Neutral Citation No: [2021] NIQB 76	*Ref:* **HUM11604**
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **08/09/2021**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

_____

IN THE MATTER OF AN APPLICATION BY JR 139 (A MINOR) ACTING BY HIS MOTHER AND NEXT FRIEND FOR JUDICIAL REVIEW

_____

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

_____

Ciaran White (instructed by the Children's Law Centre) for the Applicant
Philip Henry (instructed by Directorate of Legal Services) for the First Respondents
Michael Neeson (instructed by the Departmental Solicitor's Office) for the Second Respondent

_____

HUMPHREYS J

Introduction

Nothing should be published which would identify the Applicant or the Trust facility concerned.

[1] This application for judicial review is focussed on a decision by the respondent Trust to repurpose a facility, which I shall call SH, made on or about 18 June 2020.

[2] By virtue of this decision SH was not available for short break or respite care but only for longer term residential placements until March 2021.

[3] The applicant is a minor, now aged 12, whom I shall call DF. DF has profound autism and suffers from a severe learning disability. He is non-verbal and engages in self-injurious behaviour.

[4] I am grateful to the legal representatives in this case for the careful and sensitive way in which the issues have been handled, and for the manner in which the case was presented.

Background

[5] In July 2018 the respondent Trust assessed the applicant as needing respite or short break facilities and from this date forward, such care was provided on the basis of 2 overnight short breaks at SH per month.

[6] In March 2020, at the commencement of the Covid-19 pandemic, the short break services provided by SH ceased. On 16-18 May 2020 a brief period of respite care was afforded on an emergency basis at SH following an attack by DF on his mother. However, thereafter, the facility closed again and no further respite care was offered.

[7] Events took a significant turn for the worse for the family when, on 26 July 2020, DF put his head through a double glazed window and he was hospitalised. As a result, further hours of direct payments were offered and accepted by DF's mother, although this did oblige her to source the additional help which the family required. DF's mother makes the case forcefully that whilst such additional assistance was welcome, it was a poor substitute for respite care.

The Impugned Decision

[8] Solicitors acting on behalf of the applicant communicated with the Trust in relation to the provision of respite care in late September 2020. In its response, dated 1 October 2020, the Trust stated that having closed SH initially due to Covid-19, a decision had then been made to repurpose the facility in order to provide longer term placements for children, rather than respite care services.

[9] DF's mother states that the lack of respite care has had a serious detrimental effect on DF and also on his parents. In her affidavit she deposes to the facts:

> *"Overnight respite at [SH] is not only essential to [DF's] needs and overall wellbeing, it also makes a huge difference to our lives as his parents. I and the rest of the family have been left feeling deflated, disappointed, angry and physically and mentally exhausted. Respite contributes to the overall health and mental well-being of [DF] and us, as his parents, and his siblings."*

[10] In its reply to pre action correspondence, the Trust explained that a decision was made in June 2020 to accommodate a child who had been removed from home to SH, followed by 3 other similar placements. This meant that SH was being used as a short term care facility rather than a provider of short breaks. In accordance

with the regulatory requirements of the RQIA, this necessitated an application to vary the facility's Statement of Purpose since the two types of care cannot be provided at the same time. It was stressed that this was a temporary proposal, only to take effect until such times as alternative arrangements could be found which would allow SH to return to its original purpose.

[11] In the event, SH returned to its previous use in March 2021 albeit that the need for social distancing and increased hygiene expectations have reduced capacity.

The Grounds of Challenge

[12] The applicant was granted leave to apply for judicial review on the grounds that the respondent Trust had breached the statutory duties which it owed to the applicant 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.

[13] Leave was also granted in relation to 'target duty' grounds under Schedule 2, paragraph 7 to the Children (Northern Ireland) Order 1995 and Article 34 of the Health and Personal Social Services (Quality, Improvement and Regulation) (Northern Ireland) Order 2003.

[14] Finally, leave was granted in relation to the alleged breach of the applicant's rights pursuant to Article 8 of the European Convention on Human Rights.

The Statutory Duties

[15] Article 15(1) of the 1972 Order states:

> *"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."*

[16] Section 2(1)(b) of the 2009 Act provides:

> *"(1) The Department shall promote in Northern Ireland an integrated system of—*
>
> *(b) social care designed to secure improvement in the social well-being of people in Northern Ireland."*

[17] Paragraph 7 of Schedule 2 of the 1995 Order provides:

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

[18] Article 34 of the 2003 Order states:

> *"(1) Each Health and Social Services Board and each HSC trust shall put and keep in place arrangements for the purpose of monitoring and improving the quality of –*
>
> *(a) the health and social care which it provides to individuals; and*
>
> *(b) the environment in which it provides them."*

[19] In *Re LW* [2010] NIQB 62 McCloskey J considered the provisions of Article 15 as follows:

> *"In my opinion, Article 15 of the 1972 Order is to be analysed in the following way:*
>
> *(a) It constitutes the more detailed outworkings of the general, unparticularised duty enshrined in Section 2(b) of the 2009 Act (formerly Article 4(b) of the 1972 Order), which is to be construed as a "macro" or "target" duty, akin to a general principle (per Lord Hope in Barnett LBC, supra).*
>
> *(b) It is for the authority concerned to make available advice, guidance and assistance to such extent as it considers necessary. This plainly invests the authority with a discretion, to be exercised in accordance with well established principles.*
>
> *(c) For the purpose of making available advice, guidance and assistance to such extent as it considers necessary, the authority shall make such arrangements and provide or secure the provision of such facilities as it considers*

suitable and adequate. This language also clearly confers a discretion on the authority.

(d) Bearing in mind the present context, it is expressly provided that such "facilities" may include the provision or arranging for the provision of residential or other accommodation.

(e) Once a decision on what the authority considers "necessary" and/or "suitable and adequate" has been made, the discretion in play is exhausted. The assessment having been made, a duty of provision arises.

This analysis accommodates the proposition that, in making the assessment in each individual case, the authority can properly take into account factors such as available resources, the demands on its budget, the particular circumstances of the individual concerned and their family, including their resources, the availability of facilities and its responsibilities to other members of the population. The ingredients of this proposition are a process of reasoning by analogy with the decision in Barry and the well established principles of public law summarised in Administrative Law (Wade and Forsyth, 10th Edition) pp. 321-322. Thus factors of this kind can properly influence the assessment to be made in an individual case. However, when the assessment has been made, I consider that discretion is supplanted by duty. This, in my view, is the effect of the presumptively mandatory "shall", which contra indicates any suggestion that discretion should prevail from beginning to end. Had the latter been the legislative intention, one would expect to find its expression in the discretionary "may.""

[20] Public law recognises a distinction between general or 'target' duties on one hand and specific statutory obligations which are enforceable by individuals on the other. In *R v London Borough of Newham ex p. Ahmad* [2009] UKHL 14, Baroness Hale held:

> *"there is a fundamental difference in public law between a duty to provide benefits or services for a particular individual and a general or target duty which is owed to a whole population… An example of a target duty is in section 17 of the 1989 Act, which provides that "it shall be the general duty" of local children's services authorities to provide a range of services to safeguard and promote the welfare of children in need within their area. This does not give any particular child a right to be*

provided with a particular service: see R (G) v Barnet London Borough Council [2003] UKHL 57, [2004] 2 AC 208"

[21] So-called 'target duties' are not directly enforceable by individuals nor does a failure to meet them necessarily result in illegality – see the speech of Lord Hope in *R v London Borough of Barnet ex p. G* [2003] UKHL 57.

[22] It is not surprising therefore that Article 15 of the 1972 Order is the focus of the applicant's case. The case advanced is that an assessment was made in relation to DF and once this has occurred, a duty to provide the suitable and adequate facilities crystallised. This duty was a continuing one and it is therefore contended the respondent Trust breached that duty by making the decision to repurpose the facility and thereby ceasing to provide the services which had been assessed.

The Evidence

[23] Mr Maurice Largey, the General Contracts Governance Lead in the Trust's Social Care Procurement and Commissioning Department, was responsible for the repurposing decision. In his affidavit, he deposes to the fact that the first child was admitted to SH on a placement basis on 18 June 2020. On 26 September 2020 the Trust submitted its application to repurpose SH to a facility which provides medium term care. The delay between these dates is explained by the fact that short breaks can extend up to 90 days. It was only when it became apparent that it would not be possible to find an alternative placement for the first child within that 90 day period that the amendment to the Statement of Purpose became necessary.

[24] Mr Largey avers that the decision was made after very careful reflection and only then on the basis that the first child was placed there when there was no other option open. He states:

"We were faced with a situation where there was nowhere else that was capable of dealing with this child's needs. Short term overnight care, such as Short Breaks, are an essential part of the care regime and I do not underestimate their importance, but I was faced with the stark need to house a child in need."

[25] Mr Largey also refers to the Trust's provision of increased and alternative supports as and where necessary, including the making of additional direct payments.

[26] It is important to note that whilst the Covid-19 pandemic clearly caused the closure of the SH facility in March 2020, the case is not made that the pandemic was the reason for the decision to repurpose. No doubt the impact of Covid provided the backdrop for some of the pressures on the Trust but the evidence as to the needs of the other children who were accommodated in SH does not suggest that Covid was the reason for the decisions which were made.

[27] This is illustrated by the contemporaneous documentation. On 24 March 2020 the 'SitRep Pro Forma for Covid-19' revealed very serious Covid issues in relation to staff. Five members were self-isolating for a variety of reasons. By 25 June 2020, the same document indicates that no members of staff were self isolating. In considering the need for these longer term placements, the manager of SH commented in an email:

> *"It's not the long term answer and a real struggle for the 42 families who can't access any help or support…this is a regional and historical issue which has been compounded by the pandemic."*

[28] In March 2020, the affected parents were informed of the decision to *"temporarily stand down the [SH] Short Break service."* This was a public health based decision. The applicant's mother states that she did not receive this communication.

[29] On 24 July 2020, parents were told that the rebuilding of the provision of short term breaks had been *"delayed due to an emergency situation requiring full time care for children"*. This letter stated that SH had to *"temporarily amend its statement of purpose to accommodate young people on a full time basis"* but it sought to assure parents that efforts were being made to resolve this situation so that the young people could return to SH. The amendment to the Statement of Purpose records that:

> *"lack of medium to long term placements for children with learning disabilities is a long standing issue and not a direct result of Covid 19"*

[30] A further letter of 5 October repeated these same points and averted to the possible availability of 'outreach support'.

[31] On 6 January 2021, the Trust explained that it was working with the independent sector to find solutions for the children being accommodated in SH which would enable short breaks to be reintroduced. The letter cautions:

> *"In view of the reduced availability due to the Covid-19 restrictions it is important to prepare families for the likelihood that they will not get the same level of short break provision they would have had prior to the pandemic and this will be considered as part of your needs assessment with your specific Social Work team."*

It is stated that updated needs assessments would be carried out in January 2021.

[32] On 1 March 2021, the Trust informed interested parties of the intention to resume short breaks at SH from 5 March.

Consideration

[33] In submissions by the Trust's Counsel, it was contended that the 2018 assessment of DF which determined that short breaks were necessary, suitable and appropriate was superseded by further 'assessments' carried out in 2020. It is argued that the decision to close SH in March 2020 was, in itself, an assessment as to what was suitable and appropriate at that time. Taking into account all factors, as the Trust is entitled to do, a decision was made to stop all respite care and this new assessment brought the duty to provide the service to an end.

[34] Furthermore, there was an 'assessment' in May 2020 that the provision of 2 nights' emergency or crisis respite care was suitable and appropriate at that time. However, this did not give rise to a fresh Article 15 duty to provide short breaks on an ongoing basis. Thereafter, the Trust maintains, a further assessment led to the conclusion that no short breaks should be provided and SH should be repurposed, temporarily, to provide for longer term placements and alternative supports put in place for the applicant.

[35] On the Trust's analysis, any Article 15 duty to provide short breaks came to an end the moment the decision was made to close SH in March 2020. It is said that this was a decision the Trust was lawfully entitled to make, taking into account the pandemic, the availability of facilities and the safety of the applicant and others. The Trust further contends that the additional direct payments which were made represent the outworkings of a fresh assessment as to what was suitable and adequate in all the circumstances.

[36] The problem with this analysis is that it finds no voice whatsoever in the evidence. Mr Largey does not depose to any fresh assessment of the applicant's needs being carried out, nor is there a single contemporaneous document which suggests such an assessment was, in fact, performed. The correspondence which was purportedly sent to parents in March, July and October 2020 makes no reference to any reassessment of the child's needs. It is only in January 2021, in the context of the reduction in the number of short breaks by reason of Covid-based restrictions, it is there any mention of an updated needs assessment.

[37] In 2011 the Department of Health, Social Services and Public Safety introduced Guidance on Understanding the Needs of Children in Northern Ireland ('UNOCINI'). This provides an assessment framework whereby the needs of child can be assessed on a multi-disciplinary basis. As set out above, the 2018 UNOCINI identified the applicant's need for short breaks at SH on the basis of 2 nights per month.

[38] In July 2020 a further UNOCINI assessment finds:

> *"[SH] short term breaks to continue…[DF] to continue to attend [SH] for short term breaks 2 nights per month, 1 night at a time."*

[39] This demonstrates the specious nature of the argument advanced by the Trust. There is no doubt that a Trust can carry out a reassessment of needs and arrangements. In *JR127* [2021] NIQB 23 Colton J was considering a case where social care had ceased to be provided to two severely disabled adults as a result of the Covid-19 pandemic. The evidence presented in that case was that 6 separate reviews or reassessments were carried out between May and December 2020. He followed the Supreme Court decision in *R (McDonald) v Kensington and Chelsea RLBC* [2011] UKSC 33 where it was held that it was open to a local authority to reassess a person's needs. The learned Judge stated at paragraph [71]:

> *"In my view it would be completely artificial and unrealistic to say that services deemed to be necessary to meet the needs of persons in J and L's position prior to the Covid-19 pandemic could not be lawfully reviewed or reassessed in light of the changes designed to deal with the public health emergency from March 2020 onwards"*

[40] However, in *JR47* [2011] NIQB 42, McCloskey J held that for the Article 15 statutory duty to crystallise, it was necessary that an assessment be carried out:

> *"In any event, I find that no Article 15 assessment of Mr. E's residential needs was carried out, in the terms asserted or at all, until late 2009 at the earliest. Taking into account the intensively fact sensitive nature of the situation and circumstances of every member of the cohort to which Mr. E belongs, I reject the submission that the various statements of Government policy were tantamount to an assessment in the terms advanced. Since late 2009, two concrete attempts to resettle Mr. E in the community have been unsuccessful. In accordance with the governing policies, he has exercised his right of refusal. In my view, no duty of provision under Article 15 of the 1972 Order can properly arise until, taking into account all of the factors in play, including individual choice, a specific proposed resettlement option acceptable to the individual materialises. I find that this factual matrix does not exist and has at no time existed in the present case"*

[41] By extension of this line of reasoning, it must be the case that an actual reassessment is required in order to vary or discharge the statutory duty owed pursuant to Article 15. If statements of Government policy cannot amount to an assessment then the occurrence of events, whether the pandemic or the problems faced by other children, cannot amount to a reassessment of the applicant's needs. On the evidence before me, there was no such reassessment. Rather, the UNOCINI

assessment in July 2020 confirmed both the needs of the applicant and the arrangements and facilities which were considered suitable and adequate.

[42] This echoes the position set out by McCloskey J in *Re LW* at paragraph [48] :

> *"It seems to me that the legislation – both the 1978 Act and the 1972 Order – must contemplate revised social care assessments from time to time, in response to changing circumstances. However, there has been no revised assessment in the present case and the court must obviously proceed on the basis of the existing assessment."*

[43] The proper analysis of the evidence in this case is inescapable. The needs of the applicant and the arrangements and facilities had been assessed and identified and a duty to provide them thereby crystallised. In March 2020 when Covid struck a decision was made to temporarily suspend the provision of those services. This decision is not the subject of judicial review. When SH was reopened, a decision was made to admit other children, with different needs, and to repurpose the facility. There was no reassessment of the needs of DF nor the arrangements and facilities which were suitable and adequate. The failure to provide these placed the Trust in breach of statutory duty.

[44] The fall back argument of the Trust derives from the decision of this court in *Re Hanna* [2003] NIQB 79. In that case Coghlin J held that the Article 15 duty is to provide such facilities as the Trust considers suitable and adequate to meet the patient's needs, consistent with its overall duty to promote the health and welfare of all the people in Northern Ireland. This will inevitably require the Trust to take into account the availability of resources. In *Hanna* the applicant had to await the provision of the relevant facility, which would be provided as soon as it became available.

[45] The factual circumstances of the instant are quite different from those which prevailed in *Hanna*. This is not a case where facilities were to be provided once available but rather one where a positive decision is made to repurpose an existing facility, in full knowledge that this will prevent the Trust from delivering the short term breaks which had continued to be identified as suitable and adequate to meet this particular applicant's needs. I find therefore that the *Hanna* decision does not assist the respondent in this case.

[46] The other statutory duties relied upon by the applicant, the so-called 'target duties, provide important legal context to the compliance by the Trust with its obligations but are not, in the prevailing circumstances, actionable at the suit of the applicant.

[47] The applicant's claim in relation to the alleged breach of Article 8 ECHR adds nothing to the substance of the case. I have already held that the respondent Trust

acted in breach of statutory duty and therefore the interference with the applicant's established Article 8 rights was not "*in accordance with law*".

[48] It was agreed at the outset of the hearing that the second respondent, the Department of Health, would not make any separate submissions on the legal issues arising. I also did not have any evidence on the question, for instance, of the availability of resources. Accordingly, whilst I accept that the Department can be an appropriate respondent given the "*matrix of statutory provisions*" referred to by McCloskey J in *Re LW*, I do not make any finding in relation to the Department in this case.

Conclusion

[49] For the reasons set out, I conclude that the respondent Trust was in breach of the statutory duty which it owed to the applicant by reason of the decision to repurpose the SH facility and thereby deny the applicant short term breaks. No reassessment of the applicant's needs or arrangements was carried out and therefore the duty created by the existing assessment continued throughout this period.

[50] The short term breaks now having been restored, the relief in this case will be declaratory only. I would invite Counsel to agree suitable wording of the declaration.

[51] I will hear the parties on the question of costs.