Neutral Citation Number: [2018] EWHC 1068 (Admin)

IN THE HIGH COURT OF JUSTICE **CO/5942/2017**
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL
10 May 2018

B e f o r e:

DAVID ELVIN QC

(Sitting as a Deputy High Court Judge)

Between:

THE QUEEN
on the application of
KI

Claimant

v

LONDON BOROUGH OF BRENT

Defendant

Felicity Williams (instructed by G T Stewart Solicitors and Advocates) appeared on behalf of the Claimant

David Carter (instructed by the London Borough of Brent) appeared on behalf of the Defendant

- -

Hearing date: 1 May 2018

- -

Judgment Approved by the court for handing down (subject to editorial corrections)

DAVID ELVIN QC (Sitting as a Deputy Judge of the High Court)

Introduction

1. This is an application for judicial review, brought with permission granted on 7 February 2018 by Philip Mott QC (sitting as a Deputy High Court Judge), of the decisions of the London Borough of Brent ("the Council") to refuse to recognise the Claimant as a child in need requiring accommodation under s. 20 of the Children Act 1989 ("the 1989 Act") and, subsequently, on his attaining the age of 18 on 5 January 2018, refusing either to recognise his status as a "former relevant child" ("FRC") for the purposes of s. 23C of the 1989 Act or, if he was not, to exercise its discretion to treat him as such (see ***R (GE) Eritrea v Secretary of State for the Home Department*** [2015] 1 WLR 4123 at [53]-[55].).

2. I will refer to the Claimant in this judgment as K, to his cousin as M and to their uncle as U. K's friends are referred to as A and Y. Quotations from the evidence have been adjusted accordingly.

Duty of candour

3. Before turning to the facts of this case, it is necessary for me to consider an important preliminary issue.

4. On reading the papers, I was concerned that the Council had not fully complied with its duty of candour and questioned at the beginning of the hearing whether the Court had been given an accurate account of the material facts. It was evident from the bundle that there were a large number of significant redactions in the documents and there were documents, especially the initial viability assessment, which were missing. I asked the Council to consider this and I am told that some 400 unredacted documents were provided to the Claimant's legal team during the course of the lunchtime adjournment of the one-day hearing. I therefore allowed written submissions to be made on the question of whether there had been the omission of any material facts and compliance with the duty.

5. A clear warning had been given to the Council in the Claimant's pre-action letters in December 2017 of the need to provide disclosure and to comply with the duty of candour. I had been assured by Mr Carter for the Council at the hearing that his solicitor had been through the unredacted documents the day before the hearing and had satisfied herself that the redactions were in connection with the other child (K's cousin, M). This turned out to be incorrect and a different explanation has now been given.

6. The Court also has a witness statement dated 4 January 2018 from Tracey Low who has

been the allocated social worker for K since 13 September 2017. Although she does not say so in her statement, other than giving the usual assurances that the contents of her statement are true and correct to the best of her knowledge and belief, as the allocated social worker she will have had access to the complete Council records concerning K for the last 7 months and consulted the files before making her statement.

7. No subsequent statement or disclosure was made prior to the hearing in line with the continuing duty to consider observance of the duty of candour.

8. Unfortunately, my concerns turned out to be well-founded and from the documents disclosed and the written submissions made to me following the hearing, it is clear that an accurate picture of the material facts was not provided by the Council. This is not disputed by the Council. The Council explains in its written submissions that it did not have appropriate procedures in place to enable the lawyers to be sure that the duty had been complied with. There must have been inadequate supervision of the drafting of Ms Low's statement to ensure it dealt with the material facts. Indeed, the statement I have been provided on disclosure says nothing about Ms Low's access to, and account of, the documents or the checking of the statement of Ms Low by the legal team or what advice she was given about compliance with the duty of candour. If the legal team did not have access to all the documents until 30 April as I am told, then they cannot have properly supervised the drafting of the witness statement on 4 January.

9. I am told that the Council's Legal Department does not have direct access to client records, that Social Services keep records in multiple files, and the Legal Department is dependent on the provision of the information through the Data Protection Team. The documents were requested by the Council's legal department on 18 January (2 weeks after the filing of Ms Low's statement). It appears that despite several reminders both from the Claimant's solicitors, and internally, a set of unredacted papers (including the viability assessment) was not provided to Ms Malik, instructing Mr Carter, until the day before the hearing. In the time available, contrary to what I was told in Court, she had no time to go through them (they were not in the same order as the redactions apparently) before the hearing began. I am told that the non-disclosure in this case was not deliberate and that it -

> "is of grave concern to the Defendants who are anxious to ensure that the same thing does not happen in the future. It maybe that staff have been overly cautious during the redaction process. A full investigation will be undertaken by the various different departments to ascertain the cause of this failure."

10. The difficulties encountered cannot justify the failure by Social Services, the witness and the Council's Legal Department properly to review the material disclosed or referred to

especially since it was requested by the Claimant's legal team from the outset and the Council had 4 months between the making of the claim and the hearing. The new/unredacted documents include material which goes to the Council's asserted reasonable conclusions in respect of its statutory duties in this case. I do not know why those documents were not reviewed by either the Council's legal team or counsel before the case began. I was not asked for time before the case started to allow the documents to be reviewed.

11. Since this case concerns duties owed to vulnerable children, latterly young adults, I find this lack of effective procedures to ascertain the facts and obtain relevant documents from the department concerned to be disturbing taken with the very late concession (on the day of the hearing) that, despite resistance for over 4 months following the issue of proceedings, a duty under s. 20 had arisen at least for a period of time and that ground 1 was not contested.

12. There can be no excuse for this poor compliance given the previous decisions by the Court emphasising the "very high duty on public authority respondents" (e.g. ***R (Quark Fishing Limited) v Secretary of State for Foreign and Commonwealth Affairs*** [2002] EWCA Civ 1409, at [50]) and the *Administrative Court Judicial Review Guide 2017* which includes at sections 6.4 and 14:

> "**6.4 Duty of Candour**
>
> 6.4.1 There is a special duty which applies to parties to judicial review known as the 'duty of candour' which requires the parties to ensure that all relevant information and all material facts are put before the Court. This means that parties must disclose any information or material facts which either support or undermine their case.
>
> 6.4.2 It is very important that you comply with the duty of candour. The duty is explained in more detail below at paragraph 14.1 of this Guide.
>
> ….
>
> **14. Duty of Candour**
>
> 14.1. There is a special duty which applies to parties to judicial review known as the 'duty of candour' which requires the parties to ensure that all relevant information and facts are put before the Court. This means that parties must disclose any information or material facts which either support or undermine their case.
>
> 14.1.1. This rule is needed in judicial review claims, where the Court's role is to review the lawfulness of decisions made by public bodies, often on an urgent request being made, where the ordinary rules of disclosure of documents do not apply (see paragraph 6.5 and chapter 20 of this Guide on evidence) and where the witness statements are usually read (rather than being subject to cross examination by witnesses who are called to give their evidence orally).
>
> …

> 14.1.3. The Court will take seriously any failure or suspected failure to comply with the duty of candour. The parties or their representatives may be required to explain why information or evidence was not disclosed to the Court, and any failure may result in sanctions.
>
> 14.1.5. The duty of candour is a continuing duty. The claimant must reassess the viability and propriety of a challenge in light of the defendant's acknowledgement of service and summary grounds."

13. These duties apply not only to claimants but to public authorities who are defendants since it will often be the case that the authority under challenge has access to information and materials which are unavailable, or may even be unknown, to the claimant. The absence of a general requirement to provide disclosure should not encourage a public authority to consider that it can adopt a less rigorous approach than a claimant, or to redact relevant material, and thus not ensuring that an accurate account of the facts is presented to the Court. See the comments of Singh J. (as he then was) in ***R. (Midcounties Co-operative Ltd) v Forest of Dean DC*** [2015] EWHC 1251 (Admin) at [149]:

> "It is well established that judicial review litigation is not to be conducted in the same way as ordinary civil litigation. This is not only because there are specific provisions in Part 54 of the Civil Procedure Rules 1998 which govern judicial review. More fundamentally, it is because the relationship between a public authority defendant and the court is not the same as that between an ordinary litigant and the court. In particular it had been clear since the decision of the Court of Appeal in *R v Lancashire County Council, Ex p Huddleston* [1986] 2 All ER 941 that a public authority defendant in judicial review proceedings had a duty of candour and co-operation so as to assist the court in understanding its decision-making process and to deal with the issues fairly. It had to conduct the litigation with its cards face upwards. That was based on the concept that it acted in the public interest, and not merely to protect a private, commercial interest."

14. I do not consider that the Council properly discharged its duty in this case and this is of particular concern given the nature of the claim and the vulnerable status of the Claimant. I cannot emphasise strongly enough the importance of the duty of candour in the case of vulnerable children and young people and that the local authorities charged with these duties should have in place procedures to ensure that that they do not fall into similar errors such as those made by Brent Council in this case - which included the lack of access by the legal department to the social services records relied on by Tracey Low until almost 4 months after her witness statement was filed.

15. The Court's overriding concern is to ensure that the interests of children and young persons have been properly protected and the question of inconvenience and costs to the authorities concerned in reporting and accounting for their decisions and actions cannot be permitted

to take precedence or to provide an excuse for a failure to comply. It is the responsibility of the lawyers involved in such cases to ensure that all those involved in the authority are aware of the duty of candour and comply with it.

Relevant law

16. S. 17 and Schedule 2 of the 1989 Act place local authorities under a general duty to safeguard and promote the welfare of children in need within their area. It is common ground that at all material times K had been identified as a "child in need" within the Defendant's area.

17. S. 20 of the 1989 Act sets out the duty to provide accommodation for a child in need:

> "**20 Provision of accommodation for children: general**
>
> (1) Every local authority shall provide accommodation for any child in need within their area who appears to them 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 no permanently, and for whatever reason) from providing him with suitable accommodation and care . . .
>
> (3) Every local authority shall provide accommodation for any child in need within their area who has reached the age of sixteen and whose welfare the authority consider is likely to be seriously prejudiced if they do not provide him with accommodation.
>
> (4) A local authority may provide accommodation for any child within their area (even though a person who has parental responsibility for him is able to provide him with accommodation) if they consider to do so would safeguard or promote the child's welfare.
>
> (5) A local authority may provide accommodation for any person who has reached the age of 16 but is under twenty – one in any community home which takes children who have reached the age of sixteen if they consider that to do so would safeguard or promote his welfare.
>
> (6) Before providing accommodation under this section a local authority shall, so far as is reasonably practicable and consistent with the child's welfare- (a) ascertain the child's wishes and feelings regarding the provision of accommodation; and (b) give due consideration (having regard to his age and understanding) to such wishes [and feelings] of the child as they have been able to ascertain.
>
> (7) A local authority may not provide accommodation under this section for any child if any person who (a) has parental responsibility for him; and (b) is willing and able to - (i) provide accommodation for him; or (ii) arrange for any accommodation to be

provided for him, objects . . ."

(In this case K's uncle, U, did not have parental responsibility for him.)

18. If a child is provided with accommodation, under s. 20 he or she falls within the definition of a "looked after child" within s.22 of the 1989 Act:

> "**22.— General duty of local authority in relation to children looked after by them.**
>
> (1) In this section, any reference to a child who is looked after by a local authority is a reference to a child who is— (a) in their care; or (b) provided with accommodation by the authority in the exercise of any functions (in particular those under this Act) which are social services functions within the meaning of the Local Authority Social Services Act 1970, apart from functions under sections 17, 23B and 24B.
>
> (2) In subsection (1) "accommodation" means accommodation which is provided for a continuous period of more than 24 hours.
>
> (3) It shall be the duty of a local authority looking after any child—(a) to safeguard and promote his welfare; and (b) to make such use of services available for children cared for by their own parents as appears to the authority reasonable in his case."

19. The purpose of the duty is broad and is to protect the child, promote that child's welfare, and to provide accommodation. The application of the duty has been considered at length by the courts. In ***R. (G) v Southwark LBC*** [2009] 1 WLR 1299 at [28] Lady Hale endorsed the list of issues required to be considered under s. 20 set out by Ward LJ in ***R (A) v Croydon LBC*** [2009] LGR 24 at [75] which I do not need to repeat here given the concession made by the Council at the beginning of the hearing. Lady Hale also made some observations at [32] which I will return to later in this judgment:

> "We have heard no submissions from the other parties on the circumstances in which, once triggered, the duty under section 20(1) might come to an end. Presumably, it will do so if the criteria are no longer met—if the child is no longer "in need", or his parents or carers are no longer prevented from providing him with suitable accommodation or care, or if a competent child no longer wishes to be accommodated under that section. But the whole purpose of the leaving care provisions was to ensure that older children who were without family support were given just the sort of help with moving into independent living that children normally expect from their families. Authorities should therefore be slow to conclude that a child was no longer "in need" because he did not need that help or because it could be provided in other ways."

20. A local authority must accommodate a child to whom s. 20 applies and the application of the criteria are for the judgment of the Council though, once they have been found to apply, their application is not a matter of discretion. In ***G*** at [24] Lady Hale considered the House of Lords' decision in ***R (G) v Barnet LBC*** [2004] 2 AC 208 and held:

> "24. On the other hand, the Act draws a distinction between the "general duty" in section 17(1) and the specific duties laid down elsewhere in Part III, including section 20. As Lord Hope made clear in para 81, these duties do leave important matters to the judgment of the authority. But once those matters have been decided in a particular way, it must follow that a duty is owed to the individual child. Thus Lord Hope was able to conclude, in para 100, that there was no doubt that the authorities were under a duty to provide accommodation under section 20(1) for the children of the two claimants who did not qualify for accommodation under the 1996 Act. The concern for children's welfare which ran throughout Part III meant that the children should not suffer because their mother had come to this country or had become homeless intentionally. Thus these mothers were "prevented" within the meaning of section 20(1)(c) even though it was their own choice…."

21. At [27] and [31] she added:

> "… Parliament has decided the circumstances in which the duty to accommodate arises and then decided what that duty involves. It is not for the local authority to decide that, because they do not like what the duty to accommodate involves or do not think it appropriate, they do not have to accommodate at all."
>
> "Section 20 involves an evaluative judgment on some matters but not a discretion"

22. It is common ground that the accommodation to be provided must be suitable for the child's needs but whether it is suitable is a matter for the Council's expert judgment, subject to normal public law principles which set a high threshold for intervention by the Court. It is also right when considering the exercise of judgment to have regard to the current difficult and financially straitened circumstances in which local authorities have to operate: see Helen Mountfield QC (sitting as a Deputy High Court Judge) in ***R (O) v London Borough of Lambeth*** [2016] EWHC 937 (Admin) at [17] and [18].

23. Further, the duty under s. 20 should be read in the light of the general duty under s. 11 of the Children Act 2004 which requires local authorities to make arrangements to ensure that:

> "(a) their functions are discharged having regard to the need to safeguard and promote the welfare of children...".

24. When the s. 20 duty arises, s. 22C applies and in this case, s. 22C(5) and (6)(d) applied since U was not a local authority foster parent nor was he proposed to be one:

> "**22C Ways in which looked after children are to be accommodated and maintained**
>
> (1) This section applies where a local authority are looking after a child ("C").
>
> …
>
> (5) If the local authority are unable to make arrangements under subsection (2), they must place C in the placement which is, in their opinion, the most appropriate placement

available.

(6) In subsection (5) "placement" means—

…

(d) subject to section 22D, placement in accordance with other arrangements which comply with any regulations made for the purposes of this section."

25. Since the Council now accepts that a s. 20 duty arose on 1 August 2017, but submit that the duty (and K's status as a looked after child) ended with its arrangement in October 2017 to place the cousins back with their uncle, it is necessary to have regard to s. 22D:

> "**22D Review of child's case before making alternative arrangements for accommodation**
>
> (1) Where a local authority are providing accommodation for a child ("C") other than by arrangements under section 22C(6)(d), they must not make such arrangements for C unless they have decided to do so in consequence of a review of C's case carried out in accordance with regulations made under section 26.

26. The relevant regulations made under s. 26 are the Care Planning Placement and Case Review (England) Regulations 2010 (SI 2010/959). Reg. 27 sets out the general duties when placing a child under "other arrangements" (other than e.g. with a parent or fostering), which was applicable here, including informing the independent reviewing officer and having regard to the matters set out in Schedule 6. These included, applicable here, under para. 1, the facilities and services provided and, under para. 2 -

> "C's -
>
> (a) views about the accommodation,
>
> (b) understanding of their rights and responsibilities in relation to the accommodation

27. Part 7 of the 2010 Regulations sets out the arrangements made by the responsible authority for ceasing to look after a child. Where a child is to leave care, other duties are imposed on local authorities. These include at reg. 39:

> "**39.— Arrangements to be made when the responsible authority is considering ceasing to look after C**
>
> (1) This regulation applies where the responsible authority are considering ceasing to look after C.
>
> (2) Before deciding to cease to look after C the responsible authority must—
>
> (a) carry out an assessment of the suitability of the proposed arrangements for C's accommodation and maintenance when C ceases to be looked after by them,
>
> (b) carry out an assessment of the services and support that C and, where

applicable P, might need when the responsible authority ceases to look after C,

(c) ensure that C's wishes and feelings have been ascertained and given due consideration, and

(d) consider whether, in all the circumstances and taking into account any services or support the responsible authority intend to provide, that ceasing to look after C will safeguard and promote C's welfare.

(3) The responsible authority must include in C's care plan (or where regulation 47B(4) applies, the detention placement plan) details of the advice, assistance and support that the responsible authority intend to provide for C when C ceases to be looked after by them.

(4) Subject to paragraph (5), where C has been a looked after child for at least 20 working days, any decision to cease to look after C must not be put into effect until it has been approved by a nominated officer.

(5) In any case where C is aged 16 or 17 and is not in the care of the local authority, the decision to cease to look after C must not be put into effect until it has been approved by the responsible authority's director of children's services.

(6) Before approving a decision under paragraph (4) or (5), the nominated officer or director of children's services must be satisfied that—

(a) the requirements of regulation 9(1)(b)(i) have been complied with,

(b) ceasing to look after C will safeguard and promote C's welfare,

(c) the support the responsible authority intend to provide will safeguard and promote C's welfare,

(d) C's relatives have been consulted, where appropriate,

(e) the IRO has been consulted, and

(f) where appropriate, regulations 40 to 43 have been complied with."

28. These requirements are reinforced by statutory guidance *The Children Act 1989 guidance and regulations, Volume 2: care planning, placement and case review* (June 2015) which includes guidance in Section 5 *Ceasing to look after a child*. This states at 5.6:

> "Where the plan is for a child to return to the care of their family when they cease to be looked-after, there should be a robust planning and decision making process to ensure that this decision is in the best interests of the child and will safeguard and promote their welfare [regulation 39]."

29. It is unnecessary to consider the requirements in further detail because the Council accepts that it did not apply or comply with them. At that time the Council was still contending that s. 20 did not apply.

30. Further duties may arise under s. 23C of the 1989 Act, which provides:

> "**23C – Continuing functions in respect of former relevant children**
>
> (1) Each local authority shall have the duties provided for in this section towards –
>
> (a) a person who has been a relevant child for the purposes of section 23A (and would be one if he were under eighteen) and in relation to whom they were the last responsible authority; and
>
> (b) a person who was being looked after by them when he attained the age of eighteen, and immediately before ceasing to be looked after was an eligible child,
>
> and in this section such a person is referred to as a "former relevant child"."

31. A "former relevant child" is:

(1) a person who has been a "relevant child" (and would be one if under 18) and in relation to whom the authority were the last responsible authority; or

(2) a person who was being looked after by the authority when he reached the age of 18 and immediately before ceasing to be looked after was an eligible child: s.23C(1).

32. A "relevant child" is a child who:

(1) is not currently being looked after by a local authority;

(2) was, before last ceasing to be looked after, an eligible child for the purposes of Sch.2, para.19B; and

(3) is aged 16 or 17: s.23A(2).

33. A child is "looked after" by a local authority:

(1) if that child is in their care or they provide accommodation for a continuous period of 24 hours in exercise of their social services functions apart from those under ss.17, 23B and 24B: s.22(1); and

(2) as soon as the child becomes subject to a s. 20(1) duty: see ***R (D) v Southwark LBC*** [2007] 1 FLR 2181 at [55] (first sentence) and ***GE (Eritrea***) at [38]-[40].

This is a case under (2).

34. An "eligible child" is a child who:

(1) is aged 16 or 17; and

(2) has been looked after by a local authority for the prescribed period (i.e. 13 weeks in aggregate) which began after reaching the prescribed aged (14) and ended after reaching 16: para.19B(2) of Schedule 2 to the 1989 Act, and reg. 40(1) of the Care Planning, Placement and Case Review (England) Regulations 2010 (above).

35. Where s. 23C applies, then the FRC is entitled to support under the leaving care provisions (ss. 23C and 24D) until the age of 21 (or later if s. 23C(7) or s. 23 CZB apply). The transitional planning for a care leaver begins before the individual's 18th birthday and the detailed requirements are set out in the Care Planning, Placement and Case Review Regulations 2010 (above) and the Care Leavers (England) Regulations 2010 (S.I. 2010/2571). The Regulations are supplemented by statutory guidance in *The Children Act 1989 guidance and regulations, Volume 3: planning transition to adulthood for care leavers* (rev. Jan 2015). The duties have been recently reinforced by the introduction of the requirements for corporate parenting in s. 1 of the Children and Social Work Act 2017 (in force from 1.4.18) and the new s. 23CZB of the 1989 Act which widens the application of local authority duties.

36. The importance of the duties is highlighted in the Preface to the guidance:

> "These regulations and guidance are designed to ensure care leavers are given the same level of care and support that their peers would expect from a reasonable parent and that they are provided with the opportunities and chances needed to help them move successfully in to adulthood. Research and practice show that those leaving care supported according to the following principles have the best chance of a successful transition to adulthood:
>
> • quality;
>
> • giving chances where needed;
>
> • tailoring to individuals' needs.
>
> This guidance seeks to have these principles at the centre of decision making for care leavers."

37. See e.g. Dobbs J. on the importance of pathway planning in ***R(Birara) v Hounslow LBC*** [2010] EWHC 2113 (Admin) at [54].

38. The Courts should be astute to detect whether local authorities are seeking to avoid accommodating a child for 13 weeks in order to prevent these duties from applying. As Lady Hale held in in ***R (M) v Hammersmith & Fulham LBC*** [2008] 1 WLR 535 at [24]:

> "Thus there is all the difference in the world between the services which an eligible, relevant or former relevant child can expect from her local children's services authority, to make up for the lack of proper parental support and guidance within the family, and the sort of help which a young homeless person, even if in priority need, can expect from her local housing authority. This is not surprising as the skills and resources available to each department are so different. But it means that a huge amount depends upon whether or not she was a "looked after" child for the required total of 13 weeks, beginning some time after she reached 14 and ending some time after she reached 16.

So it would also not be surprising if some local authorities took steps to avoid this."

39. It is the Council's refusal to consider K as a FRC within s. 23C and to provide the level of support he would be entitled to receive under the leaving care provisions which lies at the heart of this case. As a vulnerable refugee who has been in the UK for only 18 months, the importance of those provisions is emphasised in order to enable K to have a successful transition to adulthood in the UK.

Facts

40. K was born in Sudan on 5 January 2000. He left Sudan because he had difficulties with the Sudanese government that had resulted in detention and ill treatment and arrived in the UK (having been accepted by the UK under the terms of the Dublin Regulation), with other young people including his cousin M, via "the Jungle" in Calais on 21 October 2016. They claimed asylum and now have refugee status and leave to remain in the UK. The Council was notified by the Home Office on 10 October 2016 that they would be arriving on 21 October.

41. Prior to their arrival, a partially redacted Council 'contact record' dated 20 October 2016 made clear the vulnerable status of K and his cousin:

> "This case meets the threshold for Children's Social Care assessment/intervention as K [BLANK][1] is unlikely to enjoy a reasonable standard of development or health and would be at continuing risk of negative outcomes without social care intervention.
>
> As K [BLANK] are new to the UK, this makes them both vulnerable young people, who requires a lot of support. Therefore a Child & Family assessment is required to explore, whether the uncle is able to meet their everyday needs and provide then with appropriate Basic care needs."

42. Having been contacted by the Home Office, on 20 October 2016 the Council's Social Services Department conducted a viability assessment of K and M's uncle, U. This was one of the documents only disclosed to the Claimant during the hearing and the substance of it had not been disclosed in the Council's evidence. Indeed, I had been told at the hearing that it could not be found. It included the following:

> "U was unable to demonstrate that he had put much thought into caring for his nephews, other than to say that they could live there and that he would provide for them. It is understood that he was only contacted today regarding caring for the boys, however he has also alluded that he has been in frequent contact with them.
>
> U has limited childcare experience and although advising that the boys would listen to

[1] I assume these redactions refer to M.

> him as he was there uncle, he showed limited insight into the needs of adolescent boys and was unable to advice on how he would impose appropriate boundaries and safeguard. He referred to children during the assessment as men and felt that they would be mature enough to require limited supervision. There was no thoughts around a possible plan to get them into education.
>
> U has four birth children of his own and provides limited child care responsibility for them. He was unable to evidence how he would be able to meet the needs of all 6 children, particularly with his limited and inconsistent income.…
>
> It is fair to conclude that U may face further financial difficulty if he were to take on the responsibility of the children without support. U's rent arrears will also need to be explored to consider if there is a risk of homelessness. In any event, the accommodation is not in my opinion deemed suitable for the children and U to occupy the same sleeping area, particularly as there is no separate room or area of personal space. Visitors to the home would also prove problematic.
>
> In any event, the accommodation is not in my opinion deemed suitable to the children and U to occupy the same sleeping area, particularly as there is no separate room or area of personal space. Visitors to the home would also prove problematic.

43. The viability assessment described the flat in terms which underline the difficulties of its accommodating the two teenagers and their uncle:

> "**ACCOMMODATION and HEALTH AND SAFETY OF THE HOME**
>
> U lives on his own in a permanent, Brent Partnership studio flat. He has a double bunk bed and a sofa in the room which also has a small dining table and TV. There is a very small kitchen which can only comfortably hold one person at a time. There is limited storage and U's clothes and shoes are fitted between two small cupboards and an airing cupboard. The airing cupboard hosts a large boiler and includes the gas and electricity meter and fuse boxes. The clothes within the cupboard present a hazardous risk of fire and is in front of the front door and only exit to the 1st floor property. There should be safety checked by a professional in my view, prior to any plans to place. Overall the studio was reasonably tidy and of a good enough hygienic standard."

44. Under the heading "Recommendation" the social worker then responsible wrote:

> "I would not support the children coming to live with U under his present accommodation arrangements and without a more comprehensive assessment of how he would meet their full needs. I am not convinced about how he would be able meet the children unidentified needs, particularly considering their possible traumatic experiences."

45. This view was underlined by an email (subject "[U] 730487") dated 21 October 2016 from Uloma Otuonye, a Council social worker, she asked Housing Option whether larger accommodation might be available:

> "We have completed a viability assessment and identified that he lives in a studio apartment, which is not suitable for three people i.e. 2 boys and maternal uncle
>
> We are wondering if it is possible to provide them a bigger accommodation.
>
> Please can you look into this case for us as we are required to provide feedback to Head of Services soon."

46. K and his cousin arrived in the UK on 21 October. After first staying in hotel accommodation provided by the Home Office, the Claimant and his cousin were then given into the care of U, to live with him at his studio flat in London NW2 which had been considered in the viability assessment. It therefore appears that the decision was made to accommodate the boys with their uncle notwithstanding the views expressed above. It is common ground between the parties that with both nephews and uncle in residence it is statutorily overcrowded.

47. This is of some importance since, while the other issues were apparently resolved, such as finance and education, the recommendation concerning the accommodation was not except that it was discussed in the subsequent CFA and U was advised to apply for a larger flat. It is important since it indicates from the outset that there was a real issue with the uncle's flat as suitable accommodation and it should not have surprised the Council in July when it became clear that there were behavioural and relationship issues between K and his uncle. Discontent was expressed with the size of the flat as early as 1 December 2016 as appears below.

48. On 1 December 2016, the Council, having conducted a child and family assessment ("CFA"), again decided that U was capable of providing for K and M's needs despite the accommodation being overcrowded. This was completed some 6 weeks after K and M took up residence and refers to a number of relevant matters including that the cousins had made advances in taking up educational opportunities:

    (1) Under "Emotional and behavioural development" it records that K[2] –

    > "stated he is a happy person and enjoys being with people. However he find their accommodation to be too small and because of the number of people who live there is difficult to get a good night's sleep";

    (2) M made a similar comment –

    > "He is happy to have a roof over his head, although the accommodation is too

[2] Correcting the various typos I have not corrected the typos appearing in all documents, as will be apparent.

small for all of them and he would appreciate a bigger place, he is happy here"

(3) Under "housing" it notes that –

> "The flat is too small and only big enough for a bunk bed. Uncle has informed housing that his nephews are with him and they were told to contact social services to help them";

(4) Similar comments are made under "Carer's capacity to respond appropriately to Children's needs" under "Basic Care", that the flat "is not big enough for three people". With regard to "emotional warmth" and "guidance and boundaries" there appeared to be no issues.

(5) However, the "Danger Statement" noted concerns about "Whether the uncle can meet K & M's everyday needs and provide positive parenting" and under "what we are worried about" the CFA noted

> "We are worried that they do not have adequate accommodation as they are sharing a studio flat"

(6) The section "what needs to happen" noted that U was to approach housing for accommodation and to seek financial support but, notwithstanding the repeated concerns about the accommodation and the preceding assessment, it noted that the case was to be closed. In the "Views on assessment" it is stated that the uncle -

> "requested for support in getting a bigger accommodation, He was advised to contact housing and let them know that his circumstances has changed. U said that he had already done that and he was sent back to social services".

(7) Remarkably, in the light of the earlier assessment, having referred to educational and financial issues, the social worker's analysis and recommendations stated:

> "This assessment has identified the need for a bigger accommodation as uncle lives in a studio flat from Brent Council which can only take a single bunk bed and no space of another bed. U has already approach[ed] his housing provider to let them know about his change of circumstances. It is understandable that housing may take a long time to be sorted out, however, the boys are happy that they have a place to live…
>
> Base[d] on the above it does not seem that there are any role for Brent Social care with this case at the moment. I would therefore suggest that the case be closed to the team."

49. This type of social services report is not to be read as if drafted by lawyers and it is necessary bear in mind its origin and function: see per Lord Dyson in ***McDonald v RBKC*** [2011]

PTSR 1266 at [53]) These types of report -

> "should be construed in a practical way against the factual background in which they are written and with the aim of seeking to discover the substance of their true meaning."

50. Even reading the CFA in this light, the CFA simply side-stepped the accommodation issue and the serious concerns expressed in October 2016 which were themselves reinforced by the comments in the CFA (including comments from K and M). Needless to say, the full force of that understanding of the Council's position only became clear with the late disclosure of the viability assessment and email of 21 October.

51. Although, as Mr Carter for the Council rightly submitted, the Council was entitled to reach its own judgment on suitability of the accommodation, subject to review by the Court (where the bar is set high for interfering with the exercise of this type of expert function), it is in any event difficult to spell out of the viability assessment or CFA any conclusion other than that the uncle's flat was too small and overcrowded and that it was not suitable for 3 people. There is nothing in the CFA to suggest otherwise than, possibly, from the bare inference from the fact that the children were accommodated in the flat and the file was closed on 21 December 2016. At that time, of course, the cousins were still new to the UK and were doubtless relieved to have a roof over their heads.

52. Social Services did not even consider it appropriate to monitor the situation given it was fully aware of the problems with the flat, having regard to the fact it did not expect an early solution to the accommodation issue. I find this concerning given their vulnerability as refugees newly come to the UK. While I acknowledge the pressure on Council resources, including accommodation and provisions of services, and on its officers, nonetheless this does not permit an authority to sidestep or ignore its important duties under the 1989 Act. While it might have been reasonable to accept the use of that accommodation initially, with the possibility of larger accommodation in the future, the terms of the viability assessment should have alerted Social Services to the need to keep the situation under review to detect any problems that might arise.

53. Within 6 months of the closing of the file, problems had arisen. K visited the Council's offices on 3 July 2017 and explained that he did not want to live with his uncle and that he did not feel comfortable living at his uncle's. His case notes record that he said he slept on the floor due to overcrowding and has made the decision to leave. He was told he had to return to his uncle's flat and, when he refused, he was told he would have to make his own arrangements. On 4 July a Group Case note recorded that K "is currently in the Civic Centre" saying that he was "having problems living with his uncle i.e. not enough room in

the household."

54. K explained in his evidence to the Court that there was no space and privacy in the flat. This is consistent with the Council's own records. The situation cannot have been easy for K's uncle, either. In addition to visits from his 4 children, U often had other visitors and when another visitor came, K would leave the flat and go to the park to give him privacy:

> "The problems started when my uncle's friends and girlfriends would come over. After a few months I felt uncomfortable about the fact that my uncle's friends would be over during the evening and night time. I spoke to my uncle about it and he said that he could not change the situation and that he did not have a solution to the situation."

55. As a result of this, K says (and this is not disputed by the Council) that -

> "My uncle's behaviour changed towards me and [M] after that conversation. He kicked us out of his flat out of the blue around July 2017. There was no argument or specific incident that occurred which led to us both being kicked out, he was angry with us and said he felt that we were both ungrateful."

56. Having been thrown out by his uncle, K slept on the street for the first night and then stayed with a friend. On 1 August 2017 K visited the Council's Social Services offices in Wembley and told Social Services that his uncle had kicked him out but Social Services were unable to help. A Group Case note of the same date records:

> "The young people were being supported by [BLANK] was from Crisis who explained her role and the concerns she has for the children and she stated that the young people had been living on the streets for the past three weeks. I stated that the young people had actually come to the Civic centre on numerous occasions to state that they wanted to leave his uncles property due to overcrowding, therefore making themselves intentionally homeless."

57. On 2 August, K saw a Social Worker at Brent Social Services offices. They used a telephone interpreter for the appointment. After taking his details, a social worker drove him to his uncle's flat. He said that this made his uncle upset and angry but that he confirmed to the social worker that he had kicked K out of the flat and that he did not want him back. Although the social worker tried to convince the uncle to change his mind, he made it clear to her that K was not able to stay there. The case note for that visit records:

> "Uncle reports the following:
>
> Unable to have K back to the property as he does not follow curfews. He says he has no space and is struggling to support him financially.
>
> He says he is not willing to making a housing application for a bigger property as his home is fit for his own purposes

> He was challenging about K remaining to be his responsibility and what plans does he have to support him as he invited him to the UK. Uncle would state he has no options…"

58. The Council's Group Case note for 2 August also recorded under "What needs to happen (Analysis & rationale)":

> "K is a 17 year old, he came to the UK via Dublin Regulation from Calais. It was agreed that K will be looked after by his uncle who can no longer care for him due to overcrowding; contact was made to the uncle yesterday (01/08/2017) however this remained unsuccessful on several attempts. K has a lack of strong family support network deeming him vulnerable; uncle has discharged his duty of care for him and therefore K is now at risk. Case to remain with BSC to ensure the safety of this young person."

59. A Child Referral document of the next day, 3 August, noted:

> "In my professional opinion, this case meets the threshold for an intervention from the FAST Team… K is a 17 year old, he came to the UK via Dublin Regulation from Calais. It was agreed that K will be looked after by his uncle who can no longer care for him due to overcrowding; contact was made to the uncle yesterday (01/08/2017); however this has remained unsuccessful on several attempts. K has a lack of strong family support network deeming him vulnerable; uncle has discharged his duty of care for him and therefore K is now at risk. Case to remain with BSC to ensure safety of this young person."

60. Social Services was not able to arrange for accommodation until 8 August 2017 having secured the uncle's and cousins agreement to mediation on 4 August. They were provided with supported accommodation at Crash Pad, run by Depaul, a charity that works to assist the homeless. K and M were happy there and lived in that accommodation for 9 weeks and one day until they were required to leave (since the Council would not authorise further accommodation there for them) on 11 October 2017.

61. The Council's person case notes records on 18 August 2017 that:

> "He [K] was advised that since the relationship with his uncle has broken social care will need to consider all options for him"

62. The agreement to mediate proved fruitless since the uncle refused to engage. However, notwithstanding what had occurred, including the problems with the accommodation, and the previous recorded views and the view that all options would have to be considered, the Council evidently then determined to place the cousins back with the uncle.

63. The Council visited the cousins at the Crash Pad on 19 September 2017 when they explained again their problems with their uncle's flat but were told that the only plan was to assist the

uncle in finding larger accommodation (which had been the solution noted in December 2016 and which had not produced a solution by then). The social worker noted the cousins "displayed body language to suggest that they were not happy with what I was telling them."

64. Disclosure of notes of a meeting with U at his flat on 22 September 2017 sheds a very different light on his subsequent agreement to re-accommodate his nephews, which agreement was heavily relied upon by the Council at the hearing in support of its submission that the s. 20 duty had been discharged by facilitating re-accommodation with the uncle:

> "U was adamant from the outset that he is not willing to resume responsibility of the boys, he explained that he has 4 children of his own and that he can not manage the stress of continuing to look after M and K.
>
> U stated that the accommodation is not suitable and although his children do not reside with him they visit often and it becomes too overcrowded. U ignored my efforts that encouraged him that SC would assist him helping him find larger accommodation, he stated that he did not want bigger accommodation to look after the boys, he stated that he did not want to continue to look after the boys.
>
> U stated that M and K have become disrespectful to him and do not listen to him or adhere to the boundaries he sets.
>
> I advised that his account of the boys is very different from the account provided by the Crash Pad. I explained that the boys are attending college regularly, and are very independent.
>
> U said that he has a different experience with the boys. I advised that I have spoken with the boys and informed them of the plan to return them home and explained that they would need to adjust their behaviour in order to make their relationship with uncle work. I also explained that I would support in rebuilding their relationship.
>
> U stated that he was not interested in this type of support as he is not willing to resume their care.
>
> I asked why U initially took responsibility for the boys care and now relinquishing his responsibility.
>
> U stated that the boys behaved differently towards him when they first arrived in his care."

65. It appears that pressure was placed on U to reconsider though he was still very resistant to the proposal:

> "I explained to U that he could face charges of Child Neglect if he does not resume his responsibility as the boys are considered as minors until they are 18 years. I explained that U would need to resume his responsibility for the boys until they are 18 years, in 4 months and then M and K can apply for Housing in their right.
>
> U refused to comply and stated he did not care about Child Neglect charges.

> U stated that the Council was 'big' and has 'many rooms' and should accommodate the boys, he suggested that the boys remain in the 'hostel' were they are.
>
> When advised that the current accommodation was not a long term arrangement for the boys he suggested that they were sent back to Sudan.
>
> U said he is happy to support the boys by continuing to provide them with clothing and they can visit him at any time but he stated that he cannot be 'stressed' with caring for them again.
>
> I advised U to nominate other family members who could support M and K for the next 4 months until they are 18 years, he said there were no other family members in the UK that could offer to provide care.
>
> I left U to consider that the boys arrangement at the Crash Pad will end in a matter of 4 weeks, I suggested he come up with a plan for their care or be prepared to receive them back home.
>
> I advised that I will arrange a meeting between he, the boys and myself next week to discuss a way forward to resolve this matter."

66. Tracey Low did not refer to these matters in her witness statement, though evidently she had become the responsible social worker on 13 September.

67. Pressure also seems to have been put on K and M. K states in evidence:

> "Tracey tried to convince me to stay with my uncle.
>
> Every week she would come to the house and ask both me and M to stay with our uncle. This went on through September and October 2017. Every week she said she could not offer accommodation any longer and that the accommodation needed to end. Every time we had the conversation I explained that my uncle had kicked me out, I was upset and angry that we were having the conversation every week.
>
> Eventually Tracey told me that my uncle had agreed let me stay in his flat I said I could not go back and stay with him because I was sleeping on the floor in the flat and in the same room as M and my uncle. I told Tracey that she was sending me back to square one. Tracey then said that my uncle could apply for bigger accommodation if M and I moved back there, I felt as though Tracey was putting pressure on us to move in with our uncle when the relationship had broken down. Roughly on 10th October 2017 Tracey came and spoke to me and my cousin M again and told us "This is your last day here"."

68. At a family meeting held on 26 September, U had obviously been persuaded by Social Services to reconsider and agreed that he would resume caring for K and M. U, however, said he had thrown the bunk bed out since the cousins had left. K is recorded as having told the social work that "he was unhappy about going back to reside with his uncle". The cousins both "advised that their only reason for not wanting to return to their uncle was because of the lack of space and wanting to live independently." They were told they should

be under no illusions about the timescale in which larger accommodation could be provided and in the meantime a new bunk bed would be funded.

69. What is remarkable about the 2017 CFA and the Child in Need (CIN) Plan that followed it on 11 October is their lack of recognition that the overcrowding at the flat and the lack of space appeared to lie at the root of the problems that had been experienced and that neither the CFA nor the CIN Plan resolved any of the issues that had led to the breakdown in the family relationship. Ms Williams expressed concern that the Council was simply trying to manage the situation for the remaining 3 months until the cousins turned 18.

70. There is no acknowledgment of the uncle's strong wish not to accommodate his nephews any longer in the context of the carer's capacity to provide for the children's needs. Under the heading "what we are worried about" the cracks were at best papered over as a "complicating factor" which in my judgment was a serious understatement since it went to the suitability of accommodation and care under s. 20:

> "M and [K] have been asked to leave the family home by their uncle, U due to overcrowding. Both boys are currently placed in DePaul Crash pad which is supported living.
>
> Complicating factors and grey areas
>
> K has reported that he does not wish to return home as he wants to live independently.
>
> M and K have reported that there was a number of people living at the family home. U reported that his children (he has 4) visit at tiume and he is unable to do anything to prevent this as they are his children.
>
> U reported that both boys have conveyed defiance towards him and K does not respect his curfew. However, these behaviours have not been noted by DePaul staff and on the contrary they described both boys as 'exemplary'."

71. The CFA records under "views of children" that K was "in agreement to turn to the care of U". I find that entry to be simply perverse. It is clear from the Council's own notes of meetings or discussions with K in in July and August 26 September and 5 October (the day after the CFA was completed but before K left the Crash Pad) that K would not return to the flat. He wanted to be independent though he made it clear on several occasions that he would return to live with his uncle if larger accommodation could be provided (see e.g. p. 10 of the CIN Plan of 11 October). This underlines the view that the difficulties the boys and their uncle experienced stemmed from the inadequacy of the accommodation.

72. Moreover, K states in his evidence:

> "The interpreter at the time didn't interpret correctly when the social worker was talking to me. I felt the interpreter was siding with the social worker because she was trying to convince me herself. Both the Social Worker and the interpreter put pressure on me and M and so M agreed to go to our uncle's flat. However, I didn't agree and the Social Worker continued to try and convince me.
>
> I made it clear that I was not going back to live with my uncle. The social worker kept on saying that I had no other choice but to go back to my uncle. Eventually she told me "See if your friends can help you. However, you don't have a problem because you can live with your uncle."

73. I note that although M did return to live in the uncle's flat, he was far from enthusiastic and it was recorded in the CIN Plan that -

> "he is not really happy with the current arrangement with regard to returning to the care of his uncle."

74. It does not require much effort to envisage the difficulties caused by two 17 year old boys having to live at very close quarters in one room with their adult uncle, without any privacy or even storage for belongings, with their uncle having regular visits from children and friends and wishing to continue with his own life. Although allegations were made by U, in the meetings from August 2017, that K had been troublesome and had not been respectful or observed proper boundaries, or curfews, it is not difficult to draw the conclusion (reinforced by independent reports of K's exemplary behaviour in the Depaul accommodation and in his studies) that this was caused by having to live in too close quarters with his uncle and cousin in the flat.

75. However, despite the strong resistance of the three family members, Social Services was determined that there was only one course of action it would contemplate – and despite K having been told on 18 August "that since the relationship with his uncle has broken social care will need to consider all options for him". The course of action appears unfortunate particularly since the Council was at pains to point out that Social Services were concerned to place the cousins with their uncle to provide a degree of stability they had not had previously – yet the situation created by the shortcomings of the flat undermined that objective.

76. For these reasons, I find it difficult to conclude that the Council complied with the Government's guidance in *The Children Act 1989 guidance and regulations Volume 2: care planning, placement and case review* (June 2015) at para. 1.11:

> "Children should feel that they are active participants and engaged in the process when adults are trying to solve problems and make decisions about them. When plans are

> being made for the child's future, s/he is likely to feel less fearful if s/he understands what is happening and has been listened to from the beginning. Close involvement will make it more likely that s/he feels some ownership of what is happening and it may help him/her understand the purpose of services or other support being provided to him/her, his/her family and carer. Where a child has difficulty in expressing his/her wishes and feelings about any decisions being made about him/her, consideration must be given to securing the support of an advocate."

77. Both the 2017 CFA and the CIN Plan set out what the Council proposed to do to provide support: see the section "what needs to happen" sections in both. These listed a number of matters including supporting the family by funding the cost of a bunk bed for the boys (noting that U had provided a sofa bed for the boys to sleep on the basis a bunk "would make the room feel more overcrowded"), assist in writing a supporting letter for "more suitable accommodation", support U in applying for the relevant benefits (pending the provision of which a weekly subsistence payments will be paid to the boys), for the cousins to continue to attend college and to undertake some direct work with them "to address the behaviour issues that U has identified". Social Care stated that it "will conduct 3 weekly to monthly visits to support the family and monitor the CIN plan".

78. Whilst the Council decided that it was in K's best interests to live with U, when he was required to leave the Crash Pad on 11 October 2017, K refused to return to the flat and said that he would stay with a friend. He did not return to live at U's flat but slept rough or "sofa surfed" with a friend, A (which was itself precarious since A was not permitted under the terms of his occupancy to have anyone else stay in his room). K himself states:

> "The Social Worker told me that social services didn't have a solution for me and therefore I had to pack my belongings. This happened on 11th October 2017, I know this because Brent social services confirmed this date with my solicitor. The social worker told me to get into the car because she was saying that I had to go to my uncle's home, she drove me to my uncle's flat or somewhere near there but I still insisted that I wasn't going to go there, so I got out of the car and walked to the park. During the time that I was in the park the Social Worker went inside the flat to speak to my uncle.
>
> I stayed in the park until about 9pm. I called another friend of mine called Y and Y told me that there was nothing that he could do to help me. I therefore telephoned another friend, A, and A said that I could stay with him.
>
> I have been living with my friend A on and off since that time… When I am unable to stay with A I sleep in the park. A has shared accommodation and his license agreement does not allow him to have anybody staying with him, so I have to sneak in and out of the accommodation.
>
> I went back to Brent Council in November 2017 because A was not able to accommodate me. First I approached Tracey on the telephone and Tracey said that she would speak to her manager about me and then make an appointment for me to come

> and see a social worker. When the meeting happened it was not with Tracey, it was with somebody else who introduced herself as Tracey's colleague. This meeting was some time in November but I do not know the date.
>
> During the meeting, Tracey phoned me and said that "You were speaking to my colleague and the situation is the same, that there is no solution for you in terms of accommodation, therefore the advice is for you to go back to your uncle" and then the meeting ended.
>
> …
>
> A is not allowed to host me because he lives in accommodation provided by social services so I go there late at night and leave early in the morning so that I am not seen. A has told me "if they find you here, I will have problems". A is not happy to host me but has pity for me. A allows me to stay because he feels sorry for me; he knows that I would sleep in the street in the cold. Despite this, on many occasions A has asked me to leave. …
>
> I can only take a shower after 3 am at A residence, as it is when everyone else is asleep. This is because if somebody sees me, they would inform the people responsible for the accommodation.
>
> I went to Brent social services … on 21st December 2017 with all my belongings and told them I had nowhere to stay. I spoke to Tracey; she said that they could not help me and that I should stay at my uncle's house. I left Brent social services and stayed in the library. I called A to tell him I had nowhere to stay so he told me to come back when it was the night time.
>
> I don't have a space to put my belongings. I put everything in one bag and hide it under A's bed. I never cook in A's house and he doesn't offer me food. I buy food outside and only go to A's house to sleep. I spend most of the day outside in the cold or in the library waiting for the night to come."

79. K instructed solicitors and on 7 and 21 December they sent letters before claim setting out the details of K's circumstances and setting out their view that s. 20 of the 1989 applied. The Council was requested to accept a duty under s. 20 and to ensure the provision of suitable accommodation. The letter of 21 December also raised the application of the duty under s. 23C. They also sought disclosure of all records and correspondence from the Council and were reminded in express terms of the duty of candour.

80. The Council's response of 12 December stated that the Council had discharged its duties relying on the 2017 CFA and the facilitating of accommodation with U. Similarly, on 22 December the Council disputed the existence of a s. 20 duty and further rejected the application of s. 23C on the footing that K was not eligible. The Council pointed to its "limited resources and desire to assist all the children in need who present to them" and that they had acted reasonably and lawfully in assessing K's needs. There was no acceptance at that stage that any duty had arisen under s. 20.

81. I do not propose to run through the procedural steps that were taken after the issue of proceedings on 22 December (including an application for interim relief and a consent order). Permission was granted as I have noted on 6 February 2018. I note from the Council's detailed grounds:

    (1) The existence or breach of the s. 20 duty was denied. However, in para. 9 the Council did "admit that [the flat] was statutorily overcrowded" (as it had done in its summary grounds);

    (2) The s. 23C duty was denied on the basis that K was not an eligible child and therefore not a FRC and had not been looked after beyond the period from 8 August to 11 October 2017;

    (3) The request to treat K as if he had been a FRC as a matter of discretion was rejected principally on the basis that he was not an eligible child, which was merely a repetition of the rejection of the application of s. 23C. (Para. 25 set out 6 factors why the Council had "decided" that the discretion should not apply, although these do not appear in the evidence and those factors were not mentioned or supported in Tracey Low's witness statement in dealing with this issue in paragraphs 37 and 38.)

82. The Council has provided assistance to K since December 2017 though not in purported discharge of s. 23C:

    (1) They have been willing to support him in applying for housing support and benefit;

    (2) they have paid him subsistence payments until his application for welfare benefits was processed;

    (3) they have placed the Claimant in supported accommodation which was arranged through the Social Services Department, and not Housing, will be available (subject to conditions) for up to two years at the end of which period, the Defendant will arrange for the Claimant to be provided with alternative accommodation by STARTPLUS.

83. Throughout this period, and indeed up to the morning of the hearing before me, the Council maintained that a duty had not arisen under s. 20 at any stage but that it had provided the supported accommodation and other assistance pursuant to s. 17. See Tracy Low's statement at paras. 33 and 34. However, at the start of the hearing on 1 May 2018 Mr Carter for the Council informed me that the Council now accepted that a duty under s. 20 had arisen on 1 August 2017 when it was approached by K and informed he had been thrown out by his uncle. The Council accepted that the s. 20 duty had applied until K left the Crash Pad on 11 October, but at that point it submits that its duty came to an end andAKa ceased to be a looked after child since he now had accommodation with his uncle.

84. However, it is accepted by the Council (and could not be otherwise given its refusal to accept it had a s. 20 duty until the hearing) that it had not followed any of the steps required to be undertaken for a child ceasing to be looked after. This issue lies at the heart of the remaining two grounds, which I will come to below, and which concern the duties which are said to have arisen in respect of his leaving care.

The grounds of challenge

85. Three grounds of challenge were advanced by the Claimant in the judicial review proceedings begun on 22 December 2016, following letters before claim dated 7 and 21 December raising substantially the same issues and seeking disclosure of all relevant material:

    (1) The Council was in breach of its duty under s. 20 in seeking to accommodate K with his uncle in October 2017;

    (2) The Council has wrongly refused to acknowledged that K is a FRC within s. 23C of the 1989 Act which gives rise to specific duties to facilitate K's transition into adulthood;

    (3) Alternatively to Ground 2, if K was not a FRC then the Council has failed to consider whether to treat him as such within its discretion.

86. For the reasons I set out below, the judicial review succeeds on Grounds 1 and 2 and I do not need to deal with Ground 3 since it is an alternative to Ground 2.

Ground 1

87. This ground is now conceded by the Council as I have already noted.

88. However, Mr Carter submitted that the Council had discharged its duty by arranging for the cousins to return to their uncle's flat in October 2017 and submitted that it was a matter for the Council's judgment that the accommodation was suitable.

89. In the light of the additional disclosure provided after the hearing began, I am not satisfied that the Council discharged its duty under s. 20 given the failure to deal with the root problem of finding suitable accommodation which was apparent from the 2016 viability assessment. Ms Low, who makes clear her view that she thought K was being provided with suitable accommodation and made himself homeless says in her statement:

    "Given the possible traumatic experiences that K may have experienced in being separated from his family and in his journey from Sudan to the UK, it is our view that

> K's uncle who K identified as the only member of his family in the UK who could provide care for him would be best placed to continue to care and support K. Whilst the Local Authority acknowledge that K has reported difficulties in the relationship with his uncle, overall they seem to get along well. K's main objection stems from the size of the shared accommodation, however obtaining larger housing takes time and K should not have given up the accommodation and family care that he was receiving because of this."

90. However, to my mind this ignores the accommodation as the cause of the problems and does not acknowledge that K was sufficiently unhappy with the Council's proposals to prefer to sofa surf or to sleep rough in the difficult circumstances he has described.

91. To the extent necessary, therefore, I consider the assessments that were made in the 2017 CFA were unreasonable having regard to the earlier contrary assessments of the inadequacy of the flat and the facts. It is questionable also whether the action of the Council protected K's welfare and, in my view, it appears to have put it at risk.

92. I will return to aspects of the s. 20 duty under Ground 2.

Ground 2

93. As already mentioned, this ground was the focus of argument at the hearing.

94. Ms Williams, for K, submitted that:

(1) The Council not only failed to acknowledge its s. 20 duty but if, as it now contends, K left care and ceased to be eligible on 11 October, did not follow the requirements imposed by law as to the ending of the s. 20 duty and leaving care;

(2) In any event, ignoring the characterisation which the Council gave to its actions on the ending of K's placement at the Crash Pad the Council in fact continued to apply its s. 20 duty and K remained a looked after child since -

(a) In fact the Council took a central role in managing the ending of the placement and the move back to the uncle's flat consistently with continuing to discharge a duty under s. 20 (see ***D v Southwark*** and Lady Hale in ***G v Southwark***);

(b) It did not in any event comply with the duties required to end care (above) and in particular the duty under reg. 39 of the 201 Regulations, since it did not recognise the duty under s. 20 at the time; and

(c) K was not able to return to suitable accommodation in which case s. 20(1)(c) applied and he remain a looked after child.

95. Mr Carter, for the Council submitted that:

    (1) The Council's duty under s. 20 ceased, and K ceased to be a looked after child, when Social Services secured the return of K and his cousin to U's flat;

    (2) K was looked after for a total period for 9 weeks and 1 day, ending on 11 October 2017 and therefore failed to meet the 13-week eligibility criterion to be considered a FRC under s. 23C.

96. The Council's submissions echo those of Southwark in ***D v Southwark***, above, at [38] and [40] where Southwark contended that since it had arranged accommodation for the child with a former partner of her father's it had discharged its s. 20 duty. Smith LJ rejected this and stated:

> "49 We are prepared to accept that, in some circumstances, a private fostering arrangement might become available in such a way as to permit a local authority, which is on the verge of having to provide accommodation for a child, to 'side-step' that duty by helping to make a private fostering arrangement. However, it will be a question of fact as to whether that happens in any particular case. …
>
> However, where a local authority takes a major role in making arrangements for a child to be fostered, it is more likely to be concluded that, in doing so, it is exercising its powers and duties as a public authority pursuant to sections 20 and 23. If an authority wishes to play some role in making a private arrangement, it must make the nature of the arrangement plain to those involved. … If such matters are left unclear, there is a danger that the foster parent (and subsequently the court) will conclude that the local authority was acting under its statutory powers and duties and that the arrangement was not a private one at all.
>
> 50 In the present case, the local authority took a central role in making the arrangements for S to live with ED. It directed the school that the father must not be allowed to take S away. It arranged a meeting attended by all the relevant parties. The father was told that he must have no contact with S. Those factors are far more consistent with the exercise of statutory powers by Southwark than the facilitating of a private arrangement. The father consented to the proposed arrangement with ED. S was consulted as to her wishes. Mr Dallas contacted ED to ask her if she would take S in. Mr Dallas delivered S to ED's home and checked that the arrangements were satisfactory. Those factors were equally consistent with an exercise of statutory powers as with the making of a private arrangement. However, there was no contact between ED and either parent. Mr Dallas said nothing to ED, either on the telephone or the following day at his office, about the arrangement being a private one, in which she would have to look to the parents for financial support or to Lambeth for section 17 discretionary assistance. Far from it, he gave her to understand that Southwark would arrange financial support. In our judgment, the judge was quite right to conclude that this was not a private fostering arrangement. Indeed, it is hard to see how he could have come to any other conclusion."

97. See to similar effect the judgment of Mr Michael Supperstone QC (as he then was) in ***R.***

(Collins) v Knowsley MBC [2009] 1 F.L.R. 493 at [30]-[34]. When presented with a submission that the circumstances there were distinguishable from those in ***D v. Southwark***, similar to those advanced by Mr Carter here, he held:

> "30 Mr Cragg submitted … that the *Southwark* case was decided on its specific facts in circumstances where a social worker expressly requested that the Claimant look after a child who otherwise would have had nowhere to live; by contrast, he submitted, in the present case the Claimant already had somewhere to live when the Defendant became involved and therefore a duty under s. 20 did not arise.
>
> 31 In my view there is no material distinction between the two cases. Until 26 November 2003 the Claimant was not living with the Leydens other than as part of "a temporary arrangement". On that day the Defendant did play a central (or "major", see Southwark , para 49) role in allowing the Claimant to stay with Mrs Leyden when the Claimant said that she wished to live with her. Having ascertained and taken into account the Claimant's views, Ms. Joyce spoke to Mrs Leyden, informed her what the Claimant wanted and, I infer, asked her whether she was agreeable to it. Further on various occasions between 26 November 2003 and January 2004 Ms. Joyce suggested and arranged and re-arranged a Planning Meeting to plan for Sarah's future. Thus through Ms. Joyce the Defendant played and intended to continue to play a significant role in the arrangements for the Claimant's future that included her living with Mrs Leyden.
>
> 32 Ms. Joyce says that she "ensured that Mrs Leyden was claiming all the relevant benefits in respect of Sarah" (Witness Statement, para. 11). It is reasonable to infer that is what she told Mrs Leyden. However the benefits Mrs Leyden received were limited to section 17 discretionary assistance. It was not explained to Mrs Leyden that she would not be receiving financial support from the Defendant for looking after the Claimant because the Defendant was not responsible for the Claimant (as she should have been told if that was the Defendant's position); rather she was left in the unsatisfactory position where she agreed to allow the Claimant to live with her permanently, but was not told the basis on which that would be, namely, one that would not involve the Defendant or any other party being obliged to provide financial support.
>
> 33 I am satisfied that as at 26 November 2003 the Claimant, who it is agreed was a child in need, required accommodation as Mr Collins was at the time "prevented" from providing her with suitable care. After his death on 16 December 2003 there was no person who had parental responsibility for her.
>
> 34 In my judgment, in the circumstances of the present case, the Defendant did have a duty to provide accommodation to the Claimant under s.20 of the 1989 Act and I find, on the facts, that a placement was made with Mrs Leyden under s.23(2) ."

98. In ***R (M) v Hammersmith and Fulham LBC*** [2008] 1 WLR 535 Lady Hale referred to the ***Southwark*** case at [38] in the following terms:

> "As the social worker had prevented the father from taking the child home from school, had taken the lead in making the arrangements, and had told the woman that financial arrangements would be made for her, it was not difficult to conclude that the authority

had in fact been discharging their duties under section 20 and could not escape their financial liabilities."

99. In ***GE (Eritrea)*** at [35] to [44], Christopher Clarke LJ pointed out, disagreeing with the Court of Appeal in ***D*** on the deeming of a child to be looked after, when in fact the authority had not done so, pointed out that the reasoning was obiter and unnecessary since it had found that Southwark had, in any event, acted in a manner which demonstrated that they were assuming a s. 20 duty.

100. In my judgment, it is necessary to look at the facts and what the Council did as opposed to how it characterised what it was doing, bearing in mind Lady Hale's statement in ***G v. Southwark*** (above) that authorities should "be slow to conclude" that a child is no longer "in need" "because he did not need that help or because it could be provided in other ways." Quite apart from the question whether the Council actually achieved compliance with s. 20, there was here a level of intervention and activity by Social Services which is wholly consistent with treating K as a looked after child under s. 20, and continued to play a significant role in managing the issues. Indeed, unlike the situation following the 2016 CFA, Social Services did not close its file for K but continued to manage his case.

101. As evidenced by the meetings, the 2017 CFA and the CIN Plan and the statements, this intervention included:

(1) The Council convened a family meeting on 26 September 2017 "facilitated by the allocated social worker";

(2) The arrangement for U to resume care of the boys was based on support from Social Care. See the CIN Plan which noted: "he asked for Social Care to support him in accessing more suitable accommodation and benefits for [the boys]". Social Care agreed that the support requested would be provided (p. 7) and made plans for financial assistance, housing, furnishing and monitoring of the arrangement (pp. 9 and 10);

(3) K's wishes and feelings were clear that he did not want to return to the accommodation that was too small (p. 9) but throughout Social Services sought to persuade him that this was the only option;

(4) On 11 October 2017 the Crash Pad accommodation was terminated by the Council and Social Services took K to his uncle's flat. He refused to return to his uncle's care;

(5) On 16 October 2017, U met with Ms Low and an appointment was made for him to meet with Brent Housing on 2 November 2017. Ms Low also supported U in applying

for benefit and he was also offered support to purchase a bunk bed for the boys:

(6) Social Services has continued to monitor the circumstances and to engage with K and his uncle and set out in the CIN Plan. Ms Low states –

> "Since the 11th October 2017, K has reported that he wishes to stay with his friend and does not wish to return to his uncle's care. … In exploring with K his reasons for not wishing to return to U's care, K does not report any safeguarding issues but rather speaks of the accommodation being too small or relationship difficulties with his uncle. We hold the view that these issues can be addressed while K remains in the care of his uncle."

(7) K met with one of Ms Low's colleagues in mid-November 2017, reporting that his accommodation had broken down. He was told that his only option was to return to his uncle;

(8) Ms Low states in her evidence at para. 30 that –

> "From the 11th October 2017 to present, Brent Children and Young People has remained committed to supporting the family under a Child In Need Plan"

102. In my judgment, this demonstrates the Council taking a central role in arranging accommodation, providing other assistance, and by continuing to monitor the arrangements. Despite the failure to persuade U to engage in mediation, there were a number of meetings and contacts in August, September and October which show Social Services taking a leading role in arranging accommodation. They did not, for the reasons mentioned, follow the required procedure to establish that K was no longer looked after. They continued to regularly monitor the position and to seek to persuade K to return to the flat after 11 October despite his unwillingness to do so.

103. I therefore conclude that the Council continued as a matter of fact to treat K as a looked after child beyond the 11 October when he left the Crash Pad and did so beyond the 13 weeks required to establish eligibility (which occurred at the end of October 2017). Indeed, I consider that he did not cease to be looked after, or that the s. 20 duty ceased, until he turned 18 on 5 January 2018.

104. Although it is not necessary in the light of my previous conclusions to express a concluded view on the accommodation at the uncle's flat, it is right that I should express my view on that given the evidence and the submissions.

105. With regard to Mr Carter's submission that the Council discharged its s. 20 duty by returning K to his uncle, I reject that contention. In the light of the evidence I have referred

to earlier, and given the additional disclosure provided after the hearing began, I am not satisfied that the Council discharged its duty under s. 20 in October 2017 given the failure to deal with the root problem of suitable accommodation. I consider the assessments that were made or assumed in the 2017 CFA and mirrored in the CIN Plan with regard to the suitability of the flat were *Wednesbury* unreasonable having regard to the earlier contrary assessments of the inadequacy of the flat and the facts and the evidence of what the overcrowded conditions had caused in terms of a breakdown in family relationships. It also misstated the wishes of K. The proposals to undertake work to address the behavioural issues missed the point that it was the accommodation that appeared to be the primary cause of this.

106. In other words, the position at the flat in October 2017 was little different to that which had led to friction in July 2017 and to the cousins being thrown out. The accommodation and its facilities had not changed and, if anything had worsened, since the bunk bed had gone, replaced by only a sofa bed so the cousins would not even have the minimal separate sleeping facilities bunks would have offered. The statutory overcrowding would have remained had K joined his cousin there and not resumed sofa surfing. Applying for a larger flat would be difficult but this had been raised in the CFA in 2016 and U clearly had not been interested in pursuing it. While he may be pursuing it now, the passage of another year meant that in October 2017 the likelihood of the situation being improved appeared no closer than it had been in 2016.

107. Mr Carter submitted that "suitability" within s. 20 was not only a matter of judgment for the Council, which it undoubtedly was, but was also not defined by the 1989 Act and could include matters such as the need for the children to be with a family member to create stability and a better basis for their transition to adulthood in the UK. That submission appeared to carry with it the acceptance that the accommodation was not physically suitable because of the overcrowding. However, as Ms Williams pointed out, s. 20(1)(c) refers to "suitable accommodation and care" which suggests that the matters Mr Carter relied upon arose under the "care" category rather than "accommodation". Further, the natural meaning of "accommodation" strongly supports the view that it relates to physical suitability, including size and facilities and, possibly, location. It is now clear, as was not the case at the hearing, that Social Services itself doubted the suitability of the accommodation when it undertook the viability assessment in October 2016.

108. The absence of compliance with the statutory requirements when assessing whether a child should leave care adds weight to my conclusion that the Council did not discharge its s. 20 duty in October 2017.

109. Whilst I do not underestimate the difficulties faced by local authorities, and their social services department, in these days of austerity and public funding cuts when available accommodation is scarce and they have a duty to promote the welfare of many children in need, it remains the responsibility of the Council to comply with the law and the overriding duty to protect the individual child and that child's welfare.

110. In any event, for the reasons I have given, I conclude that K was a looked after child in excess of the prescribed 13 week period and therefore he was eligible in terms that means that s. 23C applies to him as a FRC. It follows that the Council is under a duty to provide assistance as required in accordance with s. 23C. Indeed, since K's 18th birthday was at the beginning of January, the Council should take immediate steps to remedy its failure to date to treat K as a FRC and its previous failure to treat him as a looked after child.

Ground 3

111. This ground does not arise since I have found that the s. 23C duty in fact is owed by the Council to K. However, in the event it might be thought that the Council's response on this issue was satisfactory, I set out briefly my views on the issue and why this ground would have succeeded had Ground 2 failed.

112. The existence of the discretion to treat an individual as a FRC even if s. 23C does not apply was explained by Christopher Clarke LJ in ***GE (Eritrea)*** at [53]-[55].

113. Para 25 of the Council's Detailed Grounds set out 6 reasons why the Council is said to have decided not to exercise its discretion. However, it became clear very early in argument on this ground that the Council had not considered the exercise of this discretion at all – first, since it maintained until the hearing that K was not a looked after child at all and, secondly, since it only considered his position in terms of s. 23C and eligibility. Tracey Low's only answer to Ground 3 was:

> "Brent Children and Young People of the view that K does not qualify for the services that have been requested as he is not a former relevant child within the meaning of the Act and his current situation does not suggest he should be treated as such.
>
> As mentioned before K was provided accommodation via the Crash Pad from, 8th August 2017 to 11th October 2017 under section 17 of the Children Act 1989."

114. This provided no answer to the requests that were made on K's behalf to treat him as a FRC as a matter of discretion or to the issues set out by Christopher Clarke LJ. I reject therefore the contention set out in para. 25 of the Detailed Grounds.

115. Despite a number of requests by K's solicitors, the issue was only considered in terms of the s. 23C criteria. Self-evidently, in order to consider the exercise of the discretion the statutory criteria would not be met and the failure to do so was accepted by Mr Carter. He sought to argue that it did not arise since s. 20 had ceased to apply on 11 October 2017 for reasons I have already rejected and that the Court should in any event refuse relief.

116. Mr Carter relies on the fact that the Council has provided K with substantial assistance since he became an adult, including making subsistence payments until his application for welfare benefits was processed and placing him in supported accommodation which was arranged through the Social Services Department, which will be available (subject to conditions) for up to two years at the end of which period, the Defendant will arrange for the Claimant to be provided with alternative accommodation. He submits that given the restrictions on resources, K could not reasonably expect more to be provided.

117. The approach to the court's discretion to refuse relief is set out by Purchas LJ in ***Simplex GE (Holdings) Ltd v Secretary of State for the Environment*** [2017] PTSR 1041 at 1060:

> "It is not necessary for [counsel for the appellants] to show that the minister would, or even probably would, have come to a different conclusion. He has to exclude only the contrary contention, namely that the minister necessarily would still have made the same decision."

118. Such a submission would have failed here in my judgment since the discretion to refuse relief on the basis that the error would not have made a difference is a bold submission in the face of a complete failure by the Council to consider the discretion at all and in the context that the Council at that time were maintaining that the s. 20 duty had not arisen. The possibility, considered in ***GE (Eritrea)***, of applying the discretion to remedy early unlawfulness would simply not have occurred to, or been accepted by, the Council at the time. The fact that the Council would have had a potentially wide range of options, as ***GE (Eritrea)*** makes clear, does not assist the Council, contrary to Mr Carter's submission, but in fact makes it more difficult for the Court to conclude that the Council would necessarily have made the same decision had it conscientiously considered its discretion, which it failed to do. See e.g. ***R (BC) v Birmingham CC*** [2016] EWHC 3156 (Admin) at [65].

119. The fact that some assistance has been provided by the Council in any event, as noted above, does not mean that this would be the only assistance offered had the Council properly considered the circumstances including its own failures to acknowledge and apply its statutory duty. I would have approached that issue with additional scepticism given the failure to comply with the duty of candour had it been necessary to reach a formal conclusion on Ground 3.

120. In any event, the claim succeeds on both grounds 1 and 2 and I will hear submissions on the form of relief and costs. The Council has also stated in its written submissions on the candour issues that it wishes to address the Court as to the outcome of a meeting scheduled for 9 May to consider the issue of disclosure between the various local authority departments so as to identify procedures "that will ensure that effective and timely disclosure is given in judicial review cases".