

CHILDREN, FAMILIES & SCHOOLS COMMITTEE ADDENDUM 2

4.00PM, MONDAY, 6 NOVEMBER 2023

**COUNCIL CHAMBER, HOVE TOWN HALL, NORTON ROAD,
HOVE, BN3 3BQ**

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ADDENDUM

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Brighton & Hove City Council

Children, Families and Schools Committee

Agenda Item 38

Subject: Unaccompanied Asylum Seeking Children and Use of
Hotels

Date of meeting: 6th November 2023

Report of: Executive Director Families Children & Learning

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Ward(s) affected: All

The special circumstances for non-compliance with Council Procedure Rule 3, Access to Information Procedure Rule 5 and Section 100B(4) of the Local Government Act 1972 (as amended), (items not considered unless the agenda is open to inspection at least five days in advance of the meeting) were that the Council had wished to be in a position to update the Committee on the outcome of the litigation referred to with a judgment expected imminently, but it has not yet been made available, and so the report is now published on the basis of available information without further delay.

For general release

1. Purpose of the report and policy context

- 1.1 The purpose of this report is to update the committee on the outcome of the council's legal challenge of the Secretary of State for the Home Department (SSH) use of hotels to accommodate unaccompanied asylum seeking (UAS) children.

2. Recommendations

- 2.1 For committee to note that the systematic use of hotels to accommodate UAS children was declared unlawful in a judgement handed down by Mr Justice Chamberlain on 27.07.23.

3. Context and background information

- 3.1 In recent years thousands of highly vulnerable unaccompanied asylum seeking (UAS) children have arrived in the UK and claimed asylum having crossed the Channel in small boats, usually arriving in Kent. In June 2021 Kent County Council issued the Home Office with notice that it was

derogating its Children Act 1989 duties as it was overwhelmed by the large number of UAS children arriving at Dover in the context of lengthy delays in children being allocated to other local authorities under the Home Office run National Transfer Scheme (NTS).

- 3.2 The NTS is the statutory scheme by which children should be transferred from Kent county to another local authority under a rota system administered by Home Office Officials. The NTS has a calibrated threshold (currently 0.1% of the total child population) for identifying the numbers of UAS children that a local authority could fairly be expected to accept. At this time the NTS was not mandatory, and so authorities were not legally obliged to accept UAS from out of area. BHCC however was (and remains) in excess of the maximum allocated threshold of UAS.
- 3.2 The Home Secretary responded to Kent CC's "derogation" from its statutory duties by commissioning hotels to accommodate UAS children outside the care system altogether. It was said that the provision of hotels was "an exceptional, temporary measure to address a crisis situation". The Department for Education contacted Brighton & Hove City Council on the afternoon of 22 July 2021 to inform the Council that the Home Office would be placing up to 54 UAS children aged 16 and 17 in the Langfords Hotel from 23 July 2021 as provision in Kent was full. There was no consultation with the council regarding this course of action.
- 3.4 The Home Office informed the council that the situation in Dover was unprecedented in terms of the numbers of UAS children arriving and that the numbers arriving was outstripping the offers of transfer to local authority care under the National Transfer Scheme (NTS). A hotel was stood up in Kent the previous week, but with numbers of UAS children continuing to rise, a decision was made to stand up Langfords. The council was informed utilising Langfords was an emergency, temporary measure, and that the alternative was for children to be sleeping on the floor of the Kent Intake Unit.
- 3.5 In September 2021, Kent CC and the Home Secretary agreed a protocol which sets out how Kent CC will deal with UAS children in the future, and which (contrary to duties under the Children Act) secretly capped number of UAS children Kent would receive into its care pending their transfer to other local authorities under the NTS. The protocol was disclosed for the first time over the course of the litigation.
- 3.6 Over the objections of this council between July 2021 and February 2023, when the Langfords hotel was stood down, over 1700 UAS children aged 16 and over were placed there pending transfer to other authorities under the NTS. Only 16-18 year old males were placed there, no younger children or female children.
- 3.7 As the numbers of UAS children increased over the cap in the Kent protocol, the Home Office also contracted with other hotels in Kent, Warwickshire, Oxfordshire, and East Sussex. It emerged in the litigation that in total more than 5,400 UAS children have been accommodated in hotels at the direction

of the Home Secretary, of whom 32% were under the age of 16. In the course of the litigation the Home Office also revealed that the youngest child placed in a hotel (outside of Brighton and Hove) was aged 9. Kent provided evidence that 2,462 UAS children have been accommodated in hotels in Kent, outside of the care of Kent County Council.

- 3.8 Local authority participation in the NTS was made mandatory by the government on 14 December 2021. The NTS requires transfers take place within 10 working days. Nonetheless the average time spent by children in hotels was said by the government to be 20 working days. The experience of all the authorities with hotels in their area is that it was frequently considerably longer. In contrast to other authorities BHCC having monitored and tracked every child entering and leaving the Hove hotel was able to provide detailed evidence of the length of time before children were transferred into local authority care under the NTS.
- 3.9 Over the summer of 2022, 139 children went missing from Langfords. 89 (64%) of the children have subsequently been located, with 50 remaining missing. 11 of the missing 50 remain under 18 years old. Of the 89 children located, 12 were found to be in suspected or aligned to criminal and/or exploitative situations, including modern slavery linked to cannabis cultivation, forced car washing; criminal activity linked to drug dealing and money laundering.
- 3.10 On 19 October 2022 the Independent Chief Inspector of Borders and Immigration (“ICIBI”) published an inspection of the use of hotels for housing unaccompanied asylum-seeking children. The ICIBI recommended an exit strategy from the use of hotels for unaccompanied children within 6 months. This recommendation was “accepted” by the Home Secretary in her response dated 19 October 2022. On 6 March 2023, the Home Secretary informed Brighton & Hove CC that the Hove hotel was being “stepped down and no children are at the hotel, until further notice.” Nonetheless the Home Office continued to pay for the hotel to be available for use if needed.
- 3.11. In May 2023 the Council wrote to the Home Office seeking assurance that the hotel would not be used again. The council raised concerns with the Home Office that Langfords was both unsuitable and unsafe accommodation for UAS children given the large numbers of children who had gone missing the previous summer and asked for assurances around its use. The Home Office failed to give the necessary assurances and consequently the council issued a judicial review pre action protocol letter.
- 3.12 On 19 June 2023, the Home Office wrote to Brighton & Hove CC advising that, in response to the increased number of arrivals in recent days and in anticipation of further crossings, they had decided to “stand up” Langfords Hotel start using the hotel again imminently. The Council issued an urgent application for judicial review. In the initial stages of the review the Home Office agreed to only use Langfords Hotel as a last resort, when other

options had been exhausted and in fact the hotel has never been used again to accommodate UAS children.

- 3.13 The council's judicial review claim against the Home Office's use of hotels was joined with an existing application from the children's charity Every Child Protected Against Trafficking (ECPAT) to which Kent County Council and the Home office and Department of Education were Defendants. Kent County Council accepted that it had breached its statutory duty to UAS children who are physically in its area, but claimed to be in an impossible situation. Kent considered that if it accepted more UAS children, it would breach another duty, to ensure that the children already in its care (both UAS and others) are safe. The joint hearing of the claims took place in front of Mr Justice Chamberlain at the Royal Courts of Justice on 20-22 July 2023.
- 3.14 The Council provided crucial evidence to the Court regarding the safeguarding issues arising from the decisions of the Home Office and the ways in which it considered that the Home Office were acting unlawfully, including in bypassing Children Act duties and regulations, and the law in relation to the registration of Children's Homes. The Council argued that the use of hotels to accommodate UAS children circumvented the NTS, and left children with no corporate parent responsible for their care and welfare, placing any authority in a position where it would be impossible to meet Children Act duties to this number of children. In respect of Langfords Hotel specifically, given the high number of UAS children who went missing, with 50 people still not found, the council's position was that this hotel was additionally not safe, and drew the attention of the Court to the safeguarding report of independent scrutineer of the Brighton and Hove Safeguarding Children Partnership, Chris Robson, who provided evidence in support of the Council's claim. The government maintained that it was necessary to place children in hotels in the absence of Kent County Council or other councils making themselves available to care for them, and argued that there were available "prerogative" powers to act in an emergency. By the time of the hearing on 17 July 2023, the Home Office confirmed there were still 218 UAS children (including under 16s) being housed in hotels outside of Brighton and Hove.
- 3.15 Judgment was handed down on 27th July 2023 and declared the systematic use of hotels by the Home Office to accommodate UAS children pending their transfer under the NTS to local authority care as unlawful from December 2021 . The judgment has been published and can be accessed on line at [ECPAT -v- Kent Council judgment \(judiciary.uk\)](https://www.judiciary.uk/wp-content/uploads/2023/07/ECPAT-v-Kent-Council-judgment-2023-07-27.pdf)
- 3.16 The judgment declared that:
- Kent CC was acting unlawfully, in breach of its duties under the CA 1989, by failing to accommodate, and then look after, all UAS children when notified of their arrival by the Home Office.
 - The Kent protocol capping the numbers of UAS children to be accepted into care by Kent is unlawful

- The Home Secretary had no power to transfer children directly under the NTS without first being in the care of a receiving authority.
- There is a serious possibility of a criminal offence being committed by operating a hotel as an unregistered children home
- Accommodating children in hotels engages CA 1989 functions on the part of the local authority in whose area the hotel is situated. Those functions will certainly include the s. 17 assessment function and the s. 47 safeguarding function. Given the vulnerability of the UAS child cohort, and their likely need for the services available to looked after children, it is also likely to include the full s. 20 accommodation duty
- The routine use of hotels by the HO is declared unlawful. Even if there was a genuine emergency in July 2021 by December 2021 at the latest, the Home Secretary's provision of hotel accommodation for UAS children had exceeded the proper limits of her powers and had become unlawful
- The NTS is enforceable by the Home Secretary by judicial review - local authorities must comply with the scheme. Any local authority currently under its 0.1% quota must accept children allocated by the NTS and must do so within the timescales prescribed (5 days if from a hotel, 10 days if from another local authority, usually Kent). The court made it clear it expects the Home Secretary to make the NTS work.

3.17 On 27 July 2023, and subsequently at two further hearings in August and September, the Home Office were repeatedly ordered to transfer all UAS children from hotels into local authority care within five days (the timescales envisaged by the NTS). In addition, provision was made for the Home Office and Kent County council to renegotiate the support to be offered to Kent, on the basis that the Court would shortly declare the protocol whereby numbers were capped illegal. The court has now declared the protocol illegal and Kent have accepted that they must fulfill Children Act duties to all children in their area, but have also indicated via the Court that they are struggling with capacity to do so.

3.18 Prior to the claim being heard Kent CC issued a judicial review claim against the Home Office in respect of the operation of the National Transfer Scheme (NTS) in such a way as to ensure the timescales envisaged by the scheme were enforced (being five days for children placed in hotels, and 10 working days otherwise). It is Kent's case that if the Home Office were to operate the NTS scheme fairly, and as intended, there would be no need for any child to be placed in a hotel and Kent would be in a position to meet their Children Act duties to all children, without services reaching breaking point. Brighton and Hove City Council and more recently East Sussex County Council are interested parties to this claim. Judgment is awaited and expected imminently.

4. Analysis and consideration of alternative options

4.1 Mr Justice Chamberlain's judgement of 27.7.23 makes clear that the Home Office's systematic use of hotels to accommodate UAS children is currently unlawful. Any UAS child accommodated in a hotel is owed Children Act 1989 duties by the local authority in whose area the hotel is located. This can

include S20 (a duty to bring into care) responsibilities. The services of any authority could be overwhelmed as a result of the systemic use of hotels.

- 4.2 Despite orders that the Home Office transfer all children out of hotels into local authority care (within the timescales prescribed by the NTS) the Home Office did not achieve this until very recently and exceptionally the Court has had a number of hearings to monitor compliance, and make additional orders.
- 4.3 No child has been placed at Langford's since March 2023 when the hotel was stood down. The litigation was successful in preventing the Home Office from using it again. Nonetheless other children continued to be placed in hotels by the Home Office in the absence of available accommodation in Kent, and following the orders in an effort to close some of the hotels some children were removed by the Home office from hotels outside of Kent, not into care but placed in hotels in Kent, before finally being transferred into local authority care. For this reason BHCC has remained an active participant in the litigation, and is an actively engaged interested party in the Kent claim concerning the operation of the NTS.
- 4.4 Delays in their transfer under the NTS from hotels into local authority care meant that that it was not until 19 October that BHCC were informed that as at that date there were no children in any hotels in England.
- 4.5 The judgement also made it clear that local authorities must comply with the NTS and assume responsibility for their 0.1% quota of UAS children. The Home Office can, via judicial review of those local authorities who fail to participate fully, enforce the NTS, and since the claims were issued the NTS has been updated to reflect that this is an available enforcement mechanism. The hearing of the NTS judicial review claim by Kent County Council took place on 10 October. At that time the Home Office had not sent any pre action correspondence to any local authorities who had not transferred a child allocated to them under the NTS within timescales. Brighton and Hove continues to meet or exceed the allocated quota of UAS children under the NTS, one of only a few local authorities to do so.
- 4.6 At the time of the judgment seven hotels remained under contract to the Home Office as contingency accommodation for UAS children in the absence of local authority care on arrival. The Langfords Hotel in Hove remains stood down, although the Home Office have indicated they have a contract in place. The cost of the contract has not been revealed. The council has made it clear that Langfords is both an unsuitable and unsafe location for UAS children.
- 4.7 Over the course of the litigation disclosure by the Home Office has revealed that until the litigation the Home Secretary had rejected the option presented to exit from the use of hotels. On 23 March 2023, the Home Secretary agreed to the continued use of hotels for accommodating UAS children throughout 2023. The use of hotels was seen as the strategy to address accommodating children arriving via boats into Kent, and in anticipation of the summer crossings there was a plan to open a further 12 hotels. Those

plans to open further hotels appear to be abandoned, and no children are placed in hotel accommodation at the time of writing. The warmer months will likely see a test of whether the arrangements in Kent and the operation of the NTS will mean that Kent are able to meet their children act duties faced with rising numbers of crossings.

- 4.6 A further hearing is anticipated on a date to be set following the judgment of the Kent County Council claim when final declarations and orders in the hotels claim will be made. The council has already been awarded the costs of the judicial review claim regarding the use of hotels against the Defendants.

5. Community engagement and consultation

- 5.1 The need for community engagement has not arisen during the litigation. It is anticipated that the declaration that the systematic use of hotels for UAS children is unlawful will be welcomed.

6. Conclusion

- 6.1 Every child who is unable to live with their family needs the state to provide safe care and to act in a way that protects their welfare. UAS children are some of the most vulnerable children in society with many having suffered significant trauma both in their home country and travel to the UK. They require safe and nurturing care where their needs can be fully assessed and met. Local authorities have a duty to UAS children under the Children Act 1989 and are mandated to accept these duties under the NTS.
- 6.2 The council has been successful in its litigation against the Home Office that the systematic use of hotels to house UAS children pending transfer under the NTS is unlawful. The court has also ruled that the Home Office has the power to enforce the mandation of the NTS, and that local authorities must assume responsibility for UAS children up to their 0.1% quota.

7. Financial implications

- 7.1 As the claim was successful, the costs of the litigation were awarded to Brighton and Hove City Council in respect of the challenge to the use of hotels

Name of finance officer consulted: Davis Ellis Date consulted 31.10.23

8. Legal implications

- 8.1 The substance of the report sets out the legal context of the declaration of the court that the accommodation of children in hotels by the Secretary of State is unlawful.

8.2 In the event that children were placed in hotels again if it could not be demonstrated that the situation was a genuine emergency in which prerogative powers were properly available to the Secretary of State, or powers under the Illegal Migration Act were not available, any further use of hotels would be unlawful. In any event the use of hotels would likely be a breach of accommodation regulations, and as indicated in the judgment prima facie a criminal offence in relation to a hotel being an unregistered children's home.

8.3 In addition, were children to be placed in hotels again it is now clear that Children Act duties would be owed to them by the authority in whose area the hotel was placed. Any child arriving in Kent is owed Children Act duties by Kent CC until such time as they are transferred under the NTS to another authority.

8.4 The Illegal Migration Act 2023 became law over the period of the litigation. It does not amend The Children Act 1989. Local authority duties toward children under that legislation still apply. The act also makes clear that the Home Secretary is not the corporate parent of a child in her care.

8.5 In the event that the Home Office attempted to place children again in the area of BHCC it is therefore highly likely that the council would need to resort to further litigation.

8.6 The Illegal Migration Act 2023 confers a new duty to remove newly arrived unaccompanied children from the UK once they turn 18, and the power to remove newly arrived unaccompanied children before their 18th birthday in certain circumstances. It also provides for new powers for the Home Office to accommodate newly arrived children (e.g., in hotels or other accommodation), and a power (enforceable through the courts) for the Secretary of State to transfer responsibility for the care of an unaccompanied child within the scheme to a local authority. Those powers are not yet available as the statutory instruments have not yet been laid.

8.7 At the time of writing the judgment of the Kent claim for judicial review regarding the operation of the NTS, in which BHCC is an interested party, is awaited and expected very shortly.

Name of lawyer consulted: Natasha Watson Date consulted: 31.10.23.

9. Equalities implications

9.1 The judgment reinforces that unaccompanied asylum seeking children are entitled to the same services and rights as any other child. They are some of the most vulnerable children in our community.

10. Sustainability implications

10.1 There are no sustainability implications

Supporting Documentation

No Appendices

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