



Neutral Citation Number: [2021] EWHC 1249 (Admin)

Case No: CO/1240/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/05/2021

Before :

MR JUSTICE GRIFFITHS

Between :

THE QUEEN

on the application of

ZK

(by her litigation friend, JU)

- and -

(1) NORFOLK COUNTY COUNCIL

(2) NORFOLK AND WAVENEY CLINICAL

COMMISSIONING GROUP

-and-

LONDON BOROUGH OF CAMDEN

Claimant

Defendants

Interested
Party

Sian Davies (instructed by **Sinclairslaw**) for the **Claimant**
Clive Sheldon QC and Ben Mitchell (instructed by **Nplaw**) for the **First Defendant**
Lee Parkhill (instructed by **Mills & Reeve LLP**) for the **Second Defendant**
No attendance or representation for the **Interested Party**

Hearing date: 6th May 2021

Judgment

MR JUSTICE GRIFFITHS :

1. This is the claimant's application for permission to apply for judicial review at a rolled up hearing ordered by Steyn J which, if permission is granted, will then consider the substantive application.
2. The claimant is a 71 year old woman with a traumatic past who has multiple clinical conditions and needs, both mental and physical. In July 1998 and in June 2008, she was detained in a mental health hospital under section 2 of the Mental Health Act 1983. In December 2008, she was detained again under section 3 of the Mental Health Act ("the Act"). Her detentions were for treatment of symptoms relating to her paranoid schizophrenia, which is a mental disorder within the scope of section 117 of the Act (section 1 defines "mental disorder" as "any disorder or disability of the mind").
3. Ever since her most recent detention in 2008, the claimant has received section 117 aftercare services provided by the first and second defendants. She lived in Norwich until 2014 but she was then moved into the London Borough of Camden, because of the importance of her daughters, who live in Camden, to her care and wellbeing.
4. Since 2018, the accommodation provided to the claimant and funded by the defendants has been in a sheltered accommodation one-bedroom flat, managed by the interested party ("the Flat").
5. The claimant was admitted to hospital by reason of physical illness in November 2020. On 1 March 2021 she was transferred out of hospital to a rehabilitation bed at the St Pancras rehabilitation unit ("St Pancras"). She is now ready to go home but challenges the defendants' right to discharge her back to the Flat, on the basis that to do so would be a breach of their section 117 duties. She says that the Flat cannot be regarded as suitable accommodation.
6. The defendants accept that they are under section 117 duties in respect of the claimant, but deny that discharge of the claimant back to the Flat (a course on which they have not definitely decided, but which they maintain as a lawful option upon which they may imminently decide) would not be unlawful or in breach of their section 117 duties to the claimant.

The parties

7. The claimant's physical and mental conditions, diagnosed and undiagnosed, are summarised by her daughter and litigation friend as follows:-

"My mother has diagnoses of paranoid schizophrenia with paranoia, delusions, hallucinations, post-traumatic stress disorder, OCD, panic attacks, hoarding and anxiety. She also has several physical conditions, including morbid obesity, osteoarthritis, osteoporosis, Irritable Bowel Syndrome, and Type 2 diabetes. She regularly contracts urinary tract infections as she does not recognise that she is in an unhygienic state and/or when she is incontinent of urine or faeces due to her mental health conditions."

8. The first defendant is the local authority responsible for meeting the claimant’s needs under section 117 and the second defendant is the clinical commissioning group which shares that responsibility. The interested party (which has played no part in the proceedings before me) is the local authority which administers the claimant’s current accommodation (which is within the London Borough of Camden).
9. The claimant lacks mental capacity and conducts these proceedings by her daughter and litigation friend, JU.
10. The devotion JU has shown to her mother’s best interests is quite extraordinary. The claimant has a team of carers around her at all times, funded by the defendants, but JU has also been involved with her care since 2011. The claimant is a difficult and mistrustful person to look after and JU has, it appears from the evidence, been crucial in overseeing and coordinating the carers, in building the claimant's trust with them, and in constant vigilance over the physical and mental needs of the claimant. She has been a champion of her mother’s interests, both in these proceedings and (as the evidence very clearly shows) in discussions and negotiations with the many agencies who have been involved in providing care and support for her mother. She is also one of her mother’s official carers, and is paid (although not, it appears, for all the hours she works) in recognition of that. It is, I have no doubt, a labour of love. Nevertheless, the claimant is lucky to have such a daughter. JU should be proud of what she is doing and has done for her mother, whatever setbacks and discouragements she may meet along the way.

Section 117

11. Section 117 of the Mental Health Act 1983 provides:-

117 After-care.

(1) This section applies to person who are detained under section 3 above... and then cease to be detained and (whether or not immediately after so ceasing) leave hospital.

(2) It shall be the duty of the clinical commissioning group... and of the local social services authority to provide or arrange for the provision of, in co-operation with relevant voluntary agencies, after-care services for any person to whom this section applies until such time as the clinical commissioning group... and the local social services authority are satisfied that the person concerned is no longer in need of such services; but they shall not be so satisfied in the case of a community patient while he remains such a patient.

...

(2D) Subsection (2), in its application to the clinical commissioning group, has effect as if the words “provide or” were omitted.

...

(6) In this section, “after-care services” , in relation to a person, means services which have both of the following purposes—

(a) meeting a need arising from or related to the person's mental disorder; and

(b) reducing the risk of a deterioration of the person's mental condition (and, accordingly, reducing the risk of the person requiring admission to a hospital again for treatment for mental disorder).

12. On the face of it, this does not refer to accommodation, but both sides agree that the dictum of Mostyn J in *R (Afework) v London Borough of Camden* [2013] EWHC 424 (Admin) may be relevant, in which (refusing to grant permission to bring judicial review proceedings on the facts of the case before him) he said (at para 19):-

“...as a matter of law s117(2) is only engaged vis-à-vis accommodation if:

i) The need for accommodation is a direct result of the reason that the ex-patient was detained in the first place ("the original condition");

ii) The requirement is for enhanced specialised accommodation to meet needs directly arising from the original condition; and

iii) The ex-patient is being placed in the accommodation on an involuntary (in the sense of being incapacitated) basis arising as a result of the original condition.”

13. The claimant also relies on the reference to accommodation in the Mental Health Act 1983 Code of Practice, which states:

“33.4 CCGs and local authorities should interpret the definition of after-care services broadly. For example, after-care can encompass healthcare, social care and employment services, supported accommodation and services to meet the person’s wider social, cultural and spiritual needs, if these services meet a need that arises directly from or is related to the particular patient’s mental disorder, and help to reduce the risk of a deterioration in the patient’s mental condition.”

The grounds of the application and the relief claimed

14. The six grounds for claiming judicial review set out in the Statement of Facts and Grounds and developed in the written and oral submissions of counsel for the claimant are:-

- i) Unlawful failure to meet assessed after-care need for “suitable” accommodation.
- ii) Unlawful reassessment/decision in the first defendant’s email of 18 March 2021.

- iii) Unlawful delegation by the defendants to the interested party (the London Borough of Camden) of the duty to provide section 117 accommodation.
 - iv) Failure to take account of relevant information, namely occupational therapy opinions of Ms Sheehan and Mr Faddy, and the opinions of the claimant's clinical team including Dr Allen and Professor Chiodini.
 - v) Irrationality, in failing to recognise that the claimant's current permanent accommodation is unsuitable and in the light of that provide suitable accommodation.
 - vi) Breach of Article 8 of the European Convention on Human Rights.
15. The relief claimed by the claimant is:
- i) A mandatory order requiring the defendants to provide her with suitable accommodation and care pursuant to their section 117 Mental Health Act 1983 duty.
 - ii) A declaration that the defendants' ongoing failure to provide suitable accommodation is unlawful.
 - iii) An order quashing the defendants' decisions to delegate to or rely upon the London Borough of Camden to comply with the defendants' duties under section 117.
 - iv) Further or other relief as the Court may determine.
 - v) Declaratory relief and damages in relation to breach of Article 8 of the European Convention on Human Rights.
16. During argument, the grounds have been simplified and the relief claimed has been refined, as I will explain.

Narrative of facts

17. The most recent section 117 assessment of the claimant's after-care needs (subject to the disputed status of an email of 18 March 2021 in Ground 2 of the application, below) was on 23 January 2020 and stated (amongst other things) as follows:-

“S.117 AFTERCARE NEEDS

S.117 Aftercare Need 2:

Suitable specialist 1 bedroom sheltered accommodation / placement within an easily accessible distance to [JU] and [JU's sister M]'s postcode.

Reason for continued need:

Due to her mental health condition [ZK] cannot live independently without support.

Specialist accommodation would allow management of her condition and allow delivery of her social care package. Without a suitable specialist accommodation, [ZK] is likely to suffer mental distress and risk a relapse of her mental health and psychiatric hospital admission.

...

S.117 Aftercare Needs 5:

Care to be provided, day and night to meet [ZK's] eligible social care needs.

Reason for continued need:

[ZK's] physical health has declined since her last S.117 review in 2018. She has a number of physical and mental health care needs which are intertwined and impact on each other. It is not possible to separate [ZK's] physical health and her mental health needs out from each other. Therefore, both physical and mental health needs are required to be met under S.117 to prevent [ZK's] mental health declining and risk readmission to hospital.

The S.117 meeting agreed to change the wording of need 5 from a personal budget to meet [ZK's] eligible social care needs to the above to reflect the change in [ZK's] health and the increase in her care needs from the last review in 2018.

[JU] provides a large amount of informal care for [ZK] as well as providing funded care..."

18. At this point, the claimant was already living in the Flat. It is clear that the accommodation described in section 117 Aftercare Need 2 as "Suitable specialist 1 bedroom sheltered accommodation / placement within an easily accessible distance to [JU] and [JU's sister M]'s postcode" was universally understood and accepted to be a fair description of the Flat. There was no suggestion or expectation that the claimant should be moved out of the Flat at or around the time of the January 2020 assessment.
19. The January 2020 assessment was drawn up by the claimant's social worker Lisa Nobbs (née Beales, employed by the first defendant) as a result of a section 117 meeting on 16 January 2020 and completed on 23 January 2020. It was signed by JU and her sister M, as well as by Ms Nobbs herself and a clinical specialist nurse employed by the interested party.
20. Between the date of the January 2020 assessment and the claimant's admission to hospital on 26 November 2020, no specific event is relied upon as making the Flat no longer "suitable", which is the word in the January 2020 assessment (not a word in section 117) upon which these proceedings for judicial review (issued on 7 April 2021) are largely built. However, JU came to believe that the Flat was not, in fact, suitable for her mother, and a number of professionals have agreed with her.

21. JU commissioned Kate Sheehan, an occupational therapist, who produced an “Occupational Therapy Housing Assessment Report” for the claimant dated 8 July 2020, based on an assessment carried out for her on 19 June 2020 (“the Sheehan Report”). This was not an assessment under section 117 of the Act, and it was not commissioned by the defendants, although it was then submitted to them. It made a number of recommendations, including (in respect of “Housing”) the following:-

“Recommendation

Re-housing to a new property with the following essential features,

- Ground floor, with good sound insulation if there is a property above.
- Two bedrooms — one for [ZK] and one for the carers
- Large wet room shower
- Central heating
- Private out door room
- Storage
- Geographically near her second daughter [M] in NW5
- Second toilet and handbasin

Desirable Onsite parking

Clinical reasoning

The present property is no longer fit for purpose and puts both [ZK] and her carers at risk of accidents during personal care and does not allow for any dignity for family contact.

Ground floor property — [ZK’s] mobility is impaired due to her physical conditions, medication and weight, a ground floor property with level access is required to allow her ease of access into and out of her property

Two bedrooms — At present [ZK’s] carers is sleeping on a mattress on the floor, which affects their quality of sleep. If the care package is increased and two carers deemed necessary, they need to have space to sleep in a dignified place with an appropriate bed. [ZK’s] bed needs to be accessible from both sides to allow a safe working environment.

Large wet floor shower room — this space is require to enable the carers to support personal hygiene without affecting their

ability to move around [ZK] and reduce any musculoskeletal injuries.

Central heating — to provide an even temperature and reduce [ZK's] feeling of being cold.

Private outdoor space — Due to [ZK's] paranoia she will not sit out in a garden or local park where other people can see her or walk by, it is essential that she has a space to sit outside due to her low levels of vitamin D and to have a space for purposeful activity.

Storage — due to the amount of continence pads, equipment, wipes, gloves and other essential equipment, there needs to be space to store these products away from the working area.

Location near to her other daughter — To make [JU's] own life easier to manage, to reduce her travel time between her mother and sister.

Second toilet — to allow the one toilet to be free at all times for [JK] to access and use. It is essential for [JK] to maintain her personal hygiene and avoid the risks of infections which can lead to Sepsis. An additional toilet is required allowing carers and visiting family to use and to specifically meet [JU's] own medical needs to access and use the toilet quickly and for long periods.

Desirable

Parking - To encourage [ZK] to go out for a drive, whilst not having to go past public areas, thus reducing her paranoia but increasing her purposeful activities. To reduce the amount of time needed by [JU] to visit find suitable parking and reduce the time burden on her.”

22. On 14 August 2020, Professor Peter Chiodini, the claimant's consultant parasitologist at UCLH (who had her under his care for recurrent urinary tract infections), wrote to Ms Nobbs seeking “urgent consideration” of rehousing for the claimant. It is not clear that he had any personal knowledge of her current accommodation but, whatever the source of his knowledge, the underlying facts are not disputed, although the suggestion he made is not currently accepted by the defendants. In the letter, he said:-

“[ZK] currently lives in a ground floor flat consisting of one bedroom, one living room, one kitchen and one level access shower with one toilet and wash basin.

Recently her incontinence and toileting needs have become increasingly unpredictable. This is creating a number of issues with regard to accessibility to her toilet when she needs to access

it and that may occur whilst it is in use by her daughter or by her carer.

Given that there is only one toilet, for which there are multiple users and [ZK's] toilet needs are unpredictable, there is insufficient time to clean the toilet between users. As such there have been instances where she has soiled herself, her clothes and her surrounding environment, which increases the risk of her becoming infected with a risk of serious sepsis.

In order to ensure her accessibility to the toilet and level access shower 24 hours a day, she needs to be provided with a toilet, wash basin, level access shower solely for her personal use whilst the carers and her daughter use the second toilet and wash basin.

I shall therefore be grateful if urgent consideration can be given to providing her with accommodation which has those toilet facilities in place.”

23. On 13 October 2020, the interested party's Occupational Therapy Service (Housing) prepared a report (authored by Paul Faddy) which, it appears, was subsequently withdrawn. It stated:

“Bedroom – the bedroom is a good-sized double room. At present it has [ZK's] bariatric bed, a single bed for [JU] to use and another mattress placed on the floor for the paid carer, during the day the mattress is propped against the wall.

The room and furniture does not allow for ease of access to care for [ZK] from both sides of her bed and is not an ideal working environment for the care team. There is limited space for storage of personal items.

Bathroom & WC: has a level access shower, toilet and hand basin. The space is too small for two carers to manage [ZK's] personal care safely.”

24. The claimant was admitted to hospital (with a urinary tract infection at first, although other physical illnesses followed) on 26 November 2020. Shortly before, she was placed on the interested party's housing register with the highest available points, with a view to her being rehoused in a 2-bedroom flat.

25. On 3 December 2020, Ms Nobbs (who was then still ZK's social worker at the first defendant, although she has since gone on maternity leave) emailed the interested party's Head of Housing Allocations, Shaun Flook, saying:-

“As you are aware, ZK's current property is unsuitable as there is not enough space to provide space for carers to support ZK to maintain her personal care. It is essential ZK's carers can provide the personal care she requires to maintain her health and

wellbeing but also to ensure the carers are providing the care and support they are commissioned to do by Norfolk County Council. ZK receives care and support under s.117 of the Mental Health Act (1983). One of her identified needs, to reduce the risk of a psychiatric admission, is for Norfolk County Council to provide care day and night to meet ZK eligible social care needs.

The carers report they are struggling to efficiently, effectively and safely manage ZK's personal care as a result of her current accommodation not having enough space for them to offer this essential care. Can I request your cooperation in identifying suitable and safe accommodation for ZK as soon as possible, to ensure her personal care needs are met to reduce the risk to her health and to ensure her s.117 needs are met effectively.”

26. However, to date, ZK has not been successful in any bid for interested party housing. The issue is one both of availability and of priority. The interested party has limited housing stock and the claimant is not the only person entitled to bid for what is available. Some six months on, and on the evidence before me, there is no imminent prospect of the interested party having housing which JU and others with responsibility for ZK's welfare would regard as more suitable than the Flat, or (if and when it does have such housing available) that the claimant would be likely to be given it, in preference to others with a housing need for the accommodation in question. This is a point to which I will return.

The current position

27. The claimant has now been away from the Flat, either in hospital or (since 1 March 2021) in the St Pancras rehabilitation unit, for nearly six months. In the meantime, there have been a number of developments.
28. On 1 February 2021, Mubin Ahmed, of the agency which supplied carers to the Flat, emailed Ms Nobbs raising doubts about whether the agency would be “comfortable” in resuming care after the claimant's discharge. He explained his concerns as follows:-

“As you are already aware because of inadequate space in the current accommodation carers are unable to access ZK in bed simultaneously from both sides to deliver personal care and also due to inadequate space in the bathroom the carers are unable to deliver personal care to ZK safely.

Carers have stated ZK will need oxygen machine, which they've observed and noted that at least 2 nurses attend to her needs. Where there is 1 nurses on each side to lift her in a sitting position and also at times accompanied by a doctor. Given the current scenario, without a clear support plan in regards to what the role/tasks of care workers will be when she is back in the home, we will not be comfortable taking on the care package as the care workers feel vulnerable and at risk of possible negligence claim against them, especially if the care needs for ZK has changed and

where we have been mentioning about safely working with a client for both our staff and client.

Furthermore, carers have given feedback that whilst ZK has been in hospital, she is requiring the assistance of 4 people to roll for the purpose of safety and re-position her, please can you confirm is this the case maybe speak to the hospital and whether if an OT has been there to observe this?

As mentioned in my email to Camden council on 7 December 2020, in order for our cares to deliver personal care to ZK safely without risking their safety and worried about possible negligence claim against them, there needs to be adequate space for carers to undertake personal care effectively and safely.”

29. Mr Sheldon QC for the first defendant has made it clear that the claimant will not be returned to the Flat (if she is returned there at all, upon which no decision has yet been made) unless and until carers are in place for her there. However, the claimant relies on Mr Ahmed’s observations as further support for her contention that the Flat cannot be regarded as “suitable” (quoting the January 2020 assessment) and that alternative accommodation must be found for her.

30. On 16 March 2021, Dr Ruth Allen, a Consultant Old Age Psychiatrist, wrote to Mr Flook stating:-

“Given the urgency of [ZK’s] need, I would appreciate if Camden council could, as soon as possible, identify a suitable, two bedroom, two bathroom, ground floor and wheelchair accessible flat to meet [ZK’s] needs and avoid the need for the bidding process.”

31. This attempt to bypass the usual allocation mechanisms has not been successful, which is not surprising. However, the claimant relies upon Dr Allen’s reasoning, which was as follows:-

“[ZK] has complex medical and physical health issues including irritable bowel syndrome, repeated urinary tract infections giving rise to sepsis, urinary and sometimes double incontinence. She is dependent on carers for all activities of daily living and cannot keep herself clean after opening bladder or bowels. Her severe and enduring mental illness places her at heightened risk of self neglect and she is unable to recognise when in an unhygienic state and cannot maintain her own personal hygiene. There is high risk of infections and subsequent complications, that may need hospital admission and intravenous treatment, which has happened four times in the last year. In order to minimize the risk, her carers need immediate access to toilet and washing facilities to clean her and reduce the likelihood of further infection. The current facilities, shared by both carers and used by her daughter who is often also present to support her mother, can be a barrier to prompt action.

[ZK] has two carers at night, one who is sleeping until needed. Due to current lack of space she has to sleep on the floor which is highly unsatisfactory and puts and added strain on carers and increases the risk of care breaking down.”

32. Dr Allen wrote separately to Ms Nobbs on 16 March 2021, ruling out (with reasons) the option of placing the claimant in a care home.
33. On 18 March 2021, Ms Nobbs held a review of the claimant’s aftercare. It was decided at that meeting not to change what the January 2020 assessment said about accommodation (JU’s first witness statement, para 41). The reasons for this were explained to JU’s sister M in an email from Ms Nobbs before the meeting. In the email, Ms Nobbs noted M’s proposed amendment removing the specification that accommodation should be “1 bedroom sheltered”. She pointed out that such a change would risk moving the claimant out of her existing regime of “community independent living” (in her own Flat, with carers) and towards “a placement for residential or nursing homes or supported accommodation by social care”; it might also affect her ability to access the interested party’s housing stock, “as we would be suggesting she required care within a formal setting”. Ms Nobbs therefore recommended that they made “no changes to the current s.117 need as this is what Camden are basing their decision on and further changes could affect decisions they make. They are working on trying to resolve accommodation issues, which is positive and I think we need to see what they offer.” She stressed “the need to consider all options”, including, albeit not in the immediate future, non-community living, as “at some point her needs may decline to the point where a community setting is just not safe for ZK to reside in. I really hope this never happens...”. This email is the basis of Ground 2, and I will consider it in more detail in due course.
34. On 1 April 2021, responsibility for ZK’s social work passed from Ms Nobbs (on maternity leave) to a more senior social worker at the first defendant, Ms Natasha Mee. Her evidence to me shows that she has extensive experience acting as a social worker with people with complex mental health and physical health needs (Mee 1 para 2).
35. On 8 April 2021, a “Joint Health and Discharge Summary” for ZK was provided to the first defendant by the St Pancras rehabilitation unit, as part of the discharge planning process. It is marked “Draft” but this, I am told, is only because it cannot be finalised until her place and other details of discharge have been decided – which is not only uncertain, but potentially disputed to the point that I now have this application to decide. The Discharge Summary is said to have been completed by the nurse and occupational therapist who have been caring for and working with ZK at St Pancras (Northrop witness statement para 3), namely Salima Garvwa (nurse) and Hannah Richardson (occupational therapist), but it also identifies other professionals in her treating team (a consultant geriatrician, Dr Bettina Wan, and a physiotherapist, Amy Lewis). JU does not agree with the Discharge Report and has provided me with her own written commentary upon it.
36. The Discharge Summary undermines some of the assumptions behind the previous criticisms of the Flat as suitable accommodation for the claimant which I have set out above. I will return to this when considering the defendants’ reliance upon it.

37. In a witness statement of 12 April 2021, the first defendant's senior lawyer David Northrop set out its position as follows:-

“I have discussed this report with Lisa Nobbs, the social worker of ZK. She observed that the Unit have provided bed baths for ZK. She advised me that this may be appropriate to continue if ZK was returned to her current accommodation at [the Flat], in the London Borough of Camden.

Lisa has also said to me that ZK has lived at [the Flat] since 2018, and therefore it is likely to be a familiar environment to her and one that she would settle into if she were to return there. Lisa observed to me that familiarity is identified as very important for ZK due to her complex mental health presentation.

In light of the Discharge Summary, it seems that Monica Shaw Court may well be suitable to meet ZK's after-care needs, and in any event is an appropriate place for ZK to be discharged to in the short term until the judicial review claim is determined.”

38. Mr Northrop said that he was making arrangements to speak to estate agents in the area of Camden and neighbouring boroughs, and also to speak to the social services departments of neighbouring boroughs, to see what properties might be available for ZK (Northrop para 12). This was a broadening of the defendants' efforts, which had previously been reliant on what the interested party, or JU, could achieve, in a search for discharge accommodation as an alternative to the Flat. Ms Mee's evidence refers, also, to research of “larger properties available on the private rental market”, i.e. non-sheltered accommodation outside the housing stock of the interested party. As I have mentioned, none of these efforts have borne fruit so far.
39. Ms Mee (Ms Nobbs' successor) filed a witness statement dated 26 April 2021 in which she (like Mr Northrop) expressed the view that the Discharge Report suggests that the Flat might be suitable accommodation for the claimant, notwithstanding the previous objections. She noted from the Discharge Report that the claimant is not using the available WC facilities at St Pancras, and is expected to use pads for toileting after discharge instead of using the WC at the Flat. She also noted that she is being strip washed in bed instead of using bathing facilities away from the bed and that she was expected (according to the Discharge Report) to have all personal care completed on her bed as well. This had (Ms Mee suggested) implications for the request for a second set of WC facilities, and a larger bathroom. Ms Mee also (based, it has to be said on speculation, as she had not herself seen or ascertained the precise shape or dimensions of the claimant's bedroom in the Flat) expressed the view that the bedroom could be rearranged so that care could be provided from both sides of the bed, thus addressing another objection to the Flat as suitable accommodation. Finally, she suggested that care from one side of the bed would, in any event, be practicable. She said, in conclusion:

“From the materials that I have seen, although the existing property is not optimal for ZK, given the number of carers that she has, it does appear to me to be suitable to meet both her care and mental health needs.”

40. Ms Mee's evidence is that, if the Flat were to be considered unsuitable to discharge the claimant to upon leaving St Pancras, "The only other realistic option available within the time scale would be a move to a specialist care home that caters to individuals with mental health difficulties". She suggested in her statement of 26 April 2021 that this could be arranged relatively quickly. JU, for understandable reasons, and with the support of the observations of Dr Allen which I have referred to, is strongly opposed to this. The first defendant has not decided between the options that Ms Mee has identified, or any other options that further discussion and research may generate. However, both defendants refuse to rule out the claimant's return to the Flat when she is discharged from St Pancras as one of the possible options.
41. Ms Mee was due to inform herself further by conducting a remote visit to the Flat on 27 April 2021, in view of the restrictions on an in-person visit at that time during the COVID19 pandemic. In attendance at the remote visit, as well as Ms Mee, were the claimant's daughters JU and M, and her occupational therapist at St Pancras, Hannah Richardson. JU began the meeting by saying she would be audio-recording it and JU and M questioned Ms Mee about her "intentions and motivations regarding the remote visit, given that according to her first witness statement she considered the flat was unsuitable" (JU second witness statement, para 31). This was at a time when the hearing before me had already been fixed. Ms Mee then expressed her desire to discontinue the remote visit pending further advice. I do not find that at all surprising in the circumstances.
42. Because of JU's other commitments, it was not possible for a remote visit to take place before the hearing before me.
43. On 29 April 2021, Professor Chiodini wrote a further letter, addressed "To whom it may concern", which was exhibited to a witness statement from JU dated the following day. It does not refer to the Discharge Report and it maintains the position stated in the earlier documents relied upon by the claimant, or, therefore comment upon the alternative toileting and washing arrangements suggested there. It refers to the need to wash the claimant in the bathroom of the Flat even if the WC is required by other carers including JU; and also to the need for the claimant to have access to the WC at all times. It concludes:-
- "For all these reasons, ZK's accommodation needs to have one bathroom with a level access shower/wet room, toilet and wash basin for ZK, plus a second bathroom with a toilet and wash-basin for the use of ZK's daughter and carers.
- ...It would be in ZK's best interests if Camden Council were able to expedite the identification of a suitable ground floor 2 bedroom, 2 bathroom wheelchair accessible property."
44. In response to this, Ms Mee's second witness statement (of 5 May 2021) says:
- "It is consistent with previous documents I have read. It does not change [the first defendant's] view that the property is suitable for ZK's needs, in the interim to facilitate discharge from hospital pending the reassessment."

45. The defendants are now in the process of reassessing the claimant's section 117 needs. When complete, that assessment will replace the January 2020 assessment. The second defendant's senior nurse for learning disabilities and autism, Ms Kim Harvey, gave evidence about the timetable for this.
- i) The first and second defendants met on 29 April to begin the process.
 - ii) Ms Mee's virtual viewing of the Flat has been re-arranged to take place on 7 May (the earliest date offered by JU, which was the day after the hearing before me).
 - iii) Ms Harvey (of the second defendant) will join this meeting, as will either or both of JU and M, because the defendants regard it as important that the claimant's family are involved in the re-assessment.
 - iv) Ms Harvey has arranged to receive (i) an update from the mental health nurse about the current involvement of mental health services; (ii) information from the claimant's GP.
 - v) A Best Interests Meeting about the claimant will take place on 10 May 2021, led by an independent Chair from North London Clinical Commissioning Group. Ms Harvey will attend as an observer.
 - vi) A meeting will take place between Ms Harvey, Ms Mee and both the claimant's daughters (JU and M) on 11 May.
 - vii) Ms Mee and Ms Harvey will then meet to identify the Care Act and section 117 needs from all the information they have. From this, they aim to prepare a draft document by 12 May 2021. This will be shared with relevant individuals for review and feedback over the following 7 days.
 - viii) The first defendant and the second defendant (by Ms Harvey) will then meet to conduct a formal section 117 review, with a signed-off document to be produced "by no later than 28 May, earlier if possible" (Harvey para 9). As I have said, this will replace the current January 2020 assessment (as well as being used to update the claimant's separate Care and Support Plan, which in its current version is dated 10 November 2020).

Ground 1 - Unlawful failure to meet assessed after-care need for "suitable" accommodation; and Ground 5 - Irrationality

46. Ms Sian Davies, on behalf of the claimant, took Grounds 1 and 5 of the application together. She submitted that Ms Mee was "a lone voice" in maintaining that the Flat remains "suitable" as described in the January 2020 assessment, and that it was irrational and therefore unlawful for her to disagree with the reasons given by others for saying it is not suitable, which she described as "overwhelming evidence".
47. She particularly emphasised Ms Mee's position as a person who had not herself (unlike JU) visited the Flat.
48. There are difficulties with an application for judicial review based on the January 2020 assessment. First, that assessment is on the verge of being superseded by the fresh

assessment now in progress. However, I accept that, because the defendants are strongly maintaining the option of having the claimant discharged to the Flat at any time, even if this is before the new assessment is complete and has been approved through the processes made necessary by the claimant's lack of capacity, the pending assessment does not make the claim academic.

49. A second difficulty is that the claimant's argument is based on a selective approach to the January 2020 assessment. It is common ground that the January 2020 assessment is the current assessment so far as the claimant's section 117 needs and rights are concerned. These proceedings are not brought to claim a re-assessment. On the contrary, the claimant maintains these proceedings although the defendants have decided upon a re-assessment (albeit only recently) and are in the process of carrying it out. The January 2020 assessment does not, however, on its face justify the relief which is now claimed. The mandatory order sought by the claimant would require the defendants "to provide her with suitable accommodation and care pursuant to their section 117 Mental Health Act 1983 duty". In this, it echoes only the word "suitable" from the January 2020 assessment, but it has been clear throughout that what the claimant says would constitute suitable accommodation is not the accommodation specified in the January 2020 assessment. That requires "Suitable specialist 1 bedroom sheltered accommodation / placement within an easily accessible distance to [JU] and [JU's sister M]'s postcode" but, although the Flat is undoubtedly "specialist 1 bedroom sheltered accommodation / placement within an easily accessible distance to [JU] and [M's] postcode", the claimant says it is not "suitable".
50. It is essential that a mandatory order should be clear and specific, given the serious consequences of non-compliance, and the inconvenience of deferring disputes about specifics until after an order has been made and disputes have arisen about whether it has been broken. It is not clear from the evidence where the claimant draws the line between, on the one hand, what would be "ideal" (to use the word in Mr Faddy's Occupational Therapy Service (Housing) report of 13 October 2020 for the interested party) or "recommended" (to use the language of the Sheehan Report of June 2020) and, on the other hand, what is absolutely required to avoid a breach of duty on the part of the defendants.
51. This was, therefore, clarified by the claimant's Counsel who, in the course of argument, redrafted the proposed order for mandatory relief in the following terms:
- "The defendants forthwith provide to the claimant suitable sheltered accommodation which meets the following criteria:
- (a) a bedroom which can accommodate a bariatric hospital bed, sleeping space for two carers, ZK's ventilation machine, and essential furniture and permitting carers to have access of no less than 45 cm each side of the bed.
- (b) a level access bathroom where ZK has sole access to a toilet, level access shower and hand basin.
- (c) within easily accessible distance of JU's postcode."

52. This is directly contrary to the terms of the January 2020 assessment, in that the claimant has made it clear in argument that this order would require at least two bedrooms (“sleeping space for two carers”), and two WCs (so that ZK has “sole access to a toilet”, and others have a separate facility). I do not think, therefore, that it is sustainable as a claim based on the January 2020 assessment. I do not think that the word “suitable” can be extracted from its context and used to require something otherwise inconsistent with the January 2020 assessment. I have already noted that the word “suitable” does not appear in section 117 itself, and there no direct requirement in section 117 for the provision of accommodation, although it is possible that there might be such a requirement in the circumstances of particular cases (see paras 11-13 above).
53. If the question is whether what is currently provided (the Flat) is in line with the January 2020 assessment (leaving aside the word “suitable”) the answer must be “Yes” – it is the same accommodation as was provided unchallenged before and after the January 2020 assessment and as was understood, in and at least immediately after January 2020, to be in line with that assessment.
54. It is said that what is “suitable” now goes beyond the January 2020 assessment, in that a bigger bedroom is required, together with a bigger bathroom, a second WC apart from the one in the bathroom - in short a completely different place. This would on the face of it require a fresh assessment, which is precisely what is now in hand. This is not a case in which the defendants are refusing a fresh assessment or saying that the January 2020 assessment does not require revisiting in the light of the claimant’s changed circumstances, or current circumstances (whether or not changed). But the relief claimed from the court is not a fresh assessment but for the court simply to impose immediately, by way of mandatory order, what the claimant says is now required in order to be “suitable”. That does not seem to me to be reasonably arguable as an appropriate use of judicial review. The section 117 assessment is for the defendants to perform. Once performed, it may be subject to judicial review. But the section 117 question is not an objective question to be determined by the court and then checked against the determination of the body subject to judicial review. The defendants are entitled and indeed required to make the section 117 assessment for themselves. Subject to *Wednesbury* principles, they are entitled to exercise their own discretion. There may not be a single correct answer in all these cases, and it may not even be possible to find an answer which is altogether satisfactory, given the resource and policy constraints on what may be done for any particular individual. The court is neither permitted nor well-qualified to pre-empt the decision of the defendants.
55. I will, nevertheless, turn to the argument that it is irrational and unlawful for the defendants to maintain that the Flat is or may be “suitable”, assuming, but certainly not deciding, that the claimant is correct to measure it against that test. It is possible to challenge and disagree with the views provisionally expressed by Ms Mee in the evidence, and the claimant by her counsel and by her litigation friend have forcefully done that. I am not, however, persuaded that the material in support of their point of view is so compelling that it is irrational or unlawful for the defendants not, at least so far, to have accepted it.
56. The standards one can apply to the question of what is suitable may depend upon what is reasonably practicable. This is not a case in which accommodation meeting the claimant’s demands has been located by anyone, and the defendants are not saying that,

if it is located, they will not fund it for the claimant. All the parties are looking; no-one has so far been successful.

57. Moreover, Ms Mee is not a “lone voice” as argued for the claimant; she is herself an expert. She has explained her current thinking, and it is largely based on the Discharge Report. JU disagrees with the Discharge Report, but has not, to my mind, discredited it. It is a thoughtful and independent report by professionals with the most recent day-to-day responsibility for ZK’s care while she remains at St Pancras. The other professionals whose views I have quoted (see paras 21-23, 25, 28, 30-31 and 43 above) expressed those views without the benefit of the information in the Discharge Report upon which Ms Mee relies. The Discharge Report is currently in draft, but the passages upon which Ms Mee relies do not appear to be provisional. Insofar as JU disagrees with them (as set out in the commentary exhibited to her latest witness statement), she does so on the basis of disputes either of fact or of judgment in which she is not entitled to have the deciding voice.
58. I am also wary of what appears (for the best of motives, springing from a single-minded commitment to the claimant’s interests) to be an attempt to jump the queue for what are inevitably limited resources. The accommodation the claimant is seeking is, quite simply, on the evidence, not available at the moment. But, even if it were, it would potentially be suitable for other people as well, and it is not necessarily the case that the claimant’s need is greater or more urgent than theirs. Camden (for example) has a bidding process, and the claimant has not so far been successful in that process. There is no suggestion that this is because of any defect or unlawfulness in the process: that claim has not been made in these proceedings or any other proceedings against the interested party. Dr Allen’s letter of 16 March 2021 sought to “avoid the need for the bidding process”; and Professor Chiodini’s most recent letter “To Whom It May Concern” said “It would be in ZK’s best interests if Camden Council were able to expedite the identification of a suitable ground floor 2 bedroom, 2 bathroom wheelchair accessible property.” The claimant is not entitled to circumvent the bidding process and, if by expedition is meant the abandonment of normal processes, which would be the effect of a forthwith mandatory order of the court such as the one now proposed, I do not think that would be appropriate.
59. The claim for a declaration that the defendants’ “ongoing failure to provide suitable accommodation is unlawful” is less objectionable, but it still requires the claimant to show that the defendants are, indeed, guilty of an ongoing failure to provide suitable accommodation. For the reasons I have given, I am not persuaded. The claimant is currently accommodated at St Pancras. A number of options are being considered for her place of discharge, and a comprehensive section 117 review is in progress to identify and evaluate all the options. In the meantime, Ms Mee has given reasons for her current thinking (subject to further investigation, discussion and consideration) that the Flat “is suitable for ZK’s needs, in the interim, to facilitate discharge from hospital pending the reassessment” (para 44 above). Those reasons are based on a consideration of all the material, and appear to me to be consistent with one view of that material, although JU’s disagreement is also reasonable. That does not render the defendants’ position irrational or unlawful.

Ground 2 – Ms Nobbs’ email of 18 March 2021 amounted to an unlawful reassessment/decision

60. This ground refers to the email I have quoted in para 33 above.
61. It was based on a concern on the claimant's side that the email, or the correspondence around it, indicated that the defendants had performed, or were about to perform without input from the claimant's daughters, a fresh section 117 assessment of the claimant's after-care needs.
62. However, Ms Nobbs' email of 18 March was not conveying a decision. It was part of a conversation. It pointed out some of the pitfalls of amendments to the January 2020 assessment being proposed from the claimant's side, from her point of view. It recommended continuing with the existing January 2020 assessment for the time being.
63. The claimant now accepts that Ms Nobbs made no fresh assessment or decision about her section 117 after-care services, with the result that Ground 2 falls away. This is quite different from the section 117 re-assessment which is taking place now, in which the claimant's daughters are being involved. The claimant's representatives do not object to that re-assessment and, indeed, welcome it.

Ground 3 – unlawful delegation by the first and second defendants of the duty to provide section 117 accommodation

64. Ground 3 alleges unlawful delegation by the first and second defendants of the duty to provide section 117 accommodation to the interested party (Camden).
65. It is correct that the defendants cannot delegate to Camden their section 117 duties to the claimant. The defendants can work with Camden, however. Given the requirement that the claimant's accommodation should be accessible to JU's Camden postcode (which is strongly maintained on behalf of the claimant), it was and is sensible for them to do so.
66. The defendants have now made it clear that they do not claim a right to delegate to the interested party, notwithstanding some earlier correspondence which seemed to suggest that they were, at least initially, mostly or entirely leaving it up to Camden or the claimant's daughters to make the running. The defendants accept that, if the interested party cannot provide what is required, the duty is on them to find another way. The defendants are now (as I have summarised) making their own enquiries and are not limiting themselves to what the interested party may have to offer. This ground is now academic.

Ground 4 – failure to take into account relevant information

67. Ms Davies for the claimant argued that the first and second defendants have had notice of the occupational therapy opinions of Ms Sheehan and Mr Faddy, and the opinions of the claimant's clinical team, including Dr Ruth Allen and Professor Chiodini, all of which I have referred to. She said that they provide "compelling expert evidence as to ZK's needs in terms of accommodation" and that "Neither statutory body has engaged with those professional opinions save to attempt to delegate the accommodation duty to Camden".
68. Put like that, this does not add much to the points I have already considered under Grounds 1 and 5 (including irrationality) and Ground 3 (unlawful delegation). I see no

reason not to accept the defendants' position that they have indeed taken the material relied on by the claimant into account. They have also taken more recent information into account, chief of which is the Discharge Report. The evidence of Mr Northrop and Ms Mee for the defendants has engaged with the material and reached a point of view which I have found to be open to them. There is no statutory duty on the defendants to provide a detailed commentary on all the material available to them. Disagreeing with the opinions of others is not the same as failing to take them into account.

Ground 6 – Breach of article 8 of the European Convention on Human Rights

69. This part of the claimant's case is based on "unlawfulness in the form of failure to comply with the duty under section 117 of the Mental Health Act 1983 to meet an assessed need by the provision of suitable accommodation" (Statement of Facts and Grounds para 79).
70. It was common ground in argument that this ground could not succeed unless other grounds succeeded as well, being parasitic upon those grounds.
71. I have already rejected the argument that the defendants have failed to comply with their section 117 duties, or that they have failed to meet an assessed need by the provision of suitable accommodation. Ground 6 must, therefore, also fail.

Conclusion

72. For these reasons, permission to apply for judicial review is refused.