



Neutral Citation Number: [2010] EWHC 848 (Admin)

Case No: 5478/2009

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 7.5.10

**Before :**

**THE HONOURABLE MRS JUSTICE BLACK**

-----  
**Between :**

**S A**  
**- and -**  
**K C C**

**Claimant**

**Defendant**

-----  
-----  
Mr Patrick Roche (instructed by Ridley and Hall Solicitors) for the Claimant  
Mr Nicholas O'Brien (instructed by KCC Legal Services) for the Defendant

Hearing dates: 16<sup>th</sup> February 2010  
-----

**Approved Judgment**

**Black J :**

1. The claimant in these judicial review proceedings is A, who was born on 19 April 1995 and is 15 years old. Her litigation friend is her maternal grandmother (GM) with whom she has been living since 17 December 2004 and with whom it is likely she will continue to live for the rest of her minority. The defendant is the local authority (LA) with responsibility for A's welfare.
2. The proceedings concern the status of A vis-à-vis LA.
3. LA have been treating A as if she were a child in need for whom they have been providing services under s 17 Children Act 1989.
4. A's case is that she is in fact "a child who is being looked after by a local authority", commonly referred to in shorthand form as "a looked after child". This would have a number of practical consequences for A. Instead of receiving £63.56 per week from LA as she has been doing for the majority of A's stay with her, GM would receive £146.23 per week. LA would also have other duties in relation to A such as a duty to safeguard and promote her welfare generally and a duty to assist her in various ways as she reaches the age when she ceases to be looked after by them. There would also be a potential duty to contribute towards the cost of A taking up higher education if she decided to do so. All of this would plainly be perceived by A and GM as beneficial. Some of the steps that must be taken by a local authority in relation to looked after children, which are in fact for their benefit in terms of safeguarding their welfare, can sometimes be experienced by the child and its carer as burdensome. They are not optional extras for the looked after child but necessary adjuncts of the status. I have in mind things such as formal reviews, medicals, and approval of GM as a foster parent.
5. S 22 Children Act 1989 provides the definition of a looked after child. It says:

"S 22(1) In this Act, any reference to a child who is looked after by a local authority is a reference to a child who is –

  - (a) in their care; or
  - (b) provided with accommodation by the authority in the exercise of any functions (in particular those under this Act) which are social services functions within the meaning of the Local Authority Social Services Act 1970, apart from functions under sections 17, 23B and 24 B.

(2) In subsection (1) "accommodation" means accommodation which is provided for a continuous period of more than 24 hours."
6. S 105(1) tells us that any reference to a child who is in the care of an authority is a reference to a child who is in their care by virtue of a care order. There is no care order, interim or full, in relation to A. She cannot, therefore, be a looked after child by virtue of s 22(1)(a). She could only be a looked after child by virtue of the provision of accommodation for her by LA within s 22(1)(b). In practical terms, therefore, the

question that must be answered is whether A's accommodation with GM is accommodation "provided....by the authority in the exercise of any [relevant] functions".

7. S 22(1) does not make clear whether the sections 17, 23B and 24B there referred to are sections of the Children Act 1989 or of Local Authority Social Services Act 1970. In fact, a quick glance at LASSA 1970 reveals that it has only 15 sections so it becomes obvious that it is the Children Act 1989 to which reference is being made. S 17 imposes a general duty on every local authority to safeguard and promote the welfare of children within their area who are in need. S 17(6) provides that the services provided by a local authority in the exercise of functions conferred on them under the section may include providing accommodation. S 23B relates to 16 and 17 year olds and is not relevant here. S 24B relates to people who are at least 16 years old so is also not relevant.
8. There are various provisions of the Children Act 1989 apart from s 17(6) which deal with the provision of accommodation by a local authority. Although this is not the first time I have had to consider this aspect of the Act, I continue to have difficulty in understanding how the various provisions fit together, how it was envisaged that the scheme would work in practice and how it was thought that it would enable local authorities and others to ascertain, relatively simply, whether a child is being looked after or not.
9. Whilst the provision of accommodation under s 17(6) does not make the child a looked after child, because s 17 is excepted from s 22(1)(b), s 20 and 23 relate to the provision of accommodation in the context of functions which *are* relevant social services functions when determining whether a child is looked after.
10. S 20 sets out the duty/power of a local authority to provide accommodation for certain children.
11. S 20(4) is merely permissive and can relate to any child within the local authority's area. It provides:

"A local authority may provide accommodation for any child within their area (even though a person who has parental responsibility for him is able to provide him with accommodation) if they consider that to do so would safeguard or promote the child's welfare."
12. S 20(1) relates to particular children in need and is mandatory. It provides:

"Every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation as a result of –

  - (a) there being no person who has parental responsibility for him;
  - (b) his being lost or having been abandoned; or

- (c) the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care.”

13. S 23 also deals with the provision of accommodation for children by a local authority. It reads:

**“23 Provision of accommodation and maintenance by local authority for children whom they are looking after**

s 23(1) It shall be the duty of any local authority looking after a child –

- (a) when he is in their care, to provide accommodation for him; and
- (b) to maintain him in other respects apart from providing accommodation for him.

(2) A local authority shall provide accommodation and maintenance for any child whom they are looking after by –

(a) placing him (subject to subsection (5) and any regulations made by the appropriate national authority) with –

- (i) a family
- (ii) a relative of his; or
- (iii) any other suitable person,

on such terms as to payment by the authority and otherwise as the authority may determine (subject to section 49 of the Children Act 2004);

(aa) [use of children’s home]

(b) – (e) [repealed]

(f) making such other arrangements as –

- (i) seem appropriate to them; and
- (ii) comply with any regulations made by the appropriate national authority.

(2A) [use of children’s home]

(3) Any person with whom a child has been placed under subsection (2)(a) is referred to in this Act as a local authority foster parent unless he falls within subsection (4).

(4) A person falls within this subsection if he is –

- (a) a parent of the child;
- (b) a person who is not a parent of the child but who has parental responsibility for him; or
- (c) where the child is in care and there was a residence order in force with respect to him immediately before the care order was made, a person in whose favour the residence order was made.

(5) Where a child is in the care of a local authority, the authority may only allow him to live with a person who falls within subsection (4) in accordance with regulations made by the appropriate national authority.

(5A) For the purpose of subsection (5) a child shall be regarded as living with a person if he stays with that person for a continuous period of more than 24 hours.

(6) Subject to any regulations made by the appropriate national authority for the purposes of this subsection, any local authority looking after a child shall make arrangements to enable him to live with –

- (a) a person falling within subsection (4); or
- (b) a relative, friend or other person connected with him,

unless that would not be reasonably practicable or consistent with his welfare.

(7) Where a local authority provide accommodation for a child whom they are looking after, they shall, subject to the provisions of this Part and so far as is reasonably practicable and consistent with his welfare, secure that –

- (a) the accommodation is near his home; and
- (b) where the authority are also providing accommodation for a sibling of his, they are accommodated together.

(8) [disabled children]

(9) Part II of Schedule 2 shall have effect for the purposes of making further provision as to children looked after by local authorities and in particular as to the regulations that may be made under subsections (2)(a) and (f) and (5).

(10) [definitions relating to children's homes]"

14. As A is not in the care of LA, there is no question of accommodation being provided for A under s 23(1). It is the remaining subsections of s 23 that are material to the argument in this case.
15. The starting point for the argument on behalf of A is that, as (inter alia) R (on the application of M) v London Borough of Hammersmith and Fulham [2008] UKHL 13 (paragraph 42) establishes, the way in which a local authority choose to label their actions cannot dictate the legal consequences of them. Accordingly, the fact that LA

proceeded on the basis that they were acting under s 17 will not avail them if the circumstances are such that they should have taken action under s 20.

16. Counsel for A then advances the following three uncontentious propositions:
- a) A was a child in need, within the meaning of s 20(1) in December 2004.
  - b) Her parents were prevented, at that time, from providing her with suitable accommodation and care.
  - c) As A was in need and her parents unable to provide her with accommodation, there was potential for a duty to provide accommodation to arise under s 20(1).

17. These propositions are founded on undisputed facts about A's circumstances in December 2004. The core assessment, which was commenced in November 2004 and completed early in 2005, says, amongst other things:

“In conclusion [A's] parents are clearly unable to care for her at this point in time. A thorough assessment of their ability and circumstances would need to be undertaken by the local authority before they are able to do so.” [B32]

It is clear that had GM not been available to look after A, A would have had to go into local authority foster care. Writing some time after A went to stay with GM, and at a time when GM was finding things difficult and did not think she would be able to care for A in the longer term, the maker of the core assessment said:

“Given that no members of the family have come forward and that [GM] is unable to continue to provide long term care for [A], I recommend that a foster placement be identified for A....” [B32]

18. Mr Roche for A then invites me to look at the factual situation and to ask myself whether LA did in fact provide accommodation for A or whether this was a private arrangement within the family. This, he says, is established, by London Borough of Southwark v D [2007] EWCA Civ 182, to be the correct approach.
19. In the Southwark case, as in this, the child's parent was prevented from providing accommodation for her and she went to live with someone else, in that case a woman (ED) who had had a relationship with the child's father. The father agreed to the child going to stay with ED but did not have any contact with ED himself to arrange things. It was the social worker who contacted ED to ask whether she would care for the child, which she agreed to do. Southwark, represented by Mr O'Brien as are LA in this case, argued that they were never under a duty to provide accommodation for the child under s 20(1) because, although that duty was on the verge of arising, it never actually materialised because ED was willing to look after the child and there was, instead, a private arrangement for ED to provide accommodation. Putting it in the words of s 20(1), the duty to provide accommodation under that subsection never arose because, as ED was available, the child never “appear[ed] to [Southwark] to

require accommodation”. Alternatively, Southwark argued that if the duty had materialised, it had been discharged by arrangements being made pursuant to s 23(6) Children Act for the child to live with ED.

20. Smith LJ, giving the judgment of the court, said:

“[49] We are prepared to accept that, in some circumstances, a private fostering arrangement might become available in such a way as to permit a local authority, which is on the verge of having to provide accommodation for a child, to ‘side-step’ that duty by helping to make a private fostering arrangement. However, it will be a question of fact as to whether that happens in any particular case. Usually, a private fostering arrangement will come about as the result of discussions between the proposed foster parent and either the child’s parent(s) or a person with parental responsibility. But we accept that there might be occasions when a private arrangement is made without such direct contact. We accept that there might be cases in which the local authority plays a part in bringing about such an arrangement. However, where a local authority takes a major role in making arrangements for a child to be fostered, it is more likely to be concluded that, in doing so, it is exercising its powers and duties as a public authority pursuant to ss 20 and 23. If a local authority wishes to play some role in making a private arrangement, it must make the nature of the arrangement plain to those involved. If the local authority is facilitating a private arrangement, it must make it plain to the proposed foster parent that she or he must look to the parents or person with parental responsibility for financial support. The local authority must explain that any financial assistance from public funds would be entirely a matter for the discretion of the local authority for the area in which the foster parent is living. Only on receipt of such information could the foster parent give informed consent to acceptance of the child under a private fostering agreement. If such matters are left unclear, there is a danger that the foster parent (and subsequently the court) will conclude that the local authority was acting under its statutory powers and duties and that the arrangement was not a private one at all.”

21. Analysing the facts of that case in order to determine whether a s 20(1) duty arose, Smith LJ decided that it did, saying,

“[50] In the present case, the local authority took a central role in making the arrangements for S to live with ED. It directed the school that the father must not be allowed to take S away. It arranged a meeting attended by all the relevant parties. The father was told that he must have no contact with S. Those factors are far more consistent with the exercise of statutory powers by Southwark than the facilitating of a private arrangement. The father consented to the proposed arrangement with ED. S was consulted as to her wishes. Mr Dallas contacted ED to ask her if she would take S in. Mr Dallas delivered S to ED’s home and

checked that the arrangements were satisfactory. Those factors were equally consistent with an exercise of statutory powers as with the making of a private arrangement. However, there was no contact between ED and either parent. Mr Dallas said nothing to ED, either on the telephone or the following day at his office, about the arrangement being a private one, in which she would have to look to the parents for financial support or to Lambeth for s 17 discretionary assistance. Far from it, he gave her to understand that Southwark would arrange financial support. In our judgment, the judge was quite right to conclude that this was not a private fostering arrangement. Indeed, it is hard to see how he could have come to any other conclusion.

[51] We conclude, therefore, that by the afternoon of 20 January 2004, Southwark was under a s 20(1) duty to provide accommodation for S. Mr Dallas acted thereafter in fulfilment of that duty.”

22. The court decided that s 23 presented two potential ways in which the local authority could fulfil that s 20(1) duty. Smith LJ said,

“Either it can provide it itself by making a s 23(2) placement or it can make arrangements for the child to live with a relative, friend or connection, pursuant to s 23(6)..... It would have been open to Southwark to comply with its duty by placing S with ED thereby providing accommodation at its expense under s 23(2). Alternatively, it could have discharged its s 20(1) duty by making arrangements for S to live with ED at her expense.”

23. The Court of Appeal determined that there was a placement under s 23(2). Smith LJ said,

“Mr Dallas [the social worker] asked ED whether she was willing to take S in. Far from explaining to her that what he had in mind was that she should make herself completely responsible for S’s financial support, he told her that financial arrangements would be made. He implied that ‘someone from the office’ would make them. ED’s evidence, accepted by the judge, was that she thought that Social Services in the person of Mr Dallas were asking her to look after S and she was willing to cooperate with them. We accept that her understanding of the position is not conclusive. However, it seems to us to have been a wholly reasonable one. No reasonable bystander listening in to her two conversations with Mr Dallas (one on the telephone and one in his office) would have thought that Southwark was shedding its legal responsibility to provide accommodation for S and that ED was taking it on. We said, in respect of the situation where a local authority was facilitating a private fostering arrangement, that the local authority ought to ensure that the parties understood what they were agreeing to. It seems to us that a full explanation and a proper understanding is even more imperative where the local authority is seeking to discharge its obligations by arranging that someone else will shoulder them. Here, as Mr O’Brien accepted, the nature of the arrangement was left uncertain and,

in our view, the only inference that can reasonably be drawn is that Southwark was asking ED to accommodate S on their behalf and at their expense. The fact that Southwark did not comply with the regulatory regime is a pointer towards the opposite conclusion but the remaining facts and circumstances all point to this being an exercise of Southwark's statutory duty to provide accommodation for S. Whether what happened was a placement with 'any other suitable person' pursuant to s 23(2)(a)(iii) or whether it was 'such other arrangement as seemed appropriate' to the local authority pursuant to s 23(2)(f), we cannot say. But we are satisfied that it was not a s 23(6) arrangement. "

24. Measuring the facts in this case against the same sort of benchmarks as were used in the Southwark case, Mr Roche submits that LA took a central role in coordinating arrangements for A's residence with GM, including regulating the terms on which she stayed there, and they never made it clear to GM that this was a private arrangement and she should not look to them for support. LA's duty to provide accommodation for A therefore arose, not having been deflected by GM's preparedness to look after her. When LA asked GM to accommodate A, it was a request to provide her with accommodation on their behalf. This was not an arrangement under s 23(6) of the 1989 Act but under s 23(2) and A has therefore always been a looked after child.
25. Some of Mr O'Brien's submissions for LA in this case are very similar to those he made in the Southwark case. He argues that the factual situation was such that LA never had a duty under s 20(1) to accommodate A because GM's availability headed that off. LA fulfilled its duty to safeguard and promote A's welfare by investigating the situation and securing an agreement within the family as to how A would be cared for. He points to a number of factual distinctions between the Southwark case and this one, to which I shall come when I look in more detail at the facts of the present case. If his submission about s 20 is wrong and a duty did arise, Mr O'Brien then submits that LA discharged it immediately under s 23(6) and not s 23(2). He relies upon Re H (Care Order: Appropriate Local Authority) [2003] EWCA Civ 1629 to establish that a child whom the local authority has enabled to live with a relative under s 23(6) is not being provided with accommodation by the local authority and is not therefore a looked after child. It follows, in his submission, that A is not a looked after child.
26. Mr O'Brien also advanced some more radical arguments, however, submitting that the Southwark case cannot be applied to a situation where the child goes to live with a relative as opposed to a friend or ex-partner such as ED and that children who are not in the care of the local authority and who go to live with relatives always do so under s 23(6) and never under s 23(2).
27. He submits that his analysis is in line both with the basic legal framework of the 1989 Act and with the way in which one would intuitively view the situation where a child is living with a grandparent with the agreement of the parents and without a care order.
28. I said earlier that this is not the first time that I have had to consider the provisions of the 1989 Act which have been debated in this case. I did so also in GC v LD & Others [2009] EWHC 1942 (Fam). In that case, I explained why it was that I was not sure

that I could agree with the way in which the existing authorities had approached s 23 Children Act 1989. I acknowledged (see paragraph 37 of that judgment) that I was only fumbling towards an understanding of the provisions of s 23 and made clear the diffidence with which I expressed a view. The reported cases proceed upon the basis that s 23(2) and s 23(6) contain two distinct routes by which a local authority may fulfil their duty in relation to accommodation for a child and that these two routes have different consequences so that if the local authority place a child under s 23(2), the child remains looked after, whereas if the local authority make arrangements about accommodation under s 23(6), he does not. My difficulty is that I wonder whether there is not, in fact, one overarching provision – s 23(2) – together with a number of subsidiary provisions designed to define how the local authority is to go about fulfilling that s 23(2) duty. I continue to harbour the doubts that I expressed in GC v LD and new questions have occurred to me, not least in relation to the implications of s 23(1), which only establishes a duty on a local authority to provide accommodation in relation to a child “when he is in their care”. However, I do not think it necessary to go into the arguments on the subject further here, firstly (and obviously) because I am bound by the decided cases in any event, and secondly because, as in GC v LD, I do not think there is any difference in the outcome on the facts of this case, whichever analysis of s 23 one adopts. I will explain briefly why I say this although, just in case there should be any doubt, I make clear that the approach I have adopted is that which has the seal of approval of other judges and the Court of Appeal.

29. The existing authorities require a two stage analysis to determine whether a child such as A is looked after or not. The first port of call is s 20(1); did it appear to the local authority that a child in need required accommodation as a result of one of the prescribed circumstances? If the answer to that question is in the affirmative and a s 20(1) duty to provide accommodation arose, the second question is how one should characterise what the local authority in fact did to comply with that duty; did they make arrangements for the child under s 23(6) rather than under s 23(2)?
30. In contrast, if s 23 is, in fact, a unified scheme, only one stage would be involved. If the s 20(1) question is determined in the affirmative, the local authority would be providing accommodation for the child no matter whether they managed to make arrangements for him to live with someone who fell within s 23(6) or not.
31. In line with the authorities, counsel have both approached the matter on the basis that there are two separate questions to be answered but, as they addressed these questions, it was difficult to discern much, if any difference, between the factual considerations upon which reliance was placed at each stage. I think the furthest that it went was Mr Roche’s submission, in his Skeleton Argument, that:

“It is clear from the Southwark judgment that if the local authority wishes to take the Section 23(6) route, there is an *even greater obligation* on the local authority to ensure that the carer understands the position than under section 20” [my italics]

It is this global approach that each side took to the facts that leads me to the conclusion that my concerns about the interpretation of s 23 are of no real significance in this case.

32. I turn now to the most radical of Mr O'Brien's submissions, that is that the Southwark case does not apply where a child goes to live with a relative and that such placements are always under s 23(6) unless the child is in the care of the local authority under a care or interim care order. He advanced this theme with a number of variations which developed during the course of the hearing and so were new to Mr Roche. As a consequence, I did not feel that the debate was as full, on either side, as I would have wished, particularly as the interlocking provisions of the 1989 Act and the associated regulations are potentially full of pitfalls when it comes to interpretation.
33. Mr O'Brien argued that the Southwark case is confined, as a matter of law, to situations where there is a "private fostering arrangement" within the meaning of the 1989 Act, whereas the arrangement for A to live with GM is not a private fostering arrangement. Even if this is not the position as a matter of law, he argues that there is a material difference between asking an unrelated person (such as ED in the Southwark case) to look after a child and arranging for a relative to do so, and Southwark should not therefore be applied where the carer is a relative.
34. He spoke of a "quasi-presumption" that a child who is not the subject of a care order is not looked after when living with a relative, later developing this into the submission that such arrangements can only be made under s 23(6) and not under s 23(2).
35. Mr Roche, doing the best he could to respond when surprised during the hearing by these submissions, initially thought that the Southwark decision had been applied to a relative in Collins v Knowsley [2008] EWHC 2551 (Admin) [2009] 1 FLR 493. In fact, that case turns out to have involved the placement of a girl with her boyfriend's mother and is a straightforward example of the Southwark approach; Mr Supperstone QC (sitting as a Deputy High Court Judge) made no comment in his judgment as to whether Southwark/s 23(2) applied to relatives. I allowed counsel some further time after the end of the hearing to produce any authorities which *were* on the point but, despite their best efforts, neither could find any case dealing either with the question of the applicability of s 23(2) to relatives or with the question of whether the Southwark approach applies to them. I have looked myself at a further decision, R (on the application of A) v Coventry City Council [2009] EWHC 34 (Admin) (determined by Antony Edwards-Stuart QC, as he then was), but found this too to be concerned with the placement of a child with someone who was not a relative. The Coventry case places some emphasis on R (G) v London Borough of Southwark [2008] EWCA Civ 877 (subsequently overturned on appeal by the House of Lords, reported at [2009] UKHL 26) but neither counsel in the instant case has argued that that authority (whether in the Court of Appeal or in the House of Lords) assists me in the matters I have to determine. The territory into which I am asked to venture is therefore apparently uncharted.
36. Mr Roche argues that a relative needs to know how he or she is placed with regard to financial and practical support just as much as an unrelated carer does, and that it is also in the interests of the child that this should be so, in order to avoid a break down of the placement because of unexpected financial burdens. Faced with full information, say that the local authority is only offering s 17 help, many relatives will step into the breach anyway, but they must be in a position to make an informed choice about that. There is no logical reason, he says, why the principles set out in Southwark should not apply to them as well as to non-relatives, and LA are only

seeking to suggest that they do not because they are unable to distinguish this case from that on the rest of the facts.

37. As to s 23(2), Mr Roche submitted that Mr O'Brien's argument stretches the language of that subsection too far. He also argued that s 23(2) has to be construed in line with the Human Rights Act and he suggested that to exclude relatives in the way LA contemplated was to introduce discrimination against kinship carers in a similar way to that condemned by Munby J, in R (L and others) Manchester City Council [2001] EWHC (Admin) 707.
38. The concept of the "privately fostered child" is central to Mr O'Brien's argument about the Southwark case.
39. A "privately fostered child" is defined in s 66 in Part IX of the 1989 Act as:
  - "a child who is under the age of sixteen and who is cared for, and provided with accommodation in their own home by, someone other than –
    - (i) a parent of his;
    - (ii) a person who is not a parent of his but who has parental responsibility for him' or
    - (iii) a relative of his"
40. Part IX goes on to set out various powers and duties of local authorities in relation to the welfare of children who are privately fostered in their area and provides for regulation of who may or may not be a private foster carer. Schedule 8 is also material.
41. Living with her grandmother, A could plainly never be a "privately fostered child". Does this render the Southwark case inapplicable as Mr O'Brien argues?
42. It is plain from the judgment of the court in Southwark that the Court of Appeal had the provisions of the 1989 Act as to private fostering in mind and that their references to a private fostering arrangement are references to that concept as defined in the Act. I do not think, however, that it necessarily follows from this that they were intent on confining the approach there set out to cases in which a private fostering arrangement was on the cards or even that it was particularly material to their analysis that the arrangement with ED, if not provided by the local authority, would have been a private fostering arrangement. There was no cause, in Southwark, for the court to consider whether or not the situation would have been different if ED had been related to the child and it is not surprising that nothing is said on the subject. One is forced to search for any implicit indication in the Smith LJ's judgment as to whether the court's scrutiny of the facts was, in essence, an exercise in distinguishing an arrangement made by a local authority from an arrangement made privately (no matter whether within the confines of s 66 or not) in which the local authority played, at most, a minor role, or whether the fact that the arrangement with ED had the potential to be a private fostering arrangement within s 66 had some fundamental importance.

43. It is, of course, difficult to be certain in view of the fact that the point never needed to be considered in Southwark, but the impression I gained from the judgment was that what was of the essence was the difference between an arrangement for which the local authority was responsible on the one hand and a private arrangement of any kind on the other. Paragraph 49 of the judgment, which I have cited above, is an example of the sort of language which leads me to this view. If I am right in this thinking, it ought not to make any difference to the applicability of the principles set out by the Court of Appeal whether the private arrangement is within s 66 or, as in this case, not.
44. That is not to say that I consider the fact that a potential carer is a relative of the child is irrelevant when considering how to categorise the provision of accommodation for the child. Cases such as Southwark illustrate how fact specific the determination of that issue is and it is easy to see that the fact that someone is related to the child may make a significant difference to their attitude and that of the local authority. One would not be surprised to find, for example, that a relative is more ready to take on a child without local authority support than a friend or other third party would be and one may also find, I suppose, that a local authority could be expected to be more disposed to offering financial assistance where the proposed carer is not a relative than where they are. There is a difference, however, between factoring the family relationship in when evaluating the facts and distinguishing between relatives and other carers on grounds of principle. I am against Mr O'Brien's submission that Southwark simply does not apply where the carer is a relative; in my view, it gives valuable guidance as to the sorts of matters that may be relevant in those cases in determining the nature of the placement of a child just as it does in cases involving unrelated carers. I am, however, entirely persuaded that the fact and nature of the relationship is relevant when evaluating the situation in accordance with that guidance and there may be some cases in which the fact that the person with whom the child is to live is a relative makes all the difference to the outcome.
45. Seeking to cross-check the conclusion I had reached from my reading of Southwark itself, and in preparation for my consideration of Mr O'Brien's argument in relation to s 23, I reminded myself of who the 1989 Act classes as a "relative" i.e. (s 105) a grandparent, brother, sister, uncle or aunt (whether by the full blood or half blood or by marriage or civil partnership) or step-parent. It is by no means certain that any or all of these relatives will be closer or more committed to the child than, say, a friend, a godparent, or a former live-in partner of one of the child's parents. Furthermore, the relative's financial and other circumstances will not necessarily make it any easier for him or her to take on the child without assistance from the local authority than it would be for a non-relative. But Mr O'Brien's argument would mean that, unless the child placed with a relative is actually in care, he or she could never be classed as looked after and could never benefit from the sort of local authority support that would be offered to a comparable child placed with a non-relative. As I have said, he went so far as ultimately to submit, in terms, that, in the absence of a care order, if a child is placed with a relative, it is, by virtue of the existing authorities, *always* a placement under s 23(6), no matter what the financial arrangements and no matter whether the local authority plays a central role. Quite apart from such a rigid position being potentially disadvantageous from the point of view of the child and his or her relative in terms of financial and other support (and potentially discriminating against relatives and the children for whom they care), I am forced to wonder whether local authorities would wish it to be the case? The placement of a child with a relative

under s 23(2) would be regulated because, by virtue of s 23(3), any relative who is not sufficiently closely connected to the child to fall within the group identified in s 23(4) is a local authority foster parent; in contrast, there are no regulations governing the situation of the child who is enabled to live with a relative under s 23(6). Is there sufficient protection for all children placed with relatives if all such placements necessarily fall under s 23(6) if the child is not in care? Mr O'Brien's argument is that if the situation is grave enough for a care order in conjunction with the placement of the child within the family, then that justifies the provision of financial support, assistance with leaving care and so on, whereas if a care order is not required, support such as this is not required either. This all or nothing approach seems to me to ignore the enormous variation that there is in the circumstances of children and their parents and carers. Not only must the s 31 threshold be satisfied before the court can consider making a care order, any court contemplating an order must also have regard to the no order principle in s 1(5) of the 1989 Act. I am not persuaded that children will be properly protected if local authorities are obliged always to overcome these hurdles (and families to go through care proceedings) before the arrangements for a child to live with a relative are subject to regulation, nor am I persuaded that that will ensure sufficient support for all relatives who are caring for such children.

46. Neither the wording of s 20 nor that of s 23 contains anything actively to support Mr O'Brien's argument. Indeed, Mr Roche submits that not only is there no support for it, it stretches the language of s 23(2) beyond the bounds of proper statutory construction. I agree that the wording of the subsection presents Mr O'Brien with considerable difficulties. In contrast to s 23(1) which picks out, in s 23(1)(a), a child whom the local authority is looking after "when he is in their care", s 23(2) does not differentiate in any way between children in the care of the local authority and other looked after children, although it could have done. As drafted, it simply deals with "any child whom they are looking after" and then sets out a list of the possible placements of such a child which includes, in s 23(2)(a), without any qualification at all, a placement with a relative of the child's. S 23(3) makes provision for a sub-group of the people listed in s 23(2)(a) to be local authority foster parents. Those who are not to be treated in that way are listed in s 23(4). They do not include relatives accommodating children who are looked after but not in local authority care. This failure of the draftsman explicitly to exclude children living with relatives but not in the local authority's care from the ambit of s 23(2) or the provisions ancillary to it, when it would have been so simple to do so, leads me to suppose that it was not intended to exclude such children.
47. Does Re H (supra) force me to an alternative conclusion as Mr O'Brien suggests? The central issue in that case was which local authority was the designated local authority in relation to a child. The question of whether a local authority was providing accommodation for the child arose in connection with what is sometimes called the disregard provision in s 105(6) of the 1989 Act. The return of the child to his grandparents had been ordered by Wall J and the Court of Appeal, drawing upon an earlier decision of Wall J in a different case concerned with the placement of a child with its mother (Re C (Care Order: Appropriate Local Authority) [1997] 1 FLR 544), concluded that that placement took place under s 23(6). Thorpe LJ said,

"[17] The effect of s 23(6) is to cast upon the local authority a duty to make arrangements to enable a looked-after child to live with a person or family

to whom he is closely related or with whom he is closely connected. Once that is achieved, the looked-after child ceases to be provided with accommodation within the meaning of s 105(6) and begins to live with the relative or family arranged by the local authority pursuant to its duty under s 23(6).”

48. It will be noted that Thorpe LJ’s decision is cast in terms which include not only related carers but also other carers, albeit people with whom the child is closely connected. If its effect is to dictate that all placements with anyone in a category listed in s 23(6) (i.e. very closely connected people as listed in s 23(4), relatives, friends and other persons connected with the child) are made under s 23(6), then it is difficult to see how the Southwark case (and others like it) could possibly be decided as they were. There does not seem to have been any particular argument in Re H about this aspect of s 23 and I doubt very much that it was intended that it should be read in this way, as opposed to meaning that where a placement *did* take place under s 23(6), the child was not provided with accommodation by the local authority. It follows that I do not consider that Re H in any way forces me to reach a different conclusion from that which other considerations suggest to me is the proper one.
49. This analysis leads me to the view that local authorities who arrange for children to live with relatives may do so *either* under s 23(2) *or* s 23(6). Which route they have taken depends upon the facts of the individual case.

#### The application of the law to the facts

50. I turn therefore to analyse the facts in accordance with the guidance provided by the Southwark case, keeping firmly in mind that in contrast to the situation in that case, A’s accommodation is with a relative.
51. There was a short debate at the outset of the hearing as to whether oral evidence would be required but the parties were agreed that there was no need for this because the position was fairly clear when the statements and other documents were taken together and there was really very little dispute about what the facts are. In particular, LA do not suggest that A came to live with GM because GM was asking social services to remove her from her parents and place her with her. They concede that, as GM says, she was simply offering herself as a resource if social services thought that was necessary.
52. The bundle contained two statements from GM, a statement from Ms Frick (the social worker who supervised the allocated social worker) and a statement from Mr Brightwell who is employed by LA and who is involved in developing “local policy and practice procedures and evaluating practice standards” and was able to indicate, helpfully, the LA’s acceptance that if A is a looked after child, she would be entitled to the maintenance element of the fostering allowance, namely (for a child of A’s age) £146.23 per week, a figure with which the claimant has no quibble.
53. The local authority running records, which were produced for the hearing, were of considerable additional assistance in understanding the situation.
54. A and her mother (GM’s daughter, here referred to as M) were known to LA from the end of September 2003. M had mental health problems and had been involved in a

number of violent relationships including with A's father (F). Sometimes A was not collected from school and had to be cared for by a neighbour overnight, sometimes she was late for school and inappropriately dressed. An initial assessment by social services was completed on 26 October 2004 and recommended a core assessment. I have already referred to the core assessment, which was commenced in November 2004 and completed early in 2005. At the time that assessment began, M and F had recently split up. A was staying with F's then-partner. M told social services that she had asked F to look after A until her benefit came through because she had not received her income support and could not feed A or pay for her bus fares to school. As the passages I have quoted in the early part of this judgment from the core assessment clearly show, A's parents were unable to care for her and there seems little doubt that her experience of living with them prior to December 2004 had been harmful to her.

55. GM was born in 1946. She is now well into her 60s; in December 2004, she was 58. Early in December 2004, she was working in Sainsbury's when she received a telephone call asking if she would contact the social worker. She did so and her account, which there is no reason to doubt, is that the social worker made it clear that she needed an urgent meeting with GM. She came to meet GM at Sainsbury's during her lunch break, probably on 8 December 2004. As described by Ms Frick, GM "explained that she wanted to be considered as a carer for [A]". The meeting is not recorded in LA's running record but there is a file note of it. GM says that the social worker told her about concerns about M's care of A and she set out her own corresponding concerns. The file note records that GM said that she would want to be considered as a carer for A if A was taken away from M "because A needs love, security and stability". GM says that this was in the context of the social worker asking her in general terms whether she would be prepared to look after A. According to the file note, the social worker said she would "discuss her request to be considered as a carer for A with both M and F and had appointments to see them next week". GM says that she was not asked on this occasion whether she was prepared to take on the care of A in the near future. This assertion fits what is known otherwise about the situation at that time, given that LA were still at the stage of assessing A's parents and bearing in mind that the social worker indicated her intention to discuss the question of GM caring for A with A's parents "next week" rather than immediately.
56. GM says it was on about 15 December 2004 that the social worker rang her and asked if she would be prepared to start caring for A. She says she asked what would happen if she refused and was told that A would be put in care. She asked if she would be able to have contact with her and was told that she would have no right to have contact and it would have to be agreed with the foster parents. GM felt that she had to make an immediate decision and that if she did not offer to care for A, she risked losing her. She indicated that she was prepared to care for A. The social worker said she would bring A after school on 17 December 2004 and she did so.
57. There is little detail in Ms Frick's statement on the subject but the running records note that, on 15 December 2004, the social worker discussed with M that A should move to GM's until the core assessment was finished, but M refused and wanted the social worker to talk to A first. The next record for the same day is to the effect that the social worker visited A and spoke to her and F. A did not want to go back to live with M; F agreed to A going to live with GM. M subsequently changed her mind and,

on 17 December, she wrote a letter to social services indicating that she agreed to A moving to stay with GM. The letter says, "I have spoken to my mum who is fully prepared to look after A" and later gives an indication that M viewed this as short-term in that she says, "I'm now, only concerned for A, to be in a good family environment, then maybe after Xmas, I could move her to somewhere, where I could walk her to school" [sic]. The social worker confirmed the arrangement for A to go to GM's by telephone with M, F and GM. An agreement, written on LA's headed paper, was signed that day by all 3 relatives plus the social worker setting out that A would reside with GM until the core assessment was completed and the outcome discussed, and regulating contact which, in M's case, was to be supervised. The agreement is restrictive in content and it is clear that the driving force behind it was LA. GM was required to agree that she would adhere strictly to the contact arrangements set out and that she would contact social services if she had any concerns. A further agreement was later prepared by LA in relation to contact over Christmas.

58. GM says that she did not initiate any conversations with LA before A came to live with her; all discussions were initiated by social services. The impression given by Ms Frick's statement, in paragraph 5, that it was a telephone call from GM on 4 December 2004 that began the process which ultimately culminated in A coming to live with her is a wrong impression and arises from the omission from the statement of the fact, clearly recorded in the running records, that GM's telephone call was in response to a message left for her by social services. There is no doubt, in the light of this, that it was social services who first approached GM about A. The records make quite clear that from this point on, the social worker was centrally involved in sorting out what arrangements should be made for A, whose situation LA had rightly recognised as damaging and untenable.
59. GM says, furthermore, that the arrangement for A to live with her resulted from her discussions with the social worker and not by virtue of any discussions with M. The only indication to the contrary is the reference in M's letter of 17 December to having spoken with her mother. By this point, however, M had already been approached by the social worker to agree to A going to live with GM. She had refused this option on 15 December. Given that that was her position on 15 December and given the context described in the letter, it is obvious that any conversation M had with GM could only have taken place some time after LA opened the discussions with GM that led ultimately to A going to live with her. It would be wrong, therefore, to class any such discussion between M and GM (if indeed it took place) as in any way the origin of the arrangement.
60. GM says that she was left in no doubt in December 2004 that LA were in control of the placement. The degree and nature of LA's involvement in the situation, as revealed by the contemporaneous documentation, is consistent with this. GM says that nothing was said to her during any of her conversations that month to suggest that it was a private arrangement and it is not asserted on behalf of LA that either the nature of the placement or the question of financial support were ever addressed explicitly with her by social services. GM says that if it had been suggested to her that it was a private arrangement, she would have asked how she was to keep A. She knew neither of A's parents were in a position to offer assistance and she expected financial and practical support from LA.

61. By January 2005, GM was indicating that she would not be able to look after A on a long term basis. There seem to have been a number of factors contributing to this including work pressures, her age, and A's behaviour. At an early stage, the social worker offered a package of practical assistance but GM did not feel it sufficient to address the problems she had, even though it is recorded that she was aware that it could well mean foster care for A if she was unable to care for her. LA were exploring the options for A, including the possibility that she might live with F, but he was facing criminal proceedings and ultimately went to prison. They plainly saw foster care as a real possibility and it was the recommendation of the core assessment that a foster placement should be identified.
62. The social worker's significant involvement in day to day arrangements for A appears clearly from the records. The social worker had regular contacts with A, her school, and members of the family including GM. For example, at the end of January she visited a friend of GM's who had agreed to look after A after school, obviously to confirm she was suitable. She agreed to discuss a payment arrangement for the friend with the Team Leader. She checked that the taxi drivers who would be part of the arrangement were police checked. GM meanwhile continued to say that she would not be able to keep A in the long term, contemplating that A would go into foster care or, at a time when M was rather better, be cared for by M. The record for 11 March 2005 notes a conversation between the social worker and GM, in which the social worker indicated that she was most unhappy with GM's plan to leave A with M over the weekend and that if GM did intend this, she would be consulting her "Team Leader regarding us taking legal advice about measures to prevent this".
63. One of the things GM said to the social worker on 11 March was that she was struggling financially. This seems to be the first financial discussion going beyond the general expression of financial anxiety on the part of GM. By May 2005, LA had arranged a kinship payment for GM of approximately £63 per week but GM had been told that this was significantly less than she ought to be receiving, as she told the social worker. LA were still considerably involved in A's life at this point. The records show that they were exercised by the involvement of another family friend (GH), with whom A had been staying overnight and who might have been able to offer A a home, but who had a past conviction for murder. They continued to have great concerns about A returning to live with M and it is recorded that the social worker advised M that if she made precipitate attempt to have A back on an unplanned basis, she would discuss with her managers taking legal action to prevent this. The temporary and precarious nature of the placement with GM remains obvious from the records. For example, one of the records for 12 May 2005 says "In the short term therefore I am to contact GM to see if she can hold on to A and to pursue our application re GH and as far as seeing if Social Services will agree to psychological assessment and a kinship assessment on GH both of which she has agreed to".
64. In mid May 2005, M came to stay with GM and A and started to take A to school and collect her. Social services' records about this issue show that the social worker was concerned about this arrangement and became involved in resolving the practicalities to LA's satisfaction. The social worker continued to be much involved with the family through June. On 12 July 2005, there was a family group conference. The records for the second half of the year suggest that things began to settle down for the household,

which seems at that point to have included A, GM and M, although M later moved out.

65. Eventually, the social worker's role in the family effectively ceased. The records show no contact with GM after September 2006 which accords with what Ms Frick sets out in her statement. A has, of course, continued to live with GM throughout and there is every indication that she will continue to do so.
66. LA did not comply with any of the formalities that should have been complied with if A was a looked after child. The only meetings that there were, apart from the family group conference, were 3 Child in Need meetings on 21 April 2005, 6 March 2006, and 6 November 2006. The minutes for the first of these reflect GM's feeling that she had not got the physical or emotional energy to keep up with A and would not be able to look after her in future. The second meeting took place at a time when GM, M and A were all living under the same roof and the minutes record that GM felt that "it was time for M and A to move on". The minutes of the third meeting at last seem to record a rather more stable situation with A living with GM and M living in a hostel awaiting re-housing.
67. Mr Roche submits that, notwithstanding that LA treated the arrangements as arising under s 17, there was a pattern of social services' involvement which was not consistent with a private family arrangement or the simple provision of assistance under s 17. He submits that at the outset, LA took a major role in making the arrangements. The important discussions were between the social worker and each of the adults involved rather than between the adults themselves. Subsequently, LA monitored and regulated matters in a way which was more consistent with the protection of a looked after child. He submits that the regime in this case entails local authority involvement going beyond that which there was in the Southwark case. In this case, as in Southwark, no one told GM that the arrangement was a private one and that she could not rely on any help from social services. In all these circumstances, he submits that not only was LA's duty under s 20(1) on the verge of arising, it did arise and they did not succeed in side-stepping it by helping to make a private fostering arrangement.
68. He then submits that, the s 20 duty having arisen, if LA intended to discharge it by arrangements under s 23(6), there was an even higher onus on them to make clear that the arrangement with GM was to be a private one. As Smith LJ said in paragraph 49 of Southwark, "If the local authority is facilitating a private arrangement, it must make plain to the proposed foster parent that she or he must look to the parents or person with parental responsibility for financial support. The local authority must explain that any financial assistance from public funds would be entirely a matter for the discretion of the local authority for the area in which the foster parent is living. Only on receipt of such information could the foster parent give informed consent to acceptance of the child under a private fostering arrangement." On the Claimant's case, this onus was not discharged by LA.
69. Mr O'Brien submits that the arrangements were a plan made by the family in which LA assisted and supported, financially and in a range of other ways. He says that GM's claims that LA exercised control are belied by the contemporaneous documentation, suggesting that all contact was arranged by the family without the need for prior authority from social services and that M was a primary carer for 15

months in GM's home. He relies heavily on the fact that GM is related to A. He would argue that there is not the same need to discuss with a relative who is working, as GM was, how the child will be paid for as there is with a non-relative. It is his submission that GM had effectively only two choices in deciding whether to care for A, either she did so under s 23(6) without LA support or she did not do so at all.

70. Mr O'Brien invites attention particularly to Re H (supra) and Re C , in both of which cases the arrangement was held to have been under s 23(6) and which he says are indistinguishable factually from this case. I cannot accept that. I have referred to Re H above; the child there went to live with relatives as a result of a court decision. In Re C, the relative was the mother of the child and s 23 treats parents differently.
71. The Southwark decision, on the other hand, Mr O'Brien seeks to distinguish. In his written submission, he picked out a number of respects in which he said the two cases differed factually. As I understand it, these submissions were written before the running records became available. I suspect that Mr O'Brien would have modified (or perhaps even abandoned) some of them had he had the advantage of that material when he drafted the submissions as he would have recognised that, as is apparent from the short factual resume I have included above, some of his assertions were undermined by those records. He lists 6 points of difference which are:
- i) in Southwark, the local authority's involvement began with them preventing the father from taking his child home from school, whereas the situation here was less acute; it was deteriorating and proceedings were possible if no family solution was found;
  - ii) there, there was no prior consent by the mother whereas here the arrangement was requested by M;
  - iii) GM made clear in advance that she was there to avoid her granddaughter going into care, and confirmed that when A was brought to live with her, whereas ED was only asked after the local authority's s 20 obligation had arisen;
  - iv) LA did discuss finances with GM and identified how it would provide help and held reviews when finances could be discussed;
  - v) LA helped GM to obtain child benefit through establishing her entitlement – the fact that she did not receive it was not because she was not entitled because she was a foster carer;
  - vi) A was never treated as a looked after child and in particular the school never fulfilled the obligations that would have arisen if she had been.
72. I am satisfied that Mr Roche's analysis of the facts is the correct one rather than Mr O'Brien's. It was LA who initially approached GM with a view to taking A rather than the other way round. M was opposed to that course up to the last minute. By the time LA began to explore it, although LA had not removed A from her parents' care, the situation was quickly growing acute and, from that time on for some time into the future, the spectre of care proceedings was ever present, as the social worker remarked at intervals. GM's position in the early stages was one of willingness to act

as a safety net if A would otherwise have to go into care. There was little if any discussion between GM and M on the subject and that only after LA were well down the road towards a placement with GM. It was inevitably going to be a challenge for GM to provide a home for A for a number of reasons and so it proved as time passed. For several months, GM was of the view that she would not be able to care for A on anything other than a short term basis. In the initial months and, indeed, for a considerable time thereafter, the records reveal the depth of LA's involvement in day to day arrangements for A and the degree of their control over matters such as with whom she spent time and contact with her parents.

73. It seems to me that the pattern of LA's involvement over time is relevant because it assists in characterising the true nature of their actions, but that a particularly crucial period, which needs to be closely evaluated, is the time when A actually came to live with GM including the time immediately before and after that. It is material that, although social services sought to regulate the living arrangements that should be in place for A, notably in the agreement of 17 December 2004, no one from social services ever set out for GM, at that time, the ambit of any financial help that might be available for her and certainly no one told her that she would, essentially, be on her own with regard to financing A's stay except in so far as discretionary payments might be made under s 17. I do not accept Mr O'Brien's argument that it is unnecessary to do this where the prospective carer is a relative. As I have already said, the fact of the relationship is relevant in evaluating what happened and I have taken it into account, but GM's circumstances were not such that she would have been prepared or able to take A on whatever assistance social services would or would not be offering. Her fairly rapid decision that she could not in fact care for A, which she had reached by the beginning of January 2005, demonstrates this quite clearly. Smith LJ said in Southwark that the local authority must ensure that the parties understand what it is that they are agreeing to. Just as in that case, the nature of the arrangement here was left uncertain and GM was in no position to give informed consent to taking A on under the umbrella of, at most, s 17.
74. I am forced to the conclusion, from my examination of all the facts, that the presence of GM on the scene did not enable LA to side-step their s 20(1) duty. That duty came into existence and they then discharged it by a placement under s 23(2) rather than s 23(6). As in Southwark, the fact that LA did not comply with the regulatory regime is a pointer to the opposite conclusion but it is a rather self-serving pointer. LA did not comply because they had decided that A was not a looked after child, but their categorisation was not in any way determinative

#### Alternative remedy

75. LA argue that judicial review is not an appropriate remedy in this case because the Claimant should have had recourse to the local authority complaints procedure. In this case, this argument does not get off the starting blocks. Its foundation, as it was put in Mr O'Brien's written submissions, was that the decision about A's status is fact specific. At that time, LA had not advanced the argument that they advanced at the hearing that as a matter of principle or quasi-presumption, placements with relatives necessarily enable a local authority to side-step its s 20(1) duty or, if the duty arises, can only be placements under s 23(6). That argument is plainly the stuff of judicial review and not something that could be addressed through the complaints procedure.

In the circumstances, I need not burden this judgment with any more explanation for rejecting LA's alternative remedy submission.

Delay

76. The Claimant is, however, in more difficulty on the question of delay, given that the circumstances originally arose no later than 2005 and there have undoubtedly been long unexplained gaps in her attempts to obtain relief since that time.
77. There should be no question, in my judgment, of relief being refused in its entirety by virtue of delay. The decision that A is not a looked after child is a continuing decision and will have a material effect on A for the rest of her minority. The Claimant relies upon reasoning set out in R v Rochdale MBC ex p Schemet [1994] ELR 89 where Roch J applied the reasoning of Nicholls LJ (as he then was) in an earlier unreported case to the effect that if a policy is unlawful, the mere fact that it has been in place for a significant period is not sufficient reason for the court to countenance its continuing implementation. Mr O'Brien points out that in the Rochdale case, the delay was a matter of months only whereas here it is considerably more. However, that does not detract from the fundamental point which is, in my view, that past delay may well not be a sufficient reason for refusing to restrain further implementation of an unlawful policy or, in this case, decision about status.
78. A judicial review claim is required by the CPR to be made promptly and in any event not later than 3 months after the grounds to make the claim first arose. A was placed with GM in December 2004, differences of opinion over financing and A's status were apparent in 2005, but proceedings were not issued until 2 June 2009. A's solicitors first wrote to social services on 27 June 2005 to the effect that they considered A to be a looked after child and seeking appropriate payments. Some information was supplied by LA in response, the last bit being supplied on 12 October 2005. The next letter from the solicitors to LA was not until 29 August 2006. This set out GM's case, indicating that it was to be treated as a protocol letter for the purposes of judicial review. It seems that it was then clear that D v Southwark was in the pipeline. By December 2006, that decision was under appeal and the parties agreed to await the outcome of that. The delay occasioned by that can in no way be laid at the door of GM's solicitors but later delay can. They wrote again to LA on 31 May 2007 persisting in their claim and relying on the decision of the Court of Appeal which was by then available. LA obtained agreement for them to have some time to reply. When it came, their initial reply was simply that they would need more time. There was then a very long gap during which nothing happened between the lawyers. LA do not appear to have replied substantively as they should have done. But equally, GM's solicitors did nothing at all to move matters on. The next contact from them to LA was over a year later on 8 August 2008, reiterating their challenge. Once more, LA replied that they needed time to reply, proposing an extension until September 2008. In fact, once again, they did not reply and, once again, GM's solicitors did nothing until eventually the proceedings were issued in June 2009.
79. When contemplating granting relief where there has been substantial delay, careful consideration must be given to the prejudice that the delay has caused to any of the parties and also, in my view, to the consequences for each of the parties of the court deciding to grant or not grant relief notwithstanding the delay.

80. The prejudice to A and GM of *not* granting relief is obvious – they would be significantly worse off and, as she reaches adulthood, A would miss out on benefits that she might otherwise derive from LA by virtue of being a looked after child.
81. As for LA, I do not consider that they have been hampered by the delay, in any way, in arguing their case; this is a matter that has depended very much upon local authority records rather than recollections and there has been little factual dispute. However, to grant relief retrospectively, going back over the entirety of the considerable period during which this claim has been in the offing, would obviously be financially prejudicial to LA because it would be likely to give rise to an immediate and sizeable liability for backdated payments to top up what GM has received to the appropriate rate for someone in her position caring for a looked after child. That liability would have to be met from the funds available to LA for the current year, without any budgetary provision having been made for it. That is not simply an accounting matter. It would affect other users of services by unexpectedly depleting the funds available.
82. Mr Roche candidly acknowledges that there is no explanation for some of the considerable delay on the Claimant's part. He conceded that his submissions had to be directed primarily to the future to ensure that A now has the benefits of being a looked after child and that the court may well think justice would be done if relief were to be backdated only to a date three months before the date of issue of the proceedings. That is what I consider would be an appropriate exercise of my discretion and I propose to grant relief on that basis.

### Conclusions

83. The Claimant is, in my judgment, entitled to a declaration that A is, and has been at all times whilst in the care of GM, a looked after child. In so far as the future is concerned, that fact alone dictates how LA must treat her in terms of financial and other resources. As far as the past is concerned, in view of the significant and unexplained delay in pursuing the issue of A's status and commencing these proceedings, I intend to limit the relief granted so that, whilst I will require LA to pay GM the appropriate weekly allowance for a looked after child, that order will be backdated only to a date 3 months prior to the issue of proceedings, that is to say to 2 March 2009.
84. If counsel can agree upon the form of the order and it meets with my approval when submitted in draft, there will be no need for any attendance when I hand down this judgment. If that is not possible, they should contact my clerk to arrange a convenient date when they can attend for the judgment to be handed down.

ooooOOOOoooo