Neutral Citation Number: [2021] EWHC 455 (Admin)

Case No: CO/3834/2020

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

Manchester Civil Justice Centre
Date handed down: 1 March 2021

Before His Honour Judge Stephen Davies sitting as a High Court Judge

Between:

…

A and B (minors, by their uncle and litigation friend M)	**Claimants**
- and -	
Manchester City Council	**Defendant**

…

Ben Mansfield (instructed by **JMW Solicitors, Liverpool**) for the **Claimants**
Hilton Harrop-Griffiths (instructed by **City Solicitor, Manchester**) for the **Defendant**

Hearing date: 16 February 2021
Date draft judgment handed down: 23 February 2021

- -

APPROVED JUDGMENT

This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII. The date and time for hand-down is deemed to be 2 p.m. on Monday 1 March 2021.

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

His Honour Judge Stephen Davies

His Honour Judge Stephen Davies:

	Section	Paragraphs
A	Introduction and summary of decision	1 - 10
B	The claimants, their family and religious faith	11 - 26
C	The re-amended grounds of claim	27 - 33
D	The legal framework	34 - 63
E	Relevant events and evidence	64 - 84
F	Discussion and judgment	85 - 114
G	Conclusion	115

A. Introduction and summary of decision

1. This judicial review claim [**JR**] concerns two brothers (the two claimants, whose identities are anonymised as A and B) who form part of a family and wider community of strict[1] orthodox Haredi[2] Jews living in north Manchester. Their parents are anonymised as X and Y and have 4 other children. Their litigation friend is their uncle, anonymised as M. His position, and the claimants' case as advanced through him, is the same in all material respects as that of the parents. In this judgment I shall refer to the claimants when I refer to the case as advanced on their behalf and to the boys when I refer to them as individuals.

2. In short, the claimants challenge the decision by the defendant as the relevant local authority to offer respite placement accommodation for the boys in a residential home in the Greater Manchester area, known as Birtenshaw, instead of in an exclusively orthodox Jewish residential home in the London area, known as Bayis Sheli. The claimants contend that if placed in Birtenshaw the boys will be unable to manifest their strict orthodox Jewish faith, whether by complying with kosher dietary laws or by fully observing the Sabbath and other holy days.

3. The claim raises the issue as to whether or not the decision is public law unreasonable, in the context of the statutory background of Part III of the Children Act 1989 (**CA 1989**) against which the decision was made, and the further issues as to whether or not the decision is contrary to Articles 8, 9 and/or 14 of the European Convention for Human Rights (**ECHR**) and/or relevant provisions of the Equality Act 2010 (**Eq A 2010**).

---

1 Sometimes also referred to by themselves as ultra-orthodox Jews.
2 Sometimes also spelt Charedi.

4. It is important to state and record at the outset that: (a) the defendant does not challenge in any way the boys' right to manifest their strict orthodox Jewish faith; (b) the defendant has worked closely with Birtenshaw to prepare a care plan which would enable the boys to manifest their faith at Birtenshaw as far as considered practicable; (c) there has been close dialogue and co-operation between all parties, assisted by Rabbi Sofer[3], to whom the parents and M defer in relation to matters of religious compliance, with a view to seeking to reach agreement; (d) the claimants and Rabbi Sofer are not opposed in principle to a placement at Birtenshaw and the defendant is not opposed in principle to a placement at Bayis Sheli. The issues which divide them are: (i) whether the arrangements proposed for the placement at Birtenshaw will sufficiently allow the boys to manifest their faith; and (b) whether the advantages of the boys being placed close to the family home and schools outweigh the advantages of the boys being placed in Bayis Sheli where there is no impediment, and every opportunity, to their being fully able to manifest their faith.

5. It is also important to state and record at the outset that this is not a case where the defendant has any objection to Bayis Sheli on the grounds of comparative cost. Indeed, it appears that the costs of accommodation at Bayis Sheli are no greater than those at Birtenshaw. Further, although there has been some recent suggestion by the claimants that the facilities at Birtenshaw are not comparable to those at Bayis Sheli and that there are some other causes for concern, these do not form part of the pleaded case and I disregard them. The witness statement of Ms Barnes, Birtenshaw's deputy chief executive in charge of operations, explains that it is a charitable pioneering organisation, founded by parents who did not wish to send their own disabled children to institutions far from home, and I am satisfied there is no basis for any criticism of Birtenshaw as an establishment or of its ethos or of its staff. The same is also true of concerns previously expressed by the defendant as to Bayis Sheli. This case is concerned with principled positions taken by both parties which are, I am sure, adopted and maintained in good faith by both parties.

6. I have had the benefit of reading the witness statements filed on behalf of the claimants and the defendant, including statements from the parents, the uncle, Rabbi Sofer, the responsible social worker Ms Shaw and a representative of Birtenshaw. I also had the benefit of reading a report by an independent social worker (**ISW**), Ms Stubbs, in which she considered the boys' capacity and competence to perform certain tasks relevant to the manifestation of their faith. I have also been referred to relevant documents and to the relevant legal materials by counsel and I am extremely grateful to them both for their measured and helpful submissions

7. It is clear that the claimants face a high hurdle to persuade me that the defendant's decision is one which is not reasonably open to a local authority, acting responsibly in accordance with the statutory scheme under the CA 1989, and it is also clear that the arguments under the ECHR and Eq A 2010 raise fact sensitive issues where there is room for legitimate disagreement.

---

[3] Rabbi Sofer is employed by the Manchester Beth Din which has a kashrus division which certifies kosher kitchens and supervises kosher food at establishments such as schools and care homes.

8. There are also important differences as between the position of the two boys. As regards A, it is agreed that there should be a 12 week placement for assessment with some weekend home stays or visits The only two issues are whether the placement should be at Bayis Sheli or at Birtenshaw and whether it should be under s.20(1)(c) or s.20(4) CA 1989. As regards B, it is now agreed that he should remain at home for the present time, although whereas the defendant proposes a once fortnightly overnight respite stay at Birtenshaw the claimants propose a once fortnightly full weekend stay at Bayis Sheli together with respite placement at Bayis Sheli during school holidays. There is also a disagreement as to whether B's placement should be under s.20(1)(c) or s.17(6) CA 1989.

9. On the particular facts of this case I have concluded that:

(a) The defendant's decision in relation to A, to offer a 12 week assessment placement at Birtenshaw, is public law unlawful and in breach of his ECHR rights.

(b) The defendant's decision in relation to B, to offer a once a fortnight overnight stay at Birtenshaw, is neither public law unlawful nor in breach of his ECHR rights or contrary to the Eq A 2010.

10. I also make some wider observations in section F below which I hope will be of some assistance to the parties going forwards.

B. The claimants, their family and religious faith

11. A is 15 years, turning 16 in June 2021. B is 11 years, turning 12 in Sept 2021.

12. They both have a number of medical and behavioural conditions which require a very high level of supervision.

13. In summary, A has a diagnosis of congenital hypothyroidism, expressive language disorder, attention deficit hyperactivity disorder with difficult behaviours and an intellectual disability due to mutation on the KDM5C gene. These are long-term impairments. He functions at a much younger primary school age than his true age. He does not use verbal communication and uses signs, symbols and Makaton (an integrated language programme designed for persons with learning disabilities) to communicate. He struggles with sleep and can be awake from 3am. He can and does on occasions act violently towards his siblings and towards his parents, his mother in particular.

14. B also has a diagnosis of congenital hypothyroidism, expressive language disorder, an intellectual disability due to mutation on the KDM5C gene, as well as epilepsy. He is incontinent. He also does not use verbal communication and uses body language, facial expressions, gestures and symbols to communicate. He also struggles with sleep and can be awake from 4.30am. He also can and does on occasions act violently towards his siblings and his parents, again towards his mother in particular. He is impulsive and is liable to run out of the house and into the road with no awareness of danger from traffic.

15. The four other children range in age from 16 years to 3 years. Three of them have additional needs. The father works full time to support his family and is also heavily engaged in religious observances. It follows that the burden of looking after the 6 children falls most heavily on the mother and is not surprising that this burden is an exhausting one and has led her at times to feel overwhelmed and unable to cope.

16. Nonetheless, there is no suggestion that the parents are anything other than caring and devoted parents towards the boys and that they want only the very best for them. Indeed, it is clear that the boys are very attached to the whole family, including each other, even though they frequently fight with each other.

17. A currently attends a non-Jewish school on a daily basis, which he enjoys and where he is happy. His food is prepared and taken to school for him by his mother, so that all he needs to do is to unpack and eat his food under staff supervision. Although there is no religious observance as such he is aware in general terms of his Jewish faith and is encouraged to learn about and to celebrate it. His attendance at school has been adversely impacted over the last year due to the impact of the Covid-19 pandemic.

18. B currently attends a Jewish school on a daily basis where there is no difficulty with kosher food or religious observance and there is no plan for this to change.

19. Both currently attend an after school club for Jewish children with disabilities on a number of days each week, which they both enjoy.

20. Generally, the boys adhere to strict Jewish religious laws whilst at home. This involves adherence to strict standards for dietary matters. These are that the food they eat is kosher and prepared, sourced, stored, handled and cooked in ways that are in accordance with Jewish dietary laws, known as kashrus, including a requirement that the food is served by an orthodox Jew, a requirement that meat or fish and milk foods are separately stored and cooked, with separate cooking and serving utensils for each, and a requirement that vegetables are thoroughly checked to ensure that no insects have been inadvertently left on them. As Rabbi Sofer explains, these rules are complex, although second nature to observant orthodox Jews, and it would be unthinkable for any orthodox Jew to consume non-kosher food. It also involves adherence to strict requirements for Sabbath and other holy day observances. It is unrealistic to summarise all of these requirements, although they include a prohibition on travel and cooking and the use of electronic devices on the Sabbath and additional requirements for prayers and other religious observances for Friday evening dinner and Saturday lunch.

21. The claimants' case is that Birtenshaw cannot provide dietary compliance with kashrus requirements, even though they are willing to provide facilities such as separate fridges, cookers, storage and utensils, primarily due to the refusal to sanction the presence of a mashgiach (a Jewish person authorised to supervise the observance of Jewish dietary requirements in an establishment where kosher food is served) for a sufficient time to supervise food storage and preparation in the kitchen and to be satisfied that the kitchen is

compliant with kashrus requirements, which the claimants contend: (a) is necessary in any event; (b) is compounded in circumstances where the claimants contend that the ISW report demonstrates that neither A nor B have the capacity or competence to ensure dietary compliance, so that no argument could be made that they could do so in the absence of such visits. The claimants' case is that neither A nor B could prepare kosher food themselves because they lack sufficient mental capacity or competence in terms of their awareness of the full dietary requirements to prepare hot food, including unsealing and heating ready-made kosher meals.

22. It is important to record that Birtenshaw has no objection to the attendance of a mashgiach as such and, indeed, that they are agreed that there should be advisory visits from a mashgiach at the outset and thereafter every Saturday for Sabbath lunch. Their concern is that it would be inappropriate to permit any adult who is not a member of staff to be present for extended periods in the house, particularly in the kitchen, where the "ordinary life" ethos which they operate envisages that each and every one of the children living in the house should be able to treat the house as their home, around which they can travel as in a normal house without coming into contact with unfamiliar adults.

23. The claimants' case is also that Birtenshaw cannot provide compliance with reasonable minimum standards as regards Sabbath and other holy day requirements. In particular, it is said that allowing only one visit from a mashgiach on the Saturday would leave Friday night religious requirements entirely unfulfilled, and that having prayers played over electronic devices would be not only inadequate but in contravention of Jewish law prohibiting the use of electronic devices on the Sabbath. It is also the case that, due to Sabbath travel restrictions and Birtenshaw's location, if a mashgiach was required for any part of the Sabbath they would have to stay at a local hotel for the whole Sabbath. Whilst mashgiachs are prepared to do so, not surprisingly the same person would not be prepared to do so every weekend, so that there would have to be a rotation of individuals which Birtenshaw believes would be unsettling for the child residents if they were present for extended periods over Friday night and Saturday. The claimants are also concerned that the care plan contains no proposals as to how the religious requirements of the forthcoming Passover period could be accommodated at Birtenshaw, since the witness statement of Ms Barnes shows that the planning is still only at discussion stage.

24. I have already referred to the difficulties the parents experience as a result of the boys' behavioural difficulties, including the ever-present risk of and use of actual violence to each other, to their parents and to their siblings. In summary, although the parents can just about manage when the boys are at school, as that provides some respite, they find it almost impossible to manage during the weekends and school holidays. That is why, leaving aside anything else, they are so desperate for respite accommodation over school holidays. Sabbath and other holy days present a particular problem, because the father is required to attend synagogue at least three times on the Sabbath, leaving the mother to care for all six children very much by herself. Although the defendant has more recently provided home support over Sabbath the parents, whilst grateful, understandably find this a little intrusive.

25. Having summarised the claimants' case, I can also summarise the defendant's case most effectively by quoting par. 18 of the witness statement of Ms Shaw made 21.1.21:

> "The local authority believes that A and B's religious and cultural needs will be met to a reasonable standard at Birtenshaw due to the adjustments and arrangements which Birtenshaw have put in place. When considering all of A's needs, particularly the importance of him remaining near to his family, his right to family life, attending the same school and continuing to engage in activities in his local community, Birtenshaw is the place which is best able to meet A's holistic needs. Birtenshaw is a far more suitable venue for B's respite care needs given its proximity to the family home. As B is only 11 years old, he should be supported to remain in his parents' care if at all possible in keeping with his best interests and whilst ensuring all of his needs are met."

26. Finally, there has also been some consideration, particularly in relation to A, as to his next stages. It is plain that in reality all parties agree that any placement for A, wherever it is, is likely to become his principal residence for the rest of his childhood. The claimants have suggested that if he was accommodated on a permanent basis at Bayis Sheli - as they consider should happen - there is a suitable educational facility he could attend until aged 19. The defendant has suggested that if A was accommodated on a permanent basis at Birtenshaw he could transition to the college connected with his current school and continue attending his after-school club. It appears from the mother's witness statement there is also an educational facility for orthodox Jewish children which the parents would consider as an alternative option.

C. The re-amended grounds of claim

27. It is alleged as ground 1 that the defendant is in clear breach of the claimants' right under art. 9 ECHR to manifest their religion in worship, teaching, practice and observance.

28. It is alleged as ground 2 that the defendant is breaching the claimants' art. 8 rights to private family life as their religious beliefs, practices and culture are intimately linked to and interwoven with their private family lives and failure to offer accommodation that meets those needs is a clear breach of the claimants' art. 8 rights.

29. It is alleged as ground 2(a) that the defendant is acting irrationally and public law unreasonably in failing to accept a duty to accommodate the claimants under s.20(1) CA 1989. This is because the defendant accepts only that it has decided to exercise its power under s.20(4) to provide accommodation to A and contends that its proposal to offer once fortnightly respite accommodation to B is made under s.17(6) CA 1989.

30. It is alleged as ground 3 that the defendant is guilty of unlawful indirect religious discrimination contrary to s.19 and 29(2) Eq A 2010.

31. It is alleged as ground 4 that the defendant is guilty of discrimination under art. 14 ECHR.

32. It is alleged as ground 5 that the defendant is in breach of duty under s.22(5) CA 1989 ,by failing to give due consideration to the claimants' religious persuasion and cultural and linguistic background.

33. Finally, it was alleged as ground 5(a) that if, contrary to ground 2(a), the defendant is not under a duty under s.20(1) CA 1989 in relation to B, then it is under a duty to provide appropriate accommodation under s.17(6) and Schedule 2 Part 1 which ought to be "shared care". This claim was not pursued in oral submissions and I am satisfied that this was the right decision, since there is no reasonable prospect of my being satisfied that the proposal of fortnightly overnight respite accommodation at this stage can in itself be challenged as irrational or public law unreasonable.

D. The legal framework

34. It is plainly important to put the defendant's decisions and the claimants' challenges to them in their proper legal framework.

The Children Act 1989

35. The starting point is Part III CA 1989, entitled "Support for children and families provided by local authorities in England". It includes a group of sections concerning the provision of services to children in need and their families.

36. By s.17(1) CA 1989 a local authority is under a general duty to "safeguard and promote the welfare of children within their area who are in need, and so far as is consistent with that duty, to promote the upbringing of such children by their families, by providing a range and level of services appropriate to those children's needs". These services may include the provision of accommodation (ss.17(6)), as to which more specific provision is found in s.20. As to s.17 CA 1989 Mr Harrop-Griffiths referred me to the decision of the House of Lords in *G v Barnet LBC* [2003] UKHL 57, where it was argued for the appellant children that once accommodation was identified as a need there was an absolute right to that accommodation. Dismissing the appeals, it was held by the majority that s.17 set out duties of a general nature only, not intended to be enforceable as such by individuals. It follows that any claim for breach of such a duty could not be maintained in this case.

37. By s.20 CA 1989, entitled: "provision of accommodation for children: general", provision is made both for a duty to accommodate in the circumstances arising under s.20(1) and a power to accommodate under s.20(4).

38. As relevant to this case, the duty to accommodate arises where it appears to the local authority that any child in need in their area requires accommodation as a result of "(c) the person who has been caring for him being prevented (whether or not permanently and for whatever reason) from providing him with suitable accommodation or care".

39. It was said in *G v Barnet* that the words 'for whatever reason' indicate that the widest possible scope must be given to this provision: Lord Hope at [100].

40. Following oral submissions I referred to the decision of the Court of Appeal in *T v Hertfordshire CC* [2016] EWCA Civ 1108 which made clear at [11] (per Burnett LJ) that a decision as to whether or not it appears to a local authority that a child requires accommodation is vulnerable to attack only on conventional public law grounds. In that case the Court also noted that "the need for accommodation to be provided pursuant to section 20 will often arise as an emergency and for a short time, sometimes only for a day" [24].

41. I also referred to the decision of Nicol J in *JG v Kent CC* [2018] EWHC 1102 (Admin), a case of some initial similarity to the present, in that it involved a challenge to a refusal by a local authority to accommodate under 20(1) CA 1989 in respect of a child whose violence was causing emotional and physical harm to his siblings. In that case the judge held that in such circumstances "the only conclusion to which KCC could have come was that TG's parents were prevented from providing him with suitable accommodation, at least on a full-time basis. Even allowing for the expertise of social workers, no other conclusion could have been rationally reached" [102]. However, that was of course a decision reached on its own particular facts, which are more extreme than those of the present case, in circumstances where the local authority had not made any accommodation proposals for the child at all.

42. In contrast, under s.20(4) the local authority has the power to accommodate, even where a person who has parental responsibility for him is able to provide him with accommodation, if they consider that to do so would safeguard or promote the child's welfare.

43. As regards decisions in relation to looked after children (which do not include children provided with accommodation under s.17(6)), it is common ground that, by reference to s.22(4) CA 1989 the local authority must ascertain, so far as reasonably practicable, the wishes and feelings of the child and his parents regarding the matter to be decided and, by reference to s.22(5), give due consideration to: (a) "such wishes and feelings of his child as they have been able to ascertain, having regard to his age and understanding"; (b) his parents' wishes and feelings; and (c) "to the child's religious persuasion, racial origin and cultural and linguistic background".

44. It is well established that in public law giving due consideration to a matter does not mean treating it as decisive. In a case involving the similar phrase "due regard" used under the Eq A 2010, Dyson LJ said that what is "due" is "the regard that is appropriate in all the circumstances": *Baker v Secretary of State for Communities and Local Government* [2009] PTSR 809. It is obviously a fact-sensitive question for the local authority to determine, subject only to challenge on well-established JR grounds.

45. Section 22C CA 1989 is also material because, in determining which placement is the most appropriate one for a looked after child, the local authority must, subject to their duties under s.22, ensure so far as is reasonably practicable in all the circumstances of the child's case that the placement is such that it allows the child to live near his home, does not disrupt his education or training, enables the child and any looked after sibling to live together, and is suitable to the child's particular needs if disabled.

46. It follows from the above that any challenge to the exercise by the defendant of the statutory duties and powers under s.20 can only be founded on well-established JR grounds. Here, the principal argument advanced is that the defendant's decisions are public law unreasonable or irrational. It is well-established in law that since the decision is to be made by the local authority, the court should not interfere unless it is satisfied that the decision is outside the range of decisions open to the local authority, acting rationally and reasonably in accordance with their legal obligations. The Administrative Court does not have the jurisdiction to make its own decision as to what is in the best interests of the children.

47. I bear this restriction on the powers of the court in JR cases well in mind, even though at times Mr Mansfield's submissions came close to inviting me to make my own decision. I also bear in mind that the court is required to undertake the process of JR by reference to clearly identified challenges to clearly identified decisions. The appellate courts have repeatedly warned against the dangers of "rolling" JRs, where successive challenges are made to successive decisions in the same proceedings without proper identification of the grounds of each such challenge. However, in this case the claimants have been required by order of Julian Knowles J to plead their updated case in re-amended grounds. Moreover, given that the defendant is maintaining its decision to continue to offer placements in Birtenshaw and refuse to place in Bayis Sheli in the light of further developments and in its updated care plans it was sensibly not argued by Mr Harrop-Griffiths that I should not have regard to the up to date position, as to which both parties were permitted to file evidence, when making my decision.

ECHR and Eq A 2020

48. There is no need to further lengthen this judgment by making detailed reference to the relevant articles or case law, domestic and European. As I observed during oral submissions, I found a very useful summary for present purposes in the decision of the Divisional Court (Singh LJ and Whipple J) in *Adath Yisroel Burial Society v HM Senior Coroner for Inner North London* [2018] EWHC 969 (Admin), and I have extracted liberally and with gratitude sections from their judgment in paragraphs 49, 57 and 63 below.

49. Art. 9 provides as follows:

> "(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> (2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

50. The freedom to manifest one's religion or beliefs is not absolute but can in principle be subject to limitations. However the limitations must be prescribed by law and necessary in

order to serve one of the legitimate aims set out. To be "necessary", it must satisfy the principles of proportionality, so the following four questions have to be addressed:

(1) Is the legitimate objective sufficiently important to justify limiting a fundamental right?

(2) Are the measures that have been designed to meet it rationally connected to that objective?

(3) Are they no more than are necessary to accomplish it? and

(4) Do they strike a fair balance between the rights of the individual and the interests of the community?

51. In this case it is submitted by Mr Harrop-Griffiths that the structure of the children in need and looked after child provisions of the CA 1989 meet the requirement of proportionality in that, whilst they require the local authority to give due consideration to the child's religious persuasion, that is not to be regarded as a conclusive factor and may give weight to other countervailing factors, such as (for example) the factors mentioned in s.22C CA 1989.

52. Sensibly, Mr Mansfield did not suggest that the structure of the CA 1989 offended art. 9 ECHR. However, he did submit, and Mr Harrop-Griffiths did not disagree, and it is undoubtedly the case, that this court must consider whether or not the actual decisions made by the local authority in this case interfere with the freedom to manifest religion and, if so, whether or not they meet the requirement of proportionality. This was summarised by Lord Hope in *G v Barnet* at [69], where he noted that the general duty in s.17(1) was in keeping with art 8(2) and that "the question whether decisions taken under Pt III are compatible with the child's art 8 convention rights must, of course, depend on the facts of each case". This is not the same as simply asking whether or not the decisions are public law lawful and requires the court to conduct its own rigorous and intrusive review: see Lord Bingham in *R v Shayler* [2002] UKHL 11 at [33]. The burden of proving justification for any interference with ECHR rights lies upon the local authority: see the cases cited by Sir Michael Fordham in his *Judicial Review Handbook* 7th edition at 37.1.20.

53. In this regard it must be noted that it is not suggested that it is an answer that the boys in this case do not, due to their developmental deficits, have the same understanding of the Jewish faith and its dietary and other religious requirements as practised by the Charedi community as would an adult or a boy of 15 or 11 who did not have the same deficits. Mr Mansfield submitted that the boys, being equivalent to very young children due to their deficits, should be treated as having the same religious persuasion as of their parents, referring me to the decision of Baker J in *Re A and D (Local Authority: Religious Upbringing)* [2011] 1 FLR 615 at [73]. Mr Harrop-Griffiths did not quarrel with that submission and I accept it as obviously correct.

54. However, in the following paragraphs of his judgment in *Re A and D*, Baker J went on to observe that all of the duties of a local authority under the CA 1989 are subject to the overriding duty to safeguard and promote the welfare of children in need and looked after children and, after referring to certain observations of Ryder J in *Haringey London Borough*

Council v C [2007] 1 FLR 1035 at [36], referred to the succinct analysis of Ward LJ to the same effect in *Re P (A Minor) (Residence Order: Child's Welfare)* [2000] Fam 15 as follows: "in the jurisprudence of human rights the right to practise one's religion is subservient to the need in a democratic society to put welfare first".

55. The case of *Re P* is of some interest in that it also concerned the tension between the religion and other welfare considerations of a child born into the orthodox Jewish faith. The judgment of Ward LJ identified a number of relevant principles, including at (4) the child's rights under Art 9 ECHR and Art 14 of the Convention of the Rights of the Children. In that case the child was born with Downs syndrome and the evidence was that this would always limit her level of understanding as to her Jewish faith. It was not suggested in that case that the freedom of a child to manifest their religion should be restricted on the basis that he or she has disabilities which limit their understanding of the faith into which he or she was born. However, it does appear that it may be a relevant consideration when making a decision as to their welfare: see the judgment of Ward LJ at p.46. Nonetheless, it is also right to take into account the evidence in this case as to the importance which the parents and wider family and Haredi community would place on the boys' strict observation of their faith requirements, regardless of their limited understanding of the reasons for, or the importance of, those requirements.

56. Art.14 provides that: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, *religion*, political or other opinion, national or social origin, association with a national minority, property, birth or other status." (Emphasis added)

57. It is well established that the principle of equality in art. 14 requires that like cases should be treated alike and different cases treated differently. The right not to be discriminated against in the enjoyment of the rights guaranteed under the ECHR is also violated when states without an objective and reasonable justification fail to treat differently persons who situations are significantly different, and what must be justified is the failure to make a different rule for those adversely affected. What has to be justified is not only the underlying measure but the discrimination.

58. Art. 8 ECHR provides that:

"(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

59. It is common ground that this right is engaged and that private life includes matters of religious observance, particularly in the context of the family and wider community culture.

60. Turning to the Eq A 2010, section 19, so far as material, provides:

> "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.[4]
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –
>
> > (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
> >
> > (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
> >
> > (c) it puts, or would put, B at that disadvantage, and
> >
> > (d) A cannot show it to be a proportionate means of achieving a legitimate aim."

61. Section 29, so far as material, provides:

> "(1) A person (a 'service-provider') concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service.
>
> (2) A service-provider (A) must not, in providing the service, discriminate against a person (B) –
>
> > (a) as to the terms on which A provides the service to B;
> >
> > (b) by terminating the provision of the service to B;
> >
> > (c) by subjecting B to any other detriment.
>
> …
>
> (6) A person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination … ."

62. Section 31(3) provides that:

> "A reference to the provision of a service includes a reference to the provision of a service in the exercise of public function."

[4] The protected characteristics include religion and belief: section 4.

63. It is well established in the field of discrimination law that a person is entitled to invoke not only an actual comparator but what is described as a hypothetical comparator. Thus, here the claimants are entitled to compare their position to that of a hypothetical comparator, namely a person who does not have their religious beliefs as regards dietary and Sabbath and other holy day observance. That person would be able to comply with the strict requirements of her faith in a way which the claimant would not be able to do. That would put the claimants at a particular disadvantage when compared with persons with whom they do not share the protected characteristic. The issue of proportionality which arises under section 19(2)(d) is in essence the same issue as arises under arts. 8, 9 and 14 of the ECHR.

E. Relevant events and evidence

64. It would be both extremely time consuming and unnecessary, particularly since this is a JR where the court's function is not to make detailed factual findings or resolve factual disputes, to rehearse the chronology in detail. I will limit myself to summarising the relevant events and evidence.

65. A convenient starting point is the initial correspondence from the claimants' solicitors (**JMW**) to the defendant dated 8 September 2020 and concluding with the defendant's reply dated 9 October 2020. At this time the defendant's position was that it was providing support to both boys as children in need under s.17 CA 1989 and its care plan included support carers visiting the house at evenings and weekends as well as one overnight stay once a month once a local culturally appropriate placement was identified. The defendant had already provided a one week respite placement for the boys at Bayis Sheli in August under s.17(6) CA 1989, which had gone well, however it was denying any duty to accommodate under s.20(1)(c) or offering any accommodation under s.20(4) on the basis that it considered that the boys should remain at home with their family. JMW was asserting that unless further respite care was provided for an initial 4 - 6 week period at Bayis Sheli as the only culturally appropriate respite placement the family would likely reach breaking point and the duty under s.20 CA 1989 would be triggered. JMW noted that a child in need meeting held on 6 August 2020 had identified a number of concerns based upon the boys' conditions and behaviours and their impact on themselves and their family and that on the boys' return from Bayis Sheli the same pattern of behaviour had resumed, so that by 23 September 2020 all six children were placed on the Child Protection Register as being at risk of significant harm.

66. By 9 October 2020 the defendant had reconsidered its position and, on the basis that his parents were unable to keep A safe whilst in their care, had determined to accommodate him under s.20(4) CA 1989 for a 12 week placement, but not at Bayis Sheli on the basis that whilst there: (a) he would have only limited contact with his family, which would prejudice his chance of staying with his family long term; (b) he would lose the benefit of his attendance at his existing school. Instead, it was proposing an assessment at Birtenshaw on the basis that it believed that A's cultural and religious needs could be met to an appropriate standard by ensuring that he received a kosher diet and the staff were trained to ensure he could celebrate Jewish festivals. As regards B, the proposal was one overnight stay per fortnight at Birtenshaw under s.17(6).

67. JMW's response dated 13 October 2020 agreed the proposal for a 12 week placement for A but continued to assert that it should take place at Bayis Sheli on the basis that the facilities at Birtenshaw, including their catering facilities, would be unlikely to comply with dietary laws without separate facilities for milk and meat, outside kosher catering and the attendance of a mashgiach at every meal. They suggested a meeting involving Birtenshaw and the local Rabbi to explore whether these facilities could be provided and they also explained why the parents believed that they could keep regular contact with the boys at Bayis Sheli. They suggested that it was in the boys' interests to remain together and asked the defendant to reconsider its decision in that regard. They contended that a placement at Birtenshaw would infringe the boys' art. 9 rights.

68. There was then an unfortunate disagreement about whether or not a representative of JMW should be present at the proposed meeting. At that stage the position appeared to be that Birtenshaw was not prepared to offer a placement to the boys.

69. On 20 October 2020 the current claim was issued by the parents in their own names, asserting that the defendant's refusal to accommodate the boys at Bayis Sheli as the only identified appropriate placement was unlawful, in circumstances where it was said that a placement was urgently needed for both boys and where it appeared that Birtenshaw was no longer available and in any event unsuitable. An application for interim relief was made.

70. At the first hearing before me on 27 October 2020 I granted permission but refused interim relief, making certain consequential directions which resulted in the boys becoming claimants in place of their parents and, as urged by the parties, setting a tight timetable to a substantive hearing on 20 November 2020.

71. In the meantime, acting sensibly and encouraged by the court, the parties continued to discuss matters. At a meeting held on 10 November 2020 which was attended by the parents, uncle, Rabbi Sofer, representatives of the defendant and Birtenshaw (who had indicated that they were willing in principle to offer a placement to the boys) there was a detailed discussion as to whether or not Birtenshaw could and would put in place measures which might meet the boys' religious and cultural requirements in a way which would satisfy the parents, guided by the Rabbi. It was agreed that this was worth investigating further and the substantive hearing was adjourned. In the meantime the defendant was not prepared to offer any respite placement at Bayis Sheli, so that the pressure on the family remained. Unfortunately, despite further meetings and genuine efforts made on both sides to resolve outstanding matters, it did not prove possible for agreement to be reached, for reasons which I shall address later.

72. At a hearing held on 4 December 2020 Julian Knowles J. made an order for interim relief, requiring the defendant to provide respite accommodation for the boys at Bayis Sheli over two weeks over the forthcoming school holidays, and gave further directions including the provision of re-amended grounds. The unchallenged evidence from the claimants, supported by reports, is that both the boys and the wider family have found the respite stays at Bayis Sheli extremely positive experiences. The boys did have regular family contact through video means whilst at Bayis Sheli.

73. At a further directions hearing held before me on 18 December 2020 the parties agreed that it would be helpful to obtain an assessment from an ISW as to the boys' capacity to comply with kosher dietary requirements and other religious observances if placed at Birtenshaw, given that in summary: (a) the claimants' position was that without the assistance and attendance of a mashgiach for food preparation and over the Sabbath the defendant's proposal were unacceptable, whereas: (b) the defendant's position was that the boys had or could develop sufficient skills to enable them sufficiently to comply with only limited assistance and attendance from a mashgiach. The substantive hearing was listed to take place on 16 February 2021 with directions for the exchange of further evidence and the production of the ISW assessment.

74. I now refer to the defendant's updated care plans for the boys dated 21 January 2021. It is clear that the defendant and Birtenshaw have carefully considered the evidence and explanations provided by the claimants and Rabbi Sofer as to the relevant dietary and other religious observances and have made every effort to seek to accommodate them. I pay tribute to the thought and effort which has gone into the care plans.

75. As regards A, the proposal is for him to be placed at Birtenshaw for 12 weeks for an assessment of his needs to formulate a long term care plan. It enables A to attend his current school and after school club. A detailed explanation of his daily routine is provided. The plan for days other than the Sabbath requires A to prepare, with support, simple kosher breakfasts and packed lunches and ready-made hot kosher evening meals. In terms of other religious observances he will be played pre-recorded prayers and blessings and will be assisted with religious requirements in terms of dressing and handwashing. For the Sabbath the routine is essentially the same, save that A will prepare his Friday evening ready-made hot meal using a slow cooker (because he is not allowed to start heating food on the Sabbath). He will be assisted to set the table for the Sabbath meal and pre-recorded prayers and blessings will be played. On the Saturday a mashgiach will attend for 1 to 1.5 hours to prepare the meal and perform all other religious observances. The staff will be provided with written instructions detailing the relevant Sabbath rules, including a prohibition on the use of electronic devices. On Sundays he will spend time at home, supported by a staff member. There is an aspiration for A to be able, in due course, to spend the whole of the Sabbath with the family, but it is acknowledged that this is not currently feasible: see Shaw 16.12.20 par.16. The care plan says that he will also be supported to participate in the Jewish festivals, but provides no details.

76. As regards B, the proposal is for him to remain at home and have short respite breaks at Birtenshaw on one Sunday every fortnight, staying from lunchtime until Monday morning when he would be taken to school. The care plan involves essentially the same routine as for A whilst he is at Birtenshaw. In addition, he would continue to have additional support at home for 10 hours per week.

77. In his most recent witness statement Rabbi Sofer states that he is unable to approve these proposals for the following principal reasons.

78. In his opinion Birtenshaw could only be regarded as achieving kashrus status if a mashgiach was appointed to supervise its kashrus status. In his view this would include attending at Birtenshaw each evening mealtime for around 60 - 90 minutes either to supervise any kosher cooking or to check the packaging on any ready-made kosher food, turn on the oven, ensure that milk and meaty products are not mixed and serve the food to A. It appears from his witness statement that the need for an appointed supervisor arises regardless of the issue as to the boys' mental capacity, whereas as I read his witness statement the need for evening mealtime attendance would depend on whether or not A has sufficient capacity to undertake his own food preparation and cooking.

79. In his opinion the Sabbath proposals proposed by Birtenshaw are unacceptable because electronic devices and recordings are forbidden to be activated on the Sabbath and because the Friday night meal could not be prepared or celebrated by A without a mashgiach or some other orthodox Jew being present.

80. In his opinion the absence of developed proposals for Jewish festivals, in particular the forthcoming Passover, which lasts 8 days and has a number of additional requirements, is also unacceptable.

81. The ISW, Miss Jacqueline Stubbs, was duly appointed and instructed and proceeded to undertake an assessment and produce a report. Her conclusions are not challenged by either party.

82. In summary, the ISW was asked to consider whether or not A and B have the insight and the cognitive skills, physical skills and ability to carry out the necessary requirements to prepare and cook a Sabbath meal independently, or under supervision, as well as whether or not they are able to carry out the prayers and rituals forming part of the orthodox Jewish religion. The ISW records the arrangements proposed by Birtenshaw for the boys. It is apparent that they require intensive input from staff members based on following written instructions from the Rabbi about what must be done to ensure kosher dietary and other religious compliance. All hot food will be prepared by a Jewish person in accordance with Jewish dietary laws and delivered to Birtenshaw. Any fish or meat will need to be sealed and in the absence of a Jewish person will have to be unsealed by A or B. A or B will have to turn on the oven, because again a non-Jew cannot do so. The same is true of the service of the food. Milk and meat products and utensils must not be mixed. The written instructions will also specify what can and cannot be done over the Sabbath.

83. In summary, her conclusions as regards A were as follows:

> "2.6. The results from the tasks show that A is able to undertake some of the tasks from the list of instructions with a high level of support from adults. However, he would not be able to undertake tasks independently nor does he have the cognitive insight to undertake the tasks without prompting from adults around him".

"2.8. A has developed some independent skills through school where he has shown some insight of how to prepare and cook food and has the physical skills and the ability to undertake the tasks. A has no understanding around the risks within a kitchen and would need a high level of supervision and support from adults to be able to develop these skills in the future".

"2.7. In terms of his religion A lacked insight to understand the rituals and practices within his faith and religion. As highlighted above, it could be suggested that this may be related to the lack of opportunities to develop these skills or appropriate communication aids to help him understand his family religion. It would be recommended that further psychoeducation is needed to help him develop this understanding over a significant period of time where he is practising faith."

"2.8. In order for A to be able to carry out the care plan suggested by the local authority, he would need a long-term plan to build up to these expectations and would need to be realistic. A lacks insight into his religious aspects and this would need to be incorporated within the plan, under supervision with a person who is familiar with the customs, and this would need to be realistically developed over a significant period of time with repetitive and consistent practice."

84. As regards B, her conclusions were that:

"3.3. It is the conclusion in respect of B that due to his age, he does not have the skills or the ability to undertake the list of instructions. This may be related to the limited experience he has in terms of developing the understanding as to date he has relied on adults to undertake tasks for him based on the best interests of the child. However, B was able to undertake some basic tasks himself in terms of making and preparing a bowl of cereal and a sandwich, but lacked any skills or understanding around the dangers of the kitchen and the potential risks. It may be suggested that as B develops and matures, he may be able to develop the skills to undertake parts of the Sabbath."

"3.4. In terms of his religion, B lacked insight to understand the rituals and practices within his faith and religion. As highlighted above, it could be suggested that this may be related to the lack of opportunities to develop these skills or lack of appropriate communication aids to help him understand his family religion. It would be recommended that further psychoeducation is needed to help him develop this understanding over a significant period of time where he is practising his faith."

F. Discussion and judgment

85. In the light of the up to date evidence from the parties and the ISW it is possible to determine this case on a relatively narrow basis and I shall do so. Nonetheless, given that the case has been argued on a wider basis, and given that there may be future developments as regards the boys on which it may be helpful for the parties to have my views on these wider issues, I will

also address the issues which arise on a wider basis albeit that they are not strictly necessary to my decision on the narrow basis.

The narrow basis of decision

86. As regards A, as I have said the current care plan envisages that he will spend the whole of the 12 week assessment placement in Birtenshaw, including the Sabbath and any other religious festivals which fall within those 12 weeks, save for home visits on Sundays. The aspiration for him to spend the Sabbath with his family is no more than an aspiration and there is no detailed proposal in relation to religious festivals including, importantly, the forthcoming Passover.

87. In my judgment this proposal will not allow him to manifest his religion in worship, practice or observance, subject only to necessary limitations and, hence, will contravene art. 8 and art. 9 ECHR, for the following reasons:

(a) Unless arrangements can be made for a mashgiach or some other suitable observant orthodox Jew to attend Birtenshaw on Friday for the Sabbath Friday evening meal as well as on Saturday for the Sabbath Saturday lunchtime meal, so that a kosher meal may be prepared and consumed and the surrounding prayers and other religious observances performed on both occasions, A will be unable to keep kosher and participate in the necessary Sabbath observances which are a crucial part of his faith. That is because it is clear from the evidence of the ISW that: (a) there is no certainty that A would have the capacity or competence to prepare both Sabbath meals with hot cooked food by himself, even under the supervision of a non-Jewish staff member, in such a way that they would comply with kashrus requirements; (b) he would be unable to perform the surrounding prayers and other religious observances, both because he personally would be unable to do so, even under the supervision of a non-Jewish staff member, and because it would be forbidden for pre-recorded prayers to be played. Since Birtenshaw is unwilling, for perfectly understandable reasons to do with the broader interests of all of its accommodated children, to allow a mashgiach or other non-staff orthodox Jew to be present on both occasions, that means that there will be a significant interference with his religious freedom and his family and private life.

(b) Unless suitable arrangements can be made to enable A to observe the required religious observances at Birtenshaw for Passover, or indeed any other holy days occurring during the 12 week placement, then again he will be unable to manifest his religion subject only to necessary limitations. Again, since Birtenshaw would not be willing to permit the attendance of a mashgiach or other non-staff orthodox Jew for anything other than one Saturday lunchtime, it is plain that - even leaving aside other observances particular to individual holy days or festivals - there would be a significant interference with his religious freedom and his family and private life.

(c) In my judgment it cannot realistically be argued that these limitations are necessary for the protection either of A's own health or of the health or rights of his parents or siblings or of the other children at Birtenshaw. That is because: (a) as a matter of principle, necessity is

a demanding obstacle to overcome; (b) it cannot be necessary for the protection of A's health or that of his family that he must attend Birtenshaw and suffer these significant restrictions, when there are alternatives - such as his attending Bayis Sheli instead or through the provision of support staff at home - which would not involve the same restrictions; and (c) there is no sufficient evidence that it would be necessary for the protection of the health of the other children at Birtenshaw for A not to have such attendance of a mashgiach or other observant Jew as required over the Sabbath and other holy days or festivals.

(d) As regards the alternative of attending Bayis Sheli, whilst it is true that there would be an adverse impact on A's ability to spend time with his family and on his existing education and post-school activity, given the relatively limited extent of planned contact with his family at Birtenshaw and given the availability of educational facilities and post school activities at Bayis Sheli it cannot realistically be argued in my judgment that this adverse effect is so important that it makes it necessary for A to be placed at Birtenshaw as opposed to Bayis Sheli.

88. As regards B, the position is different, since the proposal for one overnight stay every other Sunday does not have the same adverse impact on his freedom to manifest his religion. I accept that in his case, given his relatively young age and lack of development, he could not prepare and eat a kosher hot cooked evening meal, even if ready-made and even under supervision from a staff member, given the need for him to be able to unwrap twice wrapped meat or fish food and heat up, serve and consume such food without assistance from a non-orthodox Jew. To do so he would need the attendance of a mashgiach or other orthodox Jew for the Sunday evening meal and, as matters currently stand, that would not be permitted by Birtenshaw.

89. Nonetheless, I am satisfied that for one day each fortnight he could manage with a simple cold sandwich type meal for lunch and for dinner, or even a takeaway meal for dinner[5], and in my judgment this was not such a limitation on his freedom to manifest his religion or observance as to breach arts. 8 or 9.

90. In oral argument it was suggested that even on this basis there was a risk that he might inadvertently take non-kosher food from the kitchen or from the plate of another child. However, it must be remembered that he would have at least 1:1 supervision at Birtenshaw and it seems to me that this possibility is not more than speculation and has not prevented, for example, A having been educated at a non-Jewish specialist school for some years now.

91. Nor, it seems to me, could I properly conclude that such a proposal was contrary to the defendant's obligations under the CA 1989 or public law unreasonable or irrational. It must be remembered that the defendant's proposal regarding B is put forward on the basis that it accepts that A should have a 12 week placement and considers that with limited respite and with home support the parents may be able to manage B if they do not have A at home as well. The parents accept that this is worth exploring. A decision not to offer a weekend

[5] There is evidence that there is a local kosher pizza delivery service.

placement at Bayis Sheli each fortnight instead cannot in my judgment be viewed as public law unreasonable or irrational. I can see the force of the claimants' argument that in addition to a one night per fortnight respite placement the defendant should also provide longer respite placement at holidays. However, I do not consider that the decision to the contrary, given that it is not set in stone, so that if the existing proposal was not working then of course the defendant would have to reconsider, could be regarded as public law unreasonable or irrational.

92. If the defendant chose to offer B weekend placements and/or extended placements over holiday periods, then for the same reasons I have given as regards A I would accept that in those circumstances the defendant could not reasonably decide to place B at Birtenshaw over the Sabbath or for any extended period including religious festivals. However, that is not the current position and thus not strictly necessary to determine for the purposes of this case, although I do nonetheless address it in a little more detail later.

93. Given these conclusions it follows that as regards A the claim succeeds whereas as regards B the claim fails.

Wider considerations

94. Given that the situation is fluid, and given that I have heard full argument, it seems to me to be helpful to seek to address the wider considerations which have been raised and which may arise for decision by the defendant and, potentially, determination by the court in the future.

95. The starting point for discussion is the CA 1989. There is a preliminary issue raised under the re-amended grounds as to whether or not the defendant ought to have accepted a duty to provide assessment or respite accommodation under s.20(1)(c) instead of agreeing to provide accommodation to A under s.20(4) and to B under s.17(6). This issue is not of any great direct significance in this case in my view, since the defendant is offering to provide accommodation to both boys and the only issue between the parties is where that accommodation should be and over what periods. So far as I am able to discern, with the benefit of counsels' assistance, the only differences are that: (a) if accommodation is provided under s.17(6) then the child is not a looked after child and hence the obligations in s.22(4) and (5) and in s.22C do not directly apply; and (b) if I had been satisfied that the defendant was obliged to offer accommodation under s.20(1)(c), because if I was satisfied that it could not lawfully do so at Birtenshaw, then it would follow that the defendant would be obliged to do so elsewhere, as opposed to taking the view that it would be entitled simply to decline to offer to provide any accommodation anywhere else. However: (a) as to the first point, it cannot seriously be argued that the local authority would not be obliged to consider the same matters as material considerations when making a decision under s.17(6); and (b) as to the second point, the issue appears theoretical, since there is no indication than this is the defendant's position.

96. Nonetheless, insofar as I need to decide the point, I am not satisfied that this ground has been made out. As already indicated, it is not for me to assume the decision-making function of

the local authority. Without wishing in any way to minimise the impact of the boys' behaviour upon each other, their parents and their siblings, I am unable on the evidence to conclude that the parents are prevented from providing the boys with suitable accommodation or care such that the only rational conclusion open to the defendant is that they require accommodation elsewhere, even if only temporarily by way of respite care. I must bear in mind that the defendant has taken steps to provide and has paid for after school and weekend support to the boys at home. There is no evidence from an ISW or otherwise which shows that this is so inadequate that only the provision of accommodation outside the home can meet the boys' requirements.

97. This is not a case where it can be said on the basis of the current evidence that the only public law reasonable or rational decision open to the defendant is that the boys must be provided with accommodation under s.20(1)(c) instead of some other suitable package of care and support which would not involve the provision of accommodation.

98. As to the wider argument about public law unreasonableness or irrationality, in submissions Mr Mansfield for the claimants naturally emphasised the obligation in s.22(5) CA 1989 to give due consideration to the wishes and feelings of the parents and to the child's religious persuasion and cultural background. He submitted, and I accept, that giving due consideration to the child's religious persuasion would require the local authority to give due consideration to the child's rights under art. 9 ECHR. Mr Harrop-Griffiths for the defendant did not challenge this, but naturally also emphasised the obligation in s.22C(8) to ensure, so far as reasonably practicable, that the placement allows the child to live near his home and does not disrupt his education.

99. I do not think that as a matter of statutory construction there is any order of precedence as between these statutory factors. The local authority must clearly comply with both obligations but in my view as a matter of construction neither trumps the other in case of any conflict. In many cases, such as the present, they may pull in different ways, so that it is for the local authority as the decision maker to make the decision, which will be lawful so long as it does give proper consideration to both factors and its decision is not outside the ambit of what is public law reasonable and rational.

100. Given my decision on the narrow basis, and given my observations below in relation to the claims under arts. 8 and 9 ECHR, I do not think it necessary or helpful to make any more general observations in relation to public law unreasonableness or irrationality in this case. I can see, for example, that if the defendant had proposed a placement at Birtenshaw which involved A spending each Sabbath and other religious festival at home on the basis of the provision of suitable home support, and which allowed A to receive sufficient training to ensure he could prepare ready-made kosher hot cooked meals during the rest of the week, it might be difficult to conclude that such a decision was clearly public law unreasonable or irrational. The defendant would have been entitled to weigh the relative advantages and disadvantages of each course and could in my view have reached a decision either way which would not obviously have been public law unreasonable or irrational.

101. However, as I have said, when considering the question under arts. 8 and 9 ECHR the court is required to reach its own determination, albeit according the defendant an appropriate margin within which to make its own decisions as the primary decision making body with knowledge and familiarity with matters relevant to the rights and interests of children such as the boys here and the available options which this court does not necessarily have.

102. In a case such as the present the court has to conduct an enquiry into, and conduct a balancing exercise as between: (a) the nature and extent of, and necessity for, the limitations on the boys' right to manifest their religion if placed at Birtenshaw; and (b) the risk of harm, whether in the short term, the medium term or the long term, to the health and welfare of the boys if placed at Bayis Sheli rather than locally.

103. Such an enquiry is inevitably fact specific. That is particularly important in a case such as the present. That is because if, as the evidence demonstrates, neither of the boys could observe their orthodox Jewish dietary and other religious observances at Birtenshaw in any meaningful way under the current care plans, given their own lack of capacity and the restrictions imposed on the attendance of a mashgiach or other observant orthodox Jew to enable them to do so, then in my view that factor would carry very substantial weight indeed. In my view there would have to be very significant countervailing considerations to justify such a placement.

104. Here, the primary countervailing considerations put forward by the defendant are the harm to the health and welfare of the boys through the impact upon their family life and their existing educational and other activities if they were accommodated at Bayis Sheli. These are of course extremely important considerations which require careful consideration.

105. In this case it would be necessary to consider with some care how the boys' family and educational and other life would differ if placed at Birtenshaw and at Bayis Sheli. As matters stand there is of course the added complication of Covid-19 related restrictions, but I will attempt to take a rather longer term view on the basis that as at the time of writing there is an expectation that by this summer life should be able to return to something like normal.

106. As regards A, if placed at Birtenshaw he would have the benefit of seeing his family in person every Sunday. It is unlikely that unless the care plan changed he would see them more often. That is because: (a) the parents have no realistic opportunity during the working week to visit Birtenshaw, given the father's work commitments and the overwhelming pressure of their other child commitments; (b) a mid-week overnight stay is unlikely to be satisfactory for similar reasons; (c) the parents cannot travel to Birtenshaw to visit A during the Sabbath. Of course he could have contact with his family by video meeting throughout the week other than over the Sabbath and religious festivals where as I have said the use of electronic devices is prohibited.

107. If placed at Bayis Sheli there would be the same opportunities for video contact. The parents have also said that they would arrange to visit Bayis Sheli regularly to see A at weekends, either by one parent travelling down alone or by the whole family travelling down together.

They do have relatives living local to Bayis Sheli where they could stay and where A might be able to join them. However, it is obvious that any visits could not involve travel during the Sabbath or during religious festivals when travel is forbidden and would also need to work around family work and school commitments so that, as the father realistically recognised in his evidence, extended family visits could only take place out of school term.

108. Whilst it follows that there would be a significant reduction between the overall amount of family contact for A if at Bayis Sheli, it can also be seen that the difference between the position at Birtenshaw and Bayis Sheli is not as stark as might at first appear. Moreover, whilst it would be easier for A to be able to go home for Sabbath and religious festivals if at Birtenshaw, it would not be impossible for him to do so if at Bayis Sheli so long as suitable transport could be arranged by the family, as was arranged over the recent respite break.

109. So far as A's education and other activities are concerned, if he was accommodated at Birtenshaw he would be able to continue at his current school and after-school club, both of which he enjoys and finds beneficial. However, as matters presently stand the importance of not disrupting A's education is of less weight in this case than it might be in other cases, since: (a) A will have to leave his current school at the end of this school year in any event; (b) his attendance over the last year has been much disrupted by Covid-19; (c) the evidence shows that A would have access to perfectly good educational facilities at Bayis Sheli; and (d) the after-school provision at Bayis Sheli is on any view at least as good as that already enjoyed by him.

110. There is, I appreciate, a risk in the medium to long term that A might become more institutionalised at Bayis Sheli than at Birtenshaw and that this might make it more difficult for him to re-establish himself in Manchester close to his family when he ceases to be a child. However, it is difficult to assess how much of a risk this really is at this stage, and I do not consider that it can be a decisive factor in this case.

111. Moreover, it is important to have regard to the wider benefits of being at Bayis Sheli. It seems to me that a placement at Bayis Sheli would offer A the advantage of building stable and enduring relationships and deepening his appreciation of his faith and culture in a way which would be more difficult when comparing the alternative of accommodation at Birtenshaw with family time in what will, for the immediate future at least, always be a rather pressured environment. The fact that he has been to Bayis Sheli twice now and clearly both enjoyed and benefitted from it cannot be ignored.

112. Overall, it seems clear to me that in the absence of some realistic plan for A to be able to return home from Birtenshaw every Sabbath and at religious festivals the interference with his art. 8 and 9 ECHR rights by placing him at Birtenshaw cannot be justified as necessary.

113. So far as B is concerned, there is really no more to be said than I have already said when deciding the narrow ground. There may come a time when it becomes apparent that B needs more than overnight accommodation of one or possibly more weekdays each week. If so, then similar considerations to those discussed above as regards A would apply, especially if

that accommodation would need to be provided on the Sabbath or during holy days or festivals. It would be difficult in my view as matters currently stand to justify any regular weekend or extended holiday respite placement at Birtenshaw as opposed to Bayis Sheli for the same reasons as apply to A. Indeed, I should record that if A was already at Bayis Sheli then there would clearly be the important advantage of the boys being able to spend time together if B was also at Bayis Sheli for weekend or holiday stays. However, it is possible that extended weekday respite accommodation at Birtenshaw could be justified if that allowed him to be at home with his family at weekends and continue to attend his school and after-school club during the week. That would be the case even if whilst at Birtenshaw he could only have cold or takeaway evening meals, since in my view it is the freedom to manifest his faith, rather than a wish to have hot cooked meals, which is the key factor here, so long as he can have hot cooked meals at home. I do not think it is possible or even sensible for me to say more than that.

114. Finally, there is also no need in my view for me to say anything specific about the art. 14 discrimination claim or the Eq A 2010 claim. As explained in the *Adath Yisroel Burial Society* case, the proportionality / justification considerations which apply in relation to art. 14 and under the Eq A 2010 claims are the same as those which apply under arts. 8 and 9. It is only necessary to observe that if and insofar as it might have been said that the defendant's decisions in this case were founded on the assumption that the approach under Part III of the CA 1989 in relation to the two boys was that they should not be treated any differently than any other equivalent boys of some other faith or no faith, then in my view because of the particularly pervasive requirements of their ultra-orthodox Jewish faith that would be to make the error of assuming that different cases should be treated in the same way. However, in fairness to the defendant, I do not discern any evidence of such an approach in this case.

G. Conclusion

115. I conclude this judgment by thanking the legal teams for their assistance and the parties for the way in which they have co-operated to attempt an outcome which will be in the best interests of the two boys and to wish them and all involved with their care, particularly the parents of course, the very best for the future.