Neutral Citation Number: [2013] EWHC 2475 (Admin)

Case No: CO/12740/2011

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/08/2013

Before :

THE HONOURABLE MRS JUSTICE SWIFT DBE

- -

Between :

N and N **(by their litigation friend and father, CBN)**	**Claimants**
- v -	
LONDON BOROUGH OF NEWHAM	**First Defendant**
and	
ESSEX COUNTY COUNCIL	**Second Defendant**

- -
- -

Mr Alexander Campbell (instructed by **Edwards Duthie, Solicitors**) for the **Claimant**
Mr Hilton Harrop-Griffiths (instructed by **London Borough of Newham Legal Services**) for the **First Defendant**
Mr Thomas Amraoui (instructed by **Essex Legal Services**) for the **Second Defendant**

Hearing date: 2 July 2013

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Judgment

Mrs Justice Swift DBE :

THE PROCEEDINGS

1. The claimants are two children, who were aged six and four years old at the time of the relevant events. In order to protect their anonymity, the court has ordered that they be called N and N. They bring these proceedings by their father and litigation friend, CBN.

2. On 23 December 2011, the claimants made an application for interim relief pending issue of an application for judicial review. Lindblom J ordered that the first defendant should provide the claimants with accommodation and support forthwith and until further order of the court. On 30 December 2011, the claimants issued an application for judicial review in which they challenged decisions made by the first and second defendants not to provide them and their parents with accommodation and support pursuant to section 17 of the Children Act 1989 ("the 1989 Act").

3. On 27 February 2012, Mr Michael Kent QC, sitting as a Deputy High Court Judge, gave permission to the claimants to apply for judicial review. On 22 January 2013, Miss Belinda Bucknall QC, sitting as a Deputy High Court Judge, gave the claimants permission to amend their Grounds in order to reflect the events which had happened over the previous year. Since 23 December 2011, the first defendant has continued to provide the claimants and their parents with bed and breakfast accommodation in Newham and with financial support pursuant to the order of Lindblom J.

FACTUAL BACKGROUND

The claimants' family history

4. The claimants' parents are Nigerian nationals. Both are well educated and hold degrees. The claimants' father entered the UK illegally in 1984 (having absconded from the airport when the plane on which he was travelling was impounded) and has remained in the UK ever since. Their mother entered the UK as a visitor in 1995 and stayed over when her visa expired. She and the claimants' father met in 2004 and married in 2005. The claimants were born in 2007 and 2009. Previous applications by the claimants' parents for leave to remain in the UK were unsuccessful. In October 2011, they came to the attention of the immigration services and, in November 2011, their temporary admission was authorised, with a requirement of regular reporting. On 9 August 2012, the UK Border Agency ("UKBA") informed the claimant's parents' immigration solicitors that it intended to reconsider their applications for leave to remain. No decision has yet been made on those applications. Meanwhile, neither of them has the right to work in the UK, nor any recourse to public funds.

5. It appears that, from the time of his entry into the UK until his marriage in 2005, the claimants' father worked illegally whilst living either in private rented accommodation or with friends. Between 2005 and 2009, he and the claimants' mother (and, for the later part of this period, the claimants) continued to live in private accommodation in Ilford, Essex, both working illegally. In 2009, the claimants' father lost his job as a security guard because his immigration status made it impossible for him to obtain the required licence. After that time, he did various "cash in hand" jobs and received financial assistance from friends and the church at which the family worships. In April 2010, the claimants' mother was arrested; subsequently, she was sentenced to a period of imprisonment for an offence of using false identity papers to obtain employment. Whilst she was in prison, the first claimant lived with a private foster carer, who was a close friend of the family from Nigeria and the first claimant's godmother. The claimants' mother was released from prison in late May 2010 and, shortly afterwards, the family moved to private rented accommodation in Harlow, Essex, having been threatened with eviction from their previous home because of rent arrears. The first claimant attended a nursery in Harlow for six months in 2011 and the family was registered with a GP in Harlow. In August 2011, they were again evicted from their accommodation because of rent arrears.

6. From that time until 17 December 2011, the family stayed in various bed and breakfast establishments in Ilford, Harlow and Walthamstow and, on occasion, on church premises or in the family car. Meanwhile, in September 2011, the first claimant had begun primary school in Harlow. When the family moved to Walthamstow, he was taken to and from school by car. Even after the car was sold in

November 2011, the claimants' parents continued to take the first claimant to and from Harlow each day until the end of the Christmas term, 2011.

7. On 18 December 2011, the claimants and their parents were evicted from the bed and breakfast accommodation where they had been sleeping without the knowledge or permission of the owner. The family spent that night in Whipps Cross Hospital where they had taken the second claimant, who is asthmatic and was suffering from a cold, for medical advice.

The involvement of the second defendant

The events of 19 December 2011

8. On 19 December 2011, the family was in Waltham Forest, East London, where the claimants' parents made contact with solicitors who sought help on their behalf from the London Borough of Waltham Forest ("Waltham Forest LBC") . Waltham Forest LBC referred them to the second defendant and paid for a taxi for them to travel to Essex. The claimants and their father arrived in Harlow in the late afternoon of 19 December 2011 and met the second defendant's social worker, Ms Maureen Conroy-Brown. The claimant's mother was reported to have stayed in London in order to see whether other members of her family could give them assistance. She intended to travel to Essex later that evening by train. The claimant's father told Ms Conroy-Brown that his wife's family would give her the money for the train fare. Ms Conroy-Brown noted that the children were dirty and unkempt and had little food. She took the decision to provide them (and because of the claimants' young age, their parents also) with one night's bed and breakfast accommodation in Harlow and a voucher to buy food. She also decided that an initial assessment of the claimants' needs should be undertaken, pursuant to section 17 of the 1989 Act, and that the immigration status of the claimants' parents should be ascertained.

The events of 20 December 2011

9. On 20 December 2011, Ms Conroy-Brown proceeded with the initial assessment. She obtained information from the London Borough of Hackney ("Hackney LBC"), who had carried out an assessment of the family whilst the claimants' mother was in prison. She made further enquiries of Ilford Social Care ("Ilford") which had also been involved with the family. Ilford had previously offered the family transitional arrangements to return to Nigeria which they had declined. It was reported that the claimants' parents had told Ilford Social Care that they had friends and extended family who had been supporting them.

10. On 20 December 2011, Ms Conroy-Brown spoke to the claimants' mother who told her that her husband had gone to London to see his family, paying for his fare with money that her aunt had given to her. The claimants' mother said that her brother, a doctor who lived in the North of England, was travelling south that day and was going to help her. She told Ms Conroy-Brown that her family had been helping them but, in the previous month, she had been trying to manage without their assistance. She said that she was going to ask her family for support again. She said that her husband had "made wrong decisions" and "needed to change ways that things are done". She spoke about staying at the bed and breakfast accommodation where they had spent the

previous night and financing it herself. Following that conversation, Ms Conroy-Brown told the family that the second defendant would not be providing them with accommodation that night.

11. Subsequently, the claimants' solicitors contacted the second defendant's legal department, renewing the request for accommodation. In the event, it does not appear that this request was pursued further since the claimants and their parents travelled to London later that day, where they were provided with money by a church. They used the money to pay for board and lodging in bed and breakfast accommodation in the first defendant's area.

The initial assessment

12. Ms Conroy-Brown completed her initial assessment of the claimants on 22 December 2011. It was based on her meeting with them and their father on 19 December 2011 and on the information she had subsequently obtained about their past history. In her assessment report, she observed that the children were well behaved and responded appropriately to their father who displayed affection towards them. However, she also referred to their poor hygiene and the fact that the first claimant appeared hungry. She expressed concern about the effects of the lack of stability and continuity in the claimants' lives on their emotional well being and social development. She noted that the children had no clothes with them save those they were wearing and no toys or other personal belongings. She had been told that the family's possessions were being stored in London.

13. Ms Conroy-Brown concluded that:

> " … due to financial circumstances, the parents are not meeting the children's basic needs … The family have no home … The children have no stability … They are continually moving, do not appear to have any toys and would find it difficult to sustain friends due to the constant moves."

Under the heading "**Action taken"**, she ticked the box entitled "Provision of Services (s17)". I infer that the tick was intended to indicate that accommodation and support had been provided for one night. This is supported by the entry under "Reasons for these Action *(sic)* Taken" which stated, *inter alia*:

> "… [the second defendant] financially supported one night B & B for the family and have been advised they have moved on."

14. An "initial plan" set out in the assessment report identified the steps to be taken by the second defendant during the period 22-29 December 2011. Those steps included the carrying out by the second defendant of checks with the family's GP and the first claimant's school, and the monitoring of the case by the second defendant to ascertain whether the claimants' parents were able to provide for them.

The letter before claim

15. By the morning of 23 December 2011, the claimants' parents had exhausted the funds provided to them by the church on 20 December 2011. At that time, the family was in Newham. The claimants' solicitors sent a letter before claim addressed to the first and second defendants stating that (i) the claimants and their parents were street homeless; (ii) the claimants and their parents were physically present in the first defendant's area; and (iii) the first claimant attended school in the second defendants' area. The letter required the defendants to give consideration to their duties under s17 of the 1989 Act and to carry out appropriate assessments. It further required one of the defendants to provide accommodation and financial support for the claimants and their parents pending the outcome of the assessments. The letter sought details of previous contact between each defendant and the claimants' family.

16. The letter before claim was received by the second defendant just before 12 noon on 23 December 2011, the Friday before Christmas. At 12.32pm, the second defendant responded by email in the following terms:

> ".. this family is not homeless in [the second defendant's] local Authority area and **is** homeless in [the first defendant's] area …
>
> As such the children are children in Need in the area of [the first defendant]
>
> …
>
> [The first defendant] has a duty to provide these children with accommodation in accordance with case law and the Children's Act section 17 forthwith."

17. For reasons that have never been explained, the second defendant did not inform the claimants' solicitors or the first defendant that it had very recently beforehand carried out an interim assessment of the claimants' needs. Nor did it inform them of the outcome of that assessment or the fact that it had an interim plan in place. The second defendant sent a copy of the assessment to the claimants' solicitors under cover of a letter dated 24 May 2012. The claimants' solicitors sent those documents to the first defendant on 26 June 2012.

18. On 29 December 2011, having learned of the interim order which had been made against the first defendant by Lindblom J on 23 December 2011, the second defendant closed the claimants' case.

The involvement of the first defendant

The events of 23 December 2011

19. Before 23 December 2011, the claimants' family had made no request for assistance to the first defendant. The first intimation of such a request was when the first defendant's legal department received the letter before claim by fax timed at 12.04 p.m. on 23 December 2011. There were few members of staff in the office and the fax was not picked up until about two hours later. An email exchange then took place

between the claimants' solicitor, Ms Rosie Fung, and the first defendant's lawyer, Ms Sameera Khan, during which Ms Fung told Ms Khan that, so far as she was aware, the second defendant had not undertaken any assessment of the claimants' needs. That was in fact not the case as (presumably unknown to Ms Fung), the second defendant had by that time completed its initial assessment.

20. At 3.22pm, Ms Khan sent an email response to the letter before claim, stating:

> " … I am clear that the family are ordinarily resident in [the second defendant's area] and are not the responsibility of [the first defendant]."

The email went on to note that it appeared that the claimants' family had been living in bed and breakfast accommodation for one or two days in Newham and Redbridge and that they had no other connection with the first defendant's area. Ms Khan contended that temporary residence between local authorities was not evidence of "ordinary residence" in the area of one of those authorities. She said that the first defendant would not provide accommodation for the family.

21. On the evening of 23 December 2011, an out of hours application for interim relief was made to Lindblom J, who ordered that the first defendant should provide the claimants with accommodation and support forthwith and until further order of the court. The claimants and their parents have continued to receive accommodation and support provided by the first defendant ever since.

The assessments of January and July 2012

22. The first defendant's social worker, Mr Mohamed Yongawo, met the claimants and their parents on 3 January 2012 and completed an assessment of each claimant's needs on 12 January 2012. On 12 July 2012, he completed a further assessment of whether there would be any breach of their rights under articles 3 and/or 8 of the European Convention on Human Rights ("ECHR" or "Convention") if support for the family was refused (an "ECHR assessment"). His conclusions were that the claimants were not children in need for the purpose of section 17 and that their article 3 and 8 rights would not be breached if support for the family was refused.

The updated assessments of 17 September 2012 and 12 October 2012

23. The earlier assessments were superseded by an updated assessment on each claimant for the purposes of section 17 completed on 17 September 2012 ("the September 2012 assessments") and an updated ECHR assessment on each child completed on 12 October 2012 ("the October 2012 ECHR assessments"). The assessments were undertaken by Mr Yongawo on the basis of a number of meetings and telephone conversations with the claimants' family, together with enquiries made of the first claimant's school and the family's GP practice.

24. At the time of Mr Yongawo's enquiries, the family was of course housed in accommodation provided by the first defendant with financial support (albeit modest) also provided by the first defendant. Mr Yongawo noted that the children appeared to be in good health, well fed, appropriately dressed, clean and well behaved. The first

claimant was progressing well at a new school and the second claimant was about to start at nursery. Mr Yongawo observed that he had no concerns about the ability of the claimants' parents to provide safe, appropriate and emotional care for the claimants.

25. In the September 2012 assessment reports, Mr Yongawo stated that, at his initial meeting with the claimant's parents in early January 2012, they had asked for accommodation for six weeks so as to enable them to attempt to make alternative arrangements. (The claimant's father's account of this conversation was rather different. He said that the suggestion that he and his wife should find accommodation came from Mr Yongawo.) At any rate, by August 2012, they did not appear to have made any progress in finding accommodation or any means of support. Mr Yongawo was given no information about any attempts that the couple had made to secure accommodation or support. He attempted to discover from the claimants' parents whether they had family or friends in the UK who might be able to offer them accommodation and/or financial support until the UKBA had made a final decision on their applications to stay in the UK. The claimants' parents refused to provide this information. Despite repeated requests to do so, they also declined to provide the names and contact details of any family members, whether in the UK or Nigeria, or of any of the large network of friends they claimed to have. When specifically asked for contact details for the first claimant's godmother, they refused to give them. They would not give Mr Yongawo details of the addresses at which they had previously lived. They told Mr Yongawo that they continued to receive a "little" financial support from their church in addition to that provided by the first defendant but gave no further details.

26. In his September 2012 assessment reports, Mr Yongawo concluded that the claimants were not children in need. The reasons for his conclusion are set out in the following passages:

> "There are no concerns regarding [the claimants' parents'] ability to provide safe, appropriate and emotional care for [the claimants]. It is therefore the department's position that [the claimants] are not children in need within the meaning of section 17(10)(c) because they can rely on their parents' support network in the UK rather than Newham while their immigration status is resolved…
>
> [The claimants' parent] have been offered temporary accommodation to facilitate their efforts to make appropriate enquiries of friends and social connections but it appears that this opportunity has not been effectively utilised."

That decision is challenged and I shall return to it later in this judgment.

27. Much of the information contained in the October 2012 ECHR assessments replicated that in the September 2012 assessments. However, there was some additional evidence about the family's financial situation. The claimants' parents told Mr Yongawo that they had been supported until recently by their extended family members (in particular, the claimants' maternal uncle) and friends, but did not see the

need to seek further support from family and friends. The claimants' mother refused even to discuss her extended family in Nigeria. She stated that her difficulties were the responsibility of her husband, not her own family. The claimants' parents would not consider returning to Nigeria. They said that they would be unable to obtain work there and the facilities for health and education were of a lower standard than in the UK.

28. In the October 2012 ECHR assessments, Mr Yongawo did not identify any respect in which withdrawal of support or return to Nigeria would breach the claimants' family's rights under articles 3 or 8. His conclusions were identical to those in the September 2012 assessments. He referred the case to his team manager for a decision as to why the claimants should or should not receive continued support. There is no record of any such decision being made.

The first defendant's decision

29. On 15 October 2012, the first defendant informed the claimants' solicitors of the outcome of the September 2012 assessments and the October 2012 ECHR assessments.

THE LAW

The 1989 Act

30. The relevant powers and duties of the defendants in relation to the provision of support for children are set out in sections 17 and 20 of the 1989 Act. Section 17 (1) provides that it is the general duty of every 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,
>
> by providing a range and level of services appropriate to those children's needs."

31. Section 17(3) states that any service provided by a local authority in the exercise of functions conferred on them by section 17 "may be provided for the family of a particular child in need or for any member of his family, if it is provided with a view to safeguarding or promoting the child's welfare." By section 17(6), the services provided may include providing accommodation and giving assistance in kind or in cash. The relevant provisions of the 1989 Act are concerned with the provision by social services authorities of services for the purpose of safeguarding and promoting the welfare of children. They are not concerned with the allocation of long term housing, which is a matter for the relevant housing authority. The accommodation referred to in section 17(6) is temporary accommodation only.

32. In section 17(10), a child is defined as being "in need" if:

> "…

a) he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by a local authority under this Part;

b) his health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services; or

c) he is disabled, … ".

33. Paragraph 1 of Schedule 2 to the 1989 Act requires every local authority to take reasonable steps to identify the extent to which there are children in need within its area. Paragraph 3 of Schedule 2 provides that, where it appears to a local authority that a child within its area is in need, the authority may assess his/her needs for the purposes of the 1989 Act at the same time as any assessment of the child's needs is made under any other Act.

34. In the case of *R v London Borough of Barnet ex parte G* [2003] WLR 1194, the House of Lords held that there is a duty on a local authority (in its capacity as local social services authority) to take reasonable steps to assess, for the purposes of the 1989 Act, the needs of any child in its area who appears to be in need. However, the Court said that section 17 did not impose a mandatory duty on a local authority to provide accommodation or any other service to meet the assessed needs of any individual child.

35. Until 15 April 2013, the procedures for carrying out an assessment under the 1989 Act were set out in the "Framework for the Assessment of Children in Need and their Families", which was guidance issued under the provisions of section 7 of the Local Authority Social Services Act 1970 and was to be followed unless there was good reason not to do so. That guidance has now been replaced by the guidance contained in a document entitled "Working Together to Safeguard Children".

The Nationality, Immigration and Asylum Act 2002

36. The Nationality, Immigration and Asylum Act (the 2002 Act), and its interplay with section 17 of the 1989 Act, are also relevant. Schedule 3 to the 2002 Act provides for the withholding and withdrawal of support and assistance for various classes of person. In summary, paragraphs 1 and 3 of Schedule 3 provide that an adult who is unlawfully present in the UK and who is not an asylum seeker is ineligible for support under section 17 of the 1989 Act unless, and to the extent that, its provision is necessary in order to avoid a breach of his/her Convention rights. The burden of proof is on the person applying for support to show that such support is necessary in order to avoid a breach of Convention rights.

THE CLAIM FOR JUDICIAL REVIEW

37. In their Amended Grounds for Judicial Review, the claimants challenged five decisions, namely:

(a) The decision of the first defendant (based on its September 2012 assessments) that the claimants were not children in need within the meaning of section 17 of the 1989 Act;

(b) The conclusion of the first defendant's October 2012 ECHR assessments;

(c) The decision of the second defendant not to assess the claimants' needs in accordance with section 17 of the 1989 Act and the Framework for the Assessment of Children in Need and their Families;

(d) The decision of the second defendant not to carry out an ECHR Assessment in respect of the claimants;

(e) The decisions of both defendants not to provide accommodation and support, including financial support, to the first and second claimants (and by virtue of the young age of the first and second claimants, to their parents), in accordance with section 17 of the 1989 Act.

Ground (a) The first defendant's decision based on its September 2012 assessment

38. For the claimants, Mr Alexander Campbell submitted that the first defendant's September 2012 assessments were flawed to the point of being irrational and unlawful.

39. Mr Campbell contrasted the descriptions of the claimants contained in the second defendant's assessment of 22 December 2011 with the first defendant's September 2012 assessments. In the former, the claimants were described as dirty, ill-clothed and hungry. Their parents were found to be unable to meet the claimants' basic needs, in particular their need for a stable home. In the first defendant's September 2012 assessments, however, the children were said to have been appropriately dressed, clean and well-nourished whenever they were seen and Mr Yongawo, who conducted the assessments, was satisfied that they were being appropriately cared for by their parents. He found that the children were not in need.

40. Mr Campbell suggested that the sole reason for the change in the children's circumstances between December 2011 and September 2012 was the accommodation and support with which they had been provided by the first defendant pursuant to the order of Lindblom J. He argued that, but for that accommodation and support, the claimants' parents would not be able to provide properly for the claimants, who would then return to the position in which they were in December 2011, i.e. homeless and in need. Mr Campbell submitted that Mr Yongawo had failed in the September 2012 assessments to take account of the position the claimants would be in if the current accommodation and support were to be withdrawn. He argued that, if Mr Yongawo had done that, he must inevitably have concluded that, without the accommodation and support provided by the first defendants, the claimants would be "in need". As it was, Mr Campbell argued, the second defendant's assessment of December 2011 could not be reconciled with the first defendant's September 2012 assessments.

41. For the first defendant, Mr Harrop-Griffiths submitted that, given the information in Mr Yongawo's possession, there was nothing irrational about his conclusion, following the September 2012 assessments, that the claimants were not in need. Plainly they were not in need at that time. Whether or not they would be in need if the first defendant's support was withdrawn would depend on whether their parents were able to obtain from family members and friends the accommodation and financial support they needed, pending a decision by the UKBA in their case. The claimants' parents were known to have family and friends in the UK who had supported them in the past and who might, if asked, be prepared to do so again. They had not provided any information about any attempts they had made to obtain support from such people, nor had they provided any information which would have enabled Mr Yongawo to make his own enquiries to ascertain the position.

42. Mr Harrop-Griffiths relied on the decision of Leggatt J in *MN and KN v London Borough of Hackney* [2013] EWHC 1205 (Admin). In that case, the claimant's parents were Jamaican nationals who had entered the UK illegally and had lived in the UK for several years without seeking any assistance from social services. It appeared that they had lived with various relations or friends who had provided them with financial support. The claimants' father had earned some money selling pirated DVDs in a street market. In March 2011, the claimants' mother approached the defendant ("Hackney") saying that the family was about to become street homeless. At that time they were staying with a friend but Hackney was told that they had been asked to leave in a few days' time and would then be homeless and destitute if Hackney did not provide them with accommodation and financial assistance. Hackney carried out an assessment of need together with an ECHR assessment. It concluded that the claimants were not children in need for the purposes of section 17 of the 1989 Act and that there would be no breach of articles 3 or 8 if support was refused. The claimants commenced proceedings seeking judicial review of Hackney's decision to refuse accommodation and support and were granted interim relief pending the determination of the proceedings.

43. At the hearing of the claim for judicial review, Leggatt J found that the social worker who had carried out the assessment had not been prepared to accept that it was no longer possible for the family to live without support from public funds. He had requested details of the family members and friends who had provided accommodation and support to the family during the years they had lived in the UK without support from public funds. The claimants' parents had not been prepared to reveal the information. In those circumstances, the social worker had not been satisfied that the family would be homeless or destitute in a short time as they claimed.

44. In *MN and KN*, Leggatt J noted that the reference in section 17 of the 1989 Act to children "in need" does not mean children who are objectively in need as decided by a court, but rather children whom the local authority has assessed as being in need by means of an evaluative judgment. It was, he said, for the relevant local authority to assess after a factual investigation whether a child in its area was "in need" and, if so, what range and level of services would be appropriate to his/her needs. That assessment would of course be subject to the control of the courts on the ordinary principles of judicial review. In support of his analysis, Leggatt J cited the Supreme

Court case of *R(A) v Croydon London Borough Council* [2009] 1WLR 2557, in particular the judgment of Lady Hale at paragraph 26.

45. Leggatt J concluded that, since the assessments of the needs of *MN* and *KN* did not conclude that *MN and KN* were "in need", Hackney did not have power under section 17 to provide any accommodation or any other assistance to the claimants or their parents. He concluded that the claimants would only be able to challenge Hackney's decision to refuse to provide them with accommodation or other support if they were able to establish that Hackney had failed to carry out a proper investigation or that, even though a proper investigation was carried out, it had been irrational for Hackney not to decide that its powers under section 17 were engaged. He found that there had been no failure properly to investigate and no irrationality in the decision that had been made.

46. Mr Harrop-Griffiths submitted that the circumstances of the present case were in many respects similar to those in *MN and KN*. The claimants' parents had refused to provide information which was vital to establish "need". Mr Yongawo was aware that the claimants had family members in the UK and they claimed to have a large network of friends. Those people had supported them in the past. Mr Harrop-Griffiths submitted that Mr Yongawo's decision that the claimants were not in need could not be characterised as so wrong as to render it irrational; still less could it be characterised as "unreasonableness verging on absurdity", as the test was expressed by Lord Brightman in *Puhlofer v Hillingdon London Borough* [1986] AC 485.

47. Mr Campbell argued that the facts of *MN and KN* were very different from those of the present case. In *MN and KN*, the claimants had provided no details at all about their former life in the UK. In the present case, the claimant's father had made two witness statements in the course of these proceedings in January and February 2012, explaining why the family circumstances had changed. Mr Campbell submitted that, despite the claimant's parents' refusal to provide the information requested by Mr Yongawo, it was irrational and perverse of him to reach the conclusion he did.

Discussion and conclusions on Ground (a)

48. The position of the claimants' family is unfortunately not unusual. There are many families in the UK in which the adults are illegal entrants or overstayers with outstanding immigration applications and are not entitled to work and have no recourse to public funds. Such families are effectively in limbo and fall to be supported financially either by family and friends inside or outside the UK or, failing that, by local authorities whilst the UKBA processes their applications.

49. There is no doubt that, on 19 December 2011, the claimants' basic needs were not being met. It was for that reason that the family was provided with accommodation and support on the night of 19 December 2011. However, what was not clear at that time was whether the claimants were in need because their parents were unable to provide for them or because they had chosen not to make use of the support which would otherwise have been forthcoming from family and friends. The information given to Ms Conroy-Brown by the claimants' mother on 20 December 2011 (see paragraph 10 of this judgment) suggested the latter. She reported that her brother was travelling south to help her and spoke about paying for that night's accommodation

herself. It was against that background that Ms Conroy-Brown told the family that the second defendant would not be offering them accommodation that night. By the time the initial assessment was concluded on 22 December 2011, Ms Conroy-Brown had not seen the claimants for three days and had not spoken to either of their parents for two days. The family had moved on. She did not know, whether, as the claimants' mother had suggested might be the case, her family had provided them with funds. The initial plan she formulated included monitoring of the case to ascertain whether the claimants' parents could provide for them.

50. At the time of Mr Yongawo's assessments in September 2012, the children were not immediately in need, as they had been on 19 December 2011. However, the question which underlay Ms Conroy-Brown's assessment remained the same, namely: were their parents able to obtain accommodation and/or financial assistance from members of their family and friends so as to provide for their own needs and those of the claimants? It may be that, as the claimant's father states in his witness statements, those family and friends were unable and/or unwilling to assist. However, since the claimant's parents refused to provide any details which would have enabled Mr Yongawo to contact them, it was impossible for him to ascertain whether that was in fact the case. He cannot be criticised for failing to carry out a fuller investigation when the claimants' parents wholly failed to co-operate with his attempts to do so. The problems faced by Mr Yongawo were very similar to those encountered by the social worker in *MN and KN*. Both he and Mr Yongawo were in effect prevented from carrying out a full investigation of the family's financial position because of the parents' refusal to provide the necessary information and, as a consequence, were not satisfied that the claimants would be in need if accommodation and financial support was not provided.

51. For the claimants it is said that Mr Yongawo should have taken the claimants' parents' assertion that no funds were available to them at face value. He should also have taken account of the claimants' plight as it had been in December 2011. It is suggested that no loving, caring parent such as the claimants' parents would, have allowed their children to live as they were living in December 2011 unless they had no financial support available to them. It is argued that Mr Yongawo should have recognised that and that it should have been obvious to him that any support the family had received in the past had been sporadic and had, by December 2011, ceased altogether. However, as I have already observed, there was doubt even in December 2011 about whether the claimants' parents' lack of financial support was of their own choosing. Given their failure to co-operate with Mr Yongawo's enquiries, it is not in my view surprising that Mr Yongawo concluded that the claimants were not in need. I do not consider that his conclusion – or his failure to find that the children were in need – could properly be characterised as irrational or "verging on absurdity". I therefore conclude that the first defendant acted lawfully in declining to accept that, as at September 2012, the claimants were in need. The claim for judicial review on this Ground must fail.

Ground (b) The conclusion of the first defendant's October 2012 ECHR assessments

52. The interplay between Schedule 3 to the 2002 Act and section 17 of the 1989 Act (see paragraph 36 of this judgment) was fully explored by the Court of Appeal in *R (on the application of Clue) v Birmingham City Council* [2011] WLR 99. At paragraphs 54

and 55, Dyson LJ (as he then was), giving the judgment of the Court, explained that, if an applicant seeking assistance would in general be ineligible for support under the terms of the Schedule (i.e. because he/she is unlawfully present in the UK and not an asylum-seeker), the local authority must nevertheless decide whether, and if so to what extent, it is necessary to exercise a power or perform a duty for the purpose of avoiding a breach of Convention rights. Where there is a range of different types of assistance available to the local authority which would avoid a breach of Convention rights, the local authority should identify those types of assistance and then choose between them.

53. If the local authority considers that there are available to the applicant other sources of accommodation and support so that the withholding of assistance would not cause him/her to suffer from destitution amounting to a breach of Convention rights (typically article 3), that is the end of the matter. However, if it is satisfied that there are no other sources of support and assistance, it must then decide whether there is any impediment to the applicant returning to his/her country of origin. Where the only potential impediment is practical in nature (e.g. the applicant cannot afford to pay for his/her passage to the relevant country), it is open to the local authority to avoid a breach of Convention rights by, for example, funding the applicant's return.

54. However, Dyson LJ made clear (at paragraph 66) that, when faced with an application for assistance pending the determination of an arguable (i.e. not manifestly unfounded) application for leave to remain in the UK on Convention grounds, a local authority should not refuse assistance if the effect of that refusal would be to require the applicant to leave the UK and thus to forfeit the opportunity of succeeding in his/her application for leave to remain.

55. For the claimants, Mr Campbell submitted that the first defendant's October 2012 ECHR assessments of the claimants' family were irrational and unlawful in that they failed to reach any proper conclusion as to whether the Convention rights of the claimants and/or their parents would be infringed if they were required to return to Nigeria.

56. Mr Campbell referred to the purpose of the October 2012 ECHR assessments as set out at section 2b of the assessment form:

> "The department *[i.e. the Home Office]* would want to establish whether there are any reasons for your refusal to return to your country of origin. The local authority would also want to be certain that if you elect to return to Nigeria you will not be subjected to any inhuman treatment and that your family life will not be impinged upon."

He submitted that the October 2012 ECHR assessments did not in fact address those issues. In particular, the only reference to a possible breach of article 3 of the Convention if the family were to be returned to Nigeria was the observation that the family originated from a "safe country". Section 3 of the assessment form, which invites the social worker completing the form to consider whether there would be a breach of article 3 or article 8 was not completed. Mr Campbell argued that the October 2012 ECHR assessments also failed to take account of the legal

consequences of the UKBA's agreement to reconsider the claimants' parents' applications for leave to remain in the UK as set out in *Clue*. There is complaint also that the assessment did not reach any proper conclusion as to whether refusal of support would render the claimants' family destitute so as to infringe their Convention rights.

57. Mr Harrop-Griffiths submitted that the complaints made by the claimants about the October 2012 ECHR assessments were misconceived. He argued that the assessments were carried out rationally and properly. In October 2012, the first defendant and Mr Yongawo had not been aware that the UKBA had agreed to reconsider the claimants' parents' application for leave to remain. Once the first defendant became aware of that, it accepted that the claimants' family had an extant immigration application which was currently being considered and that their application was not manifestly unfounded. Thus, there was no question of a possible return to Nigeria. The only issue was whether there were available to the family other sources of accommodation and support so that the withholding of assistance would not cause them to suffer from destitution amounting to a breach of their Convention rights. In accordance with the outcome of the September 2012 assessments, Mr Yongawo had concluded that other sources of accommodation and support were open to them so that, by implication, the withholding of assistance would not cause them destitution or a breach of their Convention rights.

Discussion and conclusions on Ground (b)

58. I accept that, if the circumstances had been otherwise, the claimants might have been able to argue successfully that Mr Yongawo had failed properly to address the issue of whether the family's Convention rights would be infringed by their return to Nigeria. However, once it was known that the UKBA had agreed to reconsider their application for leave to remain in the UK, there could have been no question of the first defendant seeking to effect their return to Nigeria. Therefore, the question of whether the return of the claimant's family to Nigeria would constitute an infringement of their Convention rights became entirely academic.

59. Furthermore, whilst the assessments did not specifically state the fact, it is plain that Mr Yongawo concluded that the family had alternative means of support available to them and would not therefore be rendered destitute if assistance was refused. He reached that conclusion for the same reasons that he had concluded in the September 2012 assessments that the claimants were not "in need". Having reached the conclusion that they would not be rendered destitute if assistance was refused, it was plainly unnecessary for him to go on to consider the effects of destitution on their Convention rights.

60. Thus, for the same reasons that I gave in respect of Ground (a), I reject the claimants' claim for judicial review on Ground (b).

Ground (c) The decision of the second defendant not to assess the claimants' needs in accordance with section 17 of the 1989 Act and the Framework for the Assessment of Children in Need and their Families

61. There is nothing in this Ground for the simple reason that, on 19 December 2011, the second defendant recognised that the claimants might be in need and put in train an initial assessment. Having formed the preliminary view that the children were in need, Ms Conroy-Brown arranged for them to be provided with accommodation and support. She continued her enquiries but the family left the second defendant's area before the initial assessment was completed. The assessment was conducted at speed and in somewhat adverse circumstances; in particular, because the school term had ended, there were difficulties contacting the first claimant's school and (latterly) the claimants' family. However, there was nothing irrational or unlawful in its conclusions or the 'initial plan' that was formulated. Since the claimants did not return to the second defendant's area, the initial plan was never put into operation and the case was closed a week later.

62. The claimants' claim therefore fails on Ground (c).

Ground (d) The decision of the second defendant not to carry out an ECHR Assessment in respect of the claimants;

63. The claimants and their family were in the area of the second defendant for no more than about 24 hours from 19 to 20 December 2011. Thereafter they returned to London and have remained there ever since. It is difficult to see how the second defendant could have carried out an ECHR assessment and what purpose it would have served at that stage, when the claimants and their parents were being accommodated and supported by the first defendant who was carrying out its own section 17 and ECHR assessments.

64. The claimants' case on Ground (d) must fail.

Ground (e) The decisions of both defendants not to provide accommodation and support, including financial support, to the first and second claimants (and by virtue of the young age of the first and second claimants, to their parents), in accordance with section 17 of the 1989 Act

The first defendant

65. In relation to the first defendant, this Ground must presumably relate to events of 23 December 2011, the allegation being that the first defendant failed, immediately after receipt of the letter of claim, to assess the claimants pursuant to its duties under section 17 and thereafter failed to exercise its powers to provide accommodation and support for the family.

66. Mr Campbell submitted that the assertion made by Ms Khan in her email response to the claimants' solicitors to the effect that the family was "ordinarily resident" in the second defendant's area and that, in those circumstances, the first defendant had no

responsibility for the claimants was wrong in law and had resulted in the first defendant misdirecting itself when reaching its decision not to provide accommodation and support for the claimants. He relied on the decision of Mr Jack Beatson QC (as he then was), sitting as a Deputy High Court Judge, in *R (on the application of Sandra Stewart) v The London Borough of Wandsworth, The London Borough of Hammersmith and Fulham and The London Borough of Lambeth* [2001] EWHC Admin 709. In that case, the claimant and her two children were homeless. She sought an assessment by the London Borough of Hammersmith ("Hammersmith") who had been accommodating the claimant and her family temporarily in a hostel after they had been evicted from their home in its area pursuant to its temporary duty to provide accommodation for a reasonable period in order to give a reasonable opportunity to secure accommodation. Hammersmith declined any responsibility to carry out a section 17 assessment and referred the claimant to the London Borough of Wandsworth ("Wandsworth") since it mistakenly believed that the hostel where the family was living was in Wandsworth's area. In fact, the hostel was in the area of the London Borough of Lambeth ("Lambeth") although the children went to school in Wandsworth's area. Wandsworth refused to carry out an assessment and referred the family back to Hammersmith on the ground that it had placed the family in the hostel. Lambeth also refused to carry out an assessment.

67. The judge in *Stewart* referred to the "unfortunate" manner in which the claimant and her children had been treated as a result of the disputes between the three local authorities. He held that the term, "within their area", means simply that a child is physically present in a local authority's area. There is no requirement for the child to be "ordinarily resident" in the area. He found that it was possible for a child to be physically present in the area of more than one local authority at the same time: for example, where the child spends part of the week with a parent in one local authority area and the rest of the week with the other parent in the area of a second local authority. In those circumstances, more than one local authority might have a duty to assess under section 17 of the 1989 Act. The judge observed that, in those circumstances, there was clearly no reason for more than one assessment to be carried out and there was a "manifest case" for co-operation between authorities pursuant to section 27 of the 1989 Act and for a sharing of the burden by the relevant local authorities. He found that both Wandsworth (because the children attended school in its area) and Lambeth (in whose area the children were living) had come under a duty under section 17 to assess the claimants' children's needs. He emphasised that the duty imposed by section 17 was only a duty to assess. He observed that, once an assessment had been carried out and the issue was which authority should provide the service(s) needed by the child, it might be relevant to consider in which area the need (as well as physical presence) arises.

68. In this case, the first defendant had limited time in which to act after it became aware of the letter of claim and the claimants' circumstances. The family had not approached the first defendant directly prior to that time and the first defendant had only the information contained in their solicitors' letter to go on. However, the first defendant accepted before me that "ordinary residence" is not the test for determining whether a local authority is under a duty to assess a child under the 1989 Act and that the first defendant should not have refused to assess the claimants on the ground that

they were not "ordinarily resident" in its area. It follows therefore that the first defendant's refusal to take any action on the basis that the claimants were not "ordinarily resident" in its area was *Wednesbury* unreasonable.

69. It is probable that, if the first defendant had applied the correct test, it would have decided that an assessment was required under section 17. It is probable also that it would have concluded after that assessment that, in the short term at least, the claimants were in need and required accommodation and support. However, section 17 gives rise to no positive duty to provide accommodation and support.

70. It would have been desirable for the first defendant to have sought the co-operation of the second defendant, pursuant to section 27 of the 1989 Act and for the two authorities, between them, to have reached agreement as to who should make the necessary provision. However, there was no duty on the first defendant to do that and, in any event, given the short notice (and since the second defendant's legal department did not seem to have been aware of the family's dealings with its social services department), it is unlikely that any approach would have borne fruit. It appears unlikely also that an informal approach from the first defendant would have had a greater effect on the second defendant than the letter of claim sent by the claimants' solicitors.

71. In the event, of course, the first defendant was constrained by the order of Lindblom J to provide accommodation and support for the claimants and their parents on the night of 23 December 2011 and thereafter. Subsequently, it carried out assessments on the claimants as previously described. Consequently, even if there had been any unlawful failure to comply with a duty to provide accommodation and support, it would be entirely academic.

72. For those reasons, the claim for judicial review of the actions of the first defendant under this Ground must fail.

The second defendant

73. The second defendant provided accommodation and support for the family on the night of 19 December 2011, the day that assistance was first requested. It is not entirely clear whether the claimants' complaints under Ground (e) include a challenge to their decision not to accommodate the family on the night of 20 December 2011.

74. In the event that they do, it is in my view necessary to consider the circumstances in which accommodation and support was not provided on 20 December 2011. Ms Conroy-Brown had been told that the family was expecting to obtain financial help from relatives; the claimants' mother had explained that she had been trying to manage without their assistance for the previous month. She had spoken of paying for accommodation herself. It was against that background that Ms Conroy-Brown informed her that the second defendant would not be providing accommodation for the family that night. I can see no reason to doubt that, if the claimants' mother had not told her on 20 December 2011 of the financial support she was hoping to get from members of her family that day, Ms Conroy-Brown would have arranged for accommodation for the family for that night also. A later request from the claimants' solicitors was not pursued since the family had moved to London. Nothing more was

heard of them before the letter of claim was received on 23 December 2011. In those circumstances, I do not consider that the decision taken not to provide accommodate for the claimants on 20 December 2011 can properly be characterised as irrational or unlawful.

75. As to the events of 23 December 2011, it is very unfortunate that, having received the claimants' letter of claim, the second defendant did not immediately inform the claimants' solicitors and the first defendant of the assessment it had carried out and the outcome of that assessment. Instead the second defendant sent an email response to the letter of claim, asserting that the family was homeless, not in the second defendant's area, but in the first defendant's area and that the first defendant was therefore responsible for the provision of accommodation. Mr Campbell contended that the second defendant had misdirected itself as to the meaning of "within their area" and had failed to appreciate that, by virtue of the first claimant's attendance at school in Harlow, he at least might be "within their area" for the purpose of section 17.

76. There is no evidence about the steps, if any, taken by the second defendant's legal department to find out what the second defendant's social services department knew about the claimants' family. If enquiries had been made, they should have revealed that the second defendant had recently carried out an assessment on the claimants. The combination of that assessment and the fact that the claimants' family appeared to be street homeless in Newham would probably have led the second defendant to the conclusion on 23 December 2011 that, in the short term at least, the claimants were in need. However, its assessment had been carried out because the claimants and their parents had been sent to the second defendant's area in a taxi on 19 December 2013. By 23 December 2011, the family was no longer in the second defendant's area and, since it had not been possible to make any checks at the first claimant's school, the second defendant would not have been able to ascertain whether the first claimant was still attending school in Harlow as the letter of claim alleged. There was no suggestion that the second claimant had any physical presence in the second defendant's area. Section 17 gives rise to no positive duty to provide accommodation and support and, even if it did, it was plainly arguable that, since both claimants were in the first defendant's area at the time, the first defendant should accommodate them. These factors, coupled with the short notice, lead me to conclude that the second defendant's response to the letter of claim cannot be characterised as irrational or unlawful.

77. It would have been desirable for the second defendant to have sought the co-operation of the first defendant, pursuant to section 27 of the 1989 Act and for the two authorities, between them, to have reached agreement as to who should make the necessary provision. However, there was no duty on the second defendant to do that and, in any event, given the short notice, it is unlikely that any approach would have been successful. It seems unlikely that an informal approach from the second defendant would have had a greater effect on the first defendant than the letter of claim sent by the claimants' solicitors.

78. For those reasons, the claim for judicial review of the actions of the second defendant under this Ground must fail.