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## **The Last Resort: Children in Custody**

### **A case exploration of the dangers of one-dimensional public decisions in respect of children in custody**

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#### **A. BACKGROUND TO LECTURE-MP's (a minor) application NIQB 52**

[1] I was kindly asked by the Northern Ireland Commissioner for Children and Young People (NICCY) to give this lecture due to my involvement in the matter of *MP's (a minor) application NIQB 52*. The matter of MP concerned a Challenge to a decision of the Belfast Health and Social Care Trust (the Trust) whereby the Trust failed to provide accommodation for MP. MP was a 14 year old who was detained in Woodlands Juvenile Justice centre, having been charged with serious offences.

[2] MP was initially denied bail in Newtownards Magistrates Court. One of the grounds for objection to bail was that the Trust had indicated they were not able to provide MP with a placement within Children's Services. High Court bail was also refused, although the Trust appeared to offer an address with 'grave reservation.' It was indicated that if alternative accommodation could be offered, bail should be brought back before the High Court. Failing such an offer, MP would remain detained.

#### **B. THE TRUST'S STATUTORY DUTIES**

[3] The Trust is under a duty to provide any child in need with accommodation, if the person caring for him is prevented from providing him with suitable accommodation or care:

*Article 21(1)(c) of the Children (Northern Ireland) Order 1995:*

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

*.... (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.*

[4] The Definition of a ‘child in need’ is contained in Article 17 of the Children (Northern Ireland) Order 1995 (The 1995 Order):

*17. 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,*

[5] The definitions of development and health are as outlined in Article 2 (2) of the 1995 Order:

***Definition of ‘development’:** physical, intellectual, emotional, social or behavioral development.*

***Definition of ‘health’:** physical or mental health*

### **C. THE TRUST’S ARGUMENTS**

[6] The rationale of the Trust’s decision is as articulated in paragraphs [28]-[53] of the Judgement. The Respondent’s arguments included:

- *MP did not qualify as a child in need simply because he could not return to his Mother’s care or the lack of alternative address.*
- *It was not reasonable or proper to argue that the duty to accommodate in all areas leads to an immediate placement.*
- *Issue of suitability must be a factor in the exercise of a duty to accommodate.*
- *Resources did not play a part in the decision-making process in relation to this case, rather risk factors were at the heart of this case.*
- *MP is engaging well in the detention facility and there have been some positives from staying in the detention facility.*

- *All of MP's health and development needs are currently being met and by the detention facility.*

#### **D. THE COMMISSIONER'S INTERVENTION**

[7] The Commissioner intervened because the impact of the Trust's decision was that MP would be held in custody until the date of hearing. There was a significant impingement on MP's right to liberty. The Trust's decision generated a dangerous presumption, for the protracted or indefinite detention of children who had no alternative form of accommodation.

[8] The Commissioner's intervention aimed to stress the need to interpret and apply Articles 17 and 21 of the 1995 Order, in a manner that is compatible with the United Kingdom's international obligations in respect of children.

[9] The core argument of the Commissioner was that article 17, the definition of a child in need, had to be read in conjunction with the principles of the United Nations Convention on the Rights of the Child (UNCRC) to ensure that detention of children remains an option of last resort.

[10] The most relevant provision of the UNCRC that the Commissioner sought to utilise was Article 37:

*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;*

[11] The Commissioner also sought to rely on the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the "Beijing Rules"), which 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.*

[12] 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...*

[13] Furthermore, the Commissioner drew attention to the United Nation’s Committee on the Rights of the Child’s General Comment No. 10 (issued in 2007):

*[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...*

[14] The UN Committee also made a number of comments directly relating to juvenile detention in this jurisdiction in its *Concluding Observations to the United Kingdom of Great Britain and Northern Ireland (2008)*. These observations were made in response to periodic reports issued by the United Kingdom Government to the Committee. The Committee addressed particular concerns in relation to the administration of juvenile justice at paragraph 77 of the 2008 report. It noted specific issues in respect of the number of children and young people who were subject to detention and the duration of the periods of remand. At paragraph 78 the Committee stated:

*[78] The Committee recommends that the State party fully implement international standards of juvenile justice... It also recommends that the State party:*

...

*(b) Develop a broad range of alternative measures to detention for children in conflict with the law; and establish the principle that detention should be used as a measure of last resort and for the shortest period of time as a statutory principle;*

## **E. THE UNCRC AND DOMESTIC LAW**

[15] The UNCRC remains unincorporated into our domestic legislation and as such:

*‘...has no binding force in the domestic law of this country, unless it is given effect by statute or expresses principles of customary international law.’<sup>1</sup>*

[16] However there is now a ‘well-established principle,’ that even where a binding international convention, such as the UNCRC, is not incorporated into

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<sup>1</sup> Lord Bingham, *A v Secretary of State for the Home Department* [2005] UKHL 71 [27], [2006] 2 AC 221, 225.

domestic legislation, the courts will seek to interpret domestic legislation consistently with it.<sup>2</sup>

[17] This ‘well-established principle’ is one that has been repeatedly applied by both the House of Lords and Supreme Court with particular regard to the UNCRC. Lord Steyn, referring to article 40(1) the UNCRC in the matter of *R v G* stated:

*‘ 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>3</sup>

[18] Baroness Hale has explicitly repeated the interpretative obligations arising in respect of the UNCRC. In *Smith v Secretary of State for Work and Pensions*<sup>4</sup> Baroness Hale opined:

*‘Even if an international treaty has not been incorporated into domestic law, our domestic legislation has to be construed as far as possible so as to comply with the international obligations which we have undertaken...’*

[19] It is therefore not enough for Trusts, or other relevant public bodies, when exercising their discretion over statutory duties to assess those duties in isolation (a one dimensional approach). Rather they should interpret their duties, when applicable, in line with international conventions such as the UNCRC.

## **F. UNCRC AND ECHR**

[20] The European Court of Human Rights (ECtHR) has also expressly taken international obligations into account when interpreting the European Convention of Human Rights. In *Al Adsani v United Kingdom* the ECtHR remarked:

*‘The convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part...’*<sup>5</sup>

[21] The ECtHR has repeatedly relied upon provisions of the UNCRC when determining and interpreting Convention Rights.<sup>6</sup> The ECtHR has also expressly utilised the Beijing Rules in their interpretation of Convention Rights (see for example *T v UK*).<sup>7</sup>

[22] By virtue of the ECtHR’s reliance upon the UNCRC to interpret the Convention, a further duty arises within our domestic legal system. As a result of the application of the “mirror principle” domestic courts should seek to replicate Convention-compliant interpretations. The United Kingdom courts have a secondary

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<sup>2</sup> Ibid.

<sup>3</sup> [2003] UKHL 50 [53], [2004] 1 AC 1034.

<sup>4</sup> [2006] UKHL 35 [78], [2006] 3 All ER 907.

<sup>5</sup> (2001) 12 BHRC 88 [103].

<sup>6</sup> See for example, *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> (Application No 24724/94) (1999) [71-75] and [96].

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 (HRA). Baroness Hale has made explicit reference to this secondary duty in *R (R) v Durham Constabulary* [2005] UKHL :

*'The Beijing Rules are not binding on member states, but the 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, it must be taken into account in the interpretation and application of those rights in our national law.'*<sup>8</sup>

[23] Trusts and public bodies should therefore take international rights and conventions, such as the UNCRC, into account when assessing if their domestic duties are Convention compliant and to ensure compatibility with section 6 of the HRA.

## **G. THE DECISION OF MP AND CONCLUDING REMARKS:**

[24] The Commissioner's submission in the case of MP was that administrative decisions, such as that of the Trust in MP, ought to be taken in a manner that is, in so far as possible, consistent with the UNCRC. A public authority should also give consideration to any relevant Rules, General Comments and Concluding Observations when carrying out its functions and exercising discretionary powers. Such an approach is necessary to ensure public authorities act compatibly with Convention Rights.

[25] Article 37 of the UNCRC is clear, in order for a detention to be lawful and not arbitrary, it must (i) be in conformity with the law, (ii) be a measure of last resort and (iii) imposed for the shortest possible period of time.

[27] Concern has already been expressed by the UN Committee on the Rights of the Child, in General Comment No. 10 at paragraph 80 (set out above) that in many countries children remain in pre-trial detention for considerable periods of time. The guidance by the Beijing and Havana Rules and Committee is also clear; pre-trial detention should be terminated as soon as possible and other alternative arrangements made. The United Kingdom and Northern Ireland had already been the subject of direct comment by the Committee on the need to ensure detention is used as a measure of last resort and for the shortest period of time.<sup>9</sup>

[28] If the Trust's interpretation of a child in need was uniformly adopted by the Trust, then a practice would arise whereby children detained on remand are

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<sup>8</sup> *R (R) v Durham Constabulary* [2005] UKHL 21 [26], [2005] 2 All ER 369.

<sup>9</sup> The UN Committee's Concluding Observations to the United Kingdom and Northern Ireland at [79].

presumptively considered not to be “children in need”. Such a practice could have the effect, as in the case of the Applicant, where a child with no alternative source of accommodation, is remanded in custody for unduly protracted periods. Such an interpretation fails to take account of the repeated advice of the UNCRC and United Nations Committee, that detention is exceptionally detrimental to the development of child. As the Committee stated in General Comment No. 10:

*‘The use of deprivation of liberty has very negative consequences for the child’s harmonious development and seriously hampers his/her reintegration in society...’<sup>10</sup>*

[29] Mr Justice Treacy determined that MP was a child in need without delving into the interpretation of the UNCRC. Mr Justice Treacy was satisfied as a matter of domestic law that article 17 was fulfilled:

*‘[68] ... 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 this deprivation 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.**’*

[30] It was therefore clear that a duty had arisen to provide accommodation to MP and the Trust had failed to do so.

[31] Mr Justice Treacy may not have embarked on an analysis of the UNCRC but his conclusion replicates the same fundamental conclusion of the UNCRC: that deprivation of a child’s liberty is harmful to a child’s development.

[32] It is now a well-established principle, not only that domestic legislation should be interpreted where possible in accordance with international obligations, such as the UNCRC, but also that public authorities must take such obligations into consideration to ensure they act compatibly with Convention Rights. It is open to Courts to consider these principles when assessing the legality and fairness of public bodies decisions. It may therefore be wise for public bodies to act with an expectation of Courts doing so, avoid the isolated one-dimensional approach and embrace a much more holistic approach when interpreting their statutory duties.

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**26<sup>th</sup> November 2014**

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<sup>10</sup> At paragraph 11, full citation above.