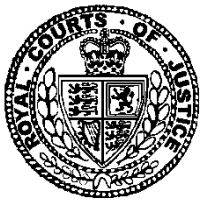

Neutral Citation Number: [2019] EWHC 2734 (Admin)

Case No: CO/1517/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18th October 2019

Before :

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

- -

Between :

THE QUEEN **(on the application of O)**	**Claimant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Rebecca Davies (instructed by **GT Stewart Solicitors**) for the **Claimant**
Naomi Parsons (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 8th October 2019

- -

Approved Judgment

Deputy Judge Mathew Gullick:

Introduction

1. This is a claim for judicial review of what is alleged by the Claimant to be the Defendant's historic and continuing unlawful failure to provide suitable accommodation to her and to her two young children. The Defendant accepts that she has a duty to provide accommodation to the Claimant and her children and that the accommodation that has been provided to them since August 2018 is not suitable for them. The issue for me to decide is whether the Defendant has acted unlawfully.

2. The claim was originally listed for a 'rolled-up' hearing by Mr David Pittaway QC, sitting as a Deputy High Court Judge, who considered the application for permission to apply for judicial review on the papers. That hearing took place before Mr Anthony Elleray QC, sitting as a Deputy High Court Judge, on 11th July 2019; however it did not proceed as a 'rolled-up' hearing because the Defendant had not filed Detailed Grounds of Defence or, save for a short witness statement exhibiting a bare chronology of events, any evidence. Mr Elleray QC granted permission to apply for judicial review and gave further directions for trial.

3. Prior to the hearing, I drew the parties' attention to the judgment of Mr Clive Sheldon QC, sitting as a Deputy High Court Judge, given on 16th August 2019 in the case of *R (on the application of Chkharchkhalia) v Secretary of State for the Home Department* [2019] EWHC 2232 (Admin) ("*Chkharchkhalia*"). This was a case raising similar arguments in which I had granted permission to apply for judicial review. Neither party had cited that judgment in their skeleton argument and it was not included in the authorities bundle. Both Counsel in due course referred me to it during the trial.

4. In addition to just under 250 pages of correspondence and documents, the evidence at trial consisted of three witness statements from the Claimant and also witness statements from her family's SEND (Special Educational Needs and Disability) support worker, Ms Beth Higgins, and from a teacher at the Claimant's elder son's school, Ms Jo Tovey. The Defendant relied on witness statements from Mr Lawrence Williams, a Service Delivery Manager for Asylum Accommodation and Support Contracts in the Resettlement, Asylum Support and Integration Department of the Home Office, and Mr Christopher Crowe, a Technical Specialist in the same department. The witness statement of Mr Williams, although filed in his name and dated 4th October 2019, was almost identical to an earlier witness statement filed by Ms Aqsa Khan, an official in the Home Office's Litigation Directorate, dated 23rd August 2019. The reason given for this late change in the Defendant's witness evidence was that Ms Khan had left the Home Office after making the statement.

The Facts

5. The Claimant is a Nigerian citizen who entered the United Kingdom lawfully as a visitor in 2013. She did not leave at the end of the permitted period of her visit and became an overstayer. The Claimant has given birth to two sons whilst in the United Kingdom. The Claimant's elder son, to whom I will refer in this judgment as "M", was born in June 2014 and so is now five years of age. Her younger son, to whom I will refer as "L", was born in October 2017 and has recently had his second birthday.

The Claimant is the sole carer for both her children; their fathers play no role in their lives.

6. In July 2017, shortly before L was born, M was diagnosed with autism. M has complex needs and displays difficult and challenging behaviours. He has limited safety awareness, displays physical aggression (including to his mother and to other children), communicates mostly by non-verbal means, has difficulty with social interaction and displays what is termed 'pica' behaviour. This form of behaviour involves M putting into his mouth things which may interest him, but which are not edible. Such items can include clothing, furniture, kitchen utensils and indeed materials which are by their very nature hazardous to M, such as nails. On occasions he ingests such items which are small enough to be swallowed. M therefore needs constant adult supervision. M's inability to communicate using language causes him high levels of frustration. On occasions, when he gets distressed M has the need to retreat to a space in which he can recover. M has also been diagnosed with global developmental delay.

7. M has a poor sleep pattern. When M is awake, the Claimant also needs to be awake in order to prevent him from coming to harm. M's poor sleeping also impacts on L. M often climbs into L's cot and either jumps on him or seeks to use the cot as a hiding place, despite L being present in the cot and attempting to sleep. It is as things presently stand impossible to separate M from L whilst the latter is trying to sleep, because the Claimant and both her children live and sleep in one room.

8. Immediately prior to the events with which this claim is concerned, from 13th February 2018 onwards the Claimant and her children lived in a two-bedroom flat which was provided by the local authority for the London Borough of Lewisham, pursuant to its duty under section 17 of the Children Act 1989 to provide services to children in need in its area. The Claimant had previously been accommodated by friends and by members of her church, but she had been asked to leave successive properties because of M's challenging behaviour.

9. On 20th April 2018, the Claimant made a claim for asylum in the United Kingdom. The Defendant is responsible for determining that claim and also for providing support to asylum-seekers whilst their claims are determined. Following the Claimant's asylum claim, the local authority in Lewisham told the Claimant that she should seek support from the Defendant and proposed to withdraw the accommodation that was being provided.

10. On 10th May 2018, the Southwark Law Centre, acting on behalf of the Claimant, wrote to the Defendant to request that support be provided to her under section 95 of the Immigration and Asylum Act 1999, the terms of which I will set out later in this judgment. In their letter, it was stated that M's behaviour was extremely challenging and that he was so disruptive that the Claimant had been asked to leave her accommodation in the past. The letter enclosed a number of items of evidence setting out M's condition and his resulting behaviour, including a speech and language therapy report and a paediatric assessment. The letter referred to the evidence from the paediatric assessment, undertaken in August 2017, showing that M would often bite other children and that he would eat hazardous materials such as sand, stone, paper and nails as well as his own clothes and shoes. It was stated that M would be at risk of harm if the family were allocated shared accommodation by the Defendant, as

other occupants would be unlikely to understand M's lack of awareness of danger and might inadvertently expose him to hazards. Other children in such accommodation would also be at risk of harm from M's behaviour towards them, including potentially biting them. The letter continued:

> "For the above reasons it is submitted that it is clear that shared accommodation would be wholly inappropriate and indeed dangerous and the family must therefore be allocated self-contained accommodation.
>
> The applicant has 2 children. Given [M's] extremely challenging behaviors [sic] it is submitted that it is very important the family are not living in overcrowded conditions and that [M] has access to his own bedroom. Therefore we request that the family are provided with a property that has a minimum of 2 bedrooms."

A request was then made that such accommodation should be provided in London, preferably within the London Borough of Lewisham. This was because M was at that point attending a specialist pre-school in the borough, which had a number of autistic children, and also because he was undergoing assessment by the local authority in Lewisham for an Education and Health Care Plan ("EHCP"), i.e. a plan setting out M's educational, health and social needs and the support necessary to meet those needs.

11. This letter also enclosed the Claimant's completed application form, dated 27th April 2018, for support to be provided to her under section 95 of the 1999 Act. In that form, the Claimant stated that she had a requirement for specific accommodation, the details being given as follows:

> "I require a 2 bedroom slef [sic] contained flat or house in London. I cannot share a kitchen, bathroom or living room. My son is very severely autistic and bite [sic] people and furniture and is very disruptive (see enclsoed [sic] evidence)."

12. The letter of 10th May 2018 was followed by a letter from the Claimant's present solicitors dated 18th May 2018 in which they requested that the Defendant should arrange with the London Borough of Lewisham for the family to be permitted to remain in their flat to enable M to continue at his pre-school. They stated that it would be "incredibly disruptive to [M's] education and ongoing assessment and treatment if he is required to leave the London Borough of Lewisham."

13. On 4th June 2018, the Claimant's solicitors wrote a pre-action protocol (PAP) letter stating that a claim for judicial review would be issued if the Defendant did not confirm that two-bedroom accommodation in the London Borough of Lewisham would be provided to the Claimant and her family. This letter appears to have been prompted by an attempt by the Defendant to move the Claimant her family to new accommodation in Leeds, West Yorkshire. On 21st June 2018, an official in the Home Office's Litigation Directorate responded to the PAP letter, stating:

> "The relevant team have confirmed that they have granted s.95 support and requested accommodation in Lewisham, London… The relevant team will be in contact with you / your client."

14. The Defendant has contracted with private companies for the provision of accommodation to fulfil her obligations under section 95 of the 1999 Act. Contracts are allocated on a regional basis. The accommodation provider for London and the South East of England is a company known as Clear Springs, formerly as Clearel. The Defendant specifies criteria to the provider for a property search to be conducted, including the type of property and location. The provider then makes a proposal to the Defendant. If the Defendant rejects the proposal, then the provider has to source a new property. If the Defendant accepts the proposal, then the property is offered to the applicant. If the applicant refuses the property that is offered, then the Defendant will make a new request to the provider.

15. It is not clear from the evidence what happened in response to the Claimant's request for accommodation, in terms of what decisions were taken by the Defendant or her accommodation provider, Clear Springs, and how such decisions were reached. That is a matter to which I shall return later in this judgment. For present purposes, it is sufficient to note that in August 2018 the Claimant was offered a studio flat in the London Borough of Lambeth. The Claimant accepted this offer of accommodation, although it was neither of the size nor in the location that she had requested. She and her children have lived in this accommodation for the last 14 months. Since 27th November 2018 at the latest, the Defendant has been on notice of the issues which make the accommodation unsuitable, something which the Defendant now accepts. I will now set out, in brief terms, what the accommodation comprises.

16. The accommodation to which the Claimant and her two children moved in August 2018, and in which they continue to live, is a studio flat which has two rooms. One room is used for living, sleeping and cooking and the other is a small shower room with a toilet. The Claimant and her children sleep in the main room. The room in which the Claimant and her children live and sleep also contains a heater, a cooker and a sink. The Claimant's evidence is that M has broken the beds provided by the landlord on several occasions and that he has also broken the heater, which is constantly on. As there is only a single main room, the cutlery and kitchen utensils must also be stored in that room and M has access to them. The Claimant describes in her evidence that M also climbs on top of the cooker as well as going inside the oven. L is copying this behaviour. M also climbs into the sink and turns on the taps.

17. Counsel were unable to assist me when I asked to be told the dimensions of the flat, but during the course of the hearing the Claimant (who was at home) emailed some photographs of the flat to her solicitors. Both Counsel agreed that I should see these photographs. The room in which the Claimant and her children live, which is on the ground floor, appears to be part of a converted late 19th Century or early 20th Century house. It contains two single beds, a cot, a table and chairs and a freestanding wardrobe. On one wall is a kitchen area which has an electric cooker (comprising an oven and hob), a small fridge, a sink and associated cupboards. The shower room is small in comparison to the main room; it has a sink, a toilet and a shower cubicle. Although the exact size of the studio flat is not material to the outcome of this claim, having seen the photographs it appears to be no larger than 300 square feet, including the shower room.

18. Taking up the Defendant's offer of this accommodation, which was in Lambeth, meant that the family moved out of the London Borough of Lewisham. M was not able to continue to attend his specialist pre-school in Lewisham. M's EHCP had to be transferred to the local authority for the London Borough of Lambeth. There was a significant period of time – six months – in which M was without a school; however, in February 2019 he was accepted into a school in Lambeth which specialises in working with children and young people with autistic spectrum conditions and associated learning difficulties.

19. I should at this point note that M had moved schools on a previous occasion whilst the Claimant and her family were being accommodated by the local authority in Lewisham. Initially, the local authority there had provided them with accommodation outside the borough, in Ilford. This meant that M could no longer attend his specialist pre-school in Lewisham, which he had been attending whilst the family were being accommodated by friends. Following a complaint by the Claimant about the suitability of the accommodation in Ilford, the local authority re-housed them in the flat in Lewisham – in which they were living when the Claimant made her asylum claim – and M was able to return to his pre-school. The Claimant's evidence is that when M returned, staff at the school noticed that M's behaviour had got worse and that they believed that this was because of the disruption that had been caused by the move away from Lewisham to Ilford.

20. Ms Higgins' evidence is that if the family were now to move out of Lambeth then it could be months before another school is found to support M's needs in another borough, that it would be stressful for M and that progress made to date could be lost and M's behaviour and development would either stand still or regress. This is supported by a letter dated 29th March 2019 from Dr Davina MacKenzie, a consultant paediatrician employed by the Guy's and St Thomas's NHS Foundation Trust, in which she states that it is essential that M remains living in Lambeth and that moving to another borough would have a negative impact on him, the result of which could be long term. Dr MacKenzie notes that the delay in finding a school for M after the family moved to Lambeth in August 2018 had already had a significant negative effect on his development, behaviour and overall wellbeing.

21. On 27th November 2018, the Claimant's solicitors wrote to the Defendant enclosing an email dated 22nd November from Ms Higgins. In that email, Ms Higgins stated that the studio flat in Lambeth was not suitable for the family and in particular for M, who had no sense of danger and required supervision at all times when awake. Ms Higgins' email stated that there were several risks present at the family's accommodation, including the proximity of the cooker to the children, the availability in the room of non-edible objects for M to chew, such as kitchen utensils, and the sleeping arrangements which meant that M would often wake L and disturb his sleep. She noted that there had already been an incident in which M had nearly been scalded whilst the Claimant was cooking. Ms Higgins concluded:

> "The room cannot be made safe and risks lowered as there is only one room to live in with two young children, one of whom has a significant disability."

The Claimant's solicitors stated in their letter:

> "The current accommodation is unsuitable for [O] and her children. The lack of space, particularly private space in which [M] can retreat when upset or anxious, is causing his condition to deteriorate. He is at constant risk of harm given the difficulty in removing all sources of danger from the living area due to the lack of space within which to store items. He has uninhibited access to the cooker and potentially dangerous kitchen implements due to the open plan nature of the living space. Furthermore, given his tendency to eat inedible objects, the inevitable clutter which accumulates within such a small living space presents [M] with a variety of dangerous, inedible objects which he is prone to try to ingest.
>
> Further still, the lack of space poses a risk to [L] as living in such close proximity to [M] puts him at risk of being bitten or hit by [M] either accidentally or intentionally.
>
> [M's] poor sleep patterns further impacts on his younger sibling and his mother as they are all sleeping within the same room. [M] will often wake up at 2:00 am and his behaviour will wake up his mother and his sibling.
>
> The unbearable living conditions are having a detrimental impact on [O's] mental health.
>
> The family require a self-contained two-bedroom accommodation, both so that [M] can have his own quiet space to retreat to and so that dangerous objects can be placed out of [M's] reach. The accommodation needs to be within Lambeth given that a further move to another Local Authority will cause significant disruption to the support already being received by the family from Lambeth children's services."

22. Having received no response from the Defendant, on 14th December 2018 the Claimant's solicitors sent a further PAP letter to the Defendant, alleging various breaches of the Defendant's public law duties. On 5th January 2019, the Defendant responded to the PAP letter stating that the medical evidence provided had been forwarded to a Home Office Medical Advisor for comment, following which a decision would be made on the Claimant's accommodation.

23. On 7th January 2019, the Home Office Medical Advisor, Dr Keen, recommended that the family be moved to larger accommodation. His recommendation was that the family should not be allocated a studio flat and that the accommodation be no higher than the first floor. No further criteria were recommended; Dr Keen's view was that it was not medically essential that the Claimant and her family be located in or near to London.

24. On 25th January 2019, the Defendant requested that Clear Springs provide new accommodation for the Claimant and her family which was not a studio flat and which was "preferably in the Lewisham area or as close as possible". This resulted in a property being selected in Hayes in the London Borough of Hillingdon. It is not

clear whether the Claimant was ever informed about this proposed move, but in any event she did not accept this property.

25. On 12th February 2019, the Defendant wrote to the Claimant stating that she would be moved to "accommodation in London" on 14th February, but not setting out the type of accommodation proposed or its location. The Claimant did not, in fact, move anywhere on 14th February. On 18th February 2019, the Claimant's solicitors asked by email for confirmation that any new accommodation would be in Lambeth. An official in the Asylum Monitoring Team responded stating that it had been proposed to relocate the Claimant and her family to West Drayton, again in the London Borough of Hillingdon, on 14th February but that this had not occurred because the letter dated 12th February had not reached the Claimant in time. The official stated:

> "However, please note the assessment team who granted the relocation request has made no specific requirement to be in the Lambeth area. The request granted states: 'Preferably in the Lewisham Area or as close as possible.' If the applicant does require to remain within the Lambeth area, this will need to be requested to the assessment team."

26. On 20th February 2019, the Claimant's solicitors wrote another PAP letter noting that their previous correspondence had specifically requested that the Claimant and her family remain in Lambeth. The letter concluded:

> "Moving out of Lambeth we [sic] cause undue disruption to [M's] education and support. His Education, Health and Care Plan will need to be transferred to another borough for what will be the 2nd time since August 2018. The process of securing an educational placement for [M] will need to begin again if he moves out of Lambeth.
>
> Please therefore take this letter as confirmation that our client does not wish to accept the alternative accommodation due to the disruption it will cause her son. In any event, the offer of accommodation in West Drayton, or for that matter, Lewisham, is not in line with what was requested in our pre-action letter. It is not clear why, despite a specific request for accommodation within the London Borough of Lambeth, the assessment team has requested accommodation in Lewisham and, even then, accommodation has been offered in West Drayton. Please therefore confirm that our client will be provided with a further notification of dispersal letter in relation to self-contained two-bedroom accommodation within the London Borough of Lambeth."

27. It appears that at the end of February 2019, the Defendant made a further attempt to move the Claimant and her family to new accommodation. Again, the Claimant's solicitors enquired about the location of the proposed new accommodation and noted that M was due to start at his new school in Lambeth on 27th February 2019. A Home Office official responded stating that a request had been made on 25th February 2019 to Clear Springs to accommodate the Claimant in Lambeth. The official appended a

copy of the request, which stated: "App[licant] must be accommodated in the Lambeth area of London."

28. On 3rd April 2019, the Claimant's solicitors again wrote to the Defendant noting that the Claimant had been informed that she was to be moved to a property in the London Borough of Croydon later that week. They stated:

> "After repeated requests that the family be accommodated in Lambeth, there is now another attempt to accommodate the family outside of the borough. Please kindly cancel this proposed move."

29. On 9th April 2019, an unnamed official from the Defendant's Asylum Support Assessment Team wrote directly to the Claimant, stating:

> "We have received your correspondence and have considered your request to be accommodated in Lambeth.
>
> I am writing to inform you that your request has been refused, Lambeth is not a dispersal area. However, we have requested for you to be accommodated within travelling distance of Lambeth.
>
> In coming to this decision, regard has been given to the statutory guidance to the Home Office on making arrangements to safeguard and promote the welfare of children, "Every Child Matters: Change for Children", issued under section 55 of the Borders, Citizenship and Immigration Act 2009 and your [sic] best interests have been examined as a primary consideration.
>
> Please be advised that you should inform us immediately if there are any changes to your circumstance [sic]."

30. On 16th April 2019, the Claimant's solicitors wrote to the Defendant noting that this claim for judicial review had been issued, that the Claimant was already being accommodated in Lambeth and requesting that the Defendant ask for assistance from the local authority in Lambeth, under section 99 of the 1999 Act. Further requests for a property were made by the Defendant to Clear Springs, which requested an extension of time from the Defendant to conduct the property search due to a lack of suitable accommodation in Lambeth.

31. On 3rd July 2019, the Claimant was sent a further notice proposing that she and her children would be moved to unspecified accommodation in "London and the South" on 8th July 2019. This accommodation was in fact in the London Borough of Merton. The Claimant refused to move to this accommodation. The Defendant then proposed on 10th July 2019 that the Claimant and her family should be moved to new accommodation in the London Borough of Lambeth consisting of a single room in which to live and sleep, with a separate kitchen and a separate bathroom. On 19th July 2019, the Claimant's solicitor wrote to the solicitor with conduct of this judicial review claim at the Government Legal Department:

> "I refer to your client's recent offer to accommodate our client in Lambeth. As per the terms of this offer, our client and her family will still only have access to one small room, with the kitchen and bathroom on different floors. This will not meet [M's] complex needs. The need for space itself has been acknowledged by your client in the disclosed computer records.
>
> However, if your client is willing to provide two rooms in the property, so that [M] could have private space away from [L] if necessary and away from any dangerous objects, my client would be willing to accept this… Please note that the second room would need to be removed of furniture and rugs placed on the floor as hard surfaces and edges are hazardous to [M]."

32. The most recent evidence of the Defendant's efforts to secure new accommodation for the Claimant and her children indicates that on 11th July 2019 – coincidentally, the day of the aborted 'rolled-up' hearing of this claim before Mr Elleray QC – the Defendant made another request to Clear Springs for accommodation with the following specifications:

> "Lambeth only, separate bathroom and kitchen, self-contained 2 bedroom. Non studio. Ground floor or lifted."

33. This request was in accordance with what the Claimant had contended since November 2018 was both the location and type of accommodation that her family needed. However, in the period of three months since this request was made, Clear Springs has been unable to find such accommodation for the Claimant and her children. An email from Clear Springs dated 22nd August 2019 records that it had made efforts to secure such a property by repeatedly emailing and telephoning property agents and potential landlords, but they had not been successful. Although no update has been provided by the Defendant in the evidence as to the position beyond that date, it is apparent that such further efforts as Clear Springs may have made on behalf of the Defendant to find accommodation since 22nd August have similarly not succeeded.

34. The reason for the inability of the Defendant and Clear Springs to find the type of accommodation which the Claimant says that her family needs and which is specified in the Defendant's latest request of 11th July 2019 is given by the Defendant's witness, Mr Williams. He does not assert that there is no available accommodation in the London Borough of Lambeth of the type requested by the Defendant; rather, his evidence is that there is no available accommodation of that type in the borough which is "affordable". Mr Williams does not give any further detail about what either the Defendant or her contractor, Clear Springs, regard as "affordable" for these purposes. I shall return to the significance of that issue later in this judgment.

The Statutory Provisions and the Defendant's Policy

35. Section 55 of the Borders, Citizenship and Immigration Act 2009 ("the 2009 Act") provides that:

> "(1) The Secretary of State must make arrangements for ensuring that—
>
> (a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and
>
> (b) any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need.
>
> (2) The functions referred to in subsection (1) are—
>
> (a) any function of the Secretary of State in relation to immigration, asylum or nationality;
>
> …
>
> (3) A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (1)…"

36. Section 95 of the Immigration and Asylum Act 1999 ("the 1999 Act") provides that:

> "(1) The Secretary of State may provide, or arrange for the provision of, support for—
>
> (a) asylum-seekers, or
>
> (b) dependants of asylum-seekers,
>
> who appear to the Secretary of State to be destitute or to be likely to become destitute within such period as may be prescribed.
>
> . . .
>
> (3) For the purposes of this section, a person is destitute if—
>
> (a) he does not have adequate accommodation or any means of obtaining it (whether or not his other essential living needs are met); or
>
> (b) he has adequate accommodation or the means of obtaining it, but cannot meet his other essential living needs.
>
> (4) If a person has dependants, subsection (3) is to be read as if the references to him were references to him and his dependants taken together.

> (5) In determining, for the purposes of this section, whether a person's accommodation is adequate, the Secretary of State—
>
> (a) must have regard to such matters as may be prescribed for the purposes of this paragraph; but
>
> (b) may not have regard to such matters as may be prescribed for the purposes of this paragraph or to any of the matters mentioned in subsection (6).
>
> (6) Those matters are—
>
> (a) the fact that the person concerned has no enforceable right to occupy the accommodation;
>
> (b) the fact that he shares the accommodation, or any part of the accommodation, with one or more other persons;
>
> (c) the fact that the accommodation is temporary;
>
> (d) the location of the accommodation."

37. Section 96 of the 1999 Act provides that:

> "(1) Support may be provided under section 95—
>
> (a) by providing accommodation appearing to the Secretary of State to be adequate for the needs of the supported person and his dependants (if any)…"

38. Section 97 of the 1999 Act provides that:

> "(1) When exercising his power under section 95 to provide accommodation, the Secretary of State must have regard to—
>
> (a) the fact that the accommodation is to be temporary pending determination of the asylum-seeker's claim;
>
> (b) the desirability, in general, of providing accommodation in areas in which there is a ready supply of accommodation; and
>
> (c) such other matters (if any) as may be prescribed.
>
> (2) But he may not have regard to—
>
> (a) any preference that the supported person or his dependants (if any) may have as to the locality in which the accommodation is to be provided; or
>
> (b) such other matters (if any) as may be prescribed."

39. Paragraph 13 of the Asylum Support Regulations 2000 provides that:

> "(1) The matters mentioned in paragraph (2) are prescribed for the purposes of subsection (2)(b) of section 97 of the Act as matters to which regard may not be had when exercising the power under section 95 of the Act to provide accommodation for a person.
>
> (2) Those matters are–
>
> (a) his personal preference as to the nature of the accommodation to be provided; and
>
> (b) his personal preference as to the nature and standard of fixtures and fittings;
>
> but this shall not be taken to prevent the person's individual circumstances, as they relate to his accommodation needs, being taken into account."

40. The Defendant has a policy, "Allocation of accommodation", which was published on 7th March 2017. It provides guidance to caseworkers on how to consider requests from asylum-seekers to be accommodated under section 95 of the 1999 Act. The introduction to the document states:

> "The overriding principle when allocating accommodation is that it is offered on a 'no choice basis' and as a general rule is provided outside London and the South East and only in areas of the UK where the Home Office has a ready supply.
>
> Caseworkers must, however, consider specific requests to be allocated accommodation in London, the South East or another specific location and consider whether there are exceptional circumstances that make it appropriate to agree to the request.
>
> All requests should be considered on a case by case basis, balancing the overarching principle that accommodation is offered on a 'no choice basis' against the strength of the exceptional circumstances that might make it appropriate to agree to the request to provide accommodation in a particular location.
>
> If it is decided not to agree to arrange accommodation in a particular location, reasons should be given and the decision must be compatible with the Home Office's obligations under Human Rights legislation and in line with our obligation to take into account the need to safeguard and promote the welfare of children in the UK."

The policy continues:

> "**Where it is not possible to provide accommodation in a particular location**

> Caseworkers may encounter some cases where it appears appropriate to provide accommodation in a particular location because of the person's exceptional circumstances, but this is not possible because there is no affordable accommodation in the area.
>
> Where this is the case, the reasons should be provided and best endeavours made to provide alternative accommodation which best suits the person's circumstances. As an alternative, it may be possible to mitigate the negative impact of a decision that accommodation cannot be provided in the location requested by agreeing to pay for travel expenses to visit the particular area. This could, for example, be appropriate in some circumstances to enable attendance for medical appointments or counselling sessions in the particular location requested.
>
> **Application of this instruction in respect of children and those with children**
>
> Section 55 of the Borders, Citizenship and Immigration Act 2009 requires the Home Office to carry out its existing functions in a way that takes into account the need to safeguard and promote the welfare of children in the UK. It does not impose any new functions, or override existing functions.
>
> Officers must not apply the actions set out in this instruction either to children or to those with children without having due regard to section 55. The Home Office instruction 'Arrangements to Safeguard and Promote Children's Welfare in the Home Office' sets out the important principles to take into account in all activities relating to children.
>
> Our statutory duty to children includes the need to demonstrate:
>
> • fair treatment which meets the same standard a British child would receive
>
> • the child's interests being made a primary, although not the only consideration
>
> • no discrimination of any kind
>
> • asylum applications are dealt with in a timely fashion
>
> • identification of those that might be at risk from harm"

41. The policy goes on to give examples of typical scenarios which caseworkers might encounter and to set out appropriate outcomes in such situations. This section of the policy provides *inter alia* as follows:

> "**Disability**

> Caseworkers should have regard to the particular vulnerabilities of asylum seekers and their children who have disabilities or serious health problems. Requests for accommodation in a particular location may sometimes be made in order to avoid unreasonable disruption of any treatment or assistance to cope with the disability that is already being provided. These requests should be considered carefully, balancing the overriding principle of allocating accommodation on a 'no choice basis' and outside London and the South East against the level of disruption caused if the person is required to relocate. Further information should be sought from child welfare agencies and medical professionals if needed.
>
> Caseworkers should have particular regard to cases where a local authority is already providing some support or assistance and support, separate to assistance with accommodation and subsistence, to cater for a person's disability. Where possible accommodation should normally be arranged close to where the support or assistance from the local authority is being provided…
>
> **Education**
>
> Requests for accommodation in a particular location because the person's children are attending school in the area should normally be refused, as arrangements can be made to transfer the children to a school in another area…
>
> If a person has a child with special educational needs who has gained entry to an appropriate school, accommodation should normally be provided near to the school, unless it is clear that accommodation can be arranged near to another location where there is an appropriate school that the child can be transferred to…"

42. Section 99 of the 1999 Act provides:

> "(1) A local authority… may provide support for persons in accordance with arrangements made by the Secretary of State under section 4, 95 or 98.
>
> (2) Support may be provided by an authority in accordance with arrangements made with the authority or with another person.
>
> (3) Support may be provided by an authority in accordance with arrangements made under section 95 only in one or more of the ways mentioned in section 96(1) and (2)

> (4) An authority may incur reasonable expenditure in connection with the preparation of proposals for entering into arrangements under section 4, 95 or 98.
>
> (5) The powers conferred on an authority by this section include power to—
>
> (a) provide services outside their area;
>
> (b) provide services jointly with one or more other bodies;
>
> (c) form a company for the purpose of providing services;
>
> (d) tender for contracts (whether alone or with any other person)."

43. Section 100 of the 1999 Act provides:

> "(1) This section applies if the Secretary of State asks—
>
> (a) a local authority,
>
> …
>
> to assist him to exercise his power under section 95 to provide accommodation.
>
> (2) The person to whom the request is made must co-operate in giving the Secretary of State such assistance in the exercise of that power as is reasonable in the circumstances.
>
> …
>
> (4) A local authority must supply to the Secretary of State such information about their housing accommodation (whether or not occupied) as he may from time to time request.
>
> (5) The information must be provided in such form and manner as the Secretary of State may direct…"

The Claimant's Submissions

44. The claim is advanced on five grounds:

i) that the Defendant materially erred in law in failing to take into account a number of relevant considerations in providing the Claimant and her children with only a studio flat and/or in not providing the Claimant and her children with suitable accommodation in the London Borough of Lambeth (Ground 1);

ii) that what is described as the Defendant's "consistent refusal to offer the Claimant suitable accommodation within the London Borough of Lambeth" is unreasonable (Ground 2) or irrational (Ground 3);

iii) that the Defendant failed to follow her own policy on the allocation of accommodation (Ground 4);

iv) that the Defendant has breached her duty under section 55 of the 2009 Act to have regard, when exercising her functions in relation to immigration and asylum (of which the provision of accommodation is one) to the need to safeguard and promote the welfare of children (Ground 5).

45. Ms Davies submits that the Defendant has failed to have regard to the need to safeguard and promote the welfare of the Claimant's children, in breach of her statutory duty under section 55 of the 2009 Act. The Defendant has not explained what, if any, consideration there has been of any disruption to M's educational provision if he were to be moved out of Lambeth (something which the Defendant has proposed to do on several occasions). Ms Davies submits that a move out of the borough would have a disastrous impact on the Claimant and her children, in particular M. The Defendant has not provided an explanation for the various changes of position that have taken place both in relation to the type of accommodation and its proposed location, or demonstrated that all relevant factors have been considered.

46. Ms Davies submits that the Defendant has failed to consider whether the search for accommodation in Lambeth should be widened beyond that which the Defendant considers to be "affordable" and that the Defendant has acted unlawfully by failing to approach the local authority in Lambeth for assistance with housing the Claimant and her family.

47. Ms Davies submits that the Court should now make a mandatory order requiring the Defendant to immediately re-house the Claimant and her children in a two-bedroom flat in Lambeth, or alternatively a flat with two rooms for living and sleeping and a separate kitchen and bathroom.

The Defendant's Submissions

48. On behalf of the Defendant, Ms Parsons submits that the Defendant accepts that the Claimant and her children require a two-bedroom property in order to accommodate M's particular needs and that they should ideally be accommodated in Lambeth. However, she submits that the Defendant cannot be required to create suitable accommodation for them, when none exists. Ms Parsons submits that the Claimant's complaint that the Defendant has restricted the search to "affordable" accommodation should be rejected as contrary to the principle of good administration and also that a finding of unlawfulness on this basis would be premature. Ms Parsons submits that the Defendant, by requesting the provision of two-bedroom accommodation in Lambeth, has demonstrated that she has complied with her duty under section 55 of the 2009 Act – as the very decision to change the specifications of the accommodation requested demonstrates that the interests of the children have been taken into account.

49. Ms Parsons submits that the Defendant has followed the terms of her policy in this regard, which makes reference to the provision of "affordable" accommodation and

that the Claimant's proposed remedy of a mandatory order is both inappropriate and unworkable because it would require the Defendant to accommodate the Claimant in a two-bedroom property in Lambeth without regard to any consideration of its cost. Ms Parsons further submits that it would not be a breach of the Defendant's policy to accommodate the family outside Lambeth, despite the disruption to M's education and development that might ensue, because the Defendant's policy anticipates that there will be requests, even ones based on disability or special educational needs, that cannot be met.

50. It is submitted that that there is no duty on the Defendant to request that a local authority provide assistance to her in order to fulfil her duty under section 95 of the 1999 Act, and that the evidence demonstrates that this would be unlikely to add to the options available given the high levels of demand for public housing in Lambeth.

Discussion

Grounds 1 and 4

51. In *R (A) v National Asylum Support Service* [2003] EWCA Civ 1473, [2004] 1 WLR 752 ("*A v NASS*"), the Court of Appeal held at [54-55] that in considering the adequacy or suitability of accommodation provided to applicants with children by the Defendant under section 95 of the 1999 Act, the individual circumstances of each person, including dependants, must be considered. The age of children and whether any person to be accommodated suffers from a disability will be relevant to the adequacy of accommodation. Also relevant is the period during which any accommodation is likely to be occupied.

52. Paragraphs 31 and 32 of the Claimant's Grounds for Judicial Review, filed in April 2019, set out 22 separate considerations which it is said were relevant considerations for the Defendant to take into account when deciding on the type and location of any accommodation that should be offered to the Claimant and which have not been taken into account. These considerations are to an extent overlapping. In summary, they are:

    i) M's lack of safety awareness, need for a quiet space to retreat to, aggressive behaviour, 'pica' behaviour, hyperactivity and poor sleeping pattern;

    ii) the risks arising from the experience of the Claimant and her children once they were in occupation of the accommodation, as identified by Ms Higgins in her email of 22nd November 2018 (see paragraph 21 above);

    iii) the impact of M's behaviour and needs on both L and the Claimant;

    iv) the disruption to M's education and development that would result if he were to be moved from Lambeth (where he has been since August 2018), having regard to the disruption already caused by previous moves.

53. Neither of the Defendant's witnesses, Mr Williams and Mr Crowe, gave evidence that they had themselves taken any of the decisions made about the Claimant's case since she made her application for support to the Defendant in May 2018. The evidence that they gave appears to have been derived entirely from the Home Office's

documents and records, and from their knowledge of the processes that are generally followed by the Home Office in providing support to asylum-seekers. There is, unlike in *Chkharchkhalia* (see at [12-17]), no statement from anyone employed by Clear Springs, the Defendant's contractor, to evidence its actions in the Claimant's case or the reasons that such actions were taken. Ms Parsons was not in a position to provide an explanation why such a statement had not been filed in this case. The result is that the available evidence regarding what decisions were taken in the Claimant's case, and why they were taken, is limited to that which appears on the face of the documents, supplemented by the evidence given by Mr Williams and Mr Crowe about why particular practices are, in general terms, adopted by the Defendant's officials.

54. It is simply unclear from the evidence to what extent each of the considerations set out at paragraphs 31 and 32 of the Claimant's Grounds have ever been considered by the Defendant, or if they have been considered, when they were first considered. The Defendant does not deny, in her Detailed Grounds of Defence, that these matters were relevant considerations. The Defendant was aware of M's condition and the issues arising in terms of the family's accommodation requirements from the very outset of the process – see paragraphs 10 and 11 above.

55. The essential point made by the Claimant is that the Defendant, in making the decision to offer the studio flat in Lambeth to the Claimant, and then in her further actions in offering accommodation both outside the borough and latterly elsewhere in Lambeth, failed to take into account those relevant considerations.

56. Mr Williams deals with the initial offer of accommodation in his witness statement. He states only that the offer of the studio flat in Lambeth was made by Clear Springs. Mr Williams does not explain why, when the Claimant had requested a two-bedroom property because of M's condition, only a studio flat was offered. Nor does he explain why, when at that point in time M had access to specialist educational provision in Lewisham, Clear Springs decided to offer accommodation in Lambeth (having initially proposed to move the family to Leeds). As I have already noted, in this case the Defendant did not (unlike in the case of *Chkharchkhalia*, to which I have already referred) file any evidence from anyone employed by Clear Springs to explain the reasons for this offer of accommodation being made. There is, similarly, nothing on the face of the documents disclosed by the Defendant to explain why it was made. Ms Parsons accepted that the evidential background to the decision making in this case was absent. In my judgment, had all or indeed any of these matters been considered when the initial offer of accommodation was made then it is highly likely that the Defendant would not have offered to accommodate the Claimant in a studio flat in Lambeth.

57. So too with the subsequent offers of accommodation. Mr Williams very frankly admitted in his evidence that he did not know why, in January 2019, the Defendant made a request to Clear Springs that accommodation should be provided "preferably in the Lewisham area" or why a property was then offered in Hayes. Mr Williams speculated that the request might have been made because of the history of support being provided to M in Lewisham and that the Defendant did not at that point have evidence, other than from correspondence sent by the Claimant's solicitors, that M was being provided with support from Lambeth; however by January 2019, as Mr

Williams accepted, the Defendant was in receipt of the Claimant's solicitors' letter of 27th November 2018, which stated *inter alia*:

> "An Education Health and Care Plan (EHCP) was drawn up for [M] in August 2018 when the family were living in Lewisham. It has since been transferred to the London Borough of Lambeth…
>
> The accommodation needs to be within Lambeth given that a further move to another Local Authority will cause significant disruption to the support already being received by the family from Lambeth children's services."

58. Even if Mr Williams is correct in asserting that there was no "evidence" before the Defendant that support was being provided to M by the local authority in Lambeth, the letter of 27th November 2018 contained in the clearest of terms a statement that M's EHCP had been transferred to Lambeth and that a move to another local authority would cause significant disruption to the support being provided to the family. There is no evidence setting out why, in those circumstances, the Defendant then requested that accommodation be provided "in the Lewisham area" or why it was then subsequently offered in the London Boroughs of Hillingdon, Croydon and Merton.

59. I accept the submission made on behalf of the Claimant that the Defendant materially erred in law in failing to take into account, when deciding on the nature and location of the accommodation to be provided to the Claimant under section 95 of the 1999 Act, the highly relevant factors that I have set out at paragraph 52 above. Had such factors been considered by the Defendant then, in my judgment, it is highly likely that the studio flat in Lambeth would not have been offered to the Claimant in the first place, and that subsequent requests and offers of accommodation would not have been made in the way that they were.

60. Since 11th July 2019, however, it is apparent that the Defendant's position has been that the Claimant and her family should be accommodated in a two-bedroom flat which is in Lambeth. The Defendant has specifically requested such accommodation from her contracted provider. It is apparent that the Defendant has, since that point in time, addressed the substance of the considerations which were not, apparently, taken into account when earlier requests to the accommodation provider, and resulting offers of accommodation, were made. Accordingly, although in my judgment the Defendant acted unlawfully in failing to have regard to relevant considerations until 11th July 2019, there would now be no purpose in granting any relief in respect of this Ground. The effect of the unlawfulness is historic; the Claimant's position has been vindicated by the change in the Defendant's stance since the claim was issued and the narrative set out in this judgment provides, in my view, a sufficient remedy in respect of this Ground. Nor do I need to make a declaration that the accommodation presently being provided is not adequate for the Claimant and her children – the Defendant accepts that it is not.

61. By Ground 4, the Claimant contends that the Defendant has breached the terms of her own policy in failing to have regard to a number of matters when providing accommodation to the Claimant, including M's autism and his needs, the impact of

the accommodation being provided on the Claimant's mental health and the impact on M if the family were required to move away from Lambeth.

62. In substance, this Ground mirrors Ground 1 albeit formally it is framed in terms of alleged breaches of the Defendant's policy. It is unsurprising that the Defendant should have a policy which requires her officials to take into account *inter alia* the needs of children with disabilities when deciding on the type and location of accommodation to be provided to families under section 95 of the 1999 Act. Again, I consider that until 11th July 2019 the Defendant was in breach of her policy in that when deciding on the type and location of the accommodation to be provided to the Claimant and her family, the Defendant failed to have regard to M's particular needs and vulnerabilities, or to the disruption that would occur as a result of moving his EHCP from one local authority to another. As with Ground 1, I decline to grant any relief given that the effect of the unlawfulness is now historic.

Grounds 2 and 3

63. By these grounds, the Claimant contends that the Defendant's "refusal", as it is termed, to offer the Claimant a two-bedroom flat in Lambeth is unlawful. Like Ms Parsons, I do not consider that there is any material difference, for present purposes, between the concepts of unreasonableness and irrationality. I will therefore consider these Grounds together.

64. It is agreed between the parties – at least since the Defendant's request to Clear Springs on 11th July 2019 – that the Claimant and her children ought to be accommodated in a two-bedroom property in Lambeth. The Defendant has not, in terms, "refused" to offer the Claimant such accommodation. Rather, no such accommodation has yet been found by Clear Springs. The reason given by the Defendant for this failure to offer the Claimant such accommodation is not that it does not exist at all, nor is it that there is not such accommodation available within the borough. The reason given is that there is no such accommodation available in Lambeth which is "affordable".

65. In *Chkharchkhalia*, a similar issue arose. The claimant and her children were being accommodated in a hostel in Croydon. The claimant had mobility difficulties and needed to access support from the Helen Bamber Foundation ("HBF") in central London, which she was unable to do given the distance involved. However, in seeking to re-house her the Defendant had made offers of new accommodation that was also in outer London and so was not suitable for her needs. Mr Sheldon QC stated at [37-38]:

> "37. … The Secretary of State has, in my judgment, acted in accordance with his various policies. His failure to procure a suitable property for Ms. Chkharchkhalia is not by reason of a failure to adhere to the Secretary of State's policies. Rather it is the fact that suitable properties have not been located, in spite of the Secretary of State's best efforts within the affordability constraints that he has applied.
>
> 38. The fact that the Secretary of State has complied with his policy does not mean, however, that there will not come a time

> when the failure to procure a suitable property is not unlawful in a *Wednesbury* sense. At present, Ms. Chkharchkhalia has been accommodated at Brigstock House for 4½ months. During that time, Ms. Chkharchkhalia has been unable to travel to the HBF for her treatment. The longer this situation continues, the more difficult it will be for the Secretary of State to justify his failure to relocate as a matter of public law. I acknowledge that CRH have used best endeavors to source a property for Ms. Chkharchkhalia within reasonable travelling distance from the area of the HBF. Those endeavors are currently bounded, however, by what is ordinarily regarded as "affordable". There will come a time where those affordability constraints will need to be relaxed to avoid a finding of unlawfulness."

I respectfully agree with that analysis insofar as a rigid adherence by the Defendant to her affordability criteria may, in particular instances, result in unlawfulness on a *Wednesbury* basis, notwithstanding that the Defendant's published policy has been complied with. Indeed, Ms Parsons did not submit that Mr Sheldon QC's judgment should not be followed in terms of the principle that I have set out; rather, she submitted that in the present case, the stage had not been reached where the Defendant's conduct was unlawful.

66. In the present case, it is abundantly clear that the Defendant's affordability criteria are a barrier – indeed, it may well be that they are the only barrier – to a two-bedroom property in Lambeth being made available to the Claimant and her children. That is expressly stated in the Defendant's own evidence. There is, however, no evidence that the Defendant has ever considered whether, and if so to what extent, those criteria should be relaxed in this particular case in order to remove the barrier to the type of accommodation which the Defendant is now seeking for the Claimant and children being secured. In my judgment, the Defendant's failure to consider whether, and if so to what extent, the affordability criteria ought to be relaxed in the particular circumstances of this case is unreasonable and unlawful. Because I have not been provided with any evidence of Clear Springs' endeavours to source properties for the Claimant and her children beyond 22nd August 2019, I am not in a position to say precisely when the Defendant's conduct, in failing to address this issue, became unlawful. However, I am satisfied that it was certainly unlawful by the date of trial, which was just short of three months after the request of 11th July 2019. This is because, in particular:

i) the Claimant and her family had been accommodated in the studio flat in Lambeth for some 14 months by 8th October 2019, the date of the trial;

ii) the Defendant was given notice of the lack of suitability of that accommodation, including in particular the safety issues arising from the type of accommodation being provided, at the latest by 27th November 2018;

iii) the Defendant had accepted, at the latest by 11th July 2019, that this accommodation was unsuitable for them, in particular because of M's complex needs, and that they should be accommodated in a two-bedroom flat in Lambeth;

iv) the Defendant knew, at the latest by 22nd August 2019, that repeated efforts by its accommodation provider, Clear Springs, to source such a property in accordance with the request made had been unsuccessful;

v) the Defendant knew, at the latest by 23rd August 2019, that the reason that the requested accommodation had not been provided was because there was "no affordable accommodation in the area" (paragraph 58 of Ms Khan's witness statement of that date, which is reflected in Mr Williams' subsequent witness statement);

vi) in the intervening period of just over six weeks, no accommodation had been found for the Claimant and her family – so over a period of some three months now, the Defendant's request for suitable accommodation has not been met by the accommodation provider, because of the cost constraints imposed by the Defendant.

I consider it is *Wednesbury* unreasonable, in the circumstances of this case, for the Defendant not even to have considered whether the barrier to the provision of such accommodation should now be removed. The Defendant has for more than 10 months been on notice of the various issues, including in particular those relating to the safety and development of both children, which arise from the provision of the studio flat, via both the Claimant's own evidence and the independent evidence provided by Ms Higgins who has visited the property. Unlike in *Chkharchkhalia*, these issues arise from the very nature of the accommodation in which the Claimant and her children are living. The Defendant has accepted that the accommodation presently provided is unsuitable, has accepted that there is a need for the family to be accommodated in Lambeth and has known for at least six weeks now (since Ms Khan's witness statement was filed) that the barrier to the provision of suitable accommodation in Lambeth, once it was requested by the Defendant, is the affordability criteria.

67. I am not, however, in a position to say whether or not the affordability criteria referred to in the Defendant's policy must necessarily be disapplied and, if so, to what extent. Ms Davies accepted that the provision of suitable housing for the Claimant and her children in the London Borough of Lambeth might require the expenditure of a significant amount of public funds. In the first instance it is for the Defendant, as the relevant decision-maker, to determine whether and if so how the affordability criteria should be relaxed. That is not something that the Defendant has ever done in this case, despite what Mr Sheldon QC said, some two months ago now, in *Chkharchkhalia* at [38]. Moreover, I have no evidence before me as to what those criteria are, whether generally or in relation to properties in the London Borough of Lambeth. Nor do I have any information about the level of rent that would ordinarily be payable on the open market for the type of property that the Defendant is now – subject to her affordability criteria – seeking for the Claimant.

68. I am not, therefore, prepared go as far as the Claimant proposes in Grounds 2 and 3, namely to declare that the Defendant's refusal – or, more accurately, failure – to provide a two-bedroom property in Lambeth to the Claimant is unlawful. I do, however, consider that the Defendant's failure even to address what may well be the only barrier to such a property being provided – namely, the continued application of her affordability criteria to the property search – is now an unreasonable failure in the

particular circumstances of this case and is unlawful. I propose to make a declaration to that effect.

69. Ms Davies also submitted that it was *Wednesbury* unreasonable of the Defendant not to have requested assistance in this case from the local authority in Lambeth, pursuant to sections 99 and 100 of the 1999 Act. I do not, however, accept that submission. Mr Williams sets out in his evidence that there is an acute shortage of social housing in London and that the local authority's website states that there is a waiting list in Lambeth of more than 27,000 people, resulting in a likely wait for local authority housing of many years. Mr Williams' evidence is that it is unlikely that an approach to the local authority for assistance in finding accommodation for the Claimant would materially add to the options available. In my judgment, the Defendant has not, in these circumstances, acted unlawfully in failing to request assistance from the local authority.

70. A further submission made by Ms Davies was that the Defendant had acted unreasonably in not searching for properties in Lambeth with two main living / sleeping rooms, as opposed to two bedrooms. This submission was not based on anything in the Grounds of Review, and indeed the relief sought at Section 7 of the Claim Form is a mandatory order for the provision of "2 bedroom accommodation in the London Borough of Lambeth". As I understood it, Ms Davies' submission was based on the terms of the letter of 19th July 2019 from the Claimant's solicitors to which I have referred at paragraph 31 above. I do not accept that the Defendant has acted unreasonably in not seeking properties which, on the Claimant's own case, are not suitable for her needs. That the Claimant's solicitors may have expressed, on one occasion, a desire to seek a compromise solution in relation to a particular property does not, in my judgment, render the Defendant's searches for accommodation since 11th July 2019 – which reflect the Claimant's own oft-expressed wish for a two-bedroom property in Lambeth – unreasonable. If the Claimant is now, contrary to her previously expressed wishes, willing to accept a property in Lambeth that does not have two bedrooms, then she can inform the Defendant of that fact. I say nothing about whether such a property would indeed be suitable for the needs of the Claimant and both her children; that is a matter for others.

Ground 5

71. The duty under section 55 of the 2009 Act requires the Defendant, when exercising her functions in relation to immigration, asylum and nationality, to have regard to the need to safeguard and promote the welfare of children who are in the United Kingdom. It is not in dispute that the provision of accommodation to asylum-seekers, and their dependants, under section 95 of the 1999 Act is a function of the Defendant in relation to asylum. Nor is it in dispute that both M and L are children who are in the United Kingdom. Thus, the Defendant is required by the statute to have regard, when providing accommodation to the Claimant and her children, to the need to safeguard and promote the welfare of both M and L. This statutory duty is expressly recognised in the Defendant's own policy, which I have set out at paragraph 40 above.

72. It is trite that the duty under section 55 of the 2009 Act does not dictate any particular outcome. Nor does it dictate that the interests of children affected by decisions in the sphere of immigration, asylum and nationality must be treated as an overriding consideration. In *ZH (Tanzania) v Secretary of State for the Home Department*

[2011] UKSC 4, [2011] 2 AC 166, Lady Hale, giving the leading judgment, stated at [26] that the best interests of children must be a primary consideration, i.e. they must be considered first:

> "Nevertheless, even in those decisions, the best interests of the child must be a primary consideration. As Mason CJ and Deane J put it in the case of *Minister for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20, (1995) 183 CLR 273, 292 in the High Court of Australia:
>
> > "A decision-maker with an eye to the principle enshrined in the Convention would be looking to the best interests of the children as a primary consideration, asking whether the force of any other consideration outweighed it."
>
> As the Federal Court of Australia further explained in *Wan v Minister for Immigration and Multi-cultural Affairs* [2001] FCA 568, para 32,
>
> > "[The Tribunal] was required to identify what the best interests of Mr Wan's children required with respect to the exercise of its discretion and then to assess whether the strength of any other consideration, or the cumulative effect of other considerations, outweighed the consideration of the best interests of the children understood as a primary consideration."
>
> This did not mean (as it would do in other contexts) that identifying their best interests would lead inexorably to a decision in conformity with those interests. Provided that the Tribunal did not treat any other consideration as inherently more significant than the best interests of the children, it could conclude that the strength of the other considerations outweighed them. The important thing, therefore, is to consider those best interests first. That seems, with respect, to be the correct approach to these decisions in this country as well as in Australia."

73. To comply with the duty under section 55 of the 2009 Act, the best interests of children such as M and L must initially be identified by the Defendant and then considered first of all, as a primary consideration. As the Defendant's policy recognises, the Defendant must demonstrate that the interests of children affected by the application of the policy have been made "a primary, although not the only consideration" and that "the actions set out in this instruction" (which actions must, necessarily, include the application of the reference to the "affordability" of accommodation in the policy) have been applied to those with children consistently with the duty imposed by section 55. The policy itself reflects the case law going back to *ZH (Tanzania)* and the approach most recently described by the Court of Appeal of Northern Ireland in *JG v Upper Tribunal, Immigration and Asylum Chamber* [2019] NICA 27 at [24], in the following terms:

> "… Absent a conscious and conscientious assessment of the child's best interests by the decision maker, those interests are likely to be ignored in the decision making process. The scales will not have been properly prepared. The child's entitlement is to have its best interests balanced with the other facts and factors in play, in particular the public interest engaged by the immigration function being performed…"

74. In the Detailed Grounds of Defence in this case, the Defendant states as follows:

> "42. The Defendant's actions demonstrate that [she] has taken s.55 into account. The requests for larger accommodation have been granted on the basis of the needs (amongst other things) of the child. The request for Lambeth (or as near to Lambeth as possible) has been granted because of the child's special educational needs. It is hard to discern in these circumstances how it can be said that the Defendant has failed to consider the welfare of the child. It is submitted that this ground must also fail."

A similar point is made in the Defendant's evidence, at paragraph 56.d of Mr Williams' witness statement:

> "… The Defendant's actions (in agreeing to provide alternative accommodation in Lambeth, and in taking all reasonable steps to provide it, and by searching for properties elsewhere in the absence of accommodation in Lambeth) is based on its [sic] acceptance of the need to safeguard and promote the welfare of the Claimant's children."

75. I consider that the Defendant has been, and remains, in breach of her statutory duty under section 55 of the 2009 Act in this case.

76. Nowhere in the evidence disclosed by the Defendant is there any assessment of what is in the best interests of either of the Claimant's children when it comes to the type or the location of any accommodation which might be provided to the Claimant's family. There are, in my judgment, at least three issues which any assessment of their best interests would need, in this context, to address:

i) M's need for the provision of education in a specialist setting, via the implementation of his EHCP, and the effects on M if such provision were to be interrupted, in particular by a move to a new local authority area;

ii) M's need to be accommodated in an appropriate and safe home environment having regard to his autism and his complex needs, in particular his lack of awareness of danger, his 'pica' behaviour and his need for a space to retreat to;

iii) L's need for a home in which the impact of M's behaviour towards him, where it has the potential to injure L or to interrupt L's development (such as M jumping into L's cot when L is attempting to sleep), is minimised.

77. The Defendant has not disclosed any assessment by anybody, whether Home Office officials (pursuant to section 55(1) of the 2009 Act) or employees of Clear Springs (pursuant to section 55(2)), of what is in the best interests of either M or L when it comes to the provision of accommodation to the Claimant and her family. Nor has the Defendant disclosed anything which indicates, expressly, that the Defendant has addressed the duty under section 55 of the 2009 Act in this case, save the statement in the letter from the Asylum Support Assessment Team to the Claimant of 9th April 2019 which I have set out at paragraph 29 above. Even allowing for the poor choice of language in the letter, in that it is addressed to the Claimant and refers to "your best interests" having been taken into account, this is a bare statement of compliance with the duty under section 55 of the 2009 Act. No reasoning is provided in the letter. No record of the underlying analysis has been disclosed, nor do the Defendant's witnesses give any evidence about the nature and extent of any such analysis. Such analysis – and the keeping of an appropriate record of it – was particularly important, in my judgment, given that the official who wrote the letter had refused the Claimant's request for her family to be accommodated in Lambeth, instead requesting that they be accommodated "within travelling distance of Lambeth", a request which in due course resulted in a property being offered in the London Borough of Merton.

78. In my judgment, the fact that the Defendant has, from 11th July 2019, requested that the Claimant and her children be accommodated in a two-bedroom property in Lambeth does not, in and of itself, demonstrate that the duty under section 55 has been discharged. It might mean that any failure to have regard to the children's best interests, contrary to the duty under section 55, was not material in terms of the outcome. In any event, however, I reject the submission made on behalf of the Defendant (see paragraph 74 above) that the duty has been in substance discharged since at the latest 11th July 2019, when the Defendant requested a two-bedroom property in Lambeth from her accommodation provider. In my judgment, there remains an ongoing failure to comply with the duty under section 55 of the 2009 Act. That is for reasons similar to those that I have given above in relation to Grounds 2 and 3.

79. The Defendant has not, as I understand the position, ever considered whether, having regard to the best interests of either or both of the Claimant's children, the affordability criteria which are the barrier to securing a two-bedroom property in Lambeth ought to be relaxed. Criteria of this sort are capable, in principle, of amounting to the sorts of countervailing considerations outweighing the best interests of children, to which the UK Supreme Court made reference in *ZH (Tanzania)*. But in order for the decision-maker to reach such a conclusion, there must be a primary consideration of what is in the best interests of the children concerned and then a consideration of the strength of any countervailing factors, such as the affordability criteria. Such an exercise should, as set out in the Defendant's own policy, have been conducted at the outset of the Claimant's claim for accommodation in May 2018. The Defendant ought at that point, in my judgment, to have considered whether it was in the best interests of M to remain in Lewisham rather than to move outside that borough, either to Leeds (as was initially proposed) or to Lambeth (which was the accommodation offered by the Defendant in August 2018, to which the family in fact moved). A similar consideration of M's best interests ought to have been undertaken by the Defendant when she proposed during 2019 to move the family from Lambeth to Hayes, then to West Drayton, then to Croydon and lastly to Merton.

80. On the evidence placed before me, the consideration of the best interests of both M and L that is required by the statute and by the Defendant's own policy in relation to the provision of accommodation to asylum-seekers was not undertaken initially or indeed subsequently, notwithstanding the bare statement that the statutory duty had been complied with that was made in the letter of 9th April 2019. That failure led to the Claimant being offered what the Defendant now accepts was unsuitable accommodation and it has continuing consequences in that the Defendant has never considered whether the best interests of either M or L are affected, or outweighed, by the continued application of the affordability criteria in the search for suitable accommodation in Lambeth. The Defendant has thereby acted unlawfully and I will make a declaration to that effect. In my judgment, on the facts of this case, the Defendant's failure to discharge the duty under section 55 of the 2009 Act is significant, and compounds the other public law errors, because in this case the evidence shows that the nature of the accommodation currently being provided is affecting the welfare of both children because it is unsafe and unsuitable for M's complex needs. This is not a case, such as *A v NASS* (see at [78] and [89]), where there is any prospect of measures being taken which will result in the current accommodation being made adequate for the family's needs.

81. Again, for reasons similar to those which I have given in relation to Grounds 2 and 3, I do not have the evidence before me upon which to base a finding that had an assessment under section 55 been conducted, the only conclusion lawfully open to the Defendant would have been that the Claimant and her children should be accommodated in a two-bedroom flat in Lambeth, irrespective of the cost to public funds. Whilst I can appreciate the strength of the best interests of the children, and in particular M, in this regard, it is a matter for the Defendant to weigh the countervailing factors and to reach a conclusion. If the affordability criteria are not in due course relaxed, or if they are relaxed but suitable accommodation still cannot be found in Lambeth, then alternative options (including moving the family out of Lambeth, with its potential adverse consequences for M) may need to be explored. Any discussion of the lawfulness of such a course of action is beyond the scope of this judgment. So too is a discussion of a proposal floated as a possibility in Mr Williams' evidence, that the Claimant and her family might move to another borough, in which event the Defendant would pay travel expenses to enable M can continue his education in Lambeth. No such proposal has yet been made by the Defendant; it is in any event not clear whether M's education, pursuant to his EHCP, could continue in Lambeth if he resided in another borough.

Anonymity

82. No application for the names of the Claimant or either of her children to be anonymised was made in the Claim Form. Nor was there any such application prior to the trial, although I understand from Counsel that the Claimant's children were not referred to by their full names at the hearing on 11th July 2019. Before me, Ms Davies made an oral application for the names of the Claimant and of her children to be anonymised. This was, she submitted, in order to protect the Article 8 ECHR rights of the children, in particular M, a child of five who was not himself a party to the proceedings and whose conditions would necessarily be discussed in some detail in this judgment. Ms Parsons did not oppose the application.

83. I grant the application for the Claimant and her children to be anonymised in this case and have accordingly given this judgment using the anonymised form. In my judgment, the interests of the Claimant's children, and in particular M, are such that it is appropriate to refer to them in this way. It is therefore necessary to anonymise the name of the Claimant, also. There is no general public interest in publishing the names of the Claimant and her children which outweighs the Article 8 ECHR rights of the children. Anonymising them does not affect public understanding of this judgment. Making their names public, in the context of the necessary discussion in this judgment of M's condition and behaviour and the arrangements for his education and care (in which M plainly has a reasonable expectation of privacy) would in my view result in a breach of the Article 8 ECHR rights of both M and L. I only note that the application for anonymity ought to have been made far earlier than it was.

Conclusion

84. For the reasons given above, this claim succeeds on a limited basis. The Defendant's actions in relation to the provision of accommodation to the Claimant and her children under section 95 of the 1999 Act have been, and continue to be, unlawful. The Defendant has been, and continues to be, in breach of her duty under section 55 of the 2009 Act. I propose to make declarations to that effect, insofar as that unlawfulness has continuing consequences for the Claimant and her children.