

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 23/12/2014

Before :

**Lord Justice Fulford**

**Mr Justice Nicol**

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Between :

**The Queen on the application of BG**

**Claimant**

- and -

**The Chief Constable of the West Midlands  
Constabulary**

**1<sup>st</sup> Defendant**

and

**Birmingham City Council**

**2<sup>nd</sup> Defendant**

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**Ian Wise QC** (instructed by **Jonas Roy Bloom Solicitors**) for the **Claimant**  
**Alan Payne** (instructed by **West Midlands Police Joint Legal Services**) for the **1<sup>st</sup> Defendant**  
**Jonathan Cowen** (instructed by **Legal Services, Birmingham City Council**) for the **2<sup>nd</sup> Defendant**

Hearing dates: 31 July 2014  
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**JUDGMENT**

**Lord Justice Fulford :**

**Introduction**

1. It is said by counsel on behalf of the claimant, Mr Wise Q.C., that this renewed application for judicial review, following refusal by Mitting J, raises questions of considerable importance for juveniles when they are kept at police stations prior to being brought before the criminal courts in this country.
2. The claimant, when aged 16, was detained in police cells before being produced in the Youth Court. This, it is submitted, is a common phenomenon, in that research by the

Howard League for Penal Reform suggests that in all likelihood significantly in excess of 40,000 children were held in police custody overnight during 2010 – 2011.

3. This application concerns four periods when the claimant was detained at a police station in the wake of a spate of offending on his part that is summarised below at [6]. The principal relief sought is a series of declarations concerning aspects of the legality of the claimant's detention, although there are ancillary applications for damages, disclosure and costs.

### **Timeliness**

4. These proceedings were issued on 1 April 2014, more than three months after the first decision that is challenged. However, given the potential importance of this application for the claimant and other individuals under the age of 17, together with certain delays as regards, first, the grant of public funding and, second, the provision of substantive responses to the pre-action correspondence on the part of the first and second defendants, I would be minded to permit the claimant to argue the entirety of the application, albeit one element is outside the three months' time limit, in order to address all of the various issues raised by this application on their merits.

### **The Facts**

5. The claimant turned 17 on 18 February 2014. He ordinarily lived with his mother and his siblings in Longbridge, Birmingham.
6. During 2012 he was convicted of attempted theft, battery, attempted robbery, burglary with intent to steal, aggravated burglary (committed whilst on bail), destruction of property (valued at less than £5000), failure to comply with the requirements of a Youth Rehabilitation Order, battery and assault occasioning actual bodily harm. A number of these offences were dealt with by non-custodial disposals. On 3 October 2013 the claimant was sentenced to a detention and training order ("*DTO*") for 22 months. As a part of this sentence, the court resentenced the claimant following the breaches of the community orders he had received for the 2012 offences.
7. The claimant was released from the custodial element of the *DTO* on 2 September 2013 when he became the subject of an Intensive Surveillance and Supervision Programme ("*ISSP*"), which he breached between 18 and 21 November 2013 by violating his electronically monitored curfew and by failing to attend appointments. His *DTO* licence supervision was due to last until 2 August 2014.
8. The four relevant periods of detention in police custody are set out below.

### ***First Period of Detention***

9. On 10 December 2012 at about 3.15 am a motorcar was stolen following a burglary of the owner's house during which the ignition key was taken. There was a short chase by the police and the vehicle was abandoned after it crashed into some parked motorcars. The claimant was arrested at 4.53 am having been observed running from the scene of the collision and he was discovered shortly afterwards hiding in a garden. He was taken to Bourneville Lane Police Station in Birmingham.

10. There appears to be no dedicated youth area at Bourneville Lane Police Station. The claimant was held by himself in an adult police cell, having arrived at about 5.00 am on 10 December 2013. Following an interview, at 8.20 pm on the same day he was charged with burglary and aggravated vehicle taking. There is a note by the custody sergeant in the custody record at 8.25 pm:

[there are] “... *reasonable grounds for believing that the detention of the person arrested is necessary to prevent them causing physical injury to any other person*”.

and at 8.33 pm:

“*I have spoken to Robyn Ills at EDT on (phone number given) they are enquiring now into the availability of secure accommodation which in this instance is required adequately to protect the public from serious harm*”.

11. At 8.45 pm the following was added:

“*Mr Halpine has called in from EDT. They have no secure beds available for the PIC therefore he will remain in custody till the morning to go to court*”.

12. At 8.49 pm the custody sergeant noted:

“*Manual print: juvenile detention form (JUR010): Certificate of juvenile detention required*”.

13. The custody sergeant had decided, therefore, that it was necessary to detain the claimant to prevent him from causing physical injury to others and/or to protect the public from serious harm, no doubt given the circumstances of the offence for which he had been arrested. He was refused bail and – given the lack of secure accommodation – he was not released from the police station to the local authority. He was held alone in an adult cell and there is no evidence that he associated with any adult who had been charged with an offence. He left the police station at 09.13 am on 11 December 2013 in order to be taken to court.

14. At the youth court, the District Judge accepted jurisdiction. The claimant and his co-accused denied the charges. A trial date was fixed. Bail was refused and the claimant was remanded to the local authority with conditions. An undated “*Certificate of Juvenile Detention*” has been disclosed – albeit this was seemingly not provided at the Youth Court on 11 December 2013 – in which it was set out that it was “*feared*” that the claimant “*will commit further offences on bail*” and that his detention was necessary “*to protect others from harm*”.

15. On 18 December 2013 the claimant appeared at the Youth Court and pleaded guilty to failing to comply with his ISSP between 18 and 21 November 2013. He was remanded on conditional bail and was made the subject of a tagging order.

16. He later absconded from the children’s home where he was placed.

### ***Second Period of Detention***

17. The claimant was arrested by the police at about 3.50 am on 7 January 2014 at his mother's house following his failure to comply with the conditions of his bail: he had removed the tag from his leg and he had not been living at the address specified by the court. He arrived at the police station at about 4.14 am. He was held in an adult cell because no juvenile room was available. He was taken to court at 9.02 am on 8 January 2014 and he was released back to the local authority. In all, he had been at the police station for less than 5 hours. He spent a significant part of the time sleeping and there is no evidence that he associated with any adult who had been charged with an offence.
18. He absconded for a second time from the children's home and he failed to attend court on the interim remand date: 15 January 2014.

### ***Third Period of Detention***

19. The claimant was arrested once more on 21 January 2014, again at his mother's home. He was taken to the police station, arriving at about 4.30 pm. He was detained pursuant to section 7 Bail Act 1976. He was held overnight in a juvenile room and he was produced at court on the following morning, 22 January 2014, leaving the police station at 8.45 am. His application for bail was refused and he was remanded to the local authority.
20. Thereafter, the claimant once again absconded.

### ***Fourth Period of Detention***

21. The claimant was arrested on 30 January 2014 at 10.45 am for failure to reside at the address that had been specified. He arrived at the police station at approximately 11.11 am. He was held in a juvenile cell. He left the police station at 2.12 pm when he was taken to the Magistrates' Court, whereon he was released on bail. He was held for just under 3 hours (during the day).

### **The Legislative and other Relevant Provisions**

22. Section 31 Children and Young Persons Act 1933 provides:

***Separation of children and young persons from adults in police stations, courts, &c.***

*Arrangements shall be made for preventing a child or young person while detained in a police station, or while being conveyed to or from any criminal court, or while awaiting before or after attendance in any criminal court, from associating with an adult (not being a relative) who is charged with any offence other than an offence with which the child or young person is jointly charged, and for ensuring that a girl (being a child or young person) shall while so detained, being conveyed, or waiting, be under the care of a woman.*

23. Section 7 of the Bail Act 1976 provides:

***Liability to arrest for absconding or breaking conditions of bail.***

- (1) If a person who has been released on bail in criminal proceedings and is under a duty to surrender into the custody of a court fails to surrender to custody at the time appointed for him to do so the court may issue a warrant for his arrest.*
- (2) If a person who has been released on bail in criminal proceedings absents himself from the court at any time after he has surrendered into the custody of the court and before the court is ready to begin or to resume the hearing of the proceedings, the court may issue a warrant for his arrest; but no warrant shall be issued under this subsection where that person is absent in accordance with leave given to him by or on behalf of the court.*
- (3) A person who has been released on bail in criminal proceedings and is under a duty to surrender into the custody of a court may be arrested without warrant by a constable—
  - a) if the constable has reasonable grounds for believing that that person is not likely to surrender to custody;*
  - b) if the constable has reasonable grounds for believing that that person is likely to break any of the conditions of his bail or has reasonable grounds for suspecting that that person has broken any of those conditions; or*
  - c) in a case where that person was released on bail with one or more surety or sureties, if a surety notifies a constable in writing that that person is unlikely to surrender to custody and that for that reason the surety wishes to be relieved of his obligations as a surety.**
- (4) a person arrested in pursuance of subsection (3) above—
  - a) shall, except where he was arrested within 24 hours of the time appointed for him to surrender to custody, be brought as soon as practicable and in any event within 24 hours after his arrest before a justice of the peace for the petty sessions area in which he was arrested; and**

[...]

24. Section 38 Police and Criminal Evidence Act 1984 provides:

***Duties of custody officer after charge***

*(1) Where a person arrested for an offence otherwise than under a warrant endorsed for bail is charged with an offence, the custody officer shall, subject to section 25 of the Criminal Justice and Public Order Act 1994, order his release from police detention, either on bail or without bail, unless—*

*(a) If the person arrested is not an arrested juvenile—*

[...]

*(iii) in the case of a person arrested for an imprisonable offence, the custody officer has reasonable grounds for believing that the detention of the person arrested is necessary to prevent him from committing an offence;*

[...]

*(b) if he is an arrested juvenile—*

*(i) any of the requirements of paragraph (a) above is satisfied [...]; or*

*(ii) the custody officer has reasonable grounds for believing that he ought to be detained in his own interests;*

*(c) the offence with which the person is charged is murder.*

[...]

*(3) Where a custody officer authorises a person who has been charged to be kept in police detention, he shall, as soon as practicable, make a written record of the grounds for the detention.*

[...]

*(6) Where a custody officer authorises an arrested juvenile to be kept in police detention under subsection (1) above, the custody officer shall, unless he certifies—*

*(a) that, by reason of such circumstances as are specified in the certificate, it is impracticable for him to do so; or*

*(b) in the case of an arrested juvenile who has attained the age of 12 years, that no secure accommodation is available and that keeping him in other local authority accommodation would not be adequate to protect the public from serious harm from him,*

*secure that the arrested juvenile is moved to local authority accommodation.*

*(6A) In this section—*

*“local authority accommodation” means accommodation provided by or on behalf of a local authority (within the meaning of the Children Act 1989);*

*“minimum age” means the age specified in section 63B(3)(b) below;*

[...]

*(7) A certificate made under subsection (6) above in respect of an arrested juvenile shall be produced to the court before which he is first brought thereafter.*

25. Section 21 Children Act 1989 provides:

***Provision of accommodation for children in police protection or detention or on remand, etc.***

[...]

*(2) Every local authority shall receive, and provide accommodation for, children—*

[...]

*(b) whom they are requested to receive under section 38(6) of the Police and Criminal Evidence Act 1984;*

26. Schedule 4 Police Act 1996 sets out the attestation of every member of the police force:

*I.....of.....do solemnly and sincerely declare and affirm that I will well and truly serve the Queen in the office of constable, with fairness, integrity, diligence and impartiality, upholding fundamental human rights and according equal respect to all people; and that I will, to the best of my power, cause the peace to be kept and preserved and prevent all offences against people and property; and that while I continue to hold the said office I will, to the best of my skill and knowledge, discharge all the duties thereof faithfully according to law.*

27. Section 11 Children Act 2004 provides:

***Arrangements to safeguard and promote welfare***

*(1) This section applies to each of the following—*

*(a) a local authority in England;*

[...]

*(h) the local policing body and chief officer of police for a police area in England;*

[...]

*(2) Each person and body to whom this section applies must make arrangements for ensuring that—*

*(a) their functions are discharged having regard to the need to safeguard and promote the welfare of children; and*

*(b) any services provided by another person pursuant to arrangements made by the person or body in the discharge of their functions are provided having regard to that need.*

*(4) Each person and body to whom this section applies must in discharging their duty under this section have regard to any guidance given to them for the purpose by the Secretary of State.*

28. Paragraph 6.6 of the statutory guidance on making arrangements to safeguard and promote the welfare of children under section 11 of the Children Act 2004 provides:

*6.6. As mentioned above, the police service has a responsibility to promote and safeguard the welfare of children by preventing offending against them and ensuring that investigations into any such offences are conducted in the best interests of the child and the criminal justice system. Moreover, section 29 of the Police Act 1996 (as amended by section 83 of the Police Reform Act 2002) requires that every member of a police force maintained for a police area attests to ensure that fundamental human rights are upheld with fairness, integrity, diligence and impartiality according to law. These responsibilities are carried out in compliance with domestic legislation and international treaties including the United Nations Convention on the Rights of the Child and the European Convention on Human Rights to protect the individual's right to life and to protect individuals from inhuman and degrading treatment.*

29. Paragraph 6.18 of the same statutory guidance provides:

*6.18. Children under the age of 17 suspected of having committed an offence are recognised as vulnerable. The Police and Criminal Evidence Act 1984 and the accompanying Code of Practice (reviewed annually) place a statutory responsibility on the police to ensure additional*



*considerations are given to the welfare and interests of a juvenile whilst dealing with them in the context of the needs of the criminal justice system. A person aged under 17 is required to be afforded special care including the provision of an appropriate adult whilst in custody.*

30. Article 3 of the United Nations Convention on the Rights of the Child (in force from 2 September 1990, ratified by the United Kingdom on 16 December 1991) provides:

*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

31. Although it is the claimant's case that the domestic provisions set out above broadly meet the United Kingdom's international obligations in these circumstances (in particular the United Nations Convention on the Rights of the Child, along with other instruments such as the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 29 November 1985, A/RES/40/33 ("Beijing Rules")), it is nonetheless argued that the various international requirements that exist as regards the treatment of juveniles provide a more comprehensive regime (see [36] – [39] and [44] – [46] below).

### **The Claimant's Case**

32. It is highlighted that after an individual is charged with an offence, there is a presumption that he will be released from police detention unless one or more of the specified grounds for detention are met. For someone under 17 years of age who has been detained,<sup>1</sup> if continued police detention under section 38(1) is justified, the custody officer is obliged to move him to local authority accommodation unless this is impracticable or – if the juvenile has reached the age of 12 – no secure accommodation is available and keeping him in other local authority accommodation would be inadequate to protect the public from "serious harm".
33. It is emphasised that the first critical question is whether the conditions for continued detention are met, and that this needs to be answered prior to any consideration of moving the child to local authority accommodation. Section 38(1)(b) requires that the juvenile is released unless one of the seven requirements of section 38(1)(a) is satisfied, or the juvenile is charged with murder (section 38(1)(c)) or the custody officer has reasonable cause to believe the child should be detained in his own interests (section 38(1)(b)(ii)).
34. In this case, the relevant considerations were those contained in section 38(1)(a) (*viz.* "the custody officer has reasonable grounds for believing that the detention of the person arrested is necessary to prevent him from committing an offence").
35. It is argued that in deciding whether to detain the claimant the police were obliged to have regard to the need to safeguard and promote his welfare (section 11 Children Act

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<sup>1</sup> See section 37(15) Police and Criminal Evidence Act 1984.

2004) and to ensure that "*additional considerations were given to [his] welfare and interests*" (Guidance 6.18).

36. The claimant emphasises the importance in this context of Article 3 of the United Nations Convention on the Rights of the Child by reference to the decision of this court in *R(on the application of HC) v Secretary of State for the Home Department* (2013) EWHC 982 (Admin); (2014) 1 WLR 1234, and particularly the following observation of Moses LJ:

*38. The impetus driving the United Kingdom to afford special statutory protection to those under 18 is the United Nations Declaration on the Rights of the Child 1959 and the Convention on the Rights of the Child 1989 ("UNCRC"). One of the key principles of the United Nations Declaration is that a child is to enjoy special protection. The preamble to the UNCRC speaks of entitlement to special care and assistance for a child. The UNCRC is the most widely ratified human rights treaty in the world. All save two states have ratified it. The United Kingdom signed on 19 April 1990 and ratified it on 16 December 1991. For the purposes of the instant application, what is of most significance is not so much what it provides but whom it protects. Article 1 of the UNCRC defines a child as a person aged under 18 unless, under the law applicable to the child, majority is attained earlier. The age of majority in the United Kingdom is 18. It was reduced to 18 from 21 on 1 January 1970, pursuant to s.1 of the Family Law Reform Act 1969. That line was drawn in s.65(1) of the Children Act 2004 [...] and s.105 (1) of the Children Act 1989 .*

37. Similarly, in the earlier case of *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4; [2011] 2 A.C. 166, Lady Hale highlighted that Article 3 "*is a binding obligation in international law, and the spirit, if not the precise language, has also been translated into our national law. Section 11 of the Children Act 2004 places a duty upon a wide range of public bodies to carry out their functions having regard to the need to safeguard and promote the welfare of children*".
38. Mr Wise argues that Article 3 imposes a greater obligation than that provided by the United Kingdom's domestic provisions, given particularly the emphasis in Article 3 that the best interests of a child are a "*primary consideration*". He submits that this requirement was afforded appropriate emphasis in the decision in *R(on the application of SR) v Nottingham Magistrates' Court* [2001] EWHC Admin 802, when Brooke LJ set out:

*65. All the contracting states of the Council of Europe have ratified the United Nations Convention on the Rights of the Child ("UNCRC"). Mr Sales accepted that where children in custody are concerned the provisions of the convention are available to inform the content of ECHR Article 8. It is therefore necessary to examine the relevant provisions of the UNCRC with some care.*

66. *All the states parties to the UNCRC undertook to respect and ensure the rights “set forth” in that convention to every child within their jurisdiction without discrimination (UNCRC Article 2.1). It follows that every public authority concerned with issues relating to the care and management of children in custody must take their interests as a primary consideration (UNCRC Article 3.1), and must afford them the following rights and entitlements, so far as they are consistent with their custodial status:*

*i) The entitlement of such protection and care as is necessary for their well-being;*

*ii) The right to maintain personal relations and direct contact with both their parents on a regular basis;*

*iii) The right to a standard of living adequate for their physical, mental, spiritual, moral and social development;*

*iv) The right to insist that any period of imprisonment must be in conformity with the law and used as a measure of last resort and for the shortest appropriate period of time;*

*v) The entitlement, when deprived of liberty, to be treated with humanity and respect for the inherent dignity of the human person and in a manner which takes into account the needs of persons of their age;*

*vi) The entitlement, when deprived of liberty, to be separated from adults unless it is considered in their best interests not to be so separated;*

*vii) The entitlement, when deprived of liberty, to maintain contact with their family through correspondence and visits, save in exceptional circumstances;*

*viii) When it is alleged or recognised that they have infringed the penal law, the right to be treated in a manner consistent with the promotion of their dignity and worth.*

*(See UNCRC Articles 3.2, 9.3, 27.1, 37(b) and (c), and 40.1).*

67. *The link between the rights and entitlements of a child which the UNCRC proclaims and a child's right to respect for his or her private life which is granted by ECHR Article 8(1) is vividly articulated by the closing words of UNCRC Article 40,*

which sets out the right mentioned in (viii) above. Article 40 ends in this way:

*“[Such a child's right to be treated in a manner consistent with his or her sense of dignity or worth] reinforces the child's respect for the human rights and fundamental freedoms of others ... and takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.”*

39. The claimant suggests that his rights under Article 8 European Convention on Human Rights are engaged in this case, as indicated by *R(SR) v Nottingham Magistrates' Court* [2001] EWHC Admin 802:

*63. Because a custodial sentence, or a secure remand, constitutes such a serious infringement of the right recognised by Article 8(1), Parliament has set a high hurdle to be crossed before courts can lawfully make an order of this kind. So far as sentencing is concerned, section 70(2) of the Crime (Sentencing) Act 2000 speaks of an offence (or offences) so serious that only a custodial sentence can be justified. In the context of a violent or sexual offence, the court must be of an opinion that only a custodial sentence would be adequate to protect the public from serious harm from the offender. Similarly, section 23(5)(b) of the CYPA<sup>2</sup>, as amended, provides that a court may only order a secure remand if it is satisfied that it is needed to protect the public from serious harm from the alleged offender.*

40. In all the circumstances, it is argued that when deciding whether to detain the claimant in police custody, the officers were required to ensure that that his best interests were the primary consideration. It is submitted that there is no evidence that they adopted this approach; indeed, it is said that the police do not appear to have had his best interests in mind at all.
41. The claimant contends that section 38 Police and Criminal Evidence Act 1984 was engaged as regards the four instances when he was detained, albeit on the third and fourth occasions he was arrested for a breach of his bail conditions. It is argued that it is necessary to adopt a purposive interpretation of section 38, and that this provision applies whenever an individual is detained after he has been charged, and that it is not limited to decisions that relate to his detention in the period immediately following the charge. It is suggested that this approach is necessary to ensure that all those detained, but particularly juveniles, are not unnecessarily held in custody. In any event, it is contended that the effect of section 11 Children Act 2004 and Article 3 of the United Nations Convention on the Rights of the Child leads to this result.

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<sup>2</sup> Repealed by Legal Aid, Sentencing and Punishment of Offenders Act 2012 c. 10 Sch.12 para.6 (December 3, 2012 subject to savings as specified in SI 2012/2906 art.7(2)).

42. In the written grounds it is suggested that the requirements of section 31 Children and Young Persons Act 1933 were breached, in that the police failed to ensure that the arrangements prevented the claimant:

*"[...] from being able to speak, communicate or interact with adult defendants. Ensuring that young persons and adults are not afforded the opportunity to speak or socialise by sharing a cell or by associating outside the cell are part of that. [...] the arrangements must also cover the risks of other types of contact. [...]" (see R (T) v Secretary of State for Justice (2013) EWHC 1119 (Admin) at paragraph 40)*

However, we note the court in that case went on to add:

*On the other hand, the arrangements mandated by section 31 plainly do not oblige the use of separate court buildings for young person defendants and witnesses or even entirely separate custody areas in the one court building.*

43. The claimant highlights that no certificates were produced at court on 11 December 2013 or on 8, 22 or 30 January 2014. It is suggested that the failure to provide these documents was unlawful and that this tends to demonstrate that the detention was unjustified and illegal. The sole undated certificate does not specify why it was feared the claimant would commit further offences or why it was necessary to detain him to protect others from the risk of serious harm (as opposed to a lesser form of harm).
44. It is argued by the claimant that Birmingham City Council does not have "a reasonable system in place to enable (it) to respond to requests under section 38(6) for secure accommodation" (see R(M) v Gateshead MBC [2006] EWCA Civ 221; [2006] Q.B. 650 at paragraph 43). In support of this contention, the claimant relies on the response of the City Council to the letter before claim, in which it indicated that it "does not have its own stock of secure accommodation due to resource implications", that "the nearest secure units are in Bristol (Vinney Green) and Nottingham (Clayfields)" and "for late night applications for secure accommodation as was the case here the outcome will usually be that the provision of such accommodation will be impracticable due to the distance from Birmingham and the steps required to provide such accommodation". It is submitted that this suggested failure directly undermines the presumption that children will not be detained in police cells. It is said that the City Council, as a result, is in breach of its obligations under section 11 of the Children Act 2004 and article 3 of the United Nations Convention on the Rights of the Child, given particularly it will never be in a position to provide secure accommodation for children.
45. Finally, it is the claimant's case that his detention was in breach of Article 5 of the European Convention on Human Rights (see *Bouamar v Belgium* [1989] 11 EHRR 1). This is said to impose a greater burden on the local authority than that identified by Dyson LJ in *R(M) v Gateshead* (considered below). The court in *Bouamar* was concerned with a minor who was moved repeatedly between prison and his family without being placed in an appropriate institution or under the supervision of educationally trained staff. The European Court of Human Rights, in concluding there

had been a breach of Article 5(1), indicated that “*Lawfulness*’ [...] *implies that the deprivation of liberty is in keeping with the purpose of the restrictions permissible under Article 5(1) of the Convention*” [50]. The court decided that Belgium was under “*an obligation to put in place appropriate institutional facilities which met the demands of security and the educational objectives of [the relevant legislation], in order to be able to satisfy the requirements of Article 5(1) of the Convention*” [52]. The court went on to observe that on the facts of that case, the “*fruitless*” repeated remands of the complainant in prison became “*less and less ‘lawful’*” [53]. It is of note, however, that the applicant in that case (who was a minor) did not complain about the multiple occasions on which he was arrested or about the “*brief losses of liberty, amounting to a few hours, which his arrest entailed*” prior to being brought before the Juvenile Court [46]. Instead, he complained about the subsequent periods of detention in a remand prison that were ordered by the Juvenile Court, which extended to as many as fifteen days at a time.

## Discussion

46. Therefore, the principal arguments advanced by the claimant are, first, that his detention in police custody was contrary to section 38(1) Police and Criminal Evidence Act 1984. Second, it is alleged that his detention breached the welfare obligations owed to him under section 11 Children Act 2004. Third, it is argued that the defendants failed to ensure that his best interests were treated as a primary consideration, as required by article 3 United Nations Convention on the Rights of the Child. Fourth, it is contended (in the written grounds) that he was impermissibly held in a mixed cell block contrary to section 31 Children and Young Persons Act 1933, and fifth it is submitted that the police failed to provide a certificate as required by section 38 (7) PACE 1984. I shall analyse these various contentions in the context of the first and third periods of detention.
47. I have not summarised the arguments of the defendants because they are broadly in line with the conclusions which I have reached, as set out below.
48. It is to be observed immediately that, on the facts, the claim as regards **the second and the fourth periods of detention** is unarguable. The **second period of detention** began at 4.14 am and lasted for a short period of time: less than 5 hours, until the claimant was taken to court early that morning. The **fourth period of detention** was shorter still – under 3 hours and it occurred in the middle of the day. It is inconceivable that a court would consider granting a declaration in these circumstances because, for both periods of detention, it would have been impracticable to transfer the claimant to secure accommodation for only a few hours prior to taking him to court. Therefore, in my view it is unsustainable to argue that the second defendant should have commenced the process of requesting alternative secure accommodation for these periods of detention that lasted, as just indicated, for less than 5 hours and 3 hours respectively. It is highly likely that the claimant’s appearance in court would have been significantly delayed if steps had been taken to transfer him. Although Mr Wise correctly emphasised in his oral submissions that section 38 Police and Criminal Evidence Act 1984 is generally directed at the detention of juveniles in police custody and not just at overnight detention, it is the short timescales involved as regards these two periods of detention prior to the claimant being taken to court that render it unarguable that steps should have been

taken to transfer the claimant to secure local authority accommodation prior to his appearance in the Youth Court.

49. Turning to the **first period of detention** and the position of the West Midlands Police, the relevant facts undoubtedly provided material support for the decision that it was necessary to detain the claimant to prevent the commission of further offences and in order to protect the public from (serious) harm. Given the claimant's antecedents and the circumstances of this offence – as set out above, he was fleeing from the scene of a recently crashed stolen motorcar – this decision was self-evidently justified. Judicial review is a discretionary remedy and it is inconceivable that this court would give a declaration in these circumstances. The decision to detain was clearly open to the custody officer and it is not vitiated because he failed to provide more detailed reasons. As Mitting J, when refusing permission on the papers, observed:

*The custody sergeant was plainly entitled to determine that the detention of the Claimant was necessary to prevent him causing physical injury to any other person and/or to protect the public from serious harm: he had been arrested for aggravated vehicle taking in circumstances in which the car had crashed into one or more parked vehicles. The risk to the public from such conduct was obvious.*

50. No secure accommodation was available to the police following their enquiry with the local authority, and, as set out above, a credible decision was made that it was necessary to detain the claimant in police custody to avoid further offences and protect the public. The fact that the police were investigating whether secure local authority accommodation was available shortly after he was charged provides strong evidence that the police were discharging their obligation – as a primary consideration – to safeguard and promote his welfare. In my judgment, there is no arguable basis for suggesting that the police failed to fulfil their responsibilities under section 11 Children Act 2004 when discharging their statutory functions under the PACE 1984. Section 11 has not “redefined” the duties and functions of the police (see *Castle v Commissioner of Police for the Metropolis* [2011] EWHC 2317 (Admin), at paragraph 51), and it “provides no warrant for rewriting” other statutory provisions (e.g. Housing Act 1996: *Huzrat v the London Borough of Hounslow* [2013] EWCA Civ 1865). In a passage of his judgment in *Castle* that has particular relevance to the present application, Pitchford LJ observed:

*51. [...] It was the strongly expressed obiter view of the Supreme Court in In re E and ZH that the purpose of section 11 was to incorporate within domestic law the spirit of the United Kingdom's international obligations towards children stated in Art. 3.1 of the UNCRC. The Court was explicit in its statements that the statutory duty was to ensure that public functions were performed having regard to the need to safeguard and promote the welfare of children. [...] The chief officer's statutory obligation is not confined to training and dissemination of information. It is to ensure that decisions affecting children have regard to the need to safeguard them and to promote their welfare. This does not mean that the duties and functions of the*

*police have been re-defined by section 11. Chapter 2.4 of the statutory guidance, to which the chief must also have regard, makes that explicit. In our view the guidance accurately states the obligation of chief officers of police “to carry out their existing functions in a way that takes into account the need to safeguard and promote the welfare of children”. The impact which the duty will have upon the performance of a function will depend to a significant degree upon the function being performed and the circumstances in which it is being performed. The responsibility will take on its sharpest focus when a police officer encounters a child who needs protection, for example in circumstances such as those anticipated by the statutory guidance concerning police investigations during which an unprotected child or a child at risk comes to their attention. A police officer will not be deterred from performing his public duty to detect or prevent crime just because a child is affected but when he does perform that duty he must, as the circumstances require, have regard to the statutory need.*

51. Therefore, the fundamental obligation to safeguard and promote the welfare of children contained in section 11 is a critical responsibility that is imposed on certain public bodies (including the police and local authorities). It incorporates within our domestic law the essence of the United Kingdom's international obligations towards children in these circumstances, particularly as set out in Article 3 of the United Nations Convention on the Rights of the Child. Section 11 makes the best interests of the child a primary consideration, given the police must ensure that their functions are discharged having regard to the need to safeguard and promote the welfare of children. Whether there has been an actionable breach of that obligation will always depend on the facts of the case under consideration. In my view, focussing on the circumstances relating to the first period of detention, for the reasons set out above it is unarguable that there was a breach of this kind on the part of the West Midlands Police.
52. As to the submission regarding the certificate, section 38 (6) and (7) require the custody officer to provide a certificate setting out the relevant “*circumstances*” in respect of a juvenile who has been detained rather than to give detailed reasons. Instead, the duty to provide reasons is to be found in section 38(3), which requires the custody officer to make a written record of the grounds for detention. Although Sedley LJ in *R v Higher Education Funding Council* [1994] 1 WLR page 204 indicated that there is a duty to provide reasons “*where the subject matter is an interest so highly regarded by the law (for example, personal liberty)*” (page 263 A), for this first period of detention the custody officer had set out the brief reasons for his decisions within the body of the custody record. In my view, that step sufficiently discharged this obligation. The extent of the explanation that must be provided in the custody record will depend on the overall circumstances, and in this case the justification for BG’s detention was self-evident, bearing in mind his antecedents and the circumstances in which he was involved in a crash with a stolen motorcar. Moreover, any failure to produce a certificate would not *ipso facto* render the claimant’s detention unlawful. It is not sustainable to argue that this court would issue a declaration in these particular circumstances, and it is of note in this regard that a



bail application was made during the hearing that immediately followed this period of detention, which the court refused. Therefore, the decision of the custody sergeant was consistent with that of the relevant court.

53. In the claimant's written grounds, there is a complaint that he was not separated from adults charged with offences (the "mixing issue"). Albeit not argued before us, I observe for the sake of completeness that he did not share a cell or mix with adult detainees. Accordingly, there is no evidential basis for suggesting that the police were in breach of the obligation to ensure that children are separated from adults charged with offences in premises such as police stations (section 31 Children and Young Persons Act 1933). It is important to have in mind the particular vice that section 31 is designed to prevent, namely that children should be prevented from associating with adults who have been charged with an offence. It appears that in this case the claimant spent most of his time asleep, alone in his cell.
54. Turning to the second defendant, Birmingham City Council, as set out above, the argument is that the local authority was in breach of its obligation to provide secure accommodation on 10 December 2013 and it is particularly emphasised that the local authority indicated that due to its funding difficulties, it did not have any accommodation of this kind at the relevant time (see [44] above). Instead, the nearest available secure accommodation was in Bristol and Nottingham.
55. Regardless of whether there is a potential argument that Birmingham City Council was in breach of its obligation under section 21 Children Act 1989 as a result of this suggested wholesale failure in December 2013 to provide reasonably available secure accommodation, in my view the issue does not arise on the facts of this case. Even though the local authority was apparently unable to offer accommodation closer than Bristol or Nottingham, the approach was not made to the second defendant by the police until mid-evening, once the claimant had been charged. The procedures for checking availability and the other steps that inevitably needed to be followed would have taken three to four hours. Almost wherever the secure accommodation was located, by the time it was possible to transport the claimant to the premises under escort, it would not have been in his best interests to place him there for only a few hours in the middle of the night, only then to return him early in the morning prior to his appearance in court. In the result he would have had, at most, four to five hours sleep. On these facts, it is not open to the claimant to argue that he is entitled to a declaration against the second defendant as regards a suggested breach of its obligations under section 21 Children Act 1989.
56. It follows that the underlying complaint based on Birmingham City Council's suggested lack of any secure accommodation and its dependence on the provision of this resource by others does not arise in this case (and the same considerations apply to the claimant's linked submission that is founded on article 5 of the European Convention on Human Rights). Although we do not have to determine that issue, this suggested obligation is clearly not an absolute one, as Dyson LJ explained in *R(M) v Gateshead*:

*41. In these circumstances, I find it impossible to spell out of section 21(2)(b) an absolute duty to provide secure accommodation when it is requested. The absolute duty is to provide accommodation. This corresponds with the custody*

*officer's duty under section 38(6) to secure accommodation (not accommodation that is secure).*

*42. That is not to say that, when it receives a request for secure accommodation under section 38(6), a local authority may simply ignore it. In my judgment, when performing its duty under section 21(2)(b), the local authority has a discretionary power to provide secure accommodation where that is requested. It is trite law that discretionary statutory powers must be exercised to promote the policy and objects of the statute: see *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, 1030C. The broad policy and objects of Part III of the Children Act are that local authorities should provide support for children and families. More particularly, the object of section 21(2)(b) when read with section 38(6) is, as *Watkins LJ* said in *M's case*, that children should not be detained in police cells if that is at all possible. In a compelling statement dated 7 March 2005, *Tim Bateman* of NACRO, who has experience of acting as an appropriate adult, says that in his opinion:*

*“... in order to ensure that due regard is given to the safeguarding and welfare of such young people, it is imperative that they should spend as little time in police custody as the proper process of the criminal case allows. In particular, it is always preferable that a young person should not, other than in exceptional circumstances, be held at a police station overnight.”*

*43. In my judgment, therefore, it is incumbent on all local authorities to have in place a reasonable system to enable them to respond to requests under section 38(6) for secure accommodation. But section 21(2)(b) of the Children Act does not impose an absolute duty on a local authority to provide secure accommodation whenever it is requested by a custody officer under section 38(6) of PACE. Having regard to (i) the urgency with which such requests will usually have to be dealt with (well illustrated by the facts of the present case); (ii) the comparative rarity of such requests; and (iii) the resource implications of maintaining a stock of such accommodation, it would be manifestly unreasonable to impose such a duty on local authorities. I do not believe that the language of section 21(2)(b) when read with section 38(6) compels such an unreasonable interpretation. I derive further support for my conclusion from the fact that section 38(6) shows that Parliament expressly contemplated that there might be circumstances where secure accommodation would not be available.*

57. However, it is unnecessary further to consider the issue of whether the second defendant had a “*reasonable system*” in place, given the particular facts of this case.
58. As regards the **third period of detention**, I consider that there is no arguable case that section 38 Police and Criminal Evidence Act 1984 was breached when the first defendant failed to enquire as to whether secure accommodation was available. This statutory provision is only engaged when an individual is charged, and on this occasion the claimant was in custody solely because he had been arrested for breach of his bail conditions (section 7 of the Bail Act 1976). It was the custody officer’s obligation to produce the claimant before a court as soon as was reasonably practicable and in any event within 24 hours of his arrest (section 7 (4) (a)), and there is no requirement under the Bail Act that is equivalent to section 38 Police and Criminal Evidence Act 1984, namely to consider transferring the juvenile detainee to local authority accommodation prior to his production at court. This is a different regime to that which applies when an individual is charged with an offence and I do not consider that it is arguable that this court should rewrite section 38 to delete the words “*is charged with an offence*” at the beginning of the section. There is no potentially sustainable foundation to the argument that this would be an appropriate purposive approach, given section 7 of the Bail Act is directed at securing the early attendance of the detained individual at court and the exercise of transferring him, or attempting to transfer him, to secure local authority accommodation may well risk impeding that objective. Additionally, I note that the claimant on this occasion was kept in juvenile accommodation and he slept for most of the time he was at the police station.

### **Conclusion**

59. However important some of these issues are from an objective viewpoint, the court needs to focus on the facts of the individual case in relation to which the claim for judicial review is made. In my view, it is not realistically arguable that this court would give the declaratory or the other relief that is sought, given the particular circumstances relating to this claimant. I would refuse this renewed application for permission to bring judicial review proceedings.

### **Postscriptum**

60. Just For Kids Law filed some brief submissions in support of an application to intervene, for which I am grateful, but they did not add substantively to the arguments set out above.

### **Mr Justice Nicol**

61. I agree. As my Lord has noted in paragraph 44 Birmingham City Council apparently has no secure accommodation units for children of its own and is dependent on arrangements with others to accommodate children who need to be detained. The nearest such units were said to be in Bristol and Nottingham. This is striking evidence. In the context of another case, a court may well have to consider whether such arrangements are compatible with the Council’s statutory responsibilities. However, I agree that such an examination is not necessary on the particular facts of the present case.