



Neutral Citation Number: [2021] EWCA Civ 1185

Case No: C1/2020/1083

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT
[2020] EWHC 622 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2021

Before :

LADY JUSTICE KING
LORD JUSTICE SINGH
and
SIR PATRICK ELIAS

Between :

THE QUEEN (on the application of AR (a child), by his litigation friend, MP)	<u>Appellant</u>
- and -	
THE LONDON BOROUGH OF WALTHAM FOREST	<u>Respondent</u>
(1) SECRETARY OF STATE FOR EDUCATION	<u>Interested</u>
(2) ASSOCIATION OF DIRECTORS FOR CHILDREN'S SERVICES	<u>Parties</u>
(3) LONDON COUNCILS	
(4) THE COMMISSIONER OF POLICE OF THE METROPOLIS	

**Ms Caoilfhionn Gallagher QC and Mr Samuel Jacobs (instructed by Just for Kids Law) for
the Appellant**

**Mr Ashley Underwood QC (instructed by Legal Services, London Borough of Waltham
Forest) for the Respondent**

Hearing date: 30 June 2021

Approved Judgment

Lord Justice Singh:

Introduction

1. This is an appeal against the dismissal of a claim for judicial review, which was brought on the ground that the Respondent does not have a reasonable system in place for the provision of secure accommodation to meet requests for such accommodation made by the police pursuant to section 38(6) of the Police and Criminal Evidence Act 1984 (“PACE”).
2. The claim for judicial review was dismissed by the Divisional Court (Davis LJ and Andrews J) on 16 March 2020.
3. Permission to appeal to this Court was granted by Nugee LJ on 12 November 2020.
4. Before the Divisional Court the Interested Parties were represented as well as the main protagonists (in the case of the Education Secretary there were written submissions only). The Interested Parties were not represented at the hearing of the appeal before us. We heard submissions from Ms Caoilfhionn Gallagher QC, who appeared with Mr Samuel Jacobs, for the Appellant; and from Mr Ashley Underwood QC, for the Respondent. I would like to thank them all on behalf of the Court for their written and oral submissions.

Factual Background

5. The facts of the particular case which have given rise to this appeal can be summarised briefly, since the underlying claim for judicial review was brought as a “systemic challenge” to the arrangements which the Respondent has in place for the provision of secure accommodation for juveniles who were otherwise to be detained in police cells, rather than a complaint on the individual facts of this case as such. The facts of the individual case are set out more fully in the judgment of Andrews J in the Divisional Court, at paras. 15-24.
6. The Appellant was born on 27 May 2002 and was 16 years old at the relevant time.
7. On 27 December 2018, he was arrested on suspicion of possession of a knife and robbery, and detained at Lewisham Police Station at around 14:30. The alleged robbery had occurred on 2 November 2018.
8. On 28 December 2018, the police contacted the Respondent to request secure accommodation at around 17:00. The custody sergeant explained to the social worker, in this case the Manager of the Emergency Duty Team, that secure accommodation was required because of the risks that the Appellant posed to the public. It was suggested that the Appellant could return to his placement overnight, but it was reiterated that the risks to the public posed by the Appellant were too high for him to return to non-secure accommodation. The custody sergeant confirmed with the Team Manager that the Respondent could not source secure accommodation for the Appellant. The reasons given for this were that the notice given was too short, and that all the secure accommodation providers were located outside London. At

17:40, an Inspector approved the decision that the Appellant should therefore remain in police custody until his court appearance the next day.

9. On 29 December 2018, the Appellant was released from custody and appeared in court at 9:30.

Material legislation

10. By section 37(15) of PACE it is provided that, in that part of the Act, “arrested juvenile” means a person arrested with or without a warrant who appears to be under the age of 18. For convenience I will use the word “children” to refer to such arrested juveniles.
11. Section 38(1) of PACE provides:

“Where a person arrested for an offence otherwise than under a warrant endorsed for bail is charged with an offence, the custody officer shall ... order his release from police detention, either on bail or without bail, unless–

- (a) If the person arrested is not an arrested juvenile–
 - (i) his name or address cannot be ascertained or the custody officer has reasonable grounds for doubting whether a name or address furnished by him as his name or address is his real name or address;
 - (ii) the custody officer has reasonable grounds for believing that the person arrested will fail to appear in court to answer to bail;
 - (iii) in the case of a person arrested for an imprisonable offence, the custody officer has reasonable grounds for believing that the detention of the person arrested is necessary to prevent him from committing an offence;
 - (iiia) in a case where a sample may be taken from the person under section 63B below, the custody officer has reasonable grounds for believing that the detention of the person is necessary to enable the sample to be taken from him;
 - (iv) in the case of a person arrested for an offence which is not an imprisonable offence, the custody officer has reasonable grounds for believing that the detention of the person arrested is necessary to prevent him from causing physical injury to any other person or from causing loss of or damage to property;

- (v) the custody officer has reasonable grounds for believing that the detention of the person arrested is necessary to prevent him from interfering with the administration of justice or with the investigation of offences or of a particular offence; or
 - (vi) the custody officer has reasonable grounds for believing that the detention of the person arrested is necessary for his own protection.”
- (b) if he is an arrested juvenile—
- (i) any of the requirements of paragraph (a) above is satisfied but, in the case of paragraph (a)(iia) above, only if the arrested juvenile has attained the minimum age; or
 - (ii) the custody officer has reasonable grounds for believing that he ought to be detained in his own interests;
- (c) the offence with which the person is charged is murder.”

12. Subsection (6) provides:

“Where a custody officer authorises an arrested juvenile to be kept in police detention under subsection (1) above, the custody officer shall, unless he certifies—

- (a) that, by reason of such circumstances as are specified in the certificate, it is impracticable for him to do so; or
- (b) in the case of an arrested juvenile who has attained the age of 12 years, that no secure accommodation is available and that keeping him in other local authority accommodation would not be adequate to protect the public from serious harm from him,

secure that the arrested juvenile is moved to local authority accommodation.”

13. Section 21(2) of the Children Act 1989 (“the 1989 Act”) provides:

“Every local authority shall receive, and provide accommodation for, children—

...

(b) whom they are requested to receive under section 38(6) of the Police and Criminal Evidence Act 1984;

...”

14. Ms Gallagher also relies on the provisions of sections 22, 22G and 53, in relation to “looked after” children. For my part, I do not consider that it is necessary to set out those provisions here because, as will become apparent, I consider that the central issue in this appeal can and should be determined on the basis of the duty in section 21(2)(b) of the 1989 Act.
15. I should, however, also mention section 82(2) of the 1989 Act, which provides:

“The Secretary of State may make grants to local authorities in respect of expenditure incurred by them in providing secure accommodation in community homes other than assisted community homes.”

The decision of this Court in *Gateshead*

16. Section 21(2)(b) of the 1989 Act was considered by this Court in *R (M) v Gateshead Metropolitan Borough Council* [2006] EWCA Civ 221; [2006] QB 650, in which the main judgment was given by Dyson LJ, with whom Moore-Bick LJ agreed. Thorpe LJ also agreed with his conclusion and reasoning but gave a short concurring judgment.
17. The facts of *Gateshead* can be derived from the headnote and were as follows. The claimant in that case lived with her mother within the area of the defendant local authority. She was voluntarily accommodated by the defendant for various periods until her 16th birthday, when she discharged herself. In November 2004 she was living in a hostel in Sunderland, outside the defendant’s area, when she was arrested on suspicion of wounding with intent, and detained at a police station in Sunderland. At 12.20 p.m. the police station’s custody officer spoke to a social worker from the defendant’s emergency team, and enquired whether the defendant could provide secure accommodation overnight until the claimant was produced at the Magistrates’ Court in the morning. The social worker replied that the defendant could provide an address to which the claimant could be bailed, but not secure accommodation. Since the custody officer was of the view that nothing less than secure accommodation would suffice to protect the public from serious harm from the claimant, he detained her overnight at the police station, pursuant to section 38(1) of PACE. The claimant sought judicial review of the defendant’s failure to provide her with secure accommodation, contending that the defendant had breached its duty, under section 21(2)(b) of the 1989 Act. The Court of Appeal in due course granted permission to bring the claim for judicial review and retained the substantive hearing to itself.
18. The Court held that the duty under section 21(2)(b) of the 1989 Act to respond to a custody officer’s request under section 38(6) of PACE falls on the local authority

which receives that request and is not limited to the authority within whose area a child is detained. However, the Court held that, although the duty to provide accommodation is an absolute one, the duty to provide *secure* accommodation when it is requested by a custody officer under section 38(6) of PACE is not absolute. The local authority has a discretion to provide secure accommodation but it must exercise that discretion in accordance with public law principles.

19. Importantly for present purposes, Dyson LJ said, at paras. 42-43:

“42. That is not to say that, when it receives a request for secure accommodation under section 38(6), a local authority may simply ignore it. In my judgment, when performing its duty under section 21(2)(b), the local authority has a discretionary power to provide secure accommodation where that is requested. It is trite law that discretionary statutory powers must be exercised to promote the policy and objects of the statute: see *Padfield v Minister for Agriculture, Fisheries and Food* [1968] AC 997, 1030C. The broad policy and objects of Part III of the Children Act 1989 are that local authorities should provide support for children and families. More particularly, the object of section 21(2)(b) when read with section 38(6) is, as Watkins LJ said in *R v Chief Constable of Cambridgeshire, Ex p M* [1991] 2 QB 499, that children should not be detained in police cells if that is at all possible. ...

43. In my judgment, therefore, it is incumbent on all local authorities to have in place a reasonable system to enable them to respond to requests under section 38(6) for secure accommodation. But section 21(2)(b) of the Children Act 1989 does not impose an absolute duty on a local authority to provide secure accommodation whenever it is requested by a custody officer under section 38(6) of PACE. Having regard to (i) the urgency with which such requests will usually have to be dealt with (well illustrated by the facts of the present case); (ii) the comparative rarity of such requests; and (iii) the resource implications of maintaining a stock of such accommodation, it would be manifestly unreasonable to impose such a duty on local authorities. I do not believe that the language of section 21(2)(b) when read with section 38(6) compels such an unreasonable interpretation. I derive further support for my conclusion from the fact that section 38(6) shows that Parliament expressly contemplated that there might be circumstances where secure accommodation would not be available.”

20. At para. 48, Dyson LJ continued:

“... It is a matter for the discretion of the council to decide what system to introduce to deal with requests for secure

accommodation by the police under section 38(6). It is wholly unrealistic to expect local authorities to be able to guarantee that they will provide secure accommodation for children whenever a request is received from the police for such accommodation. It is a matter for the judgment of the local authority, taking full account of the need to avoid having children detained in police cells if at all possible, to decide what arrangements to make to provide secure accommodation when it is requested by the police. The court should be slow to strike down as unlawful arrangements that have been made by local authorities. In my view, they should do so only if satisfied that an authority has made no arrangements at all, so that they can never provide secure accommodation when it is requested, *or where the arrangements that have been made are ones that could not have been made by a reasonable authority, mindful of the need to avoid having children detained in police cells if at all possible.*” (Emphasis added)

21. At the hearing before us Mr Underwood submitted that the last statement of principle must be read as simply an alternative formulation of what had preceded it, in other words that a local authority will only be held to have breached its duty if it has made no arrangements at all, so that it can *never* provide secure accommodation in response to a request under section 38(6) of PACE. I do not accept that submission. Although a judgment should never be read as if it were a statute, it is plain on a fair reading of that passage that Dyson LJ had in mind two alternatives. They are distinct principles as a matter of substance as well as of language. Furthermore, as I read it, the last statement of principle represents the manifestation in this particular context of the well-known, and more general, principles of public law which are to be found in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (*Wednesbury* unreasonableness or, as it tends to be called in more recent times, irrationality); and *Padfield v Minister for Agriculture, Fisheries and Food* [1968] AC 997.
22. Applying those principles to the facts of the case, Dyson LJ found that the defendant was not in breach of its duty to provide secure accommodation. The claim for judicial review was therefore dismissed.

The decision of the Divisional Court in the present case

23. The Divisional Court accepted the submission of the Respondent that it had a reasonable system in place for responding to requests under section 38(6) of PACE. It held that that the complaint was really about the national lack of secure accommodation. It was not irrational for the Respondent not to spend its limited resources on owning and maintaining secure accommodation which would then be used by other local authorities. The Court considered that requests such as the present are a “rarity”. The Respondent had acted rationally in entering into centralised

arrangements with three other London boroughs to deal with out of hours requests for secure accommodation.

24. The main judgment in the Divisional Court was given by Andrews J. There was a concurring judgment by Davis LJ.
25. As Ms Gallagher submitted at the hearing before us, much of what is said in the judgment of Andrews J is uncontentious. I am indebted to Andrews J for the thorough way in which she set out the factual and legal context to this case. She summarised the legal background at paras. 4-14; the factual background relating to this particular Appellant at paras. 15-24; and the system operated by the Respondent at paras. 25-42.
26. As Andrews J noted at para. 25, there are three classes of secure accommodation placements: welfare placements, youth justice placements, and PACE placements. Welfare placements are made by a local authority pursuant to section 25 of the 1989 Act, which gives the authority power to make such a placement for the protection of the child and/or others. Youth justice placements are made by the Youth Custody Service and not by a local authority, when a child has been detained or sentenced by the criminal courts or remanded to secure local authority accommodation.
27. As Andrews J said at para. 26, a home used as secure accommodation for children must be a Children's Home as defined in the Care Standards Act 2000. Since secure accommodation for children is regulated, local authorities can only use Children's Homes which are authorised by the Secretary of State for Education to be used for the provision of secure accommodation: see regulation 3 of the Children (Secure Accommodation) Regulations 1991 (SI 1991 No. 1505). These are known as Secure Children's Homes ("SCHs"). A privately managed secure unit which is licensed to provide secure accommodation for welfare and/youth justice purposes may not necessarily be licensed also to provide secure PACE accommodation. As Andrews J noted, by reference to written submissions which had been made on behalf of the Education Secretary, this will depend on whether its Statement of Purpose provides for admission of children in those circumstances.
28. As Andrews J mentioned at para. 30, the Respondent operates the arrangements for the provision of secure accommodation in accordance with the Home Office Concordat on Children in Custody. We were referred to that Concordat at the hearing of this appeal.
29. Ms Gallagher placed particular reliance on guidance on PACE, which is included in the Concordat. This guidance refers to the requirements of section 38(6) of PACE and notes that a child who is charged with an offence and denied bail must be transferred from police to local authority custody unless either (1) transfer was "impracticable" or (2) the child is over 12 years of age and required secure accommodation but none was available.
30. The guidance goes on to say that, in this context, the term "impracticable" is often misunderstood. The guidance states that this does not relate to the availability of, for example, local authority accommodation. Rather it should be taken to mean that "exceptional circumstances render movement of the child impossible" or that "the

child is due at court in such a short space of time that transfer would deprive them of rest or cause them to miss the court appearance.”

31. In my view, that passage needs to be read in its proper context. That was not a reference to *secure* accommodation but to accommodation more generally.
32. What is of more direct relevance is what is then said under the heading ‘Secure Accommodation’. There the guidance states:

“If secure accommodation was requested and was not available, then the police may lawfully continue to detain the child. This is the case even if the Local Authority has failed to meet its statutory obligations.”
33. It is therefore clear that the police do not act unlawfully if they continue to detain a child who needs secure accommodation but none is made available by a local authority. This will be so even if that local authority is in breach of its own statutory duties.
34. As Andrews J noted, the Concordat has been supplemented by the London Protocol for the provision of local authority accommodation for children held in police custody but that Protocol was only implemented after the events concerning this particular Appellant which gave rise to this claim.
35. As Andrews J noted at para. 31, there are 15 providers of secure accommodation in England and Wales. None is in London. The nearest providers are Hailsham (East Sussex), Copthorne (West Sussex), Bristol, Swanwick (Southampton) and Peterborough. It is not clear that all provide placements under PACE but the nearest one which appeared to do so on the evidence before the Divisional Court was Hailsham, which is around 57 miles from Lewisham police station, where the Appellant was detained.
36. As Andrews J noted at para. 32, the evidence filed on behalf of the Respondent provided no example of a PACE request ever being met by this Respondent. Before this Court Ms Gallagher pointed out that, on the evidence before the Divisional Court, in 2018, only one request out of 342 was met in the whole of London.
37. At paras. 43-71, Andrews J summarised the nature of the claim for judicial review, including the submissions for each party.
38. At para. 54, she quoted from a joint letter from the Home Secretary and the Education Secretary dated 20 January 2015, which was addressed to all local authorities. We too were shown that letter.
39. The purpose of the letter was to draw attention to “the serious problems there are in some areas across England in complying with the Police and Criminal Evidence Act 1984 (PACE) and the related requirement in section 21 of the Children Act 1989 with respect to the care of children who have been charged with an offence and have been denied bail.” The letter then referred expressly to the requirements of section 38(6).

40. The letter included the following sentence:

“The law is clear that there are very limited circumstances to justify the detention of children at police stations.”

41. The letter also said:

“Police custody can be a distressing experience and this is particularly so for children and young people in trouble. It is for this reason that the legislation is designed to keep their stay in police custody to a minimum. So that the law is operating as Parliament intended the Government will therefore be working with chief constables, police and crime commissioners and local authorities to ensure that the best interests of children and young people are served. What this means is ensuring compliance with the law across all police and local authority areas in England. ...”

42. The letter went on to say that the Government had begun to examine the issue comprehensively. It also exhorted local authorities to work with neighbouring local authorities and the police in their area to play their part to ensure that the law was being adhered to.
43. Before the Divisional Court there were written submissions on behalf of the Education Secretary. At para. 56, Andrews J noted that, on his behalf, the Court’s attention was drawn to para. 8.15 of the Children Act 1989 Guidance and Regulations, Volume 2, in which it is stated that:

“It is the responsibility of the local authority to identify a suitable placement for all children transferred to their care under PACE.”

44. At paras. 57-58, Andrews J referred to the evidence filed in the proceedings by Police Sergeant Anne-Marie Bullivant, of the Metropolitan Police. As she noted by reference to that evidence, it is common for custody sergeants when contacting all London Borough Councils requesting that a minor be transferred to secure accommodation, to be told that this is not possible.
45. The core reasoning of Andrews J for rejecting the claim for judicial review was set out at paras. 72-76:

“72. It seems to me that there is a great deal of force in Mr Underwood’s submissions. This claim is really a complaint about the nationwide lack of secure accommodation available to all local authorities due to the absence of funding by Central Government. As the Court of Appeal made clear in *Gateshead*,

the duty of the local authority is to put in place a reasonable system to enable it to respond to requests under s.38(6) for secure accommodation. The evidence in the present case is very similar to that in *Gateshead*, in that the local authority has no secure units of its own, it purchases such accommodation from registered providers, and the nearest provider is many miles away (though much less than the distance involved in *Gateshead*).

73. The handful of requests for the provision of overnight secure accommodation made to the four London Boroughs (including Waltham Forest) collaboratively operating the out of hours EDT system, in the period of around 18 months before and after AR's arrest, indicates that such requests remain a comparative rarity (as they were in 2006 when *Gateshead* was decided). Waltham Forest did not ignore those requests but, as in *Gateshead*, tried to meet them: however, the secure accommodation was either unavailable, or if available, too far away from London to be practicable. That was not the fault of Waltham Forest, as it had no practical alternative to using the 15 approved providers using the system and procedures laid down by the Department for Education. The only means theoretically available to it to avoid that course would be to spend its limited resources on providing, staffing, and maintaining its own secure accommodation which would then be made available to all local authorities, but a decision not to go down that route can hardly be described as irrational.

74. The absence of evidence of successful placements does not lead to the conclusion that there is a systemic breach of statutory duty as Ms Gallagher contended. I cannot see any valid distinction between the system which was found to be lawful in *Gateshead* and the system adopted in the present case.

75. In my judgment it was rational for Waltham Forest to enter into centralised arrangements for the use of existing, authorised secure accommodation via the Secure Accommodation Network, to operate these arrangements in accordance with the Concordat (as subsequently supplemented by the London Protocol), and to make arrangements to pool its resources with three other London Boroughs to provide an out of hours response through the EDT to urgent applications, including s.38(6) requests for accommodation, both secure and non-secure. The guidance and procedure set out in the EDT handbook establishes that Waltham Forest had its legal duties well in mind when it developed the out of hours system. The procedure squarely faced up to the practical impediments to providing secure accommodation in a case where the child had to be transported in the middle of the night and then brought back for a hearing in court the next morning.

76. Waltham Forest had to form a value judgment about the appropriate use of its resources, taking account of its statutory obligations, and the judgment that it formed was plainly one that was open to it. For those reasons, I would dismiss this claim.”

46. At paras. 77-78, Andrews J addressed two ancillary issues:

“77. There are two final matters that I would add. First, in the light of the ongoing work that is being carried out by the London authorities through London Councils with a view to trying to take positive steps to address the absence of secure accommodation for children in or near to London, I would not have been minded to grant declaratory relief even if I had been persuaded that the claim for judicial review was well-founded.

78. Secondly, on 6 March 2020, over a week after the hearing, the Court was sent a copy of a further witness statement from Ms Twite which seeks to amplify, and in some aspects modify, the evidence of Mr Temple, for example by suggesting that the Hailsham unit would not accept a s.38(6) placement from London but only from more local areas. Such evidence could and should have been obtained and served in advance of the hearing, and it is far too late to receive it now. I would decline to admit it in the interests of fairness and the good administration of justice, but in any event, having considered its contents *de bene esse*, it would have made no difference to the result of these proceedings.”

47. In his concurring judgment, at para. 84, Davis LJ agreed that it was too late, and would be potentially unfair, to permit the further evidence of Ms Twite, served after the hearing before the Divisional Court had been concluded.

48. At para. 85, Davis LJ said:

“Even had the claim otherwise been well-founded, I would in the circumstances, and in common with Andrews J, not have granted the discretionary remedy of declaratory relief. But in the result, this claim must be dismissed.”

The Appellant’s grounds of appeal

49. Ms Gallagher advances four grounds of appeal:

- (1) The Divisional Court erred in concluding that the claim is really a complaint about the nationwide lack of secure accommodation due to the absence of funding by central government.
 - (2) The Court failed to consider the London-wide failure to provide secure accommodation.
 - (3) The Court erred, in all the circumstances, in concluding that the Respondent's system is reasonable.
 - (4) The Court erred in concluding that, in any event, it would be appropriate to refuse relief in its discretion.
50. Under Ground 1 Ms Gallagher submits that the statutory scheme set out by Parliament in the 1989 Act places the responsibility for providing secure accommodation on local authorities and allows for the Secretary of State to provide funding to meet this responsibility. The Respondent has never applied for such capital grants. Therefore, the failure to provide secure accommodation cannot be said to be due to lack of funding from central government. In this context she also points out that some other local authorities have managed to provide secure accommodation (14 of the 15 secure units around the country, the other one being provided by a charity), so the sole issue cannot be lack of government funding.
51. Under Ground 2 Ms Gallagher submits that the evidence before the Divisional Court showed that, across London in 2018, only one of 342 requests was met. She submits that over 340 requests a year cannot properly be described as a "rarity", as the Divisional Court thought; and the lack of requests being met in practice distinguishes the position in London from other parts of the country.
52. Under Ground 3 Ms Gallagher submits that the judgments in the Divisional Court contains a fundamental misunderstanding of the system of secure accommodation in stating that the local authorities in England and Wales do not own or manage any secure accommodation themselves. Individual local authorities do own and manage their own secure accommodation, however none of the London local authorities do so. There is no reason for why this is the case.
53. She submits that the errors revealed by Grounds 1-3, taken cumulatively, led the Divisional Court to reach a conclusion, that the Respondent has in place a reasonable system which complies with its duty as set out in *Gateshead*, which was wrong.
54. Under Ground 4, Ms Gallagher submits that the fact that potential initiatives suggested by the London Councils are being explored does not mean that relief should have been refused in any event, even if the Respondent was found to be in breach of its statutory duty in accordance with *Gateshead*. She reminds this Court that the Appellant does not seek any mandatory or other coercive order. He seeks only declaratory relief to the effect that the Respondent's current system is not reasonable and, accordingly, that the Respondent is failing to comply with its statutory duty. If the Court concludes that the Respondent is in breach of its duty, in principle it should grant a declaration to that effect.

Grounds 1-3

55. As was clear from the way in which Ms Gallagher presented her submissions, the first three grounds overlap with each other. As Ms Gallagher submitted at the hearing before us, the first two grounds identify alleged errors of law in the decision of the Divisional Court which contributed to the main ground of appeal, which is Ground 3: that the Divisional Court erred in all the circumstances in concluding that the Respondent's system is reasonable.
56. Ms Gallagher submits that Andrews J fell into error as the result of a factual misunderstanding at para. 29, where she said:
- “The procedures adopted by Waltham Forest for dealing with requests for secure accommodation under s.38(6) of PACE are described in Ms Gordon's first witness statement. She explains that, in common with all local authorities in England and Wales, Waltham Forest does not own or manage any secure accommodation itself; the provision of such accommodation is coordinated by the Secure Welfare Coordination Unit, which is funded by the Department for Education. Local authorities have access to pooled licensed secure accommodation through a centralised arrangement known as the Secure Accommodation Network (‘SAN’). Each local authority purchases the accommodation from the providers on the SAN as and when required.”
57. Ms Gallagher submits that in fact, on undisputed evidence, the pool of secure accommodation around the country is not funded by central government. At the hearing before us Mr Underwood accepted on behalf of the Respondent that there was an error of fact in that paragraph but he submitted that it had had no material impact on the reasoning of Andrews J, in particular at paras. 72 and 75.
58. I am very conscious, as both members of the Divisional Court were, that, in the context of decisions which have implications for public finances, the courts “must tread with caution”: see e.g. my judgment in *R (Drexler) v Leicestershire County Council* [2020] EWCA Civ 502; [2020] ELR 399, at paras. 56 and 79. As I said at para. 56: “The allocation of scarce or finite public resources is inherently a matter which calls for political judgement.” Nevertheless, the courts do have a role to play, applying well established principles of law, including the principles which were set out in *Gateshead*, which are an application in this context of the principles in *Wednesbury* and *Padfield*.
59. I am also conscious, as will be other members of this Court, that the issue in the present case arises in the context of what has been described as “the crisis in the provision of secure accommodation in England and Wales”: see *In re B (A Child)* [2019] EWCA Civ 2025; [2020] Fam 221, at para. 4 (Baker LJ). As Baker LJ went on to say in that paragraph, this was the subject of comment and expressions of concern by the Court of Appeal in 2019 in *In re T (A Child)* [2018] EWCA Civ 2136; [2020] Fam 1, at paras. 2, 5 and 6 (Sir Andrew McFarlane P).

60. At para. 6, Baker LJ said that this significant shortfall in the availability of approved secure accommodation is causing very considerable problems for local authorities and courts across the country. It has been the subject of expressions of judicial concern in a number of cases. Baker LJ said:

“The absence of sufficient resources in such cases means that local authorities are frequently prevented from complying with their statutory obligations to meet the welfare needs of a cohort of vulnerable young people who are at the greatest risk of harm. The provision of such resources is, of course, expensive but the long-term costs of failing to make provision are invariably much greater. This is a problem which needs urgent attention by those responsible for the provision of resources in this area.”

61. I do not accept Mr Underwood’s submissions in response to Grounds 1-3. With respect to the Divisional Court, I have reached the conclusion that Andrews J did misunderstand the true position when she said, at para. 72:

“This claim is really a complaint about the nationwide lack of secure accommodation available to all local authorities due to the absence of funding by central government.”

62. First, it is important to recall that the statutory duty to provide a reasonable system is imposed on each individual local authority. It is not imposed on the central government. True it is that the local authority does not have to discharge that duty directly by providing the secure accommodation itself. It may do so by entering into arrangements with others, for example a charity. It may also discharge its duty by making arrangements for the “pooling” of secure accommodation with other local authorities. As Ms Gallagher submitted at the hearing before us, there is nothing inherently objectionable about that but what is essential is that the local authority cannot avoid the statutory duty imposed on it. The end result of the arrangements it chooses to make must be a reasonable system as set out in *Gateshead*.

63. Secondly, there was no evidence that the central government had caused the difficulties by not providing funding. Indeed, there was no evidence that the Respondent authority had even applied for central funding. What is clear is that the Secretary of State has the power to make a grant to local authorities in this context under section 82(2) of the 1989 Act.

64. Thirdly, this is a case where in practice there is no realistic prospect of secure accommodation being available for a child in response to a request from the police under section 38(6) of PACE, at least during the week. There may be some prospect of it at the weekend but even the evidence about that is far from clear. At the hearing before us, Mr Underwood accepted that there was no prospect in all probability of a place being available for overnight accommodation at short notice during the week. Accordingly, in my respectful judgement, this was not a case where something less than “the ideal” was being achieved (as it was put at para. 82 in the judgment of Davis

LJ). The system was inherently likely to fail in the sense that, as a matter of routine, the answer to a police request would be “No.”

65. Having a reasonable system in place means more than simply having a telephone service or “negotiating” with the police to see if secure accommodation is really required in the circumstances of an individual case. It includes at least the reasonable prospect in practice of being able to provide such secure accommodation in a case where it is needed.
66. I have reached the conclusion that this was truly a case where the duty to make reasonable provision as set out in the decision of this Court in *Gateshead* was not fulfilled. The system which the Respondent authority had in place was not reasonably capable of providing secure accommodation in response to a request under section 38(6) of PACE.
67. Finally in this context, I would bear in mind that the problem on the evidence before the Divisional Court and this Court is London-wide. There simply are no units available which can realistically be used either within London or within a sufficiently close distance that a child could properly be produced in good time at a Magistrates’ Court. The stark reality is therefore that children are having to be put into police cells overnight as the norm rather than the exception. This is contrary to the statutory purpose of the 1989 Act, as identified by this Court in *Gateshead*.

Ground 4

68. As I have mentioned, the Divisional Court expressed the view that, even if the claim for judicial review had otherwise succeeded, they would have refused any relief in the exercise of their discretion. This is the subject of Ground 4 in the present appeal.
69. In my view, this was not part of the decision made by the Divisional Court. It was certainly no part of the order made by it. It was simply an *obiter* indication of what the Court would have done in hypothetical circumstances. The premise for it is not clear. In particular, it is not clear on what basis the claim for judicial review would have succeeded on this hypothetical basis. In my view, a far safer course is for this Court now to consider the question of remedies afresh for itself. We now know the basis on which the Respondent has breached the law. In principle, in my view, the Court should grant some remedy to reflect that breach.
70. As Ms Gallagher stressed at the hearing before us, she does not seek any mandatory order or a coercive order of any kind. In principle, it seems to me that the just and proper course is for the Court to grant a declaration that the Respondent was at the material date (December 2018) in breach of its duty under section 21(2)(b) of the 1989 Act.
71. At the hearing before us Mr Underwood ventilated the possibility that, depending on what this Court said on the substantive merits of the appeal, the Respondent might wish to make further submissions on the question of remedies and perhaps to place evidence before the Court as to the up-to-date position on the facts.

72. For my part I consider that all that is required is for this Court to make a declaration as to the past. What should happen in the future to take account of that declaration is a matter in the first instance for the Respondent. If anyone has a complaint in law to make about future action or inaction by the Respondent, that could in principle be the subject of new legal proceedings but that is not a matter for this Court in these proceedings.
73. As Ms Gallagher made plain, it is not the function of this Court to set out precisely what the Respondent must do to comply with its duty to have a reasonable system in place. It would not be appropriate for this Court to do so: that is a matter entrusted by the law to the Respondent and, as *Gateshead* makes clear, it is a matter for the exercise of its discretion. All that this Court has been asked to do, and has now done, is to state that, at the material date, the Respondent did not have a reasonable system in place.

Applications to adduce fresh evidence

74. For the sake of completeness, I should deal with two applications to adduce fresh evidence in this Court, one by the Appellant and the other by the Respondent.
75. As I have mentioned, the Divisional Court proceeded on the basis that the nearest secure accommodation to Lewisham Police Station was in Hailsham: see para. 32 of the judgment. This was based on the evidence before that Court, including the statement of Mr Alex Temple, which had been filed on behalf of the Appellant. He had made enquiries of Lansdowne Secure Unit on 25 March 2019 and based his understanding on that telephone conversation.
76. The hearing before the Divisional Court took place on 26 February 2020. On the following morning, Ms Jennifer Twite, a lawyer working at Just For Kids Law (solicitors for the Appellant) received text messages from a journalist at BBC London, who had been in court for the hearing. Lansdowne had told the BBC that they would not accommodate a child from London pursuant to section 38(6) of PACE. Further enquiries were made by the solicitors acting for the Appellant, which culminated in a witness statement by Ms Twite dated 5 March 2020. As I have mentioned earlier when summarising the judgment, an application was made after the hearing in the Divisional Court, but before judgment was given, to adduce that witness statement as late evidence. The Divisional Court refused permission to admit that evidence.
77. Before this Court the Appellant sought permission to rely on that evidence. By order of Nugee LJ dated 18 December 2020 that application was adjourned to the substantive hearing.
78. On behalf of the Appellant it is submitted that the Court has a discretion to admit fresh evidence under CPR 52.21(2). That discretion is to be exercised in accordance with the overriding objective but the Court will generally still look to the well-established principles in *Ladd v Marshall* [1954] 1 WLR 1489 as to the relevant factors:

- (1) whether the evidence could have been obtained with reasonable diligence for use at trial;
 - (2) the evidence would probably have an important influence on the result of the case, though it need not be decisive;
 - (3) the evidence must be credible, though it need not be incontrovertible.
79. It is submitted that, in the context of important public interest litigation such as this, it would be particularly unfortunate if the Court were not able to have a complete and accurate factual picture. The point is also made that, in accordance with the “cards on the table” approach which is required in judicial review cases, the Respondent itself should wish, and be able, to provide clear information to the Court as to which accommodation providers will permit children to be admitted under section 38(6) of PACE, as distinct from welfare placements or youth custody placements.
80. I would not admit the evidence of Ms Twite. The reason for this is that this application is not made to this Court for the first time. There is in substance an appeal against the decision of the Divisional Court to refuse to admit this evidence. That was a case management decision well within the broad ambit of discretion vested in that Court. I can see no error of principle made by the Divisional Court nor do I regard its conclusion as being one to which it could not reasonably come. Nonetheless, I would observe that the fact that the Respondent was apparently unaware of exactly which accommodation was potentially available to it to meet PACE requests reinforces my conclusion that no reasonable system was in place.
81. The second application which is before this Court is made on behalf of the Respondent. The Respondent seeks permission to adduce the witness statement of Daniel Phelps, Corporate Director, Children’s Services at the Respondent authority, dated 22 June 2021. To some extent this evidence seeks to update this Court on factual matters since the decision of the Divisional Court. Further, the evidence appears in part to be directed to the question whether discretionary relief should be given depending on the outcome of the substantive appeal. For example, it is said, at para. 4, that there has been “a significant development” in that the Government’s spending review update of November 2020 included an announcement in relation to £24 million of new funding to respond to the gap in provision in the present context. It is said that the Respondent will continue to work in close collaboration with their regional partners to respond to the national challenge.
82. That application on behalf of the Respondent in turn prompted the Government Legal Department to send a letter to the Court dated 28 June 2021, on behalf of the Education Secretary, who was and remains an Interested Party in these proceedings. The letter said that, if the witness statement of Mr Phelps was intended to imply criticism of the Education Secretary, it was not clear to what pleaded issue in the appeal this goes. It also observed that references to the spending review and the care review were given without context and without exhibiting any relevant documents. The Education Secretary does not consider that the witness statement provides any basis for factual findings to be made. The letter also informed the Court that the Department for Education would be assessing all bids for capital funding when the deadline for them closes in July.

83. As was mentioned at the hearing, this Court has looked at all the material that was placed before us (on behalf of the Appellant and on behalf of the Respondent) *de bene esse* because it did not wish anyone to feel that justice had not properly been done. In the circumstances, however, I do not consider that this Court should give permission to the Respondent to adduce the statement of Mr Phelps. It does not meet the criteria in *Ladd v Marshall*.
84. We need to recall that this Court is considering an appeal from the judgment of the Divisional Court and does not sit as a court of first instance. The question for this Court is therefore whether the judgment of the lower court was “wrong”: see CPR 52.21(3)(a). The appeal is by way of “review” and not a re-hearing: see CPR 52.21(1). Usually the review will be conducted on the basis of the evidence which was before the lower court.
85. In any event, I have not found any of the new material to be of any real assistance in deciding what is the central issue in the present appeal. For the reasons I have already set out, in my view this appeal should be allowed simply on the basis of the evidence which was before the Divisional Court. In so far as the statement of Mr Phelps goes to the question of appropriate relief, I do not think that it is of assistance: as I have said above, I have reached the conclusion that the Court should grant a declaration that the Respondent was in breach of its statutory duty in December 2018. What should happen for the future (a matter to which the evidence of Mr Phelps relates) is a matter for the Respondent and others, including the Education Secretary, if an application for funding is made to him.

Conclusion

86. For the reasons I have given I would allow this appeal.
87. I would grant a declaration that the Respondent was at the material date (December 2018) in breach of its duty under section 21(2)(b) of the 1989 Act to have a reasonable system in place to respond to requests by the police for secure accommodation under section 38(6) of PACE.

Sir Patrick Elias:

88. I agree.

Lady Justice King:

89. I also agree.