CA on appeal from Lewes County Court (His Honour Judge Kennedy QC) 1st December 2000

1. **LORD JUSTICE PETER GIBSON**: I will ask Lady Justice Arden to give the first judgment.

2. **LADY JUSTICE ARDEN**: This is an appeal from the decision of His Honour Judge Kennedy QC, sitting in the Lewes County Court, made on 28th February 2000. The judge gave reserved reasons for his decision on 23rd May 2000 and by his order he struck out the claim which was made by Mr Mensah. That claim was issued on 23rd September 1999. It seeks damages from the respondents, Islington Council and East Sussex County Council, for psychological damage. In addition it seeks an apology.

3. Mr Mensah has been present at this hearing in the Court of Appeal. He appeared before the learned judge; but he felt unable to make submissions to the court today. In the circumstances we allowed his Mackenzie friend, Mr Alexander, to make submissions on his behalf. In addition we rose for some one hour twenty minutes to enable Mr Alexander to prepare his submissions. In giving that permission, which was quite exceptional, speaking for myself, I was desirous of ensuring, so far as I could, that every possible point was put forward on behalf of Mr Mensah in his claim. I regret to say, however, to have experienced a little disappointment in that matter as it appeared that when the court resumed Mr Alexander was not fully familiar with this case.

4. I now turn to the facts in outline. Mr Mensah was born in March 1965. It is believed that he is the child of a Nigerian mother and a Ghanaian father. He was 18 on 16th March 1983. He was placed in foster care by Islington Borough Council on 4th January 1966 at the age of 10 months. In December 1966 Islington Council placed Mr Mensah with white foster parents, Mr and Mrs Saunders, in Lewes in Sussex. The complaint which Mr Saunders makes is not directed to the original placement but to the alleged failure of the authorities to review the fostering arrangements adequately after 1970 when cultural knowledge had progressed.

5. In January 1971 East Sussex County Council took over supervision of the placement from Islington Council. Mr Saunders died in May 1974. Mr Mensah remained with Mrs Saunders until 1985. He was then 20 years of age. As I have said, the claimant commenced proceedings on 23rd September 1999; and that is a critical date. Islington Council applied to have the particulars of claim struck out on 2nd October 1999. The East Sussex County Council made a similar application on 25th October 1999. The application to strike out was heard by District Judge Fawcett on 2nd November 1999. There was no transcript of those proceedings; but His Honour Judge Kennedy heard an appeal against the order to strike out the claim on 24th January and, as I have said, he gave his decision and then reserved reasons.

6. I now turn to the judgment of His Honour Judge Kennedy. The judge referred to the fact (and I will come to it later) that from 1996 Islington had made efforts to help Mr Mensah. Islington Council's letters, in his Lordship's judgment, recognised that Mr Mensah had expressed a concern to the Lewes social workers about his fostering and identity problems in late 1979 and early 1980. In paragraph 10 of his judgment he referred to an independent review, which I will also refer to a little later in this judgment. He held that that acknowledged that by modern standards a black child would not normally be fostered with white parents. In addition, the review found that there were no signs before Mr Mensah left Mrs Saunders of the kind of behavioural problems which would have caused him to have been differently treated. The judge referred to the fact that Mr Mensah had applied for legal aid as long ago as 1996. He then referred to a probation report in 1989, which had been accompanied by a psychiatrist's report, and he held that these were arguably clear confirmation that Mr Mensah then knew well what his psychological problems were and the cause of them.

7. In paragraph 17 of the reasons the judge said this*: "Mr Mensah is here clearly capable of stating his case intelligibly. Indeed, bearing in mind the level of his distress and general psychological disturbance -to say nothing of the chronic severe urticaria from which he now suffers - he has always conducted himself before this Court with dignity and courtesy."*

8. At paragraph 24 the judge expressed himself satisfied that Mr Mensah had all the necessary knowledge both of his condition and its cause long before November 1996. His Lordship then considered whether he should exercise his discretion conferred by section 33 of the Limitation Act 1980. He refused to exercise his discretion in Mr Mensah's favour because of evidential problems.

9. At this point the judge referred to the witness statement of Sarah Erwin. She is a solicitor in the firm of Brown Jacobson, who act on behalf of Islington. She had reviewed the files and in an earlier part of her affidavit had identified the names of persons who had the conduct of Mr Mensah's care arrangements going back to 1966 and forward to 1978. She also stated that she had asked solicitors for the claimant to ask if the individuals could be identified to see if they were contactable. Then in paragraph 10, which is the paragraph the judge specifically referred to, she said this: *"Mr Mensah may ask the court to exercise its discretion to allow his claim to proceed pursuant to the provisions of Section 33 of the Limitation Act 1980. I respectfully submit that this would not be equitable for the following reasons:-*

a) the evidence now available to the Court is less cogent than if the Claimant had brought his claim within the initial 3 year limitation period in that:-

(i)potential witnesses are likely not to be contactable;

(ii)there appear to be gaps in the social services files of the two Councils. In the absence of these documents, it is difficult to address the claim.

b) Any witnesses we do manage to contact are likely to find their recollection of events and their memories of the Claimant severely diminished by the passage of time and by the lack of documents which may have aided their recollection."

10. Finally, his Lordship expressed the view that mediation was inappropriate and that the form of relief which Mr Mensah sought in an apology was not a form of relief open to the court.

11. The matter has come before the Court of Appeal on one previous occasion. It came before Henry LJ and Wall J on 18th October 2000. The court then adjourned this matter to come on on notice to Islington Council and East Sussex County Council so that they could assist the court (1) on the evidence on the limitation point; (2) on the question of the effect of the decision in **Barrett v Enfield Borough Council;** and (3) whether Civil Procedure Rules 52 r13 applies.

12. On this application counsel have appeared on behalf of the two respondents, the two defendants to the claim, and they have filed a skeleton arguments. In the event, the point on **Barrett's** case has not had to be argued because neither of the respondents has contended that there was a case where there is no cause of action, and neither respondent has relied on any point under CPR 52 r13. So the court has focused exclusively on the limitation point.

13. I now want to say more about Mr Mensah's case.

14. Mr Mensah has prepared a number of statements. In particular I have seen statements of 27th January 2000, 29th February 2000, 17th March 2000, 1st November 1999, 24th November 1999 and 25th September 1999. We also have his grounds of appeal. In essence his case is that he acquired knowledge of the claim on 4th November 1996. He submits that he first mentioned to his general practitioner, Dr David Supple, on that date that he was psychologically damaged. Counsel for Islington Borough Council, Mr Ford, has submitted that that means that Mr Mensah must have known about the claim before that date. That is logically so. But, of course, the question for the court is: how long before that date? Second, Mr Mensah relies upon ignorance of the law. He is not, of course, legally qualified. I will shortly set out section 14 of the Limitation Act, which states precisely the form of knowledge which is required for this purpose. Third, Mr Mensah disputes that the cogency of evidence will not have altered with time. But as respects that, of course, the oral evidence of persons who dealt with Mr Mensah's case will be required and it is inevitable that their recollection will have to be cast back some 20 to 30 years, and it is only human that recollections are not good after that period of time.

15. A number of matters appear from Mr Mensah's statements. He says that when he left his foster home he had to devote himself to survival in an adult community and to searching for his Nigerian mother. He also had to adjust to being an independent person. He has been living in Brighton. He refers in his statements to the lack of the statutory reviews for 1975 and 1976, or at least the evidence of them. But the position is that Islington's files, I think it is true say the Sussex files, do not contain documents which constitute statutory reviews in those years. Mr Mensah says that this is suspicious. He was then ten years of age and he was concerned about what was then happening to him at home and at his school. I will just read one very brief passage to illustrate his concern from the typescript of Mr Mensah's statement of 1st November 1999. He says this: *"What is disturbing is the period from 1970 onwards social services department had available lots of new*

knowledge of cultural information of black people in care had progressed rapidly there is no way that the developing knowledge was addressed or considered by the East Sussex County Council social workers in the monitoring side Islington never monitored this see initial comments in January 1999 document about this. The foster placement was not stable I may have experienced sexual abuse because there is unrecorded information in 1975 and 1976."

16. Mr Mensah relies on the report of Dr Maxime as showing that as far back as 1976 the East Sussex County Council should have helped him towards a psychological balance to aid him in his search for a sound identity. He points out in his statement that he has been refused legal aid on several occasions since 1996.

17. It appears that Mr Mensah was sadly very unhappy with his foster family. He says that Mrs Saunders lied to the local authority about his well-being and, as I have noted, he also claims to have been sexually abused by Mr Saunders; but he does not claim that East Sussex County Council were aware of this. He attended a remedial school for part of his schooling. He says that there was already a psychologist's report in 1976 stating that he does not accept himself as a black person, and he says that Islington Borough Council did not bother to interview the social worker who had his care under her responsibility in 1977 to 1978. He describes his period of care as a haunting experience.

18. I now turn to a series of investigations and reports on Mr Mensah's case. The first one is an investigation by the Islington Borough Council carried out on 20th April 1998. It starts at page 107 of the appeal bundle. This is a report made by Mr Figes, and there is the name of an independent person, Mr Halahmy. I need only refer to this briefly because it leads to an independent review. In this report it is said at page 109 of the bundle: *"It is a tenet of current foster placements that young people should wherever possible be linked with carers who reflect their ethnic/cultural background. This will only be overridden in circumstances where the young person has regular contact with others of his/her own culture who will fulfil this part of his/her development. Opinions may differ on the correctness of cross cultural placements but not on the need to preserve and develop an understanding of a young person's background.*
'In making any such decision ... a Local Authority shall give due consideration ..... to a child's religious persuasion, racial origin and cultural and linguistic background. Children Act 1989 Sect 22(5)C.'

The Children Act 1989 also developed the system of Independent Visitors for young people without any family links.

Such emphasis on placement and independent visiting clearly did not exist in the 60's and 70's. In fact, the decisions around Mr Mensah were governed by the legislation designed for a different age and cultural circumstance."

19. At the end of the report in the conclusions it is stated in the opinion of the writer that: *"Given the standards that existed at that time I do not find evidence that Mr Mensah's care was inadequate or abusive. He is likely to have received more protection and attention than if consigned to long term residential care or foster placement at a later age. Certainly there were short comings and maybe insufficient affection but the most telling fact is that he stayed there not just until aged 18 but over a year longer."*

20. Then at page 115 of the bundle, the investigating officer concluded: *"I do not find that all Mr Mensah's future difficulties arose from the failure to address identity issues."*

21. That is not, however, a point that I will need to pursue.

22. There was an independent review in 1998 of that report. The critical passages, in my judgment, are at page 121-2 and 122-3. The second complaint which had been put before the independent person for consideration was as follows: *"The inappropriate placement of a black child in a white area causing social isolation and dislocation."*

23. The report continues*: "According to the report from the IO, which I have received and read, teenage reviews of Mr Mensah state that, 'he was popular in the community, attended work regularly, although he didn't like it, posed no behavioural problems to his carers.'"*

24. In my reading of this report on the files it is clear me that the London Borough of Islington were presented with no evidence of the classic signs of discontent: absconding, offending, poor school work, complaints from carer, etc. He said: *"I partially uphold this complaint for the following reasons:*

6.6 Mr Mensah was the only black child in a white community. The background and experiences of his foster carers and his social workers lacked insight and awareness of the impact of this upbringing on Mr Mensah. As

a child and a young person he was unable to articulate alone how deeply affected he was in his isolation from his racial and cultural background.

It is only as an adult that he has been able to explain the impact his upbringing has had on his personal development and to seek the support he needs to express the source of his deep emotional difficulties.

6.7 The evidence from the files which I have read show that he leads as normal a possible life, during his placement. Symptoms did not appear until he was older and lead to some criminal activity and a custodial sentence."

25. The independent report did not comment on Mr Mensah's request for compensation, but contained this conclusion:

"8.1 This complaint, in my opinion, has been fairly investigated by Mr Figes, the IO. The files were read carefully to ensure all the facts have been examined carefully and independently.

8.2 It has been acknowledged in both the IO's report and my report that Mr Mensah's claims about the identity crisis he has suffered as a result of this placement are very real. However the files do not show any evidence documented by the L.B. of Islington. In the era that he was placed current practice did not reflect those needs.

8.3 I would therefore recommend that Mr Mensah is offered continued support. This could take the form of intensive psychotherapy or counselling in order to come to terms with the problems he is experiencing."

26. There was then a panel review on 13th January 1999; but before that date Mr Baker, acting on behalf of Mr Mensah, made representations. Mr Baker was the director of the Brighton and Hove Racial Equality Service. I will draw attention briefly to some of the points which Mr Baker makes. He refers to the Race Relations Act having been passed in 1968, though it is not suggested that that Act was of direct relevance in the circumstances of this case. He also refers to the identity problem which Mr Mensah had. He said:

"It is agreed in the Investigation that [Mr Mensah's] identity has been damaged. What is relevant is whether Islington should ... have recognised this problem , and it is clear that if they did no action was taken.

During this period everyone was happy with [Mr Mensah], which was his intention as he sought to integrate within the confines set by those around him. He sought to be white, even though that destroyed his internal identity.

This conforms to the work of Peter Berger, whose books have been part of social work and other sociology course work since 1963."

27. Then in his conclusions Mr Baker said*: "Clearly we do not agree with Mr Figes' conclusions. It is our contention that the focus on 1968 is not relevant. Islington failed to properly maintain its parental responsibility, and that makes the Council responsible."*

28. He then turns to deal with other matters and does not expand on that particular conclusion. I will now go back to the panel of review.

29. The notification of the decision of the panel of review was in a letter from the chair person to Mr Mensah dated 13th January 1999 in the bundle at 124. I am now going to set out certain passages which are material.

"The Panel were faced with the difficult task of looking retrospectively at your care. The Panel had to decide whether it was either fair or appropriate to apply contemporary standards of care to your situation. The Panel had to conclude that it could not. Practitioners operating in your time in care were working with the knowledge and understanding they had. Clearly today things would be done quite differently.

The Panel also considered carefully your comments about the investigation conducted by Roy Figes and Rafael Halahmy. The Panel concluded that the investigation was not thorough and therefore there were gaps in the report. The Panel felt that efforts should have been made to engage the foster mother and social workers involved. The Panel did not feel that reading records alone were enough to make definite conclusions on the adequacy and quality of your care. Without re-investigation the Panel would not be able to draw conclusions, but would like to stress that it acknowledges your feelings and pain and in no way disbelieves the allegations made.

The Panel conclude that with the benefit of hindsight the care that you received was inadequate and failed to prepare you for adult life as a black male. The Panel conclude that it is desirable that Islington Council offers some level of support in helping to redress this. The Panel are conscious of limitations imposed by law in the way a local authority is able to offer support, especially to someone who resides outside its geographical location and technically they have no responsibility of. Thus the Panel make the following recommendations to the Chief Social Services Officer.

1The Department supports any Housing application. ...

2An ex-gratia payment is made to cover the costs of counselling ...
3Once Mr Mensah is ready to relocate, the ex-gratia payment should cover the reasonable costs of relocation."

30. There is also in the bundle a report from Dr Maxime dated 24th February 2000. Dr Maxime is a chartered and registered clinical psychologist and consultant in the clinical psychology of children and families. She says that she has over 19 years in the area of children and families. The critical passages of her report for present purposes are at page 144 and 145 of the bundle. At paragraph 3.xi she says this: *"Sadly, I can say with clinical certainty that Mr Mensah's present unstable psychological condition is as a result of his being cared for; for the past 17 years in a placement, as Mr Figes, the Investigating Officer in his 01.6.98 Report stated, '....would not occur today.' ...*

4.v Therefore, even if early documentation is no longer available we have evidence that at least from the age of ten years, Frederick Mensah was in need of some psychological help to aid him in developing a sound identity formation as he developed over time.

4.vi As a Therapist, I am like some of my other professional colleagues involved in this matter less interested in 'who is to be blamed' and more concerned with 'what can be done to help this young man who has clearly suffered and is still suffering from a traumatic early life care experience towards some sort of psychological equilibrium."

31. She then makes a number of recommendations. The first is as follows:

"5.1 It is with careful thought and deliberation that I submit to the Honourable Court as my first recommendation, that Mr Frederick Mensah be offered some type of financial compensation for the suffering and ongoing psychological trauma he has endured at the hands of the two local authorities; especially Islington Council who were overseeing his welfare when placed with the Saunders family.

5.2 That arrangements are made as recommended in Jim Baker's Report for Islington Social Services to make provisions for Mr Mensah to have a minimum of 3 years Therapy Counselling with an agreed black Therapist.

5.3 That a clear package of continuing support and assistance is arranged for Mr Mensah in respect of housing, training and work exposure so as to assist this young man toward psychological stability."

32. I do not read Dr Maxime's report as saying that Islington fell below the standard of care to be expected of Islington Borough Council during Mr Mensah's childhood. She does, I accept, recommend that the court should award compensation; but that, of course, must depend upon the law. Third, she does clearly say that an appropriate way of assisting Mr Mensah would be by providing support and assistance in respect of housing benefit and work exposure and also in respect of therapy.

33. I now turn to the question of limitation. As I have said, the application to this court has focused on the issue of limitation. Time started to run on Mr Mensah's 18th birthday, which was 6th March 1983.

34. I now turn to the Limitation Act. I will start with section 11. Section 11 applies to actions for damages for negligence: see subsection (1). Subsection (3) provides that: *"An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) or (5) below".*

35. Subsection (4) provides that: *"Except where subsection (5) below applies, the period applicable is three years from-*
(a) the date on which the cause of action accrued; or
(b)the date of knowledge (if later) of the person injured."

36. In this case subsection (5) is not relevant.

37. So the commencement of the period during which Mr Mensah could bring a claim commenced on whichever was later: the date on which the cause of action accrued -- I will take that date to be his 18th birthday -- or, if later, the date of the knowledge of the person injured. The position is that Mr Mensah had to bring his claim within three years of whichever was the appropriate date. Insofar as knowledge is concerned, this is defined for the purposes of section 11 by section 14. This says: *"Subject to section 1(a) below"*, which is not relevant,

"In sections 11 and 12 of this Act references to a person's date of knowledge are references to the date on which he first had knowledge of the following facts-
(a) that the injury in question was significant; and
(b) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute the negligence, nuisance or breach of duty;
(c)the identity of the defendant."

38. I do not need to read (d) because it does not apply. Then the tail piece to that subsection provides, *"...and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant."*

39. There has been some argument on the construction of the effect of section 14(1)(b), and our attention was drawn to the principle which is summarised in the Civil Court Practice 2000, Volume II at page 3506, paragraph 2017.3. It reads*: "**Knowledge that injury attributable to acts or omissions Time starts to run against a claimant for the purposes of this section**" [that is section 11] "**when he knew that the injury on which he founded his claim was capable of being attributed to an act or omission of the defendant irrespective of whether, at that point, he knew that the act or omission was actionable or tortious:** see **Dobie v Medway Health Authority** [1994] 4 All ER 450, **Broadley v Guy Clapham & Co** [1994] 4 All ER 439."*

40. We were also referred to section 33 of the Act. That says in subsection (1):
"If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which-
(a)the provisions of section 11 or 12 of this Act prejudice the plaintiff or any person whom he represents; and
(b)any decision of the court under this subsection would prejudice the defendant or any person whom he represents;
the court may direct that those provisions shall not apply to the action, or shall not apply to any specified cause of action to which the action relates."

41. Then under subsection (3):
"In acting under this section the court shall have regard to all the circumstances of the case and in particular to-
(a) the length of, and the reasons for, the delay on the part of the plaintiff;
(b)the extent which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11;
(c)the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection ascertaining facts for the purposes of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;
(d)the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;
(e)the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages; and
(f)the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received."

42. The crucial question to be answered at this point is: when did Mr Mensah have the requisite knowledge for the purposes of the commencement of the limitation period for the purposes of section 11? I have read section 14, which defines knowledge for this purpose. The respondents have drawn our attention to a letter before action which Mr Mensah wrote in his own handwriting on 22nd July 1996. The letter starts by saying: *"I was fostered as a young child in my possession I have my records from islington social services department. The records that I have from the nineteen sixties are not accurate and their is controversy in places in those records."*

43. Then towards the concluding parts of the letter, he says: *"...I just cannot settle in this life I'm not happy. I never got on with the Saunders family I asked them about my natural parents when I was fourteen years old."*

44. That would be 1979. *"They said my mother didn't want me. This made me angry. I've been trying to find my real parents for a few years now I've got the international social services trying to find my father. The salvation army are trying to find my mother all though their doing this on my behalf know real progress has come from this because of lack of evidence none of this is my thought. The controversy and mismanagement lies with Islington Social Services who gave me these records. Yes, I want two sue Islington Social Services child care department for what they have put me through I want £50,000 in compensation to help me build my shattered life."*

45. It is signed by Mr Mensah. So, while Mr Mensah would not be able to articulate the precise nature of the fault which he alleges on the part of Islington Borough Council, in my judgment it was not necessary for him to do so. He merely had to be aware that some act or omission had taken place which had adversely affected him while he was in care for which Islington Borough Council or East Sussex Borough Council

were responsible. He clearly refers to mismanagement on the part of Islington Social Services and he refers to his shattered life, which indicates that he was aware that he had suffered significant injury.

46. In addition to this, the fact that Mr Mensah was already conscious of his cultural identity crisis is apparent from reports in 1989. There is in the green file placed before us a probation report of 5th April 1989. That states on the first page under "*Past History*" that Mr Mensah had been taken into care at an early age and placed with foster parents in Lewes at the age of three and remained there until he was 20. *"During the years leading up to his departure from the family, continual rows ensued. He has angry and bitter memories of his time in Care believing that his welfare was not the prime concern behind the foster placement. He remained in contact with his foster parents after he left but now sees little of them."*

47. Then under paragraph 5 headed "*Conclusion": "Largely as a result of his past history Mr. Mensah is a confused and angry young man who lacks the maturity of his age."*

48. There was also a report from Dr Culliford, a consultant psychiatrist, dated 6th April 1989. Dr Culliford says: *"Mr Mensah was fostered into a Caucasian family ... . This couple were elderly, and Mr Mensah described feeling unhappy throughout the lengthy period of fostering which continued until he was 20. '**I never felt much love**', he said. Indeed he felt used by the family who made him work hard. He is also aware of having been confused about his identity and keen for a number of years to discover more about the Ghanaian aspects. '**I felt different. I felt odd**', he told me about living in a white family in Lewes."*

49. There was also a pre-sentence report of 14th November 1994. This is later in time, but it says at paragraph 8 that Mr Mensah vividly describes his awareness of a conflict between his nature, which is inherited from his parents, and his nurture. He is angry and resentful that he was brought up in an alien culture as he feels that this has caused his crisis of identity. That report therefore seeks to reflect something which Mr Mensah had expressed to the probation officer, Mrs Miller, who wrote that report. There seems to me little doubt that the earlier reports of 1989 were handed to Mr Mensah at about the same time.

50. In my judgment, there is no basis for challenging the judge's conclusion that Mr Mensah had the requisite knowledge for the purposes of section 11 of the Limitation Act 1980 well before 23rd September 1996. In my judgment the documents show that he would have had that knowledge from about 1989 or at the latest 1994. Accordingly, it becomes necessary to consider whether the judge erred in the exercise of his discretion under section 33. I have already referred to that section. That section requires the court to consider all the circumstances of the case, including particular matters which are referred to in subsection (3). His Honour Judge Kennedy was particularly impressed about the evidential difficulties of the case. I have already expressed my view that those concerns were well placed, bearing in mind that much will turn on the recollection of persons responsible for the care of Mr Mensah over years from the 1960s through to mid 1985.

51. There were other factors to which the learned judge did not refer. In particular there is, as it seems to me, grave difficulty in Mr Mensah showing that either of the defendants was in fact in breach of a duty of care. In order to succeed in his claim he has to show a duty of care which is not, at this stage at least, challenged. He also has to show a breach of a duty of care, that is that the defendants fell short of the standard to be expected of reasonably careful and competent local authorities at that time. I have read the reports that have been filed, and there is, as I say, no prospect of success on the basis of those matters in establishing a breach of duty.

52. The third matter, to which the judge did not refer but which also confirms his conclusion, is that there were recommendations for some form of amends to Mr Mensah. I hope those recommendations for amends were duly taken up by the defendants. It is a factor which would have confirmed the judge in his conclusion.

53. It goes without saying, but I think it ought to be said, that litigation in this sort of case is extremely cumbersome, lengthy, time consuming and costly and, as I see it, there would be little in addition for Mr Mensah to get out of it other than that which the London Borough of Islington have already been recommended to provide. Of course one cannot but feel sympathy for Mr Mensah's problems; but at the end of the day, in my judgment, the judge's judgment cannot be disturbed.

54. **LORD JUSTICE PETER GIBSON**: I agree. I add a few words on the unusual way that the hearing of this application for permission has proceeded.

55. Mr Mensah commenced proceedings in person and earned the commendatory remarks from His Honour Judge Kennedy QC which Arden LJ has already cited from Mr Mensah's appearances before that judge. Before us Mr Mensah appeared with a Mackenzie friend, Mr Alexander. Mr Alexander had applied some time ago to this court to be allowed to address the court on behalf of Mr Mensah. That was refused as Mr Alexander had no right of audience. When Mr Mensah was given the opportunity to address us today, it soon became apparent that he was not in a position to present his case himself and that despite this court's refusal to allow Mr Alexander to speak for Mr Mensah, Mr Mensah was relying on Mr Alexander to do just that. He asked that Mr Alexander should be allowed to make submissions. We were anxious that Mr Mensah should have a proper opportunity of dealing with the points taken against him by the defendants. In accordance with the overriding objective of the CPR and to avoid the waste of today's hearing, attended, as this court had earlier directed, by counsel for the defendants, we took the exceptional course in this highly unsatisfactory situation of allowing Mr Alexander to speak for Mr Mensah.

56. But I must make it clear that this should not be taken as creating any precedent as to how those who have no right of audience can act as advocates for litigants in person. Anyone who aspires to be an advocate should obtain the requisite qualifications, and the court should be very slow to permit those who are allowed to be present in court as Mackenzie friends to act as advocates. That is not the proper function of a Mackenzie friend. The position in law was recently restated by this court **in R v Bow County Court ex parte Pelling** [1999] 1 WLR 1807. I repeat and endorse the warning given by Lord Woolf MR at page 1825 that if a person chooses to appear regularly as a Mackenzie friend and uses the litigant as a mere puppet, such behaviour could provide a firm foundation for a judge not wishing him to be present as a Mackenzie friend.

57. Mr Alexander's first request to us was to ask for an adjournment to enable an application for legal aid to be made. But he told us that Mr Mensah had tried unsuccessfully to obtain legal aid on four previous occasions, and there is no reason to think that he would be more successful on a fifth attempt. Mr Alexander then asked for an adjournment on the basis that he had not had a proper opportunity to consider the papers and because the skeleton argument of one of the defendants arrived only last night and that of the other defendant only this morning. So far as he was requesting an adjournment to read the papers other than the skeleton, Mr Alexander has known for some time that he could appear has a Mackenzie adviser and he has had ample opportunity, in my view, to familiarise himself with the documents which Mr Mensah chose to put before this court. So far as he was requesting an adjournment to read the skeletons provided rather late by the defendants, it was plainly right that he should have that opportunity. We therefore adjourned the hearing for more than an hour to enable him to read those brief skeletons and to consider them.

58. Mr Alexander did not begin to grapple with the difficulties provided by the documents referred to by my Lady, nor with the conditions posed by the Limitation Act. Having heard what he has had to say, I too am in no doubt, for the reasons given by my Lady, that the appeal has no prospect of success. Indeed, I would go further. This is an attempt to appeal in a case where there has already been one unsuccessful appeal to a court. Mr Mensah would have had to show that a point of principle or practice was raised or that the case was one which for some other compelling reason should be considered by this court: see paragraph 2.19 of the Practice Direction for the Court of Appeal (Civil Division). That test, in my judgment, was plainly not satisfied.

59. I too, therefore, would dismiss this application.

Order: Application dismissed with costs. Permission to appeal to the House of Lords refused.

The Applicant appeared in person assisted by his Mackenzie friend, Mr Alexander.
MR S FORD (Instructed by Brown Jacobson, 44 Castle Gate, Nottingham, NG1 7BJ) appeared on behalf of Islington Council.
MR A WARNOCK (Instructed by Barlow Lyde & Gilbert, Beaufort House, 15 St Boltoph Street, London EC3A 7NJ) appeared on behalf of East Sussex County Council.