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Case No: CO/2941/2012

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/05/2013

Before :

MR JUSTICE LEGGATT

- -

Between :

MN and KN	**Claimant**
- and -	
London Borough of Hackney	**Defendant**

- -
- -

Benjamin Tankel (instructed by **National Youth Advocacy Service**) for the **Claimant**
Thomas Amraoui (instructed by **Browne Jacobson**) for the **Defendant**

Hearing date: 11 April 2013

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Approved Judgment

Mr Justice Leggatt:

Introduction

1. This is a claim for judicial review of a decision of the defendant local authority ("Hackney") dated 16 March 2012 to refuse to provide accommodation and support to the claimants, together with their parents, under section 17 of the Children Act 1989. The claimants claim that in taking this decision Hackney acted unlawfully, and they seek a declaration to that effect.

2. Permission to proceed with the claim was initially refused on paper but was granted on 4 October 2012 following an oral hearing.

The Facts

3. The claimants are two children, a brother and sister. At the time of the decision they were aged, respectively, 3 and 13. To protect their anonymity the court has ordered that they be referred to as MN and KN.

4. The claimants and their parents are Jamaican nationals who are present illegally in the United Kingdom. KN was born in Jamaica in November 1998. Her father, Mr Nelson, entered the UK on 10 June 2000 on a visitor's visa valid for four weeks. However, he has never left. KN (then aged 2) and her mother, Ms Stewart, joined him in the UK in July 2001, also entering on visitor's visas. The evidence does not disclose the date when the visas expired, but they too have stayed here ever since. MN was born in the UK in September 2008. He suffers from an atypical form of autism which was diagnosed in May 2011.

5. The family made no attempt to establish a right to live in the UK until March 2010, when they applied for leave to remain. That application was refused by the Secretary of State for the Home Department in a letter dated 10 November 2010. In March 2011 solicitors representing the family made a request for this decision to be reconsidered or, failing that, for a decision to be taken to give directions to remove the family from the UK. The reason for the latter request was that an appeal lies to a tribunal against a decision to give removal directions whereas there is no right of appeal against a decision to refuse leave to remain. To date, however, no decision has been taken to set removal directions but nor has the Secretary of State reconsidered the decision to refuse leave to remain.

6. From the time when they first arrived in this country until March 2011, the family lived here without seeking any assistance from social services. It appears that they lived with various relatives or friends who also provided them with financial support, sometimes in return for child care and other domestic help. For some of the period Mr Nelson also earned some money by selling pirated DVDs in a street market.

7. Ms Stewart first approached Hackney in March 2011 stating that she was about to become homeless. Hackney's response was that, because of her immigration status, she was not entitled to housing assistance. She next contacted Hackney in January 2012 stating that she was once again facing homelessness. Assistance was again refused, but on 30 January 2012 Hackney commissioned an assessment of whether the

claimants were children in need as defined in section 17 of the Children Act 1989 (the "Children Act assessment").

8. On 5 March 2012 solicitors instructed by Ms Stewart wrote to Hackney saying that the family would be street homeless from 16 March. This was followed by a letter before action dated 14 March 2012 which stated that, although the family were currently staying temporarily with a friend, they had been asked to leave before 17 March 2012 and would then be homeless and destitute unless Hackney provided them with accommodation and financial assistance.

9. Hackney had by that time nearly completed the Children Act assessment together with a further assessment of whether there would be a breach of article 3 or article 8 of the European Convention on Human Rights if support for the family was refused (the "ECHR assessment"). For the purpose of these assessments a social worker, Mr Donald Brown, met members of the family on four occasions and made other enquiries. The Children Act assessment was completed and sent to Ms Stewart's solicitors on 15 March 2012. Its conclusion was that the claimants were not children in need for the purpose of section 17. I shall have to return to the reasons for that conclusion which are at the centre of the dispute in this case.

10. The ECHR assessment was sent to Ms Stewart's solicitors on 16 March 2012. Its conclusion was that there would not be a breach of article 3 or article 8 if support was refused.

11. On 19 March 2012 these proceedings were begun seeking judicial review of Hackney's decision to refuse accommodation and support and also seeking urgent interim relief. On the same day Lloyd-Jones J made an order requiring Hackney to provide the claimants and their parents with support and suitable temporary accommodation. Such support and accommodation have since been provided while these proceedings are continuing. It remains Hackney's position, however, that the family are not in fact destitute and in need of such assistance.

The Statutory Framework

12. The relevant duties and powers of Hackney with regard to the provision of support are conferred by sections 17 and 20 of the Children Act 1989. Pursuant to section 17(1), 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."

13. Any service provided by a local authority in the exercise of a function 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": see section 17(3). The services provided "may include

accommodation and giving assistance in kind or, in exceptional circumstances, in cash": see section 17(6).

14. Pursuant to section 17(10), a child is taken to be "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 [of the Act];
>
> (b) his health or development is likely to be significantly impaired, or further impaired, without the provision for him of services; or
>
> (c) he is disabled."

15. Section 17 does not impose a specific duty on a local authority to provide accommodation or any other service to meet the assessed needs of any individual child: see R(G) v Barnet LBC [2004] 2 AC 208.

16. Section 20 of the Act does impose a specific duty on a local authority to:

> "(1) … provide accommodation for any child in need within their area who appears to them to require accommodation as a result of –
>
> …
>
> (c) the person who has been caring for him been prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care."

Unlike section 17, however, section 20 does not give the local authority power to provide accommodation for any other member of the child's family.

17. Also relevant to the issues in this action is Schedule 3 to the Nationality, Immigration and Asylum Act 2002. This provides for the withholding and withdrawal of support from certain categories of person. The provisions of Schedule 3 relevant for present purposes are the following:

> Paragraph 1(1): "A person to whom this paragraph applies shall not be eligible for support or assistance under … (g) section 17 ... of the Children Act 1989 ... (k) section 2 of the Local Government Act 2000 ..."
>
> Paragraph 1(2): "A power or duty under a provision referred to in sub-paragraph (1) may not be exercised or performed in respect of a person to whom this paragraph applies …"
>
> Paragraph 2(1): "Paragraph 1 does not prevent the provision of support or assistance … (b) to a child …"

> Paragraph 3: "Paragraph 1 does not prevent the exercise of a power or the performance of a duty if, and to the extent that, its purpose or performance is necessary for the purpose of avoiding a breach of (a) a person's Convention rights ..."
>
> Paragraph 7: "Paragraph 1 applies to a person if (a) he is in the United Kingdom in breach of the immigration laws within the meaning of section 50A of the British Nationality Act 1981 and he is not an asylum seeker ..."

18. The inter-relationship between these provisions and section 17 of the Children Act 1989 is not straightforward. As a matter of construction, however, and as analysed in R (M) v Islington LBC [2005] 1 WLR 884, the effect of Schedule 3 of the 2002 Act as it applies in the present case appears to me to be as follows:

    (1) The claimants and their parents are all in the United Kingdom in breach of immigration laws (and are not asylum-seekers). Paragraph 1 of Schedule 3 therefore applies so as to make them all *prima facie* ineligible for support or assistance under section 17 (see paragraph 7).

    (2) However, as the claimants are children, paragraph 1 does not prevent the provision of support or assistance to them (see paragraph 2(1)(b)).

    (3) Nevertheless, paragraph 1 does indirectly have this effect so long as the claimants are living with their parents, because it prevents powers under section 17 from being exercised so as to provide support or assistance to the claimants' parents (see paragraph 1(2) and R(M) v Islington LBC at paras 17–19).

    (4) All this is subject to paragraph 3, which allows a power under section 17 to be exercised if and to the extent that its exercise is necessary for the purpose of avoiding a breach of the Convention rights of any member of the claimants' family.

19. The upshot is that, even if the claimants are children "in need" for the purpose of section 17 of the 1989 Act, Hackney may only provide accommodation or other support to them and their parents as a family in the exercise of its powers under section 17 if and to the extent that to do so is necessary for the purpose of avoiding a breach of Convention rights.

20. It was to address the latter question that Hackney carried out the ECHR assessment.

The Decision

21. On the basis of the two assessments, Hackney decided that the claimants and their parents were not eligible to be provided with accommodation or other support under section 17 of the 1989 Act. There is a dispute between the parties, however, about what the ground was on which Hackney reached this decision.

22. Counsel for the claimants, Mr Tankel, submits that it is clear from the two assessments that Hackney reached no conclusion as to whether the claimants were

destitute and therefore "in need" under section 17; instead Hackney decided that in any event its duties could be discharged by supporting the family to return to Jamaica. Mr Tankel argues that this approach was flawed on a number of grounds. These grounds (in the order that I will consider them later in this judgment) are that Hackney erred in law in:

(1) Failing to consider or to give any proper consideration to whether the claimants' needs would be met in Jamaica;

(2) Failing to recognise that it owed a duty to support the family to enable them to stay in the UK until such time as a decision is taken to give directions for their removal and an appeal against that decision on article 8 grounds is determined;

(3) Failing properly to consider the impact of its decision on the claimants' rights to respect for their private life under article 8;

(4) Failing to consider whether the claimants' best interests would be served by returning to Jamaica; and

(5) Failing to discharge its public sector equality duty under section 149 of the Equality Act 2010.

(A further ground that Hackney failed to discharge its duty under section 20 of the Children Act 1989 was not pursued, as Mr Tankel accepted that in the way Hackney approached the matter this duty did not arise.)

23. Counsel for Hackney, Mr Amraoui, takes issue with the basic premise on which the claimants' case is founded – namely, that Hackney did not reach a conclusion on the question of whether the family was destitute. To the contrary, he submits, a careful reading of the two assessments reveals that their author, Mr Brown, concluded that the family was not destitute. Hence it was not strictly necessary for Mr Brown to consider the possibility of supporting the family to return to Jamaica although, adopting a 'belt and braces' approach, he did so. Mr Amraoui has also advanced arguments in answer to each of the claimants' grounds for seeking judicial review. But he puts at the forefront of his submissions the question of what Hackney actually decided.

24. It is common ground that, if Hackney reached a lawful conclusion that the family was not destitute, then all the grounds on which judicial review has been sought fall away. I will therefore consider this threshold issue first.

The evidence for Hackney's decision

25. To ascertain what, if anything, Hackney decided about whether the claimants were destitute, it is necessary to examine the two assessment documents prepared by the social worker, Mr Brown. Of these, the Children Act assessment is in principle the more important as it was specifically directed to the question whether the claimants were children in need as defined in section 17. Both documents, however, need to be read together to understand Mr Brown's factual findings and reasoning. It is common ground that the assessments should not be construed as if they were legal documents

and should be given a fair reading, bearing in mind that they were written by a social worker and not a lawyer.

26. Hackney has also sought to place some reliance on a witness statement made by Mr Brown which gives an account of his decision-making process. However, I consider that little or no weight should be given to that evidence. Not only has the statement been prepared many months after the decision was made for the purpose of this litigation, with all the obvious dangers of *ex post facto* rationalisation which that involves but, more fundamentally, it seems to me that what a public authority decided should in principle be ascertained objectively by considering how the document communicating the decision would reasonably be understood, and not by enquiring into what the author of the document meant to say or what was privately in his mind at the time when he wrote the document.

The Assessments

27. The two assessments are long documents. The Children Act assessment runs to 8 closely typed pages and the ECHR assessment runs to 17 pages. Although I have considered the assessments by reading them as a whole, I will limit quotation from them to the passages on which most emphasis was placed in argument and which seem to me to be the most important.

28. The Children Act assessment contains sections which deal with the reasons for the assessment, family background, environmental factors, child development and a summary of issues affecting the parents' capacity to respond appropriately to the needs of their children. There is then (on page 6) a section headed "Formulations / Analysis" in which the social worker carrying out the assessment is required to set out "their understanding of how the information set out above fits together to inform an understanding of the family's current situation and the implications of this for the child/children's future welfare." Mr Brown completed this section as follows:

> "This family presented as destitute and Ms Stewart initially requested that her children be taken into to care. They faced deportation as they have overstayed their visa. … They have been reliant on the good will of their friends and family and this has been the situation since they came to the UK. They have not provided any information to indicate what has changed and why the support from family and friends can no longer be provided and indeed they have only stated that they will not be able to remain in their current accommodation during the course of this assessment and subsequent to the author of this assessment explaining to the family that if they were not destitute the local authority could not accommodate them.
>
> The accommodation that they are currently sharing is overcrowded but comfortable therefore it is difficult to consider them as destitute although it appears that that accommodation will no longer be available following 16 March 2012. The local authority is not in a position to provide support under the immigration rules unless not to do so would be a breach of the family's human rights. A separate assessment under the ECHR

> has been undertaken and concludes that it would not be a breach of the family's human rights if the local authority were not to provide support, however the local authority would, if necessary, assist the family in returning to Jamaica if the family were to agree this course of action and such assistance could not be obtained elsewhere.
>
> There are no factors identified that suggest that the children are not receiving good enough parenting and no other agencies have raised concerns. The parents state that returning to Jamaica would place the children at a disadvantage that would be detrimental to their welfare. However, the ECHR assessment does not bear this claim out and the family have not provided sufficient evidence to support this statement.
>
> Taking the above factors into account it would appear that there is no responsibility for Hackney Children and Young Peoples services at this stage. The family can either continue to support themselves as they have hitherto, or alternatively if this is not possible, can be assisted to return to Jamaica. …"

29. In the next section, headed "Implications for each child in the household", Mr Brown wrote:

> "Should the family return to Jamaica, the implications for the children have been discussed in the ECHR assessment. A move to Jamaica would undoubtedly be an enormous change for the children. [MN] has never lived there and [KN] is likely to have no memory of living there, however, they would be moving as a family unit with both parents and such moves can [be] managed by children well with assistance and support from their parents. The [ECHR] assessment sets out in more detail the facilities available to the family in Jamaica which in this author's view are adequate to meet the needs of the children."

30. On the final page of the assessment form (page 8) the person completing it is required to answer the question "Is the child in need as defined by the Children Act 1989?" The answer given to this question was "no".

31. A theme which runs through both assessments is the lack of information about who the family had stayed with during the period of more than 10 years that they had been in the UK and about how they had supported themselves or been supported during that time. For example, on page 4 of the ECHR assessment in addressing the question "how has the applicant/family supported itself until now?", Mr Brown wrote:

> "Ms Stewart and Mr Nelson have stated that they have relied on the good will and kindness of their friends and family. They have not explained why this good will and kindness has ceased and have given very scant information about how they have supported themselves in this country to date. They have provided no contact details for family and friends who provided

> assistance for the first nine years of their stay in the UK some of whom appear to continue to provide financial assistance according to Ms Stewart…"

On page 13 Mr Brown wrote:

> "It has not been possible to fully assess the family's means of support as the family has not provided sufficient information in respect of their finances and how they have supported themselves for the last 10 years in this country in order to enable the author of this assessment to consider whether the family can continue to support themselves or not."

Similarly, on page 14 Mr Brown wrote:

> "… There is no clear history or explanation from the family as to why their circumstances have now changed which would explain that, although they have managed to support themselves in this country for the last 10 years, they are no longer able to do so. Nor have they provided details of any family members who would be able to explain why assistance which has previously been forthcoming is no longer forthcoming."

32. On page 16 of the ECHR assessment, Mr Brown justified his conclusion that, if support was refused, there would not be a breach of article 3 or article 8 by stating:

> "In regards to article 3 it is the author's view that if support was refused then this family would not be subject to treatment amounting to torture or to inhuman or degrading treatment or punishment.
>
> They have sustained a life in the UK without services for 10 years. It is the author's view that this family is resourceful and has successfully managed to bring up two children without state support for the last 10 years and that they will be able to continue to do so without state support.
>
> If they are unable to continue to support themselves in this country then the alternative option is to seek assistance with a return to their country of origin …
>
> It is the author's view that the family could return to Jamaica without compromising their article 8 right to family life for the reasons set out in this assessment. The family's needs would be met in Jamaica at an adequate level as discussed in this assessment."

33. Mr Brown concluded the ECHR assessment (on page 17) by stating:

> "For the reasons set out above (namely that the family have the option of continuing to support themselves in this country as they have always done, or, alternatively if this option is no longer available to them, to make arrangements to return to Jamaica) the author recommends that there will be no breach to the family's human rights by the London Borough of Hackney declining to offer support to this family."

34. A team manager was asked to confirm Mr Brown's recommendation by completing a separate box at the end of the assessment form. The team manager wrote:

> "At time of writing the information provided does not indicate that these children are children in need save for housing issues.
> …
>
> It would appear that the family's primary need is for housing however as they do not have recourse to public funds they are not entitled to assistance from the state. If they were to consider returning to their country of origin assistance could be afforded to them for a limited period."

What did Hackney decide?

35. It can be seen from the passages I have quoted that the assessments do not give a clear and consistent answer to the question whether the claimants and their parents were (or were about to become) homeless and destitute if they remained in the UK. Some of the statements made are difficult to reconcile with others. On page 16 of the ECHR assessment Mr Brown positively asserts that in his view, having managed without state support for the last 10 years, the family "will be able to continue to do so." Other statements, however, indicate that Mr Brown has been unable to reach a positive conclusion. Thus, in the "Formulations / Analysis" section of the Children Act assessment he stated that, although the family "presented" as destitute, "it is difficult to consider them as destitute". And on page 13 of the ECHR assessment Mr Brown said that the family had not provided sufficient information to enable him "to consider whether the family can continue to support themselves or not."

36. Reading the assessments as a whole, I do not accept the contention advanced by Mr Amraoui in his skeleton argument that Mr Brown made a finding that the claimants were not destitute. I think the assessments are more equivocal than that. I also think it noteworthy (although not precluding the argument) that Hackney did not advance it either in the Summary Grounds of Defence dated 29 March 2012 or in their Detailed Grounds of Defence dated 12 November 2012. Thus, paragraph 16(2) of the Detailed Grounds states that:

> "The [ECHR] assessment was unable to reach a definitive conclusion on this point and it is clear from the [Children Act] assessment that Mr Brown harboured real doubts about the claim that the family were in fact faced with destitution in March of this year …"

This seems to me to be a reasonable summary of the position.

37. In my view, the essential thrust of Mr Brown's process of reasoning can fairly be stated as follows. In circumstances where the family had lived in the UK for 10 years without support from public funds, Mr Brown was not prepared to accept that this was no longer possible without knowing exactly how they had managed to survive without state support for all that time. In particular, Mr Brown had requested details of the friends and family members who had provided accommodation and support to the family during this period so that he could contact these people and check whether any of these sources of assistance were still potentially available and, if not, why not. However, Mr Nelson and Ms Stewart had not been willing to reveal this information. In those circumstances Mr Brown was not satisfied that the family was destitute, the essential reason being that the claimants' parents had failed to provide him with sufficient information to enable him to accept their claim that the family would be homeless after 16 March 2012 if Hackney did not assist them.

Legal consequence of Hackney's decision

38. The next question is to determine the legal consequence of this decision. The general duty and powers of a local authority under section 17 of the Children Act 1989 to provide assistance arise only where children are "in need". Although section 17 does not say so in terms, I think it clear as a matter of construction that when section 17 refers to children "who are in need" this does not mean children who are objectively in need as decided by a court but children whom the local authority has assessed as being in need. The correctness of this interpretation is also confirmed by strong authority. It reflects the unanimous view of the Supreme Court in R (A) v Croydon LBC [2009] 1 WLR 2557 – albeit a view which is strictly *obiter* as the point did not fall for decision in that case.

39. As Lady Hale (with whom all the other members of the committee agreed on this question) observed in A at para 26, unlike the question whether someone is a "child" which is a matter for objective fact, whether a child is "in need" is not a matter of objective fact but requires an evaluative judgment to be made. The purpose for which the judgment is required is to enable the local authority to decide whether it can and should provide services (from its own funds) to a child within its area and, if so, what range and level of services are appropriate to the child's needs. Furthermore, the assessment of need is likely to require a factual investigation and section 17 of the 1989 Act places responsibility for making that investigation on the local authority: see section 17(2) and paragraph 1 of Schedule 2, which requires a local authority to take reasonable steps to identify the extent to which there are children in need within their area. In these circumstances the proper inference is that the question whether a child is "in need" within the meaning of section 17 is intended to be a matter for the determination of the local authority.

40. Lady Hale in A at para 26 analysed the point in this way:

> "The question whether a child is "in need" requires a number of different value judgments. … Questions like this are sometimes decided by the courts in the course of care proceedings under the Act. Courts are quite used to deciding them upon evidence for the purpose of deciding what order, if any, to make. But where the issue is not, what order should the court make, but what service should the local authority provide, it is entirely

> reasonable to assume that Parliament intended such evaluative questions to be determined by the public authority, subject to the control of the courts on the ordinary principles of judicial review. Within the limits of fair process and 'Wednesbury reasonableness' there are no clear cut right or wrong answers."

41. It follows that, unless and until a local authority has determined that a child within its area is "in need", its powers under section 17 to provide services to the child or the child's family are not engaged. Accordingly, since in this case the assessments undertaken by Mr Brown did not conclude, and Hackney did not decide, that as of 16 March 2012 the claimants were "in need", Hackney did not have power under section 17 to provide accommodation or any other assistance to the claimants or their parents.

42. That would still be the legal consequence even on the claimants' own case that Hackney reached no conclusion as to whether the family was destitute. As I have indicated, I do not think that this is a fair characterisation of the outcome of Hackney's investigation. But even if it was, it would not be sufficient to establish that Hackney had the power (let alone a duty) to provide any services for the claimants under section 17. Only a positive conclusion that the claimants were in need would have had that result.

43. In these circumstances it seems to me that the claimants would only have any basis for challenging Hackney's decision to refuse to provide them with accommodation or other support if they were able to establish either that Hackney failed to carry out a proper investigation or that, even though a proper investigation was carried out, it was irrational for Hackney not to conclude that the family was destitute so that its powers under section 17 were engaged.

Sufficiency of the investigation

44. As I have mentioned, it was the duty of Hackney pursuant to paragraph 1 of Schedule 2 to the 1989 Act to take reasonable steps to ascertain whether or not the claimants were in need. However, Mr Tankel accepts that such reasonable steps were taken. He is plainly right, in my view, to do so. It is clear from the assessments themselves as well as the witness evidence that Mr Brown duly investigated whether or not the claimants and their parents were destitute, including meeting members of the family on four occasions. On the evidence, the reason for his inability to make a positive finding that the family was, or was not, destitute was not any lack of diligence or effort on his part, but the failure of the claimants' parents to provide him with sufficient information.

Rationality of the decision

45. Mr Tankel has submitted, as a fallback, that if Hackney did not find that the claimants were "in need" its decision was irrational. I cannot accept that submission. As I have indicated, Mr Brown, a social worker with some 16 years experience, met the family on four occasions and no criticism has been, or could on the evidence be, made of the thoroughness of this aspect of his investigation. In deciding whether to recommend that the claimants were "in need", he was entitled to take account of the fact that the family had successfully supported themselves in this country for over a decade without recourse to public assistance. He might have inferred from this that the

family was only likely to be seeking assistance as a last resort. That, however, was not the inference he drew. Mr Brown was best placed to judge and was entitled to decide what approach to adopt. He was entitled to be sceptical of claims that the family was about to become homeless, which were made only after he had explained that if they were not destitute Hackney could not accommodate them. He was entitled to request relevant information including detailed information about how the family had supported themselves in the past. He was entitled to draw adverse inferences, or at least to refuse to draw favourable inferences, when only scant information was provided. All these were matters of fact and judgment which the court cannot and should not attempt to second-guess. I am in no position to say that the approach adopted or the conclusion reached by Mr Brown was wrong let alone irrational.

Conclusion on section 17

46. I therefore conclude that Hackney acted lawfully in declining to accept that as at 16 March 2012 the claimants were children in need. It follows that Hackney had no duty or power to provide the claimants or their parents with accommodation and support under section 17 (or section 20) of the Children Act 1989. This claim for judicial review must therefore fail.

The Claimants' Grounds

47. Having reached this conclusion, it is not strictly necessary for me to decide whether any of the claimants' grounds for seeking judicial review would have been justified if Hackney had found that they were in need. I have, however, heard full argument on those grounds and I will give my views on them in case there is an appeal and in case Hackney should carry out a further assessment.

48. Although Hackney was not satisfied that the family was destitute as at 16 March 2012, the assessments recognised that there was at least a real possibility that they would become so. In the time which this litigation has taken to come to court, the family's circumstances may have changed. Before withdrawing the temporary accommodation and support which it has now been providing for over a year, Hackney will need to assess the family's current circumstances. Should Hackney decide now or at any future time that the family will be destitute if assistance is withdrawn, it will have to consider the human rights issues which then arise. If Hackney approaches those issues in the same way as it did in the ECHR assessment prepared by Mr Brown, all the arguments raised in the claimants' grounds will then arise. It therefore seems to me that it will do no service to the parties if this action is dismissed after proceeding for more than a year without any expression of view as to the merits of those grounds.

49. For the purpose of what follows I will assume, as Mr Brown did when undertaking the ECHR assessment, that the claimants would be destitute and therefore "in need" for the purpose of section 17 of the Children Act 1989 unless the family is provided with assistance. On the basis of the ECHR assessment, Hackney decided that, in that event, the claimants were not eligible for support under section 17 because the family could return to Jamaica without any breach of their human rights. The claimants' grounds for seeking judicial review are all directed to the lawfulness of that decision.

The purpose of the ECHR assessment

50. The reason for enquiring into whether a return to Jamaica would result in a breach of the claimants' (or their parents') rights under the European Convention on Human Rights derives from Schedule 3 to the 2002 Act. As noted earlier, Schedule 3 prevents a local authority from providing any assistance under (amongst other statutory powers) section 17 of the Children Act 1989 to a family who are present in the UK in breach of immigration laws unless to do so is necessary to avoid a breach of Convention rights. Where the children of such a family are "in need" within the meaning of section 17, the local authority must therefore assess whether there will be a breach of any member of the family's Convention rights if no assistance is provided and, if so, whether there is any more economical way of avoiding such a breach than to provide accommodation and support to the family under section 17.

51. In Birmingham City Council v Clue [2011] 1 WLR 99 at para 55, Dyson LJ explained the position as follows:

> "If the withholding of assistance would not in any event cause a person to suffer from destitution amounting to a breach of Convention rights (typically article 3), the local authority's investigation ends there. The local authority must, therefore, investigate whether there are available to the claimant other sources of accommodation and support. But if it is satisfied that there are no other sources of assistance which would save the claimant from destitution amounting to a breach of a Convention right, then it must consider the matter further. It must then decide whether there is an impediment to the claimant returning to his country of origin."

52. In the present case, as I have discussed, Hackney was not satisfied that there were no other sources of accommodation and support which would save the family from destitution. The investigation could therefore have ended there. However, Mr Brown went on to consider whether, if the family was or became unable to support themselves in the UK, there was any impediment to the claimants and their parents returning to their country of origin.

53. The only practical impediment was the cost of travel. Mr Brown expressed the view that this impediment could be overcome by obtaining funds for travel from the International Organisation for Migration (which assists families to return to their country of origin) or, if that organisation was unable to assist, by Hackney exercising powers to purchase tickets for the family either under the Withholding and Withdrawal of Support (Travel Assistance and Temporary Accommodation) Regulations 2002 or under section 2 of the Local Government Act 2000.

54. The claimants do not challenge the proposition that they could, if necessary, be assisted financially to return to Jamaica. Mr Tankel has submitted, I think correctly, that the 2002 Regulations are not applicable in this case. But he did not dispute that Hackney would have power under section 2 of the Local Government Act 2000 to fund the cost of travel, if this was the cheapest way of avoiding a breach of the claimants' Convention rights. The power to use section 2 of the Local Government

Act 2000 for this purpose is established by the decision of the Court of Appeal in R (Grant) v Lambeth LBC [2005] 1 WLR 1781.

55. Hackney had therefore to consider whether there was a legal impediment to the claimants and their parents returning to Jamaica on the basis that this would result in a breach of a Convention right. The rights considered in the ECHR assessment were those conferred by article 3 of the Convention, which prohibits torture or inhuman or degrading treatment or punishment, and article 8, which confers a right to respect for private and family life. It is not suggested that any other Convention right was relevant and should have been considered.

56. As is apparent from the passages which I quoted earlier, the conclusion of the ECHR assessment was that there would not be a breach of the rights of the claimants and their parents under articles 3 and 8 if they returned to Jamaica.

57. The claimants do not challenge the lawfulness of that decision as regards article 3. Their criticisms of the ECHR assessment focus on article 8.

58. Unlike article 3 which is absolute, the right to respect for private and family life conferred by article 8 is qualified by article 8(2) which states:

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

The application of article 8 therefore requires a two-stage test. Stage one is to consider whether what is contemplated involves interference by a public authority with the exercise of the right to respect for private or family life which is sufficient to fall within the scope of article 8. If it does, then stage two is to determine whether such interference is not only in accordance with the law but is necessary and proportionate to one or more of the legitimate aims specified in article 8(2).

59. One of the questions considered by the Court of Appeal in Birmingham City Council v Clue was how a local authority should apply article 8(2) in a case of the present kind. When the Secretary of State for the Home Department is exercising immigration functions such as deciding whether to grant leave to remain or to issue removal directions, the legitimate aims which may justify interference with article 8 rights are those served by an effective system of immigration control. However, as the Court of Appeal emphasised in Clue, a local authority considering whether to provide assistance to a family living in its area is not exercising an immigration function. Its function is to decide how to spend a limited budget for providing social services. Thus the Court of Appeal took the view that the only legitimate aims which are in principle capable of justifying interference by the local authority with article 8 rights are those (namely, "the economic well-being of the country" and "the protection of the rights and freedoms of others") served by the proper and efficient allocation of its budget. Hence it is open to a local authority in an appropriate case to justify refusing

to provide assistance even where this would interfere with article 8 rights by reference to the competing calls on its budget of other people in need: see Clue at paras 71-73.

60. In this case, however, Hackney did not reach the second stage of asking whether interference with article 8 rights was necessary and proportionate to the pursuit of a legitimate aim. The conclusion arrived at in the ECHR assessment was that article 8 was not engaged at all as the claimants and their parents could return to Jamaica without compromising their right to respect for their private and family life.

61. On behalf of the claimants, Mr Tankel challenges the lawfulness of that decision on the five grounds which I identified at paragraph 22 above. I will consider these grounds in turn.

(1) Failure to assess whether the claimants would be "in need" in Jamaica

62. It is convenient to take first the contention that Hackney's approach was unlawful because Hackney examined only whether returning to Jamaica would breach the claimants' human rights and did not ask whether the claimants would cease to be "in need" in Jamaica.

63. As part of the ECHR assessment (at page 6) Mr Brown had to identify "what difficulties, whether in terms of employment, schooling, medical provision or otherwise, would be caused were the family to return home?" In answering that question, Mr Brown considered whether the claimants' educational and medical needs as well as their basic material needs for accommodation and financial support would be met if the family returned to Jamaica, and found that they would. His conclusion, as summarised on page 16 of the ECHR assessment (and cross-referred to on page 7 of the Children Act assessment), was that "[t]he family's needs would be met in Jamaica to an adequate level." Albeit that the question was discussed in the context of human rights and not directly by reference to section 17, Hackney did therefore in substance consider whether the claimants would be in need in Jamaica.

64. In any case I believe that Hackney's approach was legally correct. Mr Tankel's argument that Hackney should have asked whether the claimants would cease to be "in need" in Jamaica as defined in section 17 is based on a passage in the judgment of Buxton LJ in R (M) v Islington LBC [2005] 1 WLR 884 at para 49. In that passage Buxton LJ said that, before it could lawfully discharge its duty under section 17 of the Children Act 1989 by funding tickets rather than by providing support including accommodation in the UK, the local authority would have to be confident that the child would cease to be "in need" in the country of destination. Mr Tankel relies on this statement to argue that only if this test was satisfied could Hackney have regarded funding the claimants and their parents to return to Jamaica as an available option.

65. A similar argument that this test had to be satisfied seems to have been accepted in Blackburn-Smith v Lambeth LBC [2007] EWHC 767 (Admin) at paras 29–34. In my view, however, the argument is based on a misunderstanding of R (M) v Islington. In the passage relied on, Buxton LJ was assuming that the statutory power which the local authority would need to invoke in order to fund the cost of tickets for a child and her parent to return to their country of origin was section 17 of the 1989 Act. Buxton LJ's view was that section 17 could only be used for this purpose if the local authority

could be confident that the child would cease to be "in need" if removed to the foreign country.

66. A few months later, however, R (Grant) v Lambeth LBC [2005] 1 WLR 1781 was decided. As I have already mentioned, in that case the Court of Appeal held that a local authority in principle has power to fund travel costs under section 2 of the Local Government Act 2000. In the present case Mr Brown considered – and the claimants do not dispute – that Hackney could, if necessary, fund tickets by exercising this power. It therefore does not matter whether or not section 17 of the 1989 Act could alternatively be used for that purpose. It therefore also does not matter whether Buxton LJ was right to say that a local authority can only use section 17 to fund tickets if it can be confident that the child would cease to be in need in the country of destination. As Hackney did not propose to use its powers under section 17 to fund the cost of travel, that question does not arise.

(2) R (KA) v Essex City Council

67. The ground which Mr Tankel advances as the claimants' primary ground for challenging Hackney's conclusion that the claimants and their parents could return to Jamaica without compromising their article 8 rights is based on the recent case of R (KA) v Essex City Council [2013] EWHC 43 (Admin).

68. In reliance on that case, Mr Tankel submits that Hackney was wrong in law to consider the substantive question of whether moving to Jamaica would result in a breach of the claimants rights' to respect for their family and private life. Instead, Hackney should only have considered whether, if the Secretary of State were to decide to give directions for the removal of the family to Jamaica, the claimants would have grounds for arguing on an appeal to a tribunal against that decision that their removal would contravene their article 8 rights. Provided that the claimants would have such grounds which are not obviously hopeless or abusive, then requiring them to return to Jamaica before a removal decision has been made and the claimants have exhausted their rights of appeal against that decision would automatically be a breach of their rights under article 8. So, Mr Tankel submits, since Hackney did not decide (and could not reasonably have decided) that an appeal by the claimants against a removal decision on article 8 grounds would be obviously hopeless or abusive, Hackney's approach was wrong in law. Had the correct approach been followed, Hackney would have been bound to conclude that moving to Jamaica would result in a breach of the claimants' Convention rights.

69. The present case, as Mr Amraoui accepted, is indistinguishable on its facts from KA. Hence if KA was rightly decided, the conclusions for which Mr Tankel argued must follow. Having read the judgment in KA, however, I was concerned about whether I should follow it. At the end of the oral argument, I therefore requested and subsequently received further written submissions from counsel on the KA case and specifically on whether the decision in that case was justified or required by the decision of the Court of Appeal in Birmingham City Council v Clue [2011] 1 WLR 99, by which I am of course bound.

70. Clue concerned a claimant who (1) was unlawfully present in the UK (within the meaning of paragraph 7 of Schedule 3 to the 2002 Act), (2) was destitute and (3) had made an application for leave to remain which raised grounds under the Convention

and had not yet been decided by the Secretary of State. The Court of Appeal held that in such a case, provided that the application for leave to remain is not obviously hopeless or abusive, a local authority cannot refuse to provide assistance to the claimant if to do so would have the practical effect that the claimant would have to leave the UK before the application for leave to remain has been decided.

71. In so holding, the Court of Appeal built on Strasbourg jurisprudence to the effect that "the Convention is intended to guarantee not rights that are theoretical or illusory, but rights that are practical and effective": see Clue at para 67, citing Artico v Italy (1980) 3 EHRR 1, para 33. In particular, in Ciliz v Netherlands [2000] 2 FLR 469 the European Court of Human Rights (First Section) held that it was incompatible with article 8 for the immigration authorities to expel an immigrant father involved in family law proceedings concerning his right to contact with his child before the conclusion of those proceedings as to do so would preclude meaningful further involvement in the proceedings and thus effectively pre-judge their outcome. The Court said (at para 66) that:

> "whilst article 8 contains no explicit procedural requirements, the decision-making process leading to measures for interference must be fair and afford due respect to the interests safeguarded by article 8."

72. In Clue, the Court of Appeal applied such reasoning to the situation in which the claimant was awaiting the outcome of an application for leave to remain in the UK. If the claimant left the UK before the application had been decided, the Secretary of State would have treated the application as withdrawn: see para 65. The Court of Appeal accepted the claimant's argument that for the local authority to bring about that result by withholding assistance would be to pre-empt the decision of the Secretary of State – a decision which it was the function of the Secretary of State and not the local authority to make. On this basis the Court of Appeal held that, on learning that the claimant had made an application for indefinite leave to remain in the UK on grounds which expressly or implicitly raised article 8 of the Convention, the local authority should not have refused assistance pending the determination of the application unless they considered that the application was hopeless or abusive. To do so would have caused the claimant to forfeit her claim for leave to remain which would be a breach of her Convention rights.

73. The decision of the Court of Appeal in Clue goes significantly further than the decision of the Strasbourg Court in Ciliz in that it treats the procedural requirement implicit in article 8 for a fair decision-making process as imposing a positive obligation on a public authority to incur public expenditure. In Ciliz the obligation found to be implicit in article 8 was a negative one – being to refrain from expelling the claimant from the country before proceedings aimed at protecting his article 8 rights had been determined. In Clue the Court of Appeal held that the need to make Convention rights effective extends to a positive obligation on a local authority to provide financial assistance to enable a person to remain in the country until her pending claim has been determined. It is one thing to say that it is an interference with the right to respect for family and private life to expel someone from the country during the currency of court proceedings in which that person is asserting rights protected by article 8. It is another and stronger thing to say that it is such an

interference to refuse to provide financial support needed to enable the person to live in the country until the proceedings have been determined.

74. The decision in KA extends the ambit of article 8 further still.

75. KA concerned a claimant who (1) had been refused leave to remain in the UK, (2) was not the subject of any directions to remove her from the UK, (3) would, if a decision to give such directions was made, have a right of appeal against that decision to a tribunal and (4) would on such an appeal have an arguable case that removal would contravene her article 8 rights. It was held by Mr Robin Purchas QC (sitting as a deputy High Court Judge) that for the defendant local authority to refuse to support the claimant in these circumstances until (a) a decision to issue removal directions had been made by the Secretary of State and (b) the claimant had had the opportunity to appeal against that decision would itself be a breach of the claimant's article 8 rights.

76. In reaching this conclusion, the judge relied on Clue. He also relied on R (Daley-Murdock) v Secretary of State for Home Department [2011] EWCA Civ 161, [2011] Imm AR 500, in which (at para 14) the Court of Appeal gave as one answer to an argument that the absence of a right of appeal against the refusal of leave to remain made the legislative protection for article 8 rights inadequate the fact that there would be a right of appeal to a tribunal if and when a removal decision was made. On the basis of these authorities Mr Purchas QC concluded that a person who has been refused leave to remain in the UK but who has an argument (which is not obviously hopeless or abusive) that his removal would infringe a Convention right has, as part of that Convention right, a procedural right to appeal against removal directions if and when they are made. The judge held that it would be a breach of this "substantive Convention procedural right" for the defendant local authority to refuse to provide support for the claimant and her family under the 1989 Act when the consequence would be their return to their country of origin (see paras 55-56).

77. At para 52 of the judgment the judge explained his reasoning as follows:

> "Whether the procedural right is engaged will depend upon the particular circumstances of the individual case. It would not generally apply until an application for leave to remain had been made. But I do not accept that with the refusal of leave to remain and pending the issue of removal directions the procedural protection under the 2002 Act including appeal against an immigration decision ceases to have relevance or is replaced by the general right to judicial review. Where on the facts of the case it is demonstrated that a person has a substantive convention claim, for example to a family or private life in this country, that would found an appeal against removal directions if made, a decision that effectively deprived the person of that protection would in my judgment be in breach of his convention procedural right. The fact that the right will only be activated as and when the immigration decision is made does not negate its existence as part of the person's convention right in the interim."

78. In Clue the Court of Appeal was considering the position only of a person who has made an application for leave to remain which was currently pending. The Court of Appeal was not addressing the position of someone who (like the claimants in the present case) has made an application for leave to remain which has been refused. KA was concerned with this latter situation. It has therefore taken Clue a stage further and, it seems to me, a stage too far.

79. If the decision in KA is right, then article 8 requires that where someone who has been refused leave to remain in the UK but is not willing to leave the country voluntarily asserts that their removal would contravene their article 8 rights, then (unless that assertion is obviously hopeless or abusive) the local authority has a duty to assist them to stay in this country in breach of UK immigration laws by providing them, if they would otherwise be destitute, with accommodation and support at public expense until such time as the Secretary of State decides to give directions for their removal and they have exhausted their right of appeal against that decision.

80. I confess to finding this a remarkable conclusion. If it is correct, it would (as Mr Tankel very fairly observed) put people who are illegally present in the UK in a better position than those who live here lawfully (including British citizens). As mentioned earlier, section 17 of the 1989 Act does not create an individually enforceable right to be provided with accommodation or other support. But if the decision in KA is correct, an overstayer with a potential Convention claim does have an individually enforceable right to be provided with accommodation and support in so far needed to enable him to continue to breach UK immigration laws.

81. When legal argument leads to a result which is contrary to common sense, as seems to me to be the case here, it is necessary to examine carefully whether something has gone wrong in the reasoning. Where the reasoning in KA appears to me to have gone wrong is in treating a right which would arise in hypothetical circumstances as if it were an existing right which entitles the holder to be provided with financial support now. It is one thing to say that a person who has an outstanding application for leave to remain (or a pending appeal to a tribunal) on article 8 grounds has a right not to have that application or appeal frustrated. It is quite another to say that a putative right to appeal against a decision which has not been made has the same effect. A right to appeal against a decision which has not been made is not a right which exists in some inactive state. It is a right which does not exist and will never exist unless and until there is a decision to appeal against.

82. I unhesitatingly accept that the right to appeal to a tribunal against a removal decision on Convention grounds is an important procedural safeguard which necessarily carries with it a right not to be removed while an appeal is pending. But I see no justification for interpreting the Convention or the 2002 Act as conferring a right on a person who is not the subject of a removal decision to be supported by a local authority until such a decision is made. There is no principle of interpretation which requires that result. Nor is there anything in the Strasbourg case law to support it. I respectfully consider that KA extends the scope of Convention rights beyond anything that can by any legitimate process of analysis be found to be implicit in them.

83. I understand that the decision in KA is under appeal to the Court of Appeal. Unless and until the Court of Appeal upholds the decision, however, I find myself unable to follow it.

84. I would therefore not accept that in the present case merely because the claimants have a potential argument (which is not hopeless or abusive) that removing them from the UK would contravene article 8, this in itself gives them a right under article 8 to require Hackney to provide them and their parents with accommodation and support to the extent necessary to enable them to stay in the UK until such time as a decision is taken to remove them and a tribunal has considered that argument.

(3) Failure to apply article 8

85. I therefore consider that Hackney was correct not to short-circuit the assessment of Convention rights in this way and to address the question whether returning to Jamaica would result in a breach of the claimants' substantive rights under article 8. The claimants' next ground of challenge to Hackney's decision, however, is that, in addressing this question, Hackney failed to give any proper consideration to the impact which moving to Jamaica would have on the claimants' private lives.

86. The claimants do not challenge Hackney's assessment in so far as it related to their family life. There was no suggestion that the claimants should be separated from their parents: any move to Jamaica would be as a family unit. Nor is the right to family life infringed because it must be conducted outside the UK in a country with a lower standard of living: see R (Mahmood) v Secretary of State for the Home Department [2001] 1 WLR 840.

87. As well as family life, however, article 8 also protects the right to respect for a person's private life. As the Court of Appeal observed in Clue (at para 27), this entails considerations far wider than the right to family life. The concept of private life extends to those features which are integral to a person's identity or ability to function socially as a person: R (Razgar) v Secretary of State for Home Department [2004] 2 AC 368, 383 at para 9. In the case of a settled migrant it includes the totality of social ties between the individual and the community in which he or she is living: see e.g. Üner v The Netherlands (2006) 45 EHRR 421 at para 59. Since mental stability is an indispensable condition to enjoyment of the right, where removal from the country in which a person is living is in contemplation, it also requires account to be taken of the foreseeable consequences of removal on the person's mental health: see Razgar at para 9.

88. Mr Tankel submits that the ECHR assessment in the present case contains no proper analysis of the impact which moving to Jamaica would have on the claimants' private lives. It focuses on their family life and whether this could be maintained in Jamaica. It fails to consider the extent of the claimants' social ties and cultural attachment to the UK and what it would mean to return to a country of which they have no recollection, particularly for KN who has lived for over ten years in the UK. Mr Tankel points out that the conclusion stated in the assessment does not even explicitly mention private life, stating only that it was the author's view that the family could return to Jamaica "without compromising their article 8 right to family life" (emphasis added).

89. On behalf of Hackney, Mr Amraoui responds that the fact that "private life" is not mentioned in terms does not show that Mr Brown failed to consider it. On the contrary, he submits, it is clear – when the assessment is read, as it ought to be, fairly and as a whole, and not construed as if it were a statute or deed – that Mr Brown did

consider the impact on the claimants' private lives. He was plainly aware of the extent to which the claimants have social and other ties in this country and for that reason evaluated at some length the educational, social and healthcare provision available in Jamaica and gave specific consideration to the provision available for disabled children. These were all factors pertaining to the children's private life, as distinct from their family life. Thus, Mr Amraoui submits, the allegation of failure to consider the claimants' private lives is not made out.

90. I accept of course that the fact that the ECHR assessment expressly refers only to family life is in no way conclusive, although it may be symptomatic. I accept also that the assessment does contain (on pages 3-4) discussion of the claimants' medical and educational needs and (on pages 6 and 7) of the medical, educational and social services available in Jamaica. The whole focus of the discussion, however, is on whether the family's needs would be met in Jamaica at an adequate level. There is no evaluation or real acknowledgement anywhere in the assessment of the claimants' social and cultural ties to the UK which would be severed by moving to Jamaica. In these circumstances the claim that Hackney failed to give proper consideration to the claimants' rights to respect for their private life is in my view justified.

91. In particular, KN, who was aged 13 at the time of the assessment, had been living in the UK since the age of 2, practically the whole of her self-conscious life. All her friendships and relationships with people and with the outside world, including all her educational experiences, will therefore have been formed in the UK. It is a reasonable and obvious assumption, recognised in the Strasbourg case law on the right to respect for private life protected by article 8, that "the longer a person has been residing in a particular country the stronger his or her ties with that country and the weaker the ties with the country of his or her nationality will be": see Üner v The Netherlands (2006) 45 EHRR 421, para 58. It was on this basis that in Üner (albeit in the context of deportation) the Grand Chamber of the European Court of Human Rights found it "self-evident that the court will have regard to the special situation of aliens who have spent most, if not all, their childhood in the host country, were brought up there and received their education there" (para 58). The court went on to state (at para 59):

> "Regardless of the existence or otherwise of a 'family life', therefore, the court considers that the expulsion of a settled migrant constitutes interference with his or her right to respect for private life."

92. It is no doubt in recognition of this "special situation" that in July 2012 Parliament amended the immigration rules so as to re-introduce the "seven-year" rule for applications by children for leave to remain on the grounds of private life in the UK. Rule 276ADE(iv) provides that an applicant would qualify for leave to remain if he or she is under the age of 18 years and has lived continuously in the UK for at least 7 years. Thus, if KN were now to apply for leave to remain in the UK on the grounds of private life, it is likely that her application would be granted.

93. Mr Brown must have been aware that the claimants, and particularly KN, had established social, educational and cultural ties with the UK which would be broken by moving to Jamaica. There is indeed express reference to this in the Children Act assessment where, in a passage that I quoted earlier from the section headed "Implications for each child in the household" on pages 6-7, Mr Brown wrote:

> "A move to Jamaica would undoubtedly be an enormous change for the children. [MN] has never lived there and [KN] is likely to have no memory of living there, however, they would be moving as a family unit with both parents and such moves can [be] managed by children well with assistance and support from their parents."

94. Discounting the significance of a move on the basis of an unsupported general assertion that "such moves" can be managed well with parental support has an air of complacency about it. More importantly, from the point of view of the article 8 right to respect for private life, it applies the wrong test. The question is not whether a move could be "managed" but whether it would constitute an interference (justifiable or otherwise) with the claimants' right to respect for private life.

95. At least in the case of KN, it seems to me self-evident from her age and the length of time that she had been living continuously in the UK (having never been outside the UK since she arrived aged 2) that she has a private life in this country and that re-locating to Jamaica would involve an interference with her right to respect for her private life. That is not to say that such interference could not in principle be justified under article 8(2) by reference to other legitimate aims. But that would have to be at stage two of the article 8 analysis. In this case, as mentioned earlier, stage two was not reached as Hackney concluded at stage one that the family could re-locate to Jamaica without any interference with their article 8 rights. At least in the case of KN, that conclusion was in my view one which could not properly or rationally have been reached if proper consideration had been given to her right to private life.

96. In relation to MN, the ECHR assessment recorded (on pages 3-4) that he had been identified as having language speech delay issues and diagnosed as having "A type" [sic] autism for which he was receiving "appropriate attention from the education and medical professionals." The potential effect on MN's mental health of moving to Jamaica was addressed (on page 7) as follows:

> "The youngest child has been diagnosed as having A type autism and would need assistance in managing this. At present he is receiving assistance with speech and language development which would need to continue if he is to reach his potential. Information obtained from the ARK Community centre confirmed that they assessed [MN] and at the time of writing the assessment report was not available. However Dr John Loftus' office will provide a copy of the assessment. This will assist with securing appropriate services if this child returns to Jamaica. Information provided by the UKBA indicates that there are provisions in Jamaica to assist children with disability."

97. As Mr Tankel observed, the information from the UKBA on which Mr Brown here relied was of a very general kind. There is nothing to indicate that any consideration has been given to whether any of the provision in Jamaica to assist children with disability would be available to a child with autism or atypical autism; to what provision there is for children with special educational needs rather than physical

disabilities; to what such provision costs; nor to whether MN could realistically be expected to access such provision.

98. It is also apparent that Mr Brown had not seen the assessment prepared by Dr Loftus, apparently taking the view that it would be enough to forward a copy of the report to the Jamaican authorities and that it was not necessary to consider it himself as part of the ECHR assessment. That approach is difficult to defend. The relevance that Dr Loftus' opinion would have had is apparent from a letter dated 17 August 2011, which Dr Loftus had written in support of the family's application for leave to remain. In that letter Dr Loftus stated:

> "[MN] has received and continues to receive co-ordinated multi-disciplinary and interagency support for his difficulties from education and health professionals which is essential for any child with ASD [Autistic Spectrum Disorder]. The prognosis for his development in the long term is uncertain. ASD is a lifelong disability but [MN] is responding to the input he is receiving and it is essential that this continues.
>
> There are very limited services for children with autism in his parents' home country of Jamaica. Additionally, education support services for children who have special educational needs are also very limited.
>
> If [MN] were to relocate to Jamaica he would not receive the co-ordinated multi disciplinary team approach to his difficulties that he receives in the UK and which international research and experience have shown to be essential for children with ASD. This would result in him failing to reach his potential and almost certainly be associated with behavioural problems and possibly regression in the skills he has achieved." [emphasis added]

99. It is reasonable to assume that Dr Loftus would have expressed a similar opinion if he had been consulted in connection with the ECHR assessment.

100. The expert opinion of Dr Loftus was information which was available and which it seems to me that Hackney ought to have obtained and taken into account in assessing the consequences which a move to Jamaica would be likely to have for MN's mental health.

101. For these reasons, I conclude that Hackney failed properly to consider and assess whether moving to Jamaica would interfere with the claimants' rights to respect for their private life. If Hackney's decision to refuse support had depended on the view that moving to Jamaica would not result in a breach of the claimants' article 8 rights, I would accordingly have held that the decision was unlawful.

(4) Failure to consider the claimants' best interests

102. As a further ground of challenge, the claimants contend that, in making the ECHR assessment, Hackney was obliged to give primacy of accord to their best interests and to whether their best interests lay in returning to Jamaica, but failed to do so.

103. In support of this ground Mr Tankel referred to section 11 of the Children Act 2004, which imposes a duty on local authorities to make arrangements for ensuring that "their functions are discharged having regard to the need to safeguard and promote the welfare of children". He also cited ZH (Tanzania) v SSHD [2011] 2 AC 166, where Lady Hale said at para 33:

> "In making the proportionality assessment under article 8, the best interests of the child must be a primary consideration. This means that they must be considered first. They can, of course, be outweighed by the cumulative effect of other considerations."

104. Mr Tankel further submits, citing Tologiwa v Secretary of State for the Home Department [2012] EWHC 2386 (Admin), that considering the best interests of the child in the context of removal to another country requires a factual investigation into what facilities would actually be available in that country to meet the needs of the individual child and that reliance on general country information is not sufficient. Mr Tankel emphasises the broad nature of the relevant investigation. He cites R (Asefa) v Secretary of State for the Home Department [2012] EWHC 56 (Admin), in which Langstaff J (at para 57) summarised the content of the duty to safeguard and promote the welfare of children in four propositions, the first of which was as follows:

> "'Best interests' can involve a wide-ranging enquiry, and is not limited to the of harm, or breach of basic Convention rights; the inquiry extends potentially to take in 'the broad concept of lifestyle', and a 'whole series of factors', including the continuity of care and affection and the opportunity to form long term attachments based on mutual trust and respect, and may extend to educational opportunity, and securing 'optimal life chances' for a child." [citations omitted]

105. In the present case I see no need to invoke section 11 of the 2004 Act in order to establish that in making its assessments Hackney was obliged to have regard to the need to safeguard and promote the welfare of children. That was the whole purpose and focus of the investigation to determine whether Hackney could and should exercise its powers under section 17 of the 1989 Act. It does not seem to me, however, that on the approach which Hackney took it was necessary to assess – either as a primary consideration or at all – whether it was in the claimants' best interests for the family to return to Jamaica. 'Best interests' is not part of the definition of a person's private or family life nor is it relevant to the question whether removal to another country would interfere with a person's right to respect for their private and family life. Its potential relevance in applying article 8, as the above quotation from ZH indicates, is at stage two of the analysis when an assessment is made of whether such interference is proportionate to a legitimate aim.

106. As I have already indicated, in the present case Hackney did not decide that moving to Jamaica would interfere with the claimants' rights to respect for their private life but that such interference was nevertheless justified by the pursuit of a legitimate aim. Had Hackney carried out such a balancing exercise, then ZH and the other authorities relied on by Mr Tankel show that it would have been necessary for Hackney to treat the best interests of the claimants as a primary consideration. As it is, however, Hackney did not reach its decision in this way and this ground of challenge therefore seems to me to miss the mark.

(5) Breach of public sector equality duty

107. The claimants' final ground for seeking judicial review is that, in making its assessment, Hackney failed to comply with its duty under section 149 of the Equality Act 2010 in relation to MN.

108. As part of the duty imposed by section 149 of the Act, a public authority must in the exercise of its functions have "due regard", in particular, to "the need to ... take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it": see section 149(3)(b). One of the "relevant protected characteristics" is disability: see section 149(7). In addition, section 149(4) provides:

> "The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities."

109. MN has a disability by reason of his autistic spectrum disorder and Mr Tankel submits that the same failure to give proper consideration to whether MN's special needs would be met in Jamaica which I have found vitiated the assessment of his article 8 rights also amounted to a breach of Hackney's public sector equality duty.

110. As with the argument that primacy should have been given to the claimants' best interests, I am not persuaded that the public sector equality duty is relevant to the assessment of whether moving to Jamaica would interfere with the right to respect for private life. It seems to me that only factors relevant to that assessment were those which fall within the scope of article 8, and other statutory duties do not come into it. The only point at which the public sector equality duty could be relevant would be at stage two, in assessing whether interference with private life was justified by competing calls on Hackney's social services budget. At that stage Hackney would no doubt be required to have due regard to the need to take steps to meet the special needs of MN resulting from his disability. In the way that Hackney approached the matter, however, the duty did not arise.

Summary of conclusions

111. The law governing this case is complex, some might say unduly complex. I will seek to summarise my conclusions as to how it applies.

112. If Hackney had found that the claimants and their parents were about to be made homeless, the claimants would have been children "in need" within the meaning of

section 17 of the Children Act 1989. In an ordinary case Hackney would then have had to consider only whether it should exercise its powers under section 17 to provide the family with accommodation and support.

113. However, because the family are in the UK in breach of immigration laws (and are not asylum-seekers), paragraph 1 of Schedule 3 to the Nationality, Immigration and Asylum Act 2002 prevents Hackney from providing the claimants and their parents with assistance under section 17 of the 1989 Act except to the extent (if any) that to do so is necessary in order to avoid a breach of Convention rights.

114. This requires an assessment of whether providing the claimants and their parents with accommodation and support under section 17 is necessary in order to avoid a breach of Convention rights. This in turn requires Hackney to determine whether for the family to return to their country of origin would result in a breach of their Convention rights. If it would not, then Hackney would have power (under section 2 of the Local Government Act) to assist the family financially to return. As that would be a cheaper option than providing them with accommodation and support in the UK under section 17, the latter would not be necessary in order to avoid a breach of their Convention rights.

115. In assessing whether returning to their country of origin would result in a breach of Convention rights, the rights which need to be considered are those conferred by articles 3 and 8. It is not suggested in this case that the claimants and their parents would be subjected to inhuman or degrading treatment in Jamaica so as to engage article 3. Nor is it suggested that moving to Jamaica would interfere with their family life as they would go as a family unit. The key question is whether returning to Jamaica would result in a breach of the claimants' rights under article 8 to respect for their private life.

116. If the Secretary of State were to decide to give directions for the claimants and their parents to be forcibly removed from the UK, they would have a right to appeal against that decision to a tribunal and would have an argument (which would not be obviously hopeless or abusive) that removing them to Jamaica would be a breach of their rights under article 8 to respect for their private life. If the recent case of R (KA) v Essex City Council [2013] EWHC 43 (Admin) was rightly decided, this is by itself sufficient to establish that withholding support from the claimants and their parents would be a breach of article 8. In my view, however, KA was not correctly decided and it is wrong to regard article 8 as having such an expansive scope.

117. I therefore consider that it is for Hackney to make its own assessment, as it has done in the present case, of whether returning to Jamaica would interfere with the claimants' rights to respect for their private life. However, the assessment made was in my view flawed because it failed to give proper consideration to the strength of the claimants' (particularly KN's) ties with the UK and the impact which moving to Jamaica would have on MN's mental health (given his autistic spectrum disorder). Had proper consideration been given to those matters, it seems to me that Hackney would have been bound to conclude, at least in the case of KN, that moving to Jamaica would constitute an interference with her article 8 rights.

118. At that stage of the assessment it would be legitimate for Hackney to consider whether competing calls on its budget to support other people in need justify the

interference with the claimants' article 8 rights that would result from having to return to Jamaica. In making that assessment, however, Hackney would be required to treat the claimants' best interests as a primary consideration. Hackney would also be obliged (by section 149 of the Equality Act 2010) to have due regard to the need to take steps to meet the needs of MN as a child with an autistic spectrum disorder.

119. Unless Hackney could properly conclude that the harm of interfering with the claimants' article 8 rights was outweighed by the competing claims of others, Hackney would be both entitled and obliged to exercise its powers under section 17 of the Children Act 1989 to provide the claimants and their parents with accommodation and support in order to avoid a breach of their Convention rights.

120. This elaborate chain of analysis will only become necessary, however, if and when Hackney is satisfied that the family would be destitute unless they are provided with accommodation and support. As at 16 March 2012 Hackney was reasonably not satisfied that this was the case. Its decision to refuse to provide accommodation and support to the claimants and their parents was therefore lawful, and this claim for judicial review must accordingly be dismissed.