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Case No: AC-2023-LON-002048; CO/2459/2023

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/11/2023

Before :

MR JUSTICE CHAMBERLAIN

- -

Between :

THE KING
on the application of
KENT COUNTY COUNCIL

Claimant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

-and-

(1) BRIGHTON AND HOVE CITY COUNCIL
(2) EAST SUSSEX COUNTY COUNCIL

Interested Parties

Hugh Southey KC, Sarah Hannett KC and Azeem Suterwalla (instructed by Bevan Brittan LLP) for Kent County Council

Stephanie Harrison KC and Ollie Persey (instructed by Bhatt Murphy Solicitors) for Brighton and Hove City Council and East Sussex County Council

Deok Joo Rhee KC, Jack Anderson and Anna Dannreuther (instructed by Government Legal Department) for the Secretary of State for the Home Department and the Secretary of State for Education

Hearing date: 10th October 2023

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Approved Judgment

This judgment was handed down remotely at 11.30am on 28th November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE CHAMBERLAIN

Mr Justice Chamberlain:

Introduction

1 This is my third substantive judgment concerning unaccompanied asylum-seeking children ("UAS children") entering the United Kingdom in Kent on small boats. There are three separate claims for judicial review. Their targets include a protocol agreed in September 2021 between Kent County Council ("Kent CC") and the Home Secretary setting out how Kent CC was to deal with UAS children ("the Kent Protocol"), a protocol setting out the procedure for the transfer of responsibility for UAS children from one local authority to another under the National Transfer Scheme ("the NTS Protocol") and a series of decisions made by the Home Secretary in relation to the design and operation of the NTS.

2 On 27 July 2023, after a hearing on 20 and 21 July 2023, I handed down a judgment on a series of preliminary issues arising in these claims: [2023] EWHC 1953 (Admin). I concluded that Kent CC was acting unlawfully, in breach of its duties under the Children Act 1989 ("CA 1989"), by failing to accommodate and look after all UAS children when notified of their arrival by the Home Office and by ceasing to accept responsibility for some newly arriving UAS children, while continuing to accept other children into its care. I also concluded that the Home Secretary was acting unlawfully by agreeing the Kent Protocol, which capped the numbers of UAS children for whom Kent CC would accept responsibility; by arranging transfers (purportedly under s. 69-73 of the Immigration Act 2016 ("IA 2016")) other than in accordance with arrangements made between local authorities; and (from December 2021 at the latest) by systematically and routinely accommodating UAS children in hotels, outside the care system.

3 Having heard submissions from the parties about relief, I made an order quashing the Kent Protocol in its entirety and the NTS Protocol insofar as it permitted the Home Secretary to make arrangements for the transfer of responsibility for UAS children without the participation of the entry authority. However, I suspended the effect of both these orders under s. 29A(1)(a) of the Senior Courts Act 1981 ("SCA 1981") for three weeks, until 18 August 2023, and set a further hearing for 17 August 2023 to consider whether to grant any further relief.

4 In a second judgment handed down on 1 September 2023, I explained why I had granted that relief and why, at the hearing on 17 August 2023, I extended for a short time the suspension of the order quashing in part the NTS Protocol, granted mandatory orders against Kent CC and the Home Secretary and set a further hearing to consider whether to grant additional relief: [2023] EWHC 2199 (Admin).

5 The second relief hearing took place on 15 September 2023. I granted a mandatory order requiring the Home Secretary to take all possible steps to transfer UAS children in hotels at that date into the care of a local authority by 22 September 2023 and, in respect of children placed in a hotel after that date, all possible steps to transfer each such child into the care of a local authority within 5 working days.

6 As I have explained, the first stage of this litigation, which led to the first judgment, involved the resolution of certain preliminary issues of law arising in all three judicial

review claims. As a result of a series of procedural directions, for the most part agreed, the next stage concerned a series of issues arising in Kent CC's claim for judicial review, in particular Kent CC's allegations that the Home Secretary has acted and is acting unlawfully in the design and operation of the NTS. Those issues were argued at a hearing on 10 October 2023. This judgment relates to those issues. It was agreed that there would be a further hearing to consider relief between two and four weeks after this judgment was handed down. That hearing has been fixed for 15 December 2023.

The evidential position at the time of the hearing on 10 October 2023

7 On 10 October 2023, I was told that there were 19 UAS children currently being accommodated in hotels, all within Kent CC's area; and the UAS children in Kent CC's care were all in single occupancy rooms. I was also given some more detailed data about the numbers of UAS children arriving and the average delays before transfer. There was a dispute about how this data was presented and, accordingly, about the extent to which the position had improved. I do not consider it necessary to resolve that dispute. Whether Kent CC or the Home Secretary is correct, the position as at 10 October 2023 represented a considerable improvement on the position at the previous hearing, which itself was considerably better than the position at the time of my first judgment. It was not possible to predict whether the position would improve further or deteriorate. All parties agreed that this would depend in part upon the weather, which would dictate how many boats would be able to cross the Channel, as well as on efforts by Kent CC to increase capacity and by the Home Secretary to increase the speed of transfers.

The evidence and submissions

Kent CC

8 Hugh Southey KC for Kent CC drew attention to the evolution of the NTS Protocol. In version 1, which applied from 1 July 2016, its stated aim was to ensure a fair distribution of UAS children across all local authorities and regions in the UK and to ensure that appropriate services were available to them. Local authorities where UAS children accounted for 0.07% or more of the total child population were able to arrange transfers to local authorities within the same region on a voluntary basis.

9 Version 2 applied from 15 March 2018 and allowed children to be transferred to another region (including the devolved nations) where UAS children made up less than 0.07% of the total child population where "good reason" was shown. Kent CC was treated as a region on its own.

10 The numbers of UAS children arriving in Kent rose steeply over the course of 2019. Between 1 January and 31 May 2020, Kent CC was unable to transfer responsibility for any UAS children, despite multiple requests. In the period from January to August 2020, 448 UAS children arrived in Kent, but only 69 were transferred out. As noted in my first judgment, Kent CC ceased accepting newly arriving UAS children into its care in August 2020.

11 In the autumn of 2020, the Home Secretary and Education Secretary undertook a consultation on proposed changes to the NTS. There was a delay in publishing the Government's response. Kent CC sent a pre-action letter threatening judicial review of

the Government's failure to mandate compliance with the NTS on 3 June 2021. In the same month, the Government announced changes to the NTS, including a national rota to determine which authority would be the "receiving authority" and a new weighting system to take account of pressure on local services. At this stage, however, the NTS remained voluntary.

12 On 14 June 2021, Kent CC again announced that it would no longer accept newly arriving UAS children into its care and the Home Office began to commission hotels to accommodate them. In October 2021, the Home Secretary and Education Secretary approved a mandatory scheme. Local authorities would be directed to comply with it. It was anticipated that this would eliminate the need to use hotels to accommodate UAS children. (The directions were made in December 2021 and February 2022.)

13 Meanwhile, version 3 of the NTS was published on 14 December 2021. It introduced a time limit for transfers of 10 working days from referral and stressed the importance of ensuring that transfers take place "without delay". There was an "escalation process" for local authorities that did not comply. This involved the Home Office sending a letter to the receiving local authority if it had not accepted a transfer 20 working days after the entry local authority first made its request. The letter asked for confirmation that the transfer would be completed within a further 2 working days. If that did not work, the Home Office might decide to escalate the matter internally. This involved a number of steps, leading to the possibility of a recommendation for judicial review proceedings to be brought against the recalcitrant local authority. Kent CC says that, in practice, the child was by this time invariably placed with another local authority.

14 Version 4 was promulgated on 24 August 2022. It reduced the 10 working day transfer deadline to 5 working days for children who were not in the care of a local authority (i.e. those who were being accommodated by the Home Secretary in hotels) and increased the threshold for transfers from 0.07% to 0.1% of the total child population. It also increased the funding available to local authorities which received a child within 5 working days.

15 Version 5 was published on 28 June 2023, but it contained no significant changes. Version 6 was published on 17 August 2023, following my first judgment. The main change was to make clear, in line with the legal conclusions in my judgment, that the arrangements for transfer must be made by the entry authority (and not the Home Office).

16 Mr Southey observes that changes to the NTS appear to have been responses to particular problems. At no stage has the Home Secretary sought to identify the number of UAS children who need to be transferred if all children are to be provided with support under the CA 1989 in a safe manner or what steps need to be taken to achieve that number of transfers. The rota seems to have been designed on the basis of 652 transfers per year, but in recent years the numbers requiring transfer have exceeded this figure. For example, a ministerial briefing on 10 July 2023 shows that funding was cut for UAS child placements for affordability reasons without any assessment of the sums needed to be paid to local authorities to ensure that they are not out of pocket.

17 Mr Southey summarised the current position on the ground as follows:

(a) Kent CC has repeatedly made clear that there comes a point where it cannot continue safely to accommodate and support children in compliance with its duties under the CA 1989. The Home Secretary has never sought to gainsay this judgement. The Education Secretary decided not to take action to direct Kent CC to comply with its statutory duty. It can be assumed that this was because the Home Secretary judged that Kent CC was acting reasonably.

(b) Kent CC's evidence filed for the purpose of the relief hearings following my first judgment shows that it is taking all reasonable steps to increase its capacity to accommodate and look after all UAS children. Despite these steps, between 27 July and 15 September 2023, there were 165 UAS children for whom Kent CC had been unable to find a safe and suitable placement.

(c) Kent CC's evidence for the hearing on 15 September 2023 showed that it had not so far been unable to accommodate a UAS child (or any child) because of funding constraints. The issue has been capacity.

(d) The additional capacity which it has been able to find has been short-term only. Longer-term solutions are dependent on funding and other support from central Government.

(e) There is apparently no plan to commence ss. 16 and 17 of the Illegal Migration Act 2023 ("the 2023 Act"), which empower the Home Secretary to provide accommodation for UAS children in England and to direct local authorities in England to accept transfers directly from such accommodation.

18 As to the operation of the NTS, Mr Southey submitted as follows:

(a) As at May 2022, the Home Office's own analysis shows that performance against the 10 working day target was highly variable and further work was required to support less experienced regions achieve the pace being achieved in London and the South East.

(b) Ministers wrote to local authorities in August 2022 making clear how much pressure the NTS was under.

(c) Attached to a ministerial submission dated 17 November 2022, there was analysis which showed that only 46% of transfers from hotel accommodation were taking place within 5 working days, but no similar analysis was undertaken of what proportion of transfers from one local authority to another were taking place within 10 working days.

(d) Analysis covering the period April to September 2023 showed that: as of 7 September 2023, the Home Office had escalated 447 individual NTS referrals to receiving local authorities; a total of 98 local authorities were subject to the escalation process; in escalation cases, transfers took place within 10 working days of the most recent escalation letter in 39% of cases and within 20 working days of the most recent escalation letter in 61% of cases.

(e) Average transfer times for transfers from Kent CC to another local authority had consistently been longer than 10 working days – between 23 November 2021 and

5 September 2023, it was 13.97 days (16.30 days for under 16s); between 1 January 20 and 5 September 2023, it was 10.83 days (13.67 days for under 16s).

(f) These figures show routine non-compliance (with average transfer times exceeding the maximum transfer time stipulated in the NTS). Moreover, insofar as they show some improvement, they must be treated with caution. They reflect the action taken by Kent CC since my first judgment to effect transfers outside the NTS. Moreover, even in August and September 2023, only 78% and 71% of NTS transfers were completed within 10 working days; and the figures were substantially worse before that. In any event, the figures do not reveal by how much and in how many cases the 10 working day time limit was significantly exceeded and whether there are repeat offender local authorities.

(g) No analysis appears to have been undertaken as to whether enforcement against recalcitrant local authorities would remedy wide-scale non-compliance.

(h) The Home Secretary's evidence for these proceedings appears to evidence a policy decision not to take legal action to ensure that local authorities comply with the time limits.

19 Mr Southey's grounds of challenge to the decisions taken in the operation of the NTS can be grouped under five heads.

(a) The design and/or operation of the NTS is inconsistent with the aims and objects of s. 72 IA 2016, contrary to the principle in *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997. The NTS frustrates the statutory purpose of the IA 2016. It also frustrates the statutory purpose of CA 89 by preventing all children enjoying the support they are entitled to.

(b) The Home Secretary is failing to operate the NTS in accordance with its express terms, which mandate time limits for the transfer of UAS children from one local authority to another.

(c) The Home Secretary is in breach of the duties imposed by s. 55 of the Borders, Citizenship and Immigration Act 2009 ("BCIA 2009") in that the best interests of children have not been a consideration, as required, in the design and/or operation of the NTS.

(d) By continuing to operate hotels in KCC's area, the Home Secretary has unlawfully frustrated KCC's compliance with its statutory duty under s. 20 CA 89 to accommodate and look after all UAS children presenting in its area.

(e) The design and/or operation of the NTS and/or the use of hotels by the Home Secretary in Kent CC's area is irrational.

20 Kent CC seeks a declaration that the Home Secretary is acting unlawfully in these ways and a mandatory order requiring the Home Secretary to implement an effective NTS forthwith.

Brighton & Hove CC and East Sussex CC

21 Stephanie Harrison KC for Brighton & Hove City Counsel ("Brighton & Hove CC") and East Sussex County Council ("East Sussex CC") supported Kent CC's claim. She emphasised that the claim had been necessary because the Home Secretary had since the summer of 2021 been using hotels as an alternative to ensuring the proper and effective functioning of the NTS. Ministerial submissions in February and March 2023 indicated consideration had been given to an exit strategy, but this had been rejected. Instead, the use of hotels had become embedded in the operation of the system.

22 The Home Secretary's reliance on the average transfer times was apt to mislead. It was necessary to consider more granular evidence. Brighton & Hove CC's and East Sussex CC's evidence reveals the true extent of the delays that can occur. Many children (including under 16s) were remaining in hotels for prolonged periods.

23 Ms Harrison relied on the judgment of Julian Knowles J in *R (DMA) v Secretary of State for the Home Department* [2020] EWHC 3416 (Admin), [2021] 1 WLR 2374 and of the Court of Appeal in *R (Johnson) v Secretary of State for Work and Pensions* [2020] EWCA Civ 778, [2020] PTSR 1872 in support of the proposition that the operation of the NTS was unlawful.

The Home Secretary

24 Deok Joo Rhee KC for the Home Secretary submitted that the court should focus on the present position, rather than seeking to attribute blame for historic unlawfulness. At the time of the hearing on 10 October 2023, only 19 UAS children were being accommodated in hotels. There had been a significant improvement since the first judgment, for which the Home Secretary and Education Secretary were both grateful. Whilst intensive work remained to be done – in particular by Kent CC and the Home Secretary with a view to the conclusion of a mutually acceptable financial settlement following the quashing of the Kent Protocol – a significant cause of the previous difficulties had been resolved by my first judgment.

25 As to the present position:

(a) Whereas before Kent CC had accepted only 120 UAS children above its 0.1% threshold, it had since increased its capacity so that as at 21 September 2023 it had 759 UAS children in its care (including the 346 children in its 0.1% cohort).

(b) Kent CC had, however, continued to decline to accept some UAS children, including 14 since the last relief hearing on 15 September 2023.

(c) The Home Secretary had been able to effect an overall reduction in the number of UAS children being accommodated in hotels. Only 2 hotels were now being used, both in Kent. There was a striking contrast between the position in March 2023 (when it was projected that 12 hotels would be needed by October 2023) and the current much reduced use of hotels.

(d) The NTS has undergone notable improvements, so that: (i) from January to 5 September 2023 (and especially since the date of my first judgment), transfers have broadly kept pace with referrals; (ii) average transfer times are now 10.83 days (for transfers from Kent CC to a local authority) and 8.27 days (for transfers from hotels).

(e) Although it is true that these are average transfer times, and there are outliers, care must be taken before attributing delays to the NTS, rather than to difficulties in securing placements in individual cases, having regard to the child's best interests. Some of the delays are attributable to procedures insisted upon by Kent CC.

26 Ms Rhee submitted that these improvements were attributable to combined action by Kent CC and the Home Secretary and Education Secretary. So far as the Secretaries of State are concerned, this has included the continuation of incentivised funding at the rate of £6,000 per UAS child for authorities able to accept transfers within 5 working days and more proactive engagement with receiving authorities, including use of the NTS escalation procedure. Kent CC has also continued to receive significant financial support. Some of the improvements were attributable to action by Kent CC since the first judgment, but such action is to be expected, given that Kent CC was found to be in breach of its non-derogable duties. The court should not proceed on the footing that Kent CC cannot safely accept UAS children just because it so declares.

27 As to the evolution of the NTS, Ms Rhee submitted as follows:

(a) The threshold of 0.07% of a local authority's total child population was never a target. It has always been open to local authorities to exceed this figure.

(b) The NTS Protocol has always stressed that the child's best interests are to be a primary consideration.

(c) The NTS Protocol was modified in version 2 to allow transfers to another region which had not met the 0.07% threshold.

(d) When in August 2020 Kent CC announced its unwillingness to accept newly arriving UAS children into its care, the Home Secretary does not accept that it was "forced" or legally permitted to do so.

(e) Between 28 August and 30 September 2020, the Home Secretary and Education Secretary undertook a consultation on further changes to the NTS. This elicited more than 200 responses. In response, on 10 June 2021, a package of reforms was introduced, including a new national rota, the adoption of a new weighting system for transfers, a 12.5% uplift in the contribution made by the Home Office to the costs of former asylum-seeker care leavers and other increases in funding, including the allocation of £3 million to an exceptional costs fund to support local authorities experiencing exceptional costs.

(f) The decision to commission hotels followed Kent CC's unlawful decision, in June 2021, to cease accepting newly arriving UAS children. The Home Secretary had no option but to "stand up" hotels. It was against this background that the Home Secretary entered into the Kent Protocol.

(g) The changes to the NTS bore fruit – as evidenced by the increase in the number of local authorities receiving transfers in the second half of 2021 as compared to the first half of that year.

(h) In December 2021, the Home Secretary then promulgated version 3. Compliance with the NTS was made mandatory in December 2021 (for local authorities which had not made representations opposing mandation) and February 2022 (for the remainder).

(i) In April 2022, the Home Secretary developed a Standard Operating Procedure providing for the monitoring of compliance with the timescales set out in the NTS Protocol.

(j) On 24 August 2022, a Home Office Minister wrote to local authority leaders announcing further changes to the NTS and increased funding for local authorities which accepted a transfer within 5 working days. The 10 working day transfer deadline was reduced to 5 working days for children not in the care of a local authority. The threshold of 0.07% of the total child population was increased to 0.1%.

(k) On 24 October 2022, the Minister was briefed on the steps being taken to reduce the use of hotels.

(l) On 16 December 2022, the Minister announced an additional funding pilot for local authorities to accept responsibility for UAS children.

(m) On 28 June 2023, version 5 of the NTS Protocol was published.

(n) On 17 August 2023, version 6 was published, making clear that the entry local authority must refer children into the NTS, providing further guidance on transfers outside the rota, amending the escalation procedure, adding an additional tool in the form of pre-engagement ahead of NTS transfer times and clarifying the potential for judicial review to be used against recalcitrant local authorities.

28 Ms Rhee drew attention to a number of features in the current version of the NTS Protocol (version 6), including: (i) the express statement that "…the best interests of unaccompanied children being considered for transfer must always be a primary consideration throughout the transfer process"; (ii) the express statement that the "threshold" of 0.1% of a local authority's general child population is not a "cut off" point for accepting responsibility for UAS children and the clear indication that local authorities retain the flexibility to agree transfers outside of the rota when that is in the best interests of the child concerned; (iii) the express reference to the escalation procedure and the enforceability of the NTS by proceedings for judicial review.

29 As to the grounds of challenge, Ms Rhee submitted that:

(a) The NTS clearly promotes the objects of ss. 69-72 IA 2016. It seeks to alleviate the burden on authorities such as Kent CC and ensure a more even distribution of this burden among mandated local authorities. The statutory aim is <u>not</u> to ensure that no authority looks after no more UAS children than 0.1% of its total child population. Nor is it to ensure that every local authority looks after that number of UAS children. That being so, there is no basis for the suggestion that the NTS operates so as to frustrate the purpose of the IA 2016. There is no breach of the *Padfield* principle simply because powers exercised to further the purpose of a

statute could have been exercised better: *R (Sathanantham) v Home Secretary* [2016] EWHC 1781 (Admin), [2016] 4 WLR 128. As to design, the NTS is not restricted in any way because it is based on transfers of 652 per year. Where that number is exceeded, the transfers simply move through "transfer cycles" more quickly. The regional system is not an impediment to the effective operation of the NTS and it is difficult to see what other system would be more effective. As to enforcement, Parliament has not provided any specific enforcement mechanism. The Home Secretary has taken proactive steps to encourage compliance (for example, see the correspondence with Cornwall Council in June 2023) and has made clear that judicial review is in principle available in appropriate cases. There has been no policy decision not to take legal action. That said, it was entirely reasonable to conclude that direction, coupled with incentives and negotiation are more likely to be effective.

(b) Kent CC has failed to identify any requirement in the NTS Protocol with which the Home Secretary has failed to comply.

(c) The best interests of UAS children underpin the NTS. That is why Parliament provided that transfers can only take place pursuant to arrangements between local authorities, each of which is required to take into account the best interests of the particular child under consideration. The Home Secretary has plainly had regard to the best interests of UAS children in designing and operating the NTS. Kent CC is wrong to suggest that fulfilling the s. 55 BCIA duty required the Home Secretary to undertake an assessment of the number of children needing to be transferred and the consequences of a failure to hit that number. The number of arrivals is inherently uncertain, but the Home Secretary has taken measures to increase the number of transfers in response to the sustained increase in numbers of arrivals. The use of hotels is a consequence of Kent CC's failure to discharge its statutory duties.

(d) It will rarely be proper to infer that a public authority has used its powers to frustrate the exercise of functions by another authority. No such inference is appropriate here. The use of hotels in Kent is obviously justified, because Kent is typically the entry point for UAS children and accommodation and support is required immediately.

(e) In order to conclude that the design or operation of the NTS was irrational the court would have to be satisfied that the Home Secretary had taken decisions that no reasonable Minister could have taken. In circumstances where Parliament has conferred a broad discretion in relation to the design and operation of the scheme, and given the Home Secretary's institutional competence in this regard, the court should be slow to conclude that the high threshold has been reached.

Discussion

The proper focus of this claim – past or present?

30 In *R (AA) v National Health Service Commissioning Board* [2023] EWHC 43, [2023] PTSR 608, I said this at [100]:

> "…it is important to bear in mind that judicial review remedies are, in general, forward-looking. They are appropriate where the public authority cannot or will not remedy the breach itself. As Woolf LJ emphasised in [*R v Inner London Education Authority, ex p. Ali* (1990) 2 Admin LR 822], the function of judicial review is not, generally, to conduct inquests into whether an authority is culpable for an admittedly unsatisfactory situation."

31 I accordingly accept Ms Rhee's submission that the court's focus should be on the question whether the Home Secretary is *now* (or was at 10 October 2023) complying with the duties imposed by the law in relation to the NTS, rather than whether and to what extent there had been such compliance in the past. However, in some situations it may be difficult to form a view about the legality of a defendant's present conduct without at least some understanding of the legality of past conduct. This is one such situation. To decide what steps the law requires the Home Secretary to take in the light of my judgment of 27 July 2023, and whether those steps have been taken, it is necessary to reach at least some outline conclusions about what the law required beforehand, even if those conclusions are unlikely themselves to ground any forward-looking relief.

The first four grounds of challenge

32 I can deal relatively quickly with the first four grounds of challenge. In my judgment, none of them is well-founded, whether one focuses on the Home Secretary's conduct prior to my first judgment on 27 July 2023 or subsequent conduct.

33 As to the first, the *Padfield* principle is that a statutory power must be exercised to promote, and not to frustrate, the policy and objects of the statute which conferred them; and these are to be determined by construction of the statute: see *Padfield* at 1030 (Lord Reid). *Padfield* was important because it reasserted that, even where Parliament confers a power rather than a duty to act, a failure to exercise the power may be unlawful if it frustrates the intention of Parliament: see *M v Scottish Ministers* [2012] UKSC 58, [2012] 1 WLR 3386, [42], [46] and [47] (Lord Reed). In this case, however, the complaint is not that the statutory power has not been exercised. It is about *how* that power has been exercised. In such a case, the *Padfield* principle imposes constraints on the decision-maker's purpose, not on the result achieved. The principle has no application where the holder of a statutory discretion is "trying but failing" to achieve the statutory purpose: see *R (Sathanantham) v Secretary of State for the Home Department* [2016] EWHC 1781 (Admin), [2016] 4 WLR 128, [67] (Edis J).

34 In my judgment, that is the position here. All the evidence indicates that the Home Secretary's decisions in relation to the NTS were aimed at reducing the burden on Kent CC and distributing that burden equitably among other local authorities. The real complaint is that the Home Secretary failed properly to grasp the scale of the problem or the extent of her own responsibility for it, and, accordingly, that what was done was not enough. Even if that criticism is correct, it does not give rise to a breach of the *Padfield* principle. Nothing in the judgment of Knowles J in *DMA* suggests the contrary. That case expressly approved the reasoning in *Sathanantham*: see at [202]. At [204], Knowles J said that a decision to continue a failing system could engage the *Padfield* principle if it amounted to a "deliberate decision to delay". Even on Kent CC's

case, however, that is not an apt characterisation of the Home Secretary's decision-making in relation to the NTS. As noted above, the complaint is that the Home Secretary's actions were ineffective, not that they amounted to a deliberate decision to avoid taking action to alleviate the burden on Kent CC.

35 The second ground of challenge adds little to the first. It does not matter whether the NTS Protocol is characterised as a "public law instrument", as opposed to a policy or guidance document. Either way, there is nothing in its terms with which the Home Secretary's conduct is inconsistent. The NTS Protocol does not prevent local authorities from engaging directly with one another pursuant to s. 27 CA 1989 – as they in fact have done since my first judgment. Nor is there anything in the Home Secretary's conduct which is inconsistent with the decision to mandate compliance with the scheme. In this respect, the real complaint is that the Home Secretary has failed to *enforce* compliance, not that anything was done which in principle undermines or frustrates the obligation to comply.

36 As to the third ground of challenge, the obligation imposed by s. 55 BCIA is an obligation to make arrangements for ensuring that immigration functions *(inter alia)* are discharged "having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom". That obligation is not breached simply because (in the view of the court) the relevant functions could have been exercised in a way which *better* safeguards and promotes the welfare of children. The question for the court is whether the Home Secretary made arrangements for ensuring that, when the functions were exercised, the persons exercising them had regard to the specified need. In this case, the documents recording the Home Secretary's decision-making in relation to the NTS shows that the relevant decision-makers thought that what they were doing was sufficient to safeguard and promote the welfare of children. There is, therefore, no evidence to support a breach of s. 55 BCIA.

37 The fourth ground of challenge is that the Home Secretary's powers have been exercised in such a way as to frustrate the discharge of Kent CC's functions under s. 20 CA 1989. For much the same reasons as I have given in relation to the first ground of challenge, I do not consider that Kent CC has shown that the Home Secretary's decision-making in relation to the NTS has had the effect of frustrating the discharge of Kent CC's s. 20 CA 1989 duties.

Rationality

38 The fifth ground of challenge is that the Home Secretary's powers have been exercised irrationally.

Two aspects of irrationality

39 At the hearing, Mr Southey drew attention to *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin), [2019] 1 WLR 1649, in which Leggatt LJ (with whom Carr J agreed) distinguished two aspects of rationality. At [98], he said this:

> "This legal basis for judicial review has two aspects. The first is concerned with whether the decision under review is capable of being justified or whether in the classic Wednesbury formulation it is 'so unreasonable that no reasonable authority

> could ever have come to it': see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223, 233—234. Another, simpler formulation of the test which avoids tautology is whether the decision is outside the range of reasonable decisions open to the decision maker: see e.g. *Boddington v British Transport Police* [1999] 2 AC 143, 175, per Lord Steyn. The second aspect of irrationality/unreasonableness is concerned with the process by which the decision was reached. A decision may be challenged on the basis that there is a demonstrable flaw in the reasoning which led to it – for example, that significant reliance was placed on an irrelevant consideration, or that there was no evidence to support an important step in the reasoning, or that the reasoning involved a serious logical or methodological error. Factual error, although it has been recognised as a separate principle, can also be regarded as an example of flawed reasoning – the test being whether a mistake as to a fact which was uncontentious and objectively verifiable played a material part in the decision-maker's reasoning: see *E v Secretary of State for the Home Department* [2004] QB 1044."

40 During the hearing, I suggested to counsel that it might be said that, at least prior to my first judgment on 27 July 2023, the Home Secretary's decision-making in relation to the NTS was vitiated by the second kind of irrationality identified here – viz. process irrationality – because there was a failure to take into account the Home Secretary's own responsibility for Kent CC's unlawful failure to discharge its s. 20 CA 1989 functions in respect of every UAS child and the unlawfulness of the systematic and routine use of hotels; and these were matters which, as a matter of law, had to be taken into account.

The relevance of the conclusions in my first judgment

41 The arguments of Mr Southey for Kent CC and Ms Rhee for the Home Secretary at times bore a striking similarity to those advanced at the hearing on 20 and 21 July 2023. They induced a sense of *déjà vu*. Mr Southey's theme was that Kent CC had been "forced" into the position of declining to accept newly arriving UAS children because of the Home Secretary's failure to operate the NTS in such a way that transfers kept pace with arrivals; and only the Home Secretary had the levers needed to ameliorate the situation. The *leitmotif* of Ms Rhee's submissions was that the Home Secretary had resorted to the use of hotels because of Kent CC's unlawful refusal to discharge its statutory responsibility under the CA 1989 to accommodate and look after every newly arriving UAS child; and in the face of that refusal she had done her best to operate the NTS in such a way as to assist Kent CC as much as possible, introducing reasonable modifications from time to time as circumstances changed.

42 These positions would be perfectly understandable if I had not already determined in my first judgment that, up to 27 July 2023, both Kent CC and the Home Secretary had been acting unlawfully. The unlawfulness of the Kent Protocol was, as I held, attributable to both parties: see [168]-[169] of my first judgment. The use of hotels had become systematic, routine and entrenched so that they functioned as a substitute for

local authority care from December 2021 at the latest: see [201]-[205] of my first judgment. From this date, the Home Secretary was acting unlawfully. The issues now before me focus exclusively on the conduct of the Home Secretary. They fall to be determined against this background.

43 There are two consequences. First, I should not assume that, whenever Kent CC said that it could not safely accept any more UAS children, that was always so. Not only was Kent CC acting unlawfully when it made those declarations; in addition, the vast increase in the number of UAS children it has taken into in its care since 27 July 2023 suggests that it could almost certainly have accepted at least some additional UAS children at an earlier stage (though not on the basis of the funding arrangements in the Kent Protocol).

44 Second, however, it would not be fair for the Home Secretary to treat Kent CC's breach of duty as a fixed feature of the legal landscape when she herself was party to it (by agreeing the Kent Protocol) and indeed enabled it (by using hotels in a systematic and routine manner). As I said at [207]:

> "…the Secretaries of State have a range of options open to ensure that UAS children are accommodated and looked after as envisaged by Parliament. These include: directing Kent to comply with its statutory duty under s. 84 CA 1989 (a power which can be exercised by the Education Secretary); increasing the funding made available to Kent CC with a view to lifting the cap on the number of UAS children the RSCS can accept; increasing the financial incentives available to other local authorities to encourage them to accept transfers from the RSCS more timeously; making more robust the arrangements for dispute resolution in the NTS Protocol (for example, by introducing a binding adjudication mechanism); and bringing judicial review proceedings to enforce the terms of the NTS. It is for the Home Secretary to decide whether to take any of these measures, or others, and if so in what combination."

The context relevant to the assessment of process rationality in this case

45 It is a matter of fact that the Education Secretary decided not to direct Kent CC to comply with its statutory duty. Mr Southey says that this is because it was concluded that it would be difficult or impossible to show that Kent CC was acting unreasonably, and that being so the power to make a direction did not arise. There is some evidence from which an inference to that effect might be drawn. However, I do not need to make any finding about this, because the reasons for the decision not to make a direction do not matter. Whatever the reasons, having decided not to seek to direct Kent CC to comply with its duty, the Home Secretary had to find another way of bringing to an end the unlawful situation for which she herself was partly responsible.

46 One way would have been to provide significantly increased funding to Kent CC with a view to increasing the number of UAS children it could look after. That was not done. By agreeing to the Kent Protocol, and the cap on numbers inherent in it, the Home Secretary acquiesced in Kent CC's breach of duty. The only mechanism left to the Home Secretary to remedy the unlawful situation for which she was herself partly

responsible was therefore the NTS. As Sales LJ put it in *R (London Criminal Courts Solicitors Association) v Lord Chancellor* [2015] EWCA Civ 230, [2016] 3 All ER 296 at [13]:

> "…even if a decision-maker starting with a blank canvas might have a wide discretion how to proceed in order to achieve the result required, he might proceed in stages and gradually structure his consideration of how to move forward. A decision-maker who structured his approach in this way might adopt criteria as a guide for himself. If he does so, the rationality of his decision-making might in principle be tested by reference to the rationality of his assessment whether his own chosen criteria have been satisfied. The rationality of steps in his reasoning could in this manner be assessed in a more precise and determinate way."

47 I appreciate, of course, that when the matters to which a decision-maker must have regard are not prescribed by statute, it is for the decision-maker to decide what is and is not relevant, subject only to rationality review: see *R (Friends of the Earth) v Secretary of State for Transport* [2020] UKSC 52, [2021] PTSR 190, [118]-[119] (Lord Hodge and Lord Sales). But the rider is important. There will be some considerations which, as a matter of rationality, *must* be taken into account.

48 In this case, there were, in my judgment, two key matters in this category: (i) that the Home Secretary was (through her agreement to the Kent Protocol) partly responsible for Kent CC's unlawful failure to discharge its s. 20 CA 1989 function in respect of every UAS child; and (ii) that the Home Secretary's use of hotels had by December 2021 become systematic, routine and therefore unlawful. These facts were centrally relevant to the exercise of the Home Secretary's discretionary powers in relation to the NTS. In my judgment, no exercise of those powers which failed to have regard to those facts could be lawful.

The legality of the Home Secretary's decision-making in relation to the NTS from December 2021 to 27 July 2023

49 It would be disproportionate to deconstruct and examine each and every decision taken by the Home Secretary in relation to the NTS during the period December 2021 to 27 July 2023. However, it is possible to draw three general conclusions.

50 First, I do not accept that the Home Secretary was at any stage or is now obliged by law to take, or even threaten, enforcement action in the form of judicial review proceedings against recalcitrant local authorities. Deciding whether and if so when to take or threaten such action is quintessentially a question of judgment, best taken by Ministers on the advice of officials who have been negotiating with the local authorities concerned and thus have a feel for the likely reaction of those authorities. Experience suggests that, while in some situations taking or threatening legal action may produce results, in others it may lead to an entrenchment of positions and the breakdown of cooperation. The need to avoid the latter consequence is of particular importance given that arrangements for transfer depend on a good faith assessment of what is in the best interests of the individual child both by the entry authority and by the receiving authority.

51 Second, however, some of Kent CC's, Brighton & Hove CC's and East Sussex CC's criticisms of the pace and urgency of the Home Secretary's decision-making process in relation to the NTS are well founded. There were long delays between June 2021 (when limited changes to version 2 were announced) and December 2021 (when version 3 was published and the first group of local authorities were mandated to comply with the NTS). In May 2022, the Home Office's own analysis showed that performance against the 10 working day time limit was very variable, but it was a further three months before version 4 was published in August 2022. Despite further analyses showing patchy performance, at the start of 2023, there was a deliberate decision to keep using hotels for the remainder of the year; and all the evidence suggests that the use of hotels would have continued as a matter of routine policy had it not been for my first judgment. It is difficult to avoid the conclusion that the slow pace of decision-making, and the view that it was acceptable to continue to use hotels, was affected by the Home Secretary's unlawful failure to take into account, or indeed recognise, her own responsibility for the unlawful situation which had occurred and, thus, her own pressing responsibility to remedy it.

52 Third, Kent CC was right to criticise the lack of any proper analysis of the changes to the NTS which were required to eliminate the use of hotels. I accept that it is for the Home Secretary to decide what analysis to undertake, subject only to rationality review: see *R (Balajigari) v Secretary of State for the Home Department* [2019] EWCA Civ 673, [2019] 1 WLR 4647, [70]. But the decision about what analysis should be undertaken had to be taken on the basis of a proper understanding of the law. The approach taken was to make minor modifications at intervals of months or years, and after extensive consultation and long consideration of the responses, all on the premise that the use of hotels might still be required if Kent CC continued to act in breach of its CA 1989 duties. That approach may have been an appropriate response to a simple breach by another public authority of its legal obligations, particularly where the breach is of uncertain duration. It was not an appropriate response to a sustained and long-term breach for which the Home Secretary was partly responsible and in which she had acquiesced. The fact that the Home Secretary was enabling this breach by routinely providing hotel accommodation as a substitute for local authority care made it legally necessary to devise a plan directed at using the NTS to *eliminate* the use of hotels as soon as possible. No such plan was formulated. In this respect, the Home Secretary's decision-making in relation to the NTS was unlawful in the period December 2021 to 27 July 2023.

The current position

53 Since my first judgment, the two facts to which the Home Secretary previously failed to have regard (see para. 48 above) have been, or should have been, obvious. Since 27 July 2023, there have been a number of improvements to the operation of the NTS. These, combined with the impressive work that has been done collaboratively by Kent CC and the Home Secretary to increase the capacity of Kent CC's children's services for UAS children, appear to have effected a significant reduction in the numbers of children being accommodated in hotels. Whether this will be sustained remains to be seen.

54 In one respect – the timescale for writing to recalcitrant local authorities – Ms Rhee accepted at the hearing that arrangements could and would be improved. One

significant failing in the past – the lack of a proper analysis of what changes are required to the NTS to *eliminate* the use of hotels – does not appear to have been remedied yet. But I do not consider that it would be fair to stigmatise this omission as irrational at a point where the arrangements between Kent CC and the Home Secretary were still in the process of negotiation. The terms of the final arrangements are likely to have an impact on what is needed to ensure that all UAS children are taken into care on arrival. It is also relevant that, at the time of the hearing on 10 October 2023, no decision had been made to commence the provisions of the Illegal Migration Act 2023 ("the 2023 Act") that confer power to accommodate UAS children. The Home Secretary is entitled to some time to decide, as a matter of policy, whether and when these provisions should be enforced.

55 However, if the provisions of the 2023 Act are not to be commenced, and once final arrangements between Kent CC and the Home Secretary are concluded, rationality will require a plan to be prepared to ensure that the use of hotels to accommodate UAS children ceases and does not resume. The details of such a plan are for the Home Secretary to determine. A lawful plan will at minimum need to:

(a) expressly recognise the Home Secretary's own responsibility for the unlawful state of affairs identified in my first judgment and his resulting responsibility to remedy it and ensure it does not recur;

(b) estimate the range of numbers of UAS children likely to arrive in the short and medium term (taking into account historical data and accounting for inherent uncertainties);

(c) model (based on the terms of the final arrangements concluded between Kent CC and the Home Secretary) the speed and quantity of NTS transfers likely to be required to ensure that *no* UAS children are accommodated in hotels;

(d) contain arrangements to ensure that transfers take place in line with what is required to eliminate permanently the use of hotels to accommodate UAS children (whether through incentives offered to receiving authorities or through a dispute resolution and/or enforcement procedures or otherwise).

Conclusion

56 For these reasons:

(a) The first four grounds of challenge are dismissed.

(b) However, the Home Secretary's decision-making in relation to the NTS scheme was unlawful during the period December 2021 to 27 July 2023 because and insofar as it failed to have regard to the facts that: (i) the Home Secretary was (through her agreement to the Kent Protocol) partly responsible for Kent CC's unlawful failure to discharge its s. 20 CA 1989 function in respect of every UAS child; and (ii) the Home Secretary's use of hotels had by December 2002 become systematic, routine and therefore unlawful.

(c) It is not possible to stigmatise as irrational the Home Secretary's decision-making in relation to the NTS in the period between 27 July and 10 October 2023, given

that the parties were in negotiations during that period with a view to agreeing new arrangements for Kent CC to take a much larger number of UAS children into its care and the final arrangements were likely to have a bearing on what changes were required to the operation of the NTS. The Home Secretary was also entitled to some time to consider whether to commence the provisions of the 2023 Act conferring power to accommodate UAS children.

(d) But, if the provisions of the 2023 Act are not commenced, and once the final arrangements between Kent CC and the Home Secretary are concluded, the Home Secretary will be required as a matter of law to formulate a rational plan for the operation of the NTS capable of eliminating permanently the use of hotels to accommodate UAS children, with the features set out at para. 55 above.