



Neutral Citation Number: [2023] EWHC 377 (Admin)

Case No: CO/1887/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/02/2023

Before :

LORD JUSTICE BEAN

MRS JUSTICE COLLINS RICE

Between :

THE KING
on the Application of

MEDWAY COUNCIL

Claimant

- and -

SECRETARY OF STATE FOR THE HOME
DEPARTMENT

Defendant

SECRETARY OF STATE FOR EDUCATION

Interested
Party

Stephen Cragg KC (instructed by **Solicitor, Medway Council**) for the **Claimant**
Deok Joo Rhee KC and **James Anderson** (instructed by **Government Legal Department**) for
the **Defendant** and the **Interested Party**

Hearing date: 15th February 2023

Approved Judgment

This judgment was handed down remotely at 10.00am on 24 February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Lord Justice Bean :

1. This is the judgment of the court to which we have both contributed.
2. By these judicial review proceedings, Medway Council, a small unitary local authority in south-east England, challenges a direction from the Home Office mandating its participation in a national statutory scheme for the equitable distribution of responsibility for unaccompanied asylum-seeking children ('UAS children').

Legal framework

(a) Children Act 1989

3. Local authorities have a '*general duty*' under section 17 of the Children Act 1989 ('the Children Act') to safeguard and promote the welfare of all children 'within their area' who are 'in need', by providing a range and level of services appropriate to those needs. They have a particular duty under section 20 to provide accommodation for such children, if they need it because for example there is no-one with parental responsibility for them.
4. UAS children are almost without exception 'in need', and usually engage the housing duty. The default position is that these children find themselves 'within the area' of those few local authorities covering major entry points to the UK (such as Dover and Heathrow or the national asylum intake unit in Croydon).
5. A child for whom such accommodation is provided by a local authority for more than 24 hours becomes a 'looked-after child' (section 22(1)) of the local authority. Further duties of safeguarding and welfare are owed to looked-after children. They must be looked after in 'the most appropriate placement available' (section 22C(5)). A 'placement' means fostering, children's home or other regulated accommodation. That can include arranging for the child to be accommodated in another local authority's area, but the 'placing' authority retains responsibility for these looked-after children.

(b) Immigration Act 2016

6. Section 69 of the Immigration Act 2016 Act ('the 2016 Act'), however, provides for the transfer of Children Act functions and responsibilities in relation to a UAS child from one local authority to another, on the basis of voluntary arrangements made between them.
7. The 2016 Act also confers a power for the Secretary of State to prepare a scheme for the transfer of such functions, with which local authorities may be directed to comply. That specific power to direct participation in the scheme is made subject to the Secretary of State being satisfied that such direction '*will not unduly prejudice the discharge by each receiving authority of any of its functions*'. These provisions are contained in section 72 of the 2016 Act.

Scheme for transfer of responsibility for relevant children

72 (1) The Secretary of State may prepare a scheme for functions of, or which may be conferred on, a local authority ("the transferring authority") to become functions of, or functions which may be conferred on, one or more other local authorities in the same part of the United Kingdom (a

“receiving authority”) in accordance with arrangements under section 69(2).

(1A) The Secretary of State may prepare a scheme in relation to a local authority to which section 69 applies (“the transferring authority”) and one or more other local authorities in one or more other parts of the United Kingdom (“a receiving authority”) having the effects mentioned in section 69(3B).

(2) A scheme under this section—

(a) must specify the local authorities to which it relates, and

(b) unless it relates to all relevant children who may be the subject of arrangements under section 69 between the transferring authority and each receiving authority, must specify the relevant child or children, or descriptions of relevant children, to which it relates.

(3) The Secretary of State may direct the transferring authority and each receiving authority under a scheme under this section to comply with the scheme.

(4) A direction may not be given under subsection (3) unless the Secretary of State is satisfied that compliance with the direction will not unduly prejudice the discharge by each receiving authority of any of its functions.

(5) Before giving a direction under subsection (3) to a local authority, the Secretary of State must give the authority notice in writing of the proposed direction.

(6) The Secretary of State may not give a direction to a local authority before the end of the period of 14 days beginning with the day on which notice under subsection (5) was given to it.

(7) The local authority may make written representations to the Secretary of State about the proposed direction within that period.

(8) The Secretary of State may modify or withdraw a direction under subsection (3) by notice in writing to the local authorities to which it was given.

(9) A modification or withdrawal of a direction does not affect any arrangements made under section 69 pursuant to the direction before it was modified or withdrawn.

(10) Subsections (5) to (7) apply to the modification or withdrawal of a direction as they apply to the giving of a direction, but as if—

(a) the reference to the proposed direction were to the proposed modification or proposal to withdraw the direction, and

(b) subsection (6) permitted the Secretary of State to withdraw the direction before the end of the 14 day period with the agreement of the local authorities to which it applies.

(11) In this section “local authority”, “relevant child” and “part of the United Kingdom” have the same meanings as in section 69.

The National Transfer Scheme for UAS Children

8. The problem of the concentration of a growing number of UAS children in a very few local authorities led the Home Office in 2016 to prepare a national transfer scheme, relying on the voluntary co-operation of local authorities exercising their functions under section 69 of the 2016 Act. This voluntary NTS operated on the basis of trying to achieve an outcome in which no local authority should have to look after more UAS children than amounted to 0.07% of their child population. It did achieve some rebalancing. But not all local authorities were prepared to co-operate, resulting in a greater burden on those who did.
9. The Home Office undertook a consultation exercise, launched on 28th August 2020, with proposals to strengthen the voluntary scheme, including a rota giving advance notice of placements, and a system of weighted factors by which allocation numbers would be calculated. The revised scheme was introduced in June 2021. It doubled the number of participating local authorities. But the increase in take-up fell short of growing demand. The few local authorities into which UAS children were continuing to arrive from abroad had numbers above the 0.07% target at levels half as much again, double, or more.
10. The situation led to something of a crisis in south-east England, with Kent County Council declaring itself unable to look after any more UAS children. The voluntary scheme could not place all the new arrivals in other participating authorities. The Home Office was forced to place (older) UAS children in hotels pending a solution. That was not sustainable. It is local authorities who must discharge Children Act functions; the Home Office has no functions in relation to the care of UAS children and no infrastructure to provide it. The accommodation of UAS children in hotels, other than on an emergency or short-term basis, with no sustained care support or services, is plainly not a discharge of Children Act responsibilities and not in the children’s best interests.
11. Work began within government, led by the Home Office and the Department for Education, with a view to preparing for the replacement of the voluntary NTS with a mandatory scheme using section 72(3) powers, at least on a temporary basis, as being the only solution left to the problem. The June 2021 scheme was taken as a starting point, and further refinements made to the multi-factorial weighting system for determining

numbers against the 0.07% standard. The principal new issue in moving from a voluntary to a mandatory scheme, however, was the ‘undue prejudice’ test in section 72(4) of the 2016 Act, read together with the procedural provisions of section 72(5)-(7) requiring notice to be given of any proposed direction to a local authority, followed by a period of two weeks within which the authority might make written representations.

12. A submission to Home Office ministers of 20th October 2021 set out the culmination of the work and recommended the initiation of a process for publishing a mandatory NTS and for directing local authorities to participate in it. This submission had two annexes directed to the planned operation of the ‘undue prejudice test’. Annex F set out the criteria by which any representations received from local authorities would be considered, and Annex G set out the procedure for doing so. The procedure was to involve a cross-departmental moderation panel ‘*to ensure consistent consideration and properly recorded decisions against a set of criteria*’, the results of which would be recommended for ministerial decision. The three options envisaged for such recommendation would be:

I **Direct** – for cases where it is clearly established that the representations do not meet the threshold to be excluded from participation, as the representations do not support that participating in the NTS will impact on their ability to perform their functions.

II **Not direct** – for cases where it is clearly established that the local authority meets the exceptional criteria to not be directed to participate in the NTS as doing so will impede their ability to perform their functions.

III **Escalate** – for complex or borderline cases where it is not considered they fall clearly in to either of the above categories.

13. The criteria were set out as follows:

“Annex F – Threshold to consider representations from local authorities

Mandating the National Transfer Scheme

Annex F Consideration of representations from local authorities

We are proposing to direct transfers to LAs below the 0.07% threshold only based on the most recent available Management Information. We anticipate a proportion of these LAs will make representations as to why they are unable to participate in a mandatory NTS.

Section 72(4) of the Immigration Act 2016 states that a direction relating to the NTS may not be given unless the Secretary of State is satisfied that compliance with the direction will not unduly prejudice the discharge by each receiving authority of any of its functions. There are a number of reasons a LA could use to insist they should be exempt from receiving a mandated transfer:

1. Capacity and operational readiness (not issues relating to 0.07% threshold LAs who will already be exempt)

2. Inexperience in supporting UASC
3. Best interests of the child
4. Economic reasons – including bankruptcy, financial and funding concerns
5. Insufficient placements in the local authority area and costs of out-of-area placements
6. Cost of long-term support required by care leavers
7. Age disputes – for example, resources, litigation and safeguarding concerns
8. Need for equitable distribution of other cases – for example, asylum dispersal
9. Wider pressures and other asks from Home Office on the local authority (for example, adult dispersal and resettlement)
10. OFSTED / Children’s Services inspection rating
11. Political concerns
12. Exceptional circumstances – in true crisis and unlikely to be able to offer care to any newly presenting children, UASC or otherwise
13. LA believes their UASC population is now over 0.07% (which is subject to verification against internal Management Information).

After careful discussion with officials in DfE and DLUHC, the agreed approach to consider representation is:

- Any representations under **categories 1-11** above, singly or in combination, would not be compelling enough to exempt the local authority from being directed to receive a mandated transfer. **The local authority will be directed to participate in the mandatory NTS.**
- Any representations that fall under **category 12 and 13** would support the request that **a local authority should not be directed to accept transfers. The local authority would be exempt from participation in a mandatory NTS.**

It is expected that only representations which fall under category 12 and 13 would be able to support the conclusion that a local authority should not be directed to receive transfers under a mandated NTS. It is expected that only a local authority which can demonstrate it is in a true crisis at the time they are directed to receive transfers and would struggle to offer adequate care to **any** child presenting in their area should be considered exempt from receiving direction at that time, or those supporting at or above 0.07%. The Chief Social Worker for England has previously provided the view that all LAs should be able to support an additional child in need in their area regardless of other pressures.

All representations will be considered on a case-by-case basis including any criteria made in representations not already anticipated above.”

14. The reference to the Chief Social Worker’s view is to an email exchange of 27th September 2021 in which the deputy director for looked-after children at the Department for Education had asked her:

“You will be aware that the Home Secretary and the previous Secretary of State recently agreed to mandation of the National Transfer Scheme on a temporary basis.

Cross government agreement to this is currently being finalized and the Home Office are now working on operationalising this with our support.

We would very much like your input and views on 2 key things.

Firstly, do you consider that there are any reasons why it would not be reasonable for an LA to accept a child through the NTS (for example a very recent Ofsted judgment which indicates that children may not be safe)?

For context, under Section 72(4) of the 2016 Act, a direction may not be given to comply with the NTS unless the Secretary of State is satisfied that compliance by a Local Authority will not unduly prejudice the discharge of that Local Authority’s functions. This means that by law a Local Authority may make written representations about the proposed direction to the Secretary of State and a direction will not be given before the end of a period of 14 days beginning with the day on which notice was given.

...”

The Chief Social Worker had replied:

“There are no practice circumstances in which I think it’s reasonable to refuse to accept responsibility for a young person under the NTS. Local authorities should pride themselves on their ability to be able to look after any child for whom they have responsibility regardless of who that child is [or their] ethnicity or any other social circumstance. To argue anything else is a very slippery slope indeed.

...”

15. The submission’s recommendations were accepted. A joint letter from Home Office and Department for Education Ministers was issued to all local authorities on 23rd November 2021 giving formal notice under section 72(5) of the 2016 Act that the Secretary of State proposed to direct them to comply with the NTS. It explained the ‘unprecedented situation’ of accommodating UAS children in hotels, and the need to resolve it as soon as

possible by ensuring all children transferred promptly to local authority care for the discharge of Children Act responsibilities. It explained that the revised voluntary scheme introduced the previous summer had not responded to the scale of UAS child intake; the number of vulnerable children needing local authority placement needed ‘a national response where everyone plays their part’. It explained the 0.07% threshold and the modelling supporting it, and the funding arrangements supporting the scheme. It set out the ‘undue prejudice’ provision of section 72(4), identified the entitlement of local authorities to make written representations, and explained a process for doing so.

16. This letter was sent to a total of 206 local authorities, under cover of individual emails giving an indication of the projected initial allocation each authority could expect to receive in the coming months. 159 did not make any representations in response, and 18 replied affirming their willingness to participate. All of these were sent a direction to participate in the NTS on 14th December 2021, when the scheme was published in full and came into force. Twelve authorities responded to the effect that they were already over the 0.07% limit. Where that was verified, these were sent a direction to participate in the scheme, but given a nil initial allocation of UAS children. 17 authorities replied with representations which required individual consideration of the ‘undue prejudice’ test. Medway was among them.

The Medway direction

17. The Leader of Medway Council responded to the formal notice with a letter of 3rd December 2021 asking for the Council to be exempt from the mandatory NTS. He provided figures for Medway’s UAS child population, and its looked-after children in general. He drew particular attention to a July 2019 OFSTED report rating its children’s services as ‘inadequate’ (the lowest rating available). A recent OFSTED follow-up report of 19th October 2021 had noted ‘modest but fragile progress’, but that most children in Medway who required support were not yet receiving a good enough service, and recent staff turnover was threatening to undermine such ‘tenuous’ progress as had been made. The letter explained that its ‘in-area’ accommodation provision for looked-after children was at capacity, forcing them to rely on accommodation in other local authorities. Its in-house fostering services had no vacancies and its commissioned fostering agencies had few if any places within the area. They were already constrained to place five looked-after children in unregistered placements and seven older children in unregulated placements. The letter concluded:

“Our ability to manage our ‘indigenous’ children’s safeguarding is adversely impacted and to mandate for Medway Council to accept UASC children in our own right would be detrimental to Medway Council’s ability to provide a good level of service to all our children, young people and families, including those UASC already placed in Medway.

For the reasons above, I would respectfully ask that Medway Council is exempt from the mandatory NTS scheme at this time.”

18. A moderation panel was convened on 10th December 2021 to consider the representations of local authorities seeking to avoid a direction to participate in the NTS. It comprised officials from the Home Office, Department for Education, and Department for Levelling

Up, Housing and Communities. The transcript records discussion of preliminary issues including that ‘the legal test is that local authorities need to demonstrate that compliance with the scheme would unduly prejudice the discharge of their functions. That’s the bar we will look for them to meet if they’re to be exempted from the scheme.’ The ‘Annex F’ criteria were before the meeting. The following exchange was recorded about them:

“DfE Official: I’ve read the annex. If the ministers agreed to it then we can’t deviate from that much. In reality a lot of the issues have been raised by a lot of the people that written back are well-known issues of the whole system, ie like lack of sufficiency of care placements. Nearly everyone could have written that if they wanted to and many chose not to do so. Few wrote with that clarity, how what they’re writing really sort of impacts them discharging any of their functions completely, and so that’s the bar I set when I was looking through them. Is the bar whether they say if we take this UASC, we won’t be able to deliver on these other things that we have to under statutory element?”

HO Official: That’s 100% in line with the position that we have taken.

HO Official: The legal test is what you can see there in section 72, subsection 4, that compliance with the direction will not unduly prejudice the discharge of the authority’s functions.

DLUHC Official: On that basis, I’m happy to move on, but my only reflection is that I felt this was a bit black and white. I think it’ll come out when we actually get to some of the cases where we might have strong financial reservations about some of them. I just wanted to be clear that I think that it’s a bit black and white to say if there’s a financial problem it doesn’t matter the degree.”

19. The meeting turned to the individual cases. In each case, it had before it a proforma prepared by Home Office officials which tabulated the authority’s representation by subject matter against the Annex F criteria. Medway’s proforma had noted that it needed to be considered by the moderation panel on the basis of having sought DfE advice. It recorded that advice as being:

“Medway set out clearly the pressures on their placement capacity, including as a result of other local authorities placing children in the borough. Medway not receiving directed transfers will not change those pressures as other LAs could feasibly place those children within the area instead. However, should it be operationally feasible I would suggest exploring whether transfers to Medway could be backloaded in light of the point raised about current use of unregistered provision, providing additional time for the Council to prepare. I therefore recommend that the council be directed to participate in the scheme.”

20. When the panel came to consider Medway's case, it was noted that Medway was effectively saying it was already trying to support UAS children beyond its capacity. There was some discussion about additional support which might be provided. There was a suggestion that, if Medway fully took on Children Act responsibility for some of the UAS children it was accommodating for Kent County Council it could reach the 0.07% that way, so 'doing its duty' without increasing the numbers physically in their area. But the only salient issue it saw in Medway's case was its location, close to one of the most hard-pressed local authorities. The decision was taken to recommend issuing Medway with a direction.
21. That duly came in the form of a Home Office letter of 15th February 2022 from Kevin Foster MP, Minister for Safe and Legal Migration, on behalf of the Home Secretary, addressed to all the local authorities who had made representations. (The letter appears to have been sent in identical terms to each recipient authority, but it was common ground that each one should be treated as a separate direction.) It said that 'the representations from your local authority requesting an exemption have been given careful consideration.....in line with legal obligations set out under Section 72(4) of the Immigration Act 2016'. The pressures on local authorities and the 'issues raised in your letter with respect to those pressures' were acknowledged. The Minister concluded: 'However, I am satisfied that compliance with the direction will not unduly prejudice the discharge by your local authority of any of its functions. Therefore, a decision has been taken to direct your local authority to participate in the NTS. Whilst I can understand you may be disappointed by this decision, it was taken following careful consideration against the relevant threshold.' The letter set out funding arrangements and next steps, including that 'from today my officials will begin referring young people for placements in your local authority'.
22. That is the decision challenged in the present judicial review proceedings. All local authorities have now been mandated to participate in the NTS. Medway is the sole local authority to challenge a direction.
23. Its indicative initial allocation of UAS children under the scheme was 5 out of 652. As explained to us, that is the result produced by the multi-factorial equation designed with the 0.07% proportion in mind, and reflects the low UAS child population in Medway's care, compared to other local authorities. As of November 2021, the evidence is that Medway had made funding claims to the Home Office for 5 UAS children. That is 0.12% of all the UAS children in the country. Medway's overall population amounts to 0.42% of the country. Its UAS child population is the lowest per 10,000 of the population of any authority in the south-east England region. Its supported asylum population is significantly lower than the regional average. It had not participated in the voluntary NTS at any time.

The present judicial review proceedings

24. In a pre-action protocol letter of 17th February 2022, Medway said it was unable to accept any children under the NTS '*for the reasons which have not been addressed by the Secretary of State*'. It was seeking suspension and quashing of the direction as being irrational and unfair.
25. The Government Legal Department's response of 17th March set out the background and 'further explanations for the decision'. These included:

“Factors such as child population, supported asylum population, UASC population, former UASC care leaver population, looked after children population, are separately taken into account when deciding on the number of UASC to be allocated to an authority under the NTS. As such, and bar exceptional circumstances deemed sufficient to meet the legal test where the authority could demonstrate that they were in true crisis (and thus unlikely to be able to offer care to any newly presenting children, UASC or otherwise – ie any child needing a care placement) they are not in themselves considered as a basis for exempting an authority from the NTS.

Further, factors such as capacity and operational readiness, Ofsted ratings, insufficient placements in the local authority, costs of out-of-area placements were not considered in themselves to warrant exemption. These are factors that are present across many authorities, and in view particularly of the context against which the decision was taken to mandate the NTS, to exempt an authority for such reasons would be liable to undermine the operation of the Scheme. As such, and bar exceptional circumstances deemed sufficient to meet the legal test, these were not considered to meet the threshold in section 72(4) of the 2016 Act.

Finally, where the local authority considers and the SSHD agrees that their UASC population is at over 0.07% of their population (the threshold set for transfers under the NTS), directions would be issued to participate in the NTS but children would not be allocated whilst the UASC population was at or over 0.07%.”

26. The GLD’s letter also attached copies of Annexes F and G, and redacted versions of the transcript of the moderation panel’s proceedings and the proforma before it relating to Medway’s case.
27. Medway issued judicial review proceedings on 5th April 2022. Its proposed grounds were:
 - (1) The Defendant has not applied the statutory test in the 2016 Act in considering the Claimant’s representations but has applied a far more onerous test.
 - (2) The Defendant’s policy excludes many relevant factors which should clearly be taken into account in deciding whether or not compliance with the scheme will unduly prejudice the discharge of other functions.
 - (3) On the basis of the application of these unlawful criteria, the Claimant’s representations have not been considered and relevant factors not taken into account.

28. Permission was granted on all grounds by Eyre J on 23rd May 2022. No UAS children have yet been allocated to Medway under the NTS.

Discussion

Ground 1

29. Mr Cragg submits in his skeleton argument:-

“33. Under s72(4) of the 2016 Act, the burden is on the Defendant to be satisfied that the direction under s72(3) of the 2016 Act ‘will not unduly prejudice the discharge by each receiving authority of any of its functions’. The onus is not on the Claimant to establish that undue prejudice will be caused.

34. Rather than considering whether the Defendant is satisfied that there will not be undue prejudice the language of the documents reveals that the Defendant has, in fact, put the onus on the Claimant and other local authorities to establish much more. Thus, a local authority must show that it is in ‘a true crisis at the time they are directed to receive transfers’ (Annex F) [400] and that ‘compelling reasons’ need to be provided (see the document summarising the Claimant’s case) [299]. Such a high test is set, it seems, because otherwise to exempt a local authority ‘would be liable to undermine the operation of the NTS’ (see judicial review response letter) [313], although there is nothing in the statutory language which suggests that this issue is part of the test to be applied, in the case of any individual authority.

35. The test applied by the Defendant is not the test set out in the statute and the resulting decision that the Applicant comply with the direction is unlawful.”

30. It is well known that asylum seekers arriving in this country are not evenly distributed geographically. For example, there have for many years been substantial numbers arriving in Kent (mostly through the port of Dover) and in the London Borough of Hillingdon (through Heathrow Airport). As we have recorded above, voluntary arrangements were put in place to spread the burden of providing services to UAS children. The purpose of Parliament in enacting s.72 of the 2016 Act was plainly to confer on the Secretary of State the power to introduce a mandatory scheme or schemes should the time come when voluntary arrangements proved to be insufficient. Many recipients of directions under a mandatory scheme may be unhappy about receiving them. If s.72(4) had simply referred to “prejudice” to the receiving local authority’s functions, the mandatory scheme would have been doomed from the start. Any local authority could have protested that, given staff shortages and the budgetary pressures which nowadays are all but universal, the discharge of their functions, such as their statutory duty under the Children Act 1989 to look after children in need in their area, would be prejudiced at least to some extent.

31. Hence Parliament's choice of the adverb "unduly". As in the phrase "unduly harsh" considered by Lord Carnwath JSC in *KO (Nigeria) v SSHD* [2018] UKSC 53; [2018] 1 WLR 5273 at [23], the words "unduly prejudice" imply that there is a "due" level of prejudice which may be acceptable or justifiable in the relevant context, whereas "unduly" implies something going beyond that level. As Ms Rhee KC submits, the use of that word confers an evaluative discretion on the Secretary of State.
32. We do not consider that this case turns on the burden of proof. On 23 November 2021 Medway were sent a copy of the Scheme and given notice, as s.72(5) of the 2016 Act requires, of the proposed direction. The Leader of the Council, Cllr Alan Jarrett, then sent representations in his letter of 3 December 2021. The moderation panel considered them but nevertheless recommended that a direction should be given, which in due course it was: the Minister's letter of 15 February 2022 stated that "I am satisfied that compliance with the direction will not unduly prejudice the discharge by your local authority of its functions".
33. The more substantial point is whether, by effectively confining exemption from participation in the Scheme to councils in a state of crisis or complete breakdown of children's services, the Home Office had imposed a different test from one of undue prejudice.
34. In answering this question it is important to look at how the Scheme works. After the preliminary step of giving notice to the authority under section 72(5), the first stage is a direction that the authority must participate in the Scheme. This is a binary choice for the decision-maker: either a direction is given or it is not. The second and more nuanced stage is an allocation or a series of allocations of a specified number of UAS children to that authority. In some cases the allocation figure was nil. A challenge to an allocation might well be different from a challenge to the original direction to participate. Suppose that once Medway had been given a direction to take part in the Scheme, the Home Office had allocated 40 UAS children for immediate transfer to Medway (to bring their total up from the 5 they already had to the threshold of 0.07% in one fell swoop). It is at least arguable that such an allocation might have been open to judicial review. But what Medway were seeking in Cllr Jarrett's letter of 3 December 2021 was exemption from having to take part in the Scheme at all.
35. It was in our view neither irrational or otherwise unlawful for officials to devise, and for Ministers to approve, a policy that the burden of providing the services to UAS children imposed on authorities such as Kent and Hillingdon should be widely shared; and that, although usually (if not inevitably) this will cause a degree of prejudice to the discharge by recipient local authorities of their other functions, it should only be in circumstances of crisis amounting to a complete breakdown that a local authority should be exempt from participation in the Scheme altogether on the grounds of *undue* prejudice to the discharge of its functions, so that the question of numbers does not even arise.
36. Mr Cragg further submits that:-
 - “39. There is nothing in the legislation which suggests that every local authority should be subject to a direction when one is made. Indeed, s72(2) of the 2016 Act requires the Defendant to decide which local authorities will be made the subject of a direction, and each local authority must be considered

individually when the question of undue prejudice is considered: s72(4) of the 2016 Act.”

37. We have noted above that, of the 206 local authorities who received the ministerial letter of 23 November 2021, only 29 made representations against being required to take part. 12 of these were on the grounds of having reached the 0.07% threshold: these were included in the Scheme but given initial allocations of zero UAS children. As for the remaining 17, the moderation panel recommended the issue of qualified directions in two cases and unqualified directions in the other 15, including Medway. The “matrix” document prepared for the panel meeting and the record of that meeting show that Medway’s case was considered individually.

38. Mr Cragg’s skeleton argument continues:-

“40. Further, there is nothing in the legislative framework which indicates that any direction from the Defendant must have the end result that all UASC are accommodated by local authorities. Thus, this is not a case where there is a statutory duty on the Defendant to ‘achieve a broad but measurable and very specific strategic outcome’. It is certainly possible to envisage circumstances where, if ‘undue prejudice’ is caused to many local authorities, the Defendant would not be able to direct that all UASC children are accommodated by local authorities and, if that situation arose, the Defendant would need to use (or seek to legislate for) other powers, provisions and funding to secure accommodation. The Defendant might find that undesirable, but the proper application of s72 of the 2016 Act certainly makes it a possible outcome.”

39. This point was not pursued in oral argument and we regard it as wholly unattractive. No one doubts that many local authorities’ children’s services are currently under great pressure. But, unlike local authorities, the Home Office and its officials do not have the facilities, the skills, or the legal powers and duties to look after children pursuant to the Children Act 1989. It is plainly not in the best interests of UAS children to be accommodated, at any rate for more than very short periods, in hotels or immigration reception centres.

40. We consider that the statutory test of undue prejudice was properly applied in Medway’s case.

Ground 2 – fettering of discretion

41. Mr Cragg laid great emphasis on the contents of Annex F to the submission to Ministers of 20 October 2021, and in particular to the recommendation that representations under any or all of headings 1-11 should not be regarded as making a case for exemption from the Scheme. He referred us to *Re Findlay* [1985] AC 318.

42. Headings 1-11 of Annex F were not being put forward to Ministers as anything more than a catalogue of the types of argument which had been put forward in the past by authorities as to why UAS children should not be sent to their area, and might well be again. One of these, “political concerns”, would in our view be a wholly illegitimate reason for

exemption. Most of the others might be regarded as indicators that an intake of UAS children under the Scheme would cause some difficulties for the council concerned. But if they were to be taken into account at what we have called stage one – the direction to participate in the Scheme – this would result in a complex, multi-factorial bureaucratic exercise, and would seriously undermine the policy that the burden of providing services to UAS children should in principle be shared by all.

43. We have already held, in rejecting Ground 1, that the Home Office was entitled to interpret “undue” prejudice as requiring circumstances amounting to a crisis such as a complete breakdown of children’s services. Having evolved that policy, the decision-makers were not unlawfully fettering their discretion in giving effect to it. We therefore reject Ground 2.

Ground 3

44. This is essentially parasitic on Grounds 1 and 2, and Mr Cragg did not treat it separately in oral argument. The representations in Cllr Jarrett’s letter were indeed considered by the Panel, but the view was properly taken that they did not demonstrate undue prejudice so as to justify exemption from participation in the Scheme.

Conclusion

45. We accordingly dismiss Medway’s claim for judicial review.