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## **Bail for 'Children in Need'**

### **MP's (a minor) Application [2014] NIQB 52**

NICCY recently intervened in the judicial review of a decision of Belfast Health and Social Care Trust. The matter centered on a 14 year old (MP) who had been charged with a serious offence. When he came before the court, he had no bail address to put forward and so one was sought from the Belfast Health and Social Care Trust. None was offered at the Magistrates Court and therefore bail was refused. When an application for bail was brought before the High Court, the Respondent Trust offered one address but did so with grave reservations. As a result of this, MP was remanded to Woodlands Juvenile Justice Centre with the High Court Judge indicating that should the Trust offer alternative accommodation, the matter should be brought back before him.

MP's legal representatives successfully sought leave to bring a judicial review of the Respondent Trust and requested the Commissioner considered intervening in the matter.

The key issues in the case were:

1. Whether MP was a 'child in need' as defined in Article 17 of the Children (Northern Ireland) Order 1995 (herein after the Children Order); and
2. Whether the Respondent Trust was under a duty to provide MP with accommodation under Article 21(1)(c) of the Children Order.

Article 17 of the Children Order states:

“For the purposes of this Part a child shall be taken to be in need if—

(a) he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by an authority under this Part;

(b) his health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services; or

(c) he is disabled,

and “family”, in relation to such a child, includes any person who has parental responsibility for the child and any other person with whom he has been living.”

Article 21(1) of Children Order states:

“Every authority shall provide accommodation for any child in need within its area who appears to the authority to require accommodation as a result of—

(a) there being no person who has parental responsibility for him;

(b) his being lost or having been abandoned; or

(c) the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care.”

### **The Applicant's Case**

The Applicant's case was that MP constituted as a ‘child in need’ under Article 17 and as a result the Respondent was under a statutory duty to provide him with accommodation pursuant to Article 21(1)(c). By failing to do so, the Applicant argued the Trust had acted ultra vires, in contravention of a legitimate expectation and in a procedurally unfair manner. The Applicant further submitted that the impact of the Trust failing to provide accommodation had resulted in the denial of bail and MP's indefinite remand.

The arguments raised on behalf of MP are set out in further detail at paragraphs [7] - [27] of the judgment.

## The Respondent's Arguments

The arguments raised by the Respondent are set out at paragraphs [28] – [53] of the judgment. The key arguments are set out below:

1. The Respondent did not accept that the fact that MP was unable to return to his home and the lack of an alternative potential address satisfied the Article 17 test.
2. The Respondent did not accept that any duty to provide accommodation arose purely because of MP's arrest and restriction on returning home.
3. The Respondent argued that there were no concerns which would lead to the Article 17 test being satisfied.
4. The Respondent argued that as the child was engaging well in the Juvenile Justice Centre and that as there had been some positives from staying in the detention facility, this mitigated against the fulfillment of Article 17.
5. The Respondent argued that the Applicant was not a child in need at that time and that all of his health and development needs were met adequately and most appropriately in detention.
6. The Respondent submitted that the remand in custody to detention rendered the Applicant outside the definition of a 'child in need'.
7. The Respondent did not accept that it had a duty to the Applicant under Article 21(1)(c) at that time. In the event that the court deemed that such duty has existed, the Trust submits that it has appropriately discharged its duty as part of an ongoing process.

## The Commissioner's Intervention

The matter was considered by the Commissioner's Legal Funding Committee who felt that the case satisfied the legislative requirements for an intervention<sup>1</sup> and the additional hurdles set out in the Commissioner Legal Funding Criteria.<sup>2</sup> Leave to intervene was sought from the court and granted.

The Commissioner was concerned that the Trust's interpretation of the concept of a 'child in need' (i.e. that a child on remand is not a 'child in need' because of the engagement of the youth justice system and so there is no duty to accommodate) could have the effect of creating a presumption of protracted or indefinite detention for children who because of the circumstances of the alleged offending have no alternative source of care or accommodation.

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<sup>1</sup> Under Article 14 The Commissioner for Children and Young People (Northern Ireland) Order 2003

<sup>2</sup> A copy is available [here](#)

The Commissioner sought to assist the Court by referring to appropriate international legal principles for the purposes of assessing the legality, proportionality and fairness of the Respondent’s decision. The Commissioner, through written and oral submissions, sought to highlight the need to interpret and apply Articles 17 and 21 of the Children Order in a manner compatible with the United Kingdom’s international obligations in respect of children detained on remand in the youth justice system. The Commissioner submitted that the interpretation of the statutory obligations arising from Articles 17 and 21 could be properly informed by an analysis of the legal principles contained in the United Nations Convention on the Rights of the Child (UNCRC) and its subsidiary instruments. An analysis of these is set out below.

Article 37 of the UNCRC states that: “States Parties shall ensure that:

....

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.”

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the “Beijing Rules”) provide relevant guidance on the application of Article 37:

“Rule 13: Detention pending trial

13.1 Detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time.

13.2 Whenever possible, detention pending trial shall be replaced by alternative measures, such as close supervision, intensive care or placement with a family or in an educational setting or home.

....

Rule 19: Least possible use of institutionalization

19.1 The placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period.”

The UNCRC is further supplemented by the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the “Havana Rules”). These provide:

“Rule 1: The juvenile justice system should uphold the rights and safety and promote the physical and mental well-being of juveniles. Imprisonment should be used as a last resort.

Rule 2: Juveniles should only be deprived of their liberty in accordance with the principles and procedures set forth in these Rules and in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules).

Deprivation of the liberty of a juvenile should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases. The length of the sanction should be determined by the judicial authority, without precluding the possibility of his or her early release.

....

Rule 17: Juveniles who are detained under arrest or awaiting trial ("untried") are presumed innocent and shall be treated as such. Detention before trial shall be avoided to the extent possible and limited to exceptional circumstances. Therefore, all efforts shall be made to apply alternative measures...”

The United Nations Committee on the Rights of the Child has already addressed the issue of the pre-trial detention of children in General Comment No.10, making a number of relevant comments as set out below:

“[11] The use of deprivation of liberty has very negative consequences for the child’s harmonious development and seriously hampers his/her reintegration in society. In this regard, article 37(b) explicitly provides that deprivation of liberty, including arrest, detention and imprisonment, should be used only as a measure of last resort and for the shortest appropriate period of time, so that the child’s right to development is fully respected and ensured.

....

[80] The Committee notes with concern that, in many countries, children languish in pretrial detention for months or even years, which constitutes a grave violation of article 37 (b) of CRC. An effective package of alternatives must be available (see chapter IV, section B, above), for the States parties to realize their obligation under article 37(b) of CRC to use deprivation of liberty only as a measure of last resort. The use of these alternatives must be carefully structured to reduce the use of pretrial

detention as well... In addition, the States parties should take adequate legislative and other measures to reduce the use of pretrial detention. Use of pretrial detention as a punishment violates the presumption of innocence...The duration of pretrial detention should be limited by law and be subject to regular review.”

[81] The Committee recommends that the State parties ensure that a child can be released from pretrial detention as soon as possible, and if necessary under certain conditions...”

Turning to the UK and Northern Ireland specifically in it’s Concluding Observations in 2008, the UN Committee drew attention to their concerns about our system and the detention of children and young people in Northern Ireland noting the number of children and young people who were subject to detention and the duration of the period of remand. 3

The Commissioner submitted that although the UNCRC remains unincorporated into our domestic legislation, there is now a ‘well-established principle’ that even where a binding international convention, such as the UNCRC, is not incorporated into domestic legislation, the courts will seek to interpret domestic legislation consistently with it.<sup>4</sup> This ‘well-established principle’ is one that has been repeatedly applied by both the House of Lords and the Supreme Court with particular regard to the UNCRC.<sup>5</sup>

Further, the European Court of Human Rights has repeatedly relied upon provisions of the UNCRC when determining and interpreting Convention rights.<sup>6</sup> By relying upon the UNCRC to interpret and apply the European Convention of Human Rights, a secondary duty has now been acknowledged without our domestic legal system. UK courts therefore have a secondary duty to take the UNCRC and relevant international rights into account when considering Convention rights and ensuring compatibility with section 6 of the Human Rights Act.<sup>7</sup>

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<sup>3</sup> Paragraphs 77 and 78

<sup>4</sup> Lord Bingham, *A v. Secretary for State for the Home Department* [2005] UKHL 71 [27], [2006] 2 AC 221, 225

<sup>5</sup> Lord Steyn, *R v. G* [2003] UKHL 50 [53], [2004] 1 AC 1034 “*Ignoring the special position of children in the criminal justice system is not acceptable in a modern civil society. In 1990 the United Kingdom ratified the Convention on the Rights of the Child...the House cannot ignore the norm created by the Convention...*”

<sup>6</sup> See *T v United Kingdom* (1999) 7 BHRC 659. *Pini v Bertani*; *Manera and Atripaldi v Romania* (Application Nos 78028/01 and 78030/01) [2005] 2 FLR 596 [139]. *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* (Application No 13178/03) [2007] 1 FLR 1726 [83].

<sup>7</sup> Baroness Hale, *R v Durham Constabulary* [2005] UKHL : “The Beijing Rules are not binding on member states, but the

The Commissioner also highlighted to the Court that the European Court of Human Rights has also expressly utilized the Beijing Rules in their interpretation of Convention Rights.<sup>8</sup> Domestic courts have also considered the General Comments of the Committee to have persuasive weight<sup>9</sup> and have also relied upon the Committee's Concluding Observations.<sup>10</sup>

The application of the UNCRC has been expressly held to apply to the exercise of administrative decisions.<sup>11</sup> The Commissioner submitted to the Court that administrative decisions, such as that of the Respondent Trust, ought to be taken in a manner that is, in so far as possible, consistent with the UNCRC. A public authority should give consideration to any relevant Rules, General Comments and Concluding Observations when a public authority, such as the Trust, is carrying out functions and exercising discretionary powers. Such an approach is necessary to ensure public authorities act compatibly with Convention Rights.

The Commissioner was concerned that should the Trust uniformly adopt their interpretation of Article 17; a practice would arise whereby children detained on remand are presumptively considered not to be 'children in need'. Such an interpretation would be at odds with the fundamental principles of detention as a measure of last resort as it could have the effect, as was the case with MP, where a child with no alternative source of accommodation is remanded into custody for unduly protracted periods. The Commissioner submitted that such an interpretation of a 'child in need' also fails to take into account the repeated advice of the UINCRC and the UN Committee on the Rights of the Child that detention is exceptionally detrimental to the development of the child.<sup>12</sup>

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same principle is reflected in the United Nations Convention on the Rights of the Child ...which has been ratified by all but two of the member states of the United Nations. This is not only binding in international law; it is reflected in the interpretation and application by the European Court of Human Rights...of the rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms...to that extent at least, therefore, is must be taken into account in the interpretation and application of those rights in our national law."

<sup>8</sup> T v. UK (Application No 24724/94) (1999) [71-75] and [96].

<sup>9</sup> Lord Buxton R (on the application of C) v Secretary of State for Justice [2008] EWCA Civ 882 [61] '...the Secretary of State appeared to suggest to the JCHR that he was bound only by the Convention, and not by the views of the UN Committee. The JCHR, at para 30, stated that it was very disappointed by the Secretary of State's apparent lack of respect for the views of the UN Committee. So am I....

<sup>10</sup> Baroness Hale in R (Williamson) v Secretary of State for Education [2005] UKHL 15, [2005] 2 AC 246 [84-86] She described the General Comment as 'the authoritative international view of what the UN Convention requires.'

<sup>11</sup> D v Home Office [2005] EWCA Civ 38, [2006] 1 All ER 183 [11]

<sup>12</sup> See General Comment No. 10, para 11 "The use of deprivation of liberty has very negative consequences for the

With respect to the timeframe within which the duty to provide services under Article 21 should be discharged, the Commissioner submitted that any timeframe must be a reasonable one and should be expressly informed by the UNCRC principles that detention should be a measure of last resort and for the shortest period possible.

### **Outcome**

In considering this matter, the court found that the Article 17 test was satisfied and MP was indeed a 'child in need', making the following declaration:

“One’s liberty and one’s enjoyment of the presumption of innocence are fundamental rights which go to the very dignity of the human being. Therefore, on the basis of respect for the dignity of the individual and as a matter of public policy, it is not open to the respondent to consider that these deprivations will not at a minimum significantly impair his health or development, regardless of the quality of that institution or his engagement with that institution. In the most fundamental sense the applicant child’s human development is being necessarily retarded by the deprivation of these basic rights.”

Turning to the Article 21 test, the court found that MP’s parent was prevented from providing him with suitable accommodation or care and as a result, there was an absolute duty on the Respondent Trust to provide accommodation for him. The Court concluded that the Respondent had not done so and therefore found the Trust to be in breach of their duty.

The Commissioner was pleased to see the UNCRC and its subsidiary instruments mirrored to a large extent in the judgment.

Following judgment, the Respondent Trust were able to offer MP accommodation and he was soon after released on bail.

Unfortunately this case is not unique and the issues raised in MP’s matter remain a concern for the Commissioner. Since judgment was handed down, the Commissioner’s

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child’s harmonious development and seriously hampers his/her reintegration in society...”

See also the commentary of Rule 19 Beijing Rules “The many adverse influences on an individual that seem unavoidable within any institutional setting evidently cannot be outbalanced by treatment efforts. This is especially the case for juveniles, who are vulnerable to negative influences. Moreover, the negative effects, not only of loss of liberty but also of separation from the usual social environment, are certainly more acute for juveniles than for adults because of their early stage of development...”



Legal and Investigations department has been contacted on behalf of several young people facing the same difficulties as those encountered by MP in securing a bail address from their Health and Social Care Trust when they themselves have none to put forward. The Commissioner's Legal & Investigations team has been able to provide those representatives with advice and assistance. We recently held a CPD event to raise awareness of the judgment in MP's case so legal professionals could use this precedent in challenging such decisions. A copy of the CPD lecture can be found [here](#). We will also be in contact with the Health and Social Care Trusts to bring this judgment to their attention and remind them of their responsibilities towards children and young people in contact with the youth justice system.

**Sinead Mallon LL.B**