Neutral Citation Number: [2013] EWCA Civ 904

Case No: C1/2013/0828

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION ADMINISTRATIVE COURT (MALES J)
REF: CO13267/2010

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/07/2013

Before :

Lord Justice Maurice Kay, Vice President of the Court of Appeal, Civil Division
Lord Justice Lewison
and
Lady Justice Gloster

- -

Between :

London Borough of Tower Hamlets	**Appellant**
- and -	
The Queen on the application of X	**Respondent**

- -

Mr Kelvin Rutledge QC and Ms Sian Davies (instructed by **London Borough of Tower Hamlets Legal Services**) for the **Appellant**
Ms Fiona Scolding and Ms Amelia Walker (instructed by **Ridley and Hall LLP**) for the **Respondent**

Hearing date : 4 July 2013

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Approved Judgment

Lord Justice Maurice Kay :

1. X is the foster mother of her two nephews and one niece. In the Administrative Court, Males J began his judgment by describing her as "one of the unsung heroines of our society": [2013] EWHC 480 (Admin), at paragraph 1. No one would disagree with that. In these judicial review proceedings she is challenging the policy and practice of the London Borough of Tower Hamlets (the Council) whereby she, as a family foster carer, receives less money than she would receive as an unrelated foster carer looking after the same children. Males J concluded that the Council's policies are unlawful "to the extent that they discriminate on the grounds of the pre-existing relationship with the child between family and unrelated family carers": paragraph 115. He reached this conclusion as a matter of domestic public law and did not determine an alternative ground of challenge based on Article 14, in conjunction with Article 8, of the European Convention on Human Rights and Fundamental Freedoms.

The family background

2. I gratefully take and adapt the following description of the family background from paragraphs 1 – 4 of the judgment below. Since August 2009 X has been the carer for, and since February 2011 the registered foster mother of, these three damaged and difficult children. The children's parents both have learning difficulties. Their mother has problems with drugs and alcohol. Their father has schizophrenia and is currently in a mental hospital. The children (who have three other siblings with whom this case is not concerned) experienced severe neglect from a young age. The eldest child, now aged 16, has learning difficulties, speech and language difficulties, and poorly developed social skills. She is emotionally very immature and has had thoughts of suicide. She has nocturnal eneuresis. She is currently under psychiatric care because she says that she hears voices. The middle child, aged 14, has autism and Tourette's syndrome, with severe emotional difficulties, compulsive behaviour and a history of self harm. He has learning difficulties, speech and language problems, and features of ADHD. When he first arrived in the X's care he was doubly incontinent, self harming, dribbled and spat constantly, and was very destructive of furniture and other objects. He still has problems controlling his continence. The youngest child, aged 7, has ADHD and autism and severe development delay, as well as asthma and a squint. Upon placement with X he required constant supervision (including at night when he would wake up frequently, as he still does). He had tantrums and could behave violently. His behaviour at school still includes attacks on other children and members of staff. He too suffers from nocturnal eneuresis.

3. In 2007, after a lengthy period when social services had been involved with the family, the children were removed from the parental home and were placed with foster carers. However, three separate placements each broke down as the carers could not cope. For a while the children lived separately from each other as no foster carer could be found to manage all three of them together. Eventually the Council approached X, and asked if she would consider caring for them. She agreed to do so, although this involved giving up her job as an art restorer, which gave her financial independence and which she enjoyed, moving (at the Council's request) to a bigger house in a semi-rural area out of London (which posed its own problems, as X is blind in one eye and cannot drive) and becoming dependent on state benefits.

4. In February 2011 X was formally approved as a foster carer for the children. This required her to satisfy a number of stringent requirements, which many relatives caring for children would not be able to do. There are in fact only a dozen or so registered family foster carers currently caring for children looked after by the Council. The panel which approved X as a foster carer observed that it was highly unusual for three such complex children to be placed with a single foster carer, and that it was only permissible in this case because the alternative was to split up the family and because of the dedication of X.

5. The children's most recent LAC (looked after child) reviews make clear that X has provided an excellent standard of care and commitment to the children which it would be impossible to replicate elsewhere. These are extremely demanding and exhausting children and the emotional, physical and financial cost of caring for them is high, but X has provided them with a safe and secure environment in which to grow up and has brought a measure of calm and stability to their lives. Despite their continuing and very significant problems, the children are now happy and settled in a way which would otherwise have been impossible. Indeed, the difficulty of providing any alternative and the extent of the burden undertaken by X can be demonstrated further by the fact that, although the Council was willing to pay for respite care, for some two years it was impossible to find anybody willing to care for the children while X had a break from them. This only became possible in about October 2012.

The statutory framework

6. The principal statutory provisions are contained in the Children Act 1989 (as amended). Part III is headed *Local Authority Support for Children and Families*. The following provisions are of particular relevance:

> "17.(1) It shall be the general duty of every local authority (in addition to the other duties imposed on them by this Part) –
>
> (a) to safeguard and promote the welfare of children within their area who are in need; and
>
> (b) 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
>
> …
>
> (10) For the purposes of this Part a child shall be taken to be in need if –
>
> (a) he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of

health or development without the provision for him of services by a local authority under this Part;

(b) his health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services; or

(c) he is disabled,

and 'family', in relation to such a child, includes any person who has parental responsibility for the child and any other person with whom he has been living.

…

20.(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.

…

22. (1) In this Act, any reference to a child who is looked after by a local authority is a reference to a child who is –

(a) in their care; or

(b) provided with accommodation by the authority in the exercise of any functions …

…

(3) It shall be the duty of a local authority looking after any child –

(a) to safeguard and promote his welfare; and

(b) to make use of services available for children cared for by their own parents as appears to the authority reasonable in his case.

…

22A When a child is in the care of a local authority, it is their duty to provide the child with accommodation.

22B It is the duty of a local authority to maintain a child they are looking after in other respects apart from the provision of accommodation.

22C(1) This section applies where a local authority are looking after a child (C).

(2) The local authority must make arrangements for C to live with a person who falls within subsection (3) (but subject to sub-section (4)).

(3) A person (P) falls within this subsection if –

(a) P is a parent of C;

(b) P is not a parent of C but has parental responsibility for C; or

….

(4) Subsection (2) does not require the local authority to make arrangements of the kind mentioned in that subsection if doing so –

(a) would not be consistent with C's welfare; or

(b) would not be reasonably practicable.

(5) If the local authority are unable to make arrangements under subsection (2), they must place C in the placement which is, in their opinion, the most appropriate placement available.

(6) In subsection (5) 'placement' means –

(a) placement with an individual who is a relative, friend or other person connected with C and who is also a local authority foster parent;

(b) placement with a local authority foster parent who does not fall within paragraph (a);

(c) placement in a children's home in respect of which a person is registered under Part 2 of the Care Standards Act 2000; or

(d) subject to section 22D, placement in accordance with other arrangements which comply with any regulations made for the purposes of this section.

(7) In determining the most appropriate placement for C, the local authority must, subject to the other provisions of this Part (in particular, to their duties under section 22) –

(a) give preference to a placement falling within paragraph (a) of subsection (6) over placements falling within the other paragraphs of that subsection;

(b) comply, so far as reasonably practicable in all the circumstances of C's case, with the requirements of subsection (8); and

(c) comply with subsection (9) unless that is not reasonably practicable.

(8) The local authority must ensure that the placement is such that –

(a) it allows C to live near C's home;

(b) it does not disrupt C's education or training;

(c) if C has a sibling for whom the local authority are also providing accommodation, it enables C and the sibling to live together;

(d) if C is disabled, the accommodation provided is suitable to C's particular needs.

(9) The placement must be such that C is provided with accommodation within the local authority's area.

(10) The local authority may determine that –

> (a) the terms of any arrangements they make under subsection (2) in relation to C (including terms as to payment); and
>
> (b) the terms on which they place C with a local authority foster parent (including terms as to payment but subject to any order made under section 49 of the Children Act 2004).
>
> (11) The appropriate national authority may make regulations for, and in connection with the purposes of this section.
>
> (12) In this Act 'local authority foster parent' means a person who is approved as a local authority foster parent in accordance with regulations made by virtue of paragraph 12F of Schedule 2 …"

7. The reference to section 49 of the Children Act 2004 is a reference to the provision whereby the Secretary of State may by order make provision as to payments to be made by a local authority to a local authority foster parent with whom any child is placed by that authority under section 22C of the Children Act 1989.

8. Returning to the 1989 Act (as amended), the following provisions are also relevant:

> "22F Part 2 of Schedule 2 has effect for the purposes of making further provision as to children looked after by local authorities and in particular as to the regulations which may be made under section 22C(11).
>
> 22G(1) It is the general duty of a local authority to take steps that secure, so far as reasonably practicable, the outcome in subsection (2).
>
> (2) The outcome is that the local authority are able to provide the children mentioned in subsection (3) with accommodation that –
>
> (a)is within the authority's area; and
>
> (b)meets the needs of those children.
>
> (3) The children referred to in subsection (2) are those –
>
> (a)that the local authority are looking after,
>
> (b) in respect of whom the authority are unable to make arrangements under section 22C(2), and

> (c) whose circumstances are such that it would be consistent with their welfare for them to be provided with accommodation that is in the authority's area.
>
> (4) In taking steps to secure the outcome in subsection (2), the local authority must have regard to the benefit of having –
>
> (a) a number of accommodation providers in their area that is, in their opinion, sufficient to secure that outcome; and
>
> (b) a range of accommodation in their area capable of meeting different needs that is, in their opinion, sufficient to secure that outcome.
>
> (5) In this section 'accommodation providers' means –
>
> local authority foster parents …"

Statutory guidance

9. By section 7 of the Local Authority Social Services Act 1970, all Local Authorities are obliged, in the exercise of their social services functions, including the exercise of any discretion conferred by any relevant enactment, to act under the general guidance of the Secretary of State. Section 7A of that Act further provides that, without prejudice to section 7, "every local authority shall exercise their social services functions in accordance with such directions as may be given to them under this section by the Secretary of State". In addition, the Secretary of State has power to issue guidance pursuant to section 23 of the Care Standards Act 2000. We have been referred to three documents containing relevant statutory guidance.

(1) Fostering Services: National Minimum Standards

10. This document was issued pursuant to the power contained in the Care Standards Act. Its primary purpose was for the use of OFSTED in connection with the inspection of fostering services. However it also applies more generally and, of course, those who are the expected subjects of OFSTED inspections will normally wish to ensure that they comply with the standards required by OFSTED.

11. Standard 13 refers to the general duty of a local authority to secure sufficient accommodation for looked-after children pursuant to section 22G of the Children Act. It describes its intended outcome as:

> "The fostering service recruits, assesses and supports a range of foster carers to meet the needs of children they provide care for and is pro-active in assessing current and future needs of children."

Standard 13.1 then states:

> "The local authority fostering service implements an effective strategy to ensure sufficient foster carers to be responsive to current and predicted future demands on the service."

12. Standard 28 is specifically concerned with payment to foster carers. Its intended outcome is that:

> "Payments to foster carers are fair and paid in a timely way."

Standard 28.1 then provides:

> "Each foster carer receives at least the national minimum allowance for the child, plus any necessary agreed expenses for the care, education and reasonable leisure interests of the child, including insurance, holidays, birthdays, school trips, religious festivals etc, which cover the full costs of caring for each child placed with her/him."

Standard 28.5 adds:

> "There is a clear and transparent written policy on payments to foster carers that sets out the criteria for calculating payments and distinguishes between the allowance paid and any fee paid. …"

Standard 28.7 is of importance in the present case. It states:

> "Criteria for calculating fees and allowances are applied equally to all foster carers, whether the foster carer is related to the child or unrelated, or the placement is short or long term."

13. Standard 30 is concerned with family and friends as foster carers. The intended outcome is stated in these terms:

> "Family and friends foster carers receive the support they require to meet the needs of children placed with them."

Standard 30.10 provides:

> "Financial and other support is provided to all foster carers according to objective criteria that do not discriminate against foster carers that have a pre-existing relationship with the child. Family and friends foster carers may require some services to be delivered in a different way, but there should be equity of provision and entitlement."

(2) The Children Act 1989 Guidance and Regulations volume 4: Fostering Services

14. This guidance was issued pursuant to section 7 of the Local Authority Social Services Act 1970. The Preface states:

> "Local authorities should comply with this when exercising these functions, unless local circumstances indicate exceptional reasons that justify a variation."

15. Chapter 5 is headed *Approving and Supporting Foster Carers*. Paragraph 5.71 states:

> "It is essential that all foster carers are given clear information about criteria for making financial payments to them, including allowances, fees and other expenses. Allowances must be sufficient to cover the full cost of caring for each child placed with them, and must be reviewed annually. The Government has put in place a National Minimum Fostering Allowance … which is the very minimum which should be provided to a foster carer for each child placed. Criteria for calculating allowances must apply equally to all foster carers, whether or not they are related to the child or the placement is long or short term (Standard 28)."

Paragraph 5.73 provides:

> "Fees are in addition to allowances and may be paid by fostering services to reflect the expertise and the nature of the tasks undertaken by a range of foster carers. Where fees are paid by a fostering service these must be payable to those on their register of foster carers who meet the criteria set out for the scheme, including short and long term carers and family and friends carers."

16. The references to the National Minimum Fostering Allowance is to guidance which is not statutory. It distinguishes between geographical areas and the ages of children. In the present case, it is common ground that the amounts paid to X significantly exceeded the National Minimum Fostering Allowances.

(3) Family and Friends Care: Statutory Guidance for Local Authorities

17. This guidance was also issued pursuant to section 7 of the Local Authority Social Services Act. It states at paragraph 1.5:

> "Such guidance should be complied with by local authorities when exercising these functions, unless local circumstances indicate exceptional reasons that justify a variation."

18. Paragraph 4.2 requires each local authority with responsibility for children services to publish a policy setting out its approach towards promoting and supporting the needs of children living with family and friends carers. Paragraph 4.3 states that, whilst the detail of the policy is a matter for local determination within the length and extent of legislation and statutory guidance, it must address the matters outlined in the rest of the document.

19. Paragraph 4.48 refers to the National Minimum Standards for fostering services and continues:

> "Fostering services must deliver services in a way which ensures that family and friends foster carers are fully supported to care for children placed with them and are not disadvantaged as a result of their prior relationship with the child."

20. The next subparagraphs state:

> "4.49 Fostering allowances to foster carers must be sufficient to meet the cost to the carer of caring for the child and should be at least the minimum set annually by the Department of Education. The allowances paid by a fostering service must be calculated for family and friends foster carers on the same basis as for all other foster carers, and any variations should relate to the child's needs, the skills of the carer or some other relevant factor that is used as a criterion for all of the service's foster carers.
>
> 4.50 A judicial review of Manchester City Council's policy on payments of allowances to family and friends foster carers in 2001 … came about because foster carers who were relatives of the children they were caring for were paid significantly less allowance than non-relative carers. The Court held it was unlawful to discriminate against family and friends carers by paying them a lower allowance than non-relative foster carers. There is no requirement to pay a fee to reward a carer's time, skills, commitment, etc in addition to the allowance. Where a fee is paid, it must be payable to those foster carers who meet the criteria set out for the scheme, including foster carers who are family and friends."

The distinction between allowances (which reflect the cost of providing for the needs of the children) and fees (which are a form of remuneration for foster carers) is important but it is not always faithfully maintained in the guidance or by the Council.

The Council's policies

21. The Council promulgated its own guidance on, among other things, family and friends foster care allowances in November 2011. There is a section headed *Children with Disabilities placed with in-house foster carers – weekly allowance enhancement*. "In-house foster carers" are those who are registered with the Council but who are unrelated in the sense that they are not family and friends foster carers. The children in the present case are "children with disabilities" for these purposes. The document refers to "recognition of the higher support needs of children with disabilities". It provides for an increased weekly payment, up to the maximum the foster carer receives in Disabled Living Allowance for a child. The qualifying criteria are that the foster carer is approved by the Council, the child is looked after by the Council and the child is in receipt of Disabled Living Allowance. It goes on to provide that 50% of the extra weekly allowance is to be used towards the support needs of the child and that 50% is "in the form of a reward/fee element". It then provides:

> "Family and friends foster carers are eligible for the needs enhancement but not for the reward/fee allowance."

This differential features prominently in X's complaint in the present case. It is reflected in later guidance issued by the Council, including *Children with Disabilities placed with in-house foster carers – weekly allowance enhancement* (April 2012).

The position of X

22. In his judgment, Males J described (at paragraphs 55 to 58) the amounts of money paid to X by the Council and by way of state benefits. It was common ground that the total paid to her for herself and the children exceeded £50,000 per year. The judge said (at paragraph 58):

> "Nevertheless, the amounts paid to [X] are substantially less than the amounts which would be paid to her if she were unrelated to the children; she does not as a matter of course receive any allowance for festivals or birthdays; she does not receive any fostering fee, although unrelated foster carers do receive such fees; and she does not receive the 'reward/fee' element of the additional payment made to unrelated foster carers of children with disabilities in accordance with the [council's] policy. All that said, however, the local authority's policy is to ensure that it does pay sufficient to [X] … to meet the needs of children placed with her."

The position of the Council

23. Males J described the position of the Council under a sub-heading *The Local Authority's thinking*. He based it on the Council's policy and on the witness statements of Mr Philip Morgan, the Group Manager (Resources) in the Council's Children's Services Department. He summarised it as follows (at paragraph 53):

> "(a) The allowances (including where applicable, the 'Needs Enhancement' element of the extra weekly allowance paid in respect of children with disabilities) paid to family foster carers exceed the National Minimum Foster Allowances and are sufficient to ensure that the needs of the children concerned are met. Where in individual cases such allowances are not sufficient for that purpose, the policy contains provision for additional payments to be made, applications for which will be considered on their individual merits. In fact, however, although the policy provides for the possibility of an enhanced allowance to a family foster carer, in practice no such payment has ever been made. This is said to be because such enhanced allowances are 'intended to deal with exceptional circumstances not otherwise provided for in the otherwise comprehensive allowance scheme'.

> (b) This local authority is not alone in making additional award payments to unrelated foster carers, who do a different job with different expectations and demands from family foster carers. I understand this reference to 'additional reward payments' to encompass (i) the fostering fee of £171 per week … and (ii) the reward/fee element of the extra weekly allowance paid in respect of children with disabilities which is explicitly described as such.
>
> (c) While a family foster carer is only approved for, and only looks after, a specific child or children, unrelated foster carers have to be in a position to care for a child or several children at any time, frequently at very short notice, and irrespective of any employment or other commitments they may have. They are expected to accept and deal with children with a wide range of presenting behavioural problems, despite the serious management issues which may arise and family disruption that this may cause.
>
> (d) Further, unrelated foster carers are only paid when children are actually placed with them, but have to be available to take in children when the need arises. That availability is of critical importance in view of the local authority's statutory duties to look after children in need. For example, if the authority is suddenly faced at night or over a weekend with a child in a distressed state, perhaps reporting allegations of abuse, which needs to be removed from the parental home, it does not have the option of saying that it has nowhere for the child to go.
>
> (e) Reference is also made to the difficulties of recruiting and retaining unrelated foster carers, and to the competition between local authorities for their readily transferable services.
>
> (f) Holiday, festive and birthday allowances are not routinely paid to family foster carers because it is the local authority's experience (which is consistent with the practice of other local authorities in London) that carers of a child remaining in its network of family and friends generally take a more active role, financially and practically, in relation to such occasions than can reasonably be expected from unrelated foster carers."

24. He also set out in tabular form (at paragraph 54) what were said to be the differences in the roles undertaken between family and unrelated foster carers.

The Manchester case

25. It is apparent on the face of the statutory guidance (see paragraph 20 above) that it was formulated with an eye on *R(L and others) v Manchester City Council* [2002] 1 FLR 43. This case, a decision of Munby J, featured prominently in the submissions before us. It was concerned with differentials in relation to allowances paid to foster carers for the maintenance of the children in question rather than with any fee/reward element for the foster carers. The issue was the legality of a policy under which short-term foster carers who were friends or relatives of the children were paid a significantly lower rate in respect of the child's maintenance than was paid to other foster carers. The differences were stark. In one case, maternal grandparents were being paid less than one fifth of Manchester's normal rate which was itself somewhat lower than the national minimum recommended rate. The policy was held to be unlawful on the grounds that it was irrational, discriminatory, arbitrary and inflexible. The level of payments failed to meet the welfare requirements of the children. Moreover the policy contravened Articles 8 and 14 of the ECHR.

The judgment of Males J

26. In his judgment Males J dealt in detail with the *Manchester* case. He acknowledged factual differences between it and the present case. In the *Manchester* case "the allowances paid were so low that they infringed the fundamental welfare principle". He immediately added (at paragraph 70):

> "But in a case like the present, where the allowances paid exceed the national minimum allowances and can be (and are) supplemented where necessary by payment of additional expenses, so that they are sufficient to meet the needs of the child or children, the position is very different. I accept that [X] feels herself to be unfairly treated, but it is not suggested that she will be unable or unwilling to continue to care for the children. Nor is there any evidence before me to suggest that the mere fact of the payment of higher payments to unrelated foster carers in circumstances where the lower payments made to family foster carers are nevertheless sufficient to meet the needs of the child has deterred, or is likely to deter, potential family foster carers from coming forward."

He also noted the concession made by Ms Fiona Scolding, on behalf of X, that the Council's policy would be lawful if they simply reduced the payments made to unrelated foster carers.

27. He then went on to consider whether, nevertheless, the Council's policies fail to comply with the statutory guidance. He concluded:

> "83. … to justify payment of differential allowances on the basis that the task of family foster carers and the expectations on them are different from those applicable to unrelated foster carers is therefore contrary to the principle of equal treatment on which the guidance insists in full knowledge of the

> differences inherent in the respective roles of the two groups concerned.
>
> …
>
> 85. I conclude, therefore, that the local authority's policies on fees (and if necessary allowances) are not in accordance with the statutory guidance to the extent that they provide for different treatment of family and unrelated foster carers. Moreover I do not consider that the departure from the guidance can be characterised as so minor that there is substantial compliance."

28. The next question was whether there were cogent reasons for departing from the guidance. There was and is no dispute about the relevant legal principles. Having considered *R v Islington Borough Council ex parte Rixon* (1998) 1 CCLR 119 and *R (Munjaz) v Mersey Care NHS Trust* [2006] 2AC 148, together with other authorities, Males J said (at paragraph 35):

> "In summary, therefore, the guidance does not have the binding effect of secondary legislation and a local authority is free to depart from it, even 'substantially'. But a departure from the guidance would be unlawful unless there is cogent reason for it, and the greater the departure, the more compelling must that reason be. Conversely a minor departure from the letter of the guidance while remaining true to its spirit may well be easy to justify or may not even be regarded as a departure at all. The Court will scrutinise carefully the reason given by the authority for departing from the guidance. Freedom to depart is not necessarily limited to reasons resulting from 'local circumstances' …, although if there are particular local circumstances which suggest that some aspect of the guidance ought not to apply, that may constitute a cogent reason for departure. However, except perhaps in the case of a minor departure, it is difficult to envisage circumstances in which mere disagreement with the guidance could amount to a cogent reason for departing from it."

On behalf of the Council, Mr Kelvin Rutledge QC accepts this summary of the legal principles.

29. Applying those principles, Males J observed (at paragraph 90):

> "… the guidance insists on the principle of equal treatment so far as fees and allowances are concerned in addition to the welfare principle, and does so despite recognising the existence of the difference between family and unrelated foster carers. The local authority takes a different view."

In other words, this is a case in which the Council essentially disagreed with the guidance. The judge then considered with manifest sympathy the dilemma of the Council which might have to consider increasing the payments made to family foster carers to the same level as unrelated foster carers, which would in turn have an impact on its ability to finance other services or reducing the payments made to unrelated foster carers or some combination of these two. He came to the conclusion that the Council had taken "too narrow a view" of what it might have to do. For example, it might specify particular qualifications as prerequisites for enhanced fees in circumstances wherein unrelated foster carers who treat fostering as their livelihood might in general be more likely to have or obtain such qualifications than family foster carers. He said (at paragraph 92):

> "What matters, in essence, is that the criteria for payment of fees must not simply be (as at present) that the recipient is unrelated to the child in her or his care. But so long as the criteria are genuine and reasonably related to the task of fostering children looked after by the local authority, and so long as family foster carers are not excluded from seeking to meet them, there is no reason why they should not be criteria which unrelated foster carers are much more likely to satisfy."

30. He added (at paragraph 94):

> "If I were satisfied that all reasonable possibilities had been considered and rejected for good reason, so that the local authority's ability to perform its statutory duties would indeed be seriously affected by a declaration of illegality, I would necessarily conclude that there were sufficiently cogent reasons for departing from the guidance. Indeed that conclusion would suggest that the guidance itself was fundamentally flawed. But that is not the position on the evidence before me. It follows that the local authority's policies are unlawful. I reach this conclusion with some regret, as I do not doubt the good faith of the local authority or the real and serious efforts which it makes to ensure, in very difficult circumstances and with limited resources, the best possible outcome for all the children who are or may in future be in its care."

31. Having reached these conclusions Males J decided not to come to a final view on the alternative ECHR challenge. By way of remedy, he declared the council's fostering policies to be unlawful to the extent that they discriminate on the grounds of pre-existing relationship with the child between family and unrelated foster carers in the payment of the fostering fee and the "reward/fee" element of the payments made to carers of children with disabilities. Rather than grant further relief, he accepted that the Council would need time to reconsider its policies for which he allowed a period of three months with liberty to apply in the event that a new policy was not issued within that time.

This appeal

32. At the end of the hearing of this appeal we were able to inform the parties that we were dismissing it and that, like Males J, we would resist the temptation to venture into the alternative ECHR challenge. We made an order extending the time within which the Council should reconsider its policies. The remainder of this judgment gives my reasons for dismissing this appeal.

33. Mr Rutledge's submissions began with a vigorous attempt to distinguish the *Manchester* case. To an extent I regard his attempt as successful. On a factual level the differentials in *Manchester* could never have survived a *Wednesbury* challenge. It was a more extreme case than the present appeal. Munby J granted relief on a number of grounds (including a breach of Article 14 of the ECHR). As regards traditional public law grounds he referred (at paragraph 78) to four reasons why the policy was unlawful. It imposed an arbitrary and inflexible cash limit; it was in conflict with the welfare principle enshrined in section 23(3)(a) of the Children Act; it was irrational in the *Wednesbury* sense; and it was "fundamentally discriminatory" as between family and unrelated short-term foster carers. I accept that, in relation to the first three of those reasons, there are factual differences between the *Manchester* case and the present appeal but there is also an important distinction in the basis of the challenge. X's case is based on policies promulgated by the Secretary of State since, and (to some extent) in the light of, the *Manchester* case. The fourth – "fundamentally discriminatory" – reason has been the subject of some debate before us. Mr Rutledge was critical of any resort to discrimination as a free-standing common law ground of challenge. Ultimately, it seemed to me to be a sterile debate because, in my judgment, Munby J was using the language of "fundamentally discriminatory" as no more than a subset of *Wednesbury* irrationality. In the event, I do not find it necessary to resort to any free-standing ground based on discrimination to conclude that the Council have acted unlawfully in the present case. Nor did Males J.

34. The real issues in the present case are whether the Council departed from the statutory guidance and, if so, whether it has cogent, permissible reasons for so doing. Before turning to them, I should address and dispose of two logically prior attacks on the statutory guidance. First, it is submitted that, although described as guidance, the relevant provisions are not guidance at all but instructions or directions. In the *Family and Friends Care: Statutory Guidance for Local Authorities* it is stated that allowances paid by a fostering service "must be calculated for family and friends foster carers on the same basis as for all other foster carers" (paragraph 4.49) and, where a fee is paid, "it must be payable to those foster carers who meet the criteria set out for the scheme, including foster carers who are family or friends" (paragraph 4.50). In *R (Munjaz) v Secretary of State for the Home Department* [2006] 2 AC 148, Lord Bingham (at paragraph 21) distinguished between guidance and instruction. Can it be said that, in the present case, the use of the word "must" requires the taxonomy of the text to be one of instruction and so outside and beyond the authority of the guidance-giving powers in section 7 of the Local Authorities Social Services Act 1970 and section 23 of the Care Standards Act 2000? Surely not. Statutory guidance is often expressed in such terms. The important point is that it is set out in a document which, as here, enjoins that it is "guidance" which "should be complied with …, unless local circumstances indicate exceptional reasons that justify a variation". In this context, I do not consider that "exceptional reasons" are anything

other than the "cogent reasons" which generally permit a departure from statutory guidance: see *Munjaz (ibid).*

35. Secondly, it is pointed out that statute has provided the Secretary of State with a power to issue orders. Section 49(1) of the Children Act 2004, which is headed *Payments to foster parents*, provides that he

> "may by order make provision as to the payments to be made –
>
> (a) by a local authority … to a local authority foster parent…"

36. Such orders have to be laid before and approved by both Houses of Parliament: section 66(4). So, it is submitted, it was not open to the Secretary of State to proceed by way of statutory guidance. If he wanted to regulate payments to foster carers, he was under an obligation to resort to the power conferred by section 49 of the 2004 Act, just as the Home Secretary could not circumvent the statutory obligation to work through the Immigration Rules by resort to guidance outside the Rules: *Pankina v Secretary of State for the Home Department* [2011] QB 376. In my judgment, this submission, in relation to which the Council does not have permission to appeal, is totally misconceived. The power to issue guidance, which has existed since before the 2004 Act, was not cut down by the enactment of section 49, which simply provides an alternative, discretionary ("may by order") power to regulate by statutory instrument. Section 3 (2) of the Immigration Act 1971, by contrast, was expressed in the form of an unequivocal obligation ("shall from time to time") to use the Immigration Rules in defined circumstances. The judgment of Sedley LJ in *Pankina* emphasises at several points the unique status of the Immigration Rules: see, especially, paragraph 17. I do not consider that this submission should attract a grant of permission to appeal.

37. I return to the two issues which I identified in paragraph 34, above. I keep in mind that it is for a local authority to determine matters such as payment, albeit after consideration of the statutory guidance issue. As to the first issue, I am in no doubt that the Council did not comply with the statutory guidance which, when read as a whole, seeks to ensure that allowances and fees paid to family foster carers should not be less than those paid to their unrelated colleagues. On any view, X is being treated unequally, in particular in relation to fees. Males J was incontrovertibly right about that.

38. The final and most important question is whether the Council has established cogent reasons justifying a departure from the statutory guidance. In one sense, any such reasons have a whiff of *ex post facto* about them because, as Lewison LJ pointed out in the course of argument, the Council's evidence does not describe a considered decision to depart from the guidance. However, I accept Mr Rutledge's submission that a departure from the guidance may be justified by cogent reasons objectively established as such through litigation, even if they were not carefully considered at the time of departure.

39. Nevertheless, in my judgment it is impossible to say that Males J reached a wrong conclusion about the absence of cogent reasons. The statutory guidance has at its heart a policy that, absent cogent reasons, there should be no differentials between

family and unrelated foster carers. The policy is a reflection of the statutory requirement set out in section 22C(7)(a) which gives preference to family and friends as foster carers. This is undoubtedly based on the understandable view that, usually, this will have the best chance of achieving a successful outcome in what are very often extremely challenging circumstances. Although it is not suggested that X will give up the responsibilities she so impressively undertakes if she is not equiparated with unrelated foster carers, the success of the statutory preference is plainly underwritten by the equal treatment guidance. I appreciate that a local authority also has the difficult task of securing, so far as is reasonably practicable, the provision for children in its area of accommodation which meets their needs: section 22G. To that extent, there may be a need to incentivise unrelated foster carers who significantly outnumber family foster carers (of whom there are about a dozen in Tower Hamlets). But there is no evidence that unrelated foster carers seek a differential over and above their family colleagues. Moreover, as Males J pointed out (at paragraph 92), where unrelated foster carers do have additional qualifications, it is possible, within the statutory guidance, to have a fee structure which permits differentiation on that ground: see paragraph 4.49 of the guidance, set out at paragraph 20, above. It was the Council's failure to consider and seek alternatives that led Males J to the conclusion that a policy of differentials based purely on the basis of the lack of a pre-existing relationship could not be said to carry with it cogent reasons for departure from the statutory guidance. I agree with that conclusion.

40. These are the reasons why I dismissed the Council's appeal. I should add that, on another level, there is much that is unsatisfactory about the Council's policy to the extent that it lacks clarity as between allowances and fees. However, I have not found it necessary to give further consideration to that. As it is now in the process of reconsidering its policy, the Council would be well advised to ensure clarity in the future. I should also add that an application for permission to appeal to the Supreme Court stands adjourned.

Lord Justice Lewison:

41. I agree.

Lady Justice Gloster:

42. I also agree.