competent to provide the care which the applicant needs in the home. The package is provided in light of the obvious fact that the applicant's mother cannot herself provide this care 24 hours per day, seven days per week. The care package also includes provision for 12 nights' hospice accommodation per year for the applicant by way of respite for her mother. There had previously been provision for 24 nights per year overnight respite in a facility called Forest Lodge but this closed in March 2020 following the introduction of Covid-19 restrictions. It has since reopened and engagement is ongoing to recommence stays there for the applicant, although her mother was concerned about this for fear of the Covid-19 transmission risk.

[13] In the event that the applicant returns to school, this will require a reconsideration of the package. As mentioned further below, there has been a dispute as to who should provide care when the applicant is attending school.

[14] In addition to the carers' hours outlined above when staff attend the house, the applicant also receives 36 hours of 'direct payments' per week. This is a budget provided so that care can be employed directly by the family on a private basis on days and times of their choosing. These hours are described by the Trust as an "artefact" from the applicant's pre-surgery care package (when her needs were at a much lower level). At that time, the 36 hours direct payments were mainly used for overnight care. They were retained after the July 2020 package was put in place for the purpose (the respondent avers) of giving the applicant's mother more time to spend with the applicant's brother.

[15] The respondent's summary of the current care package is that it provides for 147.5 hours of care per week, leaving only 20.5 hours per week when a carer is not looking after the applicant.

[16] However, this leads on to a key issue in this case – which is what happens if and when a carer is not able (for whatever reason) to cover their shift and cannot be

replaced (because of the short notice involved, staff shortages or for some other reason). Where a care shift is missed, the applicant's mother is generally required to handle matters herself. Where it is a night shift which is missed, this impacts on the applicant's mother's sleep, since the person providing the relevant care is required to remain awake and vigilant throughout the night. The applicant's mother's evidence, which I accept, is that missed shifts by the carers imposes a very significant burden on her, given the remainder of her caring responsibilities. It can result in her going for 37 hours without sleep. In February 2020, the applicant's mother's GP insisted on the applicant being put into hospital because her mother was suffering from sleep deprivation and exhaustion and was close to breakdown.

[17] As noted above, the applicant is provided with direct payments in order to permit her mother to employ someone to assist with her care. The applicant's grandmother had previously taken on this role, albeit reluctantly and intending it to be a short-term measure. However, she has since retired. A friend of the applicant's mother was then secured to fulfil that role, along with one other person, but on the applicant's evidence this is again a short-term solution only. Her evidence is that seeking to employ another person through the direct payments route is another cause of anxiety and stress for her.

[18] A significant, and disturbing, feature of the evidence in this case was that the applicant's needs and her care arrangements are fracturing her relationship with her brother and driving a wedge between them. This is mainly because, when caring for the applicant, the applicant's mother does not have sufficient time to devote to the applicant's brother's needs. This causes him to lose out on time with his mother and activities he wishes to engage in; and, in turn, to resent his sister.

[19] The applicant issued the present proceedings in January 2021 and was granted leave to apply for judicial review on certain grounds at that time. The focus of the proceedings at that point was the alleged failure to provide cover for care shifts throughout late 2020. As discussed further below, the parties agreed to participate in mediation and did so, and were involved in consequent discussions, which concluded in August 2021, but without resolution. The applicant provided an amended Order 53 statement in late October 2021 and I directed that the additional grounds should be dealt with on a rolled-up basis at the hearing, which was then listed for early 2022. The respondent did not take issue with this, notwithstanding some concerns about the case becoming a 'rolling' judicial review.

[20] In October 2021, the applicant's mother was diagnosed with chronic fatigue syndrome. She also came to the point in November 2021 of considering, and expressing, suicidal thoughts. The care team reported concerns to senior staff at the Trust at this time and they attended the applicant's home and arranged for family to take the applicant to the Children's Hospice (on 16 November) and for the applicant's brother to go to his grandmother's house. There is no doubt that late 2021 was a period of significant upheaval for the applicant's mother, which

coincided with staffing pressures impacting on the delivery of the applicant's care package.

[21] The Trust has highlighted a spate of unexpected sick leave on the part of staff which has impacted to some degree on the provision of the applicant's care. For instance, in December 2021, the main agency carer became seriously ill at the same time as some Trust carers also unexpectedly took ill. This led to an extension of the applicant's hospice stay.

Difficulties in resolving factual disputes

[22] The above is a short summary of some of the key facts in this case, not all of which are uncontentious. In addition, there is a very considerable amount of further factual detail in the affidavit evidence which has been filed on behalf of the parties which is clearly contentious. An indication of the respondent's overall approach to the evidence can be found in this passage from the affidavit of its deponent, Ms Noade (the Trust's Head of Service for Learning Disability Services):

> "The Trust recognises that it must have a long term working relationship with the Applicant's family. We are conscious of trying not to damage that relationship through the averments in this affidavit and we hope that we can continue to try to work together constructively for [the applicant's] wellbeing. However, a number of averments made about the Trust are inaccurate, others are unjust and unfortunately the affidavit evidence presented on behalf of the Applicant does not reflect a true representation of the overall factual situation."

[23] Likewise, in the rejoining affidavit sworn by the applicant's mother, which responds almost on a paragraph-by-paragraph basis to the respondent's lengthy replying affidavit, she takes strong issue with a variety of averments in the Trust's evidence, describing a range of the sworn averments on behalf of the Trust as "completely untrue", "totally incorrect", and so on.

[24] The court's experience in several of the applications brought in this field is that the applicant's grounding affidavit (on the basis of which leave to apply for judicial review may often be granted on the papers) paints a sorry and depressing picture which presents the relevant authorities as having obviously failed to provide adequate care. However, when the respondent's detailed affidavit evidence is filed, it very often appears that the summary provided in the applicant's initial evidence is unduly simplistic and fails to adequately reflect engagement between the authorities on the one hand and the service user or their guardian on the other. Not infrequently, an allegation of failure to provide a service can be seen, with the benefit of fuller evidence, to amount to little more than a failure to provide a service on the precise terms or in the precise manner demanded by the applicant or on their

behalf. There appears to me to be elements of this in the present proceedings. In addition, however, as this case also illustrates, there are frequently strong disagreements not merely as to matters of judgment, evaluation or perception but also in respect of what was or was not said or done over the course of exchanges between the parties.

[25] It is well known that judicial review proceedings are not generally well equipped to deal with the resolution of disputed factual issues because of the absence of oral evidence and cross-examination, particularly where there are a variety of factual disputes ranging over a lengthy period of interactions. This characteristic of public law litigation has frequently been emphasised. It results in an in-built disadvantage to a judicial review applicant where the resolution of disputed issues of fact in their favour is an important stepping-stone to succeeding in their case. That is because, since the burden of proof lies on the moving party, where the court is unable to resolve a factual dispute it is generally assumed against the applicant: see *Re TP's Application* [2006] NIJB 171, at para [12].

[26] This is a reason why cases such as the present are often not well suited to resolution by way of judicial review. In the present case, there are a range of factual disputes – some of which are undeniably tangential but some of which might well be more important – which I have simply not been able to resolve on the basis of the limited (although lengthy) affidavit evidence before me.

Relevant statutory provisions

[27] The applicant contends that the Trust is in breach of its duty to her under section 2 of the Chronically Sick and Disabled Persons (Northern Ireland) Act 1978. There is no dispute in this case that the applicant is a person to whom section 1 of the Act applies and to whom, therefore, section 2 also relates. Section 2, under the heading 'Provision of social welfare services', is in the following terms:

> "Where the Department of Health and Social Services for Northern Ireland is satisfied in the case of any person to whom section 1 above applies that it is necessary in order to meet the needs of that person for that Department to make arrangements under section 2(1)(b) 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 by that Department under section 2(1)(b) of the Health and Social Care (Reform) Act (Northern Ireland) 2009 and 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 that Department, 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 that Department or otherwise;

(g) the provision of meals for that person whether in his home or elsewhere;

(h) the provision for that person of, or assistance to that person in obtaining, a telephone and any special equipment necessary to enable him to use a telephone,

then, that Department shall make those arrangements."

[28] For the purposes of these proceedings, no issue was taken by the Trust with the duty imposed upon the Department by section 2 falling upon its shoulders. This

approach has been taken in a number of judicial review applications so that the court has not been troubled with a dispute between the Trust and the Department as to where responsibility for compliance with the duty ultimately rests. I proceed on the basis therefore that, by reason of the arrangements between the Department and the Trust, the Trust stands in the shoes of the Department in terms of the discharge of the section 2 duty towards the applicant.

[29] The section 2 duty relates to the provision of social care (or social welfare services, to use the phrase in the statutory heading); not health care. The most relevant sub-paragraph for present purposes is sub-paragraph (a), which relates to "the provision of practical assistance for [the applicant] in [her] home."

[30] Article 15(1) of the Health and Personal Social Services (Northern Ireland) Order 1972, under the heading 'General social welfare', provides that:

> "In the exercise of its functions under section 2(1)(b) of the 2009 Act the Ministry 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 or arranging for the provision of residential or other accommodation, home help and laundry facilities) as it considers suitable and adequate."

[31] As McCloskey J observed at para [35] of his judgment in *Re LW's Application* [2010] NIQB 62; [2010] NI 217, this duty applies to a broader section of the community than those to which section 2 of the 1978 Act applies. It is clear from Article 15(1) that the arrangements to be made in this regard need not be provided directly by the Department but that, instead, it can arrange for the necessary facilities to be provided by someone else. Article 15(1) states:

> "Arrangements under paragraph (1) may include arrangements for the provision by any other body or person of any of the social care on such terms and conditions as may be agreed between the Department and that other body or person."

[32] Section 2(1)(b) of the Health and Social Care (Reform) Act (Northern Ireland) 2009 is referred to in both section 2 of the 1978 Act and Article 15 of the 1978 Order. Section 2(1) of that Act, under the heading 'Department's general duty', is in the following terms:

> "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."

[33] This provision underscores the responsibility of the Department for both health care and social care – a distinction the respondent was keen to emphasise for the purpose of these proceedings. Section 2(1)(b) of the 2009 Act – and Article 15 of the 1972 Order and section 2 of the 1978 Act – are concerned with social care, rather than health care. As I have mentioned above, some of the applicant's needs are medical or healthcare needs, albeit not delivered by qualified nurses. For present purposes, I proceed on the basis that the majority of the care provided by carers who attend at the applicant's home constitutes assistance for the applicant which has been determined as being necessary and which falls within the purview of section 2 in light of her identified needs.

[34] I return to the precise nature and extent of the duties imposed by section 2 of the 1978 Act below, since this has already been the subject of judicial consideration but in some cases which might be thought to adopt a different emphasis, if not indeed a different approach, to what the duty require. Although the applicant has relied on Article 15 of the 1972 Order, that is less important in the circumstances of this case, since it is common case that section 2 of the 1978 Act applies and that obligation will, if anything, be stronger than the more general obligation under Article 15. I also discuss the legislation specifically dealing with direct payments in the discussion of that topic, below.

Departmental guidance

[35] The applicant has also relied on Departmental guidance issued by the Department of Health, Social Services and Public Safety ("the Department") in June 2011 entitled, 'UNOCINI: Understanding the Needs of Children in Northern Ireland' ("the Departmental guidance"). In particular, she relies on paras 4.8.1 and 4.8.4 of that guidance, which describe UNOCINI Family Support Pathway Assessments and UNOCINI Family Support Plans.

[36] Also of potential significance in this case is different guidance issued by the same department, entitled, 'A Guide to Receiving Direct Payments' (revised in November 2008). Again, reference is made to this in the course of the discussion of the applicant's case in relation to direct payments.

The unsuccessful mediation

[37] In cases similar to the present application the court has now, in appropriate instances, become accustomed to suggesting mediation, or some other form of alternative dispute resolution (ADR), between the parties. This can be done informally or, more formally, by adjourning or staying the case and, at the same time, inviting the parties to mediate or use some other ADR process pursuant to RCJ Order 1, rule 20. The court is entitled to take these steps of its own motion.

[38] In the present case, the court's initial case management order contained the following direction:

> "In light of the complex factual background to this application and the fact that it raises difficult practical issues, which are not readily susceptible to the grant of relief by the Court (other than in a general way by the grant of a declaration or an order of *mandamus*), pursuant to RCJ Order 1, rule 19 the Court invites the parties to give consideration to the question of mediation in this case and to liaise with a view to progressing mediation if both parties are amenable to its use. Within 10 days of the date hereof, the Court is to be provided with a joint note (to be provided by the applicant's representatives but agreed with respondent) summarising each party's position on the possible use of mediation to resolve the issues giving rise to these proceedings."

[39] The limited function of the court in applications such as the present means that, in many instances, public law litigation will not be an appropriate or effective means of addressing complaints about the day-to-day provision of care. This is for a variety of reasons:

(a) First, many of the issues which arise in cases such as this involve the exercise of professional judgement on the part of the Trust, which is by nature ill-suited to judicial supervision by reason of the court's institutional competence and lack of expertise in this area.

(b) Second, well-established authority underpins the court's reluctance to grant mandatory injunctive relief directing the deployment of scarce resources on the part of the executive or public authorities, particularly in a context of finite and stretched means.

(c) Third, and relatedly, the court's remedial toolkit is likely to be inapt to deal with the intricacies of enforcing a care package, even if it were otherwise minded to do so. The prerogative orders are blunt instruments in this field and even the flexibility of injunctive relief is unlikely to assist where ongoing

oversight would be inappropriate and where the relevant duties are also not entirely hard-edged (see the discussion at paras [55]-[57] below).

(d) Fourth, the constantly changing factual picture in many of these cases means that the court may well not have a clear grip of the most current factual position or latest developments.

(e) Fifth, even if it were to do so, that would give rise to the risk of the court permitting an inappropriate 'rolling' judicial review, constantly evolving to challenge new or changing decisions, acts or omissions, which is generally undesirable (see, for instance, *R (Dolan) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605, at para [118]).

(f) Sixth, where (as often occurs) there are disputes of fact – sometimes many such disputes over a lengthy period of time and a variety of instances – the Judicial Review Court is not well placed to resolve these disputes, as I have mentioned at paras [25] and [26] above.

(g) Seventh, finally, and put shortly: the court has neither the expertise nor resources to micro-manage the provision of care. Attempting to do so is unlikely to comply with the overriding objective in RCJ Order 1, rule 1A.

[40] None of what is said above is to underestimate the importance of such cases to applicants, who often turn to the courts as a last resort in circumstances of desperation. It is simply to highlight that such individuals' expectations must be carefully managed as to what the courts, for reasons of both principle and practicality, can and will deliver for them; and to emphasise that other means of dispute resolution, which are more informal and collaborative, may be much better placed to deal with disputes which have arisen about the details of care delivery. As Mr Henry recently put it in another similar case which is before the Judicial Review Court, a process such as mediation has a "greater problem-solving capacity" in this sphere, since it is less adversarial and much more flexible. The involvement of lawyers and an independent third party can, however, be an important dynamic in trying to introduce fresh thinking or move one or both sides from entrenched positions.

[41] In the present case, the parties willingly engaged in mediation over a period of some months but, regrettably, were unable to resolve the issues which gave rise to the initial claim for judicial review (nor, indeed, the later issues which emerged). Notwithstanding this, in the court's experience mediation has proven successful in other such cases; and parties and their advisers are urged to explore ADR mechanisms instead of, in advance of, or (as a last resort) alongside public law litigation in such cases in future. The court has powers under Order 1, rule 20(2) to extend the time for compliance by any party with any provision of the Rules of the Court of Judicature where the parties decide to use an ADR process. This would include the time limit for bringing a judicial review in Order 53, rule 4. For my part,

such extensions will readily be granted if the parties wish to pursue alternative dispute resolution in good faith but are concerned about losing litigation rights in the event that this is unsuccessful.

[42] A key issue raised repeatedly by respondents in this type of application – with some force – is that, in a context of limited resources, adversarial litigation in fact adds to the problems. Generally, the time and costs spent by the Trust in defending and paying for litigation depletes its otherwise limited resources. More specifically, in a case such as the present, the need for those involved with the specific service user to give instructions, attend consultations and review documents and evidence, directly impacts upon their ability to provide or oversee the care which is the subject matter of the dispute. A public authority of course cannot insulate itself from the possibility of legal challenge or from the supervisory jurisdiction of the court merely by pleading a scarcity of resources which will be further depleted by its defending proceedings. Nonetheless, in this field, the point may be thought to carry some weight where, for the reasons given above, the capacity of the court to effectively resolve the dispute is limited in a variety of ways.

[43] Although mediation has not proven successful in this case, such that the court is required to rule on the issues of contention between the parties, they are to be commended for pursuing it. For the reasons summarised at para [39] above, I urge the parties in future cases raising similar issues to the present to consider carefully whether or not an application for judicial review is really the best, or most appropriate, course of action in order seek to resolve the underlying issues giving rise to the dispute.

The nature of the statutory obligations

[44] In the course of the written and oral argument in this case, I was referred to a number of previous authorities which addressed the nature and extent of the obligations imposed by section 2 of the 1978 Act and Article 15 of the 1972 Order.

[45] In *Re Judge* [2001] NIQB 14, Coghlin J examined the provisions of both section 2 and Article 15. Referring to the obligation to make arrangements and provide (or secure the provision of) such facilities as the Trust or Department "considers suitable and adequate", Coghlin J said that he was "satisfied that these provisions afford the Trust a discretion which must be exercised in accordance with the usual *Wednesbury* principles." There was no obligation on the Trust in that case to "guarantee" a particular outcome in light of the fact that it had "clearly taken reasonable steps to arrange" for the particular need to be met.

[46] To similar effect, in *Re Hughes* [2004] NIQB 91, Kerr J examined the nature of the two statutory obligations "against the background of the breadth of responsibility that the various trusts have for the provision of services over a wide range of health and social welfare fields." Against that background, at para [14] of the judgment he said this:

> "To isolate from the vast array of duties a particular area of responsibility and consider its requirements on an individual basis may prompt a misconceived view as to the nature of these particular obligations. I am satisfied that the duty imposed in each item of legislation cannot sensibly be regarded as absolute in its terms. In other words, I do not accept the premise on which [counsel for the applicant's] primary argument is founded, *viz* that, come what may, the trust was ultimately obliged, by reason of these provisions, to carry out the works to the applicant's home…"

[47] At para [18] of his judgment, Kerr J agreed with the approach which had been taken by Coghlin J in the *Judge* case and further stated:

> "The duty imposed on the trust is to evaluate the needs of persons suffering from a disability and to take steps to alleviate them. It does not mean that the trust must in every instance provide from its own resources the facilities required to meet the requirements of the applicant. The present case exemplifies the impossibility of such a notion."

[48] At para [20], the judge – referring to the decision of the House of Lords in *R v Gloucestershire County Council, ex parte Barry* [1997] 2 All ER 1 – again reiterated that "the duty imposed on the trust is not absolute" but, rather, was "a duty to do what it reasonably can to mitigate the effects of the disability on the person concerned…"

[49] There is also support in these authorities for the suggestion that, in deciding how an individual's needs should be met, the authority is entitled to consider the cost of providing them, since this cannot be considered "in a vacuum from which all considerations of cost were expelled": see Kerr J in the *Hughes* case, at paras [19]-[20].

[50] Rather than the above authorities, on which the respondent relies, the applicant places more reliance on the decision of McCloskey J in the *LW* case (*supra*). In that case, the learned judge held that, whilst the trust has discretion at the time of assessing need and deciding what services to provide, once that decision has been made, the duty to provide those services crystalises pursuant to section 2 of the 1978 Act and that duty is absolute. In short, the applicant submits on the basis of this authority that – albeit she accepts that there is a very limited degree of tolerance (perhaps of a *de minimis* nature) – the duty to provide what the Trust has assessed as being necessary is absolute. The respondent's contention is that, even if that is so where one is dealing with a section 2 case, it nonetheless cannot be the case that any failure to deliver the assessed services, "however minor", gives rise to a claim for

breach and a remedy. I accept that submission. The key issue is really what degree of tolerance is inherent within the duty and then, in the present case, whether that tolerance has been exceeded. The respondent does not contend that the standard is one of *Wednesbury* irrationality (albeit some passages in the *Judge* and *Hughes* decisions might be thought to lend support to such an approach). Rather, it contends that its actions are to be governed simply by an objective assessment on the part of the court as to whether it has acted reasonably.

[51] In the course of his decision in *LW*, McCloskey J also accepted that, in assessing what is necessary to meet a child's assessed needs, the authority could properly evaluate what may reasonably be expected of parents with means (see para [32]).

[52] This territory has been returned to in some more recent decisions of the High Court in Northern Ireland. In *Re JR127's Application* [2021] NIQB 23 Colton J considered the closure of a trust-operated overnight respite facility and other reductions in care (including domiciliary care) which arose as a result of the Covid-19 pandemic. The applicants, who were two brothers, had complex needs and required specialist care. Their needs had been assessed and a decision had been made that, as part of their care package, they would be provided with regular overnight respite care. When that was interrupted during the course of the pandemic, they argued that section 2 of the 1978 Act created an absolute duty that their respite care was provided. By the time of the hearing, it was the non-provision of respite care which remained the key issue in contention. Colton J dismissed the application for judicial review, partly on the basis that the provision of respite care did not fall within the specified facilities listed in section 2 of the 1978 Act (see para [27]); but also, relying on *R (McDonald) v Kensington and Chelsea RLBC* [2011] UKSC 33, on the basis that the Trust was permitted to reassess how an individual's needs would be met (even if their underlying presenting need had not changed) and that the circumstances of the pandemic called for a reassessment of what provision was necessary, which the trust had undertaken (see paras [70]-[71]). The altered level of provision which the judge considered the trust had determined to provide in light of the new circumstances could not be condemned as *Wednesbury* unreasonable (see para [90]). Colton J also considered that, where an unforeseen event such as the pandemic called for a reassessment of the appropriate provision, the trust was to be permitted a reasonable period of time to adapt to the significant change in circumstances when complying with its statutory duty, with what was reasonable in all the circumstances being fact and context specific (see para [93]). The learned judge's pithy summary of some of the earlier jurisprudence in this area, at paras [15]-[21] of his judgment, is particularly helpful. Colton J did not consider it necessary to decide whether the section 2 duty to provide services which had been assessed as necessary was an "absolute duty" or subject only to *Wednesbury* review since, on either basis, he considered that the respondent was not in breach of its duty (see para [94]). That was because "the reasonable period … for compliance has not elapsed and … reasonable alternatives have been provided."

[53] The respondent also relied on *Re SK2's Application* [2018] NIQB 104, a decision of O'Hara J in relation to the duty to accommodate in Article 27 of the Children (Northern Ireland) Order 1995 ("the Children Order"). Although not directly relevant to the present case, Mr Henry offered this authority as an illustration of another seemingly absolute duty, directed towards meeting the needs of vulnerable children, where the courts had accepted that the relevant authorities were accorded a reasonable time for compliance. This arose because of the potential difficulty in providing an immediate response and the need to ensure that what was provided by way of accommodation was suitable. In that case, O'Hara J relied on an earlier decision of McCloskey J in *Re JR47's Application* [2013] NIQB 7 involving a yet further (although analogous) duty, in that case relating to resettling someone who had been discharged into the community from long-term in-patient care in a mental health facility

[54] It is also appropriate to mention a recent decision of Humphreys J, which followed on from Colton J's decision in *Re JR127*, in the case of *Re JR139's Application* [2021] NIQB 76. That was another case involving the breakdown in provision of respite care. It was addressed under Article 15 of the 1972 Order (and the 'target duty' set out in section 2(1)(b) of the 2019 Act) in light, no doubt, of the finding of Colton J that overnight respite care was not one of the facilities envisaged in section 2 of the 1978 Act. The learned judge also considered relevant provisions of the Children Order and the Health and Personal Social Services (Quality, Improvement and Regulation) (Northern Ireland) Order 2003. The focus of the case, however, was the Article 15 duty to provide respite in light of the initial assessment that such a facility should be provided to the applicant. The trust's case was that, alongside the closure of the relevant facility, a reassessment of the applicant's needs had occurred, along the lines which had been accepted by Colton J in *Re JR127*. Humphreys J did not accept that contention, since it was unsupported by the evidence relating to the applicant's specific circumstances (see paras [36]-[39]). Although there was no doubt that the trust could carry out a reassessment of needs and arrangements, for the trust to rely on an altered assessment there had to in fact be "an actual reassessment" in the circumstances of the individual's case, rather than merely reliance on external factors (see para [41]).

[55] The respondent continues to rely on the decisions in *Judge* and *Hughes*, discussed above. It is accepted that there is a degree of tension between what was said in those cases as to the latitude which will be afforded to a Trust which is making provision pursuant to section 2 of the 1978 Act and what was said by McCloskey J in *LW*. In *LW*, McCloskey J accepted that there was a tolerance within the relevant duty which was fact-specific and governed by what was reasonable; but not in a way which easily lent itself to a *Wednesbury* analysis, given the overlay of the statutory duties which were in play.

[56] From the foregoing authorities, I draw the following general conclusions in relation to section 2 of the 1978 Act:

(a) The first step is for the trust to assess the individual's needs, which involves the exercise of judgment.

(b) Once a need has been identified, the trust has a measure of discretion as to how that need should be met.

(c) In considering how the need should be met, the trust is entitled to take into account:

(i) the individual's own conduct (past or expected), insofar as this is relevant to the way in which the need can or will be met;

(ii) the means of the individual or, in the case of a child, their parents;

(iii) the assistance of others – including, but not limited to, other public authorities – which is reasonably expected to be available to the individual in order to assist with the meeting of their need; and

(iv) the cost to the trust of providing the necessary services.

(d) Accordingly, there is an element of discretion and judgement on the part of the trust in formulating the appropriate care package. In the absence of *Wednesbury* irrationality (including the leaving out of account of a clearly material consideration or taking into account of an irrelevant consideration), which is a high threshold, the court is very unlikely to upset the determination of the public authority with both the experience and expertise, and indeed the express statutory function at the legislature's behest, to set the appropriate care package.

(e) However, once the trust has determined what services it will provide in order to meet the individual's assessed needs, it is under a clear statutory obligation to provide those services: it "*shall* make those arrangements." Presumptively, it should provide (or secure the provision of) the services and care which it has determined is necessary to meet the relevant individual's needs.

(f) However, this clear obligation is subject to the qualification that the trust will not be in breach of its statutory duty in the instance of every failure in service provision. There is some (limited) leeway for non-compliance in circumstances where the trust has been thwarted from making the usual provision by circumstances beyond its control but where it has made reasonable efforts to secure that provision. For my part, I would not consider this to be a matter for the trust's own judgment subject only to *Wednesbury* unreasonableness. That would deprive of appropriate effect the duty to make the provision assessed as necessary; and wrongly blurs the distinction which has now been clearly drawn in earlier authority between the stages of assessing need and the appropriate provision to meet that need (where

discretion and judgement apply) and the later stage of delivering upon what has been assessed as being required. I would also not consider it to be a question simply of asking objectively whether the trust had acted reasonably in all the circumstances. Again, that seems to me to undervalue the obligation on the trust to strive to make the provision which it has assessed as necessary in order to meet the vulnerable individual's need. I would prefer to approach the matter on a basis akin to that discussed at paras [38]-[42] of *Re JR143's Application* [2021] NIQB 72 in relation to the provision of special educational measures which have been assessed as necessary, namely that there is a duty of substantial compliance which will not be breached where a specific instance of non-provision can be shown by the authority in question to have arisen notwithstanding that it has made every reasonable and practical effort to deliver the relevant service.

(g) A trust is at liberty to reassess an individual's needs and/or the care package which is appropriate to meet those needs in the circumstances as they then stand. Indeed, there is an ongoing obligation on the part of a trust to review its assessment of the individual's needs and the appropriate services to be provided to them from time to time. It will generally be a matter for the trust (or Department, as the case may be) as to when this should be done (subject to any representations they have made to the individual in this regard which might give rise to a legitimate expectation on their part; or where, as under Article 17A(1) or 18A(1) of the Children Order, there is a statutory obligation to conduct a certain type of assessment upon request). However, they may be required to conduct such a reassessment where circumstances change to the extent that it would be irrational for them not to conduct a reassessment or review, or where to fail to do so could not be considered to be consistent with the purpose of their statutory obligations.

(h) Where a review becomes necessary, the authority will be allowed a reasonable period of time to conduct it before any failure to do so becomes unlawful; and where a review has been undertaken, the authority will also be allowed a reasonable period of time (to be judged by reference to the specific factual circumstances and context) to introduce any new services or facilities identified as being required.

(i) Ongoing informal review is to be commended; but the obligation to reassess from time to time requires something more than that, namely a more formal and holistic reassessment akin to the initial appraisal of the individual's needs and what is (then) appropriate for them to be met.

[57] In my view, the approach outlined at sub-paragraph (f) above gives appropriate weight to the need to be comparatively strict when interpreting and applying the section 2 obligation in light of its purpose (cf. O'Hara J at para [27] of the *SK2* case), given that the statutory obligation is designed to provide for needs to be met on the part of vulnerable people, whilst at the same time recognising that the

legislature could not have intended that a care plan be fulfilled to the letter in the face of insuperable practical difficulties. It also reflects that the relevant statutory duty is one of 'making arrangements', rather than a direct obligation of result to the effect that the care be provided. The intensity of review the court will apply in order to determine whether a trust has failed to discharge its duty of substantial compliance will obviously vary depending on the nature of the social care which is at issue. Where, as here, the provision is closely related to the health of the vulnerable person whose care is in issue a more intense scrutiny of the trust's justification for non-provision will be appropriate.

[58] In light of the discussion above about the nature of the statutory obligation in play in this case, I turn to consider the four aspects of the applicant's claim as presented in oral argument.

The 'failure to deliver' issue

[59] What Mr White termed the 'failure to deliver' issue is essentially a contention that, over a period of time, the Trust failed to provide care sessions which form part of the applicant's care package. This limb of the applicant's challenge does not engage with the adequacy of the July 2020 care package but, rather, simply contends that, at relevant times, it was not being delivered to the applicant as intended. This was essentially the single issue in the case when it commenced in early 2021 (and the only limb of the case on which leave has been granted).

[60] The respondent denies that there has been a failure to deliver in these terms. It claims that, in the relevant period before the hearing (October 2021 to December 2021) it delivered over 95% of the sessions required and that its level of delivery has been consistently high over the latter part of 2021. It accepts that, immediately after the implementation of the package in July 2020, "some shifts were missed at that time" and that there were "teething problems" whilst the package was "still in its relative infancy"; but denies that, on analysis, the position is as serious as was presented in the applicant's application for leave to apply for judicial review.

[61] The applicant's mother and next friend has averred that approximately one shift in every week has been missed. Mr White submitted that, since there were 12 shifts required to be provided each week, this equated to the applicant missing out on around 8.5% of the care sessions to which she was entitled. She points out that, in the period from October 2020 to December 2020 (immediately before these proceedings were initially issued), the Trust's own figures indicate that there was just shy of a 90% level of provision.

[62] Ms Noade has provided a detailed table in her affidavit evidence addressing the particulars of missed shifts relied upon by the applicant in late 2020 and early 2021. In many cases, issue is taken with the accuracy of the information provided on the applicant's behalf. In others, it is accepted that a shift was missed and an explanation has been provided for this. In respect of several of them, it is averred

that the issue arose because the applicant's mother was unwilling for an agency care worker to provide the applicant's care because she also worked in a nursing home (which the applicant's mother considered to give rise to a risk of Covid transmission which she was not prepared to accept). Much higher rates of coverage were achieved thereafter, consistently over 95% throughout 2021.

[63] Whatever the position previously, the applicant contends that further difficulties were obviously encountered in or around December 2021 as the applicant had to be placed in the Children's Hospice owing to the lack of carers. Further difficulties were expected when one of the carers involved was scheduled to undergo surgery, with knock-on effects on the provision of the applicant's care package. She further contends that there is an evidenced issue of missed or uncovered shifts; and that this is continuing. The Trust contends that from January 2021, it has consistently achieved good levels of performance, up to 100% and never less than 95%, so that, whatever the failings in the earlier life of the package, this element of the applicant's claim is now academic. It is said that, in a care package of such intensity, particularly when devised and delivered during a public health emergency, there will always be some "bumps." On the applicant's case, every week there is at least one shift which is not filled by agency or Trust staff. The Trust's affidavit evidence describes this as "not true."

[64] As to some of the acknowledged interruptions in provision, the Trust characterises them as unexpected, whereas the applicant contends that many of them were foreseeable and capable of being planned for (*e.g.* staff absence for planned surgery or planned periods of annual leave) or ought to have been the subject of responsible contingency arrangements. It is impossible for me to reliably discern, in respect of many of these issues, whether the Trust has in fact made every reasonable and practical effort to avoid a shift or shifts being missed. In some instances, it seems clear that the Trust cannot reasonably be criticised. For example, an agency worker was taken into hospital, having lost power down one side of her body. That was plainly not foreseeable and gave rise to difficulties. So too was the collapse of a Trust carer who was working in the applicant's home, followed by an illness requiring surgery. On the other hand, it does seem to me that there is some force in the applicant's suggestion that the Trust's planning and staffing arrangements should have a more robust capacity for dealing with staff absences, particularly where these have occurred with some degree of notice.

[65] However, the respondent's response to this last point is that it has tried to alter the staffing arrangements to build in more control of absences and a greater capacity to cover staffing gaps – but that its proposals in this regard have met resistance from the applicant's mother. The Trust says that it has sought to deal with these issues by employing two new part-time Band 3 staff to replace the full-time agency staff member who was caring for the applicant. The Trust considered this to provide greater flexibility and control in relation to the management of holiday requests, annual leave and sickness cover. However, the applicant's mother did not agree with this suggested approach, partly because she considered that the new

recruits would be less qualified and experienced and partly because the staff member who would be replaced was not, in her view, causing any problems in this regard and was in fact a staff member whom she was keen to keep. The applicant says that her issue was with the Trust's management of its own staff, not the agency carer who was going to be replaced in the new arrangement. I entirely understand the applicant's mother's eagerness to retain the services of the carer in question, who has been involved with the applicant for a long time and who seemingly has been a source of great support to both the applicant and her mother. Nonetheless, I am satisfied that the Trust's efforts to improve the situation have not been able to be progressed in the way in which it would have liked because of the applicant's mother's preference in this regard.

[66] The respondent also relied upon the fact that the applicant's mother had made a decision to refuse entry to their family home to a carer because that person also worked in a care home. In Mr Henry's submission, the applicant's mother was free to make this choice "but the consequences of those decisions can be taken into account when considering statutory duties." The Trust further relies upon the fact that, during periods when the applicant was in hospital, it could be expected that the hospital authorities would provide all of the services necessary for the applicant's care; and that her school also has responsibility for her care during the day, including bringing in suitable carers. These are contentious issues and, in my view, do not bear on the primary complaint in relation to this aspect of the case (which is that, when the applicant is at home, there are too many sessions where her anticipated care provision is not available).

[67] Although the July 2020 assessment in this case was made during the currency of the pandemic (so that the Trust cannot say – and, indeed, does not say – that the onset of the pandemic constituted a significant change in circumstance), Mr Henry submits that other key developments, some of which are related to the pandemic, may represent a significant change in circumstance to which the Trust is entitled to respond and on which it is entitled to rely. In the present case, unexpected sick leave on the part of relevant staff is relied upon in this regard.

[68] The Trust's evidence has also covered the significant efforts made in respect of recruitment of additional staff to assist with the applicant's care; and the problems which have been encountered in doing so, for a variety of reasons, some of which are beyond the Trust's control. It is seemingly very difficult to attract new staff to this type of work at the moment.

[69] I consider it likely that there were periods in late 2020 when the provision actually made for the applicant fell so far short of what she was entitled to expect as a result of her care package that the respondent was in breach of its duty under section 2 of the 1978 Act. Nonetheless, since matters have moved on considerably since that time, I do not consider that this requires to be reflected in any grant of relief by the court. The position since that time is less clear cut. I accept the thrust of the respondent's case that its delivery throughout most of 2021 was very much

improved and that many of the issues with missed shifts (insofar as they have been established by the applicant, bearing in mind the conflict of evidence in relation to these) were unfortunate but unavoidable. I am sympathetic to the applicant's mother's case that missed shifts should be kept to a minimum given the nature and purpose of the care which is provided to the applicant and the knock-on effects on her (and, therefore, the family as a whole) of the applicant's mother having to cover when a carer is unavailable. In the final analysis, however, I am not prepared to hold that the Trust has been in breach of its duty because, notwithstanding the concerns I have about its failure to plan more robustly for covering staff absences, I am persuaded on the basis of the respondent's evidence that it has been conscientiously seeking to deal with this issue but has been handicapped in doing so to some degree by choices made by the applicant's mother. Albeit the reasons for these choices may be understandable, as Mr Henry submitted they may have knock-on consequences for which the Trust cannot then be held entirely responsible.

[70] Before leaving this aspect of the case, I should also mention a subsidiary argument which was raised by the applicant. She relies upon the statement in the Departmental guidance to the effect that the UNOCINI Family Support Plan is "to serve as the contract" between the Trust and the family. From that, the applicant extrapolates that there is a firm commitment to deliver the Family Support Plan and that the Trust is subject to more than an obligation to use best endeavours. There is, the applicant submits, "only a very limited capacity" for the Trust to fail to deliver what is envisaged within the care package within the bounds of the law.

[71] This is really a species of legitimate expectation argument. I accept the respondent's submission that the representation contained in the Family Support Plan is not so clear and unqualified as to give rise to a substantive legitimate expectation, enforceable in public law, that each and every specified and planned care session will be delivered. That such an assurance is required is emphasised in case law such as *Re Loreto Grammar School's Application* [2012] NICA 1 (see para [42]). The July 2020 package specifically refers, for instance, to staff sickness or staff shortage and contains the warning that, "During these times every effort will be made to find alternative staff, however there will be occasions where this will not be possible." Similarly, in respect of covering annual leave and Bank Holidays, whilst the support plan sets out arrangements for this, it also notes that "this will be dependent on wider demands placed on the [Community Children's Nursing] service at any given time." Even assuming the Family Support Plan operated as a contract, therefore, it itself recognises practical limitations on the Trust's power to deliver all that is intended at all times. I do not consider this aspect of the applicant's case added anything to her reliance on the statutory duty upon the Trust under section 2 of the 1978 Act. She is correct that there is limited scope for the Trust to fail to deliver what it has assessed as necessary but, for the reasons given above, in the circumstances of this case, I do not consider that the Trust has been shown to have failed in its duty of substantial compliance as I have explained it.

The inadequacy issue

[72] The applicant further asserts that the care package which she has been assessed as requiring is, in fact, no longer suitable or adequate for her needs. That is principally because (she submits) it does not properly account for her mother's responsibilities towards her brother; and because it prescribes 36 direct payment hours for her, rather than prescribing 36 hours of direct service from the respondent Trust. The applicant's evidence is also to the effect that it was initially envisaged that the applicant's care package would be for seven days and seven nights (when the Trust thought that a private care provider was going to be able to provide staff to fulfil the totality of the package) but that, when it became clear that the private company could not do so, the Trust reduced the package to five days and seven nights. The underlying thrust of this point is that the applicant's package should provide for 24/7 care.

[73] The applicant contends that the current level of provision is in breach of her Convention rights under article 8 ECHR and/or article 2 of the First Protocol ("A2P1") to the ECHR. This contention is advanced because the applicant's mother is said to be required to choose between (on the one hand) permitting the applicant to attend school but limiting her ability to care for the applicant's brother or (on the other hand) spending time caring for the applicant's brother, in which case the applicant's ability to attend school is inevitably restricted. This relates to the arrangement permitting the applicant's mother to use one of the 'weekday' day care sessions at the weekend, so enabling her to spend a day at the weekend with the applicant's brother (but meaning that on one school day, the applicant does not have the assistance required to ensure she can get to school).

[74] The applicant's mother would also wish to have a dedicated team of Trust workers to provide the applicant's care. The respondent sees the benefits of such an approach but has indicated that, for a variety of reasons, it would never be possible to have a Trust team that is exclusively dedicated to the applicant without the need for cover from others from time to time. In any event, this is not the type of issue which could properly be the subject of a mandatory order granted by the court in the exercise of its supervisory jurisdiction.

[75] In short, the court is asked to conclude that the present care package is inadequate. Whatever may have been the intention or effect when the package was put in place, the applicant contends that it no longer caters for the family situation, particularly in light of the difficulties faced by the applicant's mother in seeking to parent her other child. Since the respondent Trust is aware of the strain under which the family is now existing, and the stress and anxiety being suffered by the applicant's brother, she contends that her article 8 rights entail a positive obligation for the Trust to "devise alternate means of delivering the care package to the applicant, or alter its terms to eliminate the impact on the applicant of the delivery of the present care package." It is said that the issues relating to the care of the applicant's brother are well known to the Trust and have been for some time.

[76] In particular, the breakdown in provision which occurred in November 2021 is said to be indicative of the inadequacy of the care being provided under the July 2020 package. Albeit the Trust points to the applicant being accommodated in the hospice as an example of it making responsive, exceptional provision to ensure the applicant's immediate needs were met, I agree with the applicant that this in fact illustrates a breakdown of the usual arrangements in that instance. The precise reasons for this situation occurring are, however, a matter of contention, which it is not possible for me to resolve, and far from entirely clear cut. It is certainly not possible, however, to simply conclude that this situation arose because the present care package provision is inadequate. The Trust has also indicated that there was some provision for additional respite afforded to the applicant which was not being taken up.

[77] There is a further dispute between the applicant's mother and the Trust as to whether (as the Trust contends) there is no need for the applicant to be attended by qualified nurses at all times. The Trust takes the view that the applicant's needs can be met by a mixed package of social care and nursing care provision; but the applicant's mother disputes this. She also takes issue with the Trust's position in relation to the question of whether the personnel who are delivering the care services to the applicant should be on hand to care for the applicant when she is in school or when she happens to be in hospital. The former is something which the applicant's mother was keen to ensure, partly as a result of her vigilance about the applicant contracting Covid.

[78] Although I have great sympathy for the incredibly difficult situation faced by the applicant and her family, I accept the respondent's submission that, when it comes to the assessment of what is required to meet the applicant's needs, the Trust's judgement should be upset only on *Wednesbury* grounds and that those exercising their professional judgement in this field are to be accorded a significant discretionary area of judgement. I have not been persuaded that the high threshold for the court to intervene on this issue has been met. No expert evidence was provided on behalf of the applicant taking issue with the Trust view as to the adequacy of current provision. It is likely to only be in the most extreme of cases that a judge will be able conclude that a trust's assessment of need, or what is appropriate to meet that need, is irrational, particularly given the additional factors which a trust is entitled to take into account in that assessment (see para [56](c) above).

[79] As noted above, a further issue is the question of whether, when the applicant returns to school, her daytime care in school should be provided (as her mother would wish) by the carers who care for her at home and who are therefore familiar with her. The Trust's position is that, if the applicant is attending school, responsibility falls on the Education Authority to provide adequate care. This has been the subject of discussions between the Trust, the Education Authority, school staff and the applicant's mother. The Trust has indicated that, notwithstanding that

it is not its responsibility, it has agreed to provide its carers to go into school for the first three months to give the school time to find suitable classroom assistants and/or carers; and that it will provide training to those classroom assistants and/or carers once they have been identified. There is no basis on which I could conclude that this proposal is *Wednesbury* irrational.

[80] Insofar as the applicant relied upon her Convention rights, it was in respect of the 'inadequacy' limb of her case. She relied upon her A2P1 right to education and, more broadly, the article 8 right to family life of her mother and brother (in the manner summarised at para [73] above). It seems to me that this aspect of the case is academic on two bases. The first is that, at all times material to the evidence presented in the case, the applicant was not attending school. The second is that, as set out below, the Trust had agreed at the time of the hearing to conduct a full review of the applicant's case (taking into account the needs of the family more generally) so that the issue of which the applicant was complaining would be reassessed at that point: see para [90] below. In any event, I see no basis for any possible conclusion that the applicant's right not to be denied education under A2P1 has been violated in this case, in circumstances where there is a school place available to her; there is a care package which provides care during the day for five days per week; there is agreement that the school and Education Authority will provide care for her when she is attending school; and there is agreement from the Trust that its carers will undertake such responsibilities as are required for several months until the school's care provision has been adequately set up. As the courts have emphasised in a number of recent cases, the A2P1 right is a relatively weak right, designed to address cases where education is being denied (see, for instance, *JR143* (*supra*), at para [90]).

[81] As to the applicant's reliance on article 8 rights more generally, either in terms of her brother's relationship with her mother or the alleged failure to adequately cater for her needs, this argument was not pressed strongly (if at all) in the oral presentation of her case.

[82] In the *Judge* case, referred to above, Coghlin J also examined an article 8 claim. That case depended on its facts but, whilst the judge recognised that article 8 may impose certain positive obligations to ensure that the integrity of a person's home was protected, he was influenced by the fact that the complaint in that case did not involve interference by the State or a failure to protect the applicant. An article 8 claim was also rejected in the *Hughes* case in which, at para [30], Kerr J noted that in order to establish a breach it was necessary for the applicant to show that article 8 imposed a positive obligation to ensure that she was provided with certain facilities necessary to cater for her condition. In relation to such positive obligations, the State enjoyed "a wide margin of appreciation as to the need for and the content of any measures taken to ensure respect for family and private life."

[83] In *JR127* Colton J proceeded on the basis that the applicants' article 8 rights had been interfered with, but considered that the article 8 argument added nothing

to the substance of the applicants' case under section 2 of the 1978 Act (see para [97]). So too, in *Re JR139*, Humphreys J considered that article 8 added nothing of substance to the case (see para [47]). Where, as in that case, there was a breach of the relevant statutory duty, an interference (if any) with article 8 rights would not be in accordance with law.

[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.

The 'failure to reassess' issue

[85] The applicant further contends that the Trust is in breach of its duties under either the 1972 Order or the 1978 Act in failing to reassess her need for services in order to meet her current needs, particularly in light of the passage of time since the care package was instituted in July 2020 and the pressures placed on her mother in terms of caring responsibilities for her brother. In addition to contending that the failure to conduct a further assessment of the applicant's needs is irrational, the applicant also contends that it is in breach of a procedural legitimate expectation engendered by correspondence from the Trust and the Departmental guidance on such assessments.

[86] The applicant's mother would welcome a reassessment of the applicant's needs and an assessment of herself as a carer, such assessments to accommodate all of the family's relationships and needs as a whole (taking account of the applicant's mother's caring responsibilities for the applicant's brother). Her evidence is that she is not aware of any proper reassessment having been carried out, although the respondent's position is that it is continually reviewing and assessing the situation. The applicant accepts that her mother "does seem to have undergone some form of a carer's assessment in or about 17 November 2021" but said that any developments as a result of this were still awaited.

[87] Mr White submits that assessment, and indeed reassessment from time to time, is an inherent part of the statutory duties discussed above. As is apparent from para [56](g) above, I accept that submission. The passage of time and change of circumstances in this case is such that the duty to undertake a further assessment has

'crystalized', in the applicant's submission. Relying on the Departmental guidance, the applicant also contends that such a review can be initiated by anyone contributing to her care plan (in this case, her mother).

[88] The respondent contends that the applicant's case on this limb is "factually flawed because there have been a number of reviews and in reality, the package has been under constant review." On the Trust's case, the applicant's care package has been "continually monitored", with senior staff in both the nursing and care teams within the Trust being involved throughout, as well as social workers and carers. There is a "constant dialogue" between the Trust and applicant's mother, with contact often occurring daily and sometimes even several times *per* day. In addition, the Trust has indicated that it conducted a UNOCINI Family Support Plan review in late April 2021, a nursing assessment in May 2021 and a Looked After Child (LAC) Review in November 2021 (although this was focused on the provision of respite at Forest Lodge). The Trust also secured the applicant's mother's agreement to undergo a carer's assessment which was conducted in mid-November.

[89] In the April 2021 social care review it was clearly noted that the date of the next review would be 26 November 2021. However, as noted above, in November 2021 the applicant's mother's physical and mental health had taken a significant downturn resulting in the applicant having to be provided with what was effectively emergency respite care in the hospice. Notwithstanding the Trust's case that the applicant's care is kept constantly under review, it also accepts that "a more comprehensive UNOCINI review was meant to take place in late November" but says that "the situation the family were experiencing at that time did not allow for it to be progressed." In addition, in late November and December 2021 the Trust team suffered significant sick leave issues, both on the ground and at more senior level. (Not only were some carers ill but the family's social worker was ill, as were two relevant Heads of Service, who had had a hands-on approach in the case and were to lead the review.)

[90] The Trust also contended that this aspect of the applicant's case is academic because a further review was planned to take place shortly after the hearing in this case which would take into account the carer's assessment undertaken in respect of the applicant's mother in November 2021 (to which, on the Trust's case, the applicant's mother had previously declined to consent – although this is disputed). Mr White described this forthcoming review as being welcome. Mr Henry informed me that this review had been scheduled for November 2021 but had been postponed from that time because of the state of the applicant's mother's mental health then.

[91] However, even if those features were not present, the Trust also submitted that it was permitted a reasonable period of time within which to reassess, which had not expired.

[92] I accept the applicant's submission that a review, of the type required, involves a more holistic reassessment of the situation than is inherent in day-to-day

monitoring of the provision of the care package and the family's needs. There is a need for the Trust to step back and more formally, and in a more structured way, re-assess the appropriateness of the arrangements. That is not to undermine the importance of regular and continuing monitoring which, of course, is to be welcomed and encouraged. However, a more structured reconsideration is called for from time to time. That is, indeed, what is envisaged in the Family Support Plan itself and the UNOCINI guidance, which generally envisages review every six months.

[93] On the whole, however, I do not accept the applicant's case that the Trust has acted unlawfully in failing to reassess earlier. Unlike the *JR139* case dealt with by Humphreys J and discussed above, in the present case the Trust has actively and substantively reconsidered the applicant's ongoing needs and the appropriateness of the provision made for them. In doing so, it has gone beyond the mere day-to-day monitoring of the applicant's care package. The more general scheduled reassessment in November 2021 was de-railed for a variety of reasons which were beyond the Trust's control. Albeit that the applicant had been told that the reassessment would occur by the end of November, that was not a sufficiently clear or un-caveated representation to give rise to an enforceable substantive legitimate expectation in that regard; and, in any event, the developments which meant that it was not held were such that the Trust's failure to hold the review at that time could not be considered to be an abuse of power. I also do not accept the applicant's case that it was *Wednesbury* unreasonable for the respondent, in light of the ongoing monitoring and response which was ongoing, the push to more structured and formal reassessment back to January. That reassessment now having occurred, this aspect of the case has been superseded by events; but, for the reasons summarised above, I would not have held that the Trust was in breach of its reassessment obligation in any event at the point of the hearing.

The direct payments issue

[94] Finally, as appears from the discussion above, one of the remaining key issues of contention between the applicant and the Trust is the extent to which the Trust can meet its obligations towards her simply by the provision to her of 'direct payments' in order to allow the applicant to purchase her own care. The applicant's mother has described the concerns she has about this system, including the difficulty she has had in recruiting appropriate and willing individuals to provide the necessary care. This phenomenon is familiar to the court from other cases where, although direct payments are available, the individual requiring care (or their family) are unable to find anyone willing and able to provide the care, notwithstanding the availability of funds to pay for this.

[95] In the present case, the applicant seeks a declaration that she may terminate the direct payments arrangement which has been made in respect of any service provided to her under Article 18C of the Children (Northern Ireland) Order 1995, or any other statutory provision, by way of the withdrawal of her consent to this

arrangement, so that, as a result, any relevant service will have to be provided directly by the Trust thereafter.

[96] The applicant's case is that her mother only ever reluctantly agreed to the direct payments allocation and that her grandmother was then persuaded to carry out a role funded in that way which was intended only to be on a temporary basis but persisted for longer than intended. She has since retired from employment and has ended her work under the direct payment allocation. The applicant's mother's best friend has been filling in since, simply on the basis that she has observed the stress which the applicant's mother is under and was prepared to help out. One other person is lending a hand but has been candid about the fact that she is seeking other employment. Between these two individuals, 32 hours of the 36 hours provision is being covered. Whether and for how long this can or will continue is entirely unclear, giving rise to understandable concerns on the part of the applicant's mother as to the stability of this aspect of the applicant's care arrangements. The applicant's mother would much prefer a direct service situation, whereby the Trust provides the required care rather than paying to outsource this to her.

[97] At the time of the hearing in this case, the applicant's position was that the Trust had not responded to her request to terminate the direct payments arrangement. By the time of filing its skeleton argument, the Trust's position was that this limb of the applicant's case was academic because it had indicated that it would "permit the applicant to jettison the 36 Direct Payment hours" which, it said, could be organised and formalised during the (then) forthcoming review. The applicant countered that, although it was clear that the respondent accepted she was entitled to discontinue consent to receipt of direct payments, it was not clear whether the 36 hours of additional care which could be purchased by those payments would then be replaced by the Trust by way of direct provision of carers for those hours.

[98] The applicant's key point is that direct payments are only available in respect of an assessed need so that, if the individual refuses consent to have that need met by direct payments, the onus reverts back to the Trust to meet the need directly itself. The respondent says that the 36 hours of direct payments are for the provision of social care, whereas the applicant's mother wishes these to be replaced with 36 hours of nursing care. (The Departmental guidance on direct payments makes clear that they cannot be made for health services, including community nursing, and that they are to cover assessed personal social services.)

[99] To some degree, this aspect of the applicant's case blends into her claim that a reassessment is required and that, on foot of that reassessment, the same or a greater level of care is required to be provided than was catered for in the July 2020 package. I cannot determine that latter issue since it will depend on the outcome of the Trust's intended reassessment and review of the applicant's case.

[100] I can, however, rule on the legal issue raised by the applicant. The short answer is that direct payments can only be used by the Trust with the service user's

consent; and that where, as here, they are deemed necessary as part of a care package, unless and until there has been a reassessment to the effect that those hours of care are no longer appropriate, the withdrawal of the individual's consent to direct payment will mean that responsibility for providing the care which they were intended to fund will pass back to the Trust. In accordance with the legal principles discussed above, upon the reactivation of the Trust's responsibility to provide this care once consent to direct payments is withdrawn, the Trust will be afforded a reasonable period of time (to be judged against the specific context and facts of the case) to get the provision up and running. In the present case, I would expect that period of time to be short.

[101] The requirement of the service user's consent to care being provided by means of direct payments flows from the reference in article 18C(1) of the Children Order to such payments being made "with that person's consent"; with the same phrase repeated in section 8(1) of the Carers and Direct Payments Act (Northern Ireland) 2002 and in regulation 2(1) of the applicable secondary legislation, namely the Personal Social Services and Children's Services (Direct Payment) Regulations (Northern Ireland) 2004 (SR 2004/120). The relevant person will be defined by virtue of Article 18C(2) but, in this case, is the applicant's mother as a "person with parental responsibility for a disabled child." Where that consent is withdrawn, it will not therefore be permissible for the Department or Trust to secure the provision of the relevant service through the making of those payments. Nonetheless, as the authority will have decided for the purposes of Article 18 of the Children Order (which, for present purposes, overlaps with section 2 of the 1978 Act) that the child's needs call for the provision by it of a service under that article, it will then fall to it to provide that service itself (whether directly or by the authority, rather than the child's parent, facilitating the provision by others of that service) under Article 18 of, and Schedule 2 to, the Children Order.

[102] The fact that a trust cannot provide an individual with direct payments to fund services they require without their consent is plainly recognised in the Departmental guidance, which states:

> "**If the Trust offers me Direct Payments, can I refuse?**
>
> Yes. The Trust cannot give you Direct Payments without your consent. If the Trust has agreed to provide social services, and you do not want Direct Payments, you will receive the services instead.
>
> If you accept Direct Payments and then change your mind you can stop at any time. Contact the Trust and ask them to stop making Direct Payments and arrange services instead."

[103] The question of whether the 36 hours' care covered by the direct payments in this case remains necessary after the applicant's circumstances have been reassessed (and should therefore be replaced by 36 hours of direct care provision) is not a matter for me; although it would seem strange if, albeit these payments are said to be an 'artefact' from an earlier package, the Trust had been funding care hours which it did not consider to be appropriate. I also note that the enabling provision at issue here, Article 18 of the Children Order, specifically provides at Article 18(3) that, "Any service provided by an authority in the exercise of functions conferred on it by this Article may be provided for the family of a particular child in need or for any member of his family, if the service is provided with a view to safeguarding or promoting the child's welfare." As a result, it is permissible for the Trust to fund services to both the applicant's mother and/or her brother, provided the Trust does so with a view to promoting the applicant's welfare. Indeed, the need to assess the needs of the family unit as a whole in complex cases such as this was emphasised by Treacy J in *Re JR30's Application* [2010] NIQB 86; [2011] NI 10, at para [28].

Conclusion

[104] The love and care which the applicant's mother, who is the driving force behind these proceedings, has for her daughter is obvious and undeniable. I have no doubt that these proceedings have been brought with the applicant's best interests at heart. Nonetheless, there are a number of areas of contention in this case – such as the level of qualification and experience required of those who provide care to the applicant or the identity of those who provide care when she attends school – which typify matters which are simply not appropriate for resolution by way of public law proceedings. The applicant's mother, quite understandably, has strong views about what she considers would be best for her daughter and has advocated robustly, as she is entitled to do, for the Trust to provide the services which she considers would best meet the applicant's needs. For its part, the Trust must make its own assessment of these issues, applying its own professional judgement and taking into account the matters set out at para [56](c) above. It is not the role of this court to referee, much less to determine, disputes on many of these issues. My role is simply to conduct an audit of the legality of the Trust's actions, bearing in mind the respective roles of the Trust and the court and also the (limited) degree of tolerance which, of necessity, is inherent within the relevant statutory obligations even after the Trust has made its assessment and put a care package in place.

[105] For the reasons given above, I dismiss the applicant's application for judicial review in relation to the 'failure to deliver' issue, on which leave was granted. Although there may have been some merit in that claim when the proceedings commenced, matters have moved on since that time and I do not consider that any relief in relation to the issue is warranted at this point. I refuse leave to apply for judicial review on the 'inadequacy' issue. I grant leave on the 'failure to reassess' issue but dismiss that element of the application. I also grant leave on the 'direct payments' issue but, in light of developments and the clarification of the legal position set out above, need grant no relief on that issue either.

[106] I will hear the parties on the issue of costs but, provisionally, consider that the most just outcome in this case is that each party should bear their own costs.