
GARDEN COURT
CHAMBERS

Local Authority duties to Children and Judicial Review

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Introduction

What this part of the seminar will cover:

- Section 17 – Duties to Children in Need
- Section 17 – Duties to migrant children and their families
- Duties and powers to accommodate children (Section 20)

Section 17 Duties

- Services to children in need generally provided under CA 1989 section 17, with exception that most services to disabled children provided by Chronically Sick and Disabled Persons Act (CSPDA) 1970 section 2
- **Section 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.

- There is a duty to assess all children who are or may be 'in need' in accordance with the *Framework for the assessment of children in need and their families*, TSO, 2000, and from 15 April 2013 is to be found in *Working Together to Safeguard Children*, DfE, March 2015 (now 2018). – the requirement being for an initial or core assessment, now updated.
- In accordance with the guidance, local authorities are required to publish a local protocol for their assessments and a threshold document which describes the criteria for referral for assessment.

Section 17 Duties

- Following assessment, a decision must be taken as to whether it is ‘necessary’ to provide services to the child or family. If positive then duty arises to provide services to meet the assessed need
- Any services provided to children ‘in need’ must be specified in a care plan which should amount to ‘a realistic plan of action’ to show who will do what and when to help the child.
- Lord Hope in In R(G) v Barnet LBC [2003] UKHL 57: section 17 scheme does not create a specific or mandatory duty owed to an individual child. It is a target duty which creates a discretion in a local authority to make a decision to meet an individual child's assessed need.
- Unless and until a local authority has determined that a child within its area is 'in need', the powers under s 17 to provide accommodation or any other assistance are not engaged (*MN and KN v Hackney Borough Council [2013] EWHC 1205 (Admin)*).
- There are no categories or sub-divisions of 'children in need' in the statutory scheme (*R (on the application of (1) C (2) T (3) M (4) U) (Appellant) v Southwark London Borough Council (Respondent) & Coram Children's Legal Centre (Intervener) [2016] EWCA Civ 707*).

Schedule 2 CA 1989

Section 17(2) states that for the purpose of facilitating general duty under section 17(1) LA's shall have 'specific' duties and powers set out in CA 1989 Schedule 2 Part I.

In R(G) v Barnet LBC [2003] UKHL 57: Lord Nicholls described these duties and powers as a 'motley collection'.

Schedule 2 CA 1989:

- These include:

(i) A duty to take 'reasonable steps' to identify the extent to which there are children in need in the authority's area. [Sch 2, para 1.]

(ii) A duty to 'open and maintain a register of disabled children within their area'; [Sch 2 para 2.]

(iii) "Where it appears to a local authority that a child within their area is in need, the authority may assess his needs for the purposes of this Act at the same time as any assessment of his needs is made…" [para 3]

(iv) A duty to take 'reasonable steps, through the provision of services under Part III of this Act to prevent children within their area suffering ill treatment or neglect' [para 4(1)]

(v) A duty to inform another authority if a child in their area who is likely to suffer harm moves or is likely to move to the second authority's area; [para 4(2)]

(vi) A power to assist a person who is causing a child to suffer to be likely to suffer ill treatment to move to alternative premises [para 6(1) (a)]

(vii) duty to provide services 'to minimise the effect on disabled children within their area of their disabilities' and to give disabled children the opportunity to lead lives which are as normal as possible; and to assist individuals who provide care for such children to continue to do or more effectively by giving them breaks from caring . [para 6(1)(b) and (c)]

(vii) A duty to take reasonable steps to reduce the need to bring care proceedings, criminal proceedings, any other family proceedings, or proceedings under the inherent jurisdiction of the High Court with respect to children within their area; [para 7(a)]

(viii) A duty to take reasonable steps to encourage children their area not to commit criminal offences [para 7(b)]

(ix) A duty to take reasonable steps to avoid the need for children within their area to be placed in secure accommodation [para 7(c)]

(x) A duty to make such provision as they consider appropriate for the following children 'in need' living with their families including:

- advice, guidance and counselling;
- Occupational, social, cultural or recreational activities

- Home help
- Assistance with travelling to and from home for the purpose of taking advantage of any other service; and
- Assistance to enable the child and his or her family to have a holiday; [para 8]

(xi) A duty to make provision for such services as they consider appropriate, including those listed in para 8, in respect of 'accommodated children', that is those for whom the local authority has received a notification under section 85 or s86 from another agency that is providing the child with accommodation. [para 8A]

(xii) A duty to provide such family centres as local authorities consider appropriate in relation to children within their area; [para 9]

(xiii) A duty to take such steps as area reasonable practicable to enable children in need who are not looked after but living apart from family to enable them to live with family, or to promote contact if necessary to safeguard or promote welfare; [para 10]

(xiv) A duty to have regard to the different racial groups to which children in need in area belong in making arrangements for day care and in promoting fostering in their area. [para 11]

Section 17 Duties: R (C & Others) v London Borough of Southwark [2016] EWCA Civ 707

- It is settled law that the section 17 scheme does not create a specific or mandatory duty owed to an individual child. It is a target duty which creates a discretion in a local authority to make a decision to meet an individual child's assessed need.
- The decision may be influenced by factors other than the individual child's welfare and may include the resources of the local authority, other provision that has been made for the child and the needs of other children (see, for example *R (G) v Barnet London Borough Council* [2003] UKHL 57, [2004] 2 AC 208 at [113] and [118]).
- Although the adequacy of an assessment or the lawfulness of a decision may be the subject of a challenge to the exercise of a local authority's functions under section 17, it is not for the court to substitute its judgment for that of the local authority on the questions whether a child is in need and, if so, what that child's needs are, nor can the court dictate how the assessment is to be undertaken.
- The court should focus on the question whether the information gathered by a local authority is adequate for the purpose of performing the statutory duty i.e. whether the local authority can demonstrate that due regard has been had to the dimensions of a child's best interests for the purposes of section 17 CA 1989 in the context of the duty in section 11 Children Act 2004 to have regard to the need to safeguard and promote the welfare of children.

‘In Need’

(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.

Broad statutory definition is merely first hurdle that child must clear in order to be entitled to services, and must not exclude groups, as this is likely to be unlawful

Child in Need: Case Law

- ***R (A) v Croydon LBC*** [2009] UKSC 8, [2010] 1 All ER 469, [2009] 1 WLR 2557

Lady Hale in *A* at para 26 analysed the point in this way:

"The question whether a child is 'in need' requires a number of different value judgments . . . . Questions like this are sometimes decided by the courts in the course of care proceedings under the Act. Courts are quite used to deciding them upon evidence for the purpose of deciding what order, if any, to make. But where the issue is not, what order should the court make, but what service should the local authority provide, **it is entirely reasonable to assume that Parliament intended such evaluative questions to be determined by the public authority, subject to the control of the courts on the ordinary principles of judicial review.** Within the limits of fair process and 'Wednesbury reasonableness' there are no clear cut right or wrong answers."

Child in Need: case law

- ***R(O) v London Borough of Lambeth*** **[2016] EWHC 937 (Admin)**
- Application for judicial review made by a child challenging the London Borough of Lambeth's assessment of her as not being a 'child in need' under section 17 Children Act 1989.
- 'O' was the claimant child, supported by her mother and litigation friend, 'PO', in this application for judicial review of the decision of the London Borough of Lambeth Council to refuse to provide her with accommodation and support. O argued that the local authority's decision was irrational and unlawful.
- The Judge found in favour of the Local Authority and dismissed O's claim. The Judge found that the family did have a reasonable level of support and that the evidence available formed a rational basis to conclude that the assessing social worker could not be satisfied that PO and O were destitute [45]. Additionally, O and PO had been assisted by friends with accommodation in the past. O and PO could provide no explanation as to why such support could no longer continue [49]. As such, it was a reasonable inference for the Local Authority to conclude that O was not a child in need.

Child in Need: case law

- ***R(O) v London Borough of Lambeth*** **[2016] EWHC 937 (Admin)**
- Guidance from Helen Mountfield QC (sitting as a Deputy High Court Judge) at [17]:
- "17. Whether or not a child is 'in need' for these purposes is a question for the judgement and discretion of the local authority, and appropriate respect should be given to the judgements of social workers, who have a difficult job. In the current climate, they are making difficult decisions in financially straitened circumstances, against a background of ever greater competing demands on their ever diminishing financial resources. So where reports set out social workers' conclusions on questions of judgement of this kind, they should be construed in a practical way, with the aim of seeking to discover their true meaning (see per Lord Dyson in McDonald v Royal Borough of Kensington & Chelsea [2011] UKSC 33 at [53]). The way they articulate those judgements should be judged as those of social care experts, and not of lawyers. Nonetheless, the decisions social workers make in such cases are of huge importance to the lives of the vulnerable children with whose interests they are concerned. So it behoves courts to satisfy themselves that there has been sufficiently diligent enquiry before those conclusions are reached, and that if they are based on rejection of the credibility of an applicant, some basis other than 'feel' has been articulated for why that is so"

‘Within their area’

- Duties only owed to children who are ‘within the area’ of particular local authority.
- Approach is broad and may be ‘in need’ in the area of more than one authority.
- R v Wandsworth LBC ex p Sandra Stewart [2002] 1 FLR 469 – Jack Beatson QC held that ‘within there area’ meant simply that the physical presence’ of a child within the authority’s area is required. This meant that children held to be ‘within the area’ of both Lambeth where the hostel they lived was located and Wandworth where they went to school. But they were not in the area of Hammersmith who had placed them as a temporary measure outside of their area.
- Important to ensure children ‘in need’ are not neglected while authorities resolve who should meet their need. Section 27 CA 1989 permits an authority to ask another authority for assistance in carrying out its Part III functions, and duty applies to other public bodies such as housing authorities.
- R (Liverpool CC) v Hillingdon LBC [2008] EWHC 1702 – held that Liverpool’s initial responsibility for a young failed asylum seeker AK ceased when he was no longer within their area, having been detained and removed to adult immigration facilities in Hillingdon, but reverted to Liverpool upon his voluntary return.

Children in Custody – whose responsibility

- What are duties to children 'in need' who are in custody.
- R(Howard League for Penal Reform) v Sec of State for Home Department [2003] 1 FLR 484 – established that the duties which a local authority would otherwise owe to a child under section 17 or s47 do not cease to be owed because the child is detained in custody
- The primary responsibility to the child lies with the 'host authority, but obligations on the 'home authority to children who were 'looked after' prior to the imposition of a custodial sentence subsist during the sentence.
- *Working Together to safeguard children* statutory guidance also makes it clear that where children were looked after – continuing duty to visit and to assess children while in a YOI on sentence or remand.
- Children accommodated pursuant to section 20 lost that status on entering custody, however the home authority must appoint a representative to visit all children and young people who have ceased to be accommodated who will be responsible for assessing the child's needs in order to make recommendations about the support the child will need whilst detailed and support necessary on release.

Duty to Assess

- No explicit duty to assess under the CA 1989. A majority of the House of Lords in the Barnet case accepted that as a matter of public law, such a duty did exist. Lord Hope stated that compliance with this duty 'will involve assessing the needs of each child who is found to be in need in their area as paragraph 3 of Schedule 2 makes clear." [para 77]
- The Secretary of State's Guidance "*Working Together to Safeguard Children*", the relevant version of which was published in July 2018. The initial and core assessment should cover the three domains:

(i) The child's developmental needs;

(ii) Parenting capacity;

(iii) Family and environmental factors.

- Important outcome is that the assessment carefully and accurately sets out and evaluates child's needs so that a proper decision can be made as to what services (if any) are required to be provided to the child and/or family to meet those needs.

Young Carers Needs Assessments

17ZA Young carers' needs assessments

(1) A local authority must assess whether a young carer within their area has needs for support and, if so, what those needs are, if –

(a) it appears to the authority that the young carer may have needs for support, or (b) the authority receive a request from the young carer or a parent of the young carer to assess the young carer's needs for support.

...

(7) A young carer's needs assessment must include an assessment of whether it is appropriate for the young carer to provide, or continue to provide, care for the person in question, in the light of the young carer's needs for support, other needs and wishes.

(8) A local authority, in carrying out a young carer's needs assessment, must have regard to (a) the extent to which the young carer is participating in or wishes to participate in education, training or recreation, and the extent they wish to work

(9) The assessment must involve the young carer; the parent and any other person the young carer wants involved;

(10) Must provide a written record; (11) consider whether the young carer is a child in need and (12) A local authority must take reasonable steps to identify the extent to which there are young carers within their area who have needs for support.

Services for Children in Need

Section 17 (5) Every local authority –

(a) shall facilitate the provision by others (including in particular voluntary organisations) of services which it is a function of the authority to provide by virtue of this section, or section 18, 20, 22A to 22C, 23B to 23D, 24A or 24B; and

(b) may make such arrangements as they see fit for any person to act on their behalf in the provision of any such service.

(6) The services provided by a local authority in the exercise of functions conferred on them by this section may include providing accommodation and giving assistance in kind or in cash.

In ***R(O) v London Borough of Lambeth*** **[2016] EWHC 937 (Admin)**, Helen Mountfield QC, sitting as a Deputy High Court Judge, gave the following helpful summary concerning the application of s.17, in particular in cases where the family has no immigration right to be in the UK.

"6. That duty [under s.17(1)] does not impose an obligation upon a local authority to provide anything particular for any child. However, by virtue of section 17(3) Children Act 1989, a local authority has a wide discretion to provide a service for a particular child in need or any member of his family "if it is provided with a view to safeguarding or promoting the child's welfare". Such services may include accommodation or the giving of assistance in kind or in cash: section 17(6) Children Act 1989.

Power or Duty to Provide accommodation

- Section 17(6) provides that: "The services provided by a local authority in the exercise of the functions conferred on them by this section may include providing accommodation and giving assistance in kind or in cash."
- Local authorities have a **power** to provide accommodation to children in need and their families under section 17(6)
- **R(G) v Barnet LBC [2003] UKHL 57** considered whether CA 1989 23(6) imposed a duty to accommodate children with their families. The HL unanimously rejected this argument finding that section was only concerned with the placement of looked after children with parents or relatives who already had accommodation and not with the provision of accommodation.
- The majority also concluded that s17 did not place a duty on the LA in the case of any individual child to provide accommodation for the child and the child's parents together, in order to avoid separating them.
- That LAs were allowed to take into a/c their resources when considering how to meet general duty under section 17
- LAs were stretched and entitled to regard their child protection and safeguarding duties as core functions and to preserve resources for meeting those duties

Services for Migrant Children and their Families

If a parent falls into one of the following categories, they are excluded from accessing support by schedule 3 of the Nationality, Immigration and Asylum Act 2002, unless the situation is so serious that a failure to provide support would breach human rights. The excluded categories are:

- Granted refugee status by another EEA state
- Citizens of other EEA states
- Refused asylum seekers who have failed to cooperate with removal directions
- People in the UK in breach of immigration laws (except asylum seekers). This means:
- Present in the UK without a right of abode or leave to enter/remain
- Not entitled to remain in the UK under EEA treaties
- Not exempted from the need to have leave (e.g. diplomats, forces personnel)

Services for Migrant Children and their Families

- If the family falls into one of the excluded categories, they may still be able to access section 17 support if failing to provide support would breach a person's rights under the ECHR or EU law.
- Where there are no alternative forms of support, the family is not able to leave the UK, and the family is destitute, failure to provide support may:

(i) amount to "inhuman or degrading punishment" contrary to Article 3 of the ECHR or

(ii) amount to an unjustified interference with their right to a private or family life contrary to Article 8 ECHR.

- In such cases, the adults will not be excluded by Schedule 3
- If the parents may be excluded under schedule 3 of the Nationality, Immigration and Asylum Act 2002, social services may also carry out a further human rights assessment.

Migrant Children: Case Law

- In ***R(MN & KN) v Hackney LBC*** **[2013] EWHC 1205 (Admin)**,
- Letter before action dated 14 March 2012 which stated that, although the family were currently staying temporarily with a friend, they had been asked to leave before 17 March 2012 and would then be homeless and destitute unless Hackney provided them with accommodation and financial assistance.
- A Children Act assessment was completed with a conclusion was that the Claimants were not children in need for the purpose of s 17.
- The ECHR assessment concluded that there would not be a breach of art 3 or art 8 if support was refused.
- Leggatt J (as he then was), considered the relationship between s.17 of the 1989 Act and Schedule 3 NIAA 2002, which provides for the withholding and withdrawal of support from certain categories of person. At [18] to [19] Leggatt J considered that:
- The Claimants and their parents were all in the United Kingdom in breach of immigration laws (and were not asylum-seekers)

R(MN & KN) v Hackney LBC [2013] EWHC 1205

- 1)Paragraph 1 of Sch 3 therefore applies so as to make them all prima facie ineligible for support or assistance under s 17 (see para 7) and
- (2) However, as the Claimants are children, para 1 does not prevent the provision of support or assistance to them (see para 2(1)(b)).
- (3) Nevertheless, para 1 does indirectly have this effect so long as the Claimants are living with their parents, because it prevents powers under s 17 from being exercised so as to provide support or assistance to the Claimants' parents (see para 1(2) and R(M) v Islington LBC at paras 17 – 19).
- (4) All this is subject to para 3, which allows a power under s 17 to be exercised if and to the extent that its exercise is necessary for the purpose of avoiding a breach of the Convention rights of any member of the Claimants' family.
- 19. The upshot is that, even if the Claimants are children “in need” for the purpose of s 17 of the 1989 Act, Hackney may only provide accommodation or other support to them and their parents as a family in the exercise of its powers under s 17 if and to the extent that to do so is necessary for the purpose of avoiding a breach of Convention rights.”

R(MN & KN) v Hackney LBC [2013] EWHC 1205

- Conclusion at para 41: "It follows that, unless and until a local authority has determined that a child within its area is "in need", its powers under s 17 to provide services to the child or the child's family are not engaged. Accordingly, since in this case the assessments undertaken by Mr Brown did not conclude, and Hackney did not decide, that as of 16 March 2012 the Claimants were "in need", Hackney did not have power under s 17 to provide accommodation or any other assistance to the Claimants or their parents."
- Considered the sufficiency of the investigation into circumstances and found that the LA had taken reasonable steps to ascertain whether the claimant was in need. Court did not find that irrational decision
- Hackney acted lawfully in declining to accept that were children in need.
- Note: If the family fails to provide enough information to demonstrate that the children are in need, social services may conclude that it has no power to provide support: *MN & Anor v London Borough of Hackney* [2013] EWHC 1205 (Admin) and *R (O) v London Borough of Lambeth* [2016] EWHC 937 (Admin). This can include providing information about where they have previously stayed, who has provided support, and why support can no longer be provided.

Migrant Children: Case Law

- ***R(O) v London Borough of Lambeth*** **[2016] EWHC 937 (Admin)**

"13. If a child, especially a young child, is here with a parent, and the family unit cannot be sent anywhere else, it will often constitute a breach of the child's rights to respect for her private and family life not to accommodate her with her family. If the local authority must assume that the family cannot be removed from the jurisdiction consistently with its human rights (as to which see paragraph 39 below), then the effect of section 17 Children Act 1989 and duties not to breach Convention rights by reference to section 6 Human Rights Act 1998, read together with paragraphs 2 and 3 of schedule 3 of the Nationality Immigration and Asylum Act 2002, is consequently often to render the section 17 power to accommodate – in effect – a duty imposed on the local authority to act as provider of last resort in cases where a child and his or her family would otherwise be homeless or destitute."

Migrant Children: Case Law

***R(O) v London Borough of Lambeth* [2016] EWHC 937 (Admin)**

- Grounds and Judgement in this case:
- The first ground of challenge was that the finding as to destitution was irrational. The Judge found that the assessing social worker was entitled not to be satisfied that the family was destitute.
- The second ground of challenge was to the rationality of Lambeth's conclusion that O and PO did not require accommodation because it was assessed that PO had access to a more extensive network of support available to her than she was prepared to disclose in the assessment and that people in that network could continue to accommodate her. The Judge found that this was a reasonable inference to draw

Migrant Children: Case Law

R (on the application of OA and others) v Bexley London Borough Council [2020] EWHC 1107 (Admin)

- The Claimants are a family of three. The First Claimant ("**C1**") is the mother, the Second Claimant ("**C2**") is her 16 year old son, and the Third Claimant ("**C3**") is her 19 year old son and C2's older brother.
- The Claimants are all Nigerian nationals. None of them has immigration leave to remain in this country. As such, they have been excluded from mainstream benefits by Schedule 3 of the Nationality, Immigration and Asylum Act 2002 ("**NIAA 2002**"); generally referred to as having "no recourse to public funds" ("**NRPF**").
- Bexley accepted section 17 duty towards C2 as a child in need in their area and provided accommodation and financial support to C2 and to C1. C3 lived with them but not because Bexley considered they had an obligation but because it didn't cost any more for him to stay.
- the Defendant was judgement entitled to conclude, and indeed bound to conclude, that it had no power under s.17 of the 1989 Act to provide financial support for C3, in order to meet the welfare needs of C2.

What is required

- Required to assess each individual's child's needs and decide whether and if so how, to meet them according to the assessment framework;
- A refusal to accommodate a family together can be challenged on ordinary public law 'reasonableness and proportionality grounds" and under Article 8 ECHR which requires the court to determine for itself the proportionality of any failure to provide services, including accommodation by a local authority;

In addition:

- Local authorities may have to help a family in the longer term where there are legal or practical barriers that prevent a family returning to the country of origin. This could be the case where, for example:
- The family is waiting for the Home Office to make a decision on an application for leave to remain (that is not hopeless or abusive) based on human rights grounds, as in *Birmingham City Council v Clue* [2010] EWCA Civ 460; or

- The family is appealing against an immigration decision (and the appeal is not hopeless or abusive) or proceeding with a judicial review; or
- The family can show that they are unable to return to their country of origin (e.g. they are in the late stages of pregnancy, or have a serious medical condition that prevents travel).
- Where there is a barrier to the family's return, the local authority will not be able to discharge its duty by advising or assisting the family to return to their country of origin. They will have to provide support.
- If no legal or practical barrier has been identified, the local authority should consider for itself whether returning the family to their country of origin would breach their human rights or their rights under European law. Usually the local authority undertakes a further assessment (frequently called a "human rights assessment") to establish whether any exceptions to the restrictions exist.

Section 20

20 Provision of accommodation for children: general

(1) Every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation as a result of –

- (a) there being no person who has parental responsibility for him;
- (b) his being lost or having been abandoned; or
- (c) the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care.

....

(3) Every local authority shall provide accommodation for any child in need within their area who has reached the age of sixteen and whose welfare the authority consider is likely to be seriously prejudiced if they do not provide him with accommodation.

Section 20

(4) A local authority may provide accommodation for any child within their area (even though a person who has parental responsibility for him is able to provide him with accommodation) if they consider that to do so would safeguard or promote the child's welfare.

(5) A local authority may provide accommodation for any person who has reached the age of sixteen but is under twenty-one in any community home which takes children who have reached the age of sixteen if they consider that to do so would safeguard or promote his welfare.

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

(a) has parental responsibility for him; and

(b) is willing and able to –

(i) provide accommodation for him; or

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

Section 20

S. 20 of the 1989 Act sets out the duty to provide accommodation for a child in need.

R(G) v Southwark LBC [2009] 1 WLR 1299 provides guidance on how the duty under Section 20(1) is triggered. Baroness Hale drew on the analysis of Ward LJ in R(A) v Croydon [2008] EWCA Civ 1445 to construct seven questions (para 28):

- Is the applicant a child?
- Is the applicant a 'child in need'?
- Is the child within the local authority's area?
- Does the child appear to the local authority to require accommodation?
- Is that need the result of:
- There being no person who has parental responsibility for the child; or
- The child being lost or having been abandoned;

R(G) v Southwark LBC [2009] 1 WLR 1299

- The person who has been caring for the child being prevented (whether or not permanently and for whatever reason) from providing the child with suitable accommodation or care?
- What are the child's wishes and feelings regarding the provision of accommodation for him or her?
- What consideration is duly to be given to those wishes and feelings?

In that case, after considering the list, Baroness Hale concluded: "It follows , therefore, that every item in the list had been assessed in A's favour, that the duty had arisen, and that the authority were not entitled to "sidestep" that duty by giving the accommodation a different label." (para.28)

- **R (on the application of Cunningham) v Hertfordshire County Council & Another [2016] EWCA Civ 1108 i**s relevant to the question of whether the child required accommodation pursuant to section 20(1). At paragraph 21, Lord Justice Burnett states:

"21. A recurrent theme in the appellant's submissions is that if she had not agreed with her daughter to accommodate R, then Hertfordshire would have been fixed with a statutory duty to accommodate him and then support him as a looked after child. That, however, is not how the statutory duty under section 20(1) of the 1989 Act is couched. The duty arises when it appears to the local authority that a child in need in their area requires accommodation. Only then are they obliged to provide accommodation. That is an intensely fact-sensitive enquiry. It is for the local authority to make the assessment. Their conclusion is vulnerable to challenge only on conventional public law grounds, including that it was not one reasonably open to them."

Williams & Anor v Hackney LBC [2019] 1 FLR 310, SC

In ***Williams & Anor v Hackney LBC [2019] 1 FLR 310, SC***, Barnoness Hale@

In this case: Since the parents had neither objected nor unequivocally requested the children's immediate return, there was a lawful basis for the children's continued accommodation under s 20. Therefore, the ground on which the judge held their accommodation to have been in breach of the parents' Art 8 rights was not made out (see para [61]).

Where s 20 arrangements replaced the compulsory police protection arrangements under s 46, without the children returning home in the meantime, the focus was upon whether there had been a truly voluntary delegation of the exercise of parental responsibility, and in a case such as the present, it was upon the parents' rights under s 20(7) and s 20(8) (see para [53]).

The Supreme Court reiterated that a local authority cannot interfere with a person's exercise of their parental responsibility against their will unless it has first obtained a court order and accordingly, no local authority has the right or the power, without a court order, to remove a child from a parent who is looking after the child and wishes to continue to do so.

Williams & Anor v Hackney LBC [2019] 1 FLR 310, SC

- Within this context, the Supreme Court stated the following principles governing the use of s 20:

(a) Where a parent agrees to the removal and accommodation of his or her child, that parent is simply delegating the exercise of their parental responsibility, for the time being, to the local authority;

(b) Any such delegation of the exercise of parental responsibility must be real and voluntary. Delegation of the exercise of parental responsibility by a parent should not occur as the result of compulsion where the parent lacks the requisite capacity to decide to delegate parental responsibility or where an impression has been given to the parent that he or she has no choice but to delegate the exercise of parental responsibility. However, delegation can be real and voluntary without being fully informed;

(c) Absent a real and voluntary delegation of the exercise of parental responsibility to it, the local authority has no power to interfere with the parent's parental responsibility by removing the child;

(d) The active delegation of a parent who is not looking after, or offering to look after, the child is not required, any more than it is when there is no one with parental responsibility or the child is abandoned or lost;

Williams & Anor v Hackney LBC [2019] 1 FLR 310, SC

(e)In any event, as a matter of good practice, local authorities should give parents clear information about what they have done and what the parents' rights are. This should include not only the parents' rights under s 20(7), (8), but also their rights under other provisions of ChA 1989, including the right pursuant to Sch 2, Pt II, para 15 to know the whereabouts of their child. Parents should also be informed of the local authority's responsibilities. In an appropriate case, that may include information about the local authority's power and duty to bring proceedings if they have reasonable grounds to believe that the child is at risk of significant harm if they do not;

(f) Parents may ask the local authority to accommodate a child as part of the services they provide for children in need. If the circumstances fall within s 20(1), there is a duty to accommodate the child. If they fall within s 20(4), there is power to do so. Again, this operates as a delegation of the exercise of parental responsibility for the time being and, although s 20 does not expressly require that such delegation be made with informed consent, the duty under s 20(1) and the power under s 20(4) are subject to s 20(7)–(11). Again, as a matter of good practice, parents should be given clear information about their rights and the local authority's responsibilities;

(g) Pursuant to s 20(7), the authority cannot accommodate a child if a parent with parental responsibility who is willing and able either to accommodate the child herself or to arrange for someone else to do so objects;

Williams & Anor v Hackney LBC [2019] 1 FLR 310, SC

(k) A parent with parental responsibility may remove the child from accommodation provided or arranged by a local authority at any time without the need to give notice, in writing or otherwise. The only exception to this is where preventing such a removal constitutes doing what is reasonable in all the circumstances to safeguard and promote the child's welfare for the purposes of ChA 1989, s 3(5);

(i) If a parent unequivocally requires the return of the child, the local authority has neither the power nor the duty to continue to accommodate the child and must either return the child in accordance with that requirement or obtain the power to continue to look after the child, by way of applying for an emergency protection order, or if time allows, an interim care order;

(j) If there is a CAO under ChA 1989, s 8 or an order under the inherent jurisdiction of the High Court providing for the child to live with a particular person or persons, or if there is a special guardianship order in force, then a parent cannot object or remove the child if the person or persons with whom the child is to live, or the special guardian or guardians, agree to the child being accommodated;

(k) Once an accommodated child reaches 16, a parent has no right to object or to remove the child if the child is willing to be accommodated by the local authority;

Williams & Anor v Hackney LBC [2019] 1 FLR 310

(l) There is nothing in s 20 to place a limit on the length of time for which a child may be accommodated. However, local authorities have a variety of duties towards accommodated children. The general duties towards looked-after children in ChA 1989, s 22 include a duty to safeguard and promote their welfare, in consultation with both the children and their parents. This duty is reinforced by the Care Planning, Placement and Case Review (England) Regulations 2010, r 4 requiring local authorities to assess a child's 'needs for services to achieve or maintain a reasonable standard of health or development' and prepare a care plan for her, to be agreed with the parents if practicable;

(m) Although it is not a breach of s 20 to keep a child in accommodation for a long period without bringing care proceedings, it may well breach other duties under ChA 1989 and regulations, or be unreasonable in public law terms to do so. In some cases, it may also breach the child's or the parents' rights under Art 8 of ECHR.

Williams & Anor v Hackney LBC [2019] 1 FLR 310

Baroness Hale:

"In sum, there are circumstances in which a real and voluntary delegation of the exercise of parental responsibility is required for a local authority to accommodate a child under section 20, albeit not in every case: see para 40 above. Parents with parental responsibility always have a qualified right to object and an unqualified right to remove their children at will (subject to any court orders about where the child is to live). Section 20 gives local authorities no compulsory powers over parents or their children and must not be used in such a way as to give the impression that it does. It is obviously good practice in every case that parents should be given clear and accurate information, both orally and in writing, both as to their own rights and as to the responsibilities of the local authority, before a child is accommodated under section 20 or as soon as practicable thereafter." [para 64]

Section 20

The earlier authorities of *Coventry City Council v C [2012] COPLR 658*, *FD* and *Re N (Adoption: Jurisdiction) [2016] 1 FLR 621*, *CA* covered a lot of issues around section 20. The following aspects of that guidance are likely to remain relevant and applicable following the decision in *London Borough of Hackney v Williams*:

(a) Every parent has a right, if he or she is capacitous, to exercise his or her parental responsibility by agreeing to delegate the exercise of that parental responsibility by having their child accommodated by the local authority;

(c) Every social worker obtaining agreement from a parent is under a personal duty to be satisfied that the person giving their agreement does not lack the required capacity;

(d) The social worker must actively address the issue of capacity, take into account all the prevailing circumstances and consider the questions raised by MCA 2005, s 3, in particular the parent's capacity to use and weigh all the relevant information. If the social worker has doubts about capacity, no further attempt should be made to obtain agreement on that occasion. Advice should be sought from the social work team leader or management;

Section 20 cont.

(e) In the context of newborn children, local authorities may wish to approach with great care the obtaining of agreement from mothers in the aftermath of birth, especially where there is no immediate danger to the child and where it is probable that no order would be made by the court.

(f) The documentation prepared in respect of an agreement to the accommodation of a child under s 20 should adhere to the following principles:

(i) Wherever possible, the agreement of a parent to the accommodation of their child under s 20 should be properly recorded in writing and evidenced by the parent's signature;

(ii) The written document should be clear and precise as to its terms, drafted in simple and straightforward language that the particular parent can readily understand;

(iii) The written document should spell out, following the language of s 20(8), that the parent can 'remove the child' from the local authority accommodation 'at any time';

(iv) The written document should not seek to impose any fetters on the exercise of the parent's right under s 20(8);

(v) Where the parent is not fluent in English, the written document should be translated into the parent's own language and the parent should sign the foreign language text, adding, in the parent's language, words to the effect that 'I have read this document and I agree to its terms'.

Section 23 Children Act 1989 – Leaving Care Provisions

James Holmes, Garden Court Chambers

15 September 2020

Introduction

Paragraph 5:15 of 'The Children Act 1989 Guidance and Regulations, Volume 2: Care Planning, Placement and Case Review [DfE, 2015]' states;

'[Statutory Guidance requires that] care-experienced young people should expect the same level of care and support that others would expect from a reasonable parent. The responsible authority should make sure that such young people are provided with opportunities they need, which will include offering them more than one chance to succeed.'

'Transition to adulthood is often a turbulent time: transitions are no longer always sequential – leave school, work, relationship, setting up home, parenthood. Young people can become adults in one area but not in others. For many young adults, their transition to adulthood can be extended and delayed until they are emotionally and financially ready and they have the qualifications they need and aspire to, so that they have the opportunity to achieve their economic potential. Young people from care may not have this option .... Care leavers should expect the same level of care and support that others would expect from a reasonable parent.'

Children and Social Work Act 2017

On the 1st April 2018 certain provisions were brough into force, with the following ones being relevant in the context of leaving care provisions;

Section 1 establishes `Corporate Parenting Principles' and provides that:

'(1) A local authority in England must, in carrying out functions in relation to the children and young people mentioned in subsection (2), have regard to the need—

(a) to act in the best interests, and promote the physical and mental health and well-being, of those children and young people

(b) to encourage those children and young people to express their views, wishes and feelings

(c) to take into account the views, wishes and feelings of those children and young people;

(d) to help those children and young people gain access to, and make the best use of, services provided by the local authority and its relevant partners

(e) to promote high aspirations, and seek to secure the best outcomes, for those children and young people;

(f) for those children and young people to be safe, and for stability in their home lives, relationships and education or work;

(g) to prepare those children and young people for adulthood and independent living.'

- All departments of the local authority, not just the children's services staff, must have regard to these principles – *Applying Corporate Parenting Principles to Looked-after Children and Care Leavers*.
- Authorities must publish information about;
    - the services which it offers to care leavers due to functions under Children Act 1989; and
    - other services that might assist care leavers in, or preparing for, adulthood and independent living
- 'Other services' are defined under **Section 2** as including – those relating to health and wellbeing, relationships, education and training, employment, accommodation, and participation in society.
- Every English Local Authority must have regard to any further guidance given by the Secretary of State as to the performance of its section 1 duty.

Preparation for ceasing to be a Looked After Child

- Any child whom has been looked after by a local authority for whatever period of time is owed a duty by that authority '*to advise assist and befriend him with a view to promoting his welfare when they have ceased to look after him*'

- In all cases when an English Local Authority is considering ceasing to look after a child, it must;
  - Carry out an assessment of the proposed arrangements for the child's accommodation and maintenance when he ceases to be looked after;
  - Carry out an assessment of the services that the child and, where appropriate, the applicable parent/other person with PR or person whom had a CAO, might need;
  - ensure were appropriate the young persons wishes and feelings have been obtained;

Assessment of the Young Person

- The assessment of the young persons needs pursuant to para 19B(4), Sch 2, Children Act 1989 must be completed not more than three months after the young person turns 16 years old and must consider the matters prescribed by **Regulation 42 Care Planning, Placement and Case Review (England) Regulations 2010**

- If the child is, or is reasonably believed to be a victim of human trafficking, or is an unaccompanied asylum-seeking child without indefinite leave to remain, who has applied or indicated an intention to apply for asylum, the assessment must include consideration of his needs as a result of that status.

- The difference between the assessment and the information within a pathway plan is, the care plan is concerned with the young persons current needs whilst being looked after whereas a pathway plan is to look at how they are to be supported to transition to adulthood with those needs.

- The content and procedure of an assessment is set out within **Care Planning, Placement and Case Review (England) Regulations 2010.** Failure to follow the regulations can result in a successful JR as per ***R (on the application of J) v Caerphilly County Borough Council [2005] EWHC 586 (Admin)***

Relevant case law re assessment

- ***R (on the application of G) v Nottingham City Council and Nottingham University Hospital [2008] EWHC 400 (admin),*** Munby held in summary at **[35 – 36]**;

That the assessment and preparation of the pathway plan was two entirely different exercises. The former is to assess the child's needs, while the latter is to set out the manner in which the Local Authority proposes to meet those assessed needs. 'Assessment' goes much further than the identification of needs, it involves an analysis and evaluation of the nature, extent and severity of the child's needs.

- ***R (on the application of A) v Lambeth London Borough Council [2010] EWHC 1652*** Kenneth Parker J upheld a judicial review claim by a young person, now aged 18, who had become involved in criminal and anti-social activities, and he set out the nine prescribed matters to be included in the assessment and pathway plan.

- ***R (on the application of P) v London Borough of Newham [2004] EWHC 2210 (admin)***, a case in which the court set a date by which time a draft pathway plan was to be provided, followed by a final pathway plan due to the fact the child was approaching 18 years old.

Pathway Plan - The Care Planning Placement and Case Review (England) Regulations 2010

- Pursuant to Children Act 1989, Authorities are obliged to assess the needs of eligible 16 and 17 year old children whom they are looking after, to develop pathway plans for them and appoint a personal adviser for each child.

- The regulations require the Local Authority to undertake a holistic assessment of the child's needs and expects a Local Authority to consider the following;

    a) identification the needs of the child in relation their mental and physical health;

    b) emotional well-being

    c) Accommodation

    d) Identity;

    e) Financial needs

    f) Educational

- The plan should have a high level of detail and is comparable to a care plan

Pathway Plan - The Care Planning Placement and Case Review (England) Regulations 2010

- The plan must be explicit about the timescales within which any required action will be implemented, and by whom.
- There must be a thorough assessment of the suitability of the potential accommodation for the young person, and how if there is to be a change how the young person will develop necessary skills.
- It must be ensured that;
  - the child's personal education plan (PEP) is maintained as part of the preparation and review of the pathway plan and builds on his educational progress;
  - each pathway plan scrutinises the measures being taken to help the child prepare for when he ceases to be looked after, by considering his progress in education or training and Page 14
  - how he is able to access all of the services needed, including SEN provision, to prepare for training, further or higher education or employment;
  - links are made with further education colleges and higher education institutions, and care leavers are supported to find establishments that understand and work to meet the needs of looked after children and care leavers; and
  - each eligible care leaver knows about the 16-19 Bursary Fund, receives a bursary of £2,000 when progressing to a recognised Higher Education course, and that arrangements for the payment of this bursary are agreed with the young person 13

Relevant case law re pathway plan

- ***R (on the application of J) v Caerphilly County Borough Council [2005] EWHC 586 (Admin)*** – the fact a child may be uncooperative and refuses to engage, is no reason for the local authority not to carry out it's obligations

- ***R (on the application of A) v Lambeth London Borough Council [2010] EWHC 1652*** Kenneth Parker J reiterated the case law that a pathway plan
  - Must be a 'detailed operational plan'
  - Should look beyond the persons immediate needs and go onto to plan for his imminent need

- ***R (on the application of Birara) v Hounslow London Borough Council [2010 EWHC 2113 (admin)*** For examples of deficiencies in a pathway plan

Reviewing Pathway Plans

- Pathway plans should be reviewed in two circumstances;
  - At the request of the child; or
  - At intervals of no more than 6 months

- Prior to the young persons 18th birthday, the IRO should receive 20 working days before an updated copy of the final pathway plan, and consideration should be had as to whether to hold a review out of sequence.

Relevant Child

- A relevant child, is one aged 16 or 17 who is not looked after by the Local Authority and who was, before ceasing to be looked after was an eligible child. – **Section 23A Children Act 1989**

- An eligible child who was subject to a care order, which was discharged after he attained the age of 16, and is living independently is also a relevant child.

- An additional category includes a child whom is 16 or 17, was not subject to a care order but was detained or in hospital, but had been looked after by the Local Authority for a period/s amounting to at least post their 14 birthday.

- A young person, will not be deemed a relevant child if they have lived with, whether that period commenced before or after the child ceased to be looked after by the LA, either of the following of a continuous period of six months or more;
- Their parent;
- Somebody else who has Parental Responsibility; or
- Someone whom formerly had a child arrangement order in their favour.

Duties on Local Authority's – Relevant Child

- to keep in touch with a former relevant child whether within their area or not and if they lose touch to re establish contact;

- to continue to appoint a personal advisor and keep their pathway plan under regular review;

- to safeguard and promote the young person's welfare by maintaining them by providing them with appropriate accommodation and whatever other support is necessary, particularly in relation to their education, training and employment needs. These are onerous responsibilities, which will continue beyond the young person's 21st birthday if the pathway plan provides for either continuing education or training.

Former Relevant Child

- **Section 23(C) Children Act 1989** ensures that a Local Authority continues to remain responsible for a 'former relevant child' in the same way that it is for a 'relevant child'. The use of the word 'child' is misleading as to qualify the person must be over 18 years old.

- The terms embraces two categories of young person who have already qualified for support i.e.
  - one who was a relevant child (and would be one if he were under eighteen) and ion relation to whom the local authority were the 'last responsible authority'
  - One who was being looked after by the local authority when he attained the age of eighteen and immediately before ceasing to be looked after was an eligible child.

Duties – Former Relevant Child

- The below duties continue until the young person reaches 21 years old or can continue beyond that if the pathway plan sets out a programme of education or training beyond that.
- There are also a duty to consider a staying put arrangement.

- The duties which fall upon the Local Authority are;
  a. to keep in touch with a former relevant child whether within their area or not and if they lose touch to re-establish contact;
  b. to continue to appoint a personal advisor and keep their pathway plan under regular review;
  c. to safeguard and promote the young person's welfare by maintaining them by providing them with appropriate accommodation and whatever other support is necessary, particularly in relation to their education, training and employment needs.

Staying Put Policies

- All Authorities have a duty to have staying put arrangements
- Any arrangement must include financial support to the former foster carer – **Section 23CZA CA 1989**
- This opportunity applies equally to those young people placed in the independent sector as those placed in house
- Such discussions should take place where possible before the child is 16 and should be subject to a written 'living together agreement'
- Such arrangements should continue until 21 years and should be a 'cliff edge'
- Staying put polices – not governed by Fostering Services (England) Regulations 2011 but it is duty placed upon the Authority

Relevant Case Law – Re former relevant child

- **R (on the application of R) v London Borough of Croydon [2012] EWHC 4243 (admin)** Thirlwall J held that the claimant was entitled to a declaration that he should have been treated as a looked after child, under the provisions of the Children Act 1989, s 20, even though both the local authority and the Secretary of State for the Home Department had treated him as an adult and the National Asylum Support Service had provided him with accommodation accordingly. As a result, now that he was an adult, the local authority had a duty to treat him as a 'former relevant child'.

- **But in R (on the application of GE (Eritrea)) v Secretary of State for the Home Department [2014] EWCA Civ 1490** the Court of Appeal held that there was no good reason to hold that a child who has not in fact been looked after by a local authority should be treated as if he had been, so as to be able, in that way, to become a 'former relevant child'. That could not have been within the contemplation of the legislative draftsman.

Relevant Case Law – Re former relevant child cont.

- However, as an alternative approach, the court held that in certain circumstances a local authority might be obliged to exercise discretion to take action to correct any previous error as to the age of the young adult. This might entail according to him some, or even all, of the rights to which he would have been entitled as a 'former relevant child', though it would not mean that he fell within that definition. The court gave guidance on the approach that local authorities should take in this situation.

Relevant Case Law – Re former relevant child cont.

- **R (on application of O) v Barking and Dagenham London Borough Council [2010] EWHC 634 (admin)** it was observed that the purpose of the legislation was to enable these young adults 'to stand on their own two feet by providing a point of contact, an advisor, a pathway plan and assistance either in securing employment or in following a course of education or training and, therefore, if necessary, accommodation or alternatively accommodation in a community home by section 20(5)'.

- **R (on application of Sabiri) v London Borough of Croydon [2012] EWHC 1236** , Charles George QC, sitting as a deputy judge of the High Court, held that s 24B(2) cannot extend to the provision of accommodation itself, but rejected the local authority's submission that the 'expenses' referred to in ss 24B(2)(a), 24B(2)(b), and 23CA(5) referred to expenses other than the cost of accommodation. He declared that the words 'contributing to expenses incurred by him in living near the place where he is or will be receiving education or training in section 24B(2) and 23CA(5) of the Children Act 1989 permit the local authority to make a contribution, including 100 per cent contribution, to accommodation and accommodation-related expenses'. Although he did not find it necessary to invoke a purposive approach to his interpretation of the statute, he observed that a narrow construction would be 'inconsistent with the purpose of this legislation, which is that the local authority should stand in the place of a parent for those who lack a natural parent, who would normally fund those

Relevant Case Law – Re former relevant child cont.

R (SO) v London Borough of Barking and Dagenham (Secretary of State for the Home Department intervening) [2010] EWCA Civ 1101 the Court of Appeal allowed an appeal by a 19-year-old Eritrean asylum-seeker and held that, as a former relevant child, the local authority was under a duty to accommodate him under the provisions of the Children Act 1989, s 23C(4)(c). Although the wording of s 23C(4) was not entirely clear, it had to be read in the context of the history of the Children Act 1989, s 17 and the predecessors to that section, which confirmed that 'other assistance' could include accommodation. It was highly unlikely that the Parliamentary draftsman had used that same phrase in s 23C(4) without intending to convey the same meaning. While it had to be interpreted within its own immediate context, which was not the same as s 17, this neither compelled not encouraged the attribution of a different meaning from that phrase.

Moreover, as an asylum-seeker, and given the merely residual nature of the powers of NASS to provide accommodation to the claimant under the Immigration and Asylum Act 1999, the local authority, in deciding whether to provide accommodation for her, was not entitled to have regard to the possibility of support by NASS.

Children and young persons qualifying for advice and assistance

- **Section 24 Children Act 1989** defines a person qualifying for advice and assistance as;

(1) a person to whom s 24(1A) applies, i.e. who has reached the age of 16 but not the age of 21; with respect to whom a special guardianship order 2 is in force and who was, immediately before the making of that order, looked after by a local authority;
(2) a person to whom s 24(1B) applies, i.e. a person who does not fall within s 24(1A), is under 21 and who was (but is no longer) at any time after reaching the age of 16 3 but before reaching 18:

(a) looked after by a local authority;
(b) accommodated by or on behalf of a voluntary organisation;
(c) accommodated in a private children's home;
(d) accommodated for a consecutive period of at least three months 4 by any Local Health Board, Special Health Authority, NHS Commissioning Board, clinical commissioning group, or a local authority in the exercise of education functions; or in any care home or independent hospital; or in any accommodation provided by an NHS Trust or NHS Foundation Trust; or (e) privately fostered

Children and young persons qualifying for advice and assistance – duties

- For the duty or power imposed to apply the relevant authority are required to be satisfied of two conditions:

  (a) the person qualifying for advice or assistance needs help of a kind which they can give under the Children Act 1989, s 24A or s 24B; and

  (b) in the case of a person to whom ss 24(1A) and 24(1B) applies 2 and who was not being looked after by any local authority, that the person who was looking after him does not have the necessary facilities for advising or befriending him.

- Where assistance is given under the Children Act 1989, s 24A, the relevant English local authority as defined in s 24(5) may give it in kind or, exceptionally, in cash. Financial assistance is particularly important for those seeking to establish an independent life.

- Assistance given under the Children Act 1989, s 24A or s 24B (employment, education and training) 1 is subject to conditions regarding repayment in s 17(7)(9)

Unaccompanied Minors

- If the young person is a former unaccompanied migrant child who has been granted leave to remain, or who has an outstanding asylum or other human rights claim or appeal, they are entitled to the same level of care and support as any other care leaver.
- If he has reached adulthood, exhausted his appeal rights, established no lawful basis to remain in the United Kingdom and a decision has been made that he should return to his home country, a human rights assessment will be required – ***Care of Unaccompanied Migrant Children and Child Victims of Modern Slavery: Statutory Guidance for Local Authorities,*** *at paragraph 83*

Thank you

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