Case No. ME15C00859

IN THE FAMILY COURT
Sitting at Medway

IN THE MATTER OF THE CHILDREN ACT 1989
& THE HUMAN RIGHTS ACT 1998
AND IN THE MATTER OF T (dob 9.1.08)

13 October 2015

B e f o r e :

Her Honour Judge Lazarus

MEDWAY COUNCIL — **Applicant**

and

M

and

T (by her Children's Guardian) — **Respondents**

Mr Stephen Tucker represented Medway Council
Ms Kate Makepeace Grieve represented the Mother, instructed by Naomi Smith at G T Stewart Solicitors
Mr Edward Lloyd-Jones represented the Child, instructed by Colin Dearmer at Berry & Lamberts Solicitors

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JUDGMENT

SUMMARY

1. In this judgment, within ongoing care proceedings, I have determined the applications by T and Mother under the Human Rights Act for declarations and damages. I have set out below the alarming history of the unlawful accommodation of T by Medway Council for over 2 years, and my reasons for declarations to that effect and for the award of damages of £20,000 each to T and her Mother for breaches of their rights to respect for their family life under Article 8 and to fair trial under Article 6 of the European Convention on Human Rights.

2. Given the remarkable extent of T's unlawful accommodation by Medway Council and its additional ancillary failings, I considered and all parties agreed that this issue should be dealt with separately from the ongoing assessments and determination of Medway Council's overarching applications under s31 Children Act 1989 relating to T and her baby sister G. The substantive issues within the s31 determinations are comparatively complex and inevitably sensitive; involving Mother's mental ill-health and lack of capacity, Mother's and G's Father Mr O's respective immigration status, T's complex emotional difficulties and the challenge of her poor relationship with her Mother. Additionally, G and Mr O are uninvolved in this aspect of the case, G having been born to Mother and Mr O on 9.6.15 and proceedings being issued in relation to her shortly thereafter. She remains with her Mother in a specialist mother and baby psychiatric unit.
3. Accordingly I directed Medway Council to file statements from Jo Cross, Head of Service Looked After Children and Proceedings, and from Sue Dunkin, Principal Reviewing Officer at Medway Council. I have been asked to anonymise the names of Social Workers, the Head of Services and the Independent Reviewing Officers involved, as those named are no longer in Medway's employment and have not therefore been notified of these proceedings and the issues raised that involve them. In those circumstances, I have decided that part-anonymisation is a reasonable course to take, on condition that Medway Council ensures that it uses its best endeavours to bring this judgment to their attention. I have borne in mind that in his recent judgment of *Re A [2015] EWFC 11* the President anonymised the identities of social work professionals. Part-anonymisation protects their identities but identifies them sufficiently that they and Medway Council understand to whom I refer.
4. These element of this case was then listed before me on 1.9.15 when I heard submissions relating to Medway Council's purported use of s20 Children Act 1989 and their accommodation and care of T, and was then adjourned part-heard to 8.10.15 in order to enable T's Children's Guardian and Mother's litigation friend the Official Solicitor to formally issue Human Rights Act applications and for further submissions as to declarations and damages.
5. I make the declarations that are set out in more detail below, but in summary: T's accommodation by Medway Council for 2 years and 3 months from shortly after placing T in foster care on 11.2.13 until care proceedings were brought on 7.5.15 was unlawful and Medway Council failed to bring proper proceedings in a proper and timely way, in breach of the respect that must be shown to T's and her Mother's rights to family life and to fair trial under Articles 6 and 8 ECHR.
6. I have decided that those declarations are not just satisfaction in themselves, and I award T and Mother the sum of £20,000 each.

THE HISTORY

7. This can be fairly straightforwardly set out, and there is no dispute as to the background facts.
8. Mother was born in X in the 1970s (her recollection of which year differs from that in her passport). She is an overstayer, having been granted visas in 2003 and 2006, the last of which expired in 2007. She claims to be a victim of human trafficking and more specifically to have been exploited and abused by fellow nationals in this country since her first arrival here in 2003 and her return in 2006 following a short visit to X. A support charity, The Poppy Project, is currently assisting Mother with an appeal against the decision in March 2015 by the Home Office in which they decided she is not a victim of trafficking. She has required the services of an interpreter during hearings.
9. Mother is currently represented by the Official Solicitor as her litigation friend. She suffered an extremely serious episode of depression with psychotic features in early 2013 resulting in detention in hospital from February to August 2013. Her mental health deteriorated again immediately before baby G's birth on 9.6.15 and led to a further formal detention with her illness showing similarly acute features. G and Mother are currently placed at the B mother and baby psychiatric unit. Mother is making slow progress there.
10. Dr King, consultant psychologist, in her reports and capacity assessments to this court, also confirms that Mother's intellectual functioning is so low as to satisfy a diagnosis of learning disability. Given the global low functioning, Dr King considers even with an improvement in mental state that any consequent improvement in her cognitive functioning would be minimal. Dr King also considers it likely that Mother has been subject to traumatic experiences.
11. T's F did not remain in any substantial relationship with Mother and has not been traced.
12. T was born on 9.1.08, making her 7 years 9 months old now, and just 5 when she first came to the notice of Medway Council. This was due to a referral made on 8.2.13 by T's school that T was being collected by a number of adults and concerns that Mother may be a victim of trafficking. Coincidentally, within a few days T was placed in emergency foster care, as her Mother was detained in hospital under the Mental Health Act on 11.2.13.
13. It is clear that Mother was too unwell to discuss T's accommodation and there are no records whatsoever of any discussion with Mother of T's whereabouts and care until her discharge in August 2013. It is likely, and there is no evidence to the contrary, that there was no proper explanation to her within this six month period, and Medway Council do not suggest there was, albeit I accept that for some of this time she would have been suffering from severe and disabling mental ill-health. There is certainly no document suggesting that there was any agreement by Mother to this accommodation. What Medway Council claims is that this was a different kind of lawful accommodation under s20, until she was well enough to consider T's accommodation by Medway Council. It was not, and I shall deal with this further below.

14. It is clear that at the point of accommodation, and while Mother continued to be detained, that there was no one with parental responsibility able to care for or take decisions for T. A note of a home visit (although it is unclear who the Social Worker was visiting) by Social Worker supervisor CS states: "*Agreed that as family were unable to provide evidence [of family links with T] and that no one is exercising PR for T that she would be placed in [foster care]*.".
15. A single effort to arrange contact between T and her Mother in hospital took place on 28.2.13, but T reacted poorly to her Mother's ill-health and this apparently led to her subsequent refusal to have direct contact.
16. On 6.3.13 a Legal Gateway Panel meeting took place but understandably no record of it is before the court, although reference to its conclusions can be found in other documents.
17. On 9.3.13 a Child and Family Assessment was begun, and completed on 24.4.13.
18. On 11.6.13 a second Looked After children (LAC) review took place (the minutes of the first have not been supplied and are likely never to have been recorded). This second review noted that at the first LAC review it was agreed that the Social Worker would pursue a capacity assessment of Mother. The Social Worker confirmed to the review that she had attended a CPA (care planning for the Mother by those treating her) with Mother and that a "capability" (sic) assessment had taken place and Mother "*is not able to make an informed decision to give consent for her daughter due to her mental illness*.". The review was informed that the Legal Gateway meeting had decided not to apply for a care order. The Independent Reviewing Officer (IRO) LC then properly expressed her concerns that there was no one with parental responsibility (PR) for T and set out a recommendation of the review that the Social Worker should present the case again to the Legal Gateway panel. This recommendation was not followed.
19. This LAC review, at which Mother was obviously not present nor represented in any form, also decided to put T's contact with her Mother on hold due to T's unfortunate reaction to seeing her Mother unwell. Indirect contact was to take place by sending cards and photos to M, although there is no mention of the same being provided to T. Risk assessments and reviews of contact were required but no such assessments took place.
20. On 2.7.13 a further legal panel meeting was due to take place, but did not, as it appears that the decision made at the earlier meeting was still considered to be applicable. This is referred to in social work records dated 3.7.13 which entry is headed, alarmingly, as follows: "*Legal Notes - Legal Panel decision - no need to issue proceedings as local authority can make decisions under s20*". This heading is then borne out by the text of two emails below it of the same date confirming, firstly to the Social Worker Supervisor CS that the Head of Service PM "*has advised this case does not need to return as the decision from the last Legal Panel remains - there is no need to issue proceedings as the local authority can make decisions for T under s20, as there is no one available to exercise PR*.", and secondly from CS to the Social Worker AT that "*[PM] had decided that this does not need to return to panel. Mother is not*

requesting that T be returned home at this stage si (sic - should read 'so') I think we will have to monitor the situation.".

21. On 9.7.13 Medway Council applied for T's birth certificate, although it is not clear on what basis. It is suggested by the local authority that anyone can apply for a birth certificate, however they held no parental responsibility and I therefore query the rationale behind such a step.
22. On 13.8.13 a Permanency Panel (CAPP) meeting took place and T's case was discussed and the case recording sets out the decision was for the "*Case to return to Legal Panel - needs to be in care proceedings as serious concerns over Mum's ability to grant Section 20*.". Most unfortunately, another expression of this accurate and urgent concern was not acted upon.
23. Instead, the Social Worker visited Mother at her B&B accommodation on 15.8.13 as she had just been discharged from hospital the day before. The Social Worker claimed in her note of that visit that she had been told at an earlier professionals meeting that Mother had capacity to make decisions. She then continues by stating she explained why she was visiting, that she needed Mother's consent for the local authority to continue to look after T and for medical emergencies. Although Mother signed an extremely brief document I have seen dated 15.8.13, the Social Worker AT herself stated in her note: "*however I was not convinced she had full understanding about what was happening. Mental health capacity assessment needs to be undertaken on Mother to ensure she does have capacity to make decisions*.". This was not done, and indeed no such assessment was undertaken until it was ordered within proceedings almost two years later.
24. Instead, again, the Social Worker AT, accompanied by Mother's mental health Social Worker, visited Mother on 3.10.13 and purported to obtain a fresh s20 agreement which they were satisfied she understood and had capacity to make as Mother was able to repeat back to them that it was her consent to Medway Council, that it was voluntary and she accepted she could not care for T then. Medway Council has not been able to provide this document. To its credit, Medway Council does not now attempt to suggest that they obtained a valid s20 agreement from Mother. It is conceded that the August and October 'consents' should not have been relied upon. Clearly Mother should have been properly assessed for her decision-specific capacity, and been fully informed and supported. It is highly unlikely that she would have been assessed as having capacity given her low functioning in combination with her mental illness.
25. In the meantime on 10.9.13, the social work records reveal a note entered by DH, presumably then managing this case as it is headed "*Manager's Decisions: Supervision*". She wrongly describes T as having been placed in foster care as an "*abandoned child when Mother was detained under the MHA*". T was not abandoned. Detention in hospital for treatment under the Mental Health Act does not constitute and should never be treated as an abandonment by a

parent of their child. DH, however, correctly goes on to say the following: "*Mother has signed the Section 20 but Social Worker was concerned whether she fully understood the meaning of this*", and with a mixed stab at an accurate understanding of the position wrote: "*T cannot remain under Section 20 indefinitely and clear decision making should be made…*", continuing under the heading "*Actions*" she includes this: "*Attend a legal gateway meeting to discuss actions regarding long term care plan for child (permanency). The local authority do not have PR and cannot make decisions regarding child under Section 20 without consent from M*".

These last comments are of course correct, but again such a meeting did not occur and still no steps were taken to address the situation.

26. In October 2013 T's case was transferred to the Looked After Children's Service. There is then no further discussion of T's legal status until 14.1.15 when Jo Cross in a social work recording invites review of whether legal proceedings are required for T. That review did not take place until 10.3.15 when a decision was finally taken by the Legal Gateway Panel that proceedings should be issued. For unfathomable reasons this drifted further in the hands of the legal department until proceedings were finally issued on 7.5.15 and an ICO was granted on 24.6.15 following receipt of the first capacity assessment of Mother by Dr King dated 16.6.15.
27. This court has not been provided with any clear dates of when contact has and has not taken place between T and her M, save that Ms Cross' statement claims that in November 2013 some direct contact was taking place at school for half an hour each session, but there is no detail as to how many sessions took place, nor of any assessments of the situation. And by December 2013 it is claimed that T was showing distress during contact and therefore it was not taking place on a regular basis. Plans were then made in March and April 2014 for contact to take place at the foster carer's home to help them build a positive relationship. I note this is referred to in the LAC review minute of 17.4.14 as a reintroduction of contact by way of five or ten minute visits by Mother. But by June 2014 it could no longer take place at the foster home. Ms Cross admits that there have been significant gaps in contact arrangements and no consistency in supervision, venue and support.
28. At some point in mid-2014 T had to spend time in respite care as her foster family went abroad on holiday and it had not been possible to arrange for her to travel with them as Medway Council could not obtain a passport for her. This was raised at the LAC review in April 2014, but its implications and ramifications were not explored. Clearly, without parental responsibility such steps to address this could not be taken on T's behalf and accordingly she suffered a significant disruption in her care.

29. It was not until October 2014 that enquiries were made about a referral for family functional therapy but T was too young. No other therapeutic service was identified until a referral to the Oakfield Centre which began on 9.2.15.

APPLICATION UNDER THE HUMAN RIGHTS ACT

30. Mother's and T's claim is brought under s7(1)(b) Human Rights Act 1998 which states:

(1)A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may— (a)… or (b)rely on the Convention right or rights concerned in any legal proceedings, but only if he is (or would be) a victim of the unlawful act.

31. The unlawful act is covered by s6(1) Human Rights Act 1998:

Acts of public authorities.(1)It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

32. Remedies are covered by s8 Human Rights Act 1998:

8 Judicial remedies.(1)In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate. (2)But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings. (3)No award of damages is to be made unless, taking account of all the circumstances of the case, including— (a)any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and (b)the consequences of any decision (of that or any other court) in respect of that act, the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made. (4)In determining— (a)whether to award damages, or (b)the amount of an award, the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention.

And "just satisfaction" is defined in Article 41 ECHR 1950:

If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

MOTHER'S & T'S POSITIONS

33. Mother and T claim that T's accommodation by Medway Council was unlawful in that it was not sanctioned by either Mother's consent nor by an order of the court, and that proceedings should have been brought as soon as possible after T's accommodation.

34. They argue that the only lawful methods, other than by Mother's consent under s20, by which T could have been accommodated would have been those set out in Parts IV and V of the Children Act 1989, namely being taken into police protection (PPO), an emergency protection order (EPO), an interim care order (ICO), or by the exercise of the court's inherent jurisdiction.

35. Those options, and the careful tests and limitations on their access, implementation or duration, are set out in sections 31, 38, 44, 45, 46, 48 and 100 Children Act 1989. I do not recite each section here as the law is well known, but the key point is that these provisions set out stringent safeguards intended to ensure that removal is lawful, necessary and proportionate, including but not limited to:
    (a) For an ICO, application of the s31 threshold criteria and s1 welfare checklist;
    (b) S44 (EPO) requires judicial approval and is strictly time limited to 8 days requiring a further appearance in court to consider s38 (ICO);
    (c) Removal under s46 (PPO), which is available to the police but not to social workers, does not require prior judicial approval but is strictly time limited to 72 hours;
    (d) And in the case of the exercise of inherent jurisdiction, leave must be obtained within the parameters of s100.

36. T and Mother rely on the familiar case law that I consider below in the Nottingham and Coventry cases and argue that Medway Council's interpretation of s20 is wrong.

37. They seek declarations that their rights to family life and to fair trial pursuant to Articles 6 and 8 of the ECHR were breached, damages and costs.

MEDWAY COUNCIL 'S POSITION & THE LAW RELATING TO SECTION 20

38. Relevant provisions of Section 20 Children Act 1989 are as follows:

20 Provision of accommodation for children: general

(1) Every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation as a result of--(a) there being no person who has parental responsibility for him;

(b) his being lost or having been abandoned; or

(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.

(2) …

(3) …

(4) A local authority may provide accommodation for any child within their area (even though 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.

(5) …

(6) Before providing accommodation under this section, a local authority shall, so far as is reasonably practicable and consistent with the child's welfare—

(a) ascertain the child's wishes [and feelings] regarding the provision of accommodation; and

(b) give due consideration (having regard to his age and understanding) to such wishes [and feelings] of the child as they have been able to ascertain.

(7) A local authority may not provide accommodation under this section for any child if any person who—

(a) has parental responsibility for him; and

(b) is willing and able to—

(i) provide accommodation for him; or

(ii) arrange for accommodation to be provided for him,

objects.

(8) Any person who has parental responsibility for a child may at any time remove the child from accommodation provided by or on behalf of the local authority under this section;

(9) … (10) … (11) …".

39. Medway Council has made the following concessions, set out in Ms Cross' statement (JC) and summarised in Mr Tucker's skeleton argument:

1. *"The local authority did not establish mother's capacity in a timely manner, particularly in respect of her capacity to object to continuing local authority accommodation of the child [JC2, 29]*

2. *There was little consideration of the child's legal status particularly after the meeting with mother on 03-10-2013 until mid January 2015 [JC2, 23 & 25].*

3. *Lack of management oversight to ensure that the child's case was considered by the Legal Gateway Panel after the LAC Review on 08-07-2014 [JC1, 6]. Although not stated directly, by inference, there was a delay in the consideration of the commencement of proceedings and therefore a delay in bringing the matter before the court.*

4. *The local authority did not explore the issue of permanence for the child and that her case had been allowed to drift. At the relevant times the local authority's processes and management oversight were poor [JC1, 8].*

5. *After considering issues concerning contact between the child and the mother [JC1, 9-13], it is clear that there have been significant gaps in the contact arrangements during the period of accommodation. There had been no consistency in the supervision of contact, the venue utilised or the support afforded to mother and child so that contact might be a positive experience for both [JC1, 14].*

6. *There were significant delays in accessing appropriate support for the child, acknowledged to be unacceptable [JC1, 16-17]*

7. *There were significant failings historically with the management and oversight of the child's case, for which unreserved apologies were given [JC1, 21]. Those failings are being addressed for this case and other cases [JC1, 22-27]."*

40. These concessions (save in part for item 1) relate to the period after Mother's discharge from hospital. I shall come onto the period in hospital below.
41. In oral argument Mr Tucker properly conceded on behalf of Medway Council, that Medway Council now accepts that at the point it had been alerted to the need to take legal proceedings at the LAC review held on 11.6.13, it cannot contest that T's accommodation from this point was unlawful. As I have said, this was an appropriate concession, being consistent with the case law that I go on to consider below. However, it is not consistent with Medway Council's overall argument that until that point it had been lawfully accommodating T without taking legal proceedings in the absence of Mother's consent.
42. Medway Council maintains that from 11.2.13 when Mother was sectioned until the LAC review on 11.6.13, that s20 provided lawful power to accommodate without such sanction from a court. This is based upon the argument set out in Mr Tucker's skeleton arguments that:

"*The local authority submits that it properly exercised its duty under s20(1)(c) to accommodate the child in February 2013 and that it was entitled to continue to do so for some period during which it could be ascertained whether Mother would recover sufficiently from her mental illness so to implement a plan of rehabilitation.", and "The local authority submits that it correctly identified in February that a duty to accommodate had arisen under s20(1)(c) and exercised that duty correctly and promptly to accommodate the child so as to safeguard and*

promote her the child's best interests. In essence, the situation was similar to the child being lost/abandoned and the local authority was not exercising its powers to circumvent the preferred use of compulsory powers under Part IV of the 1989 Act.".

43. This was argued through by an ingenious attempt to reinterpret s20 as providing lawful authority to detain a child in an open-ended manner flowing from the duty to accommodate under s20(1)(c), and/or its discretion under s20(4), which arose because of the emergency of Mother being detained in hospital due to mental ill-health.
44. This argument additionally required Mr Tucker to argue on Medway Council 's behalf that the s20(7) 'objection' provision, simply requires a parent to object or refrain from objection, and that her absence of consent was irrelevant or not required, and therefore the absence of objection meant the accommodation continued to be lawful. Medway Council's skeleton argument stated: *"The local authority accepts that Mother had not "consented" to the accommodation but she was not in a position to do so. Equally, there was no objection for the same reason. …."*
45. Mr Tucker relied on the case of *R (on the application of G) v Southwark London Borough Council [2009] UKHL 26* as establishing this principle as it had described s20 as requiring the following evaluative judgments:

    '(a) Is the applicant a child?

    (b) Is the applicant a child in need?

    (c) Is he within the local authority's area?

    (d) Does he appear to the local authority to require accommodation?

    (e) Is that need the result of:

    (i) there being no person who has parental responsibility for him;

    (ii) his being lost or having been abandoned; or

    (iii) the person who has been caring for him being prevented from providing him with suitable accommodation or care.

    (f) What are the child's wishes and feelings regarding the provision of accommodation for him?

    (g) What consideration (having regard to his age and understanding) is duly to be given to those wishes and feelings?

    (h) <u>Does any person with parental responsibility who is willing to provide accommodation for him object to the local authority's intervention?</u>

    (i) If there is objection, does the person in whose favour a residence order is in force agree to the child being looked after by the local authority?'

    [with my emphasis added]

46. That Southwark case, however, was looking at the implementation of duties arising under s17 and s20 in relation to a young person of 16 whose needs went beyond merely housing, and therefore whether he could come within the parameters of s20 accommodation and so become an 'eligible' child entitled to further services from the local authority. It was not considering the nature of s20(7), indeed it expressly did not consider items (h) and (i) above as the young person in question was over 16 and giving his own consent to accommodation. Indeed, one can see from paragraph 28 of that judgment that the matter is referred to by way of that young person's *consent*, in keeping with the interpretation of s20 found in earlier caselaw.

47. The Southwark case can therefore be distinguished from this case as being inapplicable in this context. More importantly, it does not provide the authority claimed by Mr Tucker to establish an objection-based lawful accommodation under s20.

48. Two linked authorities decided by Munby J (as he then was) clarified the legal basis for the principle that without consent proper legal authority must be obtained before a removal can be considered lawful, but additionally his second judgment directly addresses the argument proposed by Medway Council here:
    - *R (G) v Nottingham City Council [2008] EWHC 152 (Admin)* (the February judgment); and
    - *R (G) v Nottingham City Council and Nottingham University Hospital [2008] EWHC 400 (Admin)* (the March judgment).

    At #15 of the February judgment he stated:

    "… the law is perfectly clear but perhaps requires re-emphasis. Whatever the impression a casual reader might gain from reading some newspaper reports, no local authority and no social worker has any power to remove a child from its parents or, without the agreement of the parent, to take a child into care, unless they have first obtained an order from a family court authorising that step: either an emergency protection order in accordance with section 44 of the Children Act 1989 or an interim care order in accordance with section 38 of the Act or perhaps, in an exceptional case (and subject to s 100 of the Act) a wardship order made by a judge of the Family Division of the High Court."

    And at #51-55 of the March judgment he stated:

    51. "But quite apart from that there seemed to me to be a much more fundamental objection to the case which the local authority was seeking to advance. The argument that K had been lawfully accommodated by the local authority with the consent of the mother was in reality founded on nothing more than the assertion that the mother knew and understood the details of the birth plan (in both its original and its amended form) and that she did not "raise objection" to it, just as it was likewise asserted that, following the birth, she had not "raised objection" to the removal of her new-born baby.

52. *No authority of any kind was produced in support of these surprising propositions, that a mother could be said to have given her consent to the removal of her baby merely because, knowing of the local authority's plan, she did not object to it and because, when the moment of separation arrived, she did not actively resist. I am not surprised. They are, with respect to those propounding them, as divorced from legal substance as they are remote from the emotional – and dare a man be permitted to say it – the hormonal realities of the human condition. Our law has long recognised that women in the aftermath of birth may not be as able to act wisely as at other times. It is, after all, compassionate regard for those realities which underlies statutory provisions as disparate as section 1 of the Infanticide Act 1938 and section 52(3) of the Adoption and Children Act 2002.*

53. *I do not wish to be misunderstood. I am not suggesting that consent to the accommodation of a child in accordance with section 20 is required by law to be in writing – though, that said, a prudent local authority would surely always wish to ensure that an alleged parental consent in such a case is properly recorded in writing and evidenced by the parent's signature. Nor am I disputing that there may be cases where a child has in fact, and without parental objection, been accommodated by a local authority for such a period as might entitle a court to infer that the parent had in fact consented.*

54. *But the local authority here seemed to be going far beyond this. It seemed to be conflating absence of objection with actual consent – a doctrine which at least in this context is, in my judgment, entirely contrary to principle and which, moreover, contains within it the potential for the most pernicious consequences, not least because there are probably many mothers who believe, quite erroneously, that a local authority has power, without any court order, to do what the local authority did in this case.*

55. *To equate helpless acquiescence with consent when a parent is confronted in circumstances such as this with the misuse (or perhaps on another occasion the misrepresentation) of non-existent authority by an agent of the State is, in my judgment, both unprincipled and, indeed, fraught with potential danger."*

49. Additionally, this approach was reinforced, particularly as to the nature of consent, by the case of *Coventry City Council v C, B, Children Act & CH [2012] EWHC 2191 (Fam)* which addressed post-birth removal and the issue of capacity to consent to s20 accommodation. Hedley J provided clear guidance on obtaining s20 consent. He outlined the principles in respect of s20 at paragraph 25 onwards: *"section 20 appears in Part III of the Act…. The emphasis in Part III is on partnership and it involves no compulsory curtailment of parental responsibility*" and at paragraph 27: "*… the use of s20 is not unrestricted and must not be compulsion in disguise. In order for such an*

agreement to be lawful, the parent must have the requisite capacity to make that agreement. All consents under s20 must be considered in the light of ss1-3 of the Mental Capacity Act 2005. Moreover, even where there is capacity, it is essential that any consent obtained is properly informed and, at least where it results in detriment to the giver's personal interest, is fairly obtained". At paragraph 30 he goes on: "*It is to be assumed that there were reasonable grounds for believing that the child and mother should be separated and that the officers of the authority honestly believed that there were such reasonable grounds. In those circumstances a removal could be lawfully effected in one of four ways under the Children Act: by agreement under s20, by emergency protection order under s44, by police under s46 or under an interim care order (ICO) pursuant to s*38". And at paragraph 37: " …. *whatever the context, s20 agreements are not valid unless the parent giving consent has the capacity to do so….'* and at paragraph 42: *"had she lacked capacity, that would have been the end of the matter: the agreement would have been invalid and the removal unlawful. The consideration of informed consent and fairness proceeds on the assumption that incapacity is not established*".

50. The requirement of proper information is germane here. In *Williams v LB of Hackney [2015] EWHC 2629 (QB)*, Sir Robert Francis QC sitting as a Deputy High Court Judge, emphasised a number of relevant points:
    - Notwithstanding bail conditions that would prevent them for caring for their children, consent to s20 accommodation should have been sought.
    - That the process of obtaining the parents' agreement did not sufficiently inform them of: the legal basis of the children's accommodation and therefore the context; their right to withdraw their consent at any time and require the return of their children; an adequate description of the effect of the agreement; the need to seek legal advice.
    - Inappropriate pressure can render invalid a decision by someone who would otherwise have made a valid capacitous decision by undermining their capacity to do so.
51. I have also seen the most recent published case on this point: *Re AS (unlawful removal of a child) [2015] EWFC B150* which, although not binding in that it is decided by HHJ Rowe QC, also addresses the removal of a child from a Mother undergoing hospital treatment for mental ill-health and in which the London Borough of Brent attempted to rely on s20 in the same manner as Medway Council. It also involved the failure to inform the M, although in that case for a period of a week. She rejected Brent's argument as lacking authority to support it, contrary to the existing authorities I cite above, and inconsistent with the structures, checks and balances set out elsewhere in the Children Act 1989, and I entirely agree with the analysis set out in her judgment.

FURTHER DISCUSSION OF SECTION 20 ISSUES

52. The case law makes it very clear. Without Mother's informed and capacitous and freely-given consent, Medway Council had no lawful basis to accommodate T unless it were by the means regulated by the court pursuant to an order sought under the Children Act 1989.
53. While I accept there is a tension between the wording of s20(7) and some of the terminology used in the case law, the presence of the stringent tests and limitations applicable to all other modes of removal of a child from a parent's care under the CA, means that it cannot have been intended by Parliament that "Provisions for Accommodation" under s20 would have given powers to a local authority that would avoid and subvert those careful provisions in Parts IV and V of the Children Act 1989 that safeguard families from unregulated unilateral actions of local authorities that interfere with their family life.
54. If that had been Parliament's intention there would have been specific stipulation of it in the wording of s20, rather than some implied paternalist extra-judicial power. But nowhere in the wording of s20 is there provision for any 'emergency' or 'discretionary' set of powers flowing from the duty to accommodate a child under s20 that would override the means by which such accommodation must either be agreed to freely or regulated by the court to leave a local authority with an open-ended accommodation of a child, and which would only be rendered unlawful via an objection. This remains the case however beneficial or necessary the accommodation is considered to be, and whether or not the plan is to reunite the family.
55. One can see that Medway Council 's concession item 1 in paragraph 39 above, is styled to fit within the 'lack of objection/no need for consent' argument, worded as it is to refer to the failure by Medway Council to assess Mother's ability to *object* to continuing accommodation of T. However, it is quite clear that there was never a lawful accommodation of T in the first place to object to. And therefore these concessions fall short of acknowledging the initial and fundamental failing of Medway Council to respect Mother and T's rights to family life, by respecting the need to obtain her consent, and/or assess her capacity to do so, and issue proceedings if consent could not be properly obtained from the outset.
56. Even following Medway Council's own argument, it is certainly not possible for Mother to have even known she could object. For several months it is unclear that she was even informed or aware of the arrangements for T. It is fallacious to argue that the absence of objection is a valid factor in such circumstances, and carries with it the potential for both absurd and dangerous consequences whereby a local authority could justify grave interference with a family's life by claiming that no one said it may not do so.

57. It is also wholly unclear whether the Social Worker who met with this extremely vulnerable Mother in August and October gave her anything like the requisite information in order for her to give an informed consent or objection, even if there were no queries about her capacity to do so. The signed s20 'agreement' of 15.8.13 is extremely brief and does not set out in its wording any of the features described in the Hackney case as necessary to provide the required information, and for which Hackney's forms were criticised. Equally, Medway Council failed to properly assess Mother's capacity to make informed decisions about T, at the time of her hospitalisation and after discharge, despite their own concerns.
58. Shockingly, the Legal Gateway panel meeting on 6.3.13 failed to identify the correct legal approach. This led on to the wholly erroneous approach set out in the emails of 3.7.13 in which it is suggested that s20 enabled Medway Council to make decisions for T as there was no one exercising parental responsibility and Mother was not requesting T's return. There is no question that s20 can ever give a 'decision-making power' over a child. Given the extensive case law on s20 decided in the Nottingham and Coventry cases recently before the events here, and the clearly defined limits of its terms to the provision of accommodation to children, such an interpretation is obviously and dangerously wrong and that should have been clear to Medway Council's lawyers and social workers at the time.
59. Despite then receiving the recommendation set out in the June LAC review and the warning from the August permanency panel, which were based on the correct legal approach, Medway Council also then failed to follow up not only that initial recommendation but also subsequently repeated recommendations set out in the LAC reviews that as consent had not been provided and Medway Council had no parental responsibility that the case should be reviewed by a further legal panel.
60. This identifies a further flaw in Medway Council's argument, in that s20 cannot confer parental responsibility on a local authority, unlike the grant of an EPO or ICO. If it had been intended to confer parental responsibility this would have been stipulated in the provisions of the Children Act, as is set out in s33(3)(a) Children Act 1989 in relation to care orders. And yet Medway Council , in managing T's accommodation and making certain decisions as to her care were no doubt also purporting to exercise such responsibility on a regular basis, such as in relation to her schooling or by their intentions behind requesting her birth certificate. They were obliged to bow to the limitations of lacking parental responsibility when they acknowledged at a LAC review that they could not obtain a passport for her to permit her to go on holiday. Both solving the complexities of her immigration status and the mere obtaining of a passport were beyond a

local authority without parental responsibility for her. If that step was not open to them, still less the unlimited and unchecked ongoing separation of a child away from her family.

61. It could be argued that where there is such an emergency as this, and indeed as in the Brent case, that it may be reasonable to wait for a short period without taking proceedings in order to review the parent's progress in hospital in the event that their ability to care for their child might return. This would then avoid the stress and expense of time and resources in bringing unnecessary proceedings that would then have to be withdrawn. I concur with HHJ Rowe's analysis that a month in the Brent case was too long. It may be reasonable, in rare and very clear cases where such enquiries could be reasonably considered as likely to bear fruit, to wait for at most a day or two while the local authority explored the possibility of an imminent return to a parent's care. I bear in mind here that both in logic and principle such a period should be less than the time limit of 72 hours which is stipulated in the Children Act as applicable to PPOs. However, otherwise, save perhaps for the first few hours while the child's status is considered, and advice sought and steps taken to issue proceedings, it must be right that proceedings are brought as immediately as possible for all the reasons discussed above.
62. In this case, given how very gravely ill Mother was and therefore the unlikelihood of her returning to care for T within a very short period, which information would have been readily available to Medway Council , there should have been the minimum period of delay before the issue of proceedings.
63. I do not consider that Medway Council was at any time acting in bad faith. I accept that they considered they were taking necessary and beneficial steps for T. It is clear that if an EPO or ICO had been sought it would have been granted.
64. However, that is not the point. What is betrayed is the most shocking misunderstanding of the law by both social work and legal teams at Medway Council, and of the proper limitations of their exercise of power over this family, compounded by an ignorant or arrogant disregard for the advice and recommendations being provided by the LAC review process and the permanency panel.
65. Both the Nottingham and Coventry cases had been decided recently before these events took place, and this case illustrates exactly why a court must sanction such a step. Without a court forum it was solely the local authority that empowered itself to make decisions about a child unlawfully held by them, with simply a check in the form of the IRO system on the progress and welfare of a child in local authority care (and which system I consider further below).
66. T drifted in foster care without any clear focus on her contact, her need for therapy or her and her Mother's rights to family life. I find shocking the inattention to contact, such that Medway Council is not even able to specify clearly what has and has not taken place, but is obliged to admit to serious gaps in contact and flaws in its support for this essential aspect of their family

life. There would not only have arisen a duty under s34 Children Act 1989 to promote contact if an ICO were in place, but both T and Mother would have had a voice, legal advice and representation within proceedings to pursue their concerns about her accommodation, care plan, therapeutic needs and contact and Medway Council 's care of T would have been subject to the necessary judicial scrutiny applying the relevant careful tests relating to the threshold and welfare criteria set out in the Children Act to ensure interference with their family life was in T's best interests, necessary and proportionate.

67. Ms Cross has set out in her statement a number of vitally necessary improvements to Medway Council's procedures and performance which I heartily welcome, particularly as this is not the only case where the use of s20 by Medway Council has been of concern (I am aware of at least three such others, including a reported judgment of mine earlier this year). The proof, as they say, will be in the pudding and depends on consistent and rigorous application of these reforms. They are as follows:

    a. *"During the period of January to July 2015 we have reviewed a number of cases where the child/ren are accommodated under S20 and where the child/ren are aged 12 and under. Where required we have issued or are issuing proceedings;. We have begun this process for children aged 12 and over and this will complete by 1st October 2015.*

    b. *These reviews will continue and with immediate effect we have agreed that our Legal Gateway Panel, chaired by the Head of Service for Advice and Duty, Child Protection and Children in Need, will continue to monitor and track children already accommodated under S20 and will in future review all new cases involving s20;*

    c. *The reduction in the use of S20 accommodation is built into all our service and improvement plans*

    d. *We have reviewed how court work is undertaken within the LAC & Proceedings service and going forward will be targeting this work at the social workers who have the most suitable skills for court work;*

    e. *Training has been provided in recent weeks for social workers on legal processes and proceedings, including the issue of s20, and this will continue on a rolling basis throughout the year.*

    f. *We will be holding workshops on the use of S20 in September and October to provide clear guidance and support for Social Workers to ensure they are equipped to deal with any s20 issues arising and that they fully understand how S20 should be utilised and monitored. We will be providing new policies and procedures for staff across CSC in the use of s20. We plan to have these finalised by September 18th and we would be happy to share these with the Court and partner agencies including Cafcass at our quarterly meetings with the Judiciary and other agencies.*

    g. *At monthly meetings between the 2 Heads of service from CSC and the Head of Legal S20 will be a standing agenda item and we will discuss each child who has been accommodated*

under s20 in the intervening month to satisfy ourselves that the appropriate management oversight and case related activity is in place.

h. *I am in discussion with the Head of Adult Mental Health services to organise workshops for staff on capacity issues and deprivation of liberty (DOL's) awareness. I hope that these workshops can be completed by 01.11.2015.*

i. *We have an adult mental health duty social worker located within our advice and duty services to advise and assist on those cases referred to us where the parent/s have a mental health or learning disability.*

j. *We are organising PAMs training for a number of staff so that we have more staff located within CSC who are able to assess parents with a learning disability in order that we can improve the service provided to them. We hope that this will have taken place by 01.12.2015.*

k. *We have increased management capacity and have formalised an Operational Manager post in each of the service areas. They will have direct responsibility for ensuring that court work proceeds in a timely manner and that work is of a high standard*

l. *S20 cases will also be reviewed at a monthly Permanence Panel wherein the permanence planning for LAC children is reviewed. This panel, chaired by my HoS colleague has attendees from Legal services, the Principle IRO and the adoption service.*

m. *As a result of this review I am also working with my colleagues to review the S20 form that parents sign and we are introducing a checklist for staff when seeking S20 accommodation to ensure that they address all the salient issues with parents. These issues will include considering the parent/s needs arising from a mental health/learning disability. These reviews will have completed by 31.08.2015 and the updated forms will be in use thereafter.*

n. *Finally the reviewing service have implemented a new review whereby the allocated IRO will review all cases between the LAC review (ie every 6 weeks) to ensure that all planning is on track. Where required concerns will be escalated to the appropriate Operational Manager and if there is still no resolution to the relevant Head of Service."*

LOOKED AFTER CHILDREN REVIEWS & INDEPENDENT REVIEWING OFFICERS

68. Ms Dunkin's statement is helpful in its analysis of the history and the role of the Independent Reviewing Officers (IROs). They are supposed to perform a crucial role monitoring the care of Looked After children by reviewing and improving care planning and challenging drift and delay.
69. It is highly concerning that there have been five IROs in the last two years before proceedings were issued.
70. There was no IRO allocated until 18.3.13, five weeks after T was accommodated, so she was therefore not afforded a review of her care within 20 days of her accommodation as is required under the IRO Handbook and Placement Regulations. By the end of May that IRO is recorded

as being on long term sick leave, and this is considered to be the reason why there is no minute of the first LAC review available.

71. Every LAC review minute inaccurately records/repeats the date of T's accommodation as having taken place a month later than it occurred.
72. I commend the second IRO LC for correctly requiring a legal review of Medway Council's position not to take proceedings (11.6.13), however despite it not having taken place by the next LAC review that LC conducted there then began the series of failures by LC and each subsequent IRO to challenge the Social Worker and team manager and director of services about failing to follow the clear recommendation initially made in June 2013.
73. No subsequent LAC reviews (18.9.13, 17.4.14, 8.7.14, 25.11.14) made any further clear recommendations as to parental responsibility, legal status or the use of s20 although the issues are mentioned, save to repeat (presumably by cut and paste as opposed to direct engagement with the issue) the same paragraph that set out the original recommendation of 11.6.13. By 8.7.14 what is added is a recommendation to seek legal advice with a view to securing T's permanency. I am concerned that this betrays that the review process and LC failed to recognise both the full range of T's needs and her and her Mother's rights to family life, and had moved on simply to consider how to regularise what had by then become the status quo, T having been in foster care for almost 18 months at that date. This is particularly worrying as that LAC review meeting also demonstrated Mother's vulnerability: she was accompanied by an extremely domineering 'friend' who described herself as an 'auntie' (and whom the Poppy Project is concerned may have had some involvement in Mother's exploitation), and which led to a decision that all future meetings must be conducted with Mother alone.
74. Contact is touched on in the LAC reviews, but no clear picture or recommendation emerges. For example, the review of 17.4.14 mentions the reintroduction of contact I have already referred to, but little further is pursued. At the same meeting the problem with T's passport and therefore the implementation of respite care during her foster carer's holiday was raised and not addressed adequately, let alone robustly.
75. Overall, it is clear that although the fundamental fault lay with Medway Council by its social work and legal teams, the IRO process failed T, and by extension her M, by frequent changes of IRO and each one failing to rigorously apply themselves to the outstanding issues with attention or subsequently following up Medway Council's failings, and if necessary escalating the issue. Ms Dunkin rightly concedes that previous IROs were not robust enough in this respect.

76. The statutory provisions, regulations and the guidance in the IRO Handbook covering the function and performance of IROs has been carefully reviewed elsewhere (see for example *A & S (Children) v Lancashire County Council [2012] EWHC 1689 (Fam)* at paragraphs 168-217 in particular). I do not propose to make specific declarations in relation to this aspect of the case. No such declarations are sought, and the appointment and management of IROs falls to the relevant local authority in any event. Additionally, I take into account that the correct recommendation was made in June 2013 and subsequently repeated, albeit it was not followed up adequately or at all, and was ignored by the local authority from the outset.

77. Ms Dunkin confirms that since October 2014 there has been a 'root and branch review' of the IRO service: immediate allocation of an IRO, with 90% of reviews now on time; improved IRO requirements and monitoring; performance and training audits with areas of improvement requiring action within a set timescale; direct input by IROs onto the electronic system at Medway Council so alerting team managers to implement their own quality and performance processes; shortened timescales for escalating challenges with a 20 day period before it is referred to the Director of Children's Services; and mid-way reviews between LAC reviews enabling the IRO to check on progression of care plans and recommendations. Ms Dunkin as Principal Reviewing Officer now sits on the Legal Gateway Panel, resource panel and permanency panel.

78. Again these are welcome and necessary improvements, but their effectiveness will depend upon rigorous application of those improved practices.

CONCLUSION

79. For all of the above reasons I find that Medway Council 's accommodation of T and her removal from her Mother was unlawful, and as a result I have no need to go on to consider whether it was 'necessary' within the meaning of Article 8(2) ECHR.

80. I also find that Medway Council failed to issue proceedings in a proper and timely manner. This was despite warnings from June 2013 onwards. I have not found it possible to understand why there arose the original misunderstanding of the correct legal approach, why the advice given was not followed, why further legal planning meetings were not held until 2015, nor even why proceedings were not issued immediately in 2015 once the matter was looked at again by Ms Cross in January. The period involved is 2 years and 3 months, the longest currently reported in any case reported on this issue to date.

REMEDIES – JUST SATISFACTION

A. DECLARATIONS

81. T and Mother are entitled to the following declarations:

a. The local authority breached their rights under Article 8 ECHR in that they

i. Unlawfully removed T from Mother's care on 11.2.13;

ii. Failed to obtain properly informed capacitous consent for T to be accommodated, or to consider/assess adequately the question of the Mother's capacity to consent, at that date or subsequently;

iii. Accommodated T without Mother's consent between 11.2.13 and 7.5.15;

iv. Failed to inform Mother adequately or involve her sufficiently in the decision-making process in relation to T;

v. Failed to address the issues relating to their relationship and contact between them adequately;

vi. Permitted unacceptable delay in addressing all of the above.

b. The local authority breached the rights of T and Mother under Article 6 ECHR in that they failed to issue proceedings in a timely manner.

B. DAMAGES

82. An award of damages may be made under s3 Human Rights Act 1998 which states: "*No award of damages is to be made unless, taking account of all the circumstances of the case, including (a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court) and (b) the consequences of any decision (of that or any other court) in respect of that act, the court is satisfied that the award is necessary to afford "just satisfaction" to the person in whose favour the order is made*."

83. I have been referred to Re H (A Child: Breach of Convention Rights: Damages) [2014] EWFC 38 which states that: *"(1) a finding of unlawfulness should be made based on breach by a public authority of a Convention right; (2) the court should have the power to award damages in civil proceedings; (3) that the court should be satisfied, taking account of all the circumstances of the particular case, that an award of damages is necessary to afford just satisfaction to the person in whose favour it is made; and (4) that the court should consider an award of damages to be just and appropriate."*

84. In the case of Re C (A Child) [2007] EWChildren Act Civ 2, Wilson LJ stated: *"64. In general the "principles" applied by the European Court, which we are thus enjoined to" take into account" are not clear or coherent…What is clear, however, is that the European Court generally favours an award of damages in cases in which local authorities have infringed the right of parents under Article 8 to respect for their family life by shortcomings in the procedures by which they have taken children into care or kept them in care, whether temporarily or permanently."*

85. In Northamptonshire County Council v AS and Ors [2015] EWHC 199 (Fam) Keehan J approved an award of damages without any reasoning as to causation by way of any requirement for establishing a link between the breaches and any physical or mental harm.
86. Medway Council asserts that the declarations should be sufficient just satisfaction. However, I conclude that an award of damages is necessary in this case. The unlawful removal of a child amounts to interference with one of the most fundamental of rights, that of respect for family life. As in the Brent case, T was removed not simply without lawful authority but without her Mother even being properly informed until months afterwards, and her poor mental health does not justify this failure. This was an egregious breach, albeit in good faith, being exactly that which should not happen, and which failed to observe the recent and emphatically firm re-emphasis of the correct legal approach in the Nottingham case.
87. This was then exacerbated by the persistent failures to bring these breaches to an end by following recommendations and addressing the legal status of this child, with its knock-on impacts upon a highly vulnerable Mother who speaks little or no English and suffers from mental health difficulties.
88. Nowhere in the case law is there any clear guidance to assist with the assessment of the quantum of damages, and it has been described as "*highly fact sensitive*" in Re H [2014] at paragraph 87. In the Hackney case the court reminded itself that such awards should be '*fairly modest'*. It is also pointed out on T's behalf that there is no rationale set out in the case law for the decision that awarded less to a child than to its parent. I draw together below the core factors discernible from the case law, and those raised in this case.
89. The parties agreed that factors that should be taken into account, and which had been considered in the reported cases, were as follows:
    - the length of the proceedings;
    - the length of the breach;
    - the severity of the breach;
    - distress caused;
    - insufficient involvement of parent or child in the decision-making process;
    - other procedural failures.
90. I have been referred to a number of authorities and Mr Tucker provided an extremely helpful schedule to assist in gauging the previous awards made. I provide it here in a slightly amended form to reflect some minor corrections and to add the recent Brent case.

Case	**Summary**	**Actual Award**	**Adjusted Award Today in Sterling**

Case	Summary	Actual Award	Adjusted Award Today in Sterling
W v UK (1987) 10 EHRR 453	Art 8 – insufficient involvement in decision making, termination of contact and length of proceedings. Art 6 – non-availability of remedy	£12,000 each parent	£30,534
H v UK (1991) 13 EHRR 449	Breach of Art 6 – length of proceedings unreasonable (Nov 1978 to Jun 1981); failure of local authority to notify parties of placement for adoption for 5 months Breach of Art 8 – delay in proceedings Consideration of Damages adjourned.	£12,000	£28,000
TP & KMother v UK [2001] 2FLR 549	Breach of Art 6 not found. Breach of Art 8 on basis of failure to involve in decision making by not disclosing relevant information/documents Breach of Art 13 – non-availability of remedy to determine allegations of local authority breach of Art 8. 1 year period of breach.	£10,000 each parent	£14,845
P, C, & S v UK [2002] 2 FLR 631	Breach of Art 6 – lack of representation Breach of Art 8 – removal of child shortly after birth,; lack of involvement in decision making	€12,000 each applicant	£13,115
Venema v The Netherlands [2003] 1 FRC 13	Breach of Art 8 – non-involvement in decision making; separation of 5 months, distress and anxiety	€15,000 both parents	£16,153 (c£8,000 each)
Re H (a child: Breach of Convention Rights: Damages) [2014] EWFC 38	Birth 16-05-2013; Application 29-04-2014; Placement Agreement 03-06-2013; Final Order 29-10-2014. Effect on parents [paras 41-46]; Declarations [paras 49 & 50] Quantum [para 86] 11 month period of breach.	£12,000 total	£6,000 each parent

Case	Summary	Actual Award	Adjusted Award Today in Sterling
Northamptonshire CC V AS, DS & DS [2015] EWHC 199 (Fam)	S20 accommodation 30-01-2013 (when child 15 days old); Decision to commence Proceedings 23-05-2013; Application 05-11-2013; Family Placement 17-10-2014; Final Hearing 30-01-2015. local authority failure to comply with directions 10 month period of breach	£12,000 to parent £4000 to child (NB – agreed settlement figures, not award)	£12,000 £4000
Williams v LB of Hackney [2015] EWHC 2629 (Fam)	Multiple Cause of Action – most dismissed. However, court found that section 20 agreement was not validly obtained or, in any event, was subsequently withdrawn. Police Protection 05-07-2007; Agreement 06-07-2007; Withdrawal 13-07-2007; children returned 11-09-2007. 2 month period of breach.	£10,000 each parent	£10,000
Re AS (unlawful removal of a child) [2015] EWFC B150 (Brent)	Unlawful removal. C into foster care - 9.10.14. Legal planning meeting decides should issue s31 proceedings - 13.10.14. Letter sent to Mother first informing her of foster care and intended issue – 16.10.14. Proceedings issued - 11.11.14. 1 month period of breach.	£3000 £750 costs	£3000

91. The uplift in the last column to adjust the amount to current rates, by agreement of all the parties, uses the calculator available in Kemp & Kemp. Equally, all the parties agreed that the two oldest cases showed distorted inflation and should be disregarded as providing any helpful guide as to amount. Currency exchange from Euros to Sterling was effected by applying the mid-rate quoted on an internet currency conversion service as at 6.10.15.
92. The cases over the last 15 years reveal a range from almost £15,000 to £6000 for periods of breach of 1 year or slightly less, and the most recent cases vary considerably in awards for shorter periods: 2 months £10,000 and 1 month £3000. It is difficult therefore to discern any clear parameter simply from the length of the breach.
93. Of the shorter periods, the Hackney case (£10,000) involved inappropriate pressure on the parents resulting in invalid consents to accommodation being obtained and significant lack of proper information. In this case, inappropriate pressure was not placed on Mother but it

appears that she was not properly informed of the legal context and her rights, as in the Hackney case.

94. Of the longer periods, the higher sums tended to include the failure to involve the parents in decision making. This has been a marked feature of this case.
95. Mother and T each seek the sum of £25,000. Their rationale for this is that it is approximately twice that of the largest similar award and properly reflects the extremely poor quality of decision-making that led to and perpetuated this exceptionally lengthy breach. They also rely on the lost opportunities to remedy the deteriorated relationship between T and M, particularly while she was in better mental health in 2013-2014, as evidenced by the inadequate support for proper contact, and the failure to seek appropriate therapy for T that would assist her in that respect. They also both rely on their insufficient involvement in the decision-making process. In that respect I note the 6 month period during which there is no record of any information being shared with Mother, and she was not involved in or represented at any meetings where highly significant decisions were being taken, for example in relation to contact (11.6.13).
96. It is specifically cited on T's behalf that lack of proceedings led to there being no voice of the child heard in any of this sequence of events, and to there being no proper care plan which in turn led to inadequate steps taken to meet T's needs. I consider this to be a very significant factor given that the statutory protections specifically provided by the Children Act 1989, which should have been available to T by virtue of the proceedings that ought to have been taken under its provisions, are designed to prevent such a failing and to ensure that children's (and parents') Article 6 and 8 rights are appropriately respected.
97. On behalf of M, I was referred to the distress and anxiety Mother has suffered and to comments in a recent letter from her treating psychiatrist (Dr Seneviratne 1.9.15) that various factors are slowing down her recovery and these include her worry about her children, ongoing assessments and whether she will be able to care for them. I entirely accept that Mother will have been distressed by the separation from T, and additionally by its unwarranted length and by her impotence in this process. I cannot, however, clearly discern any additional impact on the deterioration in her mental health that can be attributable to this breach, given the psychiatrist's comments are so general and that her condition recently deteriorated principally, and sadly predictably, due to her pregnancy and G's birth, and also given that the actual issue of proceedings with its consequent assessments and worries is likely to have contributed to the difficulties described by her psychiatrist.
98. I was also asked to consider the loss of Mother's relationship with T and her 'lost opportunity'.

    I am assisted here by the case of *H v UK (Just Satisfaction) (1991) 13 EHRR 449*, and consider its observations as to loss of opportunity, distress and delay to chime closely with those factors in this case, (although I bear in mind that the uplifted figure awarded would show distorted inflation). It states as follows:

10. The Court would recall in the first place that the principal judgment was in no way concerned with the justification for such matters as the taking into public care or the adoption of the child or the restriction or termination of the applicant's access to her. Violations of Articles 6 § 1 and 8 (art. 6-1, art. 8) were found solely on account of the duration of the proceedings in question (see the principal judgment, pp. 59-63, §§ 70-86, and pp. 63-64, §§ 87-90). Whilst the applicant was thus the victim of a deficiency of a procedural nature, it was all the same a deficiency that was intimately connected with an interference with one of the most fundamental of rights, namely that of respect for family life.

11. …

12. As regards the applicant's loss of her relationship with her daughter and the deprivation of the latter's love, companionship and support, which she attributed to the breaches of the Convention, it cannot be affirmed with certainty that these matters would not have occurred if the relevant proceedings had been terminated more expeditiously. Indeed, it is noteworthy in this respect, as the Government pointed out, that in his report the Local Ombudsman expressed the opinion that it was "very unlikely indeed that the decision would have been different even if the [local authority] had acted more quickly" (see the principal judgment, p. 55, § 31).

13. On the other hand, the Court does not feel able to conclude that, as the Government submitted, a speedier conclusion of the proceedings in question could not have genuinely benefited the applicant in practical terms.

It is true that she allowed some seventeen months to elapse after the termination of her access to A (June 1977) before seeking its re-establishment by the High Court (November 1978). However, not only did she have a valid reason for this delay - namely, her desire to show that her health had improved and that she had a stable home – but also in November 1978 the child had not yet been placed for adoption, so that the process of "bonding" between her and her foster parents had not then begun (see the principal judgment, p. 50, §§ 18-19).

What is more problematical is that, of the various factors that contributed to the length of the proceedings, it was only the delay on the part of the local authority in filing its evidence which the European Court found to be open to criticism (ibid., p. 62, § 84). However, but for this delay - without which that evidence would have been filed before A was placed for adoption in March 1979 (ibid.,pp. 50-51, §§ 18-21) -, the subsequent proceedings might have developed differently and been concluded earlier. The Convention. The same applies to the claim in respect of period during which "bonding" between A and her foster parents had been taking place would thus have been considerably reduced. The High Court, which had to base its decision on the facts as at the date of its hearing, took the view that the applicant's case had been "seriously prejudiced" by the delay in question (ibid., p. 53, § 28). And, notwithstanding the applicant's earlier history, on which the Government relied, a particular feature of this case was the steady improvement in her condition following her meeting Mr. H in May 1977 and her subsequent marriage to him in October 1977 (ibid., pp. 49, 50 and 53, §§ 14, 17 and 28).

In these circumstances, it cannot, in the Court's opinion, be excluded that a prompter conclusion of the proceedings might have resulted in a different outcome.

To this extent the applicant may therefore be said to have suffered some loss of real opportunities, warranting monetary compensation.

14. In addition to the foregoing, the fact that the proceedings instituted by the applicant were drawn out for as long as two years and seven months, and that she saw her chances of success becoming more remote as time went by, must, in the Court's view, have left her with a feeling of frustration and helplessness, similarly warranting monetary compensation.

15. None of the factors cited in paragraphs 13 and 14 above lends itself to precise quantification. Making an assessment on an equitable basis, as is required by Article 50 (art. 50), the Court awards the applicant £12,000 for damage sustained."

99. It is very difficult to unpick the impact of Mother's mental health on the deterioration of her relationship with T from Medway Council's subsequent management of that relationship and contact with her Mother. I take into account that there would have been some deterioration due to her illness, but I must consider that the passage of time, the length and nature of the drift and the paucity of adequate assessment, planning, support or therapy throughout due to the breaches in question are relevant factors and are highly likely to have contributed to the failures to address adequately the problematic nature of Mother and T's relationship.

100. Mr Tucker for Medway Council does not suggest any figure for damages save that it should be modest and within the ambit of the reported cases, and submitted that the amount for T should be lower as she had been safe and done well in foster care. He additionally cited that Medway Council had acted from the best of motives and had supported T at public expense and that these were complex care proceedings. I consider the complexity of these proceedings to be irrelevant to the breaches in question, and the expenditure of public funds on T would, on Medway Council's case, have had to be made in any event. As to the argument that T's award should be lower as she was safe and well in foster care, I consider that while this has been the case and is the minimum to be expected, Medway Council has been obliged to admit to serious failures in meeting their duties to her in the same period. I do not therefore consider that T's award should be lower on that basis.

101. Mr Tucker submitted that any sum awarded should not be calculated on a simple pro rata basis as a way of reflecting the length of the breaches. He accepted that this was a more serious case in terms of length than other reported cases, but relied on length being only one factor and that it would be unjust to simply double an award to reflect two years instead of one year as this would be akin to there being a doubling to two separate breaches as opposed to the extension of a single breach. I accept this as a sound analysis and it would be unfair simply to increase the amount pro rata, however the length of these breaches is unusually and unacceptably long and must be reflected in the awards made.

102. A significant element of the length factor is that Medway Council has been wholly unable to explain the reasons for the initial errors and the perpetuation of those errors in the face of alternative advice, and the continued delay including into 2015 once the errors were finally spotted in January. I consider that I must reflect the length and severity of the breaches in the amount awarded, while not resorting to a pro rata increase.

103. Taking all of the above factors into account, it is clear that the circumstances of this case are very grave and merit an award that is higher than those currently reported. Other than an absence of inappropriate pressure on M and there being no element of bad faith, all other factors are shockingly poor, and the length of time over which these breaches were maintained despite advice to readdress the situation is extreme. The just and appropriate award in this case for T and Mother is £20,000 each.

LEGAL AID, PAYMENT OF DAMAGES & COSTS

104. While I have assessed this award, I am asked for the time being not to order its payment nor to consider costs. This is at the request of the Official Solicitor who is currently investigating the most appropriate way to manage such an award for a protected party within care proceedings given that this is an award properly made within care proceedings (cf. *Re L (Care Proceedings: Human Rights Claims) [2003] EWHC 665 (Fam)*) and Mother is rightly in receipt of non-means and non-merits tested Legal Aid, but where concerns exist that the Legal Aid Agency may intend to take steps purporting to claim the whole costs of Mother's representation in these care proceedings from that award. I shall therefore deal with the issue of ordering payment and costs at a later date.

HHJ Lazarus
20.10.15