Neutral Citation Number: [2019] EWHC 3351 (Admin)

Case No: CO/1984/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11th December 2019

Before :

MATHEW GULLICK
(sitting as a Deputy Judge of the High Court)

- -

Between :

THE QUEEN (on the application of AB)	**Claimant**
- and -	
THE LONDON BOROUGH OF EALING	**Defendant**

- -
- -

Khatija Hafesji (instructed by **Simpson Millar**) for the **Claimant**
Joshua Swirsky (instructed by **Ealing Council Legal & Democratic Services**) for the **Defendant**

Hearing date: 9th October 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MATHEW GULLICK

Deputy Judge Mathew Gullick:

Introduction

1. This is a claim for judicial review of the Defendant local authority's refusal to exercise its discretion to treat the Claimant as if she were a "former relevant child" within the meaning of section 23C of the Children Act 1989 ("the 1989 Act"). The Claimant is now an adult. The practical effect of the Defendant's refusal to treat her as if she were a "former relevant child" is that she does not have access to the continuing support, which lasts well into adulthood, that she would have received if she had been cared for by the Defendant prior to her 18th birthday.

2. The documentary evidence placed before me at trial consisted of just under 750 pages of contemporaneous material (mostly records disclosed by the Defendant) and *inter partes* correspondence. The Claimant filed a witness statement and there were also statements from Lois Clifton, a trainee solicitor employed by Simpson Millar (setting out the content of a discussion with the Claimant's teacher in June 2019), and from Diksha Kahlon, who at the times material to this Claim was a caseworker employed by the Women and Girls Network ("WGN"). For the Defendant, there were witness statements from Hannah Barter, a Family Support Worker employed in the Defendant's Children's Services Department, and from Simy Mathew, a Deputy Team Manager in the same department. I also had the benefit of written and oral submissions from Ms Hafesji, on behalf of the Claimant, and from Mr Swirsky, for the Defendant.

Factual Background

3. The Claimant was born in February 2001. Until September 2018, she lived with her mother and two younger twin siblings at the family home in Ealing. Although the Claimant's parents had separated several years before the events with which this Claim is concerned, her father visited the home from time to time. The Claimant's family had a long history of contact with the Defendant's social services department. The children were first brought to the attention of social services by the police on 9th April 2011, when the Claimant was 10 years old, due to what is described in the Defendant's records as "a domestic incident" between their parents. The police referral stated that there were no immediate concerns but that if problems continued between the parents then this could cause issues for the development of the children. The Defendant took no further action.

4. In February 2013, the children were again referred to social services following the hospitalisation of the Claimant's mother due to concerns about her mental health; she was suffering from depression with psychotic features and alcohol dependency. It was recorded that the Claimant's parents had been separated for five years at that point but that her father had recently moved back into the family home to care for the children. During the ensuing year, the Claimant's mother was hospitalised on at least two further occasions. A number of concerns were raised about the parents' capacity to care for the children. In May 2013, the assessing social worker stated that they were "very concerned for the children's wellbeing" and that the children were at risk of emotional harm.

5. At this point, the Defendant considered the children to be "in need", within the meaning of section 17 of the 1989 Act, and on 21st May 2013 they were put onto a Child In Need Plan to seek to safeguard their wellbeing and development. Although

there were reservations about the Claimant's father's parenting capacity, he continued to care for the children. The Defendant offered to provide respite accommodation in foster care for the children, however in August 2013 their parents refused that offer. The parents also declined to work with the Supportive Action for Families in Ealing ("SAFE") worker to provide the children with a greater understanding of the issues affecting the family, something recommended in the Child in Need Plan. In due course, however, the Defendant considered that the family was doing well; many of the objectives of the Claimant's Child in Need Plan were met and the family's case was closed by social services on 13th February 2014.

6. In November 2014, the Defendant received another referral from the local hospital following a relapse in the Claimant's mother's mental health The case was closed after a week, as the Defendant considered that further social work intervention would result in a deterioration in the Claimant's mother's mental health and that the presence of the children's father was a protective factor. No further action was taken by the Defendant following this referral.

7. On 29th September 2016, the Defendant received another referral from mental health services. It was reported that the Claimant's mother had stated that she was overwhelmed by caring for her children. An assessment was carried out in January 2017 by SAFE – a joint initiative between the Defendant and local National Health Service bodies – which highlighted that the Claimant had taken on the role of main carer for her mother and siblings, cooking and cleaning the house when she was also attempting to study for her GCSE exams. The assessor noted that although the children were generally progressing well there were concerns that the parents were not willing for the Young Carers' Project to become involved, given that the Claimant was taking mock GCSE exams and would be taking the full exams in the summer of 2017.

8. On 29th March 2017, the Claimant's mother was again hospitalised due to her poor mental health. The Claimant's mother informed SAFE that she did not want the Claimant's father in the house and disclosed that she had been a victim of domestic violence and that he had physically assaulted the Claimant's younger brother in 2015. In June 2017, it was recorded that the Claimant's father had been visiting to support the children by cooking for them. SAFE recorded that the family home was unclean, the children were unhappy that their father was coming to the house and that the family was in financial difficulty as payment of the Claimant's mother's disability living allowance had ceased. On 14th December 2017, the Claimant's mother disclosed that in October of that year she had again been assaulted by the Claimant's father. On 4th January 2018, the Defendant closed the family's case because the Claimant's mother reported that she felt able to make progress on her own.

9. On 12th April 2018, the local hospital made a safeguarding referral in respect of the Claimant. This followed the Claimant's mother telling staff that she had a daughter at home who looked after herself. The hospital staff were concerned that the children were responsible for caring for their mother due to her chronic pain and difficulty doing housework. The Defendant's social services department did not speak to the children as part of its assessment at this point. It was concluded that given the age of the three children (who were at this point 15, 15 and 17) they were not at significant risk and that the case should be closed.

10. In September 2018, when she was 17½ years old, the Claimant left the family home and went to live with her boyfriend and his family. On 1st October 2018, the NSPCC

made a referral to the Defendant in relation to the children regarding possible neglect and eating disorders. Also in October 2018, another referral was received from the local hospital stating that the Claimant's mother had been hospitalised, that she was in a critical condition, and that her two younger children were at home alone.

11. On 4th October 2018, the Defendant's social services department contacted the Claimant by telephone. She told the Defendant that she had left the family home because her mother was in hospital and her father had come to the house to support her younger siblings who were by then aged 16. She reported that she did not get on with her father and that there was a history of domestic abuse which had impacted on her mother's mental health. The Defendant's social worker recorded that the Claimant sounded fragile and was struggling to cope. She was on her way to an interview for a job to support the family, and was balancing this with school. It was stated that the Claimant would like further support from the Defendant's children's services and that she did not want to live with her father. The Claimant said that she did not get on with her siblings.

12. Starting on 8th October 2018, a further Child and Family Assessment was carried out by the Defendant. As part of the assessment process, the Claimant was twice interviewed in person by the assessing social worker, Ms Barter. On the second occasion the Claimant was accompanied by Ms Kahlon and Ms Mathew was also present. Shortly prior to the completion of the assessment, the Claimant moved to a women's refuge in another local authority's area.

13. During the assessment process, the Claimant reported that she been emotionally abused by her mother and physically assaulted by her father. She also reported self-harming and having an eating disorder. In the assessment, the Defendant stated *inter alia* as follows:

    i) That the Claimant had reported that she would make herself sick after eating, which she attributed to the anxiety and emotional abuse suffered from her mother. A further safeguarding referral made during the assessment process from the Claimant's General Practitioner confirmed that she was showing signs of depression and anxiety due to emotional abuse from her mother.

    ii) That the Claimant had poor mental health due to physical abuse from her father and emotional abuse from her mother. The assessing social worker was concerned that the Claimant had been through "a trauma" as a result of her mother's recent illness. It was recorded that the Claimant did not want to go home due to the trauma surrounding these events and also because she was concerned for her safety in the context of domestic violence and/or abuse. The assessing social worker commented that "some family work would have been beneficial in an attempt to explore the dynamics further", however the Claimant had stated that she did not want to carry out any work with the Defendant's Children's Services Department regarding the family's dynamics. It was recorded that the Claimant had declined the Defendant's offer to take part in "a family meeting with clear expectations".

    iii) The strain of the Claimant's home life had caused her to have to re-start her A-Levels at a new school during the then current academic year.

    iv) That the Claimant's father had been asked by the Claimant's mother to move back into the family home to help with domestic tasks because the Claimant's

mother was too weak to carry these out. The Claimant stated that she was very upset at this and that she did not want to go home. The Claimant reported that she was scared for her safety in the family home. The Claimant reported that her relationship with her father had broken down as he had assaulted her one year previously when she tried to leave home to be with her boyfriend. The Claimant reported that her mother had asked the Claimant not to call the police. The Claimant stated that her relationship with her younger siblings had also broken down as a result of this, because they had taken the parents' "side".

v) The history of domestic violence was noted, as were the Claimant's allegations that her father had assaulted her. The assessment acknowledged that as the Claimant had left the family home then the risk of harm to her, whether emotional or physical, had diminished. The assessment noted there was a risk that the Claimant's father could become violent towards her mother, which could affect the children, however the Claimant's mother had unique care needs and was in need of support because she was so unwell.

14. The assessing social worker noted that the Claimant had "not been able to be supported in the context of her family and the recent traumas due to her being encouraged to enter a refuge rather than any attempt to work with the family". In the concluding section of the assessment, under the heading "Analysis and Outcome", it was stated as follows:

> "This referral came due to the hospital being concerned as [the Claimant's mother] has been admitted to hospital. Further referrals were received for [the Claimant] (but not her siblings) via [the Claimant's] GP and the NSPCC with concerns that [the Claimant] was being emotionally abused by her mother and there was a history of physical abuse by her father.
>
> [The Claimant] presented as emotional and reporting that she wanted help with housing and she did not feel as if she wanted to return home from her boyfriend's home.
>
> [The Claimant] self-referred to the Womens and Girls Network and despite Children's Services wanting to work with the family on appropriate expectations and the emotional impact of her mother [sic] illness, the IDVA [Independent Domestic Violence Advisor] very quickly placed [the Claimant] out of borough into a refuge.
>
> It is in [sic] my professional opinion that it is a missed opportunity to work with [the Claimant] and build relationships with her family after the traumatic illness. There is a concern that the divisions in the family could now be increased, leaving [the Claimant] more isolated from her family and friends.
>
> The case will close to Children's Services for [the Claimant] as she does not want the family support, this decision I feel may have been swayed by the IDVA during t [sic] time of heightened vulnerability for this young person."

15. The Defendant's assessment did not state whether or not the Claimant was considered to be a child "in need" within the meaning of section 17 of the 1989 Act. Nor did the assessment make a finding as to whether the Claimant required accommodation pursuant to section 20 of the 1989 Act, despite the assessing social worker referring to the Claimant having said that she "wanted help with housing". The assessing social worker apparently considered that the Claimant's placement into a refuge outside the borough had resulted in a missed opportunity to build relationships with her family. Ms Davies, the team manager who approved the assessment, noted that it should be explained to the Claimant and to WGN that the Defendant wished to work with the family to resolve the situation. She stated that it was "very unfortunate that [WGN] have demanded that [the Claimant] is taken into care and seemingly almost encouraged it. This was not agreed… Thus, case to be closed."

16. On 17th October 2018, the Defendant completed the assessment and closed the Claimant's case. The Claimant was not provided with a copy of the assessment at this time. A copy was only provided to her in February 2019, when it was requested by her solicitors. The outcome, i.e. the decision to close the case, was however reported to the Claimant; her response is recorded as being that she was "not happy" as she felt that the Defendant "should have placed her in foster care".

17. WGN then corresponded by email with the Defendant. On 2nd November 2018, Ms Davies wrote to WGN explaining the Defendant's decision in the following terms:

> "This young person's case is closed to us. We completed an assessment and we did not identify that there was a significant risk of harm which would mean that the young person could not return home… We were somewhat disappointed that steps are taken so quickly by your service to move [the Claimant] into separate accommodation, when there could have been an opportunity for work to be done to… reintegrate her back to the family. Given her age, it is ultimately her choice if she wishes to consider moving home…"

18. Thereafter, the Claimant continued to live at the refuge. In early 2019, there were discussions between the local authority for the area in which the Claimant was then living and the Defendant in which it was concluded that it was the Defendant which was the responsible authority in respect of the Claimant. On 25th January 2019, a safeguarding referral was sent to the Defendant by the Claimant's school regarding the unsuitability of her accommodation.

19. In February 2019, the claimant was referred to solicitors, Simpson Millar, who continue to represent her. On 11th February 2019, a pre-action protocol letter was sent to the Defendant in which it was alleged that a failure by the Defendant to treat the Claimant as if she were a "former relevant child" would be unlawful. This was responded to by the Defendant on 19th February 2019. The Claimant had by that point had her 18th birthday and so was an adult. The Defendant stated that it had conducted an assessment in October 2018 and that it did not accept that it had a duty to accommodate the Claimant under section 20 of the 1989 Act and that it should therefore treat her as a "former relevant child". The letter set out in some detail the analysis said to have been undertaken by the Defendant in October 2018. It concluded:

> "What [the Claimant] said was taken seriously and therefore it was acknowledged that there is a risk however, it is felt that this was a risk that we could work with and manage safely without having to accommodate [the Claimant]. There was a long history of the father complying with the plan of moving in to support the family and then moving out. There was nothing to suggest that he would not work with the Local Authority and even the [sic] following the incident in 2017, the mother had asked him to move out and he did…"

> "However, [the Claimant] was not open to the proposed work to be undertaken with her family. [The Claimant] was clear and consistent in saying that she did not want this support. [The Claimant] had been articulate that she did not want to engage with this plan. Her stance was that she needed accommodation."

The letter concluded:

> "On the basis of the above, it had appeared to the Local Authority that [the Claimant] did not require accommodation as a result of her mother being prevented (whether or not permanently, and for whatever reason) from providing her with suitable accommodation or care, when in fact her mother was not prevented from doing so. [The Claimant] returning home with LA support and the mother's co-operation with the proposed plan was an option that was open to her – the mother was willing to ask the father to leave and she even discharged herself from hospital to return home – in all likelihood, the father would have vacated the family home – therefore the mother was not prevented from providing [the Claimant] with suitable accommodation or care."

20. The decision letter referred to the assessment completed on 17th October 2018. As I have already noted, it was only at this point that the Claimant was provided with a copy of that assessment. The Claimant then made further representations to the Defendant, which maintained its position in correspondence dated 2nd May 2019.

21. I should add that in February 2019, the Defendant's social services department had proposed to conduct a further assessment in response to the recent developments. As part of that process, it was concluded that the Claimant ought to be offered interim accommodation pursuant to section 20 of the 1989 Act pending the full assessment being carried out. In the event, the Claimant became an adult before this process could be completed. Subsequently, she moved into a hostel for young people aged up to 25.

22. On 17th May 2019, the Claimant issued this Claim for judicial review. The decisions challenged are stated to be those made on 19th February 2019 and on 2nd May 2019 and the Defendant's ongoing refusal to exercise its discretion to treat the claimant as if she were a "former relevant child". Permission to apply for judicial review was refused on consideration the papers by Mr Anthony Elleray QC, sitting as a Deputy High Court Judge, on 28th June 2019. The Claimant renewed her application for permission and it was granted at a hearing on 30th July 2019 by His Honour Judge

McKenna, sitting as a judge of the High Court. Judge McKenna made an order that the Claimant's identity should not be disclosed and that her name should be anonymised. He gave directions for an expedited trial.

23. I should record at this point that it is not disputed by the Defendant that the Claimant was a "child in need" as that term is defined in section 17 of the 1989 Act, which I will set out below. It is, however, disputed that the Defendant ever had a duty to accommodate the Claimant under section 20 of the 1989 Act.

Statutory provisions

24. Section 17 of the 1989 Act provides, so far as is material to the present Claim, as follows:

> "(1) It shall be the general duty of every local authority (in addition to the other duties imposed on them by this Part)—
>
> (a) to safeguard and promote the welfare of children within their area who are in need; and
>
> (b) so far as is consistent with that duty, to promote the upbringing of such children by their families,
>
> by providing a range and level of services appropriate to those children's needs.
>
> …
>
> (4A) Before determining what (if any) services to provide for a particular child in need in the exercise of functions conferred on them by 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 those services; 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.
>
> …
>
> (6) The services provided by a local authority in the exercise of functions conferred on them by this section may include providing accommodation and giving assistance in kind or in cash.
>
> …
>
> (10) For the purposes of this Part a child shall be taken to be in need if—
>
> (a) he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard

> of health or development without the provision for him of services by a local authority under this Part;
>
> (b) his health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services; or
>
> (c) he is disabled,
>
> and "family", in relation to such a child, includes any person who has parental responsibility for the child and any other person with whom he has been living.
>
> …
>
> (11) For the purposes of this Part, a child is disabled if he is blind, deaf or dumb or suffers from mental disorder of any kind or is substantially and permanently handicapped by illness, injury or congenital deformity or such other disability as may be prescribed; and in this Part—
>
> "development" means physical, intellectual, emotional, social or behavioural development; and
>
> "health" means physical or mental health…"

25. Section 17ZA of the 1989 Act provides, so far as is material:

> "(1) A local authority must assess whether a young carer within their area has needs for support and, if so, what those needs are, if—
>
> (a) it appears to the authority that the young carer may have needs for support, or
>
> (b) the authority receive a request from the young carer or a parent of the young carer to assess the young carer's needs for support.
>
> (2) An assessment under subsection (1) is referred to in this Part as a "young carer's needs assessment".
>
> (3) In this Part "young carer" means a person under 18 who provides or intends to provide care for another person…
>
> …
>
> (7) A young carer's needs assessment must include an assessment of whether it is appropriate for the young carer to provide, or continue to provide, care for the person in question, in the light of the young carer's needs for support, other needs and wishes.

> (8) A local authority, in carrying out a young carer's needs assessment, must have regard to—
>
> (a) the extent to which the young carer is participating in or wishes to participate in education, training or recreation, and
>
> (b) the extent to which the young carer works or wishes to work.
>
> (9) A local authority, in carrying out a young carer's needs assessment, must involve—
>
> (a) the young carer,
>
> (b) the young carer's parents, and
>
> (c) any person who the young carer or a parent of the young carer requests the authority to involve.
>
> (10) A local authority that have carried out a young carer's needs assessment must give a written record of the assessment to—
>
> (a) the young carer,
>
> (b) the young carer's parents, and
>
> (c) any person to whom the young carer or a parent of the young carer requests the authority to give a copy.
>
> (11) Where the person cared for is under 18, the written record must state whether the local authority consider him or her to be a child in need…"

26. Section 20 of the 1989 Act provides as follows, so far as is material:

> "(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 not permanently, and for whatever reason) from providing him with suitable accommodation or care.
>
> …
>
> (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 accommodation to be provided for him,

objects.

…

(11) Subsections (7) and (8) do not apply where a child who has reached the age of sixteen agrees to being provided with accommodation under this section."

27. Section 23C of the 1989 Act provides, so far as is material:

"(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".

(2) It is the duty of the local authority to take reasonable steps—

(a) to keep in touch with a former relevant child whether he is within their area or not; and

(b) if they lose touch with him, to re-establish contact.

(3) It is the duty of the local authority—

(a) to continue the appointment of a personal adviser for a former relevant child; and

(b) to continue to keep his pathway plan under regular review.

(4) It is the duty of the local authority to give a former relevant child—

(a) assistance of the kind referred to in section 24B(1), to the extent that his welfare requires it;

> (b) assistance of the kind referred to in section 24B(2), to the extent that his welfare and his educational or training needs require it;
>
> (c) other assistance, to the extent that his welfare requires it.
>
> …"

The reference to "eligible child" in section 23C(1)(b) is to a child who has been looked after for a cumulative total of at least 13 weeks between their 14th and 18th birthdays (see paragraph 19B of Schedule 2 to the Act and Regulations made thereunder). In *R (on the application of G) v Southwark LBC* [2009] UKHL 26, [2009] 1 WLR 1299 at [8], Lady Hale said that, "The general aim of these new responsibilities [i.e. under sections 23A, 23B and 23C] was to provide a child or young person with the sort of parental guidance and support which most young people growing up in their own families can take for granted but which those who are separated or estranged from their families cannot."

28. Section 24B of the 1989 Act provides, so far as is material:

> "(1) The relevant local authority may give assistance to any person who qualifies for advice and assistance by virtue of section 24(1A) or section 24(2)(a) by contributing to expenses incurred by him in living near the place where he is, or will be, employed or seeking employment.
>
> (2) The relevant local authority may give assistance to a person to whom subsection (3) applies by—
>
> (a) contributing to expenses incurred by the person in question in living near the place where he is, or will be, receiving education or training; or
>
> (b) making a grant to enable him to meet expenses connected with his education or training.
>
> (3) This subsection applies to any person who—
>
> (a) is under twenty-five; and
>
> (b) qualifies for advice and assistance by virtue of section 24(1A) or section 24(2)(a), or would have done so if he were under twenty-one.
>
> (4) Where a local authority are assisting a person under subsection (2) they may disregard any interruption in his attendance on the course if he resumes it as soon as is reasonably practicable.
>
> (5) Where the local authority are satisfied that a person to whom subsection (3) applies who is in full-time further or higher education needs accommodation during a vacation because his term-time accommodation is not available to him then, they shall give him assistance by—

> (a) providing him with suitable accommodation during the vacation; or
>
> (b) paying him enough to enable him to secure such accommodation himself.
>
> (6) The Secretary of State may prescribe the meaning of "full-time", "further education", "higher education" and "vacation" for the purposes of subsection (5)."

29. Section 31 of the 1989 Act provides, so far as is material:

> "(1) On the application of any local authority or authorised person, the court may make an order—
>
> (a) placing the child with respect to whom the application is made in the care of a designated local authority; or
>
> (b) putting him under the supervision of a designated local authority.
>
> (2) A court may only make a care order or supervision order if it is satisfied—
>
> (a) that the child concerned is suffering, or is likely to suffer, significant harm; and
>
> (b) that the harm, or likelihood of harm, is attributable to—
>
> (i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or
>
> (ii) the child's being beyond parental control.
>
> (3) No care order or supervision order may be made with respect to a child who has reached the age of seventeen (or sixteen, in the case of a child who is married)…"

30. Section 47 of the 1989 Act provides, so far as is material;

> "(1) Where a local authority –
>
> …
>
> (b) have reasonable cause to suspect that a child who lives, or is found, in their area is suffering, or is likely to suffer significant harm,
>
> the authority shall make, or cause to be made, such enquiries as they consider necessary to enable them to decide whether they should take any action to safeguard or promote the child's welfare.

> …
>
> (8) Where, as a result of complying with this section, a local authority conclude that they should take action to safeguard or promote the child's welfare they shall take that action (so far as it is both within their power and reasonably practicable to do so)."

Statutory Guidance

31. In April 2018, the Ministry of Housing, Communities and Local Government and the Department for Education published statutory guidance regarding the prevention of homelessness and provision of accommodation for 16 and 17 year old young people. The statutory provision requiring local authorities to exercise their social services functions under the guidance of the Secretary of State is set out in section 7 of the Local Authority Social Services Act 1970. Paragraphs 3.28 and 3.29 of the guidance provide:

> "3.28 Where a young person seeks help because of homelessness, the assessment must necessarily reach a decision as to whether or not the young person is a child in need and requires accommodation as a result of one the scenarios set out in section 20(1)(a) to (c) or section 20(3).
>
> 3.29 In some cases, it may not be necessary for the young person to be accommodated by children's services because the young person's needs can be met by providing other services, for example, support to enable the young person to return to the care of their family or other responsible adults in the young person's network. If children's services conclude that the young person does not require accommodation for this reason, they should consider whether they should provide services for the young person under section 17 of the 1989 Act, as a child in need. Where the local authority decides to provide services, a multi-agency child in need plan should be developed which sets out which agencies will provide which services to the child and family. The plan could include, for example, regular visits from children's services, access to family mediation or family group conferencing, or financial support under section 17(6) to sustain any plan for the young person to live with members of their family."

32. In July 2018, the Government published "Working Together to Safeguard Children", a guide to inter-agency working to safeguard and promote the welfare of children. I was taken to several passages in this guidance, which is issued, under a variety of statutory provisions including section 7 of the 1970 Act, to local authorities and other agencies including the police and schools. Paragraph 64 of the Guidance provides:

> "Where the outcome of the assessment is continued local authority children's social care involvement, the social worker

> should agree a plan of action with other practitioners and discuss this with the child and their family. The plan should set out what services are to be delivered, and what actions are to be undertaken, by whom and for what purposes."

Applicable Case Law

33. In *R (on the application of GE (Eritrea)) v Secretary of State for the Home Department* [2014] EWCA Civ 1490, the Court of Appeal considered that a local authority could use its discretionary powers to make good unlawfulness it has committed in the past. Whilst a person in the position of the present Claimant could not be deemed to be a "former relevant child" for the purposes of the statutory scheme under the 1989 Act, it is permissible for local authorities in the position of the Defendant to treat a person in the position of the Claimant as if they were a "former relevant child". The availability of this remedy has been recognised in subsequent first instance decisions, including *R (on the application of A) v London Borough of Enfield* [2016] EWHC 567 (Admin), [2016] HLR 33 at [52-58]. In the present case, the Defendant does not dispute the availability of this remedy in principle. Rather, it asserts that it has lawfully declined to treat the Claimant as if she were a "former relevant child".

34. In the *G v Southwark* case, to which I have already referred, the House of Lords considered the meaning of section 20(1)(c) of the 1989 Act in the context of a case in which the 17-year old claimant had been excluded from the family home by his mother. The local authority considered that he did not fall within the scope of section 20(1)(c). The House of Lords disagreed. In her opinion at [28(5)], Lady Hale (with whom the other members of the Appellate Committee agreed) stated that sub-paragraph (c):

> "… has to be given a wide construction, if children are not to suffer for the shortcomings of their parents or carers. It is not disputed that this covers a child who has been excluded from home even though this is the deliberate decision of the parent…"

The House of Lords approved the approach to section 20(1) that was set out by Ward LJ in *R (on the application of A) v Croydon LBC* [2008] EWCA Civ 1445, [2009] PTSR 1011 at [45]:

> "To answer the question whether decisions under section 20 of the Children Act should be entrusted to social workers, one must consider the legislative scheme as a whole. Confining myself for a moment to section 20 alone, it is immediately obvious that the decision involves a judgment being formed about a range of facts and matters such as:
>
> (1) Is the applicant a child?
>
> (2) Is the applicant a child in need?
>
> (3) Is he within the local authority's area?

> (4) Does he appear to the local authority to require accommodation?
>
> (5) Is that need the 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 from providing him with suitable accommodation or care?
>
> (6) What are the child's wishes regarding the provision of accommodation for him?
>
> (7) What consideration (having regard to his age and understanding) is duly to be given to those wishes?
>
> (8) Does any person with parental responsibility who is willing to provide accommodation for him object to the local authority's intervention?
>
> (9) If there is objection, does the person in whose favour a residence order is in force agree to the child being looked after by the local authority?

35. I was taken, in some detail, to the decision of Hayden J in *R (on the application of A) v Enfield LBC*, to which I have already made reference. That was similar to the present case in that the claimant challenged the decision of the local authority not to treat her as a "former relevant child". Hayden J considered a number of the leading authorities including the decisions of the Court of Appeal in *GE (Eritrea)* and that of the House of Lords in *G*. The local authority had determined, in an assessment carried out when the claimant was 17, that she was not a child in need because her parents were willing to accommodate her. The claimant issued judicial review proceedings. The trial took place after she had become an adult. She sought a declaration that the authority should consider exercising their discretion to treat her as if she was a "former relevant child". At [37], Hayden J stated, in respect of the issue of whether the claimant was a child "in need" for the purpose of section 17 of the 1989 Act:

> "It is paradigmatic that many children who are at risk or "in need" live with parents or carers who themselves present the risk or, as here, are unable to protect from it. That such parents continue to offer a home to their children is often, again as here, understandable but frequently irrelevant. The defendants have created a false logic: (i) the parents offer a home; (ii) the child is not homeless; and therefore (iii) the child is not "in need" (per s.17). The flaw in this reasoning, which I am satisfied was the false equation constructed by the defendants, is manifestly irrational."

36. On the facts of that case, Hayden J concluded at [42] that a reasonable decision maker could only have concluded both that the claimant was a child "in need" under section 17 of the 1989 Act and that she required to be accommodated pursuant to section 20 of the 1989 Act. Had the defendant conducted a lawful assessment then the claimant would, in the learned Judge's view, have been accommodated for at least a 13-week period prior to her 18th birthday and would then upon turning 18 have been a "former relevant child". He made declarations, the terms of which are set out in his judgment at [51], to that effect and an order requiring the local authority to consider the exercise of their discretion to treat the claimant as if she was a "former relevant child". I note however that at [52-58] the learned Judge made clear that even though his decision was to the effect that the only lawful conclusion open to the local authority would have been that the claimant required accommodation under section 20 of the 1989 Act, nonetheless he did not require the local authority to treat the claimant as if she were a "former relevant child" and he opined at [57] that the claimant's entitlement to the services provided by the local authority in this respect should not necessarily be regarded as automatic.

37. In *R (on the application of MN and KN) v London Borough of Hackney* [2013] EWHC 1205 (Admin) at [26], Leggatt J stated as follows in respect of a witness statement filed by the social worker who had taken the relevant decision in that case:

> "Hackney has also sought to place some reliance on a witness statement made by Mr Brown which gives an account of his decision-making process. However, I consider that little or no weight should be given to that evidence. Not only has the statement been prepared many months after the decision was made for the purpose of this litigation, with all the obvious dangers of *ex post facto* rationalisation which that involves but, more fundamentally, it seems to me that what a public authority decided should in principle be ascertained objectively by considering how the document communicating the decision would reasonably be understood, and not by enquiring into what the author of the document meant to say or what was privately in his mind at the time when he wrote the document."

38. I was also referred by Ms Hafesji to the decision of the Supreme Court in *R (on the application of KM) v Cambridgeshire County Council* [2012] UKSC 23, [2012] PTSR 1189 for the proposition that the intensity of judicial review in a case such as the present should be high given the profundity of the impact of the determination (*per* Lord Wilson at [36]). I am prepared to accept that proposition but, for reasons that will become apparent, I do not consider that the outcome in this case turns on any issue as the intensity of the scrutiny to be given to the impugned decision by the reviewing court.

Discussion

39. At this point, I should deal with an argument raised by the Defendant that the Claim has been brought out of time. The argument is put on the basis that this claim was filed on 17th May 2019, but it is (says the Defendant) in substance a challenge to the decision made in October 2018 not to accommodate the Claimant under section 20 of the 1989 Act. On this basis, the Defendant contends that the claim is several months out of time, as judicial review proceedings must be brought promptly and in any event within three months of the decision challenged (see CPR 54.5(1)).

40. There was a dispute at the trial about what occurred at the permission hearing before Judge McKenna on 30th July 2019. Ms Hafesji submitted that Judge McKenna had rejected the Defendant's delay argument at the permission stage. Mr Swirsky submitted that it was open to the Defendant to pursue that argument at trial because it had not been rejected by Judge McKenna. Neither party had obtained a transcript of any part of the hearing and nor, in the absence of a transcript, is there any note of Judge McKenna's judgment.

41. Judge McKenna's Order granting permission to apply for judicial review does not refer to this issue at all. It records only that permission to apply for judicial review was granted. There is no indication on the face of the Order that Judge McKenna considered that any part of the claim was out of time, as contended by the Defendant. I apprehend that if Judge McKenna had considered that some or all of the Claim was brought outside the applicable time limit, then his Order would have indicated whether or not an extension of time to bring these proceedings was granted. There is no such indication of the face of the Order. Ms Hafesji submitted that Judge McKenna had, in granting permission, held that the relevant decision was that taken in February 2019 and that the claim had been brought in time. In my view, had the learned Judge decided the matter on any other basis then there would have been a reference on the face of the Order to an extension of time. There is no such reference.

42. The difficulty with the position now taken by the Defendant is that no transcript of any part of the hearing on 30th July 2019 has been obtained. Mr Swirsky told me that Judge McKenna did not give a fully reasoned judgment on the permission application. Even if that is the case, there was nothing to stop the Defendant from obtaining a transcript of the hearing which would, no doubt, have contained both the submissions made to the Judge on this issue and, even if not in a full judgment, his decision on them. That has not been done. In the absence of any transcript, or an agreed and approved note of Judge McKenna's decision, I am not prepared to go behind what I consider is the clear meaning of Judge McKenna's Order, i.e. that the claim was brought within the applicable time limit and was reasonably arguable.

43. In *R (on the application of Litchfield Securities Ltd) v Litchfield District Council & Another* [2001] EWCA Civ 304, [2001] PLCR 32, the Court of Appeal held at [34] that a party in the position of the Defendant should be permitted to reargue at trial an issue relating to promptness which had been decided at an earlier permission hearing only in limited circumstances, i.e.:

    i) if the judge hearing the permission application has expressly so indicated; or

    ii) if new and relevant material is introduced at the trial; or

    iii) if, exceptionally, the issues developed at the full hearing put a different aspect on the question of promptness; or

    iv) if the first judge has plainly overlooked some relevant matter or reached a decision *per incuriam*.

44. I do not consider that any of these circumstances pertains in this case. In any event, even if I had accepted Mr Swirsky's argument that it was open to him to pursue this point at trial, I would not in all the circumstances either have dismissed the Claim or refused to grant any relief to the Claimant because of any delay on her part in challenging the October 2018 decision. I reject Mr Swirsky's submission that such an

approach undermines the public interest in the finality of decision-making and would permit challenges many months, or years, after a relevant assessment. Firstly, and most importantly, the Defendant did not provide the Claimant with a copy of the assessment that had been carried out in October 2018 until 19th February 2019. The Claimant was not, therefore, aware of the terms of the assessment until then. In her evidence, Ms Mathew very frankly conceded that the failure to provide the Claimant with a copy of the assessment when it had been completed, or at any point thereafter until her solicitors requested it in February 2019, was regrettable and that more could have been done by the Defendant. Ms Mathew described the process as a "learning curve". In my judgment, this failure by the Defendant is sufficient on its own to undermine the time point that is now raised. In any event, there are a number of other matters which would go to excuse any delay on the part of the Claimant, including that she was a minor until her 18th birthday in February 2019 and that during this period she was in full-time education and being accommodated in a refuge. It is also important to note that no prejudice to the Defendant arising out of any delay on the Claimant's part was asserted.

45. I do not, therefore, consider that the time issue raised by the Defendant before me should lead either to this Claim being dismissed or to no relief being granted if the Claim is well-founded. I will now consider the merits of the Claim. Before doing so, I note that there was a good deal of evidence before me about the impact that the provision of support as to the Claimant as if she were a "former relevant child" would have. It is clear that the provision of such support would have a beneficial effect. But the fact that it would be of considerable benefit to the Claimant is not determinative of the issues raised in this Claim for judicial review.

Ground 1 – whether the Defendant applied the correct legal test

46. In the present case, the Defendant does not dispute that the Claimant was a "child in need" under section 17 of the 1989 Act. The first argument made by the Claimant is that the assessment conducted in October 2018, relied on by the Defendant in support of its decision not to treat the Claimant as a "former relevant child", failed to apply the law correctly because the Defendant did not address the question under section 20(1)(c) of the 1989 Act of whether or not the accommodation available to the Claimant in the family home was "suitable" at that point in time. The statutory provisions are not referred to on the face of the assessment. That does not of itself, of course, indicate that the Defendant's assessing social worker did not apply the law correctly.

47. As set out at paragraph 17 above, on 2nd November 2018 Ms Davies sent an email to WGN in which she stated that "we completed an assessment and we did not identify that there was a significant risk of harm which would mean that the young person could not return home". The presence of a "significant risk of harm" is the test that would be applied in the event that the Defendant were to seek a care order from the Family Court under section 31 of the 1989 Act, pursuant to its duty under section 47 of the 1989 Act. It is not, however, the standard that applies when considering whether the duty to accommodate is owed under section 20 of the 1989 Act.

48. Ms Hafesji submitted that not only did the assessment itself not disclose that the Defendant had addressed the issue set out in section 20(1)(c) of the 1989 Act, but that the email of 2nd November 2018 from Ms Davies positively demonstrated that the wrong test had been applied because it referred expressly, and only, to the issue of whether there was a "significant risk of harm". For the Defendant, Mr Swirsky

submitted that the assessment did not need to identify on its face the legal tests under either section 17 or section 20 of the 1989 Act. The assessment had not been prepared by a lawyer. He submitted that it was possible to read and understand the conclusions that the assessing social worker had reached and to conclude that approach was in substance the correct one. He further submitted that Ms Davies' email of 2nd November was not part of the assessment and was of no assistance in determining whether the assessment had been conducted correctly or not.

49. I accept, in broad terms, the submissions made by Ms Hafesji on this issue, for the following reasons:

i) There is nothing on the face of the assessment itself which indicates that the correct approach was applied to the issue of whether there was a duty to accommodate the Claimant under section 20(1)(c) of the 1989 Act. There is, moreover, no language within the assessment that even approximates to the question that arises under section 20(1)(c). This is particularly surprising given that, as the assessing social worker was well aware, the Claimant had expressly requested the Defendant's assistance with accommodation.

ii) Section 20(1)(c) of the 1989 Act required that the Defendant consider whether the person who had been caring for the Claimant was being prevented "for any reason" from providing her with "suitable" accommodation or care, whether or not permanently. There is however on the face of the assessment no consideration of, or conclusion reached about, the suitability for the Claimant of continued accommodation in the family home. The assessment focused on the Claimant's placement in the refuge and considered that it represented a missed opportunity to rebuild relationships between the Claimant and her family members. That may have been the case – but the issue for the Defendant to address under section 20(1)(c) was whether, going forward, the accommodation that would be provided to the Claimant in the family home would be "suitable" or not. Paragraph 3.28 of the Government's statutory guidance (see paragraph 31 above) states that a decision must "necessarily" be reached on that issue. Ms Hafesji pointed out, correctly in my view, that throughout the assessment the assessing social worker repeatedly pointed out that the Claimant had stated that she did not want to engage with the local authority's efforts to support her return to the family home (including in the conclusion to the analysis section of the assessment, set out at paragraph 14 above) – but the primary issue was not what the Claimant's wishes were in this regard but whether she required accommodation because the accommodation that was available to her was not "suitable". Mr Swirsky submitted that it was understandable that, in those circumstances (i.e. the Claimant's expressed wish not to return to the family home), more detailed reasoning on the suitability of the accommodation had not been provided in the assessment. In my judgment, however, it is not just that there is an insufficiency of reasons for the decision in the assessment. The assessment does not disclose that the Defendant undertook the evaluative judgment that it was required to undertake by section 20(1)(c) of the 1989 Act. That the Claimant may have expressed her wishes in a particular way does not obviate the need for that assessment to be undertaken.

iii) Any assessment of the continued suitability, from the Claimant's perspective, of accommodation in the family home would necessarily have had to consider

the proposed role of the Claimant's father, against whom the Claimant had made an allegation of physical abuse. There was on the face of the records and as related by the Claimant herself, a significant history of allegations of domestic violence against the Claimant's father. The assessment does not assess the suitability of the family home as accommodation for the Claimant in this context, either with or without the involvement of the Claimant's father in supporting the Claimant's mother and the children. It is clear from the assessment that the Claimant's father was providing significant support to the family at this time; I should note that there is reference to the Claimant having been told on 15th October 2018 that the Defendant could "carry out safety planning", but no explanation of any such safety planning is given on the face of the assessment. In her witness statement, Ms Mathew gives a description of a proposed safety plan which is not apparent either from the assessment itself or from any of the contemporaneous documents. I place little weight on that evidence, or the more detailed reasoning in the Defendant's letter of 19th February 2019, for the reasons given by Leggatt J in *MN and KN* (see paragraph 37 above). In any event, Ms Mathew's evidence does not address the question of whether (either with or without the involvement of the Claimant's father) accommodation in the family home was or was not "suitable" in the context of the Claimant's mother's well-documented history of difficulties with caring for her three children.

iv) Whilst Ms Davies' email of 2nd November 2018 is not part of the assessment itself, which was conducted by Ms Barter, Ms Davies was the manager who approved the assessment. The email was also sent very shortly after the assessment had been carried out. Further, and importantly, the email was copied to Ms Barter. There is no record of her having responded to that email either at all or in terms that indicated that she had not, when conducting the assessment, addressed the issue of whether the Claimant was at "significant risk of harm", which is not the statutory test under section 20(1)(c) of the 1989 Act.

v) Ms Barter gave evidence for the Defendant in this Claim, but her witness statement was restricted to the events in February, March and April 2019 and did not refer at all to the assessment that she had conducted in October 2018 or to Ms Davies' email of 2nd November 2018. Whilst I do not draw any adverse inference in this regard, there is no positive evidence from Ms Barter regarding the approach that she applied when conducting that assessment, insofar as it is not disclosed on the face of the assessment itself. I might have been able to give such evidence some weight. In the event, there is no such evidence.

50. In my judgment, the Defendant when conducting the assessment in October 2018 failed to address, whether in form or in substance, the question which it was required to address under section 20(1)(c) of the 1989 Act. I reach this conclusion even making every allowance, as Mr Swirsky submitted I should, for the fact that the assessment was written by a social worker, not a lawyer, and for the context in which it came to be written. Ms Hafesji submitted, correctly in my view, that the assessment contained a significant deal of narrative but fell well short when it came to analysis. The Defendant's assessment left unanswered the issue of whether the accommodation that would be available to the Claimant in the family home was "suitable" or not. The assessment conducted in October 2018 was therefore unlawful. Insofar as the Defendant relied on that assessment when refusing in February 2019 to treat the

Claimant as if she were a "former relevant child" then that subsequent refusal is also unlawful.

Ground 2 – whether the Defendant's decision was irrational

51. The second Ground upon which the Claimant pursues the Claim is that the Defendant's conclusion that the duty under section 20 of 1989 Act was not owed was irrational. Given my conclusion on Ground 1, above, that the Defendant failed to apply the correct approach in law when reaching its decision, then this issue does not strictly arise for decision. But, if, contrary to my finding on Ground 1, the Defendant did address the correct question in the October 2018 assessment then I would also have upheld the Claim on this basis, albeit not for all the reasons advanced by the Claimant.

52. The Claimant contends that the Defendant's conclusion in the assessment that there was opportunity for work to be done to support the Claimant and her family with the aim of reintegrating her back into the family was irrational. I accept that argument on one of the bases on which it was put. There is nothing on the face of the assessment showing that the Claimant's father was consulted about his willingness to engage with any work to reintegrate the Claimant into the family. The Defendant's assessment records that the Claimant's mother had engaged in "safety planning" with the Defendant's social workers following her release from hospital in October 2018, but there is no indication that the Claimant's father was approached about any proposals by the Defendant to reintegrate the Claimant in the family home or about his continued involvement, going forward, with caring for the Claimant's mother and the children. The assessment makes clear that the Claimant's mother's view was that she required assistance from the Claimant's father to cope at home. The Defendant does not, however, appear to have considered, within the assessment, the Claimant's father's willingness to engage with the Defendant's proposals in this regard.

53. In my judgment, the Defendant could not rationally have concluded that there was any opportunity for the Claimant to be reintegrated into the family home, in the context of the complex history which I have set out (including, in particular, the allegations of domestic violence towards the Claimant's mother and of physical abuse of the Claimant) without considering in the assessment the position of the Claimant's father and in particular the extent to which, if at all, he was willing to co-operate with any such plans for her reintegration. Determining the Claimant's father's position in this respect before reaching such a conclusion was, in my judgment, important because he had previously expressed very negative views about the Defendant's involvement with his family. In November 2014, one of the Defendant's social workers made a record of a meeting at the family home in which it was stated:

> "At this point, the children's father intervened and stated he does not wish to speak to any social worker and wish [sic] to be left alone to continue caring for the children. Father added that he is the carer for his ex-wife and the children, ensures the children's all round needs are met. In addition to this he has also stated that he finds social workers intrusive into the family's live's [sic] and that previous social workers have not helped at all."

54. I reject Mr Swirsky's argument that it was not necessary for there to be a consideration within the assessment of the Claimant's father's position in this respect,

because the Claimant had herself expressed a firm desire not to return to the family home. That the Claimant expressed such a desire does not obviate the need for the Defendant to deal with the logically prior issue of whether the accommodation available to the Claimant was or was not "suitable". The future role, if any, of the Claimant's father was an important aspect of this, in the particular circumstances of this case. Although Ms Mathew now gives evidence on this issue in her witness statement, to which I will return below, I again do not place weight upon that evidence for the purpose of deciding whether the assessment was lawful or not, for the reasons given by Leggatt J in the passage from *MN and KN*, already cited above.

55. It is not necessary, in these circumstances, to address in any detail the other bases upon which the Defendant's decision was alleged to be irrational. For completeness, I note that I would not have held, as alleged by the Claimant, that the Defendant considered in the assessment that the provision of accommodation and the provision of support for reintegration were mutually exclusive options. Nor would I have held that the lack of specific detail on the face of the assessment regarding the support that might have been offered to the Claimant rendered the assessment irrational.

Ground 3 – whether the Defendant took into account irrelevant considerations and failed to take into account relevant considerations

56. Again, given my conclusion on Ground 1, this issue does not strictly arise for decision. Had it been necessary to decide the Claim on this Ground, then I would have rejected the arguments advanced on behalf of the Claimant.

57. The Claimant contends that the fact that her mother was willing to allow her to return to the family home was an irrelevant consideration for the purposes of the Defendant's assessment and that the Defendant erred in law by taking it into account. Ms Hafesji submitted that the ability of the Claimant's mother to provide accommodation to the Claimant was irrelevant to the issue of whether the accommodation was "suitable". I accept that the existence of such accommodation is not determinative of the issue of suitability, but I reject the contention that the availability of such accommodation (which was in the Claimant's existing family home, in which she had lived for many years) is not a relevant factor to consider when assessing the suitability of the accommodation. Ms Hafesji relied on paragraph 37 of Hayden J's judgment in the *Enfield* case, but I do not read it as being to the effect that the availability of accommodation provided by the parent(s) in the family home is an irrelevant matter when it comes to assessing suitability under section 20 of the 1989 Act, merely that it is not in and of itself determinative of whether the child is "in need" under section 17 (a matter which is not in issue in this case).

58. Nor do I accept that the Defendant failed to have regard to the Claimant's parents' capacity as parents when conducting the assessment in October 2018. Although the discrete section of the assessment under the heading of parental capacity focuses on the capacity of the Claimant to care for herself, there is reference on the face of the assessment to the Claimant's father having visited the family home every day whilst the Claimant's mother was in hospital to check on the children and make sure that they had food, and the assessing social worker considered that both parents "were able to provide the children with what they needed whilst mother was in hospital in regard to food and support." I take this latter reference to "the children" to be to the Claimant's siblings only, given that she had moved out of the family home, but the point is that the Defendant did set out in the assessment (which should be read as a whole) the immediate past history in terms of the parents' capacity to care for the

children. To the extent that the Claimant disagrees with the Defendant's view on this issue, that does not mean that the Defendant has failed to have regard to a material consideration.

59. It was also submitted that the Defendant had failed to take into account, when conducting the assessment, that the Claimant had herself been caring for her mother and siblings. I reject this argument, also. This was something of which the Defendant's assessing social worker was well aware. Reference is made in the assessment to the Claimant having "reported that she found studying at home whilst caring for her mother and siblings problematic" and to the Claimant's mother having "relied heavily upon the children in the past for help within in [sic] home and her own personal care."

Ground 4 – whether there was only one lawful outcome

60. By this ground, the Claimant contends that the only lawful outcome in her case would have been a conclusion that a duty under section 20 of the 1989 Act was owed to her and that the Defendant ought to have approached the exercise of its discretion to treat her as a "former relevant child" on that basis. It is submitted that no reasonable local authority applying the right legal test could have reached any other conclusion. The Defendant's position is that the Claimant's arguments amount to an invitation to "second-guess" the decisions of the social workers in this case. It is submitted that even if I were to find in favour of the Claimant on some or all of the other grounds of challenge in this case, this one should fail.

61. Ms Hafesji submits that the Defendant knew from the assessment it conducted in October 2018 that the Claimant's father presented a risk of violence; allegations had been made to the Defendant by both the Claimant and her mother of assaults against them. The Claimant's mother had also reported an assault on the Claimant's younger brother. There was nothing in the assessment that indicated that the Defendant did not accept those allegations as true, or that either the Claimant or her mother were to be disbelieved. The assessing social worker however relied on the Claimant's father being at the home to support the family. There was a history of the Claimant's parents refusing support that had been offered to them by the Defendant (e.g. the offer of respite foster care for the children in 2013). Ms Hafesji submits that in those circumstances no reasonable local authority could have concluded that the accommodation available to the Claimant in the family home was "suitable".

62. There is considerable force in Ms Hafesji's submissions on the merits of the Claimant's claim that the duty under section 20(1)(c) was owed to her. But I remind myself that I am not deciding afresh the issue of whether the accommodation in the family home was "suitable". Rather, I am being invited to conclude that no reasonable local authority could have reached a conclusion, by way of evaluative judgment, contrary to that advanced by the Claimant. In my judgment, there is not only one lawful outcome on these facts. In her evidence, Ms Mathew describes the plan which she says that the Defendant had in mind in October 2018, albeit that it is not set out on the face of the assessment that was conducted by Ms Barter. Ms Mathew's description of the proposed plan includes that the Claimant would be accompanied back to the family home by Ms Barter, that Ms Barter would ensure that the Claimant's father had left the property and that a written agreement was signed by both parents. Further, there would be unannounced home visits and a referral to a young carer's project. On this issue, I do give significant weight to Ms Mathew's evidence, because it is not for the purposes of this argument to be treated as an *ex post*

facto rationalisation of the (unlawful) decision actually taken, but evidence going to the separate issue of whether there was only one lawful outcome open to the Defendant on these facts.

63. On this Ground, I accept the Defendant's submissions. I do not accept that it would not have been open to the Defendant to conclude that the accommodation available to the Claimant in the family home in October 2018 was "suitable". In this regard, it appears that the Claimant's primary – although not by any means her only – concern was the continued presence of her father in the family home, whether on a long-term or temporary basis. I do not consider that, if the Defendant had conducted a more detailed assessment of the risks arising from his presence and also considered whether his presence in the family home was necessary at all, it could not have come to the conclusion that the family home was "suitable" for the Claimant. I note that on 4th October 2018, prior to deciding to undertake the assessment that was later conducted by Ms Barter, the Defendant contacted the Claimant's father who stated that he was unable to live with the children at the family home due to his work commitments, that he did not have a good relationship with the Claimant and because the Claimant did not want him in the family home he tried to avoid it where he could. That is at least an indication that, contrary to the submission made by Ms Hafesji, the Claimant's father was willing to adjust his own pattern of behaviour to avoid contact with the Claimant, in accordance with her wishes. Ms Mathew's evidence is that, based on her assessment of the Claimant's father's previous behaviour when asked to assist with supporting the family, there was "nothing to suggest that [the Claimant's father] would not work with our recommended plan in October 2018". The Claimant's mother had also indicated her willingness to engage with the Defendant's efforts to support the family. Whilst I accept that the Claimant had concerns about her mother's capacity to care for the children, Ms Mathew suggests in her evidence that this could have been addressed by, amongst other things, the involvement of the young carer's project. I should say that Ms Kahlon's evidence regarding the appropriateness of the Defendant's approach was opposed to that of Ms Mathew; in particular, she considered that a parental agreement would have been inappropriate and that, in her experience, risks to survivors of domestic violence could escalate dramatically when returning home immediately after reporting their experiences. But the fact that experienced professionals in the position of Ms Mathew and Ms Kahlon can provide opposing reasoned assessments on these matters demonstrates the difficulty of concluding that an evaluative judgment on the "suitability" of accommodation in the family home could only lawfully have reached one conclusion.

64. As Mr Swirsky correctly submitted, the issue of whether accommodation is "suitable" within the meaning of section 20(1)(c) of the 1989 Act is in the first instance a question for the evaluative judgment of the Defendant (see *A v Croydon* at [39] *per* Ward LJ), and it is consistent with the statutory scheme and the statutory guidance for the Defendant to make efforts to support a return to the family home (see paragraph 3.29 of the guidance referred to in paragraph 31 above). I do not accept that in this factually complex case, with a significant history of social services involvement and multiple factors bearing on the assessment of suitability, that the only answer lawfully open to the Defendant when reaching that evaluative judgment would have been that the accommodation available to the Claimant in October 2018 was not "suitable". Whilst Hayden J reached that conclusion on the facts of the *Enfield* case to which I have referred above (see at [35] of his judgment for some of the issues that arose in that case, including the risk of radicalisation), I do not consider that it is the conclusion that I should – or can – reach on the particular facts of this case. As Lady

Hale said in the Supreme Court in *A v Croydon*, [2009] 1 WLR 2557 at [26], within the limits of fair process and *Wednesbury* reasonableness, there are no clear cut right or wrong answers to the evaluative judgments entrusted by Parliament to public authorities in the position of the Defendant. That, in my judgment, is the case here.

65. I therefore reject the Claimant's case advanced under Ground 4. I should add that Ms Hafesji also relied on the subsequent conclusion of the Defendant's social workers in February 2019 that the Claimant should at that point be offered interim accommodation under section 20 of the 1989 Act. This does not, in my judgment, undermine the Defendant's case on what the permissible conclusions were in October 2018. I accept Mr Swirsky's submission that the situation in February 2019 was somewhat different to that which pertained in October 2018. By this point, the Claimant had been living in the refuge for several months and the social workers were looking at the circumstances that pertained at that point in time. In any event, and importantly, the February 2019 proposal to provide interim accommodation under section 20 of the 1989 Act was not made following a full assessment process of the sort that was undertaken in October 2018. It does not, in my judgment, support the conclusion that is urged on me by Ms Hafesji.

Conclusion

66. The Defendant's assessment of 17th October 2018 was unlawful because the Defendant did not address the question that it was required by law to determine, i.e. whether the accommodation available to the Claimant in the family home was "suitable" or not. The Defendant's decisions of 19th February 2019 and 2nd May 2019 not to treat the Claimant as if she were a "former relevant child" are also unlawful because the Defendant relied on the earlier unlawful assessment in coming to those decisions. I propose to make an order quashing all those unlawful decisions.

67. I do not, however, accept the Claimant's argument that there was only one result lawfully open to the Defendant, when the assessment was conducted in October 2018, on the facts of this case and that any reconsideration of the issue of whether the Claimant should be treated as if she were a "former relevant child" should be approached on that basis. The issue of whether or not the accommodation available to the Claimant was "suitable" was a matter for the Defendant's social workers to reach an evaluative judgment about, applying the law to the complex factual situation of the Claimant's family circumstances. I do not consider, for the reasons given above in respect of Ground 4, that the only possible lawful result would have been a finding that the accommodation was not "suitable". I decline to make the declarations sought by the Claimant in this regard.

Costs

68. Following the circulation of my judgment in draft, in accordance with the CPR Practice Direction 40E, the parties were not able to reach agreement on what order should be made as to costs. Ms Hafesji and Mr Swirsky made written submissions on this issue. For the Defendant, Mr Swirsky accepts that the Claimant is to be treated as the successful party for the purpose of determining costs, pursuant to CPR 44.2(2). However, he submits that the Claimant has not achieved all that she sought in this litigation and that she has been denied what was her real aim, namely the declarations that were sought under Ground 4. He also submits that Ground 3, although of lesser significance overall, added materially to the costs of the case. Accordingly, Mr Swirsky submits that there should be a reduction in the level of costs awarded to the

Claimant to reflect that she was only partly successful, pursuant to CPR 44.2(4)(b). He submits that an appropriate order would be that the Defendant should pay 50 per cent of the Claimant's costs.

69. For the Claimant, Ms Hafesji submits that the Claimant is the successful party and that she is entitled to an order that the Defendant should pay all her costs of the Claim. Ms Hafesji submits that successful parties in litigation often do not win on every issue and that failure on one or more issues does not necessarily mean that the successful party should therefore be deprived of part of its costs. In the event that argument is not accepted then Ms Hafesji relies on an offer made "without prejudice save as to costs" on 6th August 2019, shortly after the grant of permission by Judge McKenna, by which the Claimant offered to withdraw the claim on the basis that the Defendant would reconsider the exercise of its discretion to treat her as if she were a "former relevant child". That offer was rejected by the Defendant on 20th August 2019. Ms Hafesji submits that the Claimant has achieved the outcome proposed in that offer and that if she is not otherwise to be awarded all her costs of the Claim then she should be awarded 80 per cent of her costs up to 6th August 2019 and all her costs thereafter, to reflect the making and rejection of that offer to settle.

70. I was referred by Mr Swirsky to the decision of the Court of Appeal in *M v London Borough of Croydon* [2012] EWCA Civ 595, [2012] 1 WLR 2607 in which Lord Neuberger MR held at [62] that where a judicial review claim has been resolved after trial, but the claimant has not been wholly successful, issues going to the award of costs will normally include how reasonable the claimant was in pursuing the unsuccessful claim, how important it was compared with the successful claim, and how much the costs were increased as a result of the claimant pursuing the unsuccessful claim.

71. In my judgment, the issues raised under Grounds 3 and 4 were reasonably raised by the Claimant, albeit I did not accept the arguments advanced. Moreover, and importantly, I consider that they did not materially increase the costs of this litigation or the trial. There would inevitably have had to be a close examination during the litigation and at the trial of the Defendant's October 2018 decision and the background material in the Defendant's records in order to address the issues on which the Claimant succeeded. The argument on Grounds 3 and 4 did not require the parties to address any different decision of the Defendant or any different factual material to that which was considered under Grounds 1 and 2. The trial would inevitably have taken up one day of court time even had the arguments on which the Claimant failed not been advanced. Whilst I accept that the Claimant's failure on Ground 4 was on a matter of importance, in that success on that Ground would have placed her in a much more advantageous position, I do not consider that in the particular circumstances of this case that factor should result in a reduction in the amount of costs payable by the Defendant. Nor do I accept Mr Swirsky's submission that success on Ground 4 was the Claimant's real aim – particularly given that on 6th August 2019 she offered to accept a result well short of that – or the implication that by succeeding on Grounds 1 and 2 the Claimant has not achieved a result of substantial value.

72. I therefore accept Ms Hafesji's primary submission that the Claimant ought to be awarded all her costs of the Claim. I should indicate, however, that had I not accepted that submission then I would have accepted the substance of Ms Hafesji's alternative submission and so would have awarded the Claimant the majority of her costs up to

the date of the Defendant's rejection of the settlement offer and the entirety of her costs thereafter. As it is, however, it is not necessary to address that issue in any further detail or to specify the precise percentage that I would have awarded in respect of the first element had I reached my decision on that basis.