Neutral Citation Number: [2020] EWHC 1456 (Admin)

Case No: CO/4789/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/06/2020

Before :

MR JUSTICE FORDHAM

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Between :
R (on the application of
(1) MOHAMMED ALI RAJA
(2) HAIDAR ALI HUSSAIN **Claimants**
By their mother and litigation friend
RUKHSANA HUSSAIN

- and –

LONDON BOROUGH OF REDBRIDGE **Defendant**

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EMMA FOUBISTER (instructed by **Hansen Palomares Solicitors**) for the Claimants
CATHERINE ROWLANDS (instructed by **Redbridge LBC**) for the Defendant

Hearing date: 28 April 2020

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Approved Judgment

Covid-19 Protocol: This judgment will be handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down will be deemed to be *tbc*0 at 10am.

MR JUSTICE FORDHAM:

Introduction

1. This is a case about the night-time care needs of two adult brothers with severe physical and learning disabilities. It is about whether the sole justifiable response for the local authority to adopt was to provide additional care and support pending a full needs reassessment. That question really turns on whether the mother of the two brothers could, in the meantime, reasonably be expected to reposition her sons at night-time by herself. Procedurally, this case is a good example of a "rolling judicial review", capable of being embraced as appropriate, with suitable rigour and focus, within the principled flexibility recognised as applicable in public law proceedings.

2. The hearing before me was a Skype remote hearing during the Covid-19 pandemic. It and its start time were published in the cause list, with contact details available to anyone seeking permission to observe the hearing. I was addressed by Counsel, in exactly the same way as if we were in the court room. I am satisfied: that this constituted a hearing in open court; that the open justice principle has been secured; that no party has been prejudiced; and that, insofar as there has been any restriction on a right or interest, it is justified as necessary and proportionate.

The 2014 Act

3. The relevant statute is the Care Act 2014. As Peter Marquand, sitting as a deputy High Court judge, explained in R (GS) v Camden LBC [2016] EWHC 1762 (Admin) [2017] PTSR 140 at paragraph 19:

> The way the Care Act works is as follows. Where it appears to a local authority that an adult may have need for care and support a care 'needs assessment' must be carried out by the local authority under section 9. Having carried out that assessment, the local authority must go on to consider whether the assessed person has any eligible needs under section 13 and the Eligibility Regulations. If the person assessed has eligible needs, the local authority is under a duty to provide support by section 18. If the assessed needs are not eligible needs than the local authority has power under section 19 to meet those needs.

The reference to section 19 in the final sentence of this passage is, more specifically, to section 19(1). For the purposes of the present case, I add to the GS outline the following further basic points:

> Section 19(3) empowers the local authority to "meet an adult's needs for care and support which appear to it to be urgent… without having yet – (a) carried out a needs assessment or a financial assessment, or (b) made a[n eligibility] determination under section 13(1)." Section 24(1)(a) requires a local authority, when acting under sections 18 or 19(1) to "prepare a care and support plan or a support plan for the adult concerned". Under section 25(1), the plan must specify the assessed eligible needs which the local authority is going to meet and the way in which it is going to meet them. Section 27 provides for plans to be reviewed and revised, including a duty of re-assessment and re-determination in materially changed circumstances, and specifies how the local authority is to approach review and revision.

There is a contested issue of law in the present case, to which I will come, about how section 19(3) (pre-assessment meeting of urgent care needs) fits together with section 27 (review and revision of care plans). Ms Rowlands helpfully drew my attention to the amendments to section 19, made by the Coronavirus Act 2020, but neither Counsel submitted that they affected the analysis in this case and I say no more about them.

The Primary Decision-Maker

4. The primary decision-maker under the 2014 Act is the local authority. Its actions are subject to the secondary and supervisory jurisdiction of this Court. So, for example, needs assessments are for the local authority to make, but in doing so "they have to ask themselves the right questions and provide rational answers": R (McDonald) v Kensington and Chelsea RLBC [2011] UKSC 33 [2011] PTSR 1266 at paragraph 69 (Lady Hale). Similarly, re-assessment, review and revision are all a matter for the local authority, provided that "it does not act in a Wednesbury unreasonable way": McDonald at paragraph 52 (Lord Dyson). The position of the defendant as primary decision-maker is also reflected in paragraph 5.33 of the statutory guidance to which I now turn.

The Guidance

5. Central government has issued Care and Support Statutory Guidance on the application of the 2014 Act. The version to which both Counsel made reference was as updated on 2 March 2020. Sections of the statutory guidance of particular note are as follows. (1) Paragraphs 5.26 and 5.33: describing section 19(3) urgent action as being a response which may be necessitated in circumstances of "service interruption", with "urgent" taking "its everyday meaning" (para 5.26); and where "[i]t is for the local authority to decide if it will act to meet a person's needs for care and support which appear to it to be urgent. In exercising this judgement the local authority must act lawfully, including taking decisions that are reasonable" (para 5.33). (2) Paragraph 6.26, which discusses section 19 urgent action in the context of "first contact with the authority", describing "the powers to meet urgent needs where [the local authorities] have not completed an assessment", and adding "[w]here an individual with urgent needs approaches or is referred to the local authority, the local authority should provide an immediate response and meet the individual's care and support needs… Following this initial response, the individual should be informed that a more detailed needs assessment, and any subsequent processes, will follow". (3) Paragraphs 13.8, 13.19, 13.27 and 13.34, which discuss the position arising in conjunction with "review of care and support plans". In those paragraphs the Guidance explains that a local authority "satisfied that a revision is necessary… must work through the assessment and care planning processes as detailed in sections 9-12 and 25 of the Act to the extent that it thinks appropriate" (para 13.8); that "unplanned reviews" are appropriate "[i]f there is any information or evidence that suggests that circumstances have changed in a way that may affect the efficacy, appropriateness or content of the plan", in which case "the local authority should immediately conduct a review to ascertain whether the plan requires revision" (para 13.19); that "[w]hen revising the plan", the local authority "should wherever possible follow the process used in the assessment and care planning stages. Indeed, the local authority must if satisfied that the circumstances have changed in a way that affected care and support or support plan, carry out an needs or carers assessment and financial assessment, and then revise the plan personal budget accordingly" (para 13.27); and finally that "[t]he review should be performed as quickly as is reasonably

practicable. As with care and support planning, it is expected that in most cases the revision of the plan should be completed in a timely manner proportionate to the need to be met. Where there is an urgent need to intervene, local authorities should consider implementing interim packages to urgently meet needs while the plan is revised" (para 13.34).

"Interim care" and "Interim relief"

6. In this case, the word "interim" is used in two different settings. First, interim care provision is the local authority's action, as described in section 19(3) of the Act and in paragraphs 5.26, 5.33, 6.26 and 13.34 of the Guidance. That is action taken pending full appraisal by the local authority of the merits and a substantive decision by the local authority as primary decision-maker. These proceedings are all about, and only about, interim care provision. Secondly, interim relief was the interlocutory judicial remedy sought and obtained from the court at the outset of the proceedings, pending full appraisal by the Court of the legal merits and a substantive decision by the Court in its supervisory jurisdiction. The "final" order sought at the substantive hearing before me was an order requiring the defendant to continue with its "interim" care provision, as had been ordered in the Court's "interim" relief.

The Claimants and their Existing Care Package

7. The claimants are Mr Mohammad Ali Raja and Mr Haider Ali Hussain. They live with their mother, Mrs Rukhsana Hussain. In this judgment I am going to refer to them as "the claimants", and "the mother", and to the local authority Redbridge LBC as "the defendant". The first claimant is a 32-year-old man with a diagnosis of Cerebral Palsy, Epilepsy, Sjorgen Larsson Syndrome, Multiple Profound Learning Disability and Thoracolumbar Kyposis of the spine. The second claimant is a 25-year-old man with a diagnosis of Cerebral Palsy, Multiple Profound Learning Disability, Sjorgen Larsson Syndrome, Increased Thoracic Kyphosis, Shoulder Obliquity and Pelvic Obliquity. Leaving aside the disputed interim care provision, this was the nature of the care package which as at June 2019 the defendant had identified as appropriate for the claimants. This was described in care and support plans and was delivered by financial assistance, for the mother to use by engaging and paying for carers direct. (1) Personal care in the morning: 60 minutes x 2 carers (7 days a week). (2) Personal care in the afternoon: 45 minutes x 2 carers (7 days a week). (3) Personal care in the evening: 45 minutes x 2 carers (7 days a week). (4) Outreach 2:1 4 hours (5 days a week). (5) Overnight respite: 9 hours x 1 carer (one night per week).

8. The mother's witness statement dated 6 December 2019 outlined the typical day's care routine, as follows. (i) 7am personal care for the first claimant (2 paid carers). (ii) 8am personal care for the second claimant (2 paid carers), while the first claimant has breakfast ("I make breakfast and feed him"). (iii) 9-12am: the first claimant goes outdoors (2 paid carers), while (9am) the second claimant has breakfast ("I make breakfast and feed him"). (iv) 12-2pm: the first claimant returns and the claimants have lunch ("carers change the incontinence pads while I sort out lunch. I feed [one] then [the other]). (v) 2-5pm: the second claimant goes out with carers ("I stay at home with the first claimant. I carry out the physio exercises and stimulation"). (vi) 6pm: the claimants have dinner ("I prepare dinner and feed them"). (vii) 7pm: the claimants have personal care ready for bed (2 paid carers). (viii) 7:45pm: the claimants are in bed (carers leave). I have found it helpful to pause and reflect on the everyday life

experience which this, together with the night-time description to which I now turn, represents for all those involved.

9. Ms Rowlands helpfully took me back to 2017, to the care and support plans produced in respect of the claimants on 25 July 2017, following a planned review conducted on 15 May 2017. These 2017 plans referred to the claimants' night care needs, relying on the mother to continue to support them at night, but with the respite care of 9 hours per night one night per week. As Ms Rowlands accepted, the 2017 documents expressly recognised 'changing' and 'repositioning' of both claimants as assessed 'needs' requiring 'care', including at night-time. The plans and underlying review documents are written in the first person. The plans refer to "managing toilet needs" and state that the claimants "wear incontinence pads" and need "support… by changing my pads at regular intervals". The underlying review documents state that each claimant is "doubly incontinent and immobile" and that "I need to be changed and repositioned several times in the day to minimise the risk of pressure damage to my skin and to ensure that I maintain a high level of personal hygiene." So far as changing and repositioning needs at night-time are concerned, the underlying review documents state: "When I do not have carers, my mother assists me with all aspects of my personal care. She wakes up several times at night to change my pads and repositioned me…" That night-time repositioning is what this case is all about. Alongside the care and support plans drawn up in 2017 for each of the claimants was a carer's support plan, itself reviewed on 4 June 2017, again written in the first person. That document considered the position and needs of the mother. Under the heading "Review of any identified Hazards or areas of Risk", the review document stated: "My health needs have increased (I struggle with standing up and doing household tasks due to a spine problem. I also have arthritis in the neck and headaches) and my children are getting older and have more needs. I am not able to do as much as I used to and need more support to assist them."

10. The starting point is therefore that, as assessed in 2017, the two claimants each had night-time care needs requiring that they be repositioned so as to avoid the onset of pressure damage, but their mother was at that time assessed as being capable of carrying out that repositioning single-handed, notwithstanding her own health conditions. In a nutshell, it was at that time assessed that she could reasonably be expected to reposition her disabled sons at night-time, single-handedly. The central question which arose in this case, from June 2019 through to the hearing before me at the end of April 2020, was whether an urgent night-time care need had arisen, because the mother could no longer reasonably be expected to do this, with the sole justifiable response being the urgent interim care provision to allow for night-time carers, pending a full reassessment of needs.

A Full Reassessment is Pending

11. I have explained that these proceedings are about interim care provision. Everybody agrees the defendant was going to conduct, and at the time of the hearing before me had still to complete, its full reassessment of needs and the appropriate response to those needs, having conducted the necessary investigations, reviews and appraisals. The defendant's decision to conduct a reassessment can be traced back to an email from legal services dated 8 August 2019 which stated: "I can confirm that my client Department are arranging to undertake an assessment of need and will consider if night service is required as part of that assessment". A letter dated 22 November 2019 from legal services restated: "We confirm that we are agreeable to undertake an assessment

and do not dispute this." As I shall explain at the end of this judgment, documents served in April 2020 have as a clear theme that reassessment work has not been completed. For example, a carer's review document dated 22 April 2020 confirmed that the full reassessment is still pending, describing the need to review arrangements "following the introduction of new equipment and completion of the relevant Assessments, including OT, CHC, Physio and Manual Handling". The defendant's expert OT report, as I shall explain, also identified a number of important steps needing to be undertaken as part of the appraisal exercise.

A Series of Requests, Declined

12. A series of requests were made by the claimants' solicitors, asking that interim care provision be made so that the mother was no longer expected single-handedly to deal with the repositioning of her sons at night. The case put forward for the claimants was this: that the defendant as local authority has a statutory power to make interim care provision; and that the sole justifiable response was to make such provision. The series of requests can be traced back to a letter dated 11 June 2019. That letter stated that the mother "needs support with the night-time care of her sons. She is therefore requesting interim provision of 10 hours a night by one care[r] pending the completion of [assessment of] her sons' needs". The June 2019 letter explained that the mother was "expected to cover 12 hours of daily care including 10 hours of night-time care by herself", and that "at night she wakes up to change the incontinence pad for her sons [and] reposition her sons in bed". The letter described her "significant health problems which cause her pain and discomfort", describing her as "tired and… unable to continue providing night-time care". Then, as it was subsequently put in a letter to legal services dated 16 July 2019: "Your client knows that [the mother] has arthritis and hypertension … Arthritis causes her pain and her hypertension puts her at risk of a stroke. She has her own care needs and it is detrimental to her health to continue providing night-time care, in particular having to get up several times at night to reposition her sons in bed and, on her own, to change their incontinence pads. She gets very little sleep." The July 2019 letter stated: "It is therefore clear that the decision to refuse to fund night-time care in the interim pending an assessment of our clients' needs is not one which has been informed by any lawful assessment of [the claimants'] needs. It gives no reason for not providing night-time care offer expecting [the mother] to provide a substantial amount of care support day and night." The request was repeated in a number of subsequent letters. One, written on 26 November 2019, described the defendant's response as one which "fails to provide a reasonable decision for the refusing [of] interim provision for night-time care". Following a further similar request on 1 December 2019, the claimants' solicitors commenced these proceedings on 6 December 2019.

13. This series of requests for interim care provision was met with a series of responses, generally from the defendant's legal services, which declined to accede to the request. Following the new care and support plans dated 18 June 2019, which did not include this provision, there were then various responses including in particular those dated 8 August 2019, 28 October 2019, 22 November 2019, 29 November 2019 and 3 December 2019. All of those responses pre-date the commencement of proceedings. It will be necessary to revisit some of those key communications below, and to examine the reasoning contained in them.

This Claim, Resisted

14. When these judicial review proceedings were commenced, the section for "Details of the decision to be judicially reviewed" in the Court Form N461 (claim for judicial review) was filled out by the claimants' lawyers as follows: "The defendant's failure to provide interim care and support to the Claimants to meet their urgent night-time care needs under section 19(3) of the Care Act 2014". The "Date of Decision" section was filled out as: "Ongoing". Ms Rowlands did not dispute the appropriateness of a claim designed in this way. In my judgment, she was right not to do so. The remedy sought was (i) "An interim injunction requiring the defendant to fund 10 hours of night-time care per day to the Claimants under section 19(3) of the Care Act 2014"; and (ii) "A final order requiring the defendant to provide the Claimants with section 19(3) care". Ms Rowlands does take issue with the reference to section 19(3), which she says is the wrong power.

15. The claim was resisted throughout. I have referred already to the pre-action correspondence. Once proceedings were commenced, the defendant issued summary grounds of resistance, resisting permission and the interim relief being sought. That resistance to interim relief was unsuccessful, and Sam Grodzinski QC, sitting as a deputy High Court judge, granted interim relief on 12 December 2019. In response, the defendant issued an application to set aside interim relief, accompanied by further summary grounds of resistance, on 23 December 2019. That further resistance to the continuation of interim relief was unsuccessful, and on 15 January 2020 Roger ter Haar QC ordered that the interim relief should continue, granted permission for judicial review with directions and laid down a timetable which would allow the defendant to consider the matter further, and possibly even complete the full reassessment of needs. The final remedy sought by the claimants, for continuation of the interim care, was resisted by detailed grounds of resistance from the defendant dated 29 January 2020. The defendant chose, however, not to file any witness statement from any decision-maker who had considered the question of interim care provision. Finally, the claim and final remedy were resisted in a skeleton argument, revised on 27 April 2020, the eve of the substantive hearing before me on 28 April 2020.

'Sole Justifiable Response'

16. I have already mentioned that this is a judicial review claim in which the central submission made on behalf of the claimants is that the 'sole justifiable response' is the exercise of the defendant's statutory power to make interim care provision, pending the full reassessment of needs. Ms Rowlands points out that, on either party's case, the relevant statutory function is a discretion and not a duty. However, as Ms Foubister rightly points out, a statutory discretionary power must always be exercised reasonably in a public law sense. The passages from McDonald, to which I have referred, recognise that. She says this is a case in which the only response reasonably open to the defendant public authority was to exercise the power favourably, the upshot of which is that there is – in public law terms – a duty to act and a mandatory order is appropriate to require that action. That is a legal path open to a judicial review claimant, though it is an uphill one. Such claims are difficult to sustain, because the merits are for the defendant as primary decision-maker and the built-in latitude for reasonable evaluative judgments, to be respected by Courts, is a very significant one. As I explained in R (JXD) v Southwark LBC [2018] EWHC 3935 (Admin) at paragraph 14, urgent needs and the appropriate response to them are "matters for the local authority to evaluate and… any reviewing court would exercise the greatest of caution and restraint in its supervisory

jurisdiction", remembering that "the judge at a substantive hearing" is not "the primary decision-maker". I went on, however, to posit the case of a claimant who can "establish that immediate funded night-time care is the sole justifiable response". That, says Ms Foubister, is this case.

17. The 'sole justifiable response' contention permeated the claim throughout. I have mentioned that the claimants' pre-action letter of 26 November 2019 contended that the defendant's response "fails to provide a reasonable decision for the refusing [of] interim provision for night-time care". The grounds for judicial review put the 'sole justifiable response' point as follows: "In short, the claimants' position is that: (a) There is an urgent need for interim care because the claimants are known to require 24-hour care and [the mother] is no longer able to provide it at night; (b) The only justifiable care to meet this need is funding for 10 hours night-time care per day …" Similarly, at the heart of the claimants' skeleton argument was this submission: "The claimants' position is that immediate funded night-time care is the sole justifiable response to meet their urgent needs". At the heart of the defendant's skeleton argument was this submission on the point: "The claimants' case that 'the only justifiable care to meet this [urgent need for interim care] is funding for 10 hours night-time care per day'… is not… supported by the evidence the claimants rely upon. There was no evidence before the local authority that the claimants were not being provided with night-time care as required under the current arrangements. There was no basis upon which it could be said that no reasonable local authority would have failed to provide 10 hours a night additional care". So were the battle lines drawn on the central issue.

'Rolling Judicial Review'

18. These proceedings are, by their nature, an example of what has come to be described as "rolling judicial review". When I put this to Ms Rowlands, she agreed with this characterisation. I have described above the way in which the Form N461 was filled out, and the mandatory remedy which was and is sought. The claimants say that there has been an "ongoing failure" to recognise that the 'sole justifiable response' is to make interim care provision. I have described the series of rejected requests and the continued resistance of the claim. The defendant, rightly, did not object to the design of the claim as challenging an "ongoing" "failure" to make what was said to be the 'sole justifiable response'. Both parties invited the Court to consider the fresh evidence, filed in the proceedings, without objection from the other. In my judgment, both parties and their representatives were right to recognise that, in this particular case, the "rolling" nature of judicial review was not inappropriate. I will say something about why I agree with them and why "rolling judicial review" can, in some cases, be entirely appropriate, if approached with care and discipline.

19. The conventional approach to judicial review, reflected in the design of Form N461, identifies and impugns a specific "decision", with a specific date. This brings focus and discipline, including on the question of whether the claim is sufficiently prompt. Often, the claimant says there is an error of approach in a reasoned decision and seeks a quashing order. But there are lots of variations from this model. A claimant may impugn inaction or a failure or refusal, and seek a mandatory remedy. The conduct under challenge, and the alleged default, may be of a continuing nature. Sometimes a defendant authority is 'functus' once a decision has been made and lacks jurisdiction to reconsider. More usually, the defendant public authority is able to review, reconsider and react. It is important that they should. Open-mindedness is a virtue. At the letter

before claim stage, and after proceedings are commenced, a defendant may reflect and reconsider. Court proceedings and court hearings, and the costs associated with them, should be avoided if possible. Circumstances can change. There may be further exchanges of information and representations. New requests may be made and new responses written. If a new decision is adverse to the claimant, questions can arise as to whether a claimant needs to, and should be permitted to, amend the claim and grounds to challenge it. The case, for which the Court gave permission for judicial review, may be reshaped, narrowed or expanded. Issues can become 'water under the bridge' and there can be a lack of practical utility in analysing the past.

20. The dynamic reality can mean there is a 'moving target' and a 'moving picture'. The issues can seem slippery and harder to pin down. Focus, discipline and cooperation are needed. The Courts have explained that "public law litigation must be conducted with an appropriate degree of procedural rigour" (R (Talpada) v Secretary of State for the Home Department [2018] EWCA Civ 841 at paragraph 67). They have given warnings about "rolling judicial review" (an example is R (Caroopen) v Secretary of State for the Home Department [2016] EWCA Civ 1307 at paragraph 57), particularly where reliance is placed on material "not available to the decision-maker" (see eg. Kenyon v Secretary of State for Housing Communities and Local Government [2020] EWCA Civ 302 at paragraph 28). On the other hand, in cases where public authorities have ongoing functions, where open-minded re-evaluation and re-consideration are a reality and a virtue, there needs to be sufficient flexibility to ensure that the interests of justice are secured and not undermined. As it was put in Secretary of State for the Home Department v Said [2018] EWCA Civ 627 at paragraph 110: "decided cases have shown that cases are infinitely different and flexibility is desirable, allowing for rolling judicial review where appropriate. The touchstone must be fairness to the parties". In R (XY) v Secretary of State for the Home Department [2018] EWCA Civ 2604 [2019] 1 WLR 1297 the Court at paragraphs 60-62 discussed the case-law on "rolling review" and at paragraph 63 concluded: "there is no hard and fast rule. It will usually be better for all parties if judicial review proceedings are not treated as 'rolling' or 'evolving', and it is generally simpler and more cost-effective for the reviewing court to avoid scrutinising post-decision material. But there will also be a need to maintain a certain procedural flexibility so as to do justice as between the parties".

21. This case called for, and illustrates the appropriateness of, the procedural flexibility which the Courts have described. The design of the claim was permissible, sensible and has been vindicated. The parties were able to focus on the substance, and so was the Court. The central features of the case as brought were: a continuing statutory function; a continuing request for a particular care provision response; a continuing refusal of that request; and the consistent central issue as to whether the requested response was, in all the circumstances, the sole justifiable response such that the refusal was unreasonable in a public law sense. The discipline came from being able to see clearly: the basis on which the claimant says that the defendant is unlawfully failing to comply with a public law duty to act reasonably; and the basis on which the defendant says that its refusal is reasonable. This approach could take in its stride the reality on the ground, that the parties would continue to communicate about the disputed issue between them. There was no unfairness or prejudice. There was no problem of inadmissibility or irrelevance of fresh evidence. There was no need for the claim to be re-pleaded. The interests of both parties were protected, as the story of the case unfolded.

Questions of Temporal Focus

22. What all of this means in practical terms is that the Court has been able to look at whether the defendant public authority is in breach of a public law duty, at the time when the Court is considering the question and on the material before the Court, looking in particular for the most relevant reasoned response of the defendant as primary decision-maker. That meant that when the deputy judge (Sam Grodzinski QC) considered whether to order interim relief, he was able to do so on the basis of the picture as it stood at the date of his order. It meant that the deputy judge (Roger ter Haar QC) who continued interim relief and granted permission for judicial review could, equally, consider the position as it then stood. It has meant that I was in a position, as the judge dealing with the substantive hearing, to consider the position on the evidence before me.

23. That is as it should be. The statutory function is extant and ongoing. The remedy being sought is a mandatory order. I would only make a mandatory order if I were satisfied that, at the time of the order, the defendant public authority owes a public law duty to act in the way being ordered. The claimants have already achieved, through interim relief, the making and continuation of a mandatory order requiring urgent care provision for the period since those orders were made. That interim relief continues in force, until the time at which I give my substantive judgment and final order in this case, when it falls away and this judgment and my order have their bite. There are some cases in which a Court will entertain an analysis of the history of the legality of the public authority's action (and such questions could also, in some cases, be relevant to the question of costs). A good example is an immigration detention case involving, not only a question of present unlawfulness and mandatory order of release, but also damages for false imprisonment. Damages are often resolved in other judicial forums, but there are examples where it has been necessary and appropriate for a judicial review Court to proceed along a historic time-line, appraising the lawfulness, at particular key points, of the defendant's ongoing action.

Expert Evidence

24. In these proceedings both parties have put before the court expert Occupational Therapy reports. The necessary procedural rigour applicable in judicial review proceedings in relation to expert evidence is well-known: R (Law Society) v Lord Chancellor [2018] EWHC 2094 (Admin) [2019] 1 WLR 1649. In the present case, the parties for their part agreed that each side's expert report should be received and considered by the court, as being reasonably required for informed consideration and resolution of the issues. I agreed with them and granted each party permission to adduce their expert report. I also agreed, as was common ground, that the reports were independently admissible and relevant as reports considered by the defendant as primary decision-maker. It was of assistance, even as material of that kind, that the experts had stated their compliance with the rules and principles applicable to expert evidence, including the overriding obligation to the court. The claimants' expert report was two reports (one in respect of each claimant) by Ms Hillier dated 16 September 2019, provided to the defendant on 11 October 2019, and specifically considered by the deputy judges who granted interim relief and permission for judicial review. The defendant's expert report was by Ms Sheehan dated 19 April 2020 served on the claimants on 23 April 2020.

Collateral Factual Disputes

25. In the background, and along the way, these proceedings generated a number of disputed factual points, addressed in correspondence and in the documents before the Court. There were, for example, contentions made about the refusal of delivery of equipment; the cancellation of meetings; the refusal of access to an occupational therapist; obstacles placed in the way of assessment; unauthorised use of financial support; inappropriate adaptation of the home. I asked for clarity from both Counsel, as to whether it was their submission that it was necessary and appropriate for the judicial review court to resolve any of the disputed factual contentions that had arisen in the papers, for the purpose of resolving the public law issues in this case; and, if so, how it was proposed that the court should approach any such task. The response was that neither Counsel invited me to resolve any disputed question of fact, and neither submitted that it was necessary for me to do so in order to determine the issues. On one point, concerning the extent to which the mother continues to play a role in repositioning the claimants at night, Ms Rowlands made an oral submission, contested by Ms Foubister, that passages in some documents were a basis for a reasonable conclusion that the mother can reasonably be expected to reposition the claimants at night-time, single-handedly. I will come back to what I made of that.

The Wrong Power?

26. It was common ground between the parties, at the hearing before me, that the defendant does have a discretionary power to meet urgent needs, pending a full reassessment. It was also common ground that the Guidance contains passages which describe the appropriateness of such a course: especially paragraphs 5.26, 5.33, 6.26 and 13.34, to which I have referred. The legal controversy between the parties is as to whether section 19(3) of the 2014 Act is engaged in the present case.

27. Ms Rowlands for the defendant submitted in essence, as I saw it, as follows. The quotations here are taken from her detailed grounds of resistance. First, that section 19(3) is only applicable before an initial statutory needs assessment has been conducted: "section 19 is without any application in this case", since the claimants "seek … a re-assessment and not an initial assessment of their needs". That is why section 19(3) says "without having yet …" In other words, the situation described in the Guidance at paragraph 6.26 (urgent care provision at the "first contact") is the extent of the scope of section 19(3). Secondly, where there have been prior assessments, and where there is a pre-existing care and support plan, the applicable statutory function to address any necessary additional action is "a review under section 27"; and "[u]ntil that review has been completed, the obligation on the Defendant is to meet the claimants' needs as already assessed". Thirdly, in the context of a review under section 27, "if there was an obvious case for intervention, such as an emergency, or an easy adjustment to make… interim arrangements could be made". This explains the passage in the Guidance at paragraph 13.34, referring to "interim packages to urgently meet needs while the plan is revised". Such urgent interim action would "need to be provided under section 27, and in particular section 27(4)". Fourthly, since the claimants have, throughout, nailed their colours to the mast of section 19(3), the claim must fail for identifying the wrong power. That is so, even if the defendant is acting unreasonably in failing to provide urgent interim care provision.

28. I cannot accept these submissions. In my judgment, the fact that the local authority has in the past carried out a section 9(1) "needs assessment" (see section 9(1) and (2)), combined with the phrase "without having yet" in section 19(3) ("without having yet…

carried out a needs assessment") does not confine section 19(3) to a paragraph 6.26 "first contact" situation, prior to a first statutory needs assessment. The fact that there is an existing care and support plan, to which the section 27 function of review and revision is applicable, does not exclude any application of section 19(3). As the Guidance emphasises (paragraphs 13.8 and 13.27), the section 27 review and revision functions can engage the conduct of a further assessment under section 9(1). The point can straightforwardly be tested by taking section 27(4). It provides as follows: "Where a local authority is satisfied that circumstances have changed in a way that affect care and support plan or support plan, the authority must – (a) to the extent it thinks appropriate, carry out and needs or carer's assessment, carry out financial assessment and make a determination under section 13(1), and (b) revised care and support panel support plan accordingly." The "needs… Assessment" referred to in section 27(4)(a) would be a section 9(1) "needs assessment". In the period of time before that section 9(1) needs assessment has been "carried out", it would be a "needs assessment" which has not "yet" been carried out. If section 9(1) applies, why not section 19(3)? On the natural and ordinary meaning of the words, section 19(3) would straightforwardly apply to that situation. This is a benign and protective interpretation. It means, simply, that the local authority has the discretionary power to meet care and support needs "which appear to it to be urgent". It is especially important, given that Parliament referred to revision of the plan as being a step taken after the carrying out of the relevant (4)(a) assessments. That is a very strong indication that urgent needs, pending assessment, would be met not by urgent revision of the plans but by (3) urgent meeting of needs by way of provision of care and support. It follows, from an examination of section 27(4) alone, that section 19(3) is not in principle restricted to the initial contact stage, and the position prior to the carrying out of a first "needs assessment". It is to be noted that in section 19(3), Parliament spoke of the local authority as not "having yet – (a) carried out a needs assessment…"; it did not say "having yet – (a) carried out any needs assessment".

29. The present case, as I have explained, is one in which the defendant had agreed from August 2019 onwards to carry out a full reassessment of the claimants' needs for care and support. That full reassessment would constitute "a needs assessment" for the purposes of section 9(1). The position, in relation to all of the requests for interim provision of urgent additional care and support, at least from 16 July 2019 onwards, was that "a needs assessment" was to be carried out but had not "yet" been carried out. When Sam Grodzinksi QC and Roger ter Haar QC ordered urgent interim care and support to be provided in this case, on 12 December 2019 and 15 January 2020 respectively, they were – in my judgment – ordering the taking of steps which the defendant had the power to take pursuant to section 19(3). Such steps were within the statutory powers of the defendant, without it having to make any urgent revision to the care and support plan. Ms Rowlands in her skeleton argument submitted that the issue for the Court was whether the Court had "power" to order interim relief. If, by that, she was submitting that the Court was ordering by interim relief the defendant to do something under section 19(3) which that section does not cover, then in my judgment, she is wrong about that.

30. In my judgment, Ms Rowlands is right that the defendant has the power to take urgent action pursuant to section 27. That section empowers the local authority to revise a care and support plan. Although the statute mandates various matters, in the context of revision of a plan, such as the duty to have regard to specified matters and to involve

specified persons within the process, I would agree with Ms Rowlands that an urgent revision could take place, pursuant to the section 27 powers. An urgent revision to a care plan could be made, and that could have been done in the present case. That could, moreover, be especially important if there is a situation where there is something temporary and urgent but where everyone agrees that there is no question of carrying out a further section 9(1) assessment. In fact, in my view the better view is that section 19(3) "without having yet" could also be applied in that situation, but that is not this case and it is unnecessary to resolve that question. In a case where there is to be a section 9(1) further assessment, the local authority has two overlapping powers. They operate in accordance with the ordinary and natural meaning of the words chosen by Parliament, to enable a local authority to respond to urgent needs. This approach is supported by paragraph 13.34 of the Guidance which contemplates that urgent care provision may be implemented not just through an urgently revised plan, but also "to urgently meet needs while the plan is revised".

31. I will go on to consider what the position would be if Ms Rowlands had persuaded me that section 19(3) could have no application to the present case, and that the sole source of the defendant's discretionary power to meet urgent needs was the power to revise the care and support plans pursuant to section 27. Or alternatively, had she submitted that there were overlapping powers but that the defendant was entitled to say that any action would be urgent plan revision under section 27 pending re-assessment. In either of those scenarios, I would not have dismissed the claim without addressing the substance of whether the defendant's refusal to exercise its undoubted discretionary power was unreasonable. It would be contrary to the interests of justice to leave the central point of substance unresolved. Both parties, naturally, prepared to argue the point of substance on its public law merits.

32. The passage in the detailed grounds of resistance, in which the defendant accepts that section 27 would be available in an urgent case, is followed by a passage which contains the following contention regarding the substance: "Whether there is an urgent need to intervene as a matter for the determination of the local authority on the evidence before it. The Defendant does not believe that there was any urgent need in this case… It cannot be said that no reasonable authority would have failed to provide such a large increase in the care package without seeking to establish the need for such a package, even on an interim basis… The claimants have failed to provide any evidence that there was an urgent need for night-time care". In other words, the substance of the point ultimately comes down to whether the defendant has been acting reasonably, in refusing the various requests to provide the interim care provision. If the defendant succeeds on that issue, the claim must fail but if the claimants succeed on that issue, it is because the defendant has acted unlawfully. The evidence and submissions on the point of substance are identical, irrespective of the source of the discretionary power. In each case, the arguments lead inexorably in my judgment to two points: first, whether the mother could reasonably be expected to continue to reposition her sons at night single-handedly; and secondly, whether the sole justifiable response was urgent additional care and support pending a full reassessment.

33. Even if I had concluded that the claimants had located the discretionary power in the wrong part of the statute, I would not have disposed of the claim without dealing with the point of substance on which all parties were ready and fully armed. Had I found in the claimants' favour on the unlawfulness, having found in Ms Rowlands' favour as to

the location of the power, I would have granted permission to amend the grounds to rely on section 27. There was no possible prejudice to the defendant in focusing on the point of substance. It would be an injustice, and contrary to the public interest, to allow an ongoing unlawfulness to be unrecognised and unmediated because of reliance on the wrong section of the statute, in a case in which the defendant public authority has had and taken every opportunity to prepare its position both on the interpretation of the statutory scheme and the reasonableness of inaction as a matter of substance.

The Position Prior to Proceedings

34. Ms Rowlands submitted that the defendant had 'acted reasonably throughout'. She invited me to analyse the reasonableness, and so the lawfulness, of the defendant's action by taking relevant dates within the chronology in the run up to the commencement of these proceedings on 6 December 2019. She submitted in particular that the claim, when commenced, was misconceived, because there had been no unreasonableness on the part of the defendant at any stage prior to the commencement of the proceedings on 6 December 2019. She characterised that as a reason why the claim must fail. I have explained the importance of discipline in relation to the temporal focus, especially in a 'rolling' judicial review case. I have explained why the critical temporal focus is whether there is, at the time of the hearing, a basis for the grant of the mandatory remedy sought. I have explained that, unlike a Hardial Singh damages case, this is not a case where it is necessary or appropriate to undertake an analysis of historic lawfulness along a timeline.

35. At the start of this judgment I summarised the series of requests for urgent interim care provision, declined by the defendant, starting with a request on 11 June 2019. Based on submissions of both Counsel, I can identify the following key points as reflecting documented positions taken by the defendant prior to the proceedings. (1) 18 June 2019, when the defendant completed new care and support plans maintaining the previous position that: "My mother will continue to support me at night. One night per week, I will receive 9 hours of night respite at £13.10 per hour". (2) 8 August 2019, when the defendant agreed to arrange to "undertake an assessment of need and … consider if night service is required as part of that assessment." (3) 28 October 2019, when the defendant's legal services wrote a letter stating that the community health and social care team was proposing an action plan, to include a multidisciplinary team meeting, and occupational therapy and physiotherapy assessment, manual handling care plans, and interim respite placements, together with an allocated social worker. (4) 22 November 2019 when the defendant's legal services wrote a letter stating:

> We confirm that we are agreeable to undertake an assessment and do not dispute this. However, the community health and social care Fairlop team are not able to make changes to [the claimants'] Care and Support Plans without completing a reassessment of their needs. The assessment will also inform what if any, adaptions are urgently required.

(5) 29 November 2019, when the defendant's legal services wrote a letter stating that:

> [B]efore we can agree to the night-time provisions, it is necessary that an assessment of the service users' needs is required to be undertaken urgently … firstly to identify whether the need exists and secondly the equipment needed to assist the staff to provide the provision…

and adding:

> [T]he local authority cannot provide the service without first assessing the need and what equipment is required for stop As you clearly highlighted there are health and safety issues that the local authority are required to consider[] before sending its staff, if any.

(6) 3 December 2019, when the defendant's legal services wrote a letter stating:

> This local authority has not been unreasonable in requesting an urgent assessment of the service users. Contrary to your letter, we do not agree that this need is urgent. Therefore, your citation on section 19(3) is incorrect. The local authority are undertaking an urgent assessment firstly, as an attempt to resolve the matter rather than having to resort to judicial review proceedings and secondly, our client department using this opportunity to reassess both [claimants'] needs, as they have not been able to undertake a reassessment of their needs since 2017, due to your client frustrating the process… The issue of night care was initially raised in your letter dated 11 June but with no medical or expert evidence in support. You have only recently provided this on 11 October and again on 17 October… You have failed to provide any evidence to 24-hour care and support as required for the service users, you seem to demand this and are of the position that this is a reasonable ground to issue judicial review proceedings. If you intend to rely upon your own expert OT, her report does not stipulate that this is 'required' or that it is 'urgent', in fact it states in both the recommendations that:
>
> > 'It is my professional opinion [the service users] would benefit from 24-hour care and support as his home environment. He has complex manual handling needs and care needs to justify this level of provision'.
>
> Therefore, we fail to understand what is current[ly] the basis of your grounds for interim relief under the judicial review process. Due to the lack of evidence demonstrating the need for 24-hour support, the local authority are entirely just in requesting an assessment not only to determine if this need is required, but… To ensure the appropriate risks are identified and the correct equipment is put in place, if any.

36. It is appropriate that I repeat a point made at the start of this judgment, of which any judicial review judge needs to be – and remain – acutely conscious. The primary decision-maker is the defendant. The supervisory jurisdiction of the court is a secondary jurisdiction. It is to those with decision-making authority within the defendant public authority that Parliament has entrusted the difficult task of evaluating needs and their urgency. The Court must have in mind, at all times, the very significant built-in latitude which features so predominantly within the nature and application of the public law principle of unreasonableness. For a claimant to show that a public authority is acting unreasonably in relation to the exercise of a discretionary power, particularly in a context such as the present, is a high threshold.

37. I agree with Ms Rowlands that the defendant was not obliged to immediately implement interim care provision, simply because it was requested. The mother was interwoven as night-time carer into the care and support plan arrangements which went back several years, notwithstanding her spine and arthritis conditions. As the June 2017 carer's support plan review document had said:

> My health needs have increased (I struggle with standing up and doing household tasks due to a spine problem. I also have arthritis in the neck and headaches) and my children are getting older and have more needs. I am not able to do as much as I used to and need more support to assist them.

The claimants' solicitors, as at 11 June 2019 were requesting additional night-time care support because of what were said to be "significant health problems which cause [the mother] pain and discomfort, she is tired and is unable to continue providing night-time care". There was no sudden emergency described and no specific supporting evidence. The defendant's response, as at the email of 8 August 2019, was that it would arrange "an assessment of need and … consider if night service is required as part of that assessment". Everybody agreed that a full needs reassessment was appropriate, but the question remained: what about interim care provision?

38. By 11 October 2019, several months having elapsed, the claimants' solicitors put forward the two expert reports of Ms Hillier. Ms Hillier stated clearly that she was recommending "double handling at all times", for the following reason: "This is because [the claimant] requires re-positing every two hours and needs his incontinent pads changed 4 times during the day… and three times at night as stated by [the mother] during the assessment. These care tasks involve two people (double handling) for safe and correct use of the manual handling equipment needed for safe transfers". The expert reports stated that the mother had explained that each son "needs rolling from side to side at night. She told me she manually needs to roll him every two hours to prevent him from developing pressure sores. [She] stated she also needs to change [his] incontinence pads three times a night and she does this on the bed." It also stated that the mother is "currently doing repositioning… every two hours to ensure pressure sores do not develop". The reports said each claimant "would benefit from 24-hour care and support at his home environment, and this "would benefit" language was immediately followed by this explanatory reason: "He has complex manual handling needs and care needs to justify this level of provision".

39. I have identified three key themes in the defendant's refusals to implement interim provision, in the run up to the issuing of proceedings on 6 December 2019. A first theme concerned what was described as the defendant's 'inability' to make any change without a reassessment of needs. The letter of 22 November 2019 described the defendant as "not able to make changes to [the claimants]' care support plans without completing a reassessment of their needs". The letter of 29 November 2019 described a needs assessment as being "required before we instil any change in the care package, urgent or otherwise". This language, in my judgment, was an unfortunate overstatement of the position. The statute entrusted the defendant with a discretionary power to act without having completed a reassessment. It did so, even on what emerged as the defendant's analysis of section 27. A discretionary power, together with repeated requests that it be exercised, required the defendant to address whether to exercise it. Instead, the language of the refusals ruled it out. In concrete human terms, the central question was whether the mother could reasonably be expected to continue to undertake the care provision of repositioning her sons at night, single-handedly? If the local authority was reasonably satisfied that she could, then it could justify refusing to provide urgent interim care. If, on the other hand, the local authority was reasonably satisfied that she could not, then I cannot see how it could in those circumstances justify refusing the urgent interim care provision. In the latter scenario, it would be "able" to make the provision, and the needs assessment would not be "required" before it did so. It needed to ask and answer the question.

40. A second key theme in the responses, introduced in particular in the letter dated 29 November 2019, was a 'health and safety' concern about whether carers could be

expected to reposition the claimants without appropriate equipment having first been installed. The defendant said: "the local authority cannot send staff to undertake night-time care without the proper equipment in place" and "there are health and safety issues that the local authority required to consider[] before sending its staff, if any". The letter of 3 December 2019 recorded the defendant's position as "entirely just in requesting an assessment … to ensure the appropriate risks are identified and the correct equipment is put in place". There can be no doubt that the defendant was reasonably entitled to be concerned about, and wish to evaluate, equipment and health and safety. However, that could not of itself be a complete answer to whether there was or was not an urgent need, justifying immediate interim action, notwithstanding that the health and safety assessment had not yet taken place. Test it this way: suppose the defendant had learned that the mother was now in a wheelchair. The claimants needed repositioning at night. The 'health and safety' concerns applied to whomever was doing the repositioning. Either the mother was expected to do it single-handedly, or help was needed. The defendant was not sending its own carers. The mother was engaging the carers privately, using the financial support package. Carers were involved one night per week. There was a real-world situation, needing an answer. In his detailed reasons for granting interim relief, Sam Grodzinski QC addressed this point, observing that there was apparent force in the answers that the mother's chosen carers were already acting and that the defendant was not being asked to send its own staff, adding that it "will of course be open to the defendant" to include a further explanation, including in "witness evidence". That was never forthcoming. In the event, as will be seen below, the 'health and safety' aspect previously raised did not prevent Mr Knight from recognising the need and the appropriateness of interim care provision continuing.

41. The third theme within the correspondence prior to the commencement of proceedings is the one that ultimately matters most. This theme concerns whether the claimants' solicitors had provided proper evidence to support the urgent need that they were describing as calling for urgent interim care provision. It was one thing for the defendant to say that claimants' solicitors' description of the mother as "unable to continue providing night-time care" (letter of 11 June 2019) was insufficient evidence. But on 11 October 2019 the claimants' solicitors had provided to the defendant the expert Occupational Therapy reports. These had been prepared in circumstances where the claimants' solicitors had (on 16 July 2019) written a 'pre-action protocol' judicial review letter before claim. The reports were expert reports in a form which could be put before the court, accompanied by the appropriate statements of compliance, truth and conflicts and declaration of awareness. There is no witness statement from any individual entrusted with the relevant decision-making function, and no contemporaneous document showing how any such person evaluated this evidence or grappled with what the mother could be expected to do. The substantive response came in the defendant's legal services' letter of 3 December 2019, characterising the expert report as one which "does not stipulate that [the care and support] is 'required' or that it is 'urgent'", but which stated rather that each claimant "would benefit from 24-hour care and support at his home environment. He has complex manual handling needs and care needs to justify this level of provision". Thus, wrote legal services, there was a "lack of evidence demonstrating the need for 24 hour support", and no "basis" for the interim relief which the claimants' solicitors were foreshadowing seeking.

42. I have summarised above what Ms Hillier's expert reports said. In particular, they said that each claimant required repositioning several times during the night, which required

two people; and they said that the recommendation ("would benefit") was because each claimant had complex manual handling needs and care needs to justify this level of provision. In my judgment, the expert reports put forward in October 2019 could not reasonably be regarded as failing to "stipulate" that the additional night-time care and support was "required", or "urgent". The key reason given in legal services' letter of 3 December 2019 for that contention, not supported by any document from a primary decision-making individual, focused on the use of the language "would benefit from …" However, a full and fair reading of the reports show that they went far beyond recommending a course as being beneficial or optimal. In his careful and detailed reasons for the grant of interim relief on 12 December 2019, Sam Grodzinski QC said this:

> a need for night-time care is clearly supported by the OT reports of Jodie Hillier, and by what [the mother] states (supported by medical evidence [in] the bundle) about her physical inability to carry on providing such care at night time. The defendant's… letter of 3.12.19 takes issue with whether the care needs are urgent, and notes that Ms Hillier's report states that '[the claimant] would benefit from 24-hour care and support in his home environment' (my emphasis). However, I do not interpret that sentence as implying that such care is regarded by Ms Hillier as an optional or aspirational benefit, rather than an immediate need in particular when the reports are read as a whole.

I entirely agree with that assessment and cannot improve on it.

43. In my judgment, for these reasons, on the materials before the court relating to the defendant's position up to and including 3 December 2019, the defendant was not acting reasonably – in the light of the experts reports put forward in October 2019 – in refusing to exercise its discretionary power to provide urgent night-time care and support. Nothing in the documents provides reasonable support for any conclusion that the mother could reasonably be expected to reposition the sons at night, single-handedly. Indeed, I have been able to find no evidence that the defendant – and certainly anyone with decision-making responsibility – asked itself that question and, if they did, as to how they answered that question. It follows that I do not accept Ms Rowlands' submission that there was no unlawfulness as at the date when proceedings were commenced.

The Position After Commencement of Proceedings

44. I have explained why this case is not about the historic position. Judicial review is designed to be a practical and effective remedy. This is a claim challenging an ongoing refusal. The sole remedy sought in the judicial review proceedings, from first to last, was an order requiring interim care and support, pending a full reassessment of needs. Such an order has been secured, by way of interim relief, until my judgment. The purpose of the substantive hearing is for me to decide whether that order should appropriately become a final, substantive order; or whether it should be discharged and fall away.

45. The defendant had a full and fair opportunity to do two things. First, it could put forward all and any documents which it says is relevant to support the reasonableness of the position that it has adopted, in resisting the argument that the sole justifiable response in the circumstances of the present case is to provide the urgent additional care and support. Roger ter Haar QC gave a direction for written evidence, and Sam Grodzinski QC referred to witness evidence. Secondly, the defendant has been able to reconsider

and reflect on the position, in the light of the evidence provided in the proceedings, and in the light of such steps as it sees fit to undertake and evidence. So far as witness statements are concerned, I have already observed that there is no witness statement filed in this case on behalf of the defendant.

The Claimants' Witness Statements

46. The evidence before the Court includes the witness statements from the mother. A witness statement dated 6 December 2019 told the Court:

> I am requesting night-time paid care for the claimants because I am no longer fit to provide the night care. I urgently need help with supporting them at night.

It tells the court:

> I am struggling to care for them at night as turning them over causing serious pain.

It states that:

> [The claimants] need to be repositioned during the night to prevent skin and pressure damage which would occur because of their limited mobility.

It says:

> I am 56 years old. I suffer from hypertension, swollen feet and pain due to arthritis and slipped or dislocated discs affecting my back for which I need surgery. I have not accepted the surgery because I need to look after my sons. My health makes it difficult to provide the level of care I am currently providing for my sons.… I am back doing the night-time care, despite my serious back problems and pain.…

Prior to proceedings the defendant did not have (nor had it asked for) the claimants' description of the need to be set out in a formally executed witness statement. After proceedings were commenced it did have evidence of this nature and in this form.

47. There was also the supporting medical evidence supplied in the bundle, to which Sam Grodzinski QC referred. To that was added a letter from the mother's GP, dated 25 February 2020, recording her long-standing and ongoing back problems. It records that the mother "was seen at the surgery recently with acute [and] chronic back pain. She reported that she cannot walk for more than 100 meters and unable to stand for long. She is finding it increasingly difficult to look after her disabled children".

48. In a second witness statement dated 23 April 2020, the mother updates the Court. She says this:

> To conclude, I want to stress the urgency of the claimants' case. They depend on me for their needs. My health is deteriorating. I refer to my GP's report of my diagnosis dated 25 February 2020… I need surgery to relieve pressure on the spinal nerve which gives me quite a lot of pain when bending. Proposed surgery has a recovery period of 6 weeks, but without support I would have to continue my caring duties without a break. In my present condition I am unable to walk except for short distances indoors at home and not at all outdoors. I am in pain when I stand and can only do so for short periods. I have had a further MRI scan which shows a degenerative problem in my spine which is unlikely to be fixed by surgery. I also have the problem with my right shoulder which are reported to my

> GP and 2018, and pain to my knees and neck which I've been told is due to degeneration and I think the prognosis is not good. In addition, I have high blood pressure. Caring for the claimants is extremely physically demanding. The most physically demanding part is turning them at night, and as I explained in my first statement, I cannot physically do it anymore. If I tried, I would be in serious pain and at risk of causing further injury to myself… I cannot continue doing the hands-on physical tasks because of my own difficulties with pain but I am able to manage their care to keep them living at home which is essential to preserve the quality of life at home.

Significance of a Reasoned Decision Document

49. In the present case, where interim relief was granted by a first judge, and was continued together with the grant of permission for judicial review by a second judge, the defendant has been on very clear notice of the fact that there is 'a case to answer' regarding the reasonableness of refusing to recognise urgent need for interim care provision in this case. As I have explained, the pleaded position of the defendant, in its detailed grounds of resistance emphasises:

> Whether there is an urgent need to intervene as a matter for the determination of the local authority on the evidence before it. The defendant does not believe that there was any urgent need in this case.… The claimants have failed to provide any evidence that there was an urgent need for night-time care.

50. As I said in the JXD case at paragraphs 13 and 16, the judicial review court will look to see whether there is a "reasoned decision document… involving the specialist and expert local authority officers conducting a s.19(3) reasoned decision, explaining how they have approached the urgency and the need and the… alternatives, and giving the justification as to why [there] response is the appropriate response…" That was an application for interim relief, which the court had to approach in circumstances where "the court does not have before it a document which shows how such matters have been evaluated".

51. In the materials filed in behalf of the defendant during the proceedings, supporting the continued refusal of interim care provision and the continued resistance of these proceedings, the Court was shown no document which addresses the question whether the mother can reasonably be expected to reposition her sons at night, single-handedly, and concluded that she could. I asked both Counsel whether there was any such document in any of the hundreds of pages of materials put before the Court. I was shown none. The built-in latitude enjoyed by the primary decision-maker remains, this does not become a merits-based review, and the public law reasonableness threshold remains the high one. On the other hand, it will be the harder for the defendant to resist a reasonableness claim, invoking the built-in latitude applicable to it as the primary decision-maker, when it is unable to point to a document in which someone, having the statutory function entrusted by Parliament, grapples with the key questions and reasons out an adverse response.

The Position at the Hearing

52. To recap, the critically relevant question for the Court at the substantive hearing is whether – based on the evidential picture before the court – ongoing care support provision, as requested by the claimants and as ordered by way of interim relief, constituted the sole justifiable response. If so, but not unless so, there was a public law

duty to provide it, and a basis for the final mandatory order sought. It is at this point in the analysis that I need to turn to documents which were served by the defendant on 23 April 2020, 5 days before the substantive hearing. Those documents were a suite of materials running to some 270 pages. Among them were four documents of greatest significance. (1) The expert Occupational Therapy Assessment and Recommendation Report, written by Ms Sheehan on 19 April 2020. (2) and (3) "Adult Conversation" documents written by Mr Knight, in the nature of reports written following assessment visits on, as I understood it, 6 January 2020 and 15 January 2020. Each of these two documents bears a "start date" of 9 January 2020. One of them (in respect of the first claimant) was 'completed and authorised' with a date of 22 April 2020. (4) There was a carer's review document, also written by Mr Knight, dated 22 April 2020.

Full Reassessment Steps Have Not Been Completed

53. One identifiable theme arising from the material served by the defendant on 23 April 2020 is the confirmation that the full reassessment and redetermination has yet to be completed. That means it would be wrong to say that this claim has become 'academic', in the sense that there is no 'interim' period left, to which the claimed remedy of a mandatory order requiring interim care provision could apply. Each of the three documents written by Mr Knight refers to the following as awaiting completion: "the introduction of new equipment, and completion of the relevant OT, Physio, Manual Handling and CHC assessments". The defendant's expert's report (19 April 2020) repeatedly refers to assessments which are necessary and outstanding. These include "an assessment of [the claimants] sling needs [to be] completed as a matter of urgency"; "a full manual handling assessment [to] be carried out incorporating a specific review of overnight needs"; a "review [of] the need for suitable systems to improve positioning during the night e.g. Vendlet"; and a safe carer working environment "assessment… carried out as a matter of urgency and where appropriate… equipment in place to reduce risks".

A Current Need for Two-Person Repositioning

54. A second theme which clearly emerges from the documents disclosed by the defendant on 23 April 2020 is a recognition of the claimants' current needs as including night-time repositioning, involving two people. In the expert Occupational Therapist report the need is recognised, though the reference would be easy to miss. The expert's recommendation of a review of the need for suitable systems to improve positioning during the night has the following identified underlying "clinical reasoning": "To reduce the need for two carer at night and reduce the night-time manual handling risks". I agree with Ms Foubister that what the expert is there describing, on the face of it, is a recognition that the current "need" is "for two carers at night" for repositioning the claimants. Nowhere does the expert report say or suggest that there is not a current such need. Nowhere does it say or suggest that the mother is reasonably to be expected to be able to reposition the claimants at night-time, single-handedly.

55. The Adult Conversation assessment documents, written by Mr Knight, in my judgment, clearly recognise the same need. Within each of them, there are the following passages (again, written for the claimants in the first person): "I require the support of two people with all aspects of my personal care" (both claimants); "I require the support of two people when changing my [incontinence] pad" (both claimants); "I need the support of two people, to assist me with all aspects of my personal care. I require the support of

two people, for repositioning…" (second claimant); "I am dependent upon others for all aspects of my personal care. I require assistance from two carers to assist me with repositioning…" (first claimant). In relation to "managing toilet needs", the "details to support outcome decisions" says "I am currently dependent upon the support of two people in order to change my pads" (first claimant) and speak of action "[t]o continue to provide [the second claimant] with the support of two people in order to ensure his dignity at all times". In the "summary" section of each Adult Conversation, Mr Knight (now writing in the first person for himself) states as follows: "Based on the outcomes of this assessment, I have determined that [the claimant] has identified needs in the following areas… Being able to make use of my home safely. [The claimant] requires 24-hour support in order to remain safe within his living environment. He requires the support of two people, to assist with repositioning and with all transfers". There is also this: "Managing toilet needs – [the claimant] is doubly incontinent and is dependent upon two people to change his pads".

56. In the light of this material, when I look to see whether – in this case – there is now a reasoned response by a primary decision-maker, assessing whether there is an urgent need, or whether the mother can reasonably be expected to reposition the claimants at night time single-handedly, I find the content strongly supports the claimants. Far from there being a reasoned consideration which rejects the existence of the claimants' needs, to which the court would afford respect given the local authority's latitude in the exercise of its evaluative judgment, the reasoned consideration on its face recognises the existence of the need.

Well-Foundedness of the Claimants' Central Contention

57. In my judgment, the claimants' submission that the sole justifiable response is to make available the interim care provision sought, and previously ordered by way of interim relief, is well-founded and I accept it. I accept, based on all the material before the Court, that it would be unreasonable for the defendant to do other than make that interim care provision. As to what happens now, there is a third theme in the April 2020 documents, which was the subject of an important and reinforcing twist which took place during the hearing before me, to which I will come shortly. But first I need to deal with what I made of a submission about whether the mother, on the evidence, is repositioning the claimants herself. This was the point I carved out to be addressed later, when I dealt above with collateral factual disputes.

'The Mother is Repositioning the Claimants Herself'

58. In response to a question from me at the hearing, Ms Rowlands submitted that passages within Mr Knight's Adult Conversation documents, served on 23 April 2020, show that the mother continues to reposition the claimants herself at night-time, even with two carers in the house. That, she submits, supports the reasonable conclusion that the mother can herself "presently meet [the] night-time needs" (the language used in her skeleton argument). The Adult Conversation says the mother described herself as "always present at night, and offers additional support", record that "She stated that she often sleeps next to [the second claimant], in order to offer him night time support", and quotes her as saying "Before we had overnight carers, I would be solely responsible for providing any support, apart from during periods of respite. However, I still choose to assist the workers when the provide physical support". In the "summary" section, Mr Knight records that the claimant "is currently provided with the support of one worker,

throughout the night", adding that the mother "continues to provide support throughout the night". In the carer's review document, the mother's position is described as follows: "I am very happy with the support that I receive at present and with the support provided to [the claimants]. I think it is very important that the overnight support remains in place. Although I continue to assist the workers, when supporting [the claimants], this has reduced a lot of stress from my life"; and "I continue to provide [the claimants] with physical support throughout the night. I have chosen to continue with this support, despite both being provided with ten hours 1-1 support". In my judgment, these passages are not a proper evidential basis for a conclusion that the mother is carrying out repositioning by herself, notwithstanding that the carers are in the house. Nor does the document, or any witness statement, record Mr Knight as having arrived at that assessment of what was happening. The words "additional" and "assist" speak for themselves. The Court can put these passages which report the mother's description alongside her witness statement. I would also accept Ms Foubister's submission, that if the defendant wished to allege that the mother was repositioning the claimants single-handedly, it needed to make that contention clearly and promptly, in which case rebuttal evidence could have been adduced from the carers engaged at night-time.

What Happens Now?

59. I have said there was a further theme in the documents served by the defendant on 23 April 2020. It is this. One finds within the documents written by Mr Knight recognition, so far as he was concerned, that what is now to happen is continuation of the interim care provision, originally requested and ordered by way of interim relief, until the reassessment process has been completed. In the "summary" section of each of the two Adult Conversation documents there is a conclusionary paragraph written by Mr Knight says this:

> [the claimant] is currently provided with the support of one worker, throughout the night… This overnight support will remain in place on a temporary basis, until the introduction of new equipment, and completion of the relevant OT, Physio, Manual Handling and CHC assessments.

In the "review summary" section of the carer's review document dated 22 April 2020 Mr Knight says this:

> The overnight support provided to [the claimants] will be revised, following the introduction of new equipment and completion of the relevant Assessments, including OT, Physio and Manual Handling.

60. At the hearing, I asked Ms Rowlands whether, in the light of these passages, the defendant's position before the Court was that the interim care provision should continue until the completion of the steps relating to the reassessment of needs. Ms Rowlands told me that, having taken instructions, that was the defendant's position. In other words, the defendant had decided to take the course described by Mr Knight in the documents which he had written. I asked Ms Rowlands whether such a decision had ever been communicated to the claimants' representatives, for example in a letter. I was particularly concerned given that Mr Knight's adult conversation and carer review documents had arisen out of assessment visits which he had conducted on 6 and 15 January 2020, one of the documents then being signed off on 22 April 2020. The position was this. No letter had been written, communicating that this decision had been

reached. At no stage, in or after January 2020, did the defendant write to the claimants' representatives and say that a decision had been made to continue the interim care provision pending for needs reassessment. Ms Rowlands said a 'decision' had been 'communicated' through the disclosure on 23 April 2020 of Mr Knight's Adult Conversation and carer review documents. I cannot accept that. I was and am concerned, if a decision was reached, at some unknown stage after 6 January 2020, that it was never straightforwardly communicated. Nor was it communicated, for example by a covering letter, when the documents were disclosed on 23 April 2020. There have been many letters written between the parties. Ms Rowlands filed an updated skeleton argument on 27 April 2020, in the light of the documents now disclosed. It contains no clear statement of the position as it had been communicated to me, on instructions, at the hearing: namely, that the defendant had decided to continue the interim care provision until the needs reassessment steps had been completed.

61. Logically, it is possible – of course – for the defendant to decide to continue the interim care provision on the merits, while maintaining that this is not the sole justifiable response as a matter of public law reasonableness. It does not therefore follow from the decision, communicated orally at the hearing, that the claim is well-founded. However, the evidence – in my judgment – including Mr Knight's assessment documents do support the conclusion that this is the sole justifiable response. And this third theme, together with what I was told at the hearing, are relevant reinforcement. I cannot conclude that it was reasonably open to the defendant to conclude that the mother could be expected to reposition the claimants at night-time, single-handedly. I repeat that no document before me grapples with that question and arrives at that answer. Naturally, having arrived at a decision to continue interim care support, it would be unreasonable for the defendant not to deliver it. But that is a distinct point. What matters in the public law analysis is whether the claimants have persuaded me, on the evidence, that such a decision was the sole justifiable response. They have, and the conclusion is reinforced by the third theme: Mr Knight's recorded statements as to what should happen next.

'We have been saying that the claim is academic'

62. In the light of this turn of events at the hearing, Ms Rowlands submitted that the proceedings had become "academic", based on Mr Knight's documents and what was said there, and based on what she had told me on instructions about the decision which the defendant has taken. Ms Rowlands added that 'we have been saying that the claim is academic', referring to her detailed grounds of defence dated 29 January 2020. It is appropriate to examine the latter point. The position is as follows.

63. Mr Knight carried out his assessment visits on 6 and 15 January 2020. He wrote his three documents at some stage after doing so. His visits were known to have taken place and the claimants' solicitors pursued repeated requests for disclosure of the documents which had been generated, to no avail. Had the defendant ever communicated – in January 2020 or at any material time thereafter – the fact that a decision had been reached, by which the defendant had decided to continue the interim care provision ordered by the two deputy judges by way of interim relief, I have no doubt that the substantive hearing in this case would then have become unnecessary. It would have been "academic", because of a decision to give the claimants what they were asking for. It is not appropriate to pursue judicial review to a substantive hearing, to obtain from the Court an order requiring a defendant public authority to do what it has decided it will do. Such a resolution is one of the virtues of the open-minded reconsideration

within the moving picture that I described when discussing 'rolling judicial review'. The parties could have agreed a position, to be embodied in an order of the court, by way either of undertaking or continuation of a mandatory order, or agreement. The claimants' representatives would have welcomed such a decision, and the only remaining issue would have been costs. That, however, is not what happened. As I have explained, the defendant continued steadfastly to defend this claim. Ms Rowlands, as I have recorded, submitted that the claim should be rejected on various grounds such as: that the claimants had identified the wrong power; that the defendant had acted reasonably up to the time when proceedings were commenced; and that the urgent needs said to arise in this case were unevidenced. In that respect, it is striking to note that the defendant's skeleton argument of 27 April 2020 for the substantive hearing before me, revised following service of the new documents, contained the following submission: "Although it is accepted that the claimants need night-time care, there is no evidence that [the mother] cannot presently meet those needs pending a determination by the defendant in the course of a proper assessment, as she has been since her agreement to that in 2017".

64. The detailed grounds of resistance dated 29 January 2020 did include the contention that the claim had become "academic". It said this:

> The claimants' case is now academic, the assessment having been completed, and should be withdrawn. It was at all times ill-conceived, and should be dismissed.

That was not a contention that the defendant had decided to continue with interim care provision, through until completion of a needs reassessment. What was being asserted was that the reassessment itself had been completed, but that was not substantiated, no decision communicated, and it is now known to have been wrong. Unsurprisingly, the claimants' solicitors from 30 January 2020 onwards made repeated requests for the "assessment" to be provided. The claimants filed a reply document on 6 February 2020, responding to the suggestion that the assessment had been completed, and referring to their unsuccessful requests for the assessment documents and for communication of an outcome. The continued failure to supply assessment documents, and to answer questions as to what the outcome of any assessment steps was, was the subject of a detailed letter by the claimants' solicitors on 11 March 2020. The most that could be said was the hearing was being rendered academic by the news, communicated while Ms Rowlands was making her submissions in response to those of Ms Foubister, that the defendant had decided to continue the interim care provision. But by then the one day hearing was nearly complete and Mr Rowlands was maintaining all her arguments as to why the claim was "ill-conceived" and "should be dismissed". Neither side submitted that it was inappropriate for me to give judgment on the issues argued at the hearing, and I am satisfied that it is appropriate that I do so.

Conclusion and Remedy

65. In conclusion, for the reasons I have given, I am persuaded by Ms Foubister that the sole justifiable response was the continuation of the urgent interim care provision requested by the claimants, which became the subject of the interim relief orders of the court, which orders have now fallen away. I am satisfied that section 19(3) is a statutory discretionary power which was relevant and applicable in the present case. I am satisfied that the defendant could not justify as reasonable its refusal to act, as articulated in its letter dated 3 December 2019, purporting to respond substantively to

the expert occupational therapy report put forward by the claimants in October 2019; nor its refusal to act, embodied in its resistance to interim relief, and the substantive claim, in the proceedings commenced on 6 December 2019. Until the documents disclosed on 23 April 2020, nobody grappled with the central, straightforward question in this case. Was the mother reasonably to be expected to reposition the claimants during the night-time, single-handedly? Once that question was addressed by Mr Knight, it received a clear answer, an answer finding support in the evidence filed on behalf of the claimants including the expert reports of Ms Hillier, and in the expert report of Ms Sheehan obtained by the defendant itself. It is to Mr Knight's great credit that when he evaluated the position he did so straightforwardly, by reference to his assessment of the merits, and not at all 'defensively' given the litigation.

66. The claim for judicial review succeeds. In all the circumstances, I will grant the remedy sought. I will convert into a final mandatory order the order made by way of interim relief by Mr Grodzinski QC on 12 December 2019 and continued by Mr ter Haar QC on 15 January 2020. I have a discretion as to whether to order a remedy. I am satisfied that it is appropriate in this case to do so. The fact that the order embodies what I was told at the hearing is now a decision of the defendant is something which can be recorded in an appropriate recital. I regard as healthy the congruence between what I am ordering under my secondary, supervisory jurisdiction based on public law principles of review, and the position to which the defendant as primary decision-maker dealing with the merits has come in the end. Moreover, the story and circumstances of this case, including the fact that there was no decision letter communicating the new decision, reinforces my view that what is needed, in the current circumstances, is clarity.

67. What the defendant ultimately decides, once the various steps identified by Mr Knight and the expert Ms Sheehan have been carried out, will be a matter for the defendant as the primary decision-maker under the statute. It goes without saying, but perhaps in the circumstances it is worth recording, that that ultimate decision will be the one which the defendant conscientiously considers to be correct, on the merits. In public law terms, it will need to be one which is justifiable as reasonably open to the defendant, on the evidence before it, for the reasons it identifies.

Consequential matters

68. As directed by the Court when circulating his judgment in draft, the parties filed submissions on consequential matters. The parties were agreed that the mandatory order should begin with: "The defendant shall fund 10 hours of night time care per day to each of the claimants under section 19(3) of the Care Act 2014 until …" Ms Foubister for the claimants contended for this completion of the order: "… [until] further order, upon application to the court by either party to discharge this order." Ms Rowlands for the defendant objected, essentially on the grounds that it is inappropriate to require an application to the Court, which could take a long time to resolve, when the Court is functus and the decision is for the defendant as local authority. Ms Rowlands contended for this completion of the order: "… [until] completion of its assessment of the care needs of each Claimant, or further order of the Court". The words "or further order of the Court, which Ms Rowlands is appropriate to protect against non-cooperation, show that there was nothing in her "functus" objection. The Court is not "functus" if a substantive order continues to have effect. Indeed, it is not unknown for judicial review Courts to include "liberty to apply" within final orders. To Ms Rowlands' formulation

Ms Foubister objects, essentially on the grounds that what is needed is clarity, in a case where there have previously been shortcomings in the defendant's communication of its position.

69. I agree with Ms Foubister that special clarity is needed, and with Ms Rowlands that a further judicial decision should not be a prerequisite. I am satisfied that the order which reconciles the imperatives is as follows: "The defendant shall fund 10 hours of night time care per day to each of the claimants under section 19(3) of the Care Act 2014 until (i) seven days after the defendant files with the Administrative Court Office and serves on the claimants' solicitors a letter stating that it has completed its assessment of the care needs of each Claimant, or (ii) prior to that having occurred, further order of the Court."

70. That gives certainty, protects the claimants against non-communication or being taken by surprise and protects the defendant against non-cooperation. I will also at Ms Rowlands' request include within the order a recital, but using the language of the defendant's documentation, to say: "Upon the defendant having determined that overnight support as ordered by this Court will remain in place until the introduction of new equipment and completion of the relevant assessments, including OT, CHC, Physio and Manual Handling".

71. As to costs, Ms Rowlands submits that the claimants should not have their costs – alternatively not the whole of their costs – because of problems encountered by the defendant which would have obviated the need for interim provision, and where sensible and pragmatic arrangements and cooperative engagement would have avoided the proceedings, and which moreover could have resulted in long-term care provision. In particular, says Ms Rowlands: (a) the defendant's position was always that it would reassess the care needs; (b) the mother persistently failed to cooperate in assessments; (c) the mother has not accepted constructive offers; and (d) it was only on service of the claimants' expert reports on 11 October 2019 that there was material to make out the 'sole justifiable response'. I accept the submission that costs incurred prior to 11 October 2019 ought not to be the subject of a costs order against the defendant. I am equally clear that costs following that date are appropriate, in full. I have considered the history in detail in this judgment, as Ms Rowlands asked me to do. I have not made findings on collateral disputes and nor do I need to do so for the purposes of costs.

72. It was on 11 October 2019 that the evidence, and the 'sole justifiable response', came into clear focus. If the defendant had recognised the position, had focused on the key question about the mother being expected to reposition the claimants at night single-handedly, and had decided to make the interim care provision, there would have been no need for legal proceedings and there would have been no question of the claimants recovering costs. That sensible and pragmatic course was open, and remained open. But the defendant did not. Instead, it responded adversely to the evidential picture provided on 11 October 2019, continued to refuse, it resisted interim relief, it applied to set aside interim relief, it defended the claim inviting its dismissal, and it failed to communicate a decision until the hearing itself, when all the costs had been incurred. On no material issue has the defendant succeeded in this judgment. The defendant could have acted to avoid the entirety of the litigation costs. No substantive hearing should ever have been needed in this case, after Mr Knight considered the position in January 2020. There is no basis for denying the claimants any of their costs after 11 October 2019. The order will be: "The defendant to pay the claimants' costs of the judicial review proceedings,

to be assessed if not agreed, save that no costs incurred on or before 11 October 2019 are recoverable under this order." There will be a detailed assessment of the claimants' publicly funded costs.

73. I accept Ms Foubister's submission that it is appropriate pursuant to CPR 44.2(8) to make an interim order for costs. She reminded me of the relevant principles and cited illustrations from judicial review case-law. None of this was countered by Ms Rowlands, beyond the submissions made in relation to costs generally. I am satisfied by Ms Foubister's submissions, except that I will allow 21 days rather than the 14 she asked for. I will order: "Pursuant to CPR 44.2(8) the defendant shall pay 50% of the claimants' costs, covered by the costs order, on account, within 21 days of receiving their schedule of costs".