Neutral Citation Number: [2020] EWHC 622 (Admin)

Case No: CO/1324/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/03/2020

Before :

LORD JUSTICE DAVIS
MRS JUSTICE ANDREWS DBE

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Between :

THE QUEEN **On the application of AR, a child (by his litigation friend MP)**	**Claimant**
- and -	
THE LONDON BOROUGH OF WALTHAM FOREST	**Defendant**

-and-

(1) SECRETARY OF STATE FOR EDUCATION **(2) ASSOCIATION OF DIRECTORS OF CHILDREN'S SERVICES** **(3) LONDON COUNCILS** **(4) THE COMMISSIONER OF POLICE OF THE METROPOLIS**	**Interested Parties**

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Caoilfhionn Gallagher QC and Sam Jacobs (instructed by **Just for Kids Law**) for the **Claimant**
Ashley Underwood QC (instructed by **London Borough of Waltham Forest Legal Department**) for the **Defendant**
Oliver Williamson (instructed by **City of London professional Standards)** for **London Councils**

Beatrice Collier (instructed by **Weightmans) for the Metropolitan Police Commissioner**

Galina Ward (instructed by Government Legal Department) **for the Secretary of State for Education** (written submissions only)

Hearing date: 26 February 2020

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Judgment Approved

Mrs Justice Andrews:

INTRODUCTION

1. This is a challenge to an alleged systemic failure by the defendant local authority ("Waltham Forest") to provide adequate secure accommodation for children who are at risk of being detained in police cells in circumstances where normal local authority accommodation would be unsuitable to meet the risks they pose to the general public.

2. It is alleged that in breach of its statutory duty under s.21(2)(b) of the Children Act 1989, Waltham Forest failed to have in place a reasonable system to enable it to respond to requests made at short notice by the police under s.38(6) of the Police and Criminal Evidence Act 1984 ("PACE") for secure accommodation to be provided for a detained child, until he or she can be brought to court. This would mostly involve an overnight stay.

3. For the reasons set out in this judgment I am not persuaded that Waltham Forest is in breach of statutory duty as alleged, and accordingly I would dismiss this claim.

THE LEGAL BACKGROUND

4. S.38(6) of PACE provides that:

> "*Where a custody officer authorises an arrested juvenile to be kept in police detention under subsection (1) above, the custody officer shall, unless he certifies – (a) that, by reason of such circumstances as are specified in the certificate, it is impracticable for him to do so; or (b) in the case of an arrested juvenile who has attained the age of 12 years, that no secure accommodation is available and that keeping him in other local authority accommodation would not be adequate to protect the public from serious harm from him, secure that the arrested juvenile is moved to local authority accommodation."*

5. "*Local authority accommodation*" is defined by s.38(6A) as "*accommodation provided by or on behalf of the local authority (within the meaning of the Children Act 1989)*" and *"secure accommodation"* is defined as *"accommodation provided for the purpose of restricting liberty"*.

6. Section 21(2) of the Children Act 1989 provides that:

> "*Every local authority shall receive, and provide accommodation for, children*
>
> .....
>
> *(b) whom they are requested to receive under section 38(6) of the Police and Criminal Evidence Act 1984."*

7. The police are not obliged to approach the local authority for the area covering the police station where the child happens to be at the time of charge. They will often

request the provision of accommodation by the local authority for the area where the child usually resides.

8. If the child to whom s.38(6) of PACE applies is already under the care of the local authority under s.20 of the Children Act 1989 ("a looked after child"), s.25 of that Act, as modified by regulation 6 of the Children (Secure Accommodation) Regulations 1991, limits the use of secure accommodation as follows:

> "*Subject to the following provisions of this section, a child who is being looked after by a local authority in England or Wales may not be placed, and, if placed, may not be kept, in accommodation in England or Scotland provided for the purpose of restricting liberty ("secure accommodation") unless it appears that any accommodation other than that provided for the purpose of restricting liberty is inappropriate because –*
>
> *a) the child is likely to abscond from such other accommodation, or*
>
> b) *the child is likely to injure himself or other people if he is kept in any such other accommodation "*

9. The nature and scope of the obligations arising under these provisions were considered by the Court of Appeal in the case of *R (M) v Gateshead Metropolitan Borough Council* [2006] EWCA Civ 221 ("*Gateshead"*). In that case, a child charged with a serious criminal offence was detained overnight at a police station before being produced at court the next morning. It was alleged that the failure by the local authority to provide the child (a female) with secure accommodation when the police requested it under s.38(6) of PACE, in the early hours of the morning, was a breach of the statutory duty imposed on it by s.21(2)(b) of the Children Act.

10. The court rejected the argument that s.21(2)(b) imposed an absolute duty on the local authority to provide secure accommodation whenever it is requested by a custody officer under s.38(6) of PACE. It held that whilst the local authority has an absolute obligation to provide accommodation if requested to do so, it has no obligation to provide, or even to use its best endeavours to provide, secure accommodation in cases where the custody officer is of the opinion that keeping the child in non-secure accommodation would not be adequate to protect the public from serious harm from them.

11. Dyson LJ observed at [40] that Parliament must be taken to have been aware that local authorities have limited resources and that a decision to place a child in secure accommodation should not be taken lightly. He cited a passage in guidance issued by the Department of Health in 1991 to the effect that secure accommodation must be a "last resort" in the sense that all else must first have been comprehensively considered and rejected.

12. Dyson LJ said that in performing its duty to provide accommodation under s.21(2)(b) the local authority has a discretionary power to provide secure accommodation where that is requested. The duty must be exercised in a manner that promotes the policy and objectives of the statute, namely, that children should not be detained in police cells if that is at all possible. It is therefore incumbent on all local authorities to have in place

a reasonable system to enable them to respond to requests for secure accommodation under s.38(6).

13. The policy of keeping children out of police custody is consistent with international legal standards to which we were helpfully referred by Ms Gallagher QC in the course of argument, including the provisions of Article 37(b) and (c) of the UN Convention on the Rights of the Child and Rule 13 of the UN Standard Minimum Rules for the Administration of Juvenile Justice ("the Beijing Rules").

14. On the evidence in *Gateshead* it was held that the arrangements that the council had in place were lawful, despite the fact that the nearest provider of PACE secure accommodation for girls was in Hull, over 100 miles away, which was so far away as to preclude the use of it unless the request under s.38(6) was made over a weekend. Dyson LJ gave the following warning at [48]:

> "*the court should be slow to strike down as unlawful arrangements that have been made by local authorities. In my view, they should do so only if satisfied that an authority has made no arrangements at all, so that they can never provide secure accommodation when it is requested, or where the arrangements that have been made are ones that could not have been made by a reasonable authority, mindful of the need to avoid having children detained in police cells if at all possible."*

It is contended by the claimant that this is precisely the scenario in Waltham Forest.

FACTUAL BACKGROUND

15. The claimant, AR, was born on 27 May 2002 and was 16½ years old at the relevant time. He was accommodated by Waltham Forest under an arrangement pursuant to s.20(1) of the Children Act 1989. On the afternoon of 27 December 2018, police went to the care home where AR was placed, to speak to him about an attempted street robbery of two schoolboys at knifepoint on their way to school, which had occurred on 2 November 2018. It was alleged that the attacker had attempted to stab one of the victims and had only been prevented from doing so and causing serious harm, by being overpowered. The police conducted a body search of AR and discovered a samurai sword hidden in the back of his trousers. He was arrested for possession of an offensive weapon and taken to Lewisham police station.

16. Despite his age, AR already had convictions for three robberies, one theft, and three counts of possession of a bladed article, and at the time of his arrest he was under investigation for two other offences. He had a history of regular non-compliance with a curfew of 23.00 which the care home had put in place. Just over a week before his arrest, a hunting knife with a 10-inch blade had been found under his bed. At the time when it was discovered, the police had taken no further action and asked the care home to dispose of the knife, but this had not yet happened when he was arrested. The knife matched the description of the one that had been used in the attempted robbery (which had occurred a few weeks before it was found in AR's room). After AR's arrest it was handed over by the care home to the police at their request.

17. On arrival at the police station at around 14.17, AR was read his rights and requested a solicitor. He was detained in a police cell until his solicitor arrived and he was able

to have a conference with her. He was subsequently interviewed by the police in the presence of his solicitor and an appropriate adult. He remained in the police cell overnight and took part in an identification procedure the next morning. No complaint was made in this case about that period of pre-charge detention. At 14.17 on 28 December 2018 he was charged with possession of a knife in a public place, and at around 16.00 he was charged with attempting to cause grievous bodily harm with intent.

18. Following charge, AR was refused bail because the custody sergeant considered that it was necessary to remand him to prevent the commission of further offences. There were ample reasons for reaching that conclusion, including intelligence that he had sought to identify one of the schoolboy victims and threatened retribution, and his recent history of possession of bladed articles.

19. At some time between around 16.30 and 17.12 (when an entry was made in the detention log) the custody sergeant telephoned Waltham Forest and requested secure accommodation for AR overnight, explaining that he was due to appear in court the following morning at 09.00 and that secure accommodation was required because of the risks he posed to the public. The social worker to whom the custody sergeant spoke was the Manager of the Emergency Duty Team ("EDT") which provides out of hours cover for Waltham Forest and three other London boroughs, and deals with a wide variety of emergency applications. She did not provide evidence in this case. However, according to the first witness statement of Amana Gordon, the Corporate Director for Children Services at Waltham Forest, the Team Manager informed the custody sergeant that AR could return to his placement overnight. The custody sergeant's response to that suggestion was that the risks to the public posed by AR were too high for him to return to non-secure accommodation.

20. In the course of the hearing we were informed by Mr Underwood QC that, as this is a systemic challenge, with AR's case being used as an example, Waltham Forest did not consider it would be necessary or appropriate to provide the court with full details of the conversation between the custody sergeant and the Team Manager or with the notes that were taken at the time. He told the Court on instructions that the Team Manager had also suggested a non-secure placement in a different area of London, on the basis that this would suffice to meet the risks identified (particularly the risk of retributive action), but that idea was also rejected by the custody sergeant.

21. The Team Manager said to the custody sergeant that Waltham Forest could not source secure accommodation for AR at such short notice and besides, all the secure accommodation providers were located outside London. Bearing in mind the timing of his scheduled court appearance, the Team Manager and the custody sergeant agreed that it was in the best interests of AR to remain in police custody overnight.

22. In the light of that conversation, the custody sergeant certified that AR could not be moved to local authority accommodation because there was no secure accommodation available for him. That decision was noted on the custody record, and approved by a police Inspector at 17.40, who agreed that (i) secure accommodation was necessary to protect the public from serious harm and (ii) as suitable secure accommodation with the local authority was not available, AR should remain in police custody until his court appearance the next day.

23. AR therefore remained in police custody until shortly after 08.00 on 29 December when he was taken to Bromley Youth Court. The court remanded him in custody to a young offenders' institution. As Ms Collier points out in her helpful written submissions on behalf of the Metropolitan Police Commissioner (who was joined as the Fourth Interested Party by order of Sir Ross Cranston when permission was granted to bring this claim), in those circumstances no complaint can be made of the decision taken by the police to detain AR, which was lawful and accorded with the requirements of PACE.

24. Ms Gallagher confirmed at the hearing that the claimant agreed, and that no complaint was, or could be, made of the decision taken by the police to detain AR in those circumstances.

THE SYSTEM OPERATED BY WALTHAM FOREST

25. There are three classes of secure accommodation placements: welfare placements, youth justice placements, and PACE placements. Welfare placements are made by a local authority pursuant to s.25 of the Children Act 1989, which gives the authority power to make such a placement for the protection of the child and/or others. Youth justice placements are made by the Youth Custody Service (not by the local authority) when a child has been detained or sentenced by the criminal courts or remanded to secure local authority accommodation.

26. A home used as secure accommodation for children must be a Children's Home as defined in the Care Standards Act 2000. As secure accommodation for children is regulated, local authorities can only use Children's Homes that are authorised by the Secretary of State for Education to be used for the provision of secure accommodation (the Children (Secure Accommodation) Regulations 1991, reg 3). These are known as Secure Children's Homes (SCH). As *Gateshead* illustrates at [46] a privately managed secure unit that is licensed to provide secure accommodation for welfare and/or youth justice purposes may not necessarily be licensed to provide secure PACE accommodation.

27. The helpful written submissions made by Ms Galina Ward on behalf of the Secretary of State for Education (the First Interested Party in this case) make it clear that approval of a home as a SCH does not automatically mean that the home is able to accept a referral when secure accommodation is required under s.38(6) of PACE. Leaving aside availability, this will depend on whether its Statement of Purpose provides for admission of children in those circumstances.

28. Statistics exhibited to Ms Gordon's second witness statement demonstrate that as at 31 March 2019, local authority placements in a criminal justice context only accounted for around 5% of placements of children in secure accommodation. Welfare placements accounted for 56%, and the remaining 38% comprised Youth Custody Service (youth justice) placements.

29. The procedures adopted by Waltham Forest for dealing with requests for secure accommodation under s.38(6) of PACE are described in Ms Gordon's first witness statement. She explains that, in common with all local authorities in England and Wales, Waltham Forest does not own or manage any secure accommodation itself; the provision of such accommodation is coordinated by the Secure Welfare Coordination

Unit, which is funded by the Department for Education. Local authorities have access to pooled licensed secure accommodation through a centralised arrangement known as the Secure Accommodation Network ("SAN"). Each local authority purchases the accommodation from the providers on the SAN as and when required.

30. In common with all other local authorities, Waltham Forest follows the guidance and procedures set up by the Department for Education in processing and applying for secure accommodation. So far as PACE requests are concerned, Waltham Forest operates the arrangement for provision of secure accommodation through the SAN in accordance with the Home Office Concordat on children in custody ("the Concordat"). That has been supplemented by the London Protocol for the provision of local authority accommodation for children held in police custody ("the London Protocol"), which is exhibited to Ms Gordon's first witness statement, though the London Protocol was only implemented after the events concerning AR that gave rise to this claim.

31. A list of the providers of secure accommodation, which is also exhibited to Ms Gordon's first witness statement, indicates that there are only 15 providers in England and Wales. None is in London, but there are providers in Hailsham, (East Sussex), Copthorne, (West Sussex), Bristol, Swanwick (Southampton) and Peterborough, all of which are less than 2 hours' drive away from London. However, the evidence of Alex Temple, a solicitor from Just for Kids Law who has made enquiries of the providers closest to London, is that the unit in Southampton is not authorised to take PACE placements and only takes welfare placements, the Peterborough unit is an all-female facility which does not accept PACE placements, and the Copthorne unit did not accept PACE placements in 2016, and that may still be the case. The Bristol provider advertises on its website that it takes PACE placements, but Mr Temple was informed by someone working there that the unit "does not take young people under PACE under any circumstances". The nearest location to Waltham Forest which does take PACE placements appears to be Hailsham, which is around 57 miles from Lewisham police station where AR was detained.

32. In her evidence, Ms Gordon explains the practical difficulties in finding a suitable vacancy with a licensed secure accommodation provider through these centralised arrangements, even when a welfare placement is requested during normal working hours. Most such placements appear to be arranged in advance. However, she gives examples of cases in which requests for welfare placements in secure accommodation have been met, despite Waltham Forest sometimes having to wait for weeks or even months before a suitable place became available. She has provided no example of a PACE request under s.38(6) being met by Waltham Forest through the SAN.

33. As mentioned earlier in this judgment, Waltham Forest has a joint arrangement with three other London Boroughs for dealing with the practicalities of requests for secure accommodation outside working hours, managed by an EDT in accordance with agreed processes and procedures. A document entitled "4 Boroughs Children's Emergency Duty Team, processes and procedures" ("the EDT handbook") contains guidance at paragraphs 3.20-3.22 as to the procedure that must be followed when a PACE request is made out of hours by the police for accommodation of any type to be provided for a child. The EDT handbook is a substantial volume which deals with a wide range of out of hours applications (including requests for emergency accommodation under the Children Act, homelessness and domestic violence cases,

abandoned children, emergency foster carers, and emergency protection orders). Requests made under PACE are just one of many different types of application that the EDT may have to consider.

34. Paragraph 3.20 begins by reminding the reader that "*as a guiding principle it needs to be understood that police cells are not a suitable place for children to be. Therefore, wherever possible charged children should be released on bail. A night in custody can be an intimidating experience for children and the senior social worker should consider that the child may be under the influence of drugs and/or alcohol or be suffering mental ill-health*."

35. The detailed procedural guidance which follows includes the senior social worker on shift alerting the on-call practice manager about the request for accommodation under PACE, the obtaining of the practice manager's approval for secure accommodation and transport, the recording of relevant information, and the taking of the decision whether to offer secure or non-secure accommodation. The guidance makes it clear that the senior social worker is expected to visit the child in all PACE cases, and if they are unable to do so, they must email the EDT service manager with a valid reason why not.

36. The guidance identifies only 2 so-called "exemptions" to accommodation being sourced under PACE, namely, where it would be impracticable (such as extreme weather not allowing safe transfer) or if the movement falls within the middle of the night with the court appearance being early the next day. AR's case could rationally have been regarded as falling into the latter category. On the evidence, it is unrealistic to suppose that, even if a place had been found for him shortly after the custody sergeant rang Waltham Forest, all the necessary arrangements for his transfer could have been made in much less than four hours. Realistically he would not be leaving London before 21.00. The Team Manager would then have to factor in the time it would take to get to the secure accommodation and the time AR would have to leave that accommodation in the morning in order to be at the Youth Court at 09.00.

37. In a separate section following the guidance, attention is drawn to specific matters of note, including the high threshold to which police work when requesting secure accommodation under PACE, and the criteria that they must satisfy in order to justify making a request for such accommodation. The social worker is prompted to ask the police why bail has been denied, and to record all decisions clearly in the light of "*the need to ensure that we have defendable and evidence-based decision-making*". The policy goes on to explain what should happen in the event of disagreement with the custody officer's assessment of risk, and what to do if the child remains in police custody, especially for longer than an overnight stay.

38. At the end of paragraph 3.20 the reader is requested to consult the Concordat for further information (a web hyperlink is provided) and to follow a flowchart which appears on the following page. Paragraph 3.21 sets out the information that needs to be recorded on the EDT log and relevant database when a request for secure accommodation has been received from the police.

39. As Mr Underwood explained, no evidence has specifically been adduced that this guidance was followed, and the relevant records kept, in the case of AR, because this claim is not about an alleged failure by Waltham Forest to follow its published

guidance. On the contrary, it depends upon establishing that following the guidance would have been futile, because the use of SAN and adherence to the Concordat put paid to any possibility of Waltham Forest providing secure accommodation following a legitimate request under s.38(6) of PACE.

40. Between April 2018 and September 2019 (when permission to bring this claim was granted) the EDT received only 17 requests for PACE secure placements for children in police custody. Ms Gordon's evidence is that in response to those requests, Waltham Forest made enquiries with the providers using the process described in the EDT Handbook, but none of the children could be accommodated. A place was identified as available in only 4 of those cases, but even then, because the relevant children's home was located too far away from London, the decision was taken that it was neither possible nor in the best interests of the child to travel that far and be back in time for court the next day.

41. A witness statement was also provided by Mr Clive Grimshaw, the strategic lead for health and social care for London Councils, which was named as the Third Interested Party in these proceedings. London Councils is the collective name given to the activities of three joint committees established under local government legislation, involving the joint exercise of local authority functions. It has no operational role or responsibility in relation to child custody arrangements, but it has adopted a facilitation role in the operation of a voluntary co-operative of local Safeguarding Children Boards, including the London Safeguarding Children Board ("LSCB"). Mr Grimshaw explains that the LSCB was responsible for the London Protocol which supplements the Concordat.

42. A report on 18 June 2019 by Mr Grimshaw refers to the commissioning by the Association of London Directors of Children's Services ("ALDCS") in partnership with NHS England (London region) of a regional review of the use of secure children's homes for London's children and young people, which will include, among others, those who are held in police custody between being charged and appearing in court because they satisfy the criteria in s.38(6) but no local authority secure accommodation is available. ALDCS, NHS England (London) and the London Borough of Barking and Dagenham have also agreed to carry out feasibility studies into how regions can increase the sufficiency of secure residential places for children, with a view to providing a coherent approach to that challenge across the whole of London.

THE CLAIM FOR JUDICIAL REVIEW

43. On behalf of AR, Ms Gallagher submitted that the test was that set out in *Gateshead* at [48] and that Waltham Forest should have had in place a system with a reasonable prospect of making a positive response to a request made under s.38(6) of PACE. However, the system that Waltham Forest operated (in conjunction with other London boroughs) guaranteed a negative response.

44. Ms Gallagher drew the Court's attention to s.53 of the Children Act 1989 which provides that every local authority shall make such arrangements as they consider appropriate for securing that homes ("community homes") are available for the care and accommodation of children looked after by them, and may do so jointly with one or more other local authorities. S.53(2) imposes a duty, when making such

arrangements, to have regard to the need for ensuring the availability of accommodation of different descriptions and which is suitable for different purposes and the requirements of different descriptions of children. Paragraph 3A provides that:

> "*A local authority may make arrangements for the management by another person of accommodation provided by the local authority for the purpose of restricting the liberty of children."*

Thus it is clear that s.53(2) applies to secure accommodation.

45. By s.82(2) of that Act, the Secretary of State may make grants to local authorities in respect of expenditure incurred by them in providing secure accommodation in community homes other than assisted community homes.

46. Accordingly, a local authority may make arrangements with other local authorities for the provision of secure accommodation, in SCHs managed by private providers, for "looked after" children like AR to whom they owe duties under the Children Act 1989, and apply to the Secretary of State for financial assistance by way of grants under s.82(2). The written submissions made on behalf of the Secretary of State explain that capital grants are made in accordance with a strategy document annexed to those submissions, and that the Secretary of State has also provided some programme funding for feasibility studies relating to the potential establishment of new SCHs.

47. Ms Gallagher also referred to the "sufficiency" duty under s.22G of the Children Act 1989 which was introduced by the Children and Young Persons Act 2008. This is expressed as a high-level general duty on a local authority to take steps that, so far as is reasonably practicable, secure the outcome specified in subsection (2). The "outcome" is that the authority is able to provide accommodation *within its area* that meets the needs of "looked after" children in respect of whom the authority is unable to make arrangements to live with a relative or foster carer, and whose circumstances are such that it would be consistent with their welfare for them to be provided with accommodation in that area. In meeting that duty, the local authority is required to have regard to the benefit of having a number of accommodation providers in their area and a range of accommodation in their area capable of meeting different needs: (s.22G(4)).

48. The statutory guidance in respect of the sufficiency duty provides that:

> *"Section 22G requires that local authorities show that they are taking steps at strategic level to secure accommodation so far as reasonably practicable. Local authorities should not assume, for instance, that it is not reasonably practicable to secure appropriate accommodation because it is difficult to do so or because there is a lack of resources."*

49. Although reference was made to the sufficiency duty in the Claimant's skeleton argument, it was by way of illustration of the various duties and obligations placed on local authorities under the 1989 Act. In her oral argument, however, Ms Gallagher developed a submission that s.22G imposes a proactive duty on the local authority to properly evaluate the demand for secure accommodation for looked after children, consider the financial and other implications of sourcing secure accommodation in its

area, and if necessary approach the Secretary of State for funding. She submitted that when considering the question whether the system operated by Waltham Forest satisfies the duty formulated in *Gateshead* at [48], that duty is supplemented by the sufficiency duty. Mr Underwood submitted that this was seeking to resurrect a ground of judicial review for which permission was refused. This was a fair objection - the argument certainly came close to duplicating the argument on that ground (Ground 3).

50. Irrespective of whether Mr Underwood is right about that, I am not persuaded that s.22G has any bearing on the issue that the Court must decide in this claim for judicial review. Unlike s.53, there is no provision within the section making it clear that the accommodation referred to includes secure accommodation, let alone secure accommodation that is required for short-term PACE placements (as opposed to welfare or justice placements). The sufficiency duty, which is a high-level aspirational duty, is specifically directed at the welfare of looked after children, and a link between their welfare and the provision of accommodation in that local authority's area. Although there may be circumstances in which such a child has a "need" for secure accommodation to protect that child from harm, I am unable to interpret these statutory provisions as imposing any such proactive duty upon a local authority as the duty for which Ms Gallagher contends.

51. A request for secure accommodation under s.38(6) of PACE can be made to a local authority other than one which has the care of a looked after child, or in circumstances where the child is not a looked after child. Moreover, there is nothing in s.38(6) or in s.21(2)(b) of the Children Act that restricts the duty to the provision of accommodation within the local authority's own area. In the light of this, I cannot see how a high-level aspirational statutory duty that specifically relates only to looked after children and accommodation in the local authority's own area, which is concerned with the welfare of and needs of the child, not the protection of the public from harm, and which (unlike s.53) makes no mention of secure accommodation, could be used to put a gloss on the duty recognised in *Gateshead*. I agree with Mr Underwood that s.22G has nothing to do with the issues involved in this case.

52. The key issue is whether Waltham Forest could rationally have made the arrangements it has in place for dealing with requests for secure accommodation for children who are charged with criminal offences and regarded by the police as posing too serious a risk of harm to the public to release them to other local authority accommodation.

53. Ms Gallagher laid stress on the fact that the SAN subscribed to by all local authorities in England and Wales provides access to only 15 SCHs nationally, to meet the need for all three types of secure accommodation placements (welfare placements, youth justice placements, and placements under s.38(6) of PACE). None of these providers is in London, and not all can or will be able to take PACE placements even if they have a bed available. She described that provision as grossly inadequate, pointing to concerns in this regard expressed by the National Association for Youth Justice, the Children's Commissioner, and various other bodies referred to in the evidence of Ms Twite, the Head of Strategic Litigation of Just for Kids Law.

54. Ms Gallagher also referred to the contents of a joint letter sent by the Home Secretary and Secretary of State for Education to all local authorities in January 2015. The letter

drew attention to the requirements of s.38(6) and said that evidence suggested that the legal requirements were not being followed. It continued:

> *"There appear to be a number of factors that prevent the law from functioning as intended – such as a need for improved understanding as to the law concerning children and detention and insufficient provision of suitable accommodation (both non-secure and secure) by Local Authorities."*

The letter went on to say that the Government had begun to examine the issue comprehensively – from considering the supply and demand side issues to monitoring and non-compliance measures. It exhorted local authorities to work with neighbouring local authorities and the police in their area to play their part to ensure that the law was being adhered to.

55. The written submissions made by Ms Ward on behalf of the Secretary of State make reference to that letter and to the fact that the Secretary of State has recognized for some time that there are serious problems in some areas of England in complying with s.38(6) PACE. The submissions point out that there are many different reasons why a child might end up being detained in police custody overnight, and it is said that work is continuing to seek to identify where there are systemic issues.

56. The Secretary of State has issued no specific guidance in relation to compliance with the *Gateshead* duty, but he has drawn the Court's attention to paragraph 8.15 of the Children Act 1989 Guidance and Regulations volume 2 in which it is stated that "*it is the responsibility of the local authority to identify a suitable placement for all children transferred to their care under PACE."* The Secretary of State's position is that there may be many different systems that could be described as reasonable, and therefore he has not sought to constrain local authorities' freedom of judgment in this area.

57. Ms Gallagher relied upon evidence from Police Sergeant Anne-Marie Bullivant, of the Metropolitan Police, who works within a specific team within Met Detention that deals with safety and safeguarding issues that may arise in custody. PS Bullivant's evidence is that it is common for custody sergeants when contacting all London Borough Councils requesting that a minor be transferred out of custody, to be told that this is not possible. She sets out some statistics relating to children who were charged and remanded in the custody of the Metropolitan Police in the period from 2017-2019.

58. The only statistics in PS Bullivant's evidence relating specifically to Waltham Forest relate to 2019, when PS Bullivant says there were 11 non-secure requests and 9 secure requests, and 4 placements (though she also says that 22 children from Waltham Forest were remanded in police custody).That means there must have been some occasions on which the police did not request accommodation at all. PS Bullivant acknowledges that this happens. She goes on to explain that there were 39 cases (across London) in which the local authority offered accommodation, but the police felt it to be unsuitable because of the risk posed (presumably AR's case is one of those 39), or where secure accommodation was available but it was not practical to move the child due to the distance involved, or where accommodation was offered but no transport was available.

59. Ms Gallagher also referred to the responses to various Freedom of Information Act requests made by Just for Kids Law and referred to in the evidence of Ms Twite. Ms Twite raises concerns relating to the standards of record-keeping in many London Boroughs. Her evidence, however, takes matters no further in terms of the ability of Waltham Forest to respond to s.38(6) PACE requests.

60. Although the statistics and other information relied on by the Claimant indicate that the number of children kept in police custody is higher than desirable, they do not establish that Waltham Forest can never provide secure accommodation when a PACE request is made to it, or that the arrangements that it has put in place are ones that could not have been made by a reasonable authority, mindful of the need to avoid having children detained in police cells if at all possible.

61. Whilst welcoming the initiatives described by Mr Grimshaw, Ms Gallagher contended that the pace of change since the 2015 letter was written was an insult to snails. Whilst the systemic problems were not limited to Waltham Forest, since all local authorities subscribe to the SAN, she submitted that Waltham Forest's current system is unlawful, stressing that the statutory scheme makes it clear that each local authority bears an individual responsibility for compliance with s.38(6) of PACE. Although Parliament realistically acknowledged that secure accommodation may not always be available, she submitted that it cannot have intended that secure accommodation will never be available to meet a lawful request made under s.38(6) of PACE, and that this is what the evidence establishes.

62. Ms Gallagher told the Court that if Waltham Forest had answered the claim on the basis that they were working with other local authorities to address the problem, she anticipated that the claim would not have been pursued to a hearing, but instead Waltham Forest said that its system was compliant, and that was wrong. She submitted that the SAN was not a reasonable system for this London authority because it was bound to result in a negative response being given to any requests under s.38(6). The nearest provider of secure accommodation was too far away to make it practicable to use it.

63. On behalf of Waltham Forest, Mr Underwood frankly and realistically accepted that the current system (the SAN operating together with the 4 Boroughs initiative) was unsatisfactory, but submitted that, nevertheless, the claim for judicial review was misconceived. He pointed out that the effect of granting declaratory relief would be to state that Waltham Forest acted irrationally in subscribing to what all other local authorities do. Since there is a shortage of secure accommodation and each local authority has an obligation to provide it, and they are operating in financially straitened circumstances, it could not be irrational to use a pooling arrangement. Whilst it could not be said that the arrangement was lawful just because everyone else was doing it, his submission was that it could not be said that it was *irrational* of a local authority to do what every other local authority does. He also referred to the statistical evidence which showed that the occupancy rate in SCHs fluctuates between 70 and 83% and submitted that it cannot be irrational not to provide more places, when not all places are filled.

64. Mr Underwood pointed out that if Waltham Forest spent resources on constructing and staffing a new SCH in its area, it would be obliged to make it available for placements for children from all over the country, not just in London. He submitted

that on the evidence before the Court it was impossible to say what more Waltham Forest could do, over and beyond the steps that it was already taking. Any problem would have to be tackled collectively, as one local authority could not act on its own. That is what the London Boroughs were trying to do, though Mr Underwood accepted that the London Council's initiative had focused thus far upon the provision of accommodation in London that would meet the need for more welfare and youth justice placements and did not specifically address places that would be available to respond to s.38(6) PACE requests.

65. Mr Underwood laid particular emphasis on the fact that the period for which secure accommodation will be sought by the police under s.38(6) of PACE is very short, because police have an obligation to produce a detained child before a court as soon as practicable. That means that requests under s.38(6) will normally be made outside working hours and dealt with by the EDT. The EDT handbook is followed faithfully, and social workers are given training in how to deal with s.38(6) requests. The case of AR demonstrated that the response to the request was not a routine "no" but rather, that careful consideration was given to whether AR could be accommodated overnight, and Waltham Forest did offer non-secure accommodation. Whilst AR could not be accommodated in secure accommodation overnight, that did not mean that the system was irrational or that no child could be accommodated in answer to a s.38(6) request.

66. Mr Underwood strongly refuted the suggestion that the system was guaranteed to fail. He took as an example a child who was not known to the local authority, who was arrested at a time when a youth court was not sitting (e.g. on the Saturday afternoon of a Bank Holiday weekend) and it was obvious that the child needed to be detained in secure accommodation. In those circumstances if the SCH in Hailsham, or one even further afield, had a space available, it would be possible to get the child to the SCH and back in time for the youth court hearing after the Bank Holiday. He also derived some support from Ms Gordon's evidence that on one occasion it had been possible to place a child in secure accommodation within 24 hours of the request, albeit that the placement was a welfare placement and not a response to a s.38(6) request.

67. Irrespective of whether the child is accepted into secure accommodation or remains in police custody overnight, he or she will need to be produced to court the next morning. Quite apart from the geographical distance between the police station and the proposed secure accommodation, and the likely travel time, there are a number of other practical considerations which will have an impact on the timescale for getting the child there and back, including but not limited to the practical administrative arrangements for handover of the child to social workers attending the police station, and travel to and reception at the accommodation.

68. If, as in the case of AR, the local authority approached by the police is already providing a service to the child, it will have a file (or files) on the child, and he or she will have a dedicated social worker. Given that the local authority must satisfy itself that the statutory test under s.25 of the Children Act is met before it is able to justify a placement into secure accommodation, it is possible that after consulting the records on file and speaking with the social worker, the relevant manager will take a different view of the risks to the public posed by the child from that formed by the custody sergeant. The EDT handbook caters expressly for that situation, which could easily

prolong the time taken to reach a decision about where the child should stay overnight.

69. Given that the local authority has a discretion as to what type of accommodation to offer if the police request secure accommodation, the local authority may discharge its statutory duty by offering non-secure accommodation in such a case, so long as the decision maker directs their mind to the test under s.25 and exercises the discretion under s.21(2)(b) in a lawful manner. The police will then have to make up their minds whether to accept that accommodation or detain the child overnight. Even if the social worker shares the view of the custody sergeant, a proper assessment of the risks of absconding or causing injury to others is bound to take some time before any arrangements could be set in train. Thus, the practical barriers to provision of overnight secure accommodation at short notice in any given case are very high.

70. Mr Underwood submitted, and I accept, that even if a place had been found for him, AR could not realistically have been moved to such accommodation until after 21.00. He further submitted that it was unlikely to be in a child's best interests to have to travel a long distance to (and from) the secure accommodation in that short window of time. That was the rational conclusion reached by the Team Manager and the custody sergeant in AR's case, even though the request was made, at latest, shortly after 1700 hours. This might frequently be the case – and the second of the "exemptions" referred to in the EDT handbook expressly caters for that type of scenario.

71. Mr Underwood submitted that it is clear from the decision in *Gateshead* that the statutory duty is to be construed so as to reflect the fact that it will only require occasional access to secure accommodation, and that there are competing demands on local authority resources which a local authority is bound to take into account. In the present case, as he pointed out, there is no empirical evidence of such relevant matters as (for example) the demand for and costs of alternative secure provision, or of what other demands local authorities have on their resources to which, on the claimant's case, they would be bound to give a lower priority. Realistically, the claim could not succeed unless it were first established that Waltham Forest was bound to have used its resources to maintain its own stock of secure accommodation available on standby to meet such requests, which is completely unrealistic. The allocation of finite resources is quintessentially a matter of judgment for the decision maker, not the Court.

DISCUSSION AND CONCLUSION

72. It seems to me that there is a great deal of force in Mr Underwood's submissions. This claim is really a complaint about the nationwide lack of secure accommodation available to all local authorities due to the absence of funding by Central Government. As the Court of Appeal made clear in *Gateshead*, the duty of the local authority is to put in place a reasonable system to enable it to respond to requests under s.38(6) for secure accommodation. The evidence in the present case is very similar to that in *Gateshead*, in that the local authority has no secure units of its own, it purchases such accommodation from registered providers, and the nearest provider is many miles away (though much less than the distance involved in *Gateshead*).

73. The handful of requests for the provision of overnight secure accommodation made to the four London Boroughs (including Waltham Forest) collaboratively operating the

out of hours EDT system, in the period of around 18 months before and after AR's arrest, indicates that such requests remain a comparative rarity (as they were in 2006 when *Gateshead* was decided). Waltham Forest did not ignore those requests but, as in *Gateshead*, tried to meet them: however, the secure accommodation was either unavailable, or if available, too far away from London to be practicable. That was not the fault of Waltham Forest, as it had no practical alternative to using the 15 approved providers using the system and procedures laid down by the Department for Education. The only means theoretically available to it to avoid that course would be to spend its limited resources on providing, staffing, and maintaining its own secure accommodation which would then be made available to all local authorities, but a decision not to go down that route can hardly be described as irrational.

74. The absence of evidence of successful placements does not lead to the conclusion that there is a systemic breach of statutory duty as Ms Gallagher contended. I cannot see any valid distinction between the system which was found to be lawful in *Gateshead* and the system adopted in the present case.

75. In my judgment it was rational for Waltham Forest to enter into centralised arrangements for the use of existing, authorised secure accommodation via the Secure Accommodation Network, to operate these arrangements in accordance with the Concordat (as subsequently supplemented by the London Protocol), and to make arrangements to pool its resources with three other London Boroughs to provide an out of hours response through the EDT to urgent applications, including s.38(6) requests for accommodation, both secure and non-secure. The guidance and procedure set out in the EDT handbook establishes that Waltham Forest had its legal duties well in mind when it developed the out of hours system. The procedure squarely faced up to the practical impediments to providing secure accommodation in a case where the child had to be transported in the middle of the night and then brought back for a hearing in court the next morning.

76. Waltham Forest had to form a value judgment about the appropriate use of its resources, taking account of its statutory obligations, and the judgment that it formed was plainly one that was open to it. For those reasons, I would dismiss this claim.

77. There are two final matters that I would add. First, in the light of the ongoing work that is being carried out by the London authorities through London Councils with a view to trying to take positive steps to address the absence of secure accommodation for children in or near to London, I would not have been minded to grant declaratory relief even if I had been persuaded that the claim for judicial review was well-founded.

78. Secondly, on 6 March 2020, over a week after the hearing, the Court was sent a copy of a further witness statement from Ms Twite which seeks to amplify, and in some aspects modify, the evidence of Mr Temple, for example by suggesting that the Hailsham unit would not accept a s.38(6) placement from London but only from more local areas. Such evidence could and should have been obtained and served in advance of the hearing, and it is far too late to receive it now. I would decline to admit it in the interests of fairness and the good administration of justice, but in any event, having considered its contents *de bene esse*, it would have made no difference to the result of these proceedings.

LORD JUSTICE DAVIS:

79. I agree with the judgment of Andrews J.

80. The challenge raised in these proceedings is not as to the specific decision-making on behalf of Waltham Forest on the evening of 28 December 2018 (which may explain the, to my mind rather unfortunate, absence of direct evidence of the actual discussions that took place that evening). Rather, the challenge is as to whether Waltham Forest had in place a reasonable system to enable it to respond to requests for secure accommodation under s.38(6) of PACE: see paragraph 43 of the judgment of Dyson LJ in *Gateshead*. That said, the underpinning complaint in this case relates, in many ways, to the lack of availability of such accommodation on a national basis.

81. The relevant principles are set out in *Gateshead*. (Contrary to the submissions of Ms Gallagher, that decision is not required to be revisited in the light of s.22G of the Children Act, for the reasons given by Andrews J.) It is then a matter for assessment, on the evidence, as to whether Waltham Forest had a reasonable system in place.

82. I agree that the evidence does not establish that it did not have a reasonable system in place. In particular the limited, and to a degree undifferentiated, statistical evidence adduced does not sustain such a conclusion. Further, the sharing arrangements put in place cannot fairly be described as unreasonable (in the public law sense), even if in some cases they demonstrably cannot achieve the ideal. Important issues of resources and allocation also come into the equation here: and the courts must show an appropriate degree of respect for local authorities' decision-making in this regard.

83. The overarching principle underpinning s.38(6) of PACE is no doubt by reference to the best interests of children. But there will inevitably be occasions when that general principle has to accommodate the specific interests of a specific child on a specific occasion. It is hard, for example, to see how it could possibly be in the best interests of a child – indeed, how it could be fair for a child – to be, say, placed in a car at a police station late at night, driven for a considerable period of time to secure accommodation, and then be rousted out again in the early hours to be driven back to a court. The claimant would say that such a scenario shows the need for the availability of many more secure accommodation centres, available locally. That is an understandable viewpoint. But, as the *Gateshead* decision illustrates, public law principles of reasonableness do not mandate such an outcome.

84. I also agree that it is too late, and would be potentially unfair on the respondents, to seek to adduce the further evidence of Ms Twite, served after the hearing before us was concluded.

85. Even had the claim otherwise been well-founded, I would in the circumstances, and in common with Andrews J, not have granted the discretionary remedy of declaratory relief. But in the result, this claim must be dismissed.