Case No: CO/5818/2014

Neutral Citation Number: [2015] EWHC 3731 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/12/2015

Before:

SIR BRIAN KEITH (SITTING AS A DEPUTY HIGH COURT JUDGE)

- -

Between :

R (on the application of MM) (by his Mother and Litigation Friend, TM)	**Claimant**
- and -	
London Borough of Hounslow	**Defendant**

- -
- -

Eric Metcalfe (instructed by **Irwin Mitchell LLP**) for the **Claimant**
Hilton Harrop-Griffiths (instructed by **the London Borough of Hounslow**) for the **Defendant**

Hearing date: 11 November 2015.
Further representations: 13 and 17 November 2015

- -

Judgment

Sir Brian Keith:

Introduction

1. The claimant, who has been anonymised as MM, is 15 years old. He has been diagnosed as autistic. His mother is his primary carer. The defendant, the London Borough of Hounslow ("Hounslow"), is the local authority responsible for assessing and meeting his needs for care under the Children Act 1989. In this claim for judicial review, it is alleged that Hounslow failed to produce a lawful assessment of MM's needs, and to the extent that Hounslow's assessment lawfully identified MM's needs and those of his mother as his carer, it is said that Hounslow failed to make adequate provision for how those needs were to be met.

The Facts

2. MM was born in Pakistan on 1 December 2000. He was 15 earlier this month. His mother was to tell the author of the latest assessment of his needs that her marriage broke down soon after MM was born, and that the two of them came to this country in November 2001. They were subsequently granted indefinite leave to remain here. They have lived in the area for which Hounslow is responsible since 2004. That was when MM was diagnosed with autistic spectrum disorder with associated language difficulties by Hounslow's Child Development Team. The two of them live together in a two bedroom maisonette on an upper floor in a block of flats. MM shares one of the bedrooms with his mother as the other bedroom has his toys and equipment there.

3. Hounslow first assessed MM's needs in 2005. MM was assessed as requiring 12½ hours of support a week, and Hounslow provided that support in the form of direct payments. However, there is a dispute over whether his mother was assessed as requiring additional support as MM's carer. She claims that she was assessed as requiring 12 hours of additional support a week, and she relies on the fact that there were two agreements in writing between her and Hounslow, one for MM's support, and another for her support as his carer. She says that she was never paid for that support. For its part, Hounslow denies that MM's mother was ever assessed as requiring support for herself over and above the support for MM, and it claims that the existence of two agreements is probably due to the creation of a duplicate one later in 2005 when responsibility for making direct payments was resumed by Hounslow after a period of time during which they had been made on Hounslow's behalf by an outside body. MM's mother referred the dispute to the Local Government Ombudsman in 2010, but he declined to consider it since he would be having to investigate facts which had occurred many years previously. Nor has it been necessary for me to resolve the dispute because Mr Eric Metcalfe for MM accepted that its only relevance relates to the length of time that MM's mother says she has been seeking additional support as MM's carer.

4. In February 2010, Hounslow completed a further assessment of MM's needs. The social worker who prepared the assessment was John Grey. Mr Metcalfe acknowledged that it was of limited relevance to the issues which I have to decide, but he made the point that if one compares it with the latest assessment of MM's needs in February 2015, it shows that MM's mother was saying then what she is saying now about what she thinks MM's needs are, and that broadly speaking MM's needs have not really changed in the five years since the earlier assessment was prepared. It

proposed reducing the direct payments to cover only 8 hours of support a week from March 2011, but that decision was never implemented. Mr Metcalfe told me that if it had been, proceedings would have been brought then challenging it.

5. In February 2014, Phil Hopkins, the team manager of Hounslow's Social Work Team for Children with Disabilities, told MM's mother that, according to Hounslow's eligibility criteria for allocating the provision of support for children with disabilities, MM was then receiving more care in terms of direct payments than he was entitled to, and that his support would therefore be reduced. After threats of legal action, Hounslow agreed in July 2014 to review its eligibility criteria and to re-assess MM's needs and those of his mother. It took some time for Hounslow to respond to the concerns which had been expressed about the eligibility criteria, but eventually on 17 November 2014 it said that the criteria were used "as a guide to the number of hours or direct payments that is allocated following the assessment of need by the social worker", and it denied that they placed *"an unlawful fetter on the Council's discretion"*. Hounslow added that the social worker who had been allocated to assess MM's needs had left Hounslow, and that another social worker was being allocated to complete the assessment. That assessment did not materialise, and this claim was issued on 12 December 2014. It alleged that Hounslow had failed to produce a lawful assessment of MM's needs and those of his mother as his carer, and that the eligibility criteria were unlawful in that they unlawfully restricted the support which MM would otherwise have been entitled to receive. Permission to proceed with the claim was apparently given by Hayden J on 19 December 2014, but the order of that date was subsequently replaced by one dated 28 January 2015, and it may be that that was the date on which permission to proceed with the claim was given.

6. On 10 February 2015, Hounslow produced a fresh assessment of MM's needs and those of his mother. It made a number of recommendations, including that MM's mother's request for an increase in the number of hours of support for MM should not be acceded to. MM's mother wished to challenge that assessment on the basis that it was not a lawful assessment of MM's or her needs. Amended grounds of claim were lodged, and on 6 May 2015 Sir Stephen Silber granted permission for the claim to be amended. That is the claim currently before the court, because in the light of Hounslow's subsequent explanation of the eligibility criteria, the challenge to their lawfulness – at least on the basis that they unlawfully fetter Hounslow's discretion – is no longer being maintained. The other relevant feature of the case since then is that on 23 July 2015 Hounslow's Resource Allocation Panel, which is chaired by Mr Hopkins, decided to reduce the number of hours of support for MM from 12½ hours a week to the 8 hours a week which had been recommended in 2010, and to reduce the rate of the direct payments then being made to MM's mother from the higher rate of £14.30 an hour to the normal rate of £10.84 an hour. The decrease in the number of hours of support a week would be introduced gradually, with the number of hours being reduced to 10 hours a week for the first 8 weeks. It was in the context of that decision that the question of the lawfulness of the eligibility criteria was resurrected at the hearing. The contention is that they are arbitrary, and that they unlawfully informed the approach of the Resource Allocation Panel.

7. I should say something about MM's education. Since September 2005, MM has been educated at home by his mother, and she claims never to have used the direct payments for support during school hours. From September 2010 until July 2014

MM went to Inwards Small School, an independent school in Hampshire for children with learning difficulties, for 1½ days a week (later increased to two days a week), where he joined other children in cooking, games and music lessons at which he was learning to play drums and keyboard. In 2011, MM reached the age when he would normally have gone to secondary school, and his mother appealed to the First-Tier Special Educational Needs and Disability Tribunal ("SENDIST") against Hounslow's Statement of Special Educational Needs for her son, in particular its conclusion that MM should be placed in a *special* school in Hounslow. She wanted MM to continue to be educated at home, though if he was to go to school full-time, her preference was for a *mainstream* school which catered for children with learning difficulties. Hounslow's view was that MM would not be able to cope in a mainstream school. On 2 December 2014, SENDIST dismissed the appeal, and it concluded that MM should go to Oaklands School, a maintained secondary day *special* school in Hounslow. MM's mother was unwilling to allow him to go there, and he continued to be taught exclusively at home. On 19 June 2015, she was served with a school attendance order under section 437(3) of the Education Act 1996, requiring her to register MM as a pupil at Oaklands School. As far as I know, she has not yet done that, and the issue which will have to be addressed sooner rather than later is whether the education he is receiving at home is suitable.

The Legal Framework

8. The legal framework is well established. Local authorities are under a duty to "take reasonable steps to identify the extent to which there are children in need within their area": see para 1(1) of Schedule 2 to the Children Act 1989. Guidance on how the needs of such children. including the needs of their families, should be met has been issued over the years. That guidance may only be departed from where there is good reason to do so, and its core feature is that the assessment of a child's needs should not be an end in itself. Rather, it is a process which will lead to an improvement in the well-being of the child, and the conclusion of the assessment should result in a realistic plan of action, identifying the services to be provided, allocating responsibility for such action as needs to be taken, laying down a timetable for that action, and specifying the mechanism by which that action can be reviewed. A number of authorities have stressed the three stages which should inform the whole process: identifying the needs of the child, producing a care plan which specifies how those needs are to be met, and providing the services which the care plan has identified should be provided. That last stage is a critical element in the process. As Lord Wilson said in *R (on the application of KM) v Cambridgeshire County Council* [2012] UKSC 23 at [21] in the context of a local authority's duties under section 2(1) of the Chronically Sick and Disabled Persons Act 1970, once the first two stages of the process have been passed, *"the duty of the local authority to make provision for [the needs which have to be met] becomes absolute"*. Indeed, at [23] he identified an additional stage in the process where the services are provided in the form of direct payments, namely to work out what the reasonable cost of providing those services is.

9. Four other points need to be made. First, the plan of action has to be a realistic one. It should not be just a vague statement of good intent. Secondly, the needs of parent carers are an integral feature of such an assessment, since providing services which meet the needs of the parents is often the most effective means of promoting the welfare of children in need, particularly disabled children. Thirdly, the maximum

timeframe for the assessment to be produced, so that it is possible to reach an informed decision about what needs to be done next, should be no longer than 45 working days from when the assessment was commissioned. Fourthly, a new regime governing the functions of local authorities in respect of children with disabilities, including the provision of their social care needs, was introduced by the Children and Families Act 2014, but both counsel agree, for reasons which it is not necessary to explore, that it is unnecessary for the purposes of this case to look beyond the obligations imposed on Hounslow by the Children Act 1989 read together with the Chronically Sick and Disabled Persons Act 1970.

10. Having said all that, it is important not to expect so much from those who prepare these assessments that we risk taking them away unnecessarily from their front-line duties. As Hallett LJ said in *R (on the application of Ireneschild) v London Borough of Lambeth* [2007] EWCA 234 (Civ) at [71], *"a social worker preparing such an assessment cannot be expected to engage in a detailed analysis of the material obtained (often from many sources), decide what particular points have and have not been specifically addressed by the 'service user' thus far, and then take steps to ensure that any points which have been missed or not sufficiently addressed are drawn to the attention of the 'service user' for his or her response"*. She warned judges not to subject such assessments to an over-zealous textual analysis which might be more appropriate to a document drafted by a lawyer in the context of a legal dispute.

A Preliminary Point

11. When Hayden J gave permission for the claim to proceed, the claim was based on the challenge to the eligibility criteria and Hounslow's failure to produce any assessment since 2010. The latter claim is no longer relied on. Instead, the challenge is to the lawfulness of the assessment in February 2015. As a matter of form, both the failure to produce any assessment since 2010 and the challenge to the assessment in February 2015 amounted to claims that Hounslow had failed to provide lawful assessments, but in substance the two claims are very different, and it could not be said that Hayden J gave permission for the subsequent claim to proceed.

12. So if permission has been given for the current claim to proceed, it can only have been given by Sir Stephen Silber when he allowed the grounds of claim to be amended. I do not think that he can have intended to grant permission for the amended claim to proceed as well. If he had, his order would have recited that, and it did not. Indeed, his order required Hounslow to serve its *summary* grounds of defence within a particular time, whereas if he had been granting permission to proceed with the amended claim, he would have ordered Hounslow to serve its *detailed* grounds of defence. It is true that he anticipated a full hearing taking place, because he ordered both sides to give their estimate of the length of the hearing, but that was just as consistent with him having a rolled-up hearing in mind.

13. Mr Metcalfe has argued that describing the grounds of defence which had to be served as summary could just have been a mistake on Sir Stephen's part. After all, Hayden J made that very mistake himself, because whenever it was that he gave permission for the original claim to proceed, he too ordered Hounslow to serve its *summary* grounds of defence within a particular time. I acknowledge that it is possible that Sir Stephen made the same mistake as Hayden J, but the really telling point is that a new case was

being advanced against a completely new target, and despite that Sir Stephen did not say in so many words that he was giving permission for the amended claim to proceed. In that context, it is to be noted that rule 54.15 of the Civil Procedure Rules provides that where a claimant seeks to rely on grounds other than those for which he was given permission to proceed, the court's permission is required. In the circumstances, I do not think that permission to proceed with the amended claim has yet been given.

The February 2015 Assessment

14. The February 2015 assessment was called a multi-assessment. It assessed both MM's needs and those of his mother as his carer. It was prepared by Shaida Butt, a social worker in Hounslow's Social Work Team for Children with Disabilities. She had been with the team since July 2013. She has a diploma in social work from the University of Reading, a diploma in counselling and an Advanced Child Care Award. This assessment was preceded by the completion on 5 January 2015 by Ms Butt of a document headed *"Carers Assessment"*, but despite its heading it was not an assessment of MM's mother's needs. It merely set out what MM's mother claimed were her needs, and it did not include any assessment by Ms Butt about what MM's mother's needs actually were.

15. The multi-assessment she subsequently produced was an altogether different document. It is very lengthy, and the more I read it, the more I was struck by how comprehensive it was and by the effort which had obviously gone into producing it. Ms Butt was to some extent hampered by MM's mother's understandable exasperation that a social worker who had not had any contact with MM previously was preparing the assessment, because when Ms Butt asked MM's mother something, she would be told that that was something which the previous social worker, Mary Kargbo, had already been told about. Ms Butt referred to other professionals having found MM's mother to be difficult to deal with, although that, no doubt, was the product of her concern for MM's welfare. Ms Butt acknowledged that MM's mother's failure to engage with her as fully as she could have done had made it not possible for her to clarify some areas with MM's mother as much as she would have wanted. Before completing the assessment, Ms Butt had visited the family home twice, and had the notes of the visits made by Ms Kargbo on five occasions since the beginning of September 2014. In addition, she had spoken to the family's GP, to someone in Hounslow's Housing Department, Hounslow's occupational therapist and a doctor at a child development centre. She had also read the very many reports on MM which were in Hounslow's files.

16. Ms Butt referred in the assessment she prepared to MM's mother's own assessment of MM's health and his behaviour. She noted that MM's mother said that MM suffered frequently from colds, headaches and stomach ache, though elsewhere in the assessment she recorded that MM's mother's said that he was generally in good health, and the ailments he got were what other children get. He also suffered from indigestion resulting in diarrhoea and constipation, and she had put him on a special gluten- and dairy-free diet on the advice of a nutritionist she had consulted privately. Ms Butt recorded that MM's mother had told their GP that MM had other health issues associated with his ear, nose and throat, and that his nails would bleed. She noted that MM's mother had told Mr Grey that MM's hearing was sensitive. Ms Butt added that on a number of occasions she had requested a report on MM from his GP

on the present state of his health, the treatment he was receiving and the medication he had been prescribed, but that had not arrived by the date of her assessment.

17. Mr Grey had been told by MM's mother in 2010 that MM was only just beginning to understand numbers and that he had a vocabulary of 300-400 words. Indeed, SENDIST said that MM's language skills were equivalent to that of a three year old child. MM's mother told Ms Butt that MM could understand simple instructions, he would follow them when he was inclined to do so, and would say "no" if he did not want to do something. In that context, Ms Butt referred to a report prepared in 2014 by a group of professionals including a consultant paediatrician and a speech and language therapist. The report said that MM had been able to respond to some of the tasks he had been set, but that he did not have aphasia, and his difficulties with speech were *"reflective of his autism"*. All of this was consistent, said Ms Butt, with what MM's mother had told Mr Grey in 2010, and it appeared to Ms Butt that MM had made little cognitive progress in the intervening years. Ms Butt found it difficult to communicate with him. He did not respond when she spoke to him or look at her, though that may have been because he did not know her. He did not appear to Ms Butt to have made any friends at the groups he attended for children with disabilities.

18. When it came to MM's behaviour, Ms Butt noted that MM's mother said that MM had *"hypermobility issues"*, and that he had problems with his *"fine and gross motor skills"*. He could not feed himself, and although he could use a spoon, he needed help when it came to cutting food and using cutlery. He needed help doing up his zips and buttons, tying his shoelaces, combing his hair, brushing his teeth, applying moisturizer to his skin, opening and closing bottles and pouring juice. Although he was toilet trained, he needed help with washing and wiping himself, flushing the toilet and pulling his trousers up and down. If left on his own, he had a tendency to smear his faeces. He was unable to hold anything heavy. He could become easily distracted, and at times he would refuse to eat what had been prepared for him. When he was ill, it took longer to manage him. Sleeping was a problem. MM's mother told Ms Butt that MM would get up in the middle of the night, when he would be *"full of energy"*, and he would find it difficult to get back to sleep. He would sometimes wet himself at night, though he did not wear an incontinence pad when he went to bed as that did not happen very often.

19. In addition, there was MM's challenging behaviour. His mother told Ms Butt that he would get frustrated by his inability to communicate properly, and that would manifest itself in temper tantrums or in him crying or banging his head. When he had a tantrum, he would hit himself, throw himself to the floor, scratch his mother and pull her hair. As he got bigger, it would be more difficult to manage him. The frustrating thing was that MM's mother often did not know what had triggered these episodes. However, MM's mother had attended courses on how to deal with challenging behaviour in children, and she told Ms Butt that MM's challenging behaviour had decreased significantly over time as MM had begun to express himself better and had gained in confidence.

20. Ms Butt was concerned that MM's mother might have been exaggerating some of these behavioural issues. Although Ms Kargbo had been shown a video of MM banging his head, crying and hitting his mother, MM's mother could not say when that had happened, and none of the professionals who had visited the home had ever seen behaviour of this kind. Indeed, a report from Inwards Small School said that

MM had *"reduced his challenging behaviour in virtually all circumstances, whether at school or in outside activities …"* When it came to his skills, Ms Butt noted that MM's mother had been quite positive about MM when his educational needs were being reviewed in 2012. She had said then that MM was calmer and playing with other children, that he was making excellent progress in literacy and numeracy, that he was better at interacting with people, and that his *"listening attention skills"* had improved. Indeed, she had given quite an encouraging account of MM's motor skills to SENDIST. This is what Ms Butt wrote about that in the assessment.

> *"[MM] uses a fork or spoon with some spillage. He needs some help with and prompting dressing and bathing. He can undress and dress himself, clean his teeth and use the toilet alone, and although he is toilet trained he may occasionally need a continence pad at night. [MM's] confidence, basic skills and positive personality have developed and he will now attempt some surprising activities, such as wall climbing. He will also now attend and participate in assembly."*

Ms Butt said that she hoped MM's mother would allow MM to go to school so that an independent view of MM's skills, or lack of them, could be provided. She recounted at some length the history of MM's schooling and the views of both MM's mother and SENDIST. She acknowledged that with no experience of a classroom setting or school routines, MM would be likely to find it difficult to adapt, but her view was that with support he could make a successful transition into school life.

21. Another example of Ms Butt's suspicion that MM's mother may have been exaggerating things related to MM's lack of concern for his personal safety. MM's mother told her that MM would put himself at risk. He could open the front door on his own, she said, and so he had to be supervised at all times. He was said to have a tendency to run into the road, and to have no awareness of *"stranger danger"*. He would try to pull himself over their balcony. Indeed, Ms Butt said that MM's mother had told her that Ms Kargbo had seen MM *"hold the railing on the balcony and pull himself up"*. Ms Butt was unable to find any reference to that in Ms Kargbo's case notes, and MM's mother's account did not tally with Ms Butt's observation of MM when she saw him. Ms Butt said that MM's mother did not check on MM while he was on his own upstairs. That was not, of course, a criticism of MM's mother: it simply reflected MM's ability to keep himself occupied for considerable periods of time playing computer games and doing other things without help from his mother. He would come downstairs on his own if he needed something or if he wanted reassurance from his mother in the form of a kiss or a cuddle. Ms Butt said that all this was consistent with what Mr Grey and Mr Hopkins had reported, as well as the head teacher of Oaklands School who had also visited the family home. Ms Butt wondered whether the *"evidence of [MM's mother] giving differing information to professionals regarding [MM's] needs … [was] in order to increase the support she receives through Direct Payments"*. Having said all that, it should be recorded that Ms Butt did not doubt that MM had an obviously loving, caring and affectionate relationship with his mother, and although Ms Butt thought that MM's mother could benefit from some help in developing the skills to manage MM more effectively, she acknowledged that MM's mother understood the importance of stimulating MM by the use of toys and new technology, and it was plain that MM could absorb himself

for lengthy periods of time in such pursuits. Ms Butt was unable to say whether MM himself had any insight into his condition.

22. Ms Butt said that MM's mother had told her that she used the direct payments she received from Hounslow to pay for a carer for MM. He took MM to most of his activities and occasionally slept at their home when MM's mother needed a break from looking after MM. Ms Butt noted how well MM got on with him, and it is a pity that in recent months he has ceased to care for MM. Ms Butt reported that MM's mother wanted the direct payments to be increased to 25 hours' worth of support a week because she wanted MM's carer to look after MM for longer and because MM was not sleeping well at night. He would wake up and need to be looked after. Her own lack of sleep as a result of that was having an adverse effect on her own health. In that connection, she told Ms Butt that she suffered from lower back pain, an underactive thyroid and arthritis. She told Ms Butt that she would use the extra payments to pay for a carer for some nights so that she could get more sleep as well as to pay for more hours of support from MM's carer.

23. Ms Butt also said that MM's mother wanted to move to a property (a) with three bedrooms as it was no longer appropriate for MM and her to share a bedroom and (b) on the ground floor as there were times when MM's behaviour was such that she needed to put him into a wheelchair. Indeed, she reported that MM's mother had told an occupational therapist that she wanted a property with four bedrooms, the additional one being for MM's carer when he stayed the night. Ms Butt noted that MM's mother had made an unsuccessful complaint to the Local Government Ombudsman in connection with her access to opportunities for alternative accommodation. Ms Butt did not feel able to recommend a move to accommodation on the ground floor, because she did not think that MM's behaviour justified the use of a wheelchair. She thought that, if MM's behaviour continued to be as challenging as his mother claimed, the better course would be to improve MM's mother's ability to deal with it.

24. The core recommendation which Ms Butt made was that MM should go to Oaklands School which was what SENDIST had said. Although MM's mother told Ms Butt about the many activities which MM engaged in during the school day (including swimming, horse riding, playing tennis, as well activities involving music and drama), going to any school would give MM's mother the respite she needed and would enable the extent of MM's challenging behaviour to be properly assessed. And going to a special school like Oaklands would give him access to a host of other services such as physiotherapy, occupational therapy and speech and language therapy. There was, in Ms Butt's view, a better chance of MM realising his full potential at such a school rather than at a mainstream school as it would be more likely to meet his specific educational needs and manage any problematic behavioural issues. Ms Butt's other recommendations were:

- MM should be referred to Hounslow's Challenging Behaviour Team and its outreach service to work with MM and his mother to improve his behaviour, his irregular pattern of sleeping, and his skills at being independent, and to address any other issues which might arise

- MM should move into the second bedroom as he was a growing adolescent and needed his privacy

- A Child in Need Plan should be prepared to identify the various outcomes for MM which were hoped for, and meetings should be held every three months to bring things up to date

- The request for an increase in the number of hours of support should be referred to Hounslow's Resource Allocation Panel, though Ms Butt was herself unable to support the request for an increase to the extent that it related to support overnight

- MM's mother should bid for alternative accommodation under Hounslow's scheme for allocating properties

- MM's mother should ask their GP to refer her for cognitive behaviour therapy so that she could better understand the professionals' approach to MM's needs

- MM should be referred to Hounslow's Play Team which provides short break play schemes during school holidays and MM's mother should make use of Hounslow's Short Breaks programme

- Further advice should be sought about MM's hearing and his dietary requirements.

25. All of this is, of course, only a summary of what seem to me to be the important features of a very long document. Anyone considering this judgment who has access to the assessment should read it in full. I have only highlighted the things which might be regarded as material to the issues which the claim raises.

The Challenge to the Lawfulness of the Assessment

26. *MM's and his Mother's needs.* The case advanced on behalf of MM is that the assessment underestimated the extent of MM's need for support, in particular the extent of his inability to look after himself, his need to be supervised, the extent of his challenging behaviour and his need for overnight support and suitable housing. It also underestimated the needs of his mother as his carer, particularly the impact on her health and well-being of his need for supervision, his challenging behaviour and his need for overnight support. One of the planks of this argument is that Ms Butt was wrong to think that there were discrepancies between what MM's mother had told her and what MM's mother had told SENDIST, and that there was therefore no basis for Ms Butt to wonder whether what MM's mother had told her may have been *"in order to increase the support she receives through Direct Payments"*.

27. It is important to note that it was not just the difference between what MM's mother had told SENDIST and what she had told Ms Butt which had caused Ms Butt to think that there may have been an element of exaggeration of MM's mother's description of life at home. It was also the fact that none of the other professionals either had seen the challenging behaviour which MM's mother spoke of, as well as Ms Butt's own impression of MM (which was the same as that of the other professionals) that he did not need to be supervised all the time, as he spent a fair amount of time on his own keeping himself occupied without his mother being there. In any event, I disagree with the contention that there were no discrepancies between what MM's mother had told SENDIST and what she had told Ms Butt. The difference between the account she gave Ms Butt about MM's motor skills and what she told SENDIST about them is

really quite stark, and is not really attributable to one account simply being more detailed than the other. Reliance is also placed on the apparent discrepancy over whether MM occasionally wore an incontinence pad at night or whether he never wore one – a difference which is said to be irrelevant to MM's underlying problem of occasionally being incontinent at night – but I do not think that Ms Butt regarded this discrepancy as particularly significant in the overall scheme of things.

28. Having said that, the core point advanced on MM's behalf is that on those aspects of MM's mother's account which Ms Butt did not doubt, there was abundant evidence of such challenging behaviour on the part of MM and of his inability to look after himself that (a) it could not seriously be disputed that MM needed to be supervised most if not all of the time, and that (b) as a result MM's mother needed support to give her some respite from her responsibilities as MM's primary carer. That accorded with what is said to have been SENDIST's view that MM required 1:1 support. In fact, what SENDIST said in an amended statement of MM's educational needs which it approved was that MM needed full-time 1:1 support from a teaching assistant experienced in supporting autistic children with learning difficulties. In other words, the 1:1 support it had in mind was in the educational context which could be provided to MM if he attended Oaklands School.

29. Ms Butt did not think that support for MM was needed at night, and I shall return to that when I come to how MM's mother's needs were to be met. Ms Butt did not say in so many words how many hours of support a week she thought MM needed during the day over and above the support he got from his mother. But since she did not recommend an increase in the number of hours of support, she must be taken to have thought either that the level of support he was currently receiving was sufficient or that it should be reduced. The critical question is whether that view is one which she could reasonably have reached on her view of the amount of supervision MM needed in the light of what she thought was (a) the extent of his challenging behaviour, (b) the state of his motor skills and (c) the risks he posed to his own personal safety. As for (a), none of the professionals who had visited the home had seen the kind of challenging behaviour which MM's mother had described, and the school he had been attending for part of the week reported that such challenging behaviour as MM had exhibited had reduced *"in virtually all circumstances"*. As for (b), MM's mother had given SENDIST a much more encouraging account than the one she had given to Ms Butt. And as for (c), MM's mother's account did not tally with Ms Butt's own observation of MM. Where Ms Butt's own view of MM's needs differed from those of his mother, she had, of course, to go on her own view, and since she was of the view that MM should go to Oaklands School, she had to address the number of hours of support a week which MM needed outside school hours. In my opinion, it was reasonably open to Ms Butt, on *her* assessment of what MM was like, to come to either of the possible conclusions which she did about the number of hours of support a week which MM needed.

30. *Meeting MM's and his mother's needs.* There are three areas in which it is alleged that the assessment failed to make proper provision for how MM's and his mother's needs were to be met: overnight care, supervision and housing. I deal with overnight care first, though that related more to MM's mother's needs as MM's carer than to MM's own needs. The argument advanced on MM's behalf is that he needs overnight care because he often does not sleep through the night and is occasionally incontinent.

He wakes up and needs looking after. His mother needs a break from doing that on those nights when MM wakes up, which is why she uses some of the direct payments she receives to pay for MM's carer to sleep overnight occasionally so that she can have some respite and get a good night's sleep herself.

31. Ms Butt did not appear to doubt that there were times when MM woke up at night and needed looking after. She did not say in so many words why, despite that, she could not recommend an increase in the direct payments to cover overnight support, but the reason is not difficult to see. MM's mother could not predict beforehand those nights when MM would wake up and need looking after, and she might end up paying for MM's carer to stay overnight on many nights when it turned out to have been unnecessary. The most appropriate course would be to concentrate on the underlying problem, and see what could be done to improve MM's sleeping pattern. As she said in her witness statement, that could be done by MM staying overnight occasionally at Westbrook Short Break Service (which I take to be the Short Breaks programme which Ms Butt recommended in the assessment MM's mother should make use of). As Mr Hopkins said in his first witness statement, such a referral could lead to MM staying there overnight once a week. Of course, that might not give MM's mother the respite she needed, because the nights he stayed there might be nights when he would have slept well even if he had stayed at home. But the importance of the programme, said Ms Butt, was that *"the experienced staff there would be able to help him with ways in which to settle better for sleep"*. In my opinion, it was reasonably open to Ms Butt to conclude that that, coupled with a referral to Hounslow's Challenging Behaviour Team to address, amongst other things, MM's interrupted sleeping, was a more appropriate way of meeting MM's mother's needs as MM's carer when it came to overnight support.

32. I turn to supervision. Ms Butt referred to MM requiring *"close"* supervision, but that was in the context of his mother's claim that he would try to climb over the balcony. In any event, I doubt whether Ms Butt herself thought that MM needed close supervision. She thought that MM's mother may have been exaggerating the risk MM posed to his personal safety for the reasons she gave in the assessment, and when Ms Butt talked of *"close"* supervision, she may just have been recounting what MM's mother thought MM needed. But Ms Butt did not doubt that MM required some supervision in the light of (a) the deficiencies in his motor skills, (b) such risks as he did pose to his personal safety and (c) the extent to which his behaviour was sufficiently challenging that it needed to be watched. The question is whether it was reasonably open to Ms Butt to conclude that the amount of supervision which MM needed during the day could be met without an increase in the number of hours of support a week MM was already getting and by MM's referral to Hounslow's Challenging Behaviour Team and the outreach service.

33. In my opinion, it was. One of the arguments advanced on MM's behalf in support of the contention that this was not something which Ms Butt could reasonably conclude is that Ms Butt was wrong to take into account the fact that if MM was in school full-time, that would give his mother more time to herself, with the result that she would not need to engage MM's carer for as many hours a week as she does, and would not have to pay for the many activities for MM which she currently does. Ms Butt, it was said, had overlooked MM's mother's claim that she had never used the direct payments for support during school hours. Indeed, it is said that the difference

between MM's mother and the professionals over MM's schooling is completely beside the point, and should have no effect on the assessment of MM's social care needs. I do not agree with this criticism of Ms Butt's approach. The best way to meet MM's needs was to look at things holistically. It would not have been right for Ms Butt to ignore the effect of MM going to school full-time (which is what the professionals had recommended) on the extent to which his mother needed help. Her need to have time out from caring for MM would be reduced by the amount of time he was at school. Indeed, that was the very point she made in the assessment.

34. The other criticism of Ms Butt in this context relates to her view that MM's challenging behaviour was capable of being *"better managed ... by people who understand [his] needs, can predict triggers and know the behavioural strategies that work with him"*. The point being made is that although others may hypothetically be better able to manage him, the fact is that it was his mother who knew him best by far. She was therefore best placed to manage him properly, and the number of hours of support she should get should reflect that. However, Ms Butt's observation was made in the context of identifying MM's strengths and the extent of his resilience, presumably to the problems he faced. It was just one of six comments in all. And Ms Butt was entitled to conclude that there were professionals who had seen MM sufficiently often to form a judgment about how to manage MM which was at least as worthy of consideration as MM's mother's. The author of the report from Inwards Small School is such an example.

35. I turn finally to the question of housing. Ms Butt did not recommend that the family be rehoused. She only said that MM's mother should bid for alternative accommodation under Hounslow's scheme for allocating properties. She therefore thought that their current flat was adequate for their needs. There is no dispute that MM has now reached the age when he should not share a bedroom with his mother. The only question therefore is whether moving him into the second bedroom would allow sufficient space for his toys and equipment in that bedroom and the rest of the flat. Presumably Ms Butt thought that there was. I have not been told the size of the rooms nor the amount of space his toys and equipment take up. There is therefore no evidential basis on which I could possibly say that Ms Butt's view that the flat was big enough for them to have separate bedrooms and to house MM's toys and equipment was one which she could not reasonably reach.

36. That leaves the question whether it was reasonably open to Ms Butt to conclude that a flat on the ground floor was not required, whether because MM would benefit from private outdoor space or for reasons of MM's personal safety or to allow wheelchair access. I can see how a flat on an upper floor may not be appropriate if MM could get access to the balcony and was liable to behave on the balcony in such a way that he might fall over it. I assume that access to the balcony is through a door or windows from the flat. Although MM's mother told Ms Butt that she was not able to lock the windows from the inside, Mr Metcalfe told me that MM's mother has now been given keys, which I assume referred both to window locks and any door which led onto the balcony. But leaving that aside, there was plainly a concern on Ms Butt's part that the risk of MM falling over the balcony was nothing like as great as his mother was saying.

37. When it comes to wheelchair access, Ms Butt did not record being told by MM's mother why MM's behaviour was such that he needed to be in a wheelchair

sometimes when he was taken outside, and how she managed to prevent him from getting out of the wheelchair if he wanted to. However, MM's mother first witness statement tells me that there are *often* times when MM refuses to go outside, and what she needs a wheelchair for is to get him outside. Presumably she is saying that he will go outside only if he knows that he will be pushed in the wheelchair rather than walking under his own steam. Assuming that MM's mother explained that to Ms Butt, I can see how a flat on the ground floor would be an advantage, because it must be very awkward for MM's mother to carry the wheelchair down in one hand while holding on to MM with the other. But MM's mother told Ms Butt that it was only *sometimes* that a wheelchair was needed, and if Ms Butt's view was that the valuable and limited resource of a ground floor flat should be reserved for more deserving cases, that would, in my opinion, be a view which she could reasonably have reached. Finally, Ms Butt did not doubt that MM would benefit from private outdoor space, but she said that in the context of that being something which most children would benefit from. For all these reasons, I do not think that it was not reasonably open to Ms Butt to conclude that their current flat was adequate for MM's needs and those of his mother.

38. In the interests of completeness, I should add that even if Ms Butt had assessed their current flat to be inadequate for their needs, it is difficult to see how any failure on Hounslow's part to meet that need would have been unlawful. Any duty to meet that need could only have arisen under section 17(1) of the Children Act 1989, which imposes a *"general duty"* on local authorities to provide a range of services appropriate to the needs of children who are in need. In ***R (on the application of G) v London Borough of Barnet*** [2004] 2 AC 208, the House of Lords held that this general duty was not owed to each and every child in need individually, and the local authority was not obliged to meet every child's assessed needs regardless of resources.

39. *Breach of statutory duties.* As part of its obligation to assess MM's needs and those of his mother as his carer, the guidance issued to local authorities requires them to produce a plan of action which identifies how those needs are to be met. The complaint is that no such care plan has yet been produced, even though very many months have elapsed since the assessment. The recommendations which concluded the assessment could not be characterised as such a care plan since they were drafted in very general terms with no concrete proposals about how the desired outcomes could be achieved, and one of the recommendations itself was for a Child in Need Plan to be prepared. The absence of detailed provisions about how those needs are to be met (the second stage in the three stage process) has meant that nothing has been to provide the services which are necessary to meet those needs (the third stage), nor has anything been done to cost those services (the additional stage identified in ***KM***).

40. The guidance issued to local authorities contemplates co-operation between the child's family and the authority at all stages of the process of assessment. Thus, para 4.2 of the Framework for the Assessment of Children in Need and their Families ("the Framework Guidance") jointly issued by the Department of Health, the Department of Education and the Home Office in March 2000 reads:

> *"Generally, all these phases of the assessment process should be undertaken in partnership with the child and key family members, and with their agreement. This includes finalising*

> *the plan of action. There may be exceptions when there are concerns that a child is suffering or may be suffering significant harm."*

Hounslow says that a care plan has not yet been produced because MM's mother has withheld her co-operation in agreeing one. That is because it has not been possible to agree with MM's mother what services have to be provided to meet MM's needs and hers. Ms Butt set out in her witness statement the steps she took to discuss things with MM's mother, but she claims that MM's mother's simply requested that the "*paperwork"* be sent to her solicitors. Hounslow's counsel, Mr Hilton Harrop-Griffiths, told me that there have been recent meetings between Hounslow and MM's mother, but that *"they haven't got anywhere"*.

41. I would not classify any of this as non-co-operation on the part of MM's mother. There was litigation between her and Hounslow over whether Ms Butt's assessment of MM's and her needs was lawful. It is unsurprising that MM's mother was not prepared to agree a care plan based on that assessment when she was challenging the lawfulness of that assessment in the High Court. So should Hounslow have proceeded to produce the care plan without her input? Mr Metcalfe said that they should. She had always wanted a care plan produced, albeit based on what she claimed was a proper assessment of her and MM's needs. In that context, he relied on para 58 in Chapter 1 of the guidance "Working Together to Safeguard Children" issued by the Department of Education in March 2013 which superceded the Framework Guidance and which reads:

> *"Whatever the timescale for assessment, where particular needs are identified at any stage of the assessment, social workers should not wait until the assessment reaches a conclusion before commissioning services to support the child and their family. In some cases the needs of the child will mean that a quick assessment will be required."*

However, this has nothing to do with producing a care plan following an assessment of need. It relates to the provision of services pending that assessment. In my opinion, it would have been premature for Hounslow to produce a care plan based on Ms Butt's assessment when it might relatively soon be quashed. Rather, the right course for Hounslow to have taken, once permission had been given to amend the grounds to enable a challenge to the assessment to be mounted, was to wait for the outcome of the case. If the assessment was quashed, a new assessment would have to be prepared. If the assessment was not quashed, Hounslow could then produce a care plan, preferably with MM's mother's co-operation, but without it if necessary. The point is that until it was known whether the assessment had survived this legal challenge, it is not possible to characterise either the absence of a care plan, or the provision of services to meet the needs which the care plan had identified, or any costing of those services as breaches by Hounslow of its statutory duties.

42. Having said that, even though Ms Butt's assessment of MM's and his mother's needs is not being quashed, I doubt whether the Resource Allocation Panel had all the information it needed when it reached its decision on 23 June 2015 about the number of hours of support a week which MM needed. A care plan specifying the services which had to be provided if MM's needs and those of his mother were to be met had

to be produced before a panel concerned with the allocation of finite resources could come to a definitive view of the resources which should be made available to MM and his mother and what the cost of those resources would have been. It follows that once a care plan has been produced, MM's case should be considered by the Resource Allocation Panel afresh.

43. There is one final area in which it is said that Hounslow has been in breach of its statutory duties. That relates to its duties under the Breaks for Carers of Disabled Children Regulations 2011 ("the Regulations"). The contention is that Hounslow has made no provision for MM's mother to receive support in respect of the care she provides for MM contrary to regulation 4 of the Regulations. This argument was referred to in both the amended grounds and in Mr Metcalfe's skeleton argument, but it was not developed orally at the hearing, and Mr Metcalfe did not challenge the response to it in Mr Harrop-Griffiths' skeleton argument. That response seems right to me. Para 6(1)(c) of Schedule 2 to the Children Act 1989 requires local authorities to provide services designed to assist individuals who provide care for disabled children to continue to do so, or to do so more effectively, by giving them breaks from caring. In performing that duty, regulations 3 and 4 of the Regulations require a local authority to have regard to the needs of such carers, and to provide a range of services which are sufficient to assist them to provide care or to do so more effectively. The evidence about the range of services which Hounslow provides were set out in Mr Hopkins' first witness statement, and there was no suggestion that those services did not meet the requirements of regulation 4. The complaint is that some of those services should have been provided to MM or his mother as his carer, but that assumes that the duty in regulation 4 is not a general one but is owed to each and every carer individually. I agree with Mr Harrop-Griffiths that this assumption is not correct.

The Eligibility Criteria

44. As I have said, there is an issue about the lawfulness of the eligibility criteria which informs the Resource Allocation Panel's approach. Points are awarded under five headings, and the total number of points awarded provides an indication of the number of hours of support a week which a child with disabilities might get. However, the number of points awarded *"is to be used as a guide rather [than] being prescriptive"*, and the Panel *"will give weight to the family circumstances … when deciding to … allocate either more or less hours than scored"*.

45. One of the criticisms of the criteria is that the factors to be taken into account under the five headings do not reflect the seriousness of the child's needs and instead assign values according to somewhat arbitrary considerations. Three examples of that are relied on:

- Under the heading "Child Protection", it is impossible to obtain any points unless the child has had a child protection plan within the last 12 months.

- Under the heading "Behaviour", a child who is *"dependent on [an] Adult for all personal care needs beyond that of their peers of similar age"* can only obtain 10 points, whereas the maximum of 20 points is only available where a child's behaviour involves a frequent risk of harm.

- Under the headings "Environmental Factors" and "Health", a child is likely to obtain the maximum of 20 points only if they are already eligible for accommodation under section 20 of the Children Act 1989 or for continuing healthcare respectively, and in the latter case without any consideration of the requirement to commission joint packages of care.

46. The problem with these examples is that they assume that all the factors which might justify a particular number of points have to be present, whereas in truth only one of these factors need be. Take the factors under the heading "Child Protection". Two factors are stated to justify an award of 10 points: the existence of a child protection plan in the previous six months or historical concerns about safeguarding. So 10 points can be awarded if there are historical concerns about safeguarding even if there has not been a recent child protection plan in place. Similarly, under the heading "Behaviour", 20 points may be awarded where the child's challenging behaviour is present throughout the night or includes smearing or urinating frequently or inappropriately, or where the behaviour, though not challenging, places them or others at risk of harm due to a diagnosis relating to their mental health. In any event, it could not be said to be irrational to distinguish between a child who is dependent on an adult for all their personal care and a child whose behaviour is challenging.

47. The same point can be made under the heading "Health". It is true that one of the factors which might justify an award of 20 points is that the child meets *"Community Care criteria"*, ie social care provided for children by the NHS, but 20 points may also be awarded (admittedly these are extreme cases) where a child has a short life expectancy or has recently been discharged from hospital. And as Hounslow says, the prospect of joint commissioning services does not make it irrational to award the maximum number of points when the *"Community Care criteria"* are met. As for the heading "Environmental Factors", it is not disputed that a child is likely to obtain the maximum number of points only if they are already eligible for accommodation under section 20 of the Children Act 1989, but that does not mean that it is irrational to award the maximum number of points to a process which is designed to identify the level of non-residential services to be provided.

48. The other criticism of the criteria is that the number of hours of support which can be offered is irrationally low. Children who are eligible for the greatest support because they score 70 points or more can receive only up to 9 hours of support a week, and children who score less will be eligible for very few hours of support a week. There would have been a good deal in this criticism were it not for the fact that the criteria are not prescriptive. Mr Hopkins has supplied examples of the Panel offering more hours of support than a slavish observance of the criteria would justify, including cases in which the suggested maximum of 9 hours of support a week was exceeded. Indeed, the Panel's decision in the case of MM was an example of that. He was awarded a total of 20 points (15 under the heading "Behaviour" and 5 under the heading "Family/Social Relationships"), which would have justified 1-2 hours of support a week, whereas he was in fact offered 8 hours of support a week. The upshot of all this is that I do not think that the challenge to the lawfulness of the eligibility criteria has been made out.

Miscellaneous Points

49. There are two miscellaneous points which need to be made. First, although it has not affected the outcome of the case, the way Hounslow has handled things has left something to be desired. There was the delay in responding to the concerns which had been expressed about the eligibility criteria. There was very considerable delay in producing the 2015 assessment. And there were problems relating to Hounslow's preparation for the case, which Mr Harrop-Griffiths candidly acknowledged when I mentioned them to him. Those features of the case should not go unmentioned.

50. Secondly, there is, I think, no real doubt that Ms Butt regarded MM's mother as a difficult client. It may be that some of the other professionals who have been involved in assessing MM thought that as well. If MM's mother *was* difficult at times, that would, no doubt, have been because she is so concerned for MM and wants what she thinks is the very best care for him. For her part, MM's mother thought that Ms Butt was antagonistic and confrontational without any sympathy for her or an understanding of her situation or any attempt to see things from her point of view. Ms Butt does not accept that. I am mindful, of course, of the possibility that Ms Butt's assessment of MM's needs may have been unconsciously influenced by her view of MM's mother, but it has not been possible to gauge how likely or unlikely that is just from the assessment. In particular, it is not possible for me to say that the assessment shows that she was trying to undermine MM's mother's account at every turn as Mr Metcalfe argued. In the circumstances, there is obviously a limit to the extent to which I have been able to take into account the possibility that Ms Butt may have been unconsciously influenced by what she thought about MM's mother.

Conclusion

51. The analysis of the 2015 assessment to determine whether it was lawful has taken quite a time. It was not an exercise which could have been concluded summarily on a conventional application for permission to proceed with a claim for judicial review. In any event, the arguments in favour of the contention that the assessment was not a lawful one were such that they merited detailed consideration. I therefore give MM's mother permission to proceed with MM's claim for judicial review, but for the reasons I have given the claim must be dismissed.

52. I wish to spare the parties the trouble and expense of attending court when this judgment is handed down, and I leave it to them to see whether they can agree a suitable order for costs. If they cannot, their solicitors should notify the Administrative Court Office of that by 21 December 2015, and I will decide what the appropriate order for costs should be without a hearing on the basis of such written representations as the parties wish to make. The order for costs will have to reflect such criticisms as I have made of Hounslow in this judgment, and the fact that MM's mother has at least secured the benefit of my view that MM's case should be reconsidered by the Resource Allocation Panel once a care plan has been produced. If MM's mother wishes to apply for permission to appeal, her solicitors should send to the Administrative Court Office any written representations they wish to make by 21 December 2015, and I will consider that application without a hearing as well. However, her time for filing an appellant's notice will still be 21 days from the handing down of this judgment.