Neutral Citation Number: [2018] EWHC 3298 (Admin)

Case No: CO/1274/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 November 2018

Before :

KAREN STEYN QC
(sitting as a Deputy High Court Judge)

- -

Between :

R (on the application of MIV and others)	**Claimants**
- and -	
LONDON BOROUGH OF NEWHAM	**Defendant**

- -
- -

Sam Jacobs (instructed by **Matthew Gold**) for the **Claimants**
Emma Godfrey (instructed by **Onesource**) for the **Defendant**

Hearing date: 27 November 2018

- -

Judgment Approved

Karen Steyn QC :

A. Introduction

1. The first and second claimants are the father and mother, respectively, of the third claimant (who is referred to in these proceedings as MIV). MIV is a five year old boy who was born with a significant disability. The claimants are all nationals of India. They have no leave to remain in the United Kingdom. The defendant is a local authority.

2. By a claim issued on 26 March 2018, the claimants sought to challenge the alleged ongoing failures of the defendant (i) to provide adequate accommodation pursuant to s.17 of the Children Act 1989 ("the CA 1989"); and (ii) to carry out a lawful assessment pursuant to s.17 of the CA 1989 and s.2 of the Chronically Sick and Disabled Persons Act 1970 ("the CSDPA 1970").

3. The claimants acknowledge that, on 6 April 2018, the defendant made an offer of suitable accommodation which they accepted, moving into the property on 25 April 2018. Nevertheless, they maintain their challenge on three grounds. Grounds 1 and 3 both challenge the lawfulness of the defendant's alleged failure to provide suitable accommodation prior to April 2018, whereas the focus of ground 2 is on the adequacy of the defendant's assessment and provision of other services pursuant to s.2 of the CSDPA 1970.

4. Specifically:

   i) By ground 1, the claimants allege that the defendant failed to search for suitable accommodation from August 2017 to January 2018 and then from January 2018 to early April 2018 it limited its search to accommodation providers with whom the defendant had existing links, and that to do so was *Wednesbury* unreasonable and/or an unlawful fetter of its discretion. They seek a declaration to this effect and seek to rely on these alleged failings in support of ground 3.

   ii) By ground 2, the claimants contend that the defendant failed adequately to assess MIV's needs and provide the necessary services to meet those needs, pursuant to s.2 CSDPA 1970. Again, they seek declaratory relief and rely on these alleged failings in support of ground 3.

   iii) By ground 3, the claimants contend that the impact on MIV of being housed in unsuitable accommodation was of such severity that it infringed MIV's right to private and family life, in breach of article 8 of the European Convention on Human Rights ("the ECHR"). They seek damages in the sum of £12,000 and declaratory relief by way of just satisfaction.

5. On 28 March 2018, Roger ter Haar QC, sitting as a deputy High Court judge, abridged time for service of the defendant's acknowledgment of service and ordered that the claimants shall not be identified, directly or indirectly.

6. Permission to apply for judicial review was granted on the papers on 19 April 2018 by Upper Tribunal Judge Markus QC, sitting as a judge of the High Court.

7. On 26 June 2018, Andrew Henshaw QC, sitting as a deputy High Court judge, ordered the defendant to provide certain documents and information "*to the extent that the Defendant considers the Claimants are entitled to them*", by 31 July 2018. Any resulting application by the claimant for further information or disclosure, or to cross-examine a witness, was required to be issued and served by 7 September 2018. In the event, the defendant served further evidence and the claimants made no such application.

B. The Facts

The claimants' immigration status

8. The first claimant's evidence is that he applied, while in India, for a student visa permitting him to study business management in the UK. He arrived in the UK on 3 August 2009 and made a successful application in January 2011 for a further temporary period of leave to remain. The second claimant, his wife, was granted a visa enabling her to join him in the UK on 3 September 2011. MIV was born on 28 June 2013.

9. In August 2012 the first and second claimants' leave to remain was curtailed. The first claimant states that he does not fully understand how he lost his leave to remain. He had thought it was because his sponsor college licence was revoked, but was subsequently told by an immigration judge that the college had a valid licence.

10. The first claimant made a further application for a student visa which was refused, his appeal was dismissed, and by October 2015 his rights of appeal were exhausted. An application by the family for indefinite leave to remain in the UK was refused on 15 February 2017. I am told that more recently an application for leave to remain has been made, based on MIV's alleged rights pursuant to articles 3 and 8 of the ECHR. That application was refused in early October 2018 and the claimants are considering whether to challenge the refusal in judicial review proceedings.

11. Whatever the reason for the curtailment of leave six years ago, and irrespective of the merits or demerits of the claimants' most recent application for leave to remain, it is common ground that at all material times for the purposes of this challenge, the claimants have had no right to remain in the UK. That has an impact on their eligibility for housing assistance and welfare benefits.

MIV's health and development

12. MIV suffers from significant global developmental delay and epilepsy. According to a Consultant in Paediatric Neurology who has been treating MIV since January 2017, he has no language: he does not produce any words or babble, only simple vocalisations. He is hyperactive and prone to falls. He has frequent seizures. He tends to have two to three bigger seizures in the mornings or soon after awakening, consisting of a forceful head jerk followed by repetitive limb jerks, lasting 30 to 40 seconds. He is prone to injury as, if he is standing when these bigger seizures occur, he is liable to fall and bang his head. Following these seizures, MIV tends to sleep for 20 to 30 minutes. Throughout the rest of the day, about 15 to 20 times a day, MIV has more subtle head jerks which do not usually cause him to fall.

13. According to a report from a physiotherapist, MIV is able to sit, stand up from the floor, and walk short distances independently, although when walking his gait is unsteady and he walks intermittently on tip toes.

14. His developmental level is described by his teacher as being that of a child of a few months. MIV needs constant one-to-one support for all of his learning and personal needs. In particular, he needs help with feeding and he wears nappies as he is unable to indicate when he needs to use the toilet.

Initial referral and assessment of 19 April 2017

15. In March 2017 Great Ormond Street Hospital referred MIV to the defendant's children's services for assessment of his needs.

16. At that time, the claimants were renting accommodation privately. Their accommodation consisted of a single room on the first floor of a shared house. They shared a kitchen and toilet with other tenants in the house. MIV was three years old and he attended a nursery, at William Davies Primary School, for 1 hour 15 minutes per day, five days per week. He was provided with 1:1 support for those sessions.

17. A social worker employed by the defendant, Ms Gapare, undertook an assessment of MIV's needs. On 30 March 2017 she attended a meeting at MIV's nursery school, with his parents, the special educational needs coordinator and a family support worker, to gather information. On 5 April 2017 Ms Gapare visited the claimants in their home.

She completed her assessment on 19 April 2017 and it was authorised by a manager the same day.

18. The assessment noted, in the box headed "Views of the Parent(s)/Carer(s)", that MIV's parents "would like to stay at the current accommodation until their immigration status is resolved to avoid being homeless. They said they are struggling with rent money and fear eviction. They stated that they borrow money from friends or relatives from India. Parents are aware of their son's needs and they take on board all the advice given by professionals."

19. In her analysis of "what is working well", Ms Gapare included MIV's attendance at nursery, where he was showing developmental progress, and that "he stays with his parents who are aware of his needs and they are able to meet his needs". Describing "what is not working well", Ms Gapare wrote:

> "[MIV] has no sense of danger and he lacks awareness of his surroundings. He climbs on furniture and is unsteady on his feet, he falls. He needs 1:1 support at all times at home and at nursery.
>
> …
>
> The family is at present renting a single room (1st floor) under private tenancy. Dad says he sleeps on the floor whilst mum and [MIV] sleep on the bed.
>
> Parents are both unemployed and neither of them are in receipt of any benefits. They are financially struggling to pay rent and transport fares. They have fear of eviction.
>
> Dad says he sometimes walks to Newham Hospital when he does not have any money for transport to attend health appointments for [MIV].
>
> They are very anxious of becoming homeless."

20. Under the heading "analysis" Ms Gapare noted that MIV's parents were "struggling to pay rent, transport fares and to pay [for] food". She continued:

> "[MIV] requires 1:1 supervision at all times for his personal safety. They also require financial support as well as appropriate accommodation to ensure [MIV's] well being and quality of life is improved.
>
> Discussion was convened between Group Manager and No Recourse to Public Funds Team Manager and the decision was to complete an assessment and then liaise with the team to enquire whether they will financially support the family during this period.
>
> [MIV] is a child in need who needs support from the Multi Disciplinary Team and 0-25 SEND Team will coordinate to ensure that he receives support from all agencies."

21. At this stage, when MIV was three years old, Ms Gapare noted that there was no clear diagnosis of any disability apart from MIV's epilepsy and seizures, although it was clear he was delayed in reaching developmental milestones. The social worker's recommendations in April 2017 were in these terms:

> "[MIV] is able to learn but slowly and therefore he needs a highly stimulating home environment and parents that can support him with all this. At present his parents are able to offer all the care needs and stimulation, he also attends nursery [for a] couple of hours a day where he will learn social and communication needs. At present he may not meet the threshold to access services in the 0-25 SEND Team and it is recommended that the parents be supported in exploring community resources, early help and other places like the children centres. The parents can access support via Asian community organisations as they are quite isolated. Both parents are able to care for [MIV] well and the parents can support each other in caring for him, as they are not in employment.
>
> To liaise with the No Recourse to Public Fund Team whether they can provide support with housing and finances for the family as this is the major stress factor for the parents.
>
> [MIV] continues to attend William Davies Primary School and he was offered a school place at North Beckton School to commence in September 2017."

22. This assessment identified MIV as a child in need within the meaning of s.17 of the CA 1989.

The provision of temporary accommodation and the assessment of 15 August 2017

23. On 25 July 2017 the claimants approached the defendant's children's services, stating that they were facing imminent street homelessness. They had been served with an eviction letter by their landlord, from whom they had been renting single room accommodation, as they had been unable to pay their rent. They were due to be evicted on 8 August 2017.

24. Following receipt of a pre-action protocol letter in early August, the defendant confirmed, on 4 August 2017, that it would undertake a review of the s.17 assessment carried out in April 2017.

25. On 7 August 2017 the defendant offered the claimants temporary accommodation at 29 Morieux Road, secured through the No Recourse to Public Fund Team ("the NRPF Team"), and the claimants moved in on 8 August 2017. The accommodation provided by the defendant consisted of a single room on the ground floor in a shared house. The kitchen and bathroom were shared with one other woman who lived in the house.

26. The defendant also decided, at this point, to provide the claimants with financial support of £112.50 per week.

27. On 10 August 2017 the claimants' solicitor asked the defendant how long the claimants would be in their new accommodation. The claimants' solicitor wrote:

> "I fully appreciate that the accommodation given was sourced in a rush, but I understand that the room they are all in is very small and there is no space for [MIV] to move and play. My clients are concerned about the possible impact on [MIV] because of [his] disability … I understand that they raised the issue with the social worker who said that it is only temporary and that's why it is small. I should be grateful if you could confirm how long your client department thinks my clients will be in this accommodation. You'll appreciate that "temporary" can mean a great deal of things, and I know that sometimes people stay in "temporary" accommodation for a very long time."

28. The revised assessment was completed on 15 August 2017 by a social worker employed by the defendant, Mr Antwi, and reviewed the same day by his manager. Mr Antwi noted that the "family has stated that the current accommodation is a single room with no space for MIV to move around". In the recommendations section he stated:

> "Though the family have been offered tempora[ry] accommodation which is a single room in a shared house to prevent them being destitute; this is currently not meeting their needs considering [MIV's] complex needs. They will however benefit from at least two bed room house so that [MIV] can have a space to engage with his sensory toys to help enhance his delayed development.
>
> He would have met the threshold to access services in the 0-25 SEND Team if his parents had the right to remain in UK with Recourse to public funds. Notwithstanding this, it cannot be denied that [MIV] is still a child in need under s.17 of the Children Act 1989; considering the complexities in his medical condition and the fact that his parents are not in any employment that could generate income for the family to meet his basic care needs, he will benefit from support from 0-25 SEND Team, NRPF Team, SEN, Housing, Health and other Charity Organisations within the community.
>
> I recommend that the parents be supported in exploring community resources including charities."

29. Mr Antwi's manager added:

> "From the assessment it appears that [MIV] has complex needs and qualifies for assistance in the 0-25 SEND Team. However, his parents' immigration status needs to be regularised. In the meantime the child needs the basic provisions under s.17 of the Act."

30. The claimants rely on the assessment that the accommodation was not "meeting their needs" in support of the contention that the failure to take adequate steps to find alternative suitable accommodation before early April 2018 was Wednesbury

unreasonable and in breach of article 8. In addition, the adequacy of the assessment of 15 August 2017 is the subject of ground 2.

The period from 8 August 2017 to 5 April 2018

31. In September 2017 MIV was supported by the defendant to begin attending a school, with specialist early years provision. The defendant's SEN Transport Team provided assistance with taking MIV to and from school. From December 2017 this assistance was provided in the form of a payment of £150 per week to enable MIV's parents to access a taxi service to take MIV to and from school.

32. On 4 October 2017 the claimants' solicitor emailed the defendant raising what they described as "serious concerns about the suitability of this accommodation even as interim accommodation".

33. On 9 November 2017 the claimants' solicitor emailed the defendant asking when the claimants could expect to move into a two bedroom house located within reasonable distance of MIV's school. The defendant's solicitor responded the same day that she was still taking instructions in relation to the timeframes for the recommendations set out in the assessment.

34. On 14 December 2017 the defendant's solicitor informed the claimants' solicitor that as they were now in receipt of the full subsistence allowance and funding for MIV's transport to and from school, daily bus passes would only be provided for the purpose of hospital appointments, on receipt of evidence of such appointments.

35. On 3 January 2018 the claimants' solicitor sent an email to the defendant's solicitor raising issues regarding travel passes, subsistence and also asking, again, when the claimants could expect to move to a two bedroom house located within a reasonable distance of MIV's school.

36. On 10 January 2018 the defendant's solicitor responded to a number of issues that had been raised. In respect of accommodation, she wrote:

> "It is the local authority's position that although the family would benefit from a two bedroom property, that this is not essential to ensure [MIV's] wellbeing and that there is no breach of [MIV's] human rights by the Local Authority in not providing this type of accommodation to the family. Your client and his family's main need is for accommodation which has been provided by the Local Authority through the NRPF Team, I am instructed that the Local Authority is not in a position to provide the family with a two bedroom property, however the Local Authority is exploring possible other accommodation options for the family which may be more suitable for the family in terms of access and travel. These options include ground floor accommodation which would assist [MIV's] parents in getting him in and out of the accommodation, and accommodation closer to [MIV's] school in North Beckton."

37. The defendant does not suggest that it had taken any steps to look for alternative accommodation from August to December 2017. The evidence of Mr Bernard, the Practice Lead for the NRPF Team, is that following a meeting in early January 2018:

> "4. … I agreed to assist the allocated social worker and the 0-25 SEND Team with securing alternative accommodation for the family through the NRPF network of accommodation providers which the team uses on a daily basis to secure accommodation to families with NRPF in and around London.
>
> 5. From January 2018 to April 2018 I contacted a number of accommodation providers from the Local Authority's pool of accommodation providers in an attempt to seek alternative accommodation for this family, which was hoped would better suit [MIV's] needs.
>
> 6. Unfortunately the majority of my communications with accommodation providers are completed on the telephone, and due to the nature of the work these calls are not recorded by the NRPF Team. As such, I have no case records in my possession confirming the details of the accommodation providers I contacted and the dates I contacted them. However, during this period I estimate that I contacted five accommodation providers on a weekly basis to establish whether they had any accommodation which would better meet this family's needs than their current accommodation."

38. On 22 January 2018 the claimants' solicitors sent a pre-action protocol letter threatening to challenge the ongoing failure to provide the claimants with suitable accommodation.

39. On 7 February 2018 the defendant provided some support to enable the claimants to access community resources, in the form of a list of four centres or activity areas that MIV could access (such as a City Farm and a Discovery Centre), giving the addresses and telephone numbers; and providing a flyer for the dates of forthcoming 'Family Days' at one of these centres.

40. On 16 February 2018 the defendant's solicitor responded to the pre-action protocol letter. The response confirmed that the defendant was working to secure alternative accommodation. The NRPF Team was said to be in contact with accommodation providers on a daily basis to see if there is any accommodation closer to MIV's school which would be more suitable. The letter continued: "Unfortunately due to the property market in and around London the Local Authority is facing extreme difficulty in securing alternative accommodation for the Claimant's family". The defendant confirmed it would continue to seek more suitable accommodation.

41. On 23 February 2018 the defendant's solicitor explained in an email:

> "I am instructed that the Local Authority is continuously searching for properties for the family through the established links that the Local Authority's NRPF team has with providers for alternative accommodation for the family. Due to your clients' status in the UK, I am instructed that they are unable to access a tenancy agreement, nor can the local authority provide or be a guarantor, thereby ruling

> out the searches conducted by [the claimants' solicitors] on Rightmove and Zoopla.
>
> …
>
> I am instructed that the search is confined to what is available to the Local Authority's NRPF Team, and cannot take into consideration properties available on property sites Rightmove or Zoopla as detailed in point 1 above."

42. The claimants' solicitor responded that the right to rent provisions did not prevent the defendant from arranging accommodation for the family in the private rental sector. They recognised that there were "financial considerations for the Local Authority" but suggested that this was an "exceptional case" because the impact of the accommodation on MIV's well-being was said to be "very significant indeed". They asked the defendant to confirm it would "undertake additional measures to locate suitable accommodation".

43. On 16 March 2018 the defendant's solicitor confirmed that the defendant would continue to search for accommodation for the claimants using its existing links with providers and would not agree to undertake additional measures to secure accommodation. No reason was given for refusing to undertake a wider search.

44. The statement of Ms Visagie, the defendant's Service Manager for Safeguarding and Early Help, explains:

> "4. The NRPF Team has a pool of five accommodation providers, which it has existing links with. The existing links were obtained through consulting and working with officers in the Local Authority's Housing Department. The Team has made contact with the providers and has accessed support from these providers to identify accommodation for families within the NRPF Team. When a family presents to the NRPF Team the allocated worker would firstly establish if the family is entitled to support from the NRPF Team, and then they will liaise further with these accommodation providers to identify whether they have any suitable accommodation in or around London for the family in question. The majority of the accommodation available is of a shared nature and the provision of self-contained units is very scarce.
>
> 5. When accommodation is identified, the Local Authority will then contract with the accommodation provider on a nightly basis for the provision of the accommodation. The Local Authority will pay the accommodation costs in arrears on a weekly basis to the accommodation provider.
>
> …
>
> 8. The Local Authority's existing accommodation providers all deal with property in the private rented sector, however these arrangements do not involve the Local Authority entering into tenancy agreements with the accommodation providers, which would present the Local Authority with a number of risks."

45. Ms Visagie's evidence is that the "harsh reality" is that the pool of accommodation providers from whom the defendant is able to secure accommodation for families with No Recourse to Public Funds is limited.

46. MIV's father gave evidence of the impact of the accommodation at 29 Morieux Road on MIV. He said:

> "This accommodation contains dangers for [MIV] and is too small for him to play, explore and undertake activities necessary for his development. The situation we are in means that on weekends and school holidays, [MIV] is effectively a prisoner, restrained to a very small space."
>
> "[MIV] needs constant supervision, he cannot be left alone for a moment. When [MIV] is not at school only one of us can carry out essential chores, like preparing food, cleaning the house because the other needs to constantly look after [MIV].
>
> The size of the room means that it is full of things that could injure [MIV] if he fell. There are also many things including mouldy wall paper and the inside of damaged walls which are dangerous for [MIV] to put in his mouth which he will do so unless we stop him.
>
> [MIV] has a special chair which has a heavy base and a strap to hold him in. This chair was provided to us by [MIV's] occupational therapist. When [MIV] is at home we have to either keep him in this chair or be holding him on the bed. Even when [MIV] is in the chair we need to supervise him because he can wriggle out of the chair and often will be able to move it. Supervising [MIV] and carrying out other essential tasks takes up all of our time."
>
> "When one person continues chores like preparing food, the other person needs to continue to supervise [MIV]. We can often distract him with YouTube videos or TV with bright colours which he enjoys. However, this will only work for so long where he still needs constant supervision and we do not really like the idea of [MIV] watching YouTube videos for so long as we would prefer him to be playing in safe environment with suitable toys. We also put him in the special chair for some time but he will often start to cry within an hour of being in it. We therefore have to rotate between having him in the chair and holding him on the bed. I sometimes try and play with him on the bed with a soft ball we bought for him, but there is not enough space to do so properly."
>
> "Taking [MIV] anywhere outside the home is extremely difficult. Both of us are needed to put [MIV] in his push chair. When in the chair he will often kick and swing his arms about. When we are on public transport with him he has inadvertently hit other passengers who sometimes become angry at us and shout or swear. [MIV] will also grab things that he sees around him, such as items off a supermarket shelf. We therefore often feel that we cannot take [MIV] out of the house and when we do we need two people to manage him. Now we also have a financial restriction which means we cannot take [MIV] out to the shop because we cannot both afford to go as we do not have travel cards. Since we have stopped receiving travel cards [MIV] has spent an increasing amount of time at home. On non-school days, MIV is restless and more prone to tantrums as he has not had an opportunity to release his energy. He is more difficult to care for on these days."

Issue of the claim and provision of alternative accommodation

47. The claim was issued on 26 March 2018.

48. On 5 April 2018 the defendant sent emails to four accommodation providers seeking two bedroom accommodation, preferably ground floor, within the London area. The accommodation providers identified five properties. One of these properties, a two bedroom property in the area of the London Borough of Barking and Dagenham, was sufficiently close to MIV's school to be suitable.

49. The following day, the defendant showed the claimants this property and they accepted the defendant's offer of alternative accommodation. The claimants moved in on 25 April 2018, with support provided by the defendant.

50. The defendant also increased the financial subsistence support provided to the claimants to £142.45 per week, following a financial assessment completed on 16 April 2018, backdating this support to 4 April 2018.

51. As I have said, permission to apply for judicial review was granted on 19 April 2018, after the offer of two bedroom accommodation had been made and accepted.

The assessment of 16 July 2018

52. On 16 July 2018 a social worker employed by the defendant, Mr Boadu, produced a revised s.17 assessment. In this assessment it was noted that MIV attends school full-time from Monday to Friday. Special educational provision is made for him and school transport is now the responsibility of the SEN team for the LB of Barking and Dagenham, where he lives. MIV has a special wheelchair which had been reviewed on 27 April 2018 and he was waiting for a follow up wheelchair service appointment.

53. The defendant had supported the first and second claimants to obtain an HC2 certificate to assist with their own health costs. This certificate was valid for a year from 16 April 2018. The defendant had also approached two charities for help with purchasing sensory toys for MIV. One responded that they were unable to assist because the family had no right to have recourse to public funds. But the other charity provided a sum of £454.45 for the purchase of sensory toys, which were ordered for MIV.

54. Mr Boadu noted:

> "[MIV's] care needs are met at home by his parents. Both parents outlined the challenges involved in providing constant supervision to [MIV] at all times as a result of his condition. This situation is compounded by the health needs of both parents which they reported during the assessment. [MIV] however attends North Beckton Primary School full time which gives the parents a welcome break from their caring role. The parents will however benefit from respite/support during the school half term and holidays. Due to [MIV's] age, a support carer obtained via a care agency might well be able to … engage with MIV both at home and in the community. This will however be subject to the approval of the care package panel."

55. Under the heading "recommendations", Mr Boadu noted that the defendant was supporting the family with rent payments and a subsistence allowance, whilst school transport was covered by the London Borough of Barking and Dagenham. He noted that he had considered s.2 of the CSDPA 1970 and he outlined a draft plan to meet MIV's needs.

56. In the draft plan Mr Boadu noted seven desired outcomes and the actions to meet them, namely:

    i) "For parents to be supported to meet all of [MIV's] basic care needs." The action to meet this was "to continue to provide the family with suitable accommodation and a subsistence allowance until otherwise advised by the Home Office".

    ii) "To ensure that [MIV] is safe at home at all times." The action to meet this was a referral to Occupational Therapist. The referral had been made and the Occupational Therapist had completed an assessment on 18 June 2018.

    iii) "To ensure that [MIV's] special educational needs are met." MIV was in a suitable placement, with transport arrangements in place, and continuing responsibility had been accepted by the London Borough of Barking and Dagenham.

    iv) "To ensure that [MIV's] complex health needs are met." This was being met by MIV's parents always ensuring that MIV attended his health appointments.

    v) "For [MIV] to be allocated a Social Worker who will work with him to ensure that all his needs are met." MIV had an allocated social worker who was "to conduct CIN visits at least once every four weeks".

    vi) "For [MIV] to enjoy a stimulating environment at home." The action to meet this was the social worker seeking funding for the purchase of sensory toys/equipment for MIV. This had been done and a charity had provided £454.45 for the purchase of such toys/equipment.

    vii) "For the family to be provided with respite during the half term and school holidays." The action to seek to achieve this outcome was "Social Worker to present case to care package panel".

57. On or about 23 August 2018 the defendant's care panel agreed the provision of 9 hours per week outreach support during school holidays up until the end of February 2019.

58. In pre-action correspondence dated 21 September 2018 the claimants' solicitors invited the defendant to reassess the need for respite care during term time in conjunction with an assessment of the parents' needs as carers. By a letter dated 10 October 2018 the defendant agreed to reassess the family's needs for term-time respite care, including undertaking a human rights assessment. In the interim, pending that reassessment, the defendant has agreed to provide 9 hours outreach support per week during term-time.

59. There is no challenge in these proceedings to the assessment of 16 July 2018 or the current level of provision. Rather, that assessment is relied on as demonstrating the inadequacy of the 15 August 2017 assessment.

60. MIV's father's evidence regarding the accommodation they moved into in April 2018, although raising many issues, says:

> "Despite these issues the accommodation is much better for MIV. There is now a living space in which there is a floor on which MIV can walk and play. We have bought a play house which MIV likes to play in. When we get home from picking MIV up from school he will rush to go in it and play. There is now space for him to play with the limited toys he has. This is a huge improvement over the previous accommodation.
>
> We are now able to make sure that MIV has a chance to walk around at home, as recommended by his physiotherapist. We think we have started to see a slight increase in MIV's strength since moving into this accommodation, although this is limited as he was ill for the first week. MIV is also visibly happier and calmer. He is less agitated and screams and shouts less. We have also noticed that MIV's appetite has improved significantly. He also sleeps better.
>
> While we previously had to restrain MIV at all times when at home in the old accommodation, either by holding him on the bed or by strapping him into the special chair, we now only have to do this rarely and MIV is only in the chair for when we feed him."

C. The legislative framework

61. Section 17 of the CA 1989 provides, so far as relevant:

> "(1) It shall be the general duty of every local authority (in addition to the other duties imposed on them by this Part)—
>
> (a) to safeguard and promote the welfare of children within their area who are in need; and
>
> (b) so far as is consistent with that duty, to promote the upbringing of such children by their families,
>
> by providing a range and level of services appropriate to those children's needs.
>
> (2) For the purpose principally of facilitating the discharge of their general duty under this section, every local authority shall have the specific duties and powers set out in Part 1 of Schedule 2.
>
> (3) Any service provided by an authority in the exercise of functions conferred on them by this section may be provided for the family of a particular child in need or for any member of his family, if it is provided with a view to safeguarding or promoting the child's welfare.
>
> …

(6) The services provided by a local authority in the exercise of functions conferred on them by this section may include providing accommodation and giving assistance in kind or in cash.

...

(10) For the purposes of this Part a child shall be taken to be in need if—

…

(c) he is disabled,

and "family", in relation to such a child, includes any person who has parental responsibility for the child and any other person with whom he has been living."

62. Schedule 2 of the CA 1989 provides so far as relevant:

"1(1) Every local authority shall take reasonable steps to identify the extent to which there are children in need within their area."

"3 Where it appears to a local authority that a child within their area is in need, the authority may assess his needs for the purposes of this Act at the same time as any assessment of his needs is made under—

(a) the Chronically Sick and Disabled Persons Act 1970; …"

6(1) Every local authority shall provide services designed—
(a) to minimise the effect on disabled children within their area of their disabilities;
(b) to give such children the opportunity to lead lives which are as normal as possible; and
(c) to assist individuals who provide care for such children to continue to do so, or to do so more effectively, by giving them breaks from caring."

63. As Ryder LJ observed in *R (C) v London Borough of Southwark* [2016] EWCA Civ 707 at [12]:

"It is settled law that the section 17 scheme does not create a specific or mandatory duty owed to an individual child. It is a target duty which creates a discretion in a local authority to make a decision to meet an individual child's assessed need. The decision may be influenced by factors other than the individual child's welfare and may include the resources of the local authority, other provision that has been made for the child and the needs of other children (see, for example *R (G) v Barnet London Borough Council* [2003] UKHL 57, [2004] 2 AC 208 at [113] and [118]). Accordingly, although the adequacy of an assessment or the lawfulness of a decision may be the subject of a challenge to the exercise of a local authority's functions under section 17, it is not for the court to substitute its judgment for that of the local authority on the questions

> whether a child is in need and, if so, what that child's needs are, nor can the court dictate how the assessment is to be undertaken."

64. A decision not to meet a child's needs assessed pursuant to s.17 of the CA 1989 is not a breach of statutory duty, but it may be challenged on public law grounds, such as those relied on here, namely, Wednesbury unreasonableness and unlawful fettering of the authority's discretion. A local authority will also be obliged to meet the assessed needs if not doing so would put it in breach of its duty under s.6 of the HRA 1998 not to breach Convention rights: see *R (O) v London Borough of Lambeth* [2016] EWHC 937 (Admin) at [13].

65. Schedule 3 to the Nationality Immigration and Asylum Act 2002 sets out a number of classes of person who are excluded from eligibility for support or assistance under various statutory provisions, including s.17 of the CA 1989: see para 1(1)(g). These include a person who is in the UK unlawfully and not an asylum seeker: see para 7. It is accepted that MIV's parents are within the class of persons made ineligible for support by Schedule 3.

66. Schedule 3 does not prevent the provision of support or assistance to a child: see para 2(1)(b). But if the parents are excluded from the provision of accommodation by Schedule 3, this *prima facie* prevents the provision of accommodation pursuant to s.17 to the family: see *R (M) v Islington London Borough Council* [2005] 1 WLR 884. However, Schedule 3 "does not prevent the exercise of a power or performance of a duty if, and to the extent that, its exercise or performance is necessary for the purpose of avoiding a breach of (a) a person's Convention rights".

67. As Rymer LJ observed in *R (C) v LB of Southwark* at [13]:

> "A local authority that provides support for children in need under the 1989 Act is acting under its powers as a children's services authority (a local social services authority with responsibility for children) not as a local social services authority performing functions relating to homelessness and its prevention, and not as a local housing authority. The limited nature of the local authority's power is important. The local authority appropriately remind this court of the statement of principle in this regard which is to be found in *R (Blackburn Smith) v London Borough of Lambeth* [2007] EWHC 767 (Admin) at [36] per Dobbs J:
>
> > "…the defendant's powers [under section 17] were never intended to enable it to act as an alternative welfare agency in circumstances where Parliament had determined that the claimant should be excluded from mainstream benefits.""

68. Section 2 of the CSDPA 1970 provides, so far as material:

> "(4) Where a local authority have functions under Part 3 of the Children Act 1989 in relation to a disabled child and the child is ordinarily resident in their area, they must, in exercise of those functions, make any arrangements within subsection (6) that they are satisfied it is necessary for them to make in order to meet the needs of the child.

…

(6) The arrangements mentioned in subsection (4) are arrangements for any of the following—

(a) the provision of practical assistance for the child in the child's home;
(b) the provision of wireless, television, library or similar recreational facilities for the child, or assistance to the child in obtaining them;
(c) the provision for the child of lectures, games, outings or other recreational facilities outside the home or assistance to the child in taking advantage of available educational facilities;
(d) the provision for the child of facilities for, or assistance in, travelling to and from home for the purpose of participating in any services provided under arrangements made by the authority under Part 3 of the Children Act 1989 or, with the approval of the authority, in any services, provided otherwise than under arrangements under that Part, which are similar to services which could be provided under such arrangements;
(e) the provision of assistance for the child in arranging for the carrying out of any works of adaptation in the child's home or the provision of any additional facilities designed to secure greater safety, comfort or convenience for the child;
(f) facilitating the taking of holidays by the child, whether at holiday homes or otherwise and whether provided under arrangements made by the authority or otherwise;
(g) the provision of meals for the child whether at home or elsewhere;
(h) the provision of a telephone for the child, or of special equipment necessary for the child to use one, or assistance to the child in obtaining any of those things."

69. In *R (KM) v Cambridgeshire County Council* [2012] UKSC 23 [2012] PTSR 1189 Lord Wilson JSC explained at [15]:

> "When a local authority is required to consider whether it is "necessary in order to meet the needs of that person for that authority to make arrangements for" the provision of any of the matters on the service list, it is required to ask itself three questions and should do so in three separate stages: (i) What are the needs of the disabled person? (ii) In order to meet the needs identified at (i), is it necessary for the authority to make arrangements for the provision of any of the listed services? (iii) If the answer to question (ii) is affirmative, what are the nature and extent of the listed services for the provision of which it is necessary for the authority to make arrangements?"

Lord Wilson also identified a "fourth potential stage of the inquiry" at [23], in circumstances where a disabled person qualifies for a direct payment in lieu of provision of the services to him by the local authority.

70. Where the local authority assesses that it is necessary for it to make arrangements to meet assessed needs, s.2 imposes a duty to make the arrangements: it is not a mere

power. But at stages (i) and (ii) of the assessment, the cost and availability of resources may be relevant: see *R v Gloucestershire CC, ex p Barry* [1997] AC 584 at 604E.

71. Section 21(1) and (2) of the Immigration Act 2014 provides that a person who requires leave to enter or remain in the UK, but does not have it, does not have a "right to rent". A landlord must not authorise an adult to occupy premises under a "residential tenancy agreement" if the adult does not have a right to rent (and is not a British, EEA or Swiss national): see s.21(1) and (5) and s.22(1).

72. A "residential tenancy agreement" is defined in s.20(2) of the Immigration Act 2014 as "a tenancy which

> (a) grants a right of occupation of premises for residential use,
>
> (b) provides for payment of rent (whether or not at market rent), and
>
> (c) is not an excluded agreement."

73. For the purposes of s.20(2)(c), an "excluded agreement" means any agreement of a description identified in Schedule 3: see s.20(6). One form of "excluded agreement", specified in para 7 of Schedule 3, is an agreement under which accommodation is provided to a person as a result of a duty or relevant power that is imposed or conferred on a local authority by an enactment (whether or not provided by the local authority), and which is not excluded by another provision of Schedule 3.

74. In accordance with s.6 of the Human Rights Act 1998, it is unlawful for a local authority to act in a way which is incompatible with a Convention right. One of the Convention rights in Schedule 1 of the HRA 1998 is article 8, which provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

D. Article 8

75. The principal claim is that the defendant breached MIV's article 8 right to private and family life. This is the only ground in respect of which any substantive relief is sought. The complaints made in grounds 1 and 2 have been remedied and they are clearly academic. The relevance of these historic issues goes to the alleged culpability of the defendant, when considering whether a breach of article 8 has been established, and so I address them in that context. Given that they are academic, I do not consider it appropriate to address them separately as discrete grounds.

Discussion and analysis of the case-law

76. In support of the MIV's claim, Mr Jacobs, Counsel for the claimants, relied on three authorities. First, he drew my attention to the judgment of Jackson J in *Morris v London Borough of Newham* [2002] EWHC 1262 (Admin). That was a case concerning the local authority's performance of its duties under the Housing Act 1996. At [49]-[50] Jackson J considered *Marzari v Italy* 28 EHRR CD 175.

77. *Marzari* was a decision of the European Court of Human Rights concerning an applicant who suffered from a rare and serious illness called metabolic myopathy. The applicant alleged that his eviction from a privately rented apartment by a public authority violated his article 8 rights. The European Court of Human Rights considered that "although Article 8 does not guarantee the right to have one's housing problems solved by the authorities, a refusal of the authorities to provide assistance in this respect to an individual suffering from a severe disease might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such refusal on the private life of the individual". However, on the facts, the application was dismissed as manifestly unfounded.

78. In *Anufrijeva v Southwark London Borough Council* [2004] QB 1124 the Court of Appeal observed that "while Strasbourg has recognised the possibility that article 8 may oblige a state to provide positive welfare support, such as housing, in special circumstances, it has equally made it plain that neither article 3 nor article 8 imposes such a requirement as a matter of course": per Lord Woolf CJ, giving the judgment of the Court, at [33].

79. When judgment was given in *Anufrijeva*, Lord Woolf observed:

> "25. Strasbourg guidance provides little guidance in this area, for we are not aware of any case where the Court of Human Rights has held a state in breach of the Convention for failure to provide housing to a certain standard, or for failure to provide welfare support. …
>
> 30 It is noteworthy that, so far as we are aware, the Strasbourg court has not yet given a decision that a state has infringed article 3 as a result of failure to provide welfare support, let alone that article 8 has been infringed in such circumstances. The court has, however, recognised the possibility of such an infringement. …"

80. Since then, 15 years have passed, but Counsel confirmed that, so far as they are aware, it remains the position that the European Court of Human Rights has not held that a state has infringed article 8 (or article 3) as a result of a failure to provide suitable housing or welfare support.

81. In *Morris* Jackson J derived four propositions of law from his review of the authorities. Mr Jacobs relied on propositions (1), (2) and (4) which were stated in these terms at [59]:

> "1. Article 8 of the European Convention on Human Rights does not impose on a public authority a duty to provide a home to a homeless person.

> 2. The fact of homelessness may be relied upon as one element of a claim that a person's rights under Article 8 to private or family life have been breached. However, homelessness by itself cannot found such a claim.
>
> …
>
> (4) Absent special circumstances which interfere with private or family life, a homeless person cannot rely upon Article 8 of the European Convention on Human Rights in conjunction with Part 7 of the Housing Act 1996 in order to found a damages claim for failure to provide accommodation."

82. Applying these principles to the case before him, whilst acknowledging that the family had been "forced to live in grossly overcrowded and unsatisfactory accommodation for a period of 29 weeks" as a result of the defendant's breach of s.193(2) of the Housing Act 1996, he rejected the allegation that the authority had breached article 8 (*Morris* at [61]). Mr Jacobs emphasises the finding that the health problems of the claimant, in that case, were "not as grave as the health problems of many claimants who come to this Court bringing housing claims" (*Morris* at [21], and see [61(4)]). Ms Godfrey, Counsel for the defendant, did not take issue with the propositions derived from *Morris* but emphasised (as was common ground) that the leading case on the issue is *Anufrijeva*.

83. The second of the trilogy of cases relied on by Mr Jacobs was *R (Bernard) v Enfield London Borough Council* [2002] EWHC 2282; [2003] HRLR 4. Sullivan J found that "the claimants had to remain in manifestly unsuitable accommodation for some 20 months longer than would have been the case if the defendant had discharged its statutory duty towards them [under s.21 of the National Assistance Act 1948] reasonably promptly" (see [31]). Sullivan J held that although the conditions for those 20 months were "deplorable" they did not cross the necessary threshold of severity so as to amount to a breach of the claimants' rights under article 3, but he found a breach of article 8.

84. The factual circumstances in *Bernard* were rightly acknowledged to be "extreme" by Mr Jacobs. In *Anufrijeva* the Court of Appeal described the conditions prevailing in the family's home in *Bernard* as "hideous" (see [43]) and summarised the facts of *Bernard* in these terms at [39]:

> "The claimants were husband and wife. They had six children. The wife was severely disabled and confined to a wheelchair. The defendant council provided the family with a small house but in breach, as they ultimately accepted, of section 21(1)(a) of the National Assistance Act 1948, failed to provide the family with accommodation suited to her disability. The consequences to the quality of life of the family, and the mother in particular, were severe. The wife was doubly incontinent and, because there was no wheelchair access to the lavatory, she was constantly soiling herself. Living conditions were so cramped that she had no privacy. She was unable to play any part in looking after her children."

85. In *Bernard*, Sullivan J held:

> "32. I accept the defendant's submission that not every breach of duty under s.21 of the 1948 Act will result in a breach of Art.8. Respect for private and family life does not require the state to provide every one of its citizens with a house: see the decision of Jackson J. in *Morris v London Borough of Newham* [2002] EWHC Admin 1262, paras 59–62. However, those entitled to care under s.21 are a particularly vulnerable group. Positive measures have to be taken (by way of community care facilities) to enable them to enjoy, so far as possible, a normal private and family life. … Whether the breach of statutory duty has also resulted in an infringement of the claimants' Art.8 rights will depend upon all the circumstances of the case. Just what was the effect of the breach in practical terms on the claimants' family and private life?
>
> 33. … Suitably adapted accommodation would not merely have facilitated the normal incidents of family life; for example, the second claimant would have been able to move around her home to some extent and would have been able to play some part, together with the first claimant, in looking after their children. It would also have secured her "physical and psychological integrity". She would no longer have been housebound, confined to a shower chair for most of the day, lacking privacy in the most undignified of circumstances, but would have been able to operate again as part of her family and as a person in her own right, rather than being a burden, wholly dependent upon the rest of her family. In short, it would have restored her dignity as a human being.
>
> 34. The Council's failure to act on the September 2000 assessments showed a singular lack of respect for the claimants' private and family life. It condemned the claimants to living conditions which made it virtually impossible for them to have any meaningful private or family life for the purposes of Art.8."

86. Thirdly, Mr Jacobs referred to *Anufrijeva*, a case on which both parties rely. The Court of Appeal noted at [19] that the "Court of Human Rights has always drawn back from imposing on states the obligation to provide a home, or indeed any other form of financial support": see *Chapman v United Kingdom* (2001) 33 EHRR 399. At [37] Lord Woolf observed:

> "While it is possible to identify a degree of degradation which demands welfare support, it is much more difficult to identify some other basic standard of private and family life which article 8 requires the state to maintain by the provision of support. In principle, if such a basic standard exists, it seems to us that it must require intervention by the state, whether the claimant is an asylum seeker who has not sought asylum promptly on entering the country or a citizen entitled to all the benefits of our system of social security."

87. Having reviewed the cases, including Sullivan J's judgment in *Bernard* and the first instance judgments in the three appeals before them, the Court of Appeal stated their conclusions at [43]:

> "43 … Our conclusion is that Sullivan J was correct to accept that article 8 is capable of imposing on a state a positive obligation to provide support. We find it hard to conceive, however, of a situation in which the predicament of an

> individual will be such that article 8 requires him to be provided with welfare support, where his predicament is not sufficiently severe to engage article 3. Article 8 may more readily be engaged where a family unit is involved. Where the welfare of children is at stake, article 8 may require the provision of welfare support in a manner which enables family life to continue. Thus, in *R (J) v Enfield London Borough Council* [2002] EWHC 735 (Admin), where the claimant was homeless and faced separation from her child, it was common ground that, if this occurred, article 8(1) would be infringed. Family life was seriously inhibited by the hideous conditions prevailing in the claimants' home in *Bernard* and we consider that it was open to Sullivan J to find that article 8 was infringed on the facts of that case."

88. Mr Jacobs draws attention to the distinction drawn between the threshold for finding a breach of article 8 where the predicament is that of an individual compared to where a family unit is involved. However, he submitted that although ordinarily article 8 will not impose a positive obligation to provide welfare support in circumstances where failing to make such provision would not breach article 3, the exception covers not only cases where a family unit is involved but also cases where an individual is particularly vulnerable by reason of his disability.

89. In support of this submission, Mr Jacobs relied on *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449, per Lord Reed at [83], for the proposition, which I accept, that article 8 "can be interpreted in the light of international treaties, such as the UNCRC, that are applicable in the particular sphere". Mr Jacobs drew attention to articles 3(1) and 23(1)-(3) of the UN Convention on the Rights of the Child which provide:

> Article 3
>
> 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
>
> Article 23
>
> 1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.
>
> 2. States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.
>
> 3. Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the

> disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development.

90. The spirit, if not the precise language of article 3 of the UNCRC, has been incorporated into domestic law by s.11 of the CA 2004: see *ZH (Tanzania) v Secretary of State for the Home Department* [2011] 2 AC 166, per Baroness Hale JSC at [23]. Similarly, the general intent underlying the provisions of article 23 of the UNCRC cited above finds reflection in paragraph 6 of schedule 2 to the CA 1989.

91. In my judgment, the effect of *Anufrijeva* is that, insofar as the article 8 right in issue consists of individual rights, such as the right to privacy or the right to physical or psychological integrity, unless the individual's predicament is sufficiently severe to engage article 3, it is hard to conceive of a situation in which article 8 will impose a positive obligation to provide welfare support. On the other hand, where the right in issue is the right to family life, there may be a positive obligation under article 8 to provide welfare support even though the lack of such support would not breach article 3.

92. It would, in my view, be inconsistent with the Court of Appeal's judgment in *Anufrijeva* to accept Mr Jacob's submission that a positive obligation to provide welfare support may arise pursuant to article 8, if the individual is particularly vulnerable by reason of disability, even though the individual's predicament is not sufficiently severe to engage article 3.

93. However, an individual's particular vulnerability by reason of their disability will be an important factor in considering whether their predicament was sufficiently severe to engage article 3.

94. I also consider that there are circumstances where an individual's predicament may be sufficiently severe to *engage* article 3, and to give rise to a positive obligation under article 8, even though the court is not prepared to go so far as to say that article 3 has been *breached*. *Bernard* is an example of such a case. The deplorable conditions in which the second claimant lived for those 20 months could properly be said to have been so severe that article 3 was engaged, albeit Sullivan J held that there was no breach of that Convention right because the living conditions were not deliberately inflicted upon her by the defendant and there had been no intention to humiliate or debase her.

95. It also follows from *Anufrijeva* that the Court should not find an infringement of article 8 unless:

    i) There has been a failure to provide the claimant with some form of benefit or advantage to which the claimant was entitled as a matter of public law (see [44]);

    ii) There are grounds for criticising the failure to act, such that there is an element of culpability (see [45]); and

iii) The impact on private or family life of the public law failure is serious and has caused substantial prejudice to the claimant (see [45] and [46]).

96. Mr Jacobs acknowledged that, so far as he is aware, *Bernard* is the only example of a court in this jurisdiction finding that a failure to provide welfare support amounts to a breach of article 8. However, I accept his submission that one should not read too much into the lack of any such findings given that, often, cases of this nature will be considered by the local authority ombudsman rather than by the courts.

97. Ms Godfrey drew my attention to *R (McDonagh) v London Borough of Enfield* [2018] EWHC 1287 (Admin). In *McDonagh* Nigel Poole QC, sitting as a Deputy High Court Judge, rejected a claim for breach of article 8 in circumstances where the defendant was in breach of its statutory duty to provide suitable accommodation for the claimant and her three children, in particular having regard to the disability of her older son who had spastic quadriplegic cerebral palsy, from December 2015 until February 2018.

98. In reaching this conclusion, on the facts of that case, the judge relied on the following matters:

i) Although the breach was lengthy, the degree of culpability was not great. The defendant was making efforts from January 2016 to find suitable accommodation, albeit it could and should have taken more steps (see [69]).

ii) Looked at in the round, it was not obvious that the measures sought, if implemented, would have contributed positively to the development of the personality and integrity of the claimant's older son to a substantially greater extent (see [70]).

iii) The practical difficulties in finding suitable accommodation and, therefore, the likely practical impact of the breaches, had to be taken into account in striking a fair balance between the general interest and the interests of the individual (see [71]).

iv) The claim for breach of article 8 was brought by Ms McDonagh. Her older son would have been dependent on her, to an extent, in any event. She estimated that she had spent an additional three hours per day caring for her older son as a result of the unsuitable accommodation. This was a substantial additional burden, but it did not amount to a denial of her right to physical and psychological integrity or development of her right to family life (see [72]).

v) The claimant's family had not been divided or made street homeless. They lived together and family life continued, albeit under significant strain (see [73]).

vi) It was not contended that there had been any contravention of article 3. Although the Court of Appeal accepted in *Anufrijeva* that article 8 may more readily be engaged where a family unit is involved, "their observation points to the rarity of the circumstances in which the Courts are likely to find a breach of the Article 8 positive obligation in cases where, as here, the circumstances are not so severe as to constitute an Article 3 infringement" (see [74]).

99. Mr Jacobs sought to distinguish *McDonagh* on the grounds that in this case, he submitted, there is greater culpability. In addition, unlike in *McDonagh*, the article 8 claim is brought by the child rather than a parent.

Application to the facts

100. In my judgment, by providing accommodation for MIV and his parents at 29 Morieux Road from 8 August 2017 until alternative accommodation was offered on 6 April 2018, the defendant did not breach MIV's article 8 rights.

101. First, this is not a case where article 3 is engaged. There is no allegation of breach of article 3. That is unsurprising. Such a claim would not be remotely arguable on the facts of this case.

102. Secondly, the specific article 8 right relied on in this case is MIV's individual right to a private life, in particular having regard to his right to physical and psychological integrity or well-being. This is not a case where it can be contended, even arguably, that MIV's right to family life was breached. There was never any threat of MIV being accommodated other than together with both his parents. He has lived with his parents, and been cared for by them, without interruption.

103. Accordingly, this case falls into the first category that I have identified in paragraph 91 above and so the guidance given in *Anufrijeva* points strongly against the likelihood of a positive obligation being owed pursuant to article 8.

104. Thirdly, the defendant has provided accommodation for MIV and his parents in its capacity as a children's service, not as a housing authority. When MIV's parents informed the defendant that they were threatened with imminent eviction by their landlord, the defendant acted with commendable speed to provide them with accommodation, ensuring they were not rendered street homeless, and making financial subsistence payments to help them care for MIV.

105. The private rental accommodation the claimants had been living in before they were evicted was one bedroom accommodation with a shared bathroom and kitchen. They had expressed a wish to remain there while their immigration status was being resolved. The accommodation the defendant provided for the claimants on 8 August 2017 was, similarly, one bedroom accommodation with a shared bathroom and kitchen. However, the accommodation provided by the defendant had the advantage of being on the ground floor and so more easily accessible with a push chair.

106. MIV lived at 29 Morieux Road for eight months before better, two bedroom accommodation was provided by the defendant. Throughout that period MIV was four years old. Within about three weeks of moving into 29 Morieux Road, MIV was attending school full-time, where his special educational needs were catered for within a specialist resource.

107. Mr Jacobs accepted that, when the accommodation was provided on 8 August 2017, the defendant was not acting unlawfully or in breach of article 8. But he contended that within a matter of days or weeks the defendant breached article 8 by failing to provide more suitable two bedroom accommodation.

108. In my judgment, although the defendant's social worker recognised MIV's need for two bedroom accommodation to give him sufficient space to play, in the assessment of 15 August 2017, the defendant's position (as stated in January 2018) that such accommodation would be beneficial but it was not essential (at that stage) to ensure MIV's wellbeing was not *Wednesbury* unreasonable.

109. The evidence is that the defendant undertook searches throughout the period from January to March 2018 without success. Those searches were limited to a list of existing providers that the NPRF Team used following consultation with the defendant's housing department. Accommodation provided by those on the list included private rental accommodation.

110. The defendant's evidence is that it is not willing to enter into tenancy agreements because of the financial risks that entails. Consequently, given the claimants had no right to rent, the defendant was looking for accommodation that could be rented on a nightly basis. This limited the pool of available accommodation. The pool was further limited by the requirements that the accommodation should be sufficiently close to MIV's school and should be self-contained accommodation, preferably on the ground floor. These constraints were such that it is understandable that the defendant appears to have expected the search to take some time and did not anticipate that broadening the search to other providers would rapidly result in more suitable accommodation being identified.

111. With hindsight, it clearly would have been better if the search had been broadened earlier. And the defendant can be criticised, justifiably, for refusing to do so in March 2018, when the claimants' solicitors asked them to, without giving any reasons. But given the difficult circumstances that the defendant's children's services department faced, seeking better accommodation for a family with no right of recourse to public funds, I do not consider that the defendant's failure to offer alternative accommodation earlier than 6 April 2018 was unlawful as a matter of public law or in breach of article 8.

112. Fourthly, in any event, bearing in mind all the circumstances, the defendant's culpability is low. As I have said, they acted speedily to prevent the claimants being rendered street homeless and they provided better accommodation eight months later. The defendant arranged suitable schooling to meet MIV's special educational needs and supported his parents with payments to meet his transport costs. The defendant also made financial subsistence payments. Any culpability on the part of the defendant is, as in *McDonagh*, not great.

113. In order to bolster the contention that the defendant's degree of culpability is higher, the claimants challenge the adequacy of the 15 August 2017 assessment. It is not for the court to substitute its judgment for that of the local authority on the questions whether a child is in need, if so, what that child's needs are, or whether it is necessary to make arrangements for the provision of any of the services listed in s.2 of the 1970 Act. I accept Ms Godfrey's submission that the process of assessment is a dynamic one. The fact that the defendant found in the most recent assessment that MIV needed respite care during school holidays and sensory toys does not demonstrate that the assessment a year earlier, when he was a year younger and had not yet begun school, unlawfully failed to identify such needs. I also accept, insofar as this ground is relied on as demonstrating culpability, that it is pertinent to note that the claimants' solicitors did

not challenge the adequacy of the 15 August 2017 assessment in the voluminous correspondence on other matters over the eight months before this claim was filed.

114. Fifthly, although I accept that the accommodation provided in August 2017 was far from ideal, in my judgment the impact of living there has not caused substantial prejudice to MIV's private life. MIV was not housebound, save to the extent that as a four year old he could not, of course, leave the house without his parents. MIV attended school full-time. There was nothing to prevent his parents taking him out of the house at other times, albeit they were limited by their lack of means as to where they could go. There was very little space for him to play when he was at home, but his father has described engaging with MIV on the bed and entertaining him with colourful TV shows when he was sat in the chair provided by the occupational therapist. Indeed, it is clear – and to MIV's parents' credit – that, despite their difficult circumstances, MIV's parents have cared for him well.

E. Conclusion

115. For the reasons that I have given, I dismiss MIV's claim for breach of article 8 and the claimants' claim more broadly. As I have found that there was no breach of article 8, it is unnecessary to consider whether, in any event, just satisfaction would have required an award of damages or, if so, the appropriate quantum. Accordingly, the claim is dismissed.