Case No: CO/5393/2015

Neutral Citation Number: [2016] EWHC 1102 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/05/2016

Before :

MR JUSTICE NICOL

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Between :

(1) JG	**Claimants**
(2) MG	
- and -	
Kent County Council	**Defendant**
-and-	
(1) TG (by his litigation friend, the Official Solicitor)	**Interested**
(2) Sunderland City Council	**Parties**

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- -

Christopher Buttler (instructed by **Maxwell Gillott**) for the **Claimants**
Hilton Harrop-Griffiths (instructed by **Kent County Council**) for the **Defendant**
Sarah Hannett (instructed by **Ben Hoare Bell**) for the 1st Interested Party
The 2nd Interested Party did not appear and was not represented

Hearing dates: 13th-15th April 2015

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Judgment

Mr Justice Nicol :

Introduction

1. TG was born on 9th May 2001 and so he is now 14. He is a troubled child. In March 2015 he was diagnosed by psychiatrists at the Maudsley Hospital as suffering from unsocialised conduct disorder with mixed neurodevelopmental difficulties. This manifests itself in sudden and violent outbursts of rage.

2. The Claimants in the first of what are effectively two applications for judicial review before me are TG's parents. Apart from T, the Claimants have four other children. In descending age, they are: AG, a boy, born on 24th November 1996 (AG has low IQ and mental health problems and autism); SG, a girl, born on 21st July 1999; TG's twin sister whom I shall refer to as TwinG (and who, herself has learning difficulties); WG, a boy, born on 30th October 2002.

3. When the events with which I am concerned commenced, the Claimants and all of their children lived together in Kent. On 30th May 2014 Kent County Council ('KCC'), the Defendant, made a Statement of Special Educational Needs in relation to TG. Part 4 of the Statement identified Goldwyn Community Special School ('Goldwyn') as the placement where TG should receive his education. At that stage TG was 13.

4. TG's bouts of violence became more pronounced. I will need to give more detail later. At the moment, I just wish to explain the shape of the litigation. On 18th November 2014 the Social Services Department of KCC conducted an assessment of the family. Thereafter, the social worker allocated to the family was Zena Woods. From 1st January 2015, her work was overseen by Fiona Coombs, a social work team manager. KCC arranged for the family to have a series of sessions with a programme called Stronger Safer Families ('SSF') between December 2014 and February 2015. In the short term this alleviated the position. However, TG's violent outbursts continued. He was at times violent towards other members of his family. TwinG and TG's younger brother, WG, were particularly alarmed and frightened by this behaviour which included assaults on them.

5. From about March 2015 TG's parents were asking KCC to amend TG's statement of special educational needs to specify a different school. Goldwyn was a day school and they wished KCC to name instead a residential (i.e. boarding) special school. That did not happen. Again, I will postpone giving further detail.

6. On 5th May 2015 there was an incident in Goldwyn in which TG hit another child, strangled him, headbutted the wall, went behind a boy, pulled his hair and threatened to stab him with a breakfast knife. TG was sent home and, thereafter was not permitted to return to Goldwyn. On his return home that day, TG threatened to stab MG with a culinary knife. He punched his mother in the throat and hit his sister, SG. TG turned the knife on himself and caused a superficial wound to his throat and arm. The police were called. They considered tasering TG, but decided against it for fear of causing him injury.

7. The parents renewed their efforts for the statement of special educational needs to be amended to specify a residential school. Although they were given the impression that this was actively being considered by KCC, by the middle of June the Social Services Department had reached the view that it would not contribute to the funding of such a placement and this operated as an effective veto.

8. On 28th August 2015 TG tried to strangle WG. His father succeeded in pulling him off.

9. At about this stage, MG decided that he would take TG with him to stay with his parents who lived near Sunderland. He described this as an 'extended holiday' until KCC either arranged for a residential school placement for TG or provided some alternative accommodation in Kent for him and his son.

10. On 19th October 2015, KCC took the view that TG had now moved to Sunderland. They closed their social services file on him and passed the educational file (including his statement of special educational needs) to Sunderland. Sunderland initially agreed to take over responsibility for TG's education, but they subsequently took the view that TG and his father were in their area only temporarily and, in consequence, responsibility in their opinion remained with KCC.

11. MG and JG have been granted permission to apply for judicial review by HHJ McKenna, sitting as a Deputy Judge of the High Court. They allege that KCC were aware that TwinG, and WG were at real and immediate risk of ill-treatment within the meaning of Article 3 of the European Convention on Human Rights ('ECHR') from TG and they failed in their operational duty to take reasonable steps to prevent that ill-treatment. MG and JG also allege that KCC failed to carry out the duties imposed on them by ss.17, 20 and 47 of the Children Act 1989.

12. TG was named as an interested party to his parents' claim. TG has the Official Solicitor as his litigation friend. On his behalf, the Official Solicitor has endorsed the parents' claim, but he has also raised what is in reality a second claim for judicial review.

13. In this second claim, it is alleged that KCC have been in breach of various obligations to TG and his parents in KCC's capacity as the local education authority. These included obligations which they owed to TG as a child of compulsory school age and as the beneficiary of a statement of special educational needs. In particular, the Official Solicitor on TG's behalf alleges that KCC acted unlawfully on 19th October 2015 in treating Sunderland as responsible thereafter for seeing that TG received the education which the statement required.

14. Alexander Nissen QC, sitting as a Deputy Judge of the High Court, directed that there should be a rolled-up hearing of TG's claim for judicial review and that this should take place at the same time as the hearing of the substantive claim by JG and MG. Accordingly, the hearing before me was to determine (a) whether JG and MG had made good their claim, (b) whether TG should be granted permission to apply for judicial review, (c) whether TG had made good his claim.

15. Sunderland were named as an interested party by TG in his claim. They did not appear at the hearing and were not represented. However, I received a witness

statement from Annette Parr, the lead Support and Intervention Officer for Sunderland dated 11th April 2016.

16. Mr Nissen had also made directions that JG, MG and Fiona Coombs should be available for cross examination on their witness statements. Accordingly, I heard oral evidence from them as well as receiving the documentary evidence which the parties had assembled.

The facts in further detail

17. TG's difficulties have been longstanding. The Claimants first sought help from KCC in dealing with his behaviour in about 2013. At the hearing Mr Buttler, on their behalf focussed on the events from the middle of 2014. In a letter dated 9th July 2014, Dr A.A. Siddiqui, consultant paediatrician at the Children's Assessment Centre for Kent and Canterbury Hospital summarised the position in this way,

> 'For the last 3 years, TG [in this and subsequent quotations I will adopt the anonymization which is necessary although, in the original documents, names were used] has been experiencing episodes, very suddenly with quite severe rage…He becomes violent and uncontrollable and needs to be restrained physically…The longest one lasted for about 1 ½ hours and his parents had to call the police who arrested him and took him to the police station where he spent the night and was given a caution for battery. In between his behaviour is much calmer and normal. Mother said that on average he gets an attack every 10 days.'

As will be apparent, this pattern of violent rages interspersed with periods of calm, was to recur throughout the following year.

18. Even by this stage there were reports of TG being aggressive to other children at school (see the letter from Dr Nasir, Locum Consultant psychiatrist 14th November 2013), of TG punching a teacher in the throat and trying to strangle him (see the letter from Dr Nasir 20th January 2014), and of TG threatening to harm his parents and siblings (see for instance the Social Services file record for 2nd April 2013). On 22nd April 2014 a file note by Ms Beverley Taylor refers to WG, but Mr Buttler submitted, and I accept, that this must be an error and it was actually referring to TG. This note commented that he

> 'is extremely violent at times to family members and people out of the home. He beats his sister and his brothers and this is in the form of punching kicking and he tries to strangle them.'

Ms Taylor's recommendation was that

> 'an assessment is required as mother is struggling to cope with the behaviour of TG and this is impacting on the safety and well-being of the other children in the home…In line with the Kent and Medway Inter-Agency Threshold Criteria for Children in Need it is my considered view that criteria for Tier 4 services are met.'

'Tier 4 criteria' are defined as those where 'Children and/or family members are likely to suffer significant harm/removal from home/serious and lasting impairment without the intervention of specialist services, sometimes in a statutory role.'

19. The incident to which Dr Siddiqui referred and which had led to a police caution had taken place on 12th May 2014 when TG had punched and kicked his brothers and his parents and thrown dining room chairs. This, too, was recorded in a social services file note which also mentioned that TG's prescription for Risperidone had been increased to 1.5mg per day.

20. In August 2014 the Child and Adolescent Health Services ('CAMHS') made a referral of TG's case to KCC's Social Services. Alex Stringer of the Central Referral Unit of the Social Services concluded,

> 'Whilst I consider that the family are in crisis and at risk of breakdown, they are willing to work with services to respond to their needs. Therefore, in line with Kent and Medway Threshold criteria, I do not consider the threshold for social services intervention has been met at this time and instead I consider that KIASS [Kent Integrated Adolescent Support Services] [work] alongside CAMHS with safe management of TG's behaviour.'

I would add that the willingness of TG's parents to co-operate with the measures which Social Services suggested is another recurring motif of this narrative.

21. On 12th September 2014 Richard Cox, a family therapist at CAMHS, reported his concern to social services that,

> 'given the increase in violence in the family home, I would suggest that AG's other brother and two sisters may be at risk of being caught up in the violence as both TG and AG have a general lack of awareness of those around them when in a high arousal state. The other children will be affected by what they are seeing in relation to the violence that TG presents.'

22. In mid-September 2014, JG returned home from hospital after an operation. Shortly afterwards, she was attacked by TG who punched her in the face twice and kicked her in the stomach and the groin. Her stitches burst. The police were called. TG was later released back into the care of his family.

23. Anxiety as to the situation in the home was expressed by Erin Bell of KIASS, who, on 15th September 2014, said that she considered the family was 'in crisis' and Alison Cook, specialist therapist with CAMHS, who told Social Services that

> 'TG's parents and siblings have been hurt physically to such an extent parents feel they cannot keep their children safe around him… My colleague Richard Cox is also concerned about the raised level of violence in the family and the very real risks involved of someone getting seriously hurt at this time. … The situation is now at breaking point and that intervention is required now.'

24. Sandra Woollett of the Social Services Central Referral Unit shared these concerns and said that 'without intervention there is a high risk of family breakdown or of one

of the children suffering significant harm.' It seems that shortly after this KCC embarked on a formal assessment of TG (see below).

25. Dr Boggaram was a locum consultant psychiatrist in learning disability and challenging behaviour at CAMHS. She had been seeing TG for some time. In her letter of 8th October 2014 she reported that TG had a diagnosis of conduct disorder. His prescription of Risperidone had been increased slightly to 2 mg per day. She thought TG and his family would benefit from multi-systemic family therapy, but unfortunately that was not available within their team.

26. On 5th November 2014 the Social Services file records that TG had become violent to TwinG 'putting his hands around her neck and banging her head on the window.'

27. On 11th November 2014 there was the first of what was to become a series of 'Child in Need' meetings. The participants varied, but, broadly, they included the family and representatives of Social Services. This first meeting recorded the concerns about TG's behaviour, the fear that it may lead to injury to his siblings, his parents or himself and that it might lead to the family breaking down or MG leaving the family home with TG.

28. On 18th November 2014 the Child and Family Assessment was completed. This noted a concern that TG's behaviour might escalate and his aggression result in injury to his siblings, parents or himself. The family appeared to be worn out by the situation, but it was a positive sign that the family was engaging with services for all the children including Safer Stronger Families ('SSF') whose intervention featured large in the recommended actions. By 12th December 2014 it was agreed that a 12 week course of family therapy would be undertaken by SSF which was to last until the middle of February 2015.

29. By this stage TG was at school at Goldwyn. On 9th December 2014 there was a serious assault on a male member of staff. The matter was reported to the police. Subsequently, on 19th May 2015, this led to TG receiving a formal youth caution for assault by beating. On 8th January 2015 TG assaulted a female member of staff. He slapped and punched her and tried to punch her again in the face. He was placed in a de-escalation room and punched the wall. He broke a bone in his finger as a result. On 10th January 2015, Zena Woods, who had, by this time been allocated as his social worker, recorded that TG was being sent home a few times a week.

30. SSF appeared to be having some improvement on TG's behaviour at home. However, Ms Woods recorded on 24th February 2015 that over the half term holiday, things had been bad.

> 'TG tried to push TwinG down the stairs after threatening to kill her. He continuously tried to throw a hoover at JG, assaulted MG, said to TwinG he wants to stab Mum. He has said he wishes TwinG would die… TG pretends the hoover is a knife and shows TwinG how he will stab her.'

31. At the conclusion of the SSF programme, Tanya Davies, completed an exit plan dated 25th February 2015. She identified one risk as TG entering the criminal justice system as a result of his volatile outbursts at home and at school. TwinG reported to Ms Davies that she had had nightmares after TG's threats to her. At a Child In Need

meeting on 25th February 2015 it was also reported that WG had been punched in the face by TG and WG (by then aged 12) had started wetting his bed at night because of his distress. On 3rd March 2015, WG's pastoral manager at his school, reported to Ms Woods that WG had said he was not sleeping well. He was frightened that TG would come into his room and stab him as TG had threatened to do many times.

32. Dr Boggaram had referred to TG to the Maudsley Hospital for an assessment. He was seen on 23rd February 2015. On 12th March 2015 Dr Jane Anderson, ST5 in Child and Adolescent Psychiatry, and Dr Peter Misch, Consultant in Child and Adolescent Forensic Psychiatry, wrote their report. This was a long and detailed document. It identified TG as posing a High Risk of harm to others. It noted, that

> 'TG has a long and engrained history of interpersonal violence and destruction of property. This is becoming an engrained pattern of behaviour in the face of angry feelings, particularly surrounding feelings of injustice or humiliation. Victims can include family members, teachers and peers. He has now received cautions for battery and common assault. This is serious violence for a child of 13 years and seems to be escalating… TG is at risk of further violence because of his negative attitudes towards violence, victims and authority, his lack of empathy and remorse and his impulsivity and anger management problems. On the positive side, he remains living with his parents, who are struggling with his behaviour, but still want to try and help him. He has some upcoming prosocial activity planned, and he has some resilience in his personality structure. He has protected and made use of his art therapy sessions without showing aggression or violence. His school also report their commitment to trying to help him. TG is at risk of committing more serious violence in future and developing further negative attitudes to back up his anti-social stance. He is likely to become more interested in anti-social peers and this could lead to a further increase in risk.'

33. The diagnosis, as already noted, was unsocialised conduct disorder.

34. The report recommended that parents, school, local authority education, CAMHS, YOT and police had to commit to active risk management for TG. Regular meetings and sharing of information were proposed. They also recommended Functional Family Therapy.

35. As to School Placement, the report said,

> 'His current school are still committed to working with him, and the recommended family therapy intervention may improve TG's behaviour to a level which may help TG remain in this school. However, if the family intervention doesn't help or can't be provided in a timely manner (within 3 months), the network [viz the bodies referred in the previous paragraph] must carefully consider whether his current school placement adequately meets his educational needs and strongly consider residential schooling This timescale is to avoid lengthy delays causing further engrained behaviour, increasing emotional needs and further lost schooling. We would recommend a term-time placement in a school with experience in dealing with young people with anger-management problems and violence.'

36. As Ms Woods noted on 20th March 2015, JG showed her the Maudsley report and allowed her to take a copy. On 24th March 2015 Ms Woods spoke to Simon Jamison of KIASS who was 'very concerned, particularly for the other children and the potential harm that TG could cause.' Mr Jamison suggested a child protection plan. Ms Woods told him that this had been raised with management, but the view was that 'this is not a parenting issue so we are unsure what a child protection plan would achieve.'

37. As it happened, on the same day as the Maudsley Report was signed (12th March 2015) there was the annual review of TG's statement of special educational needs. I assume that the Maudsley Report was not available for that meeting. Certainly there is no reference to it in the review. It was noted that the review had been brought forward because the parents of TG wished him to be considered for a residential placement. The review agreed that this request should be forwarded to the County Panel for it to consider.

38. At a Child In Need meeting on 24th April 2015 it was reported that TG's behaviour was up and down. That morning there had been a physical altercation with another pupil and TG had injured himself by punching a window. At home, there had been no actual violence, but threats of violence were still happening.

39. I have noted that the annual review of TG's statement of special educational needs had referred the parents' request for a change of school to a residential placement to the County Panel. This met on 5th May 2015. A note of the meeting says,

> 'The Panel felt that although there was parental concern over TG's behaviour this was manifested at home and not in the educational placement. The school felt that it was continuing to meet TG's needs and that the provision for him was still appropriate in a day placement…the panel decided that the request for a residential placement should be refused as it did not meet the criteria in the code of practice. The current placement remained appropriate and TG should remain [word omitted in original].'

40. There does not appear to be any evidence that this decision was communicated to JG or MG, nor were they informed of their right of appeal to the First-tier Tribunal against the decision as required by Education Act 1996 s.328A(5) within the 7 days stipulated by s.328A(6) or at all.

41. As it happens, the same day that the County Panel met, there were, as I have mentioned, the incidents of violence by TG at his school and then, when he returned home, against his family. As I have said, the police were called. Social Services were informed that the police considered TG a danger to his siblings and it was not safe for them if TG returned home. TG was taken to hospital because of the injuries he had sustained and for a CAMHS assessment. This concluded that TG's difficulties were behavioural rather than psychiatric. The action plan which was signed on 6th May 2015 said

> 'TG is not to be left unattended, especially if other siblings present.'

In their witness statements for these proceedings JG and MG have emphasised that they have sought to ensure that TG was indeed not left alone with his siblings. Such

intense supervision of TG has caused them considerable strain, especially as he has not been attending school since the incident on 5th May 2015.

42. JG raised with Ms Woods the possibility of TG being placed in foster care. Ms Woods doubted whether that would help since foster carers would be less skilled at managing TG. Subsequently KCC did become more positive about the possibility of fostering TG, but, in the event, no suitable foster carers could be identified (Ms Coombs said in her oral evidence that the reference in her witness statement to foster carers being found in September 2015 was a mistake).

43. TG was discharged home from hospital on 6th May 2015. On the same day Social Services requested of the police a priority response alert for the family home. TG was described as posing a high risk of physical harm to others.

44. I have already noted that Goldwyn did not allow TG to return after the violent incident which had taken place there on 5th May 2015. No formal decision to exclude TG ever seems to have been taken. His statement of special educational needs which, in Part 4 named Goldwyn Brook as the school where he should be educated, was not amended. Different reasons have been given for the School's decision. On 11th May 2015 Sarah Miller, the Assessment Co-ordinator, told Kathy Langley (employed by KCC's education team) that it was felt inappropriate for TG to attend the school 'on Health and Safety grounds'. However, in an email of 3rd February 2016 Charlotte Rosslyn, the Vice-Principal and Head of School said that Ms Miller had clarified the position and TG had been out of school 'on doctor's advice – unfit for education'. The identity of the doctor in question and the nature of his or her advice are obscure. However, there is a note in the Social Service files by Ms Woods dated 11th May 2015 in which she says that TG had been seen by a doctor (again unidentified) who agreed that 'school is not an option at the moment'. The doctor had prescribed Phenogan to try to keep TG calm as and when required.

45. Ms Woods visited the family home on 12th May 2015. She stayed an hour and a half and reported that TG was very calm, well-mannered and polite and took conversations about his behaviour very well. She commented,

> 'TG clearly has a good relationship with his parents when his behaviour is good and he seems very comfortable and willing to be around them.'

2 days later on 14th May 2015 JG reported that TG had threatened to kill WG again and had also got very agitated.

46. The County Panel had considered TG's position on 5th May 2015, no doubt in ignorance of the violent events which were unfolding that day. By 14th May 2015 the Education Department of KCC had been told by the School that they no longer felt that they were an appropriate provision for TG who was no longer able to attend Goldwyn Brook on health and safety grounds (I note in parenthesis that the information that TG was absent on health, rather than health and safety grounds, had not by then been communicated to KCC). Kathy Langley and Ms Debbie Edmonds of KCC's Education Department agreed that there should be a change of placement, though the matter was to be referred to the Complex Case Panel for a decision as to whether the new placement should be a residential one 'for his own and others safety'. Social Services were to be asked about their view on the joint funding of a

residential placement. A note was added that education needed to get a copy of the Maudsley statement.

47. Between 18th and 22nd May 2015 Social Services arranged for a children's charity to pay for a holiday for TG and WG.

48. At a Child in Need meeting on 20th May 2015 it was reported that WG was wetting his bed because of his anxiety and TwinG was having nightmares and night terrors. The Maudsley report had recommended Functional Family Therapy but this was not available in the area. Ms Coombs said that their criteria for a child protection plan

> 'looked to significant harm with regards to parenting. A child protection plan would penalise the parents and look to them to minimise concerns, this is not possible as they are already doing all they can as parents to protect the children.'

49. On 1st June 2015 TG's psychiatrist, Dr Boggaram, referred TG back to the Maudsley in view of the major incident in May. She observed the following day that TG would not be admitted to a low secure hospital because he was too high a risk, but admission to a high secure hospital would require him to be sectioned under the Mental Health Act and he was not at that stage.

50. On 4th June 2015 the Education Department's Complex Case Panel agreed in principle to look at residential provision through the Dynamic Purchasing System ['DPS' which is a process of soliciting interest from schools], but the involvement of Social Care and Health would be necessary and a referral would have to be made to JRAP (the Joint Resource Allocation Panel). Kathy Langley told Ms Woods of this decision on 10th June 2015.

51. On 10th June 2015 Ms Woods visited the family home. She noted the following,

> 'the parents spoke about feeling like they are managing things better and things are improving slightly. There was one incident recently where TG jumped on WG's leg and he knocked the side of his face on the floor and sustained a black eye. The parents immediately threatened TG that they would call the police and this behaviour stopped and he just became verbally abusive before going upstairs. The parents spoke about the need to be very strict with the children and being completely consistent. They feel TG is receiving consistency and therefore will stop his behaviour and he is aware the parents will call the police…The family sounded much more positive today and this was really good to hear.'

52. At a Child In Need meeting on 15th June 2015 the incident when TG stamped on WG's thigh was mentioned but described as an example of a 'blip'. The notes of the meeting record MG as saying that he and his wife were feeling more positive and they felt like they were coping. TG was said to be bored at home and wanted residential schooling.

53. On 17th June 2015 Ms Coombs emailed the Educational Department to say that the Social Services Department would not be supporting the joint funding of a residential placement. She said,

> ‘although [TG] displays difficult and often aggressive behaviour within the family home, overall his mother and father manage this.’

Ms Langley of the Educational Department responded that the likely outcome was that TG’s placement would be another day school. Despite this, on 15th July 2015, Ms Langley put forward a request for a residential school placement to JRAP.

54. Goldwyn were investigating providing tutoring for TG at a site known as ‘Poultons Family Centre’. In connection with this Ms Woods completed a risk assessment. According to a file note on Social Service records, this was sent on 6th July 2015. The risk assessment included the warning that

> ‘TG is known to display violent and aggressive behaviour towards others. TG has caused injury to himself and others during violent assaults.’

55. The tutoring arrangements began on 9th July 2015, but TG received only twice weekly sessions of 1 hour and 30 minutes each. Even these came to an end shortly after they commenced because of the end of term. The tutoring re-started in September with 4 hours per week.

56. In a record dated 16th July 2015 it was said that,

> ‘Mum, Dad and TG are all really positive. They feel they have reached a new level of coping with it to the extent that Dad has a new job and TG will be left with his grandmother. There are still some arguments between him and WG but the parents seem to be able to manage this and TG took himself out for a walk to calm down.’

57. In August 2015 KCC through the DPS invited expressions of interest for schooling TG. The preferred alternative was for residential Monday-Friday. Alternatives which would be considered were day time only and Monday-Sunday residential. Three schools expressed interest.

58. On 28th August 2015 there was the incident, referred to above, in which TG tried to strangle WG and had to be pulled off him by his father. The police were called but decided not to detain TG as it would have meant holding him over the weekend. The matter was reported to KCC Social Services the same day. The out of hours social worker who took the call was informed by MG that ‘the family has reached breaking point and he was prepared to leave the family home with TG.’

59. In her oral evidence Ms Coombs agreed that this was the most serious incident of violence by TG. She said that KCC did not assess whether he had caused WG significant harm, or whether TG posed a risk of significant harm to his siblings or whether the family had suitable accommodation for TG.

60. On 3rd September 2015 MG told Ms Woods that at the end of the month he would be moving to stay with his parents and TG in Newcastle (The destination is variously described as Newcastle, Sunderland or Washington. These are all references to MG’s parents who live in that area. I shall refer to it as ‘Sunderland’). They would wait there until ‘he gets residential’. During a home visit on 8th September 2015 MG said he would take a prescription for TG’s medicine for 3 months but would bring TG

back for any appointments that were needed for him to remain open for health and education in Kent. Ms Woods recorded her opinion that she thought MG was taking the necessary steps to reduce the risk to TG and the other children by the two of them moving from the family home (though this meant MG giving up his job). Ms Woods explained that 'our support can be reinstated at any time if needed.'

61. The parents had sought help from Social Services with obtaining housing in Kent for TG and MG. Ms Woods supported them and drafted an application for support. She characterised their need as 'high priority' and said that the family had decided that this split was best to avoid escalation of TG's behaviour and a domestic incident occurring.

62. A Child In Need meeting took place on 9th September 2015. MG said he was looking to leave for at least 3 months. The notes of the meeting recorded

> 'the family are very frustrated with there being no movement on residential schooling, Maudsley Clinic or respite. They feel like they have been left with no other option but to take this step…JG explained that Newcastle is going to be an extended holiday and would like TG to remain on The Brooks' roll…Zena is happy to write a letter for education to support the parents' decision to take TG away from Kent. CAMHS will happily do the same…TG will temporarily move to Newcastle with his father at the end of September 2015…There needs to be decisions about TG's next educational placement. The case is going to Joint Resources Application Panel for decision making but there is still no date for this.'

63. On the following day (10th September 2015) Ms Woods wrote to JG and MG in which she said,

> 'I am writing to you to provide you with supporting documentation for your decision to take TG on an extended holiday with his father to his paternal family in Newcastle…MG has done all he can to secure housing in the local area for him and TG but at the current time there have been no housing offered to them. I have completed a Kent Agency Assessment to support the application and this should be taken into consideration for their priority level in the coming weeks. MG is planning to return to Kent when he is offered alternative housing but at the current time Newcastle is the only viable option for them to protect the children.'

64. On the same day (and so still 10th September 2015) JRAP rejected the application for a residential placement for TG. It was necessary first for Social Services to agree that the child should come into care and for there to be in principle funding. On 14th September 2015 Ms Coombs confirmed that Social Services did not agree to take TG into care.

65. On 28th September 2015 MG wrote to Ms Woods concerning his decision to take TG 'on extended leave to Newcastle until accommodation is available within my local area.' He explained that he was taking this course for the protection of his other children until accommodation or residential schooling were available. He and TG left about the beginning of October 2015.

66. On or about 2nd October 2015 KCC Social Services closed their file on TG because of his move away from Kent.

67. On 19th October 2015 KCC's Education Department sent TG's file (including his statement of special educational needs) to Sunderland Council on the grounds that TG had moved to their area. This is the decision which TG (through the Official Solicitor) seeks to challenge.

68. It seems that on the same day (19th October 2015) TG was taken off the roll of Goldwyn.

69. The Claimant's solicitors wrote a letter before action on 20th October 2015 and the claim form was issued on 5th November 2015.

70. Currently TG and MG remain living with MG's parents. TG has not been to school since he has been in the Sunderland area (and indeed has not been in school since 5th May 2015). His father is reluctant to challenge him. He remains most of the day in his room and his personal hygiene is poor. The Official Solicitor's representative saw him at the end of December and beginning of January and has said TG is keen to return to Kent and would be willing to go to a residential school.

71. In December 2015 Dr Misch said that in his view MG had acted in an entirely understandable manner in moving to Newcastle on a temporary basis. He was perplexed as to why the local authority had withdrawn the application for a specialist residential placement which was now the key component in TG's care.

The claim in respect of Social Services: the law

Article 3 of the ECHR

72. Article 3 of the ECHR provides that

> 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

Expressly it is a prohibition on the state or a public body subjecting a person to such ill treatment. However, the European Court of Human Rights has held that there is also in certain circumstances an implicit obligation to take active steps to prevent such ill treatment by third parties – see *Osman v UK* (2000) 29 EHRR 245. *Osman* was a case where the victim's life was under threat and therefore Article 2 of the ECHR was engaged, but the same principles apply where the potential victim is at risk of ill treatment within the meaning of Article 3 - see for instance *Z v UK* (2002) 34 EHRR 3. This positive duty of protection is sometimes called 'the operational duty'.

73. For ill-treatment to come within Article 3 it must reach a minimum level of severity. In deciding whether that level has been crossed, it is relevant to have regard to the age and state of health of the victim. The special vulnerability of children is important in this regard – see *E v Chief Constable of the Royal Ulster Constabulary* [2009] 1 AC 536 per Lady Hale (with whom Lord Brown agreed) at [8]. That case also makes clear that the fear of ill-treatment (of a particular severity) is also to be taken into account in deciding whether Article 3 is engaged.

74. For the operational duty to apply it is necessary that the authorities were actually aware, or ought reasonably to have been aware, of a 'real and immediate risk' of Article 3 ill treatment – see *Osman* at [116]. In order to be 'real' the risk must be substantial or significant and not remote or fanciful – see *Rabone v Pennine Care NHS Trust* [2012] 2 AC 72 at [38]. The meaning of 'immediate' is captured by the phrase 'present and continuing' – see *Rabone* at [39].

75. The operational duty will only be triggered if the authority concerned knew or ought to have known. The duty is then to take reasonable steps to provide effective protection. What steps are reasonable may also be influenced by the fact that the potential victims are children – see *E v Chief Constable of the RUC* at [9]. The Strasbourg Court has recognised that local authorities dealing with children at risk may face 'difficult and sensitive decisions' since there may be a conflict with their duties under Article 8 of the ECHR to respect and preserve family life - see *Z v UK* at [74].

76. While it can be difficult sometimes to distinguish between the negative (i.e. express obligation) under Articles 2 and 3 and the positive (or implicit, operational) duty, there are important differences in the nature of those duties. The express, negative duty is absolute: the positive, operational duty, even where it applies, is to take such measures as are reasonable to forestall the anticipated threat – see *E v RUC* above.

The Children Act 1989 ss.17, 20 and 47

77. Section 17(1) imposes a 'general duty' on a local authority

> '(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'.

There is a definition of 'children in need' in s.17(10), but there is no dispute that TG, WG and TwinG were children in need within this definition.

78. However, the purpose of s.17(1) is to set out duties of a general character which are for the benefit of children in need in the local authority's area in general. It does not impose a specific duty to meet the assessed needs of every individual child, unless (which the Claimants do not allege is relevant) the case falls within one of the specific duties in Part 1 of Schedule 2 of the Act – see s.17(2) – *R (G) v Barnet LBC* [2004] 2 AC 208 [72]-[94].

79. By s.47(1)(b) where a local authority has reasonable cause to suspect that a child who lives in their area is suffering, or is likely to suffer significant harm, they must make such inquiries as they consider reasonable to decide whether they should take any action to safeguard or promote the child's welfare. So far as reasonably practicable and consistent with the child's welfare, they must ascertain the child's wishes and give due consideration to them in deciding what action to take - see s.47(5A). Section 105 applies the definition of 'harm' in s.31(9) and so it means 'ill-treatment or the impairment of health or development including, for example, impairment suffered from seeing or hearing the ill-treatment of another'. Section 105 likewise applies the definition of 'significant harm' in s.31(10) and so, where the question of whether harm suffered by a child is significant turns on the child's health or development, his

health or development shall be compared with that which could reasonably be expected of a similar child.

80. Since s.47 only imposes a duty to investigate, the threshold for triggering it is set deliberately low – see *Gogay v Hertfordshire County Council* [2001] FCR 455 CA at [49].

81. Section 47(8) provides,

> 'Where as a result of complying with this section, a local authority conclude that they should take action to safeguard or promote the child's welfare they shall take that action (so far as it is both within their power and reasonably practicable for them to do so).

82. In the exercise of their social services functions, local authorities must act under the general guidance of the Secretary of State – see Local Authority Social Services Act 1970 s.7. The current guidance was issued in March 2015 under the title 'Working Together to Safeguard Children: A Guide to Inter-Agency Working to promote the Welfare of Children.'

83. A central feature of the guidance where there is reasonable cause to suspect that a child is suffering or likely to suffer significant harm is to bring together the relevant agencies to have a strategy discussion to decide what needs to be done and to see that that is achieved. If there are concerns of significant harm, then a child protection conference should be convened to analyse on an inter-agency basis what ought to happen. The conference should have a chair who is independent of operational or line management responsibilities.

84. Section 20(1) of the Children Act 1989 says,

> 'Every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation as a result of ...(c) the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care.'

85. Later subsections of s.20 oblige the local authority (so far as reasonably practicable and consistent with the child's welfare) to ascertain the child's wishes and give due consideration to them. This is sometimes referred to as 'voluntary care' because a person with parental responsibility can veto the exercise of the power if they are willing and able to provide accommodation for the child – s.20(7).

Social services claim: the claimants' submissions

86. Mr Buttler argued that, certainly by the end of August 2015, the operational duty under Article 3 was triggered. WG and TwinG had suffered actual physical violence at the hands of TG of sufficient severity to come within the scope of that provision. There was the particularly serious incident on 28th August, but that had to be seen against the background of what had gone before over the previous two years and more. TG's siblings were aware of not only what he had done to them, but what he had also done to their parents (including the incident in August 2014 when his

punches and kicks had caused his mother's post-operation stitches to burst) to other children at school (including, notably the incident on 5th May 2015) and to teachers at school (which had resulted in two police cautions). The fear of further violence was manifesting itself in TwinG suffering regular nightmares about what TG might do and in WG, a 12 year old boy, wetting his bed at night. There was a real and immediate risk of Article 3 ill-treatment by TG to both WG and TwinG.

87. KCC had been liaising closely with the family. Its Social Services Department, particularly, though not exclusively, through the social worker Zena Woods, was well aware of what was happening and the risks to which WG and TwinG were exposed. It was notable that KCC had not provided a witness statement from Ms Woods.

88. Mr Buttler further submitted that KCC had not done all that they reasonably could to avoid TG committing further violence and potentially more serious violence against WG and TwinG. There was a period in late 2014 and early 2015 when SSF seemed to be promising. However, its benefits were short-lived. Despite SSF, there was further violence, particularly in the summer of 2015. Parental management of TG was not sufficient to protect WG and TwinG. TG by the summer of 2015 weighed 11 stone and physically restraining him was obviously a challenge. The fear of police involvement did sometimes restrain TG, but not always. Despite the cautions he had received, TG still nearly strangled his brother in August 2015. The Functional Family Therapy was not available in the Claimants' area and the search for foster carers proved unsuccessful. The Maudsley Report, which Ms Coombs accepted provided the most authoritative assessment of TG's risk, had considered him a high risk to others. If Functional Family Therapy was not available, the Maudsley Report had said that KCC should strongly consider residential schooling. Because the Social Services Department would not support joint funding, that had not happened.

89. Mr Buttler also submitted that the duties under the Children Act 1989 were in issue. TwinG, WG and TG himself were 'children in need' and so the general duty in s.17 to safeguard and promote their welfare was engaged. Residential schooling could have been part funded by Social Services pursuant to their duty under this provision. TG was willing to undertake this and so s.17(4A) was no inhibition.

90. It was, or should have been, obvious to KCC that TG's parents were prevented from providing him with suitable accommodation or care. That was because of the risk which he presented to their other children. When TG had been discharged from hospital on 6th May 2015, they were advised never to leave TG alone with another child. They did their best to observe that precaution, but nonetheless, TG frequently punched WG. On one occasion he stamped on WG's leg and in August 2015 he tried to strangle WG. The family home was not 'suitable accommodation' in these circumstances and the duty to provide alternative accommodation for TG under s.20(1) of the Children Act was also engaged. Mr Buttler commented that Ms Coombs in her evidence had said that KCC never assessed whether the family home was suitable for TG. Absent their assessment, there was no alternative but for the Court to take a view as to whether it was – see *R (L) v Nottinghamshire County Council* [2007] EWHC 2364 (Admin) at [27]. So far as Ms Coombs said in her evidence that she did not consider that WG or TwinG had suffered significant harm, her view was simply untenable. KCC could have used this power to part-fund a residential placement. Again, that would have been in accordance with TG's wishes and so s.20(6) would have been no obstacle. The parents actively wanted this option to be

taken up. They would not have objected and so s.20(7) would not have been a problem.

91. Furthermore, it was manifest that WG and TwinG were suffering and were likely to suffer significant harm. Indeed, TG himself was at risk of harm as he had caused such harm to himself in some of his outbursts. If his behaviour remained unchecked, he was also likely to commit serious criminal offences and the resulting consequences would be another form of harm to him. The duty to investigate under s.47 of the Children Act arises if the local authority has no more than reasonable cause to suspect that this is the case. That was the only conclusion to which KCC could have come if it had considered the matter. The statutory guidance had not been followed. All the relevant agencies had not been brought together. Notably, a child protection conference of the kind stipulated by the guidance had not occurred. While there were several 'Child In Need' meetings they did not bring together sufficiently representatives (or sufficiently senior representatives) of the Social Services and Education Departments to decide what was needed to cope with the harm which the children were likely to suffer if nothing was done. Additionally, there was not a chair who was independent of those with line management or budgetary responsibility. Further, the police had not attended those meetings. Had they done so, it is likely that they would have underlined the danger posed by TG, as they did after the incident in the home on 5th May 2015.

92. Mr Buttler argued that the move of MG and TG to Sunderland did not relieve the Defendants of responsibility for these earlier breaches:

i) Ms Coombs acknowledged that there had been no assessment by KCC of whether the arrangements in Sunderland were suitable for the purposes of s.20. MG had only taken TG to his parents in Sunderland because there appeared to be no alternative way of keeping his other children safe. Yet there was nothing for TG to do in Sunderland. MG was afraid of confrontation with his son and for that reason had not intervened when TG refused to wash, change his clothes or do anything with his time other than play computer games. It was also unsuitable because the arrangement split MG from his wife and his other children.

ii) MG had only moved to Sunderland because KCC had not done what it was legally obliged to do (under Article 3 and under the Children Act) to provide assistance. Mr Buttler submitted that the Defendant could not, by breaching its duty, divest itself of responsibility to comply with those duties.

iii) It would be conspicuously unfair to allow the Defendant to rely on the move to Sunderland. MG had left Kent on the understanding that a genuine decision was about to be taken in relation to TG's residential placement. In fact, several weeks before he moved KCC's Social Services Department had said that it would not part fund the residential placement and that decision constituted an effective veto on TG being given a residential placement. Conspicuous unfairness is a form of irrationality – see *R v Inland Revenue Commissioners ex parte Unilever* [1996] STC 681 CA at 695 and *R (London Borough of Lewisham) v AQA* [2013] ELR 281, CA at [105] – [111] .

iv) For KCC to rely on the move to Sunderland would involve a breach of Article 8 of the ECHR. In either its negative or positive form there would be an interference with MG's family life with his wife and other children.

Social Services Claim: the Defendant's submissions

93. So far as the Article 3 claim was concerned, Mr Harrop-Griffiths emphasised that a high level of severity was required before the ill-treatment in question came within the provision's scope. He accepted that, in judging whether that minimum level of severity was crossed, it was relevant to take into account that WG and TwinG were children but, even so, he submitted, TG's treatment of his siblings did not come within the scope of Article 3.

94. Furthermore, there would only be a breach of Article 3 if the Defendant had not done all that it could reasonably be expected to do to protect WG and TwinG. In *Z v UK* the Strasbourg Court had recognised that it could be acutely difficult for social service authorities to decide how to respond to abuse within a domestic setting. Both the Education and Social Service Departments were aware of the benefits for TG of keeping the family together. These were not parents who were responsible for the abuse, far from it. They continued to have parental responsibility. They took those responsibilities extremely seriously and the Defendant rightly respected the decisions which they took.

95. For these reasons, there was no breach of the operational duty in Article 3.

96. The Defendant accepted that WG, TwinG and TG himself were children in need.

97. Section 17 of the Children Act did not assist the Claimants. It was not suggested that any of the children came with the specific duties in Part 1 of Schedule 2 of the 1989 Act and, as was said in *G v Barnet LBC*, the general duty in s.17(1) did not constitute a duty which could be enforced by each individual child in need.

98. Besides, by the time the Claim Form was issued, TG and his father were no longer in Kent's area. They were in Sunderland.

99. Mr Harrop-Griffiths submitted as well that the Claimants could get no benefit from s.47 of Children Act. That was essentially concerned with investigations. In this case, the Social Services Department had been very actively engaged with this family. A formal assessment had been prepared in November 2014. Both before and after that date, social workers and others on KCC's behalf had been very closely involved with the family. The very detailed records from Social Services showed the close attention which was paid to developments and incidents in the Claimants' family. The Claimants had not been able to point to any further information which more inquiries would have revealed. Nothing would have been gained by a child protection plan because there were no concerns about the parents' behaviour. In that sense, Ms Coombs was justified in saying at the Child In Need meeting of 20th May 2015 that a child protection plan would give the wrong impression that the parents were being blamed or penalised. They were not.

100. The Maudsley Report of March 2015 had recommended that KCC should consider a residential school placement. KCC had done that but decided against it. There had not

been an educational reason for this way of dealing with TG's special educational needs. There was also an incongruity that the Maudsley had proposed term-time boarding, but that would have left TG at home during the holidays and there had been problems at home in the past when TG had been at home during the holidays. The Social Services Department had considered whether to jointly fund residential schooling, but had decided against it.

The Social Services claim: discussion

101. I have set out the parties' contentions at some length, but I can give my conclusions relatively briefly.

102. I consider that the Defendant did not lawfully discharge their duties under s.20 of the Children Act. By the end of August 2015 the only conclusion to which KCC could have come was that TG's parents were prevented from providing him with suitable accommodation, at least on a full-time basis. Even allowing for the expertise of social workers, no other conclusion could have been rationally reached. Indeed, Ms Coombs in her evidence said that KCC had never asked themselves the question as to whether the family had suitable accommodation for TG. His violence, particularly to TwinG and WG was putting them at risk of harm which, as the incident on 28th August 2015 showed, the parents were not able to prevent or adequately control. I have read the Social Service Department records with care. The Department had not turned its back on the family. Far from it: there was extremely frequent contact, particularly by Ms Woods. I do not accept that any significant incident of violence by TG was omitted from her records of her contacts with the family. I accept that there were spells when TG's behaviour was very positive. However, the history showed that this was not a reliable indicator that his violence was in the past. In particular, KCC did not fully appreciate or respond to the Maudsley Report. Ms Coombs in her evidence acknowledged that it was the most comprehensive assessment of TG's risk as of March 2015. It judged that his risk of harm to others was high. Ms Coombs also accepted that since that report, there had been no further assessment by Social Services of his risk. The incidents in the school and at home on 5th May 2015, the stamping on WG's leg in June and the attempt to strangle WG in August should have reinforced the Maudsley risk assessment, despite the fact that there were good spells as well. The Maudsley Report had recommended Functional Family therapy. KCC investigated that possibility but learned that this was not available. The Maudsley Report had said that, in those circumstances, a residential placement should be strongly considered. It suggested term-time boarding, but that was consistent with its view that the continued willingness of TG's parents to engage and help him were positive features of the case.

103. I also accept the criticisms which Mr Buttler made of KCC's failure to follow the statutory guidance. That is only partly about assembling the information which the local authority needs about children in need or at risk. The guidance is also about preparing appropriate plans to address those needs and risks. KCC did not do this in the structured way which the guidance proposed and has given no good reason as to why it was not followed. I do not accept that a child protection conference would have been superfluous in the absence of criticisms of the Claimants' parenting. The value of bringing the relevant agencies together to decide how best to deal with the risks which TG posed would still have been real and important.

104. Mr Harrop-Griffiths may be correct that s.17 of the Children Act did not give the Claimants specific enforceable rights, but this is immaterial in light of the breaches of ss.20 and 47.

105. While I accept that KCC could only have concluded that TG caused harm to WG and TwinG and that there was a risk that he might cause them further harm, I have not been persuaded that the level of harm was such as to cross the high threshold set by Article 3 of the ECHR. His behaviour to those siblings was frightening and, at times, painful, but it did not reach the minimum level of severity which is necessary for ill-treatment to be equivalent to 'inhuman or degrading treatment or punishment'. TwinG and WG were young children and I have borne that in mind, but TG was not someone who was in a position of authority or trust over them. That is an important point of distinction from the cases of *Tyrer v UK* (1979-80) 2 EHRR 1 or *A v UK* (1999) 27 EHRR 611 on which Mr Buttler relied. Nor was I persuaded that the risk of worse violence by TG (and which might have crossed the Article 3 threshold) could be described as 'real and immediate.'

106. I do agree with Mr Buttler that the departure of MG and TG to Sunderland did not mean that these defaults became academic or of only historical interest. Mr Buttler sought relief only in the form of declarations. In principle, I consider that he is entitled to them in relation to breaches of the Children Act duties, though not in relation to Article 3 of the ECHR. I shall invite submissions as to the precise form that these should take.

The claim in respect of education of TG: introduction

107. As I have said, the second claim for judicial review which I have to consider was brought by the Official Solicitor ('the OS') on behalf of TG. TG is the Claimant, but it will be less confusing if I attribute the arguments which Ms Hannett advanced on his behalf as those of the OS.

108. In essence the OS challenges the decision of KCC, taken first on 19th October 2015, that responsibility for providing TG's special educational needs had been transferred to Sunderland. The OS asks me to quash that decision and to declare that responsibility remains with KCC. In resolving that question, Ms Hannett submits, I will need to consider the nature of the Court's task. Is it, as she contends, a jurisdictional fact which I must decide for myself, or should I apply the usual public law approaches to decisions taken by public bodies? She argues, however, that this is not critical since, even if I decide the more conventional (and restrained) form of review is the right one, KCC's decision was unlawful.

109. In approaching these central questions, Ms Hannett also argues, I should bear in mind earlier breaches of their duty towards TG under the Education Act.

110. Mr Harrop-Griffiths argues that the Court's task is confined to the usual forms of judicial review. KCC's decision that TG's special educational needs had become Sunderland's responsibility was lawful. That remains the case whatever earlier breaches there may have been under the Education Act.

The Education claim: the uncontroversial legal background

111. KCC first made a statement of TG's special educational needs on 30th May 2014. The governing legislation was then the Education Act 1996 ('the Education Act') Part IV. Part IV has now been repealed by the Children and Families Act 2014. However, for children who had a statement immediately prior to 1st September 2014, the old law continues to apply – see Children and Families Act 2014 (Transitional and Saving Provisions) (No.2) Order 2014 SI 2014 No.2270 article 11.

112. Section 323 of the Education Act imposed a duty on a local authority to assess a child's special education needs, but only if they were 'of the opinion that a child for whom them they are responsible' had such needs – see s.323(1).

113. Section 321(3) provided,

> 'For the purposes of this Part a local authority are responsible for a child if he is in their area and,
>
> (a) he is a registered pupil at a maintained school…or
>
> …
>
> (d) he is not a registered pupil at a school but is not under the age of two or over compulsory school age and has been brought to their attention as having (or probably having) special educational needs.'

114. Section 324 then makes provision for the local authority's duties after an assessment. It says,

> '(1) If, in the light of an assessment under section 323 of any child's educational needs and of any representations made by the child's parents in pursuance of Schedule 27, it is necessary for the local authority to determine the special educational provision which any learning difficulty he may have calls for, the authority shall make and maintain a statement of his special educational needs.
>
> (2) The statement shall be in such form and contain such information as may be prescribed.
>
> (3) In particular, the statement shall-
>
> (a) give details of the authority's assessment of the child's special educational needs, and
>
> (b) specify the special educational provision to be made for the purpose of meeting those needs, including the particulars required by subsection (4)
>
> (4) The statement shall –
>
> (a) specify the type of school or other institution which the local authority consider would be appropriate for the child,
>
> (b) if they are not required under Schedule 27 to specify the name of any school in the statement, specify the name of any school or institution (whether

in the UK or elsewhere) which they consider would be appropriate for the child and should be specified in the statement.

…

(5) Where a local authority maintain a statement under this section, then –

(a) unless the child's parent has maintained suitable arrangements the authority -

(i) shall arrange that the special educational provision specified in the statement is made for the child, and…

(b) if the name of a maintained school … is specified in the statement, the governing body of the school shall admit the child to the school.'

115. A statement of special educational needs must be reviewed at least annually – see s.328(5). In exercising their powers under Part IV, local authorities must have regard to a code of practice issued by the Secretary of State – see s.313(2). In November 2001 the Secretary of State issued 'Special Educational Needs Code of Practice'. This said that in certain circumstances, reviews should be held more frequently. What are sometimes called 'emergency' or 'interim' reviews should take place according to paragraph 9.44 of the Code,

> 'Where a school identifies a pupil with a statement of special educational needs who is at serious risk of disaffection or exclusion …It will then be possible to consider the pupil's changing needs and recommend amendments to the statement as an alternative to the pupil being excluded.'

116. If a local authority holds an annual review and decides not to amend a child's statement then it must give written notice to the parent of the child concerned together with its reasons for not making the amendment – see s.328A(2). The child's parent can then appeal to the First-tier Tribunal – s.328A(3). The notice which the local authority is obliged to give to the parent must inform the parent of this right of appeal and must be served within 7 days of the decision - see s.328A(5) and (6).

117. Schedule 27 paragraph 7(2) said,

> 'Regulations may make provision, where a local authority become responsible for a child for whom a statement is maintained by another authority, for the transfer of the statement to them and for Part IV to have effect as if the duty to maintain the transferred statement were their duty.'

118. The relevant regulations were the Education (Special Educational Needs) (England) (Consolidation) Regulations 2001 SI 2001 No. 3455. Regulation 23 provided,

> '(1) This regulation applies where a child in respect of whom a statement is maintained moves from the area of the authority which maintains the statement ("the old authority") into that of another ("the new authority").
>
> (2) The old authority within 15 working days beginning with the day on which they are informed of the move, shall transfer the statement to the new authority.

(3) From the date of the transfer –

(a) the statement shall be treated for the purposes of the new authority's duties and functions under Part IV of the Act and these Regulations as if it had been made by the new authority on the date on which it was made by the old authority, …

(4) the new authority shall within 6 weeks of the date of the transfer serve a notice on the child's parent informing him –

(a) that the statement has been transferred;

(b) whether they propose to make an assessment, and

(c) when they propose to review the statement in accordance with paragraph (5).

(5) The new authority shall review the statement under s.328(5)(b) before the expiry of whichever of the two periods expires later –

(a) the period of 12 months beginning with the making of the statement, or as the case may be, with the previous review, or

(b) the period of 3 months beginning with the date of the transfer.

(6) Where by virtue of the transfer the new authority come under a duty to arrange the child's attendance at a school specified in the statement but in light of the child's move that attendance is no longer practicable the new authority may arrange for the child's attendance at another school appropriate for the child until such time as it is possible to amend the statement in accordance with the procedure set out in Schedule 27.'

The Education claim: the meaning of 'moves' for the purposes of Regulation 23

119. Ms Hannett submitted that a child only 'moved' so as to transfer responsibility to a new local authority if he had left the old authority with a degree of permanence. It was not sufficient that the child was physically present in the area of the new local authority. She argued that there were a number of reasons which led to this conclusion.

120. Firstly, the Act contemplated that the original local authority might decide to fulfil the child's special educational needs at a school outside of its own area – Indeed, s.320 and s.324(4)(b) envisaged that the school might even be outside England and Wales. It could not have been Parliament's intention that a child who was physically outside the local authority's area because that was where the specified school was located had thereby 'moved' for the purpose of regulation 23.

121. Secondly, it was clear that the statutory scheme was for only one local authority to have responsibility for a child's special educational needs. It followed that a temporary or transitory presence in another local authority's area would not constitute a 'move' for the purposes of regulation 23.

122. Thirdly, the consequences of responsibility being transferred to a new local authority might be profound for the child. An early review of the child's special educational needs was authorised by regulation 23(5) and, if the new local authority considered that child's attendance at the existing specified school was no longer practicable, it could make arrangements for the child to attend another appropriate school. Such a shift might be necessary if the 'move' was permanent but not if it was simply temporary.

123. Ms Hannett submitted that I would not be assisted by looking at whether TG was still in KCC's area. That was a critical feature in deciding that KCC was the local authority originally responsible for assessing and providing TG's special educational needs – see s.323(1) and s.321(3). However, once a child was through that initial gateway, it was no longer necessary for him to continue to satisfy the s.321(3) criteria. Auld J. had found this to be the case in *R v Dorset County Council and Further Education Funding Council ex parte Goddard* [1995] ELR 109, 129. The case had concerned the Education Act 1981, but the relevant provisions were not materially different. He had said,

> 'In my view, the s.4(2) [equivalent to s.321(3) of the 1996 Act] criteria apply to the initial identification by a local education authority of children with special educational needs for whom it is responsible, namely the exercise of the assessment under s.5 [equivalent to s.323 of the 1996 Act] and the making of a statement under s.7(1) [equivalent to s.324 in the 1996 Act]. However, once a child is statemented… the duty to maintain the statement persists irrespective of the s.4(2) criteria. This is of a piece with the point I have already made, that the duty under s.7(2) to 'arrange' the specified educational provisions is a duty to arrange future as well as present provision.'

124. There are regulations which concern inter-authority recoupment – Education (Areas to which Pupils and Students Belong) Regulations 1996 SI 1996 No. 615. However, these expressly do not apply for the purposes of determining which authority's area a child is in for the purposes of s.321(3) of the Education Act 1996 – see regulation 2(4).

125. Ms Hannett submitted that a child should not be regarded as having 'moved' to a different local authority for the purposes of regulation 23 unless he had become ordinarily resident in the new authority's area. She argued that I could gain assistance from decisions which had considered what was involved in 'ordinary residence'.

126. The classic authority on the meaning of 'ordinary residence is *R v Brent LBC ex parte Shah* [1983] 2 AC 309, 343-4. In his leading speech, Lord Scarman said the phrase referred

> 'to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether or short or of long duration….And there must be a degree of settled purpose. The purpose may be one; or there may be several. It may be specific or general. All that the law requires is that there is a settled purpose. This is not to say that the "propositus" intends to stay where he is indefinitely; indeed his purpose, while settled may be for a limited period. Education, business or profession, employment, health, family or merely love of the place spring to mind

as common reasons for a choice of regular abode. And there may well be others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.'

127. Where a child is concerned, the focus will often inevitably shift to the purpose of the parent, as Baroness Hale said in *A v A (Children: Habitual Residence)* [2014] AC 1 at [38] in considering the meaning of 'habitual residence' for the purposes of the Brussels Regulation, but, at least in the case of an adolescent child, some account should be taken of the child's own views – see *In Re LC (Children)* [2014] AC 1038 at [37].

128. Mr Harrop-Griffiths argued that the test should simply be one of residence. So far as possible, there should be no break in a child's education. If a child 'moved' for any appreciable time, then responsibility for his special educational needs should be transferred to the new local authority, whether or not the move was for a settled purpose.

129. In my judgment an assessment of the meaning of the term 'moves' in regulation 23 should be informed by the enabling provision under which the regulation was made. As I have shown, this was paragraph 7(2) of Schedule 27 which says that regulations may be made to make provision where a local authority 'becomes responsible' for a child for whom a statement has been made by another authority. That is clearly a reference back to s.323(1) which confers an obligation on a local authority to assess the needs of a child 'for whom they are responsible' and the definition of that phrase in s.321(3). The enabling power was therefore intended to cater for the position of a child who was formerly the responsibility of one authority but who has become the responsibility of a new authority. That is also the approach in the Code of Practice which says at paragraph 8.113,

> 'When the responsibility for a child with special educational needs changes from the LEA maintaining the statement (the old authority) to another LEA (the new authority, the old authority must transfer the statement to the new authority…'

130. Section 321(3) identifies two elements which have to be present before a local authority is responsible for a child for these purposes. The first is that the child 'is in their area.' The second is that the child satisfies one of the four paragraphs of s.321(3). Paragraph (d) is that the child is of compulsory school age and has been brought to the attention of the authority as having or probably having special educational needs. KCC told Sunderland that TG did have special educational needs. Thus, in the circumstances of a case such as the present one, the critical issue is whether the child is 'in the area' of Sunderland.

131. For these purposes, therefore, it seems to me that the criteria in s.321(3) do have a continuing relevance. The term 'moves' in regulation 23 is intended to capture the situation where a child was formerly the responsibility of one authority, but has since become the responsibility of a new authority. That will only occur if the child is 'in the area' of the new authority. The issue with which I am confronted is different from that which faced Auld J. in the *Dorset* case.

132. There is no statutory guidance as to the meaning of this phrase, but in a non-statutory document published in 2009 and entitled 'Guidance on Looked after Children with Special Educational Needs' the Department for Children Schools and Families said,

> 'The term "in their area" is not defined in the legislation. In line with established practice, the Department construes this phrase to mean "ordinarily resident in their area".'

133. I agree that it is necessary to distinguish a situation where there has been a permanent move from one which is temporary or transitory. As Ms Hannett and Mr Harrop-Griffiths agreed, there can only be one local authority which is responsible for a child's special educational needs. I also agree with Ms Hannett, that the procedures envisaged in regulation 23 would be excessively cumbersome to cater for a purely temporary, short-term absence of the child from the original authority's area. I agree as well that it is of assistance to see whether there has been an alteration of the child's ordinary residence to reach a decision as to whether the child has 'moved' for the purposes of regulation 23. The features which have been identified in other contexts for deciding a person (and especially a child's) ordinary residence may be helpful.

134. At the same time, there are limits on the usefulness of this methodology. The term 'ordinary residence' (or 'habitual residence') is not used in the regulation or the enabling statute. That distinguishes this situation from that which faced the courts in the authorities which Ms Hannett cited to me. I have already alluded to one important difference. There can be only one local authority which is responsible for a child's special educational needs, whereas a person may have an ordinary residence in more than one place (see for instance *R (Cornwall County Council) v Secretary of State for Health* [2016] AC 137 at [42]). The features identified in the ordinary residence cases are therefore no more than indirect pointers in deciding whether in this case TG had 'moved' to Sunderland at the time that KCC took its decision which the OS challenges on 19th October 2015.

The nature of the Court's function when there is a challenge by a child to an authority's decision that he has 'moved'

135. Ms Hannett submits that it is for the Court to decide whether TG had moved to Sunderland by 19th October 2015. She argues that it is only if this precedent fact exists that KCC will have ceased to be responsible for providing TG's special educational needs. It is, she argues equivalent to the issue of whether a person is a 'child' for the purposes of Children Act 1989 s.20 and which the Supreme Court said was likewise an issue of precedent fact – see *R (A) v Croydon LBC* [2009] 1 WLR 2557. Whether a child had 'moved' was not a question of judgment or discretion, still less one which called for professional assessment. It was a straightforward question of fact which the Court was as well equipped to answer as the Defendant.

136. She also argued that the issue of whether a child with special educational needs has moved to a new authority has consequences, not just for the child, but also for the new authority. Thus, in this case, Sunderland should only be obliged to take on responsibility for fulfilling TG's special educational needs if he has indeed 'moved' to its area.

137. She submits that it is notable that regulation 23 does not require the old authority to consult with the new authority as to its views as to whether the child has moved. There is no provision for the new authority to object to the transfer and no dispute mechanism for resolving differences between the two authorities. Section 495(3) of the 1996 Act provides that,

> 'Any dispute between two or more local authorities as to which of them is responsible for the provision of education for any pupil shall be determined by the Secretary of State'.

But, Ms Hannett submits, that subsection is not applicable. Section 3 of the 1996 Act defines a 'pupil' as,

> 'a person for whom education is being provided at a school…
>
> And references to pupils in the context of … the exclusion of pupils from a school are references to persons who …before their exclusion were, pupils as defined by this subsection.'

TG was not a pupil in Kent and was not a pupil in Sunderland.

138. While judicial review is not usually concerned with resolving disputes of fact, Ms Hannett argued, it would be wrong to allow this to dictate the issue for the court to decide. Besides, the better the quality of the initial decision-making the less likely there will be a dispute for the court to resolve, or come to any different conclusion if there is litigation – see *R (A) v Croydon LBC* at [33].

139. Mr Harrop-Griffiths argued that the Court should adopt the conventional public law methods of review and not treat the issue of whether TG had moved as a question of precedent fact. He noted that in *Shah* Lord Scarman had taken this course with the very question of whether a student was 'ordinarily resident' - see p.341, although in the *Croydon* case Lady Hale said at [24] that it was not necessary for the Supreme Court to decide whether the same decision would be made today.

140. He argued that the dispute resolution mechanism in s.495(3) could be used to resolve inter-authority disputes. The provision should be read broadly as a similar provision had been interpreted by the Supreme Court in *R (Cornwall Council) v Secretary of State for Health* [2016] AC 137 at [32].

141. In my judgment, Mr Harrop-Griffiths's position is to be preferred on this issue.

142. It is clear that ultimately the nature of the Defendant's duty (and the consequential character of the Court's function when the Defendant is alleged to have breached that duty) is a matter of statutory construction and deciding Parliamentary intention, so far as the statute is concerned, and, so far as the regulation is concerned, the intention of the drafter of the regulation – see the *Croydon* case at [26] and [31].

143. While it is true that neither the statute nor the regulation (in this context) uses an expression such as 'if the authority considers…', this is a statutory scheme which entrusts to local authorities the power to make judgments and assessments on a great many issues. There is no indication that in respect of this one, Parliament or the

drafter of the regulation expected the Court to conduct the unusual exercise of an investigation of the facts. Many other decisions relating to special educational needs can be the subject of a merits appeal to the First-tier Tribunal, but a decision that a child with a statement has moved to another authority is not one of them.

144. I have said that the interpretation of 'ordinary residence' in other contexts may provide helpful indirect pointers in the present one. For what it is worth, therefore, Mr Harrop-Griffiths can take some support from the views of Lord Scarman in the *Shah* case that a decision as to ordinary residence in the context of student grants was reviewable only in accordance with conventional public law principles.

145. I was not persuaded by Ms Hannett's argument that there was no mechanism for resolving disputes between local authorities and this meant that KCC was divested of responsibility only if TG had in fact moved to Sunderland. In the first place, I think it far from obvious that s.495(3) is inapplicable. Ms Hannett argued that it was plain that TG did not come within the statutory definition of a 'pupil'. She submitted that there was no ambiguity and there was therefore no room for the generous type of interpretation which the Supreme Court in *Cornwall* had given to the equivalent provision in that case for the resolution of disputes between authorities. I am conscious that I have not heard on this issue two of the parties who might have had contributions to make i.e. Sunderland and the Secretary of State. But even without their assistance I do not think that the position is as plain as Ms Hannett submitted. In the first place, it seemed that TG was not taken off the roll of Goldwyn until 19th October 2015 which was the same date as the decision that the OS seeks to challenge. Secondly, the definition of a 'pupil' is broadened in the final words of s.3(1) so that 'references to pupils in the context of the admission of pupils to, or the exclusion of pupils from, a school are references to persons who following their admission will be, or (as the case may be) before their exclusion were, pupils as defined by this subsection.' My present view is that that has sufficient latitude to extend to TG. Thirdly, the potential for disputes between authorities is, at best, only indirectly relevant. No one has suggested that the dispute between KCC and the OS could be referred to the Secretary of State for resolution.

Was the decision that TG had 'moved' to Sunderland unlawful?

146. If, as I have held, the decision that TG had moved to Sunderland is challengeable only on traditional public law principles, Ms Hannett nevertheless submits that I should find it was irrational or conspicuously unfair.

147. She submits that MG and JG had made clear to KCC that the absence of MG and TG would only be temporary and pending the decision on whether a residential placement would be offered. Zena Woods referred to them taking an 'extended holiday' with MG's parents in her letter of 10th September 2015. The temporary character of their absence was underlined by the fact that it involved the separation of MG from his wife, JG, and his separation from his other children.

148. Furthermore MG made this move in the aftermath of the serious attack by TG on WG on 28th August 2015. As Zena Woods recorded in her letter of 10th September 2015 to MG and JG,

'You feel you now have no other options but for TG and MG to leave the family home so as to protect the other children and to protect TG from committing a serious offence.'

Ms Hannett argues that their conclusion that this was a necessary course was both right and obvious.

149. Additionally, MG's decision to take TG to Sunderland was influenced by KCC's breaches of its educational duties. In particular,

i) TG had effectively been excluded from Goldwyn. Whether this was for health and safety or for reasons of his own health, the proper procedures had not been followed. KCC was obliged to provide TG's special educational needs at the institution specified in his statement i.e. Goldwyn –see s.324(5), or, if that was not possible, it was obliged to amend the statement. It did neither. In accordance with the Code of Practice (which itself was statutory guidance) an emergency or interim review should have been held to consider TG's changing needs and to recommend amendments to the statement. No such review was held after Goldwyn's decision that TG could not return.

ii) Although Ms Coombs had said on 17th June 2015 that the Social Services Department would not jointly fund a residential placement, the Education Department continued for several months to pursue that proposal in JRAP even though, without the agreement of the Social Services Department, the proposal was foredoomed.

iii) There was no information that TG's health precluded him receiving full time education. Whether he had been excluded from Goldwyn for health or health and safety reasons, KCC was obliged to provide him with full-time education –see Education Act 1996 s.19(1), (3A) and (3AA). Nothing was provided until 9th July 2015 and then it was only part-time tutoring, not full-time education.

150. So far as I have found that KCC had breached its Social Services duties, those were further reasons why MG's departure for Sunderland could not be regarded as voluntary and why it would be conspicuously unfair to regard KCC as relieved of its educational duties in consequence.

151. Further, the Claimants were not warned that the departure of MG and TG to Sunderland, even on this basis, would lead to TG's statement of special educational needs being transferred to Sunderland.

152. Ms Hannett also commented that the letter from KCC of 19th October 2015 to Sunderland simply said that the file was being transferred because TG had moved to their area. The witness statement of Karen Flanagan, KCC's Special Educational Needs Manager, likewise gave no analysis of how the Defendants had come to their conclusion, save that she had referred to the 'Belonging Regulations' which Mr Harrop-Griffiths had accepted were irrelevant in this context.

153. Mr Harrop-Griffiths argued that, even if the test for whether a child had 'moved' meant more than simply a change of residence, KCC's decision that TG had moved was lawful.

154. It was unclear whether the phrase 'extended holiday' originated with MG, JG or Ms Woods, but what mattered was not the label that was attached but the reality of the exercise. On 6th September MG had said to Ms Woods that he was going to be taking with him enough of TG's prescribed medicines to last 3 months. At the Child In Need meeting on 9th September 2015, MG had said that he was 'looking to leave for at least 3 months'. That allowed KCC to conclude that TG was going to 'move' to Sunderland for the purposes of regulation 23.

155. Although no formal review was held after the incident at Goldwyn on 5th May 2015, KCC did investigate alternative possible schools. The DPS exercise was conducted and led to a number of possible alternative schools being identified.

156. Following the decision of Goldwyn that TG should not return, arrangements were eventually made for him to receive tutoring. This was not full-time education, but that was a technical breach if in fact it would not have been in TG's best interests to provide full-time education. In those circumstances s.19(3AA) would have materially qualified the duty in s.19(3A).

157. Mr Harrop-Griffiths accepted that MG and JG had been given no written notice of the decision on 5th May 2015 to refuse to amend the statement to provide for a residential placement. He further accepted that this omission had been serious because it meant that the parents were not able to appeal against that refusal to the First-tier Tribunal.

158. There had also been a misunderstanding within the Education Department as to what JRAP could achieve. It should have appreciated that, once Ms Coombs had said that Social Services would not jointly fund a residential placement, the procedures under which JRAP operated meant that a residential placement would not be approved. Instead, MG and JG had been given the impression that the possibility of a residential placement for TG was still under active consideration. On 9th October 2015 MG was wrongly told by the Education Department that JRAP had refused to approve residential placement because of his move to Sunderland. In truth, the refusal had been because of the decision by the Social Services Department not to jointly fund that form of placement.

159. In my judgment, Ms Hannett's submissions are to be preferred on this issue. KCC's decision that TG had 'moved' to Sunderland for the purposes of Regulation 23 was unlawful.

160. The decision itself simply states the conclusion that TG had moved to Sunderland. I agree that Ms Flanagan's reliance on the 'Belonging' Regulations was misplaced. So far as KCC took them into account, it misdirected itself.

161. From the contemporary documentation, it is clear that MG saw his departure from Kent as temporary. Since it involved separation from his wife and other children, it is understandable that he would have wished it to be as short as possible. It was plainly prompted by a fear that, unless TG was removed from the family home, WG or TwinG would suffer further violence. MG took with him TG's medicine to last for 3 months and said that he expected to be away for at least that period. However, in context that could only have meant that MG predicted it would take at least that period to resolve either alternative housing in Kent for himself and TG or a residential placement for TG. Any other conclusion would have been irrational.

162. The departure of MG and TG for Sunderland cannot be isolated from the earlier breaches of duty by KCC. I have in mind in particular the following:

i) KCC did not inform the Claimants in writing and within 7 days of its decision on 5th May 2015 to refuse to amend TG's statement of special educational needs in line with the parents' request. This was contrary to s.328A(6). Furthermore, in breach of s.328A(5), the parents were not told of their right to appeal against that decision to the First-tier Tribunal. There was not, therefore, the opportunity, for the Tribunal to review the merits of the decision.

ii) At the time when KCC considered the matter on 5th May 2015, it was unaware of the events which were taking place on that same day. Those events led Goldwyn to decide that TG could no longer attend the school (whether for health and safety reasons or because of his own health). That was plainly a significant development and, in accordance with the statutory Code of Practice, ought to have led to an emergency review taking place. It is far from clear as to whether KCC ever confronted the issue of whether such a review should take place. Certainly no reason is apparent from the documentation as to why it was not.

iii) Until TG's statement of special educational needs was amended, KCC was obliged to see that he received education in accordance with the statement. After 5th May, TG was not educated at the school identified in the statement and the statement was not amended.

iv) If it was the case that TG was unable to attend Goldwyn because of illness, s.19(1) of the Education Act required it to provide him with suitable education. That meant full-time education (see s.19(3A)) unless (see s.19(3AA)) there were reasons which related to TG's physical or mental health which meant that KCC considered full-time education would not be in TG's best interests. There was no evidence that TG's physical or mental health precluded him receiving full time education, nor, for that matter, does there appear to have been any decision by KCC that his best interests precluded him from receiving full time education. Nonetheless arrangements were only made for TG to receive part time tutoring and that only for a few weeks at the end of July 2015 and at the beginning of September 2015.

v) Because of KCC's internal procedures, the decision of Ms Coombs on 17th June 2015 that Social Services would not jointly fund a residential placement operated as an effective veto. Thereafter JRAP would not agree to such a placement. Yet, as Mr Harrop-Griffiths accepted, JG and MG were led to believe that residential placement was still under active consideration by KCC. MG's decision to take TG to Sunderland was made on that false basis.

vi) There were also the breaches of the Children Act 1989 to which I have already referred.

For all of these reasons, I also agree that it would be conspicuously unfair

for KCC now to rely on MG and TG's departure for Sunderland.

163. It follows that I agree the decision of KCC that TG had ‘moved’ to Sunderland for the purposes of Regulation 23 should be quashed. I will invite the parties to consider the precise terms of an appropriate order.