Neutral Citation Number: [2023] EWHC 489 (Admin)

Case No: CO/2369/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 March 2023

Before :

Jason Coppel KC
(sitting as a Deputy Judge of the High Court)

- -

Between :

The King
On the application of

(1) ZB
(2) DB **Claimants**
(by their mother and litigation friend PRINCESS BELL)

- and -

LONDON BOROUGH OF CROYDON

Defendant

- and -

NHS SOUTH WEST LONDON ICB

Interested Party

- -
- -

James Presland (instructed by TV Edwards) for the **Claimants**
Hilton Harrop-Griffiths (instructed by London Borough of Croydon Legal Services) for the **Defendant**

Hearing date: 18 January 2023

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Judgment

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

Jason Coppel KC (sitting as a Deputy Judge of the High Court):

Background

1. This claim is one of a number of sets of proceedings brought by the Claimants ("ZB" and "DB"), who are profoundly disabled children aged 14 and 12 respectively, and/or their mother ("Ms Bell") seeking to secure adequate and lawful treatment by way of housing, education and social care provision.

The circumstances of the family

2. The distressing circumstances in which the family has found itself were eloquently described by Hill J in another one of the claims, whereby Ms Bell complained of the inadequacy of housing provided by the London Borough of Lambeth ("Lambeth") at 388 Lower Addiscombe Road, Croydon (that is, in the area of the Defendant ("Croydon")). She stated, in *R (Bell) v London Borough of Lambeth* [2022] EWHC 2008 (Admin) (§§5-16):

"The needs of the Claimant and her children

5. The Claimant is a single parent living with her 3 children, a boy currently aged 14, a girl currently aged 12 and a boy currently aged 2. She has been diagnosed with autistic spectrum disorder, attention deficit hyperactivity disorder, depression and anxiety, obsessive compulsive disorder and asthma.

6. The Claimant's older son [DB] and her daughter [ZB] have significant and profound disabilities. Both have neurological conditions, global developmental

delay, learning disabilities, four limb motor disorder, epilepsy, variable heart block, the heart condition long QT syndrome and low muscle tone. They are both registered blind, use non-verbal communication, are incontinent, fed by tube and use wheelchairs. Each of them has respiratory vulnerabilities and sleep disturbance patterns.

7. [DB] has kyphosis (a curvature of the upper spine) and 50% migration in his right hip. This causes him considerable pain as he cannot lie on his right side and has difficulties being placed in a sitting position.

8. [ZB] has scoliosis (a curvature and twist of her spine), chronic rhinitis and recurring pneumonia. She requires home suctioning and oxygen saturation monitoring and is regularly admitted to hospital for respiratory illnesses. She was diagnosed with early puberty (at age 4) and takes regular hormones which affect her mood.

9. On 15 June 2020 Lambeth's occupational therapist, Sara Glassberg, noted that both children have high moving and handling needs, large equipment requirements, need hoisting for all transfers and are fully dependent on carers to meet all of their needs. She made the following recommendations for accommodation: (i) standard wheelchair property; (ii) essential amenities to either be on one level, or alternatively have the ability to have through floor lift installed; (iii) sufficient internal circulation space to allow wheelchair manoeuvrability; (iv) wet floor shower, or potential to have wet floor shower, or specialist bath and hoist installed; (v) front access to be level access, or ability to be adapted; (vi) the property to be of suitable design to support hoisting; and

(vii) sufficient floor space and storage areas to support the use of the necessary equipment.

10. On 10 May 2021 Ms Glassberg set out in an email what she considered the "minimum level of suitability" for a property for the family. This email reiterated that both children require ground floor living as they could only access the upstairs if a lift was present. They also both need their own bedroom due to the large size and quantity of their equipment and the space required for their moving and handling needs.

388 Lower Addiscombe Road

11. On 24 August 2020 the Claimant applied to Lambeth for accommodation under the homelessness provisions contained in Part VII of the 1996 Act. Lambeth provided her with interim accommodation but determined that she was not homeless. The Claimant brought judicial review proceedings against Lambeth but these were resolved. On 11 November 2020 Lambeth provided the Claimant with accommodation at 388 Lower Addiscombe Road. This was intended to be interim accommodation for the Claimant but she still lives there.

12. On 10 December 2020, Lambeth accepted that it owed the Claimant the section 193(2) duty.

13. On 11 December 2020, Lambeth accepted that 388 Lower Addiscombe Road was unsuitable due to excessive damp. The email also referred to the delay in carrying out necessary repairs and the surveyor's view that the family would benefit from single floor, level access accommodation with an accessible bathroom for the children. The email said that Lambeth would seek to rehouse the Claimant and that suitable alternatives would be proposed in the near future.

14. Since December 2020, the damp at 388 Lower Addiscombe Road has progressively worsened and spread. This was confirmed at the re-inspection by Lambeth's surveyor on 18 October 2021.

15. The Claimant points to several significant issues with 388 Addiscombe Road which make it unsuitable accommodation for her and her children.

(i) It is not only damp, but mouldy and infested with mice. The heating is not working effectively. The property is on a road where there is a continuous flow of traffic exposing the family to significant traffic fumes if they open the windows. In letters dated 17 June 2020, 3 October 2020 and 1 September 2021, Dr Ronny Cheung, General Paediatric Consultant from Evelina London Children's Hospital, explained that mould, rising damp, pest infestation and poor environmental air quality will exacerbate the already vulnerable respiratory health of both the older children and put them at risk of further infections and hospitalisations in future. He therefore strongly supported the application by the Claimant to relocate to an area with less environmental pollution.

(ii) There is only one bedroom on the ground floor where the Claimant's daughter is located. The Claimant's older son is located in a bedroom on the first floor. There is no lift. He now weighs over 30 kg and there are significant safety risks to the Claimant in her carrying her son up and down the stairs safely. With his reduced mobility and bone-mineral density along with his previous fracture, he is also at increased risk of sustaining another fracture. This means the Claimant's older son is largely restricted to being in the upstairs bedroom and so rarely sees his sister, with whom he had a very close relationship, and the family cannot socialise together.

(iii) The Claimant's older son needs to be moved around every 15 minutes, but this is made much more difficult because the Claimant is having to look after children on different floors. He has developed pressure sores on his

ear. The community nurse who attends to dress his bed sores has raised safeguarding concerns.

(iv) The bathroom is largely inaccessible to the children, meaning they cannot be bathed properly. This exacerbates their skin conditions.

(v) Both children require surgery, but this is being delayed due to the lack of suitable accommodation: the Claimant's son's hip surgery cannot move forward in his current housing given the difficulties in getting him up or downstairs; the damp at the property renders it unsuitable for any child, but particularly one in the post-operative period; and post-surgery recovery requires a very stringent manoeuvring and handling plan, which would be very difficult in the current property. These issues were set out in letters from Dr Fairhurst, Consultant in Paediatric Neurodisability at the Evelina London Children's Hospital dated 16 November 2021, Mr Fabian Norman-Taylor, Consultant Orthopaedic Surgeon at Great Ormond Street Hospital for Children, dated 1 June 2022 and an email from the lead nurse at Demelza Hospice, dated 8 June 2022.

(vi) Mr Norman-Taylor's evidence also confirms that further delays to the Claimant's daughter's surgery will cause deterioration in her condition and could make surgery significantly less effective.

(vii) Dr Cheung's evidence confirms that a lack of adequate space at the property will limit the ability of the Continuing Care and Occupational Therapy teams to help deliver mobility and developmental programmes for the children.

(viii) Because of the difficulties in moving the children, they have been confined to the property. They last left it in March 2021.

(ix) The children are unable to attend school. According to the Claimant's grounds in the Croydon proceedings, her daughter has not attended school since 12 November 2018 and her older son has not attended school since 11

March 2020. Some alternative education arrangements have been put in place through a small number of virtual lessons and music sessions each week, but this has been described in the Croydon proceedings as "minimal and unlawful" provision, which places further undue pressure on the Claimant alongside her caring responsibilities.

(x) The Claimant cannot leave the property herself unless she has sufficient carers available for a long enough period of time. That has meant that she and her younger son have only been able to leave the property 5 or 6 times since they moved there.

(x) The issues with the property are preventing both children from having respite care. Emails from Demelza dated 4 November 2021 and 8 June 2022 reiterate that respite care could not be offered for the Claimant's older son as it is not possible to safely transport him up and down the stairs. While the Claimant's daughter could be offered a short respite break, the Claimant considers it important for the children to spend time together for their own wellbeing.

(xi) Janine Tooker, the Claimant's counsellor, has confirmed that her mental health has been adversely affected by the anxiety, stress and fatigue she experiences around her living situation. Ms Tooker confirms that she has been unable to work with the Claimant on the other areas of her life for which she originally sought therapy. Dr Cheung observed that the Claimant is the children's primary carer and that if her mental health were to deteriorate, there would be an immediate risk that the children's physical and developmental needs would not be met.

16. On 5 May 2022 a Child Protection Review Conference took place within the London Borough of Croydon in relation to all three of the Claimant's children. The notes of that conference indicate that two of the professionals present considered that the children were experiencing or at risk of significant

harm due to circumstances beyond their mother's control. The notes record that the children were not living in appropriate housing and were not accessing education."

3. Hill J proceeded to make a mandatory order, directing that Lambeth secure suitable accommodation for the Claimant under section 193(2) of the 1996 Act by no later than 12 weeks from the date of the order. In reaching that conclusion, she made the following relevant findings on the evidence:

"91. Here, the accommodation currently occupied by the Claimant and her children falls fundamentally short of what Lambeth's occupational therapist concluded in her 10 May 2021 email was the "minimum" level of suitability. This is because the house does not provide two ground floor, wheelchair accessible bedrooms for the children.

92. The accommodation also falls short of several of the other requirements Ms Glassberg set out in her initial 15 June 2020 assessment. The essential amenities are not on one level and the children cannot properly access bathing facilities. It also appears from the Croydon claim that the property does not have level access from the outside. ..

94. The living conditions in this case are having a series of very damaging impacts on the Claimant and her children, particularly her two significantly disabled older children, as detailed at [15] above.

95. The two older children's physical health and development is being severely impacted by their accommodation. Their already vulnerable respiratory health is being exacerbated by mould, rising damp, pest infestation and poor

environmental air quality at the property. The Claimant's older son has developed pressure sores because she cannot turn him as regularly as is needed due to having to care for her children on separate floors. The difficulty in accessing bathing facilities is exacerbating their skin conditions. The lack of space is impacting on their mobility and developmental programmes. The Claimant and her son are at risk of significant physical injury by her carrying him up and down the stairs.

96. Perhaps most importantly in relation to their physical health and development, both children need surgery due to their physical disabilities but this is being delayed due to the lack of suitable accommodation. Further delays to the Claimant's daughter's surgery will cause deterioration in her condition and could make surgery significantly less successful.

97. The children's education and social development is also being very badly affected. They have not left the house since March 2021. Because the Claimant's older son is largely restricted to the upstairs bedroom he has limited contact with his family. The Claimant and her younger son have only been able to leave the property 5 or 6 times since November 2020.

98. Perhaps most fundamentally in relation to this area, due to the accommodation issues the children have not attended school for a lengthy period (since November 2018 for the Claimant's daughter and March 2020 for her older son).

99. Further, the accommodation issues are preventing both children from having respite care and adversely impacting on the Claimant's mental health. This in turn places the children at risk as she is their primary carer. Two professionals

involved in the 5 May 2022 Child Protection Review Conference considered that the children were experiencing or at risk of significant harm. ..

101. Here, the Claimant and her children have been living in unsuitable accommodation for over 20 months. This is a significant period of time, especially bearing in mind the young age of the children involved."

I draw attention to §94, where Hill J accepted Ms Bell's characterisation of the conditions in which she and her children were living and their effects, which had been set out in §15 of the judgment.

4. Lambeth responded to Hill J's Order by offering Ms Bell alternative accommodation at 322 Norbury Avenue, Croydon. She has objected to its suitability and further proceedings on that subject are pending before the County Court. I have been provided with some of the materials generated by those proceedings, including a recent report by Croydon's paediatric occupational therapist, Erica Blatchford Geffen, dated 10 January 2023 which concluded that "it is clear that the property does not meet the family's long term needs" and that it does not meet all of the family's essential short-term requirements either, including a bathroom which is accessible to DB. It is clear that there may be, at the least, difficult issues to be resolved regarding the suitability of 322 Norbury Avenue. Most recently, and subsequent to the hearing before me, on 27 January 2023, 322 Norbury Avenue suffered significant flooding damage due to a burst cold water tank. It is therefore uncertain whether that property will continue to be offered by Lambeth to Ms Bell.

The present claim

5. The present claim was issued on 30 June 2022 seeking, in summary, the following relief by way of final orders:

i) Quashing orders to quash what was characterised as "the Defendant's refusal to give lawful consideration to the placement of [DB] and [ZB] at the Children's Trust School ("CTS")" and "the Defendant's decision to propose that [DB] be looked after separately from [ZB] alone in a foster placement".

ii) Declarations that Croydon had been in continuing breach of its duty to secure lawful arrangements for the education of, and social care support for, DB and ZB since they were housed in Croydon's area in October 2020 or some subsequent date.

iii) A mandatory order that Croydon arrange for DB and ZB to be provided with a residential placement at the CTS.

iv) A mandatory order that Croydon provide a suitable care plan covering their transport to and from the CTS and ensuring that they could spend time in due course at weekends and during school holidays at the family home.

v) A declaration and damages reflecting Croydon's breach of the Convention rights of DB and ZB under Article 8 ECHR (the right to respect for private and family life) and Article 2 of Protocol No. 1 to the ECHR (the right to education).

6. It can be seen that a principal objective of the present claim was to secure the placement of DB and ZB at the CTS, a non-maintained special school in

Tadworth, Surrey which supports children and young people aged 2-19 who have a wide range of special needs. Croydon has refused to agree to DB and ZB being educated there, essentially because of the cost of that education, and has maintained that they should attend Linden Lodge School ("LLS") in Wandsworth, a community special school for children with visual and sensory impairments, as day pupils.

7. Shortly after proceedings were issued on 1 July 2022, Croydon agreed to accommodate DB, pursuant to s. 20 of the Children Act 1989, at the Children's Trust ("TCT") and to refer him to be assessed for a residential placement there (which was conditional upon Ms Bell's agreement). TCT operates the CTS, and is located on an adjacent site to the school. It offers care to children with special needs, including by way of residential placements. It can make limited educational provision for children but is not itself a school. Croydon's position was that TCT could be a suitable place for DB to live in the short term, but that he should be educated at LLS and so transported to and from LLS each day. In the longer term, Croydon envisages that DB should return to live with Ms Bell, in suitable accommodation provided by Lambeth.

8. In his Order dated 28 July 2022 granting permission for judicial review, Bennathan J granted interim relief requiring Croydon also to refer ZB for a short-term placement at TCT, for 12 weeks, or any lesser period agreed by Ms Bell (§3). In the event, both DB and ZB moved into TCT on 2 November 2022. ZB's 12-week placement ought therefore to have extended to 25 January 2023, and that date was confirmed in a further order of interim relief made by Richard Clayton KC on 15 December 2022. Mr Clayton KC had been due to hear the

final hearing of this claim on 29-30 November 2022, but found that significant further information, including about the progress of the children's placement at TCT, was required and he adjourned the hearing to 18 January 2023, with directions for further information to be provided to the Court.

9. Croydon had agreed not to terminate the children's placements until (at the earliest) 8 February 2022, but following the hearing before me it undertook to the Court that it would not terminate the placements until, at the earliest, 14 days after I had handed down my judgment. Both children therefore remain at TCT, are receiving some education (for two hours per day) and, I am told by Ms Bell, and accept, they are progressing well in their placements. Ms Bell and her younger son have been able to stay at TCT, initially in order to help DB and ZB settle in but they have remained there, having recently been evicted from 388 Addiscombe Road and having refused to live at 322 Norbury Avenue.

10. Croydon's position remains that both children should be educated at LLS and transported to and from there each school day. Pursuant to s. 37 of the Children and Families Act 2014 ("the 2014 Act"), it has compiled Education Health and Care ("EHC") Plans for both children, dated 22 April 2022 (DB) and 17 May 2022 (ZB), in which LLS is named as their place of education and provision is set out for their ongoing care, on the footing that they are living at home with Ms Bell ("the EHC Plans"). Ms Bell strongly objects to the EHC Plans and, as I have noted, sought orders from this Court which would have required changes to be made to their EHC plans, notably to substitute CTS as their place of education.

The First-Tier Tribunal ("FTT") proceedings

11. Pursuant to s. 51 of the 2014 Act, Ms Bell had a right of appeal to the First-Tier Tribunal against the contents of the EHC Plans, including (for example) the naming of LLS in the plans. Appeals were lodged against both Plans on 13 June 2022 and they are "extended appeals" which mount a wide-ranging challenge to the contents of the Plans. Ms Bell appeals against the statements of the children's special educational needs (section B of the EHC Plans), the education, health and social care provision which is to be made for the children (section F) and the identification of the school where they will be educated (section I) and contends that consequential amendments may be required to other sections of the EHC Plans. For its part, Croydon opposes the appeals but accepts that significant parts of the Plans require updating as they were based upon assessments some of which dated back to 2021.

12. The FTT has power to make binding orders regarding the educational contents of the EHC Plans, including the statement of the school where the children will be educated (see reg. 43 of the Special Educational Needs and Disability Regulations 2014 (SI 2014/1530)) and may, for example, order Croydon to make amendments to the Plans in this regard. So far as health and social care provision is concerned, the FTT has power to make non-binding recommendations to Croydon as to the identification of the children's health and social care needs and the provision which ought to be made in order to cater for those needs (see the Special Educational Needs and Disability (First-tier Tribunal Recommendations Power) Regulations 2017, SI 207/1306). The FTT is currently due to hear the appeals on 20 and 21 March 2023.

The issues for determination by the Court

13. The Claimants accepted shortly prior to the hearing before me – by §60 of Ms Bell's third witness statement - that the FTT and not the Administrative Court was the appropriate forum for the resolution of disputes regarding the contents of the children's EHC Plans. That position was maintained in oral argument by Mr Presland, who appeared for the Claimants. He did not, accordingly, pursue the quashing order (§5(1) above) and the mandatory orders (§§5(3)-(4) above) which were directed at the children's placement at CTS and care arrangements to accompany their placement. The Claimant's revised position was, in my judgment, entirely correct, and in accordance with the ruling of Kerr J in *R (Q) v Staffordshire CC* [2021] EWHC 3486 (Admin), §§59-60. The FTT is the specialist forum for the disputes as to which school they should attend, and other disputes regarding appropriate health and social care provision for them, and will hear factual evidence in order to resolve those disputes. The FTT can only make non-binding recommendations in relation to health and social care provision but it was not suggested that this should make any difference to the priority to be afforded to the FTT proceedings, not least because the appropriate health and social care provision for the children is entirely dependent upon whether they are to be educated at CTS, or at LLS, or somewhere else. I note that when granting permission for this claim, Bennathan J emphasised (§4) that the Administrative Court would be slow to interfere with the specialist FTT but regarded it as arguable that the Court should intervene during the period prior to the FTT's decision. For these reasons, I would have refused to grant the quashing and mandatory relief originally sought by these claims, in the exercise of the Court's discretion, even if they had been pursued.

14. I also conclude that it would be inappropriate for the Court to proceed to determine the claims for declarations that Croydon had been in continuing breach of its duty to secure lawful arrangements for the education of, and social care support for, the children (§5(2) above). That is for three reasons. First, there is a substantial overlap between the issues which are to be determined by the FTT and the issues raised by these claims for declarations. With regard to education, for example, a critical component of the claim for a declaration is that the children should not have been placed at LLS and should have been placed at CTS; and, as I have mentioned, the appropriate health and social care provision is substantially dependent upon the legality of Croydon's choice of school. In *Q*, Kerr J noted that an appeal to the FTT, "is normally the right way to determine a dispute of the present kind, rather than a judicial review claim asserting a breach of section 19 [of the Education Act 1996]" (§62). That section contains the duty to make arrangements for the education of children with special educational needs who might not otherwise receive it and is the provision with regard to education which is primarily relied upon by the Claimants in the present case.

15. Second, the declarations which are sought concern historic alleged failings of Croydon which have either been superseded, as a result of the placement of the children at TCT, or will be superseded by fresh decisions and fresh provision following the ruling of the FTT. It is not usually the concern of judicial review to investigate historic failings which have already been, or are soon to be, put right (or at least overtaken by fresh decisions which may be subject to fresh, and different, challenge). As Chamberlain J put it in the recent case of *R (AA) v NHS Commissioning Board* [2023] EWHC 43 (Admin), §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 ILEA ex p. Ali*, the function of judicial review is not, generally, to conduct inquests into whether an authority is culpable for an admittedly unsatisfactory situation. I say "generally" because, when a judicial review claimant also claims a compensatory remedy, it may be necessary to conduct a backward-looking analysis."

16. The Claimants do seek a compensatory remedy in the present case, and a "backward-looking" analysis will be necessary when I come to consider that claim. But the claims for declarations do, in my view, come within the general rule identified by Chamberlain J. For these first two reasons I would again have refused to grant relief in the exercise of the Court's discretion.

17. Third, whilst it would be artificial to consider Croydon's compliance with its statutory duties without taking account of the significant changes in the children's situation since the issue of proceedings, to do so would fall foul of the well-known injunction against "rolling judicial review". In order to maintain procedural discipline, the higher courts have cautioned against entertaining challenge to decisions and events which occurred after the issue of proceedings: see, for example, *R (Dolan) v Secretary of State for Health* [2021] 1 WLR 2326, §118:

"This Court has also deprecated the trend towards what has become known as a "rolling" approach to judicial review, in which fresh decisions, which have arisen after the original challenge and sometimes even after the first instance judgment, are sought to be challenged by way of amendment: see *Spahiu*, paras.

60-63. Although, as Coulson LJ said, at para. 63, "there is no hard and fast rule", he was right to say that it will usually be better for all parties if judicial review proceedings are not treated as "rolling" or "evolving".”

18. The claim for a quashing order regarding Croydon’s proposal that DB be accommodated in foster care (§5(1) above) has also been overtaken by events. That proposal has not been pursued for some considerable time, DB is currently accommodated at TCT and there was no suggestion at the hearing before me that foster care for DB would be pursued by Croydon in the future.

19. Finally, one of the Claimants’ pleaded grounds is that Croydon had failed to engage in appropriate inter-agency cooperation with Lambeth, resulting in delays in making appropriate provision for the Claimants. No specific relief was sought in relation to that alleged failure and it again seems to me to fall into the category of historic events which have been superseded (it not being suggested that Croydon was in continuing breach of its statutory duties in relation to cooperating with Lambeth) or, so far as relevant, will be addressed in the backwards-looking analysis of the Claimants’ Convention rights claims.

20. What remains for determination by the Court are the following claims:

    i) A claim for an order that Croydon maintain the placements of DB and ZB at TCT pending the outcome of the FTT proceedings. This was not pleaded in the original claim but was added by Mr Presland at the hearing before me without objection from Mr Harrop-Griffiths for Croydon (although he did object to the making of such an order).

    ii) The Claimants’ claims for breach of their Convention rights.

The Convention rights claims

21. I address these claims first, as they provide some relevant context for the claim that the children should not be moved pending the determination of the FTT appeals.

Article 2P1

22. Article 2P1 provides, so far as material:

> *"No person shall be denied the right to education."*

23. In *A v Head Teacher and Governors of Lord Grey School* [2006] 2 AC 363, Lord Bingham stated (§24):

> "The Strasbourg jurisprudence … makes clear how article 2 should be interpreted. The underlying premise of the article was that all existing member states of the Council of Europe had, and all future member states would have, an established system of state education. It was intended to guarantee fair and non-discriminatory access to that system by those within the jurisdiction of the respective states. The fundamental importance of education in a modern democratic state was recognised to require no less. But the guarantee is, in comparison with most other Convention guarantees, a weak one, and deliberately so. There is no right to education of a particular kind or quality, other than that prevailing in the state. There is no Convention guarantee of compliance with domestic law. There is no Convention guarantee of education at or by a particular institution. There is no Convention objection to the expulsion of a pupil from an educational institution on disciplinary grounds, unless (in the ordinary way) there is no alternative source of state education

open to the pupil (as in *Eren v Turkey*). The test, as always under the Convention, is a highly pragmatic one, to be applied to the specific facts of the case: have the authorities of the state acted so as to deny to a pupil effective access to such educational facilities as the state provides for such pupils?"

24. Lord Hoffmann formulated the Article 2P1 principles in slightly different terms but there has been held to be no material difference between their approaches (see *A v Essex County Council (National Autistic Society intervening)* [2011] 1 AC 280, §§12, 129).

25. In that case, Lord Kerr JSC, who was part of the majority for these purposes, explained how breach of Article 2P1 may arise (see §161, and Lord Brown JSC's agreement with his explanation in §128):

"I consider that a denial of education under the article can arise in a variety of ways. Obviously, a calculated refusal to allow a pupil access to any form of even basic education will be in violation of the right. But a failure to take steps to provide education when the state authority responsible for providing it is aware of the absence of the pupil from any form of education could in certain circumstances give rise to a breach of the right. If, for instance, a local education authority knows that a child has been asked by a school not to attend that school; and if the authority is responsible for the provision of education to that child; and if it takes no action to supply any alternative to what has been previously provided by the school, it is at least arguable that it is in breach of its duty under article 2 of the First Protocol. I would go further. I believe it also to be at least arguable that an authority with the responsibility for providing education, if it

knows that a pupil is not receiving it and engages in a completely ineffectual attempt to provide it, is in breach of the provision."

26. Both Kerr J in *Q* and Ben Emmerson KC (sitting as a Deputy High Court Judge) in *R (E) v Islington LBC* [2018] PTSR 349 applied the criteria set out by Lord Kerr in §161 of *A* in determining whether there had been a breach of A2P1 in those cases. In *Q*, there was no breach of A2P1 where the claimant had been out of mainstream education for 15 months, from September 2020, but had received "education" at a temporary facility which had benefitted him and during which time his needs were assessed "diligently and professionally" (§77), to the point where he was able to attend what Kerr J described as "a generic special school" (§79). An appropriate school was identified in November 2021 and the claimant started there in January 2022. Kerr J rejected criticism that the defendant's response had been "lethargic" (§82) and described the handling of Q's case as "a credit to Staffordshire rather than a disgrace" (§83).

27. In *E*, Mr Emmerson KC held that a failure to provide the claimant with access to mainstream education (of the kind ordinarily provided by the state) for 50% of the 2015-2016 school year (20 out of 39 term-time weeks (and nine weeks of school holiday)) "amounted in her particular case to a denial of the essence of her right to education for that year" (§86). He emphasised the particular facts of the case:

".. this is not to be taken as any kind of rule of thumb. E's circumstances were grave and exceptional .. I do not have to decide, one way or the other, whether the same result would follow in a case in which similar periods of absence were

suffered by a child that had a settled family background and a primary caring parent who did not suffer from serious disabilities (or where the local authority had offered or attempted to make alternative provision) and I do not do so."

28. Decided claims for breach of A2P1 are few and far between and the outcome of those cases is instructive. But every case is different, and I must apply the "highly pragmatic" test to the specific facts of the present case.

29. In the present case, the material facts seem to me to be as follows:

i) Croydon was informed by Lambeth on 2 December 2020 that the Claimants had moved into its area and, according to Ronny Burfield, team leader in Croydon's Special Educational Needs Department, forthwith accepted responsibility for them under s. 24 of the 2014 Act. Croydon received from Lambeth their then current EHC Plans, which stated that they were enrolled at LLS. Croydon's assigned social worker was aware that they had not been to school for some time (in part due to Covid-19 disruption) but proceeded on the basis that they would attend LLS once transport was arranged (which was Croydon's responsibility).

ii) The Court has been told that DB's EHC Plan coordinator, a Ms Shivacheva, sent the family's social worker and LLS the transport application form so that they could support Ms Bell in completing it. No date is given as to when this was done, but Ms Shivacheva was not appointed to be DB's coordinator until May 2021 so I must assume that it was in May 2021 or later. The coordinator was informed by LLS on 16 July 2021 that the form had been submitted, but when the coordinator followed this up with Croydon's Passenger Transport Service ("PTS")

in September 2021 she was told that no form had been received. The form was eventually submitted by Ms Bell on 6 October 2021. Therefore, the first step in enabling the children to attend school was not taken until approximately 10 months after Croydon became responsible for them.

iii) Ms Bell explained on the transport application form that each of DB and ZB would require to be accompanied on the journey to and from LLS by a nurse, who would be able to perform suctioning so as to maintain their breathing. She stated that she was unable to perform this task herself, it being an impossible task for one person and she also had to look after her youngest child. Croydon has not sought to dispute Ms Bell's evidence on that point. However, Croydon's PTS replied that it was unable to provide any medically trained staff and Ms Bell would have to attend to the children herself. There was correspondence between the PTS and Ms Bell which had not reached a conclusion by 10 December 2021, more than a year after the children had moved into Croydon's area, when a judicial review pre-action protocol letter was sent on the Claimants' behalf. Amongst other things the letter alleged that there had been a breach of the Claimants' A2P1 rights because failure to provide a suitably trained escort meant that the children could not go to school; and "Provision of a vehicle without the trained escort comfortably qualifies, in our view, as a "completely ineffectual attempt" to facilitate the children's education" (referencing Lord Kerr in *A*). The letter pointed out that LLS had identified a nurse to accompany ZB to and from school in July 2021.

iv) On 23 December 2021, Croydon replied to the Claimants' solicitors informing them that providing a nurse escort was not Croydon's responsibility, but that of the local Clinical Commissioning Group, and they had agreed to provide a nurse for ZB only, to provide suctioning only and for four weeks only. Ms Bell had already been informed of this development and had immediately raised objections with Croydon as to its adequacy, but had received no reply by 26 January 2022, when the Claimants' solicitors were required to write further to Croydon. Croydon also stated on 23 December 2021 that it would not be making any alternative educational provision for the children because they were enrolled at LLS.

v) On 21 March 2022, a further pre-action letter was sent to Croydon by the Claimants' solicitors. By this time, their focus had turned to seeking to persuade Croydon to place them at CTS but the letter also addressed their current position, noting that the issue of suitably qualified escorts had not been resolved so that they "remain without education, or the means to attend it via suitable transport".

vi) Croydon did not acknowledge or respond to that letter, and a further, comprehensive, pre-action letter was sent on 6 April 2022. The 6 April 2022 letter noted that ZB had been receiving two virtual lessons per week plus a music session, and from February 2022 DB had started to receive a music session and a virtual group communication session each week, and that Croydon had refused to provide any further education for them because education was available to them at LLS. It complained

that the children had been "out of education since being in Croydon, spanning some 18 months and counting".

vii) In its response on 19 April 2022, Croydon offered to "refer the children to home tuition if mother is agreeable to this as a temporary provision whilst the issues around the children attending school is resolved". (I pause to note that the reason that that was not offered earlier was Croydon's insistence that they should attend LLS). By 10 May 2022, when the Claimants' solicitors wrote again to Croydon, it had not been clarified whether the tuition offered would be in person or virtual. By email on 1 July 2022, the Claimants' solicitors refused the offer. They stated that home tuition had been offered as a temporary measure until the "housing is resolved" but the family's housing situation had been ongoing since November 2020 and the interim measure they sought was residential placement in CTS.

viii) In addition to the escort issue, there were other difficulties in the children attending LLS. DB was effectively confined to his upstairs bedroom and would have to have been lifted downstairs in order to leave the house. In a children and families social services assessment by Croydon dated 25 February 2022 there is recorded an update from Lambeth on 2 February 2022 that it had been agreed with Ms Bell in November 2021 to use (with a carer) a "stair climber" to move DB up and down stairs but that as of that date training to use the equipment had not yet been provided, due to objections from Ms Bell. Whereas Ms Bell maintained that the stair climber needed at least one carer and usually two to operate

it, as Ms Bell did not have the physical capability to do so, and there were no or insufficient carers on site to do this. ZB's bedroom was downstairs but there were also difficulties in a wheelchair navigating the driveway of the property to reach a vehicle. The surface of the driveway was not solid but was comprised of pebbles and a ramp (either temporary or permanent) was required, to which the owner of the property had objected.

ix) In her witness statement dated 8 September 2022, Juliet Davis, a social worker employed by Croydon, states:

"15. London Borough Croydon maintains that with the support of two carers and a portable ramp, ZB can access school from her current home, despite any objection there may be from Ms Bell's landlady. London Borough Croydon will provide that support and transport.

16.In addition, the CCG will provide an escort for her for a 4-week assessment period."

This is the first firm commitment that I can detect from Croydon to provide a suitable escort for ZB to enable her to attend school. There was no such commitment made in relation to DB (although by this stage Croydon had agreed to place him at TCT).

x) As of 2 November 2022, the children were placed at TCT and started to receive non-classroom-based education there.

30. Making all due allowances for the "weak" character of the A2P1 right and the difficulties which will ordinarily arise in establishing that a child has been

denied education in breach of that right, these facts disclose, in my judgment, that Croydon acted in breach of the A2P1 rights of DB and ZB. The children were unable to attend mainstream education and there were only a handful of schools where education could realistically have been provided to them. It has been Croydon's committed view, maintained in the face of Ms Bell's advocacy for CTS, that they ought to attend LLS, where they were enrolled at the time that Croydon assumed statutory responsibility for their education in December 2020. Knowing that the children were not in fact attending LLS, nor receiving alternative educational provision (save for a handful of virtual sessions which nobody has contended were adequate "education"), Croydon's efforts to ensure that they were able to attend, and did attend, LLS can fairly be described as "completely ineffectual" (to use the phrase of Lord Kerr in *A v Essex*).

31. As of 19 April 2022, more than 16 months after they moved into Croydon's area, the children were still unable to attend LLS for lack of adequate transport and accompanying escort arrangements. Croydon was still disputing its responsibility for providing an escort for ZB (which was only accepted after these proceedings were issued) and no solution at all had been proposed for DB to get to and from LLS. Croydon had refused to make any educational provision for the children because they were enrolled at LLS, whilst not taking the steps necessary to ensure that they could actually attend LLS. This would be a lengthy period for any child to be out of education but would have had a particularly significant impact on DB and ZB given their lack of social contact in their day to day lives. It is little short of heart-breaking to contemplate the plight of the children during this period, when they were housebound – and in DB's case confined to his bedroom - for weeks if not months on end.

32. I do not hold Croydon solely responsible for this state of affairs. Lambeth had placed the family in wholly unsuitable accommodation, which rendered it significantly more challenging for the children to attend school but, contrary to Croydon's submissions, that fact does not absolve it of its own duties under A2P1. The delay in applying for transport to and from LLS was partly down to Ms Bell. Ultimately, however, once it became aware that the children were not attending school, Croydon had a primary responsibility to ensure that they did so, or at the very least that they were able to do so (see *E*, §82) and it was also aware that Ms Bell faced challenges with her own health and wellbeing which meant that she could not be left to her own devices in taking what were far from straightforward steps to facilitate the children's education.

33. Against all of this, Croydon had very little to say in its defence. Its principal argument was that it "has been doing its best for [DB] and [ZB] in trying circumstances, with a view to them remaining with the family, having the assistance of professional care and having the education they need" (§60 of Croydon's Skeleton Argument for the 29-30 November hearing). I do not accept that Croydon's efforts to ensure that the children could attend school represented "its best"; if they did, then its best was not good enough to satisfy the requirements of A2P1.

34. Croydon's period of breach of A2P1 commenced on 2 December 2020 when it assumed responsibility for the children. I place the end of Croydon's period of breach of A2P1 at 19 April 2022, which is the date upon which Croydon formally offered to refer the children to its home tuition service, which represented at least a realistic proposal for their education, albeit a temporary

and far from satisfactory one. On one view, that is generous to Croydon. No detail was given on 19 April 2022 as to how much tuition was being offered or whether it would be in person or virtual, and it is unclear whether there was a waiting list or otherwise how quickly home tuition would have started. Eventually, as I have noted, the offer was refused by Ms Bell whom, I infer, feared that accepting home tuition would remove some of the pressure for Croydon to agree for the children to be placed at CTS. I do not criticise her for that, but I do not think that any sufficient reason has been provided as to why the offer of home tuition on a temporary basis was unsuitable, and not an adequate discharge of Croydon's A2P1 duties.

Article 8

35. The claim under Article 8 ECHR, the right to respect for private and family life, is more difficult for the Claimants. There is undoubtedly force in their central contention that the conditions in which they were living at 388 Lower Addiscombe Road, as described by Hill J and set out above, fell below the minimum standards required by Article 8 (by analogy with *R (Bernard) v Enfield LBC* [2003] HRLR 4), and that a public authority or authorities bore legal responsibility for that. The difficulty lies in establishing that liability should lie with Croydon rather than with, in particular, Lambeth, who placed the family in unsuitable accommodation and who are not before the Court. In cases where more than one public authority has, at least arguably, contributed to a breach of Convention rights, the Court must inquire as to which authority bore the primary duty to comply with the Convention (see Lord Hoffmann in *A v Lord Grey School*, §61).

36. As the authority which provided the family with unsuitable housing, which was the immediate cause of DB's confinement and inability to attend school and to a lesser extent that of ZB, given the difficulties of navigating her wheelchair across the front of the property, primary responsibility might lie with Lambeth. Yet the Claimants have chosen not to claim against Lambeth in these proceedings nor to provide the Court with any evidence or argument directed to establishing how it could be said that Croydon rather than Lambeth bore primary responsibility (in the face of submissions from Croydon that it was the Claimants' housing, provided by Lambeth, which has caused the difficulties). In addition to the housing issue, there are factual questions as to how and when Lambeth passed on social services responsibility for the children to Croydon. That appears not to have happened immediately upon them moving into Croydon's area and there is evidence to suggest that it did not happen until late 2021. I would not, of course, find that Lambeth bore primary responsibility when Lambeth is not before the Court, but nor can I find, having regard to the limited materials before the Court, that Croydon bore that responsibility for any breach of the children's Article 8 rights. I therefore dismiss the Article 8 claim on the grounds that the Claimants have not established that Croydon bore primary responsibility for any breach of their Article 8 rights.

Just satisfaction

37. The Claimants have submitted that a payment of damages is necessary to afford them just satisfaction for breach of their A2P1 rights. Croydon disputes this but relies on the same factors it relied upon in disputing liability under A2P1 – that it had been doing "its best" and that the children's plight was caused by their

unsuitable accommodation. Neither of those submissions was sufficient to avoid liability for breach of A2P1 and they have no greater force as submissions against the award of damages.

38. The Claimants seek a quantum of damages commensurate with the payments recommended by the Local Government and Social Care Ombudsman ("the Ombudsman") in cases where maladministration has resulted in a child missing out on education. As at January 2021, the Ombudsman usually recommended a payment of £200-£600 per month of missed education, the final figure taking into account factors including the child's needs, any educational provision made during the relevant period, whether additional provision can remedy some or all of the loss of education and whether the period was a significant one in the child's career. Croydon made no submissions as to the appropriate quantum of just satisfaction.

39. I am conscious that I do not have all of the evidence which I would ideally wish to see before deciding upon quantum of damages. In particular, there is no detailed evidence going to the severity of the impact upon the children of being denied education and whether that impact is likely to be rectifiable in whole or in part by future educational provision. Both of these are important matters. I could in those circumstances remit the assessment of damages to a Master of the King's Bench Division, who could give appropriate directions for filing of further evidence. However, neither party suggested that course and I consider that it would be a disproportionate step given the relatively small amounts of damages which are at stake in this case, and that the Ombudsman's Guidance –

the relevance and force of which was not disputed by Croydon – provides me with a plausible basis for calculating an award of compensation.

40. In my judgment, the appropriate figure for compensation for each child is £10,000. This represents £600 per month for the 16.5 month period between 2 December 2020 and 19 April 2022. It places the awards at the upper end of the Ombudsman's scale, in light of the absence of any significant educational provision during the relevant period and the likely severity of the impact on the children given the very limited social contact which they otherwise had.

Mandatory order pending the outcome of the FTT proceedings

41. The Claimants seek a final order from this Court prohibiting Croydon from terminating their placements at TCT before the conclusion of the FTT proceedings.

42. There are undoubtedly powerful reasons why the children should not be moved until the FTT has decided whether they should be educated at CTS or LLS or elsewhere. In recent weeks they have had excellent care and some education, which had been lacking for some considerable time before they moved to TCT. They also have a stable and comfortable environment in which they may recuperate from surgery, which was due to have taken place very recently in DB's case, and is to be arranged for ZB in the near future.

43. However, Croydon has not expressed an intention to move the children prior to the FTT's decision which could be evaluated against current circumstances. And I am not in a position to say that it would necessarily be unlawful for Croydon to decide in the future that the children should be accommodated

elsewhere, particularly as one cannot be at all certain when the FTT proceedings will conclude (and noting the possibility of an appeal against its ruling).

44. I therefore refuse to make a mandatory order requiring that the children be maintained at their current placements pending the outcome of the FTT proceedings. Any decision of Croydon to that effect will have to be judged in the light of circumstances at the time that it is made. Croydon will, I am sure, understand that it will need to have a powerful justification for causing further disruption to the children's lives during this interim period.

Conclusion

45. For the reasons set out above, I will declare that Croydon breached the Claimants' A2P1 rights between 2 December 2020 and 19 April 2022 and award just satisfaction in the amount of £10,000 each. I will dismiss the remainder of the claims.