Neutral Citation Number: [2015] EWHC 3615 (Admin)

Case No: CO/1388/2015

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/12/2015

Before :

THE HON. MR JUSTICE WILLIAM DAVIS

- -

Between:

The Queen (on the application of) Nationwide Association of Fostering Providers	**Claimant**
- v -	
(1) Bristol City Council **(2) Leeds City Council** **(3) Suffolk County Council**	**Defendants**
- v -	
Local Government Association	**Interested Party**

- -
- -

Mr Ian Wise QC and Mr S Broach (instructed by **Anthony Collins**) for the **Claimant**
Mr Peter Oldham QC (instructed by **Bristol City Council, Leeds City Council and Suffolk County Council**) for the **Defendants**
Mr James Goudie QC (instructed by **Local Government Association Legal Department)** for the **Interested Party**

Hearing dates: 3-4 November 2015

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

THE HON MR JUSTICE WILLIAM DAVIS

Mr Justice William Davis :

1. The Claimant ("NAFP") is an association established in 2008 to represent the interests of independent foster providers throughout England, Wales and Scotland. It has 78 members ranging from large charities such as Barnardos to small scale providers serving a limited geographical area. It brings this claim for judicial review against the Defendant local authorities on behalf of its members. Each of those local authorities has a duty to accommodate and maintain any child which it is looking after. In certain circumstances each local authority has a duty to place such a child in the "most appropriate placement available", the duty being imposed by Section 22C of the Children Act 1989 ("the Act"). In due course I shall consider in detail the proper construction of Section 22C of the Act in the context of the overall legislative structure with the construction of Section 22C(5) being the critical issue. In order to understand the evidence it is necessary to set out Section 22C at the outset. It reads as follows:

22C Ways in which looked after children are to be accommodated and maintained

(1) This section applies where a local authority are looking after a child

("C").

(2) The local authority must make arrangements for C to live with a person who falls within subsection (3) (but subject to subsection (4)).

(3) A person ("P") falls within this subsection if–

(a)P is a parent of C;

(b)P is not a parent of C but has parental responsibility for C; or

(c)in a case where C is in the care of the local authority and there was a residence order in force with respect to C immediately before the care order was made, P was a person in whose favour the residence order was made.

(4) Subsection (2) does not require the local authority to make arrangements of the kind mentioned in that subsection if doing so–

(a)would not be consistent with C´s welfare; or

(b)would not be reasonably practicable.

(5)If the local authority are unable to make arrangements under subsection (2), they must place C in the placement which is, in their opinion, the most appropriate placement available.

(6)In subsection (5) "placement" means–

(a)placement with an individual who is a relative, friend or other person connected with C and who is also a local authority foster parent;

(b)placement with a local authority foster parent who does not fall within paragraph (a);

(c)placement in a children´s home in respect of which a person is registered under Part 2 of the Care Standards Act 2000; or

(d)subject to section 22D, placement in accordance with other arrangements which comply with any regulations made for the purposes of this section.

(7) In determining the most appropriate placement for C, the local authority must, subject to the other provisions of this Part (in particular, to their duties under section 22)–

(a)give preference to a placement falling within paragraph (a) of subsection (6) over placements falling within the other paragraphs of that subsection;

(b)comply, so far as is reasonably practicable in all the circumstances of C´s case, with the requirements of subsection (8); and

(c)comply with subsection (9) unless that is not reasonably

practicable.

(8) The local authority must ensure that the placement is such that–

(a)it allows C to live near C´s home;

(b)it does not disrupt C´s education or training;

(c)if C has a sibling for whom the local authority are also providing accommodation, it enables C and the sibling to live together;

(d)if C is disabled, the accommodation provided is suitable to C´s particular needs.

(9) The placement must be such that C is provided with accommodation within the local authority´s area.

(10) The local authority may determine–

(a)the terms of any arrangements they make under subsection (2) in relation to C (including terms as to payment); and

(b)the terms on which they place C with a local authority foster parent (including terms as to payment but subject to any order made under section 49 of the Children Act 2004).

(11) The appropriate national authority may make regulations for, and in connection with, the purposes of this section.

(12) In this Act "local authority foster parent" means a person who is approved as a local authority foster parent in accordance with regulations made by virtue of paragraph 12F of Schedule 2.

2. The claim of NAFP is that the Defendant local authorities have failed to comply with the duty set out in Section 22C(5). It is argued that the breach of duty arises because those local authorities operate policies which mean that in many cases they do not consider a placement with an independent foster provider unless and until no placement can be found with the local authority’s in-house providers of foster care. NAFP argues that, in order to be able to consider which placement is “the most appropriate”, a local authority must consider all placements available at the relevant time. It can do that only if the search for a placement is made with every potential foster provider. The claim is a challenge to the lawfulness of the approach taken by

the Defendant local authorities. It is not argued that the Defendant local authorities acted irrationally or were Wednesbury unreasonable in their approach. Rather, it is said that they acted unlawfully due to their breach of statutory duty.

3. Although the claim is brought against three named local authorities, NAFP's case is that local authorities throughout England and Wales adopt the same general practice as the Defendant local authorities. The remedy sought is a series of declarations applicable to any local authority engaged in the process of seeking a placement for a looked after child.

4. The Defendant local authorities resist the claim. They appeared by counsel at the hearing and their case was fully argued before me. The Local Government Association ("LGA") was named as an interested party. The LGA is an unincorporated association with 415 member local authorities throughout England and Wales, those authorities representing a population of over 50 million people. The LGA submitted grounds of resistance to the claim and written submissions from James Goudie QC in support of such resistance prior to the hearing. The LGA also provided further written submissions from Mr Goudie after the hearing in relation to an issue which arose during oral argument. The Defendant local authorities supported by the LGA argue that they acted lawfully and in accordance with their statutory duty. They say that the duty imposes no obligation in respect of the process to be followed in determining "the most appropriate placement available". A challenge on Wednesbury grounds to the decision of a particular local authority theoretically could be made. No such challenge is made in this case. Since NAFP are fully conversant with the processes of the Defendant local authorities, I must infer that NAFP determined that such a challenge would not be sustainable.

5. Since the reasonableness of the Defendant local authorities' approach is not in issue, detailed consideration of how each of the Defendant local authorities goes about placing looked after children for which it is responsible is not strictly necessary. However, I shall set out in brief the evidence relating to each authority. That evidence helps in an understanding of the processes to which Section 22C is directed. I shall then consider the full statutory picture and any available guidance. Finally, I shall set out my conclusions as to the true extent and scope of the duty set out in Section 22C.

6. There are preliminary issues with which I must deal before embarking on the main parts of this judgment. First, NAFP seeks permission to rely on further evidence served some six weeks prior to the hearing, namely a further statement from Harvey Gallagher, the Chief Executive of NAFP, Mr Gallagher's initial evidence having been filed at the outset, a statement from Brenda Farrell, a senior manager with Barnardos and a report from a Mr Andrew Rome, an accountant with considerable experience of the public sector. I received the evidence de bene esse. It is arguably irrelevant in which event it would be inadmissible whenever it had been served. As already noted the issue in the case is the construction of a particular statutory provision. Mr Gallagher's further evidence concerns an Ofsted report in respect of one of the Defendant local authorities, the support said to be forthcoming from independent foster providers for NAFP's claim, whether the construction contended for by NAFP would overwhelm the system and whether the evidence provided by the Defendant local authorities in relation to comparative costs is reliable. Some of the further evidence would be relevant if the issue was whether the Defendant local authorities

had acted reasonably. Since that is not the issue, the relevance of the evidence is not apparent. Brenda Farrell's evidence covers some of the same ground as Mr Gallagher's recent statement together with other matters relating to how local authorities carry out their duty under Section 22C. Again this is not relevant vis-à-vis the construction of the statute.

7. Mr Rome's report is provided as expert evidence. It is in fact his third report. No permission has been given at any stage for expert evidence to be adduced. None of the reports comply with the relevant part of the CPR in relation to expert evidence. Despite those failings I have read the reports de bene esse. What Mr Rome's evidence purports to do is to demonstrate that the comparative costs put forward by the Defendant local authorities as between in-house foster carers and independent foster providers are wrong. In particular, he seeks to show that the difference between the costs is much less than the authorities assert. This point has nothing to do with the construction of Section 22C contended for by NAFP. Whether one type of foster carer is more expensive than another is neither here nor there if NAFP's case is correct. Cost might be relevant in terms of the reasonableness of the decision of a local authority in relation to placements. But the claim is not put on the basis of unreasonable decision making. In any event Mr Rome's evidence was not available to the Defendant local authorities and it is not suggested that it should have been. Much has been made of the fact that the costs referred to in the evidence filed for the purposes of these proceedings were not the same as put forward in earlier correspondence. Again that has no relevance to the question of statutory construction. As noted above I have considered the reports of Mr Rome de bene esse. Even if all of his criticisms were properly made, they would not affect the outcome of the claim.

8. The second preliminary point raised by the Defendant local authorities is the standing of NAFP to bring this claim. I shall consider this argument before turning to the substantive merits of the claim.

Standing

9. The Defendant local authorities argue that, irrespective of the merits of the application vis-à-vis the lawfulness of their policies, NAFP has no standing to bring this claim. It is said that the duty owed by Section 22C is for the benefit of the looked after child. It is not a duty imposed to protect the interests of any particular group of foster carers. There is no evidence of any complaint by any looked after child against the Defendant local authorities (or any other local authority) about the approach taken by the authorities to their duty under Section 22C. There is no evidence that the authorities' approach has been detrimental to any looked after child. In those circumstances it is said that NAFP simply have no interest in the claim. The Defendant local authorities invite the conclusion that the claim in reality is brought to protect commercial interests. Harvey Gallagher, the Chief Executive of NAFP, meets this proposition in his first witness statement by asserting that the primary motivation for the claim is the welfare of looked after children. He argues that changes to the approach taken by local authorities in the placement of looked after children would not necessarily lead to more children being placed with independent foster carers. It may have that effect but that would be because those carers were in a given case the most appropriate placement.

10. Permission has been granted to apply for judicial review. Permission would not have been granted had the single judge concluded that NAFP had no interest at all in the way in which the Defendant local authorities carried out their duty under Section 22C. This follows from the two stage approach identified in R v Monopolies and Mergers Commission [1986] 1 WLR 763 at 773:

> *The first stage test, which is applied upon the application for leave, will lead to a refusal if the applicant has no interest whatsoever and is, in truth, no more than a meddlesome busybody. If, however, the application appears to be otherwise arguable and there is no other discretionary bar, such as dilatoriness on the part of the applicant, the applicant may expect to get leave to apply, leaving the test of interest or standing to be re-applied as a matter of discretion on the hearing of the substantive application. At this second stage, the strength of the applicant's interest is one of the factors to be weighed in the balance. This is discussed in greater detail in the classic work Wade's Administrative Law, 5th ed. (1982), pp. 587–591.*

11. In that case Lord Donaldson MR went to state that, in judging the interest of a claimant, regard had to be had to the administrative purpose of the process with which the claim was concerned. The case was concerned with an application to set aside a decision of the Monopolies and Mergers Commission. The claimant company was a minority shareholder in a company in relation to which the decision was made. That company had an interest in reversing the decision to prevent a course being taken which was to its commercial disadvantage. Lord Donaldson MR concluded that this did not amount to any interest in the purpose of the administrative process. However, without giving reasons, the other two members of the court found that the claimant did have sufficient interest to apply for judicial review. Applying the approach articulated by Lord Donaldson MR it is arguable that NAFP did not have a proper interest in the application for judicial review. Notwithstanding Mr Gallagher's evidence, the reality of the interest of NAFP in a change of policy must be in improving the prospects of its membership vis-à-vis the placement of looked after children. But I do not propose to refuse the application for judicial review on the discretionary basis that NAFP does not have sufficient standing. Their members can legitimately be said to have more than pure commercial interests at heart. The administrative process has the purpose of protecting the interests of looked after children and NAFP members share those interests even though they also have a commercial interest. I shall deal with the claim on its substantive merits.

The evidence of the approach of the Defendant local authorities

12. Each of the Defendant local authorities adopts slightly different practices and procedures in relation to the placement of looked after children. I shall deal with them in turn. It is to be emphasised once more that NAFP does not seek to say that the approach of any of the authorities is irrational. As will be apparent from the description of each authority's processes, the authority in each case has considered carefully their approach to placements. It also is the case that, so far as is apparent from the evidence adduced by NAFP, the Defendant local authorities' processes are mirrored by most if not all of the local authorities in England and Wales. If made out, NAFP's claim means that no local authority can be identified as complying with its statutory duty.

Bristol City Council

13. Evidence as to the processes adopted by Bristol City Council comes from Ann James, the Service Manager responsible for the children in the care of the Council. She has long experience in the field of children's social care. In the past she has worked as the manager of the team directly responsible for the placements of the children in the care of Bristol City Council. She has held her present post since 2010. She has managerial responsibility for and control of inter alia the Council's four children in care social work teams and the Specialist Commissioning Team which is the team charged with the task of finding placements for children in the care of the Council. In relation to the cost of foster placements to the Council the evidence comes from Janet Ditte, the Service Manager: Finance Business Support i.e. the Council officer responsible for the finance of children's services.

14. Bristol is the 10th largest local authority in England with a population in mid 2013 of 437,492. It has a relatively young age profile. One in every five people living in Bristol is under 18. The number of looked after children in the care of Bristol City Council has increased over the last five years. As at 31 March 2015 there were 699 Bristol children who were looked after by the council. 562 (around 80%) of those children were placed with foster carers: 83 with family or friends; 312 with in-house foster carers; 167 with independent foster carers via independent foster agencies. It follows that approximately 55% of the looked after children in foster care were with in-house carers and 30% with independent foster carers. Looking at the entire group of looked after children 45% of them were placed with in-house foster carers and 24% with independent foster carers. These proportions bear a sensible relationship to the number of foster carers within the in-house team – 268 foster carers offering 448 places for Bristol children – and the number of independent foster carers – 167 foster carers who provide for Bristol children and for children from other local authorities.

15. The City Council's fostering service is a registered fostering agency. It employs a dedicated three person placement team to deal with referrals for foster care placements. Of the 268 foster carers, 114 are fee-paid. These carers are trained specifically to deal with children with complex needs. The Council's fostering service is integrated into the Council's overall structure for children in its care. This enables easier co-ordination of the various social, health and educational services provided specifically for children in care.

16. The independent foster providers used by the City Council all are parties to a framework agreement which commenced in April 2013. This framework agreement involved eight local authorities in the northern part of the South West Region. The agreement is due to run until March 2017. In respect of each local authority the providers are divided into tiers identified in descending order as 1A, 1B, 2A and 2B. Into which tier a provider is put depends upon the number of placements offered by the provider in the area of the relevant local authority and upon the cost per placement. It follows that a provider may be in tier 1A for one authority but in a lower tier for another. When in 2012 independent foster providers were invited to tender pursuant to the framework agreement, the invitation to tender stated that the policy of all of the local authorities participating in the agreement was to regard their in-house fostering services as "their primary preferred providers" and that the independent foster providers were to be tiered by each participating authority. In Bristol the Specialist Commissioning Team has a good knowledge of the placements

available from the independent foster providers. The Team meets regularly with the providers and speaks daily to them about their current ability to accept referrals. As a result the Team at any given time will have a good working knowledge of placements available with each independent foster provider and the Team will know which provider can meet the needs of particular children.

17. When a social worker employed by Bristol City Council considers that a child in the care of the Council needs to be accommodated pursuant to Section 22C(5) of the Act, the first issue considered is whether the child can be accommodated with a connected carer i.e. a placement as defined in Section 22C(6)(a) of the Act. If the child can be so accommodated, the process will go no further and the child will be placed with the connected carer. This is in line with the requirement in Section 22C(7) of the Act. If that is not possible, the social worker will complete a referral form. The referral will set out the detailed profile and needs of the child and the outcomes required from the placement. The social worker will request a type of placement – which will usually be a foster placement. The referral will be considered by the Access to Resources Panel of the Council. It is this body which decides whether accommodation is needed and whether a search for a placement should be undertaken. Assuming a decision that the child should be looked after and that a foster placement is required, it is the Specialist Commissioning Team which will carry out the search process. The senior member of the Team will decide whether to search the Council's own fostering agency first or to go the independent foster providers or to go to both sets of providers at the same time. Although the in-house agency is the preferred provider, the placement search is dictated by the needs of the particular child. In the light of the Team's knowledge of available placements, there will be cases where it is apparent that there is no suitable placement available in-house. That is when the Team goes immediately to the independent foster providers. In other cases the Team will conclude that particular issues relating to the child in question requires a search with both the in-house agency and the independent foster providers. The Team's approach is flexible depending on the circumstances of an individual case. In 2014 there were referrals to independent foster providers in just under 50% of the cases referred to the Team. This shows that the Council's preference for in-house placements and the tiered approach to independent foster providers is only a guide to the approach to be taken in relation to any particular child.

18. Once the available placement options have been identified, a senior member of the Specialist Commissioning Team will review the options. The particular requirements set out in Sections 22C(8) and 22C(9) of the Act will be considered as will the needs of the individual child, the skills of the proposed carers and any cultural or religious issues. In the event of more than one placement being available, the Team will provide the details to the child's social worker so as to allow discussion of the options with the child and the child's family i.e. to ensure compliance with Section 22(4) of the Act (infra). In the event of more than one placement being equally appropriate, the most cost effective placement will be chosen. In reality there is a shortage of placements and the choice (if any) is likely to be limited.

19. Bristol City Council has invested heavily in its in-house fostering services. Some kinds of placement such as baby carers and pre-adoption placements are specialisms of the in-house provision. Specialised placements of this kind are not offered by independent providers or require additional support by the Council of the independent

foster carer. In addition the in-house foster carers are based in Bristol. A significant proportion of the independent providers is based elsewhere in the northern area of the South West Region. Those providers generally are unable to provide a placement appropriate for a Bristol child. Finally the time taken by the Team when searching for and evaluating an independent foster provider is between 4 and 7 man hours. A in-house placement generally will take up to one hour.

20. In respect of cost comparisons the Specialist Commissioning Team up to June 2015 relied on a costing analysis prepared in 2010 from which it was concluded that internal fostering care provision was cheaper than foster care provided by independent foster carers. In June 2015 the Council conducted a further analysis. This analysis has been produced by Janet Ditte. It confirms the headline conclusion of the earlier analysis. The differential for children up to the age of 5 is just over £100 per week. For older children up to the age of 16 the differential is over £200 per week.

Leeds City Council

21. Sarah Johal is the Assistant Head of Service for looked after children for Leeds City Council. She has 20 years of experience in fostering services. Her entire career has been spent with Leeds City Council.

22. The population of Leeds in 2014 was 770,100 of whom some 23% were children. In March 2015 1,265 children were looked after by Leeds City Council. Of these children 1,023 were in foster placements with 533 placed with in-house foster carers and 268 with independent foster providers. The balance (222) were with friends or family also approved as foster carers.

23. The in-house fostering team maintained by Leeds City Council numbers 526 carers. This does not include the kinship foster carers of which there are 155. 99 carers within the fostering team specialise in providing placements for children with disabilities and complex health needs.

24. Most of the independent foster providers used by Leeds City Council have entered a framework agreement known the White Rose Framework Agreement. As the name suggests this is an agreement covering local authorities in Yorkshire extending to the Humberside area. 28 independent foster providers currently are party to the framework agreement. They are ranked in three tiers by reference to cost and quality criteria. Referrals to the independent providers are made sequentially to the three tiers with a lower tier provider only receiving a referral when a higher tier provider cannot meet the requirements of a particular child. The Council also have placements with six providers who are not party to the framework agreement but these providers are not of significance in relation to the placement arrangements of the Council.

25. The system of placement operated by Leeds City Council begins with a placement request being sent to the Council's placement service by the child's social work team. Having been screened by a manager to ensure that the request contains sufficient information the placement service will determine the strategy to be adopted. This will depend on the circumstances of the individual case. For children under 10 the placement service will focus on the in-house providers. The in-house service generally has a range of suitable providers for children of that age though independent foster providers will be considered in particular cases. Where the children are aged

10 to 13 and/or there is a sibling group with a child in that age group the approach of the placement service will depend on what then is available. There may be an initial focus on the in-house providers, there may be an approach to independent providers at the same time as the in-house service or there may an approach only to independent providers. For children aged over 13 or where there is a sibling group of 3 or more the placement service will approach in-house and independent providers at the same time. These differing approaches arise because of the availability of placements varies as between the categories of providers depending on the profile of the child concerned.

26. If the search for a placement throws up more than one suitable option, the placement team will sift the options in consultation with the child's social work team. Various factors will be considered: the suitability and skills of the potential foster carers; the location of the placements; the particular needs of the child. The placement team also will consider the cost involved in each potential placement. The overriding consideration will be the child's needs and circumstances.

27. In 2014 Leeds City Council was part of a benchmarking exercise conducted by the Chartered Institute of Public Finance and Accountancy in respect of looked after children. The result of the exercise in Leeds was that the costs of in-house foster care provision were found to be £599 per week as compared with £960 per week for care with independent foster providers.

Suffolk County Council

28. The evidence in relation to Suffolk County Council comes from Cliff James, the Council's Head of Corporate Parenting and Looked After Children Services. He has over 30 years of experience in the field of child care social work. He has worked for Suffolk County Council for the last 25 years. He has been in charge of all fostering services for the Council since 2011.

29. Suffolk is a rural county with few large centres of population. Its profile plainly is different to the other two defendant councils. However, in 2011 there were just over 150,000 children resident in the county i.e. a similar number to the urban councils against which this claim is brought. As at March 31 2015 there were 738 looked after children in the care of the Council i.e. slightly more than in Bristol. Of those 544 were in foster care: 348 with in-house providers; 123 with independent foster carers; 109 with kinship carers. In the year 2014/15 the proportion of looked after children in Suffolk placed with independent fostering providers increased and that increase is continuing in the current year.

30. As with the other councils Suffolk's in-house fostering service is integrated with other elements of the work done with looked after children. The foster carers within the in-house provision are supported by child therapists and clinical psychologists so that they can and do deal with the more difficult placements. Suffolk has combined with four other local authorities in the Eastern Region to create what is termed a select list of independent fostering providers. This list is akin to a framework agreement as operated by Bristol and Leeds because the providers have had to meet prescribed quality and cost criteria before being placed on the list.

31. The initial decision to accommodate a child who is or is about to come into the care of Suffolk County Council is taken by a County Resource Panel. That Panel will consider the type of placement appropriate to the child together with any other supporting services that might be required. Once it has been determined that a child should be accommodated with a foster carer, the Central Resource Team will identify the specific placement. The Council does not operate a policy of seeking an in-house placement first. Rather, a needs led policy is adopted matching the needs of the child against the available placements whether in-house or independent. The placement decision is guided inter alia by the factors set out in Section 22C(8) and by the value for money offered by each potential placement. The Central Resource Team at any given time has detailed knowledge of the placements available both in-house and with independent providers. If the Team identifies that a placement with an independent provider may be able to meet the needs of the child, a referral is sent to independent providers on the select list in accordance with a flow-chart. The Team sends the details of all available placements to the child's social worker for consideration. The final decision is made with the input of the social worker together with the Central Resource Team.

32. As calculated by Suffolk County Council the average weekly cost of an in-house placement in 2014/2015 in Suffolk was just under £400 per week. The equivalent cost of a placement with an independent fostering provider was just over £860 per week.

The Claimant's evidence

33. Mr Gallagher's first witness statement is dated 20 March 2015 in which he provides figures for the number of children in care in England. I shall assume that the figures were current in March 2015. At that time 68,840 children were in care. Of those, 27,160 children were placed with in-house foster carers and 16,790 were placed with independent foster providers. Thus, in March 2015 over the whole of England 61.8% of children in non-kinship foster placements were accommodated with local authority in-house foster carers and 38.2% were with independent foster providers. Mr Gallagher provides no figures for the number of placements available with independent foster providers throughout England. It is impossible to say whether there is any or any spare capacity amongst independent foster providers whether generally or in the areas served by the Defendant local authorities. Mr Gallagher points to the fact that independent foster providers sometimes provide placements after a placement with an in-house foster carer has broken down. However, he accepts that this does not provide any evidence that an independent foster provider would have been a more appropriate placement in the first instance. In any event I do not know whether the same sometimes applies in reverse i.e. a placement with an independent foster provider breaking down followed by placement with an in-house foster carer. I take into account the whole of Mr Gallagher's evidence. Much of it deals with procedural issues and matters relating to the interest and standing of NAFP. I do not need to rehearse it further.

34. The evidence of Marie Tucker, an associate for NAFP, emphasises the desirability of ensuring that a placement for a looked after child matches the needs of that child. This proposition is not in issue. It does not provide any assistance in the construction of Section 22C. Her witness statement also sets out the placement policies adopted by South Gloucestershire Council and Bath and North East Somerset Council between

2006 and 2009. In that period Marie Tucker was associated with the foster care arrangements in those areas. She describes the system as involving requests for placements going to a placements team which was separate from the authority's in-house fostering service. The team was not required to seek a placement with the in-house service before any referral to independent foster providers. Ms Tucker reduced the system to an illustrative flowchart which she attached to her witness statement. NAFP puts forward this system as one which fulfilled the duty imposed by Section 22C albeit that the Section was not in force for most of the period involved. Marie Tucker understands that the system is no longer in operation in those local authorities. However, even if it were, it would not satisfy the statutory duty as argued for by NAFP. The flowchart provides for the placement officer devising a strategy appropriate for the individual child. The strategy will take into account inter alia the timescales for finding a placement, the officer's knowledge of the market at the relevant time and any other influencing factors. The placement request will then be sent to a range of providers that have the potential to provide a placement. This system clearly provides the placement officer with considerable discretion. It is similar to that operated by Bristol City Council today. It does not match the requirement of the principal declaratory relief proposed by NAFP.

The statutory framework

35. The core duties of local authorities in respect of the support to be provided to children are to be found in Part III of the Children Act 1989. Section 17 of the Act sets out the general duty of every local authority in relation to provisions of services for children in need in these terms:

> *(1) It shall be the general duty of every local authority (in addition to the other duties imposed on them by this Part)–*
>
> > *(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.*
>
> *(2) For the purpose principally of facilitating the discharge of their general duty under this section, every local authority shall have the specific duties and powers set out in Part 1 of Schedule 2.*

………

> *(5) Every local authority–*
>
> > *(a) shall facilitate the provision by others (including in particular voluntary organisations) of services which the authority have power to provide by virtue of this section, or section 18, 20, 23 or 24; and*

(b) may make such arrangements as they see fit for any person to act on their behalf in the provision of any such service.

……….

36. It is to be noted that the general duty requires services to be provided which are appropriate to the needs of the relevant child. It follows that the notion of the needs of the child is paramount when considering the local authority's duties. The specific duties and powers set out in Part 1 of Schedule 2 to the Act take the matter no further in relation to local authority foster parenting. Further, whilst local authorities are required to facilitate the provision by others of services which they have the power to provide (which includes fostering services), the duty does not go beyond facilitation. The ordinary meaning of facilitate means that a local authority only is required to make it possible and to smooth the way for others to provide such services. Such services must include foster placements.

37. Section 22 of the Act deals with the general duty of local authorities in relation to children looked after by them. Insofar as is relevant to this case the terms of the Section are as follows:

(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 stand referred to their social services committee under the [1970 c. 42.] Local Authority Social Services Act 1970.

(2) In subsection (1) "accommodation" means accommodation which is provided for a continuous period of more than 24 hours.

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

(a) to safeguard and promote his welfare; and

(b) to make such use of services available for children cared for by their own parents as appears to the authority reasonable in his case.

(4) Before making any decision with respect to a child whom they are looking after, or proposing to look after, a local authority shall, so far as is reasonably practicable, ascertain the wishes and feelings of–

(a) the child;

(b) his parents;

(c) any person who is not a parent of his but who has parental responsibility for him; and

(d) any other person whose wishes and feelings the authority consider to be relevant,

regarding the matter to be decided.

(5) In making any such decision a local authority shall give due consideration–

(a) having regard to his age and understanding, to such wishes and feelings of the child as they have been able to ascertain;

(b) to such wishes and feelings of any person mentioned in subsection (4)(b) to (d) as they have been able to ascertain; and

(c) to the child´s religious persuasion, racial origin and cultural and linguistic background.

………..

38. Thus, in relation to any decision to be made in relation to a looked after child, it must be preceded (subject to reasonable practicability) by the local authority ascertaining the views of the child, the child's parents (including those with parental responsibility for the child) and any other person the local authority considers to be relevant. The local authority is subject to a mandatory requirement to find out the views of the child and the child's parents. The local authority is not directed as to how it is to fulfil the requirement. In relation to other potential interested parties, the local authority has a discretion as to whose views it ascertains.

39. Until 2011 Section 23 of the Act dealt with duties of a local authority in relation to the provision of accommodation by the local authority for children whom they were looking after. The relevant parts of Section 23 were in these terms:

(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 Secretary of State) 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;

(b) maintaining him in a community home;

(c) maintaining him in a voluntary home;

(d) maintaining him in a registered children´s home;

(e) maintaining him in a home provided by the Secretary of State under section 82(5) on such terms as the Secretary of State may from time to time determine; or

(f) making such other arrangements as–

(i) seem appropriate to them; and

(ii) comply with any regulations made by the Secretary of State.

(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 Secretary of State.

(6) Subject to any regulations made by the Secretary of State 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.

…………

40. Under this regime the local authority was required to place a looked after child with family, a relative or any other suitable person or to maintain the child in a home of one kind or another or to make such other arrangements for the child as seemed appropriate to the local authority. The regime changed to an extent prior to 2008 by virtue of amendments introduced by inter alia the Care Standards Act 2000. These amendments rationalised the references to the different types of homes. The amendments made are not relevant to the issues in this case. The regime (subject to reasonable practicability and consistency with the welfare of the child) involved a duty to arrange for a looked after child to live with a parent, relative, friend or other connected person. No other direction was provided by Section 23 in relation to the accommodation of a looked after child if it was not reasonably practicable to arrange for the child to live with a parent or connected person or if it was not consistent with the child's welfare to do so save that there was a duty (again subject to reasonable practicability and consistency with welfare) to provide accommodation near to the child's home and to accommodate siblings together.

41. The Children and Young Persons Act 2008 replaced Section 23 of the Act. Section 8 of the 2008 Act substituted for Section 23 of the Act six new sections, namely Sections 22A to 22F. Section 22C (insofar as is relevant to the issues in these proceedings) came into force on 1 April 2011. Section 9 of the 2008 Act added a further section to the Act, namely Section 22G which came into force on 1 April 2011. Section 22C is headed "Ways in which looked after children are to be accommodated and maintained." I have already set out the terms of Section 22C at the commencement of this judgment.

42. The scheme introduced by Section 22C on any view is significantly different to the previous regime. First, Section 22C(2) requires a local authority, subject to reasonable practicability and consistency with welfare, to make arrangements for a looked after child to live with a parent or someone with parental responsibility for the child or someone named in a child arrangements order (if one was in force immediately before any care order was made). This is a more restricted group than the types of person identified in Section 23(6) as originally enacted. Second, whereas Section 23 provided no indication of which option should be preferred in the event of a parent, relative or other connected person not being a feasible placement, Section 22C(7) provides for placement with a relative, friend or other connected person who is also a local authority foster parent as the preferred option. This type of placement – often known as kinship fostering – was not identified at all in Section 23. It combines the benefits of some prior connection between the child and the person with whom the child is placed with the training and expertise available to a local authority foster

parent. Third, whilst Section 22C(8) to some extent mirrors Section 23(7) as was, it makes additional demands on the local authority. The new scheme requires the local authority to ensure that the placement does not disrupt the child's education and training and that, where the child is disabled, the accommodation is suitable for the child's particular needs. Fourth, Section 22C(9) requires the accommodation to be within the local authority's area. This duty was not imposed by Section 23. Fifth, Sections 22C(8) and 22C(9) are subject to reasonable practicability but the "consistent with welfare" provision is not part of the scheme as it now applies. All of these changes serve to circumscribe the local authority's discretion when making a decision in relation to accommodating a looked after child to a greater degree than was the case hitherto.

43. It is argued on behalf of NAFP that the most significant difference between Section 23 as originally enacted and Section 22C is the language of Section 22C(5) i.e. the reference to "the most appropriate placement". It is said that this introduces a wholly new duty in relation to the provision of accommodation. A local authority which did not and does not fundamentally change its processes was and is in breach of this new duty. This is the crux of the case. I shall return to it shortly.

44. Section 22G of the Act as amended reads as follows:

General duty of local authority to secure sufficient accommodation for looked after children

(1) It is the general duty of a local authority to take steps that secure, so far as reasonably practicable, the outcome in subsection (2).

(2) The outcome is that the local authority are able to provide the children mentioned in subsection (3) with accommodation that–

(a) is within the authority´s area; and

(b) meets the needs of those children.

(3) The children referred to in subsection (2) are those–

(a) that the local authority are looking after,

(b) in respect of whom the authority are unable to make arrangements under section 22C(2), and

(c) whose circumstances are such that it would be consistent with their welfare for them to be provided with accommodation that is in the authority´s area.

(4) In taking steps to secure the outcome in subsection (2), the local authority must have regard to the benefit of having–

(a) a number of accommodation providers in their area that is, in their opinion, sufficient to secure that outcome; and

(b) a range of accommodation in their area capable of meeting different needs that is, in their opinion, sufficient to secure that outcome.

(5) In this section "accommodation providers" means–

- *local authority foster parents; and*
- *children´s homes in respect of which a person is registered under Part 2 of the Care Standards Act 2000."*

This duty to ensure a sufficiency of accommodation providers was not reflected in any particular provision of the Act as originally enacted. The core duty is to take steps to secure sufficient accommodation within the local authority's area which meets the needs of looked after children who cannot live with their parents or someone with parental responsibility for them. In taking those steps the local authority must "have regard to the benefit of having" both a number of providers and a range of accommodation. No duty is imposed to ensure that there are independent providers as well as in-house providers.

45. The Regulations made in exercise of the power contained in Section 22C(11) of the Act are the Care Planning, Placement and Case Review (England) Regulations 2010. Regulations 9 to 24 of the 2010 Regulations are concerned with placements. They make no provision for the manner in which the local authority is to identify the "most appropriate placement". The Regulations provide detailed guidance in relation to a number of the functions required to be performed by a local authority in relation to looked after children. For instance, Schedule 7 sets out 15 separate considerations to which a local authority must have regard when conducting a statutory review of a looked after child's case. No specific requirements are made of a local authority in relation to the "most appropriate placement". The Fostering Services (England) Regulations 2011, which deal with the management and conduct of fostering services, take the matter no further.

46. NAFP argues that section 11(2) of the Children Act 2004 is of assistance in the construction of Section 22C(5) of the Act. Section 11(2) is as follows:

(2) Each person and body to whom this section applies must make arrangements for ensuring that–

(a) their functions are discharged having regard to the need to safeguard and promote the welfare of children; and

(b) any services provided by another person pursuant to arrangements made by the person or body in the discharge of their functions are provided having regard to that need.

It is said that this emphasises that a local authority must discharge its functions with the child's welfare at the centre of its decisions. That much is true. It does not assist in determining whether the duty in Section 22C(5) is as put forward by NAFP. The Defendant local authorities obviously accept that they should safeguard and promote

the welfare of children. They argue that their processes do just that. The duty imposed by Section 11(2) is entirely general and is a "have regard to" duty. NAFP's argument on this point is circular.

Guidance and other explanatory material

47. The explanatory notes to the Children and Young Persons Act 2008 by which Section 22C was inserted into the Act provide no assistance at in the construction of that Section. The notes simply recite the text of the Section without any further elaboration or elucidation.

48. NAFP suggests that consideration of the Green Paper and the White Paper which preceded the 2008 Act is appropriate and instructive. Leaving aside the question of whether such consideration is appropriate in any event, those documents provide no assistance at all in determining the proper construction of Section 22C. The Green Paper – "Care Matters – Transforming the Lives of Children and Young People in Care" – suggested that there was a need to improve the planning and commissioning of placements. Doubtless this was a reasonable suggestion. It cannot possibly assist in determining whether the NAFP is right in its construction of a statutory provision enacted in 2008 when the Green Paper was published in October 2006. The White Paper – "Care Matters – Time for Change" – was published in June 2007. It set out the broad aims of any legislative change. It did not indicate any process relevant to the terms of Section 22C as it was eventually enacted.

49. I have been referred by NAFP to what was said by the Parliamentary Under Secretary of State, Lord Adonis, in the course of a debate in the House of Lords in respect of the Bill which in due course became the 2008 Act. Any consideration by me of what was said by Lord Adonis must be subject to the three conditions set out in Pepper v Hart [1993] AC 593 in the speech of Lord Browne-Wilkinson.

> "I therefore reach the conclusion, subject to any question of Parliamentary privilege, that the exclusionary rule should be relaxed so as to permit reference to Parliamentary materials where (a) legislation is ambiguous or obscure, or leads to an absurdity; (b) the material relied upon consists of one or more statements by a Minister or other promoter of the Bill together if necessary with such other Parliamentary material as is necessary to understand such statements and their effect; (c) the statements relied upon are clear."

NAFP argues that the meaning of Section 22C is clear. The Defendant local authorities supported by the LGA agree albeit that they disagree about the meaning. In those circumstances it is difficult to see how any party can suggest that Section 22C is ambiguous or obscure. More important the statement of Lord Adonis to which I have been referred gives no assistance at all as to the meaning of Section 22C. He told the House of Lords that the Government's intention was to improve stability in child care giving the example of the restriction on out of authority placements to demonstrate how this intention was to be achieved. No statement by Lord Adonis to which I have been referred gives any indication – clear or otherwise – about what was

intended when requiring local authorities to find "the most appropriate placement". The Parliamentary materials to which I have been referred do not satisfy the Pepper v Hart test.

50. From time to time the Department of Education publishes statutory guidance in relation to the Act. The current guidance in respect of Part III of the Act was issued in June 2015. Its status is defined by Section 7 of the Local Authority Services Act 1970. Sub-section (1) reads as follows:

(1) Local authorities shall, in the exercise of their social services functions, including the exercise of any discretion conferred by any relevant enactment, act under the general guidance of the Secretary of State.

The general purpose of the guidance is described at paragraph 1.4 of the document. It is said to be guidance which, together with the 2010 Regulations (supra), sets out how local authorities should carry out their responsibilities under Part III of the Act. The aim of the legislation is described as the provision for looked after children of the most appropriate placement to meet their needs and improve their outcomes. Chapter 3 of the current guidance deals with "Placement under the 1989 Act". It was first published in March 2010. Paragraph 3.3 describes "the most appropriate placement" as "the one (the local authority considers) will best promote and safeguard the child's welfare". Paragraphs 3.87 to 3.90 deal specifically with placements with local authority foster carers (a term of art which includes independent foster providers). The guidance states that Section 22C(5) and 6(a) and (b) require a local authority to be satisfied that placement with foster carers is the best way of meeting their duty to the looked after child and that the specific placement is the most appropriate. The term "specific placement" is not defined. It will be recalled that subsections 6(a) and 6(b) provide for different kinds of foster placement. The two kinds of foster placement for which provision is made are specific and different from each other.

51. NAFP argues that the guidance (which has statutory force) – in particular, paragraph 3.87 thereof – must require local authorities to canvass all possible foster placements. Otherwise, they could not be satisfied that the specific placement was the most appropriate, the specific placement being a reference to the placement as determined for a particular individual. Leaving aside any issue there may as to the meaning of this term, paragraphs 3.87 to 3.90 set out the particular requirements of local authorities in relation to placements with local authority foster carers. The statutory guidance in relation to sufficiency is referred to i.e. the setting of a standard for commissioning fostering services in order to improve quality and choice and to minimise the prospect of no placement being available in the local area. The need for contingency planning in relation to any particular child is identified. The regulatory regime in relation to placement of a looked after child with a local authority foster carer is rehearsed. Nothing is said about any requirement on a local authority to search every available foster provider when seeking to make a placement. Such absence is not determinative of the meaning of Section 22C. However, the consequence is that the guidance does not have the significance placed upon it by NAFP.

52. The statutory guidance on sufficiency to which I have already referred has the same status as the general guidance in relation to Part III of the Act. This guidance is concerned specifically with the duty imposed by Section 22G of the Act. (It is to be

noted that there is no such separate and specific guidance in relation to Section 22C.) However, paragraph 2.17 indicates that Section 22G has to be understood in the context of the duty imposed by Section 22C. Paragraphs 2.17 to 2.20 rehearse the statutory language in Section 22C. Again, the guidance does not require local authorities to search every foster provider when seeking to make a placement. Chapter 4 of the guidance deals with commissioning practice. This chapter contains various examples of good practice, each example being placed in a shaded box. One such example is headed "Level playing field: Gloucestershire County Council". NAFP relies on this as demonstrating the nature of the duty under Section 22C. The term "level playing field" appears more than once in the evidence submitted by NAFP. What this argument does not take into account is the fact that it is identified in the guidance as an example of good practice in terms of commissioning. The guidance implicitly accepts that other local authorities may deal with the issue in a different way. If the core argument of NAFP in relation to the statutory duty under Section 22C is correct, it is not easy to see how the "level playing field" could be considered to be an example of good practice. It would be a requirement of any local authority engaged in the placement of a looked after child.

53. Insofar as there is any ambiguity in respect of the construction of Section 22C, NAFP rely on Article 3 of the UN Convention on the Rights of the Child. That requires that, in any action concerning children, the best interests of the child shall be a primary consideration. The speech of Baroness Hale in Smith v Smith [2006] 1 WLR 2024 is cited. I accept the proposition as put by NAFP. But I do not accept that there is any ambiguity in relation to the construction – or not one which involves ambiguity as between the construction proposed by NAFP and the construction advanced by the Defendant local authorities and LGA. In any event which of those constructions best reflects the best interests of the child is a value judgment.

54. I have been referred to reports of the National Audit Office (dated November 2014) and the Public Accounts Committee of the House of Commons (dated March 2014). These are concerned only with the issue of the comparative cost of in-house foster carers and independent foster providers. They are irrelevant to the proper construction of Section 22C, not least because they postdate the amendments to the Act by some 5 years.

Conclusions

55. With the various statutory provisions, the statutory guidance and other material in mind, I turn to consider the extent of the duty imposed by Section 22C(5). In the course of argument I suggested that Section 22C of the Act sets out a clear scheme in relation to the ways in which looked after children are to be accommodated by local authorities and that the nature of the duty in Section 22C(5) can be identified by reference to the scheme. The proposition I put to the parties was as follows. The first requirement under Section 22C is that arrangements must be made for a looked after child to live with a parent or someone with parental responsibility. If that is not reasonably practicable or if it would not be consistent with the looked after child's welfare, the duty under Section 22C(5) arises. The local authority must place the child in "the most appropriate placement available". Section 22C(6) defines placement and sets out four types: kinship foster parent; local authority foster parent; children's home; some other arrangements. Section 22C(7) refers to the determination of the most appropriate placement. It requires the local authority to

give preference to placement with a kinship foster parent. Plainly that is a type of placement. It also requires compliance with Sections 22C(8) and (9), those sub-sections identifying characteristics that could be applicable to any type of placement. On that basis the reference to "the most appropriate placement" in Section 22C(5) simply means whichever placement within the definition in Section 22C(6) is most appropriate, the issues of welfare and the needs of the child being catered for by Sections 17 and 22 of the Act. I invited submissions on this proposition. NAFP and the Defendant local authorities responded orally at the hearing. LGA responded with further written submissions.

56. All parties are firm in their rejection of my suggested construction of Section 22C of the Act. NAFP relies on the following matters: the suggested construction was not contended for by any party; the suggested construction would involve the inclusion of the words "the type of" before the word "placement" in the sub-section, an inclusion not justified by the purposes of the Act; the UN Charter can be invoked to rebut a construction less advantageous to the individual child; paragraph 3.87 of the statutory guidance in relation to Part III of the Act is wholly inconsistent with the suggested construction. The Defendant local authorities also rely on paragraph 3.87 as showing that the suggested construction is not sustainable. They further argue as follows: if Section 22C(5) were concerned with the type of placement, the local authority would still need to consider the individual child's needs; the language of Section 22C(7)(a) which refers to "a placement" and to a preference over "placements" requires a comparison of specific placements. LGA argues that Section 22C is focused on the individual child as is apparent from the use of the words "looking after a child" in Section 22C(1) with "a child" being referred to as "C". "C" is used in the succeeding sub-sections of Section 22C including Section 22C(5). Thus, the focus remains on the particular child.

57. I do not consider that the arguments put forward by the parties defeat the construction set out in paragraph 55 above. I deal with those arguments as follows:

- The fact that no party puts forward this construction is not determinative. I gave the parties full opportunity to deal with the issue and I have had full argument on the topic. I am entitled to reject the consensus view if I am satisfied that it is wrong.

- The construction does not involve the insertion of the words "the type of" in the sub-section. Section 22C(5) refers to "placement". Section 22C(6) defines "placement" by reference to four types. It is the statutory language which leads to the conclusion that "placement" in Section 22C(5) means what is set out in Section 22C(6).

- The construction only is less advantageous to any particular looked after child if Part III of the Act read as a whole does not provide for the welfare of the looked after child. That is not the case. In those circumstances the suggested construction does not infringe Article 3 of the UN Convention.

- For the reasons given at paragraphs 50 and 51 above the submission in relation to paragraph 3.87 of the statutory guidance is not tenable.

- The fact that the local authority would need to consider the individual child's needs is clear from the duties imposed by Sections 17 and 22. The issue in relation to Section 22C(5) is whether a particular duty is imposed of the kind put forward by NAFP.

- The language of Section 22C(7)(a) does not require a comparison of specific placements; rather the reverse. This provision simply requires the local authority to give preference to a placement within Section 22C(6)(a) over placements falling within other paragraphs in Section 22C(6). That says nothing about specific placements within the various paragraphs.

- The focus on the particular child in Section 22C does not help with the construction of Section 22C(5). The welfare and interests of the particular child are protected by the preceding sections of the Act. The word "placement" is defined in Section 22C(6). It is that definition which is critical.

58. It follows that, notwithstanding the arguments put by all parties, I remain of the view that the duty imposed by Section 22C(5) is as set out in paragraph 55 above. If that is correct, the duty does not involve any requirement to make a particular kind of search of any one of the placements identified in Section 22C(6). I would dismiss the claim for judicial review on that ground alone.

59. However, as urged on me by the Defendant local authorities, I shall also consider the claim on the alternative basis i.e. that in Section 22C(5) the word "placement" refers to the particular placement for the individual child. I am satisfied that in those circumstances the duty imposed by Section 22C(5) does not require a local authority to contact all providers of potentially appropriate placements at the same time for every looked after child. I do so for the following reasons.

- The duty is not a procedural duty. It is what the LGA term an outcome duty. How a local authority goes about fulfilling that duty is a matter of policy within the discretion of the local authority subject to any express regulatory provisions e.g. Sections 22(4) and 22(5) of the Act.

- The word "appropriate" of itself implies an exercise of judgment by a local authority. Moreover, the judgment is one subject to the "opinion" of the local authority.

- Nothing in the statutory provision whether in Part III of the Act or in the Regulations made thereunder indicates that the duty in Section 22C(5) should be circumscribed as NAFP suggests.

- As discussed in more detail at paragraphs 35 to 46 above the statutory provisions require a local authority to make decisions in relation to looked after children in its care in such a way as to safeguard and promote their welfare. They do not set out precisely how a local authority should make such decisions.

- As set out at paragraphs 47 to 54 above none of the statutory guidance or other available materials supports a duty as contended for by NAFP.

- The logic of NAFP's construction of Section 22C(5) would require a local authority in every case to canvass all potential available placements of whatever kind i.e. including children's homes and "other arrangements". NAFP do not contend for this. If NAFP's construction of Section 22C(5) is correct, it is not clear why local authorities do not have such a duty.

60. It is instructive to consider the relief sought by NAFP. The principal declaration sought imposes on local authorities a requirement to contact "all potentially appropriate placements" when making an accommodation decision in respect of a looked after child. How are these to be defined? Section 22C(5) itself refers to the opinion of the local authority. Is what is "potentially appropriate" to be determined by the local authority? If it is, that will be a matter for the judgment of the local authority.

61. The rationality and reasonableness of the processes adopted by the Defendant local authorities are not challenged. Nothing in the processes described in the evidence indicates that such a challenge, were it to have been made, would have succeeded. I am quite sure for the reasons given above that the challenge to the lawfulness of the policies of the Defendant local authorities is misconceived. This claim for judicial review is dismissed.