HOUSE OF LORDS

R.

Vs

London Borough of Southwark

(Lord Hope of Craighead, Lord Walker of Gestingthorpe, Baroness Hale of Richmond, Lord Mance, Lord Neuberger of Abbotsbury)

20.05.2009

JUDGMENT

LORD HOPE OF CRAIGHEAD

My Lords,

1. I have had the advantage of reading in draft the opinion of my noble and learned friend Baroness Hale of Richmond. I agree with it, and for the reasons she gives I would allow the appeal.

LORD WALKER OF GESTINGTHORPE

My Lords,

2. I have had the advantage of reading in draft the opinion of my noble and learned friend Baroness Hale of Richmond. I agree with it, and for the reasons that she gives I would allow the appeal.

BARONESS HALE OF RICHMOND

My Lords,

3. The human issue in this case is simple to state. If a child of 16 or 17 who has been thrown out of the family home presents himself to a local children's services authority and asks to be accommodated by them under section 20 of the Children Act 1989, is it open to that authority instead to arrange for him to be accommodated by the local housing authority under the homelessness provisions of Part VII of the Housing Act 1996? The issue matters, as Rix LJ pointed out in the Court of Appeal, "because a child, even one on the verge of adulthood, is considered and treated by Parliament as a vulnerable person to whom the state, in the form of the relevant local authority, owes a duty which goes wider than the mere provision of accommodation": [2008] EWCA Civ 877, [2009] 1 WLR 34, para 35.

4. Section 20 contains several duties and powers to accommodate children, the relevant one for present purposes being in subsection (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;

(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."

This subsection contains two technical terms which require explanation. Most important is a "child in need", defined in section 17(10) of the 1989 Act:

"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."

Although not relevant in this case, "parental responsibility" is also a technical term, covering all the legal powers and duties of parents, and is only held by parents, guardians and people with the benefit of certain orders or agreements under the 1989 Act: see ss 4, 4A, 12 and 33.

5. It comes as something of a surprise that the issue has had to reach this House, in the light of the observations in *R (M) v Hammersmith and Fulham London Borough Council* [2008] UKHL 14, [2008] 1 WLR 535 as to what ought to have happened in the reverse situation. There the child had approached the housing authority and asked them to accommodate her. The House made it clear that she should have been referred to the children's authority for assessment. It was not contemplated that, had she been assessed as falling within the criteria in section 20(1), she might nevertheless have been referred back to the housing department. As was said then, at para 4 (but see also paras 15, 31 and 42):

". . . the clear intention of the legislation is that these children need more than a roof over their heads and that local children's services authorities cannot avoid their responsibilities towards this challenging age group by passing them over to the local housing authorities."

6. It is worth noting that neither the factual nor the legal problem was likely to arise before 2002. Before then, there was little prospect of a 16 or 17 year old being independently accommodated under the homelessness legislation. Local housing authorities only have a duty under the 1996 Act to "secure that accommodation is available" where they have reason to believe that the applicant "may . . . have a priority need" (for the interim duty to accommodate under section 188(1)) or are satisfied that he does have a priority need (for the longer term duty under section 193). While people with dependent children were expressly listed among those with priority need under section 189(1)(b), children themselves were not and so could only qualify if they were regarded as "vulnerable as a result of . . . other special reason" under section 18(1)(d). Under the Homelessness (Priority Need for Accommodation) (England) Order 2002 (SI 2002/2051), article 3, however, children aged 16 and 17 were expressly included in the list. So there was now a real possibility that they might be owed duties under the homelessness legislation. But two groups of children are excluded from those in priority need under article 3: those to whom a children's authority owe a duty under section 20 and "relevant" children who have previously been looked after by a local

authority (see para 6). As was said in the *Hammersmith and Fulham* case, at para 31:

"Such a young person has needs over and above the simple need for a roof over her head and these can better be met by social services. Unless the problem is relatively short-term, she will then become an eligible child, and social services accommodation will also bring with it the additional responsibilities to help and support her in the transition to independent adult living. It was not intended that social services should be able to avoid those responsibilities by looking to the housing authority to accommodate the child."

7. The legal issue therefore resolves itself into one of construction: what do the criteria in section 20(1) mean and how, if at all, is their application affected by the other duties of children's authorities, in particular under section 17 of the 1989 Act, and by the duties of housing authorities under the 1996 Act?

8. Before moving on to the facts of this case, it is worth noticing two other developments which have brought the issue into sharper focus recently. One is the Children (Leaving Care) Act 2000, which came into force in 2001. The 1989 Act had always contained a duty to "advise and befriend", and a power to "give assistance", to young people under 21 who had been looked after by local authorities and voluntary organisations (see section 24). But the 2000 Act introduced much more specific duties towards "eligible" 16 and 17 year olds whom they were looking after (see 1989 Act, sched 2, para 19B) and, more importantly, towards such children when they ceased to be looked after by the children's authority and became "relevant" children for this purpose (see 1989 Act, sections 23A, 23B and 23C). Some of these new duties could extend beyond childhood up to the age of 21 or even 24 if the young person was pursuing a planned course of education and training. The general aim of these new responsibilities was to provide a child or young person with the sort of parental guidance and support which most young people growing up in their own families can take for granted but which those who are separated or estranged from their families cannot.

9. The other relevant development was an influx of unaccompanied asylum seeking children. By definition, they were ineligible for housing under the 1996 Act and so their only source of publicly provided accommodation was the local children's authority. Children's authorities shouldered that burden, but disputes arose as to whether they were doing so under section 20, in which case the further "leaving care" obligations arose, or whether they were doing so under some other power, in which case those obligations did not arise: see *R (H) v Wandsworth London Borough Council* [2007] EWHC 1082 (Admin), [2007] 2 FLR 822. This same "labelling" problem arose in other cases where the children's authority had arranged accommodation for a child but was reluctant to accept that it had done so under section 20: see *R (L) v Nottinghamshire County Council* [2007] EWHC 2364; *R (D) v Southwark London Borough Council* [2007] EWCA Civ 182, [2007] 1 FLR 2181; *R (S) v Sutton London Borough Council* [2007] EWCA Civ 790, 10 CCLR 615. The message of those cases is that if the section 20 duty has arisen and the children's authority have provided accommodation for the child, they cannot "side-step" the issue by claiming to have acted under some other power.

10. In particular, they cannot claim simply to have been acting under the general duty in section 17(1):

"It shall be the general duty of every local authority (in addition to the other duties imposed upon 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."

Section 17(6) makes it clear that:

"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 exceptional circumstances, in cash."

11. Once again, therefore, we are back to the meaning of section 20.

The history of this case

12. The appellant, A, was born in 1990 in Somalia and came to this country with his mother and siblings in 1998. He was granted indefinite leave to remain in 2005. He left school after completing his GCSE examinations in 2006. Relations with his mother deteriorated during 2007 and in June she excluded him from home. He approached the local housing authority and they attempted mediation between mother and son. This was unsuccessful and he was once again excluded from home in July. After that he was, as Rix LJ put it, "sofa surfing", sleeping on friends' sofas or in cars, until 10 September 2007, when he consulted solicitors: [2009] 1 WLR 34, para 30. They immediately advised him to present himself to the children's services department, armed with a letter from them requesting an urgent assessment of his needs under section 17 of the 1989 Act and immediate accommodation under section 20(1).

13. He was asked some questions but not offered accommodation that day. The solicitors wrote again on 11 September, reserving the right to bring judicial review proceedings without further notice if a satisfactory reply were not received by the following day. This time A was referred to a social worker, Mr Brims, for assessment and given bed and breakfast accommodation in Gipsy Hill that night. On 12 September, the authority replied that the initial assessment had begun, that his mother was willing to have him back, and that they had discovered that "his immigration status (of having indefinite leave to remain) would mean that he is not prohibited from receiving temporary accommodation through the housing department". Hence they declined to accommodate him under section 20. As it happened, his mother was not prepared to have him back and he continued to be provided with accommodation in Gipsy Hill.

14. The initial assessment was completed on 18 September. This is a substantial document, which covers a wide range of issues in accordance with the guidance given in the *Framework for the Assessment of Children in Need and their Families* (Department of Health, 2000). It compares very favourably with the assessments done by the housing department in the *Hammersmith and Fulham* case and illustrates vividly how much better suited the children's services are to consider and cater for the many needs of these vulnerable young people.

15. The most important factual conclusions were that "A presents overtly as a 17 year old boy with housing and educational needs, and to be homeless due to family breakdown. Further discussions with A have revealed that he may also have some involvement in gang activity . . . " Attempts had been made at reconciling mother and son, but "A has been resolute in his view that he would not return to his mother's home", while the social worker was "concerned that [the mother] may not be committed to reconciling the situation with A at this time". He was also "concerned that A has

withheld information around his possible connections to gang activity, and possible other issues regarding his family or personal history which may be playing a role in his current situation. . . . I cannot say whether these factors are significant for A in terms of safety or personal development." His conclusion was:

"Therefore the primary needs identified here for A relate to Housing and Education. Having examined the information available, I see or have not been made aware [of] any additional needs or vulnerabilities that would suggest the need for longer-term accommodation being provided by Social Services. A is 17 years of age and not in full-time education at this point in time, therefore I feel that accommodation provided by Southwark HPU [Homeless Persons Unit] and referrals to other support agencies . . . will be sufficient at this time to work on addressing the social, emotional and practical issues identified in this assessment."

There followed a list of recommended referrals, not only to the HPU, but also to other sources of help and support. Principal among these was the children's authority's own Family Resource Team, which could provide "ongoing social work support", help him in dealings with the Department for Work and Pensions in applying for benefits, explore holding a family group conference to work on reconciling him with his mother, link in with his prospective college and provide any support necessary for his enrolment, and refer him to an agency giving housing and careers advice. This scarcely suggests that all A needed was a roof over his head.

16. This assessment was sent to A's solicitors, who wrote pointing out that it revealed that A was a child in need who fell within section 20(1)(c) of the 1989 Act. This prompted the local authority's decision letter of 20 September, which stated that:

"Our client department has fully considered your client's needs and reached the decision that section 20 is not appropriate as A has no identified need for social services support, and his needs can be satisfactorily met through provision of housing and referrals to other support agencies. . . .

Our client department has fulfilled its duty to assess your client and reached the decision that he is not in need of section 20 accommodation; he simply requires 'help with accommodation'."

17. Thereafter A continued for some time to be provided with accommodation at Gipsy Hill. The local authority claim that this was provided under the 1996 Act. A claims that, as the duty to provide accommodation under section 20(1) had arisen, he was in fact accommodated under that section. If so, it is not in dispute that he was an "eligible child" within the meaning of paragraph 19B of schedule 2 to the 1989 Act and became a " former relevant child" within the meaning of section 23C(1) of that Act when he turned 18.

18. Judicial review proceedings were begun on 28 September 2007. They failed before Simon J, who held that the criteria in section 20(1) were not met and so no duty arose: CO/8543/2007, 15 November 2007. The Court of Appeal, by a majority, dismissed his appeal: [2008] EWCA Civ 877, [2009] 1 WLR 34. The authority were entitled to conclude that he required only "help with accommodation" under section 17 and not accommodation under section 20(1). Rix LJ dissented: the test under section 20(1) was not the broad test of whether the child in question needed to be "looked after" but the much narrower test of whether the child appeared to require accommodation as a result of finding himself alone in one of the situations set out in section 20(1) (a) to (c) (para 77). A now appeals to this House.

The arguments

19. The argument presented by Mr Wise on behalf of A is simplicity itself. He acknowledges that the assessment of need under section 20(1) involves an evaluative judgment on the part of the local children's authority. But in this case, he says, all the elements required by section 20(1) were met. Indeed it is common ground (i) that A was a "child in need" at the relevant time, (ii) that he was within the area of the local authority, and (iii) that he lacked accommodation as a result of his mother being prevented from providing him with suitable accommodation or care within the meaning of section 20(1)(c). If he lacked accommodation for one of those reasons he "required accommodation" within the meaning of section 20(1), even if there was another way in which accommodation might be found for him.

20. Mr Kovats made written submissions on behalf of the Secretary of State for Children, Schools and Families (with the support of the Secretary of State for Communities and Local Government). The presumption must be that all lone children who meet the criteria in section 20(1) must be accommodated by children's services authorities, "at least until their needs have been properly assessed and plans are in place to address those needs" (para 53). Thus the authority should presume that any homeless child should be accommodated unless he is not a child in need (para 54). The authority must then carry out a core assessment (para 55). If attempts at getting the child back home fail, there might be cases in which "the child's long term needs might best be met by the provision of support to move to accommodation where he can live independently without the need to be a looked after child". This might be done under section 17 (para 56). Nevertheless, he submits that the reasoning of Rix LJ is to be preferred to that of the majority: if the child is in need, does not have accommodation, and comes within paragraphs (a), (b) or (c), the duty under section 20(1) is triggered.

21. Mr McGuire, for the local authority, argues that this is too simple an approach. In deciding whether a child "requires accommodation" under section 20(1), the authority are entitled to take into account the other sources of accommodation which may be available to the child and conclude that he does not require social services accommodation at all. All he requires is help to find or acquire that other accommodation, under the authority's general duty to provide services under section 17. He acknowledges that, before 2002, alternative sources of accommodation would not generally have included the homeless persons unit. Now that they do, however, the children's authority are entitled to conclude that this will suffice, even if other services are also required, rather than the whole paraphernalia of becoming a "looked after" child. He stresses that section 20 should be read in the light of the local authority's functions under in section 17, and prays in aid certain passages from the opinion of my noble and learned friend Lord Hope of Craighead, in *R (G) v Barnet London Borough Council* [2003] UKHL 57, [2004] 2 AC 208, at paras 81 and 100.

Discussion

22. It is important to recall what the *Barnet* case and the linked cases of *R (A) v Lambeth London Borough Council* and *R (W) v Lambeth London Borough Council* were all about. In each case, what was wanted was accommodation for the children together with their mothers. In one case, the mother was a "person from abroad" who was ineligible for housing under the 1996 Act; in another, she had become homeless intentionally and thus was owed no duty under the 1996 Act; and in the third, her existing housing was unsuitable to the needs of her disabled children. It was not in issue whether the children were owed the duty under section 20(1); the issue was whether there was a duty to provide the whole family with accommodation, either under section 17 of the 1989 Act or, if

the section 20 duty had arisen, by making arrangements to enable the children to live with their mother, under section 23(6). (Section 23 deals with the ways in which children's authorities may provide accommodation for the children they are looking after.)

23. By a majority, the House held that the "general duty" in section 17(1) of the 1989 Act was a "framework" duty owed to the local population and did not result in a mandatory duty to meet the assessed needs of every individual child regardless of resources. As Lord Hope pointed out, at para 83, that accords with the view of the *Review of Child Care Law* (Department of Health and Social Security, 1985), at para 5.8:

"We believe that the provisions should be stated clearly in general terms of making services available at an appropriate level to the needs of the area rather than in terms of duties owed to individual children or families, in order to leave local authorities a wide flexibility to decide what is appropriate in particular cases while providing for a reasonable overall level of provision. It is for local authorities to decide upon their priorities within the resources available to them."

24. On the other hand, the Act draws a distinction between the "general duty" in section 17(1) and the specific duties laid down elsewhere in Part III, including section 20. As Lord Hope made clear in para 81, these duties do leave important matters to the judgment of the authority. But once those matters have been decided in a particular way, it must follow that a duty is owed to the individual child. Thus Lord Hope was able to conclude, in para 100, that there was no doubt that the authorities were under a duty to provide accommodation under section 20(1) for the children of the two claimants who did not qualify for accommodation under the 1996 Act. The concern for children's welfare which ran throughout Part III meant that the children should not suffer because their mother had come to this country or had become homeless intentionally. Thus these mothers were "prevented" within the meaning of section 20(1)(c) even though it was their own choice. The issue in those cases was whether the duty in section 23(6) to place such children with their families included a duty to provide housing for families who had none. It was not difficult to conclude that it did not.

25. In my view, therefore, the *Barnet* case is, if anything, helpful to A, in highlighting the primacy of the specific duty owed to individuals in section 20 over the general duty owed to children in need and their families and its associated powers in section 17, just as the *Hammersmith and Fulham* case is helpful to A in highlighting the primacy of the Children Act over the Housing Act in providing for children in need.

26. It is true, as Mr McGuire points out, that the 2002 Order assumes that there will be some homeless 16 or 17 year olds who are not owed a duty under section 20. But that is a very different thing from saying that there are children who are not owed a duty under section 20 because they are or may be owed a duty under the 1996 Act. This is circular reasoning. The 2002 Order *takes out* of priority need those children who require accommodation in the circumstances set out in section 20(1). They cannot in the same breath be put back into priority need by adjudging that they do not require accommodation at all when clearly they do.

27. The only way to break out of that circle (recognised by Anthony Edward-Stuart QC, sitting as a deputy High Court judge in *R (A) v Coventry City Council* [2009] EWHC 34 (Admin)) is to read into section 20(1) the words "under this section" after "requires accommodation". Put another way, the question would then become, not "does this child require accommodation for one of the listed reasons?" but "does this child require to become a 'looked after' child with all that that entails?"

There are at least two problems with this. First and foremost, it involves reading into the section words which are not there. Second, Parliament has decided the circumstances in which the duty to accommodate arises and then decided what that duty involves. It is not for the local authority to decide that, because they do not like what the duty to accommodate involves or do not think it appropriate, they do not have to accommodate at all.

28. Section 20(1) entails a series of judgments, helpfully set out by Ward LJ in *R (A) v Croydon London Borough Council* [2008] EWCA Civ 1445, at para 75. I take that list and apply it to this case.

(1) Is the applicant a child? That was the issue in the *Croydon* case (in which leave to appeal has been granted) but it is not an issue in this.

(2) Is the applicant a child in need? This will often require careful assessment. In this case it is common ground that A is a child in need, essentially because he is homeless. It is, perhaps, possible to envisage circumstances in which a 16 or 17 year old who is temporarily without accommodation is nevertheless not in need within the meaning of section 17(10): perhaps a child whose home has been temporarily damaged by fire or flood who can well afford hotel accommodation while it is repaired. There are hints of this in the social worker's view that "A is quite a resourceful teenager - by his own admission he has spent the last 1 - 2 months moving around amongst friends and girlfriends and sourcing his own accommodation. Furthermore, it appears that A has attempted to adhere to his own values around personal hygiene despite these circumstances. . . " But it cannot seriously be suggested that a child excluded from home who is "sofa surfing" in this way, more often sleeping in cars, snatching showers and washing his clothes when he can, is not in need. Mr Brims also pointed out that "A's lack of permanent housing will have a long term impact upon his educational attainment and will also impact upon other practical areas of his life. Without permanent accommodation, A does not have a base level of stability on which to build other areas of his life, and daily tasks such as personal hygiene, washing clothes and maintaining a reasonable diet will pose significant challenges."

(3) Is he within the local authority's area? This again is not contentious. But it may be worth remembering that it was an important innovation in the forerunner provision in the Children Act 1948. Local authorities have to look after the children in their area irrespective of where they are habitually resident. They may then pass a child on to the area where he is ordinarily resident under section 20(2) or recoup the cost of providing for him under section 29(7). But there should be no more passing the child from pillar to post while the authorities argue about where he comes from.

(4) Does he appear to the local authority to require accommodation? In this case it is quite obvious that a sofa surfing child requires accommodation. But there may be cases where the child does have a home to go to, whether on his own or with family or friends, but needs help in getting there, or getting into it, or in having it made habitable or safe. This is the line between needing "help with accommodation" (not in itself a technical term) and needing "accommodation".

(5) Is that need the result of:

(a) there being no person who has parental responsibility for him; for example, where his parents were unmarried, his father does not have parental responsibility, and his mother had died without appointing a guardian for him;

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

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

As Lord Hope pointed out in the *Barnet* case, (c) has to be given a wide construction, if children are not to suffer for the shortcomings of their parents or carers. It is not disputed that this covers a child who has been excluded from home even though this is the deliberate decision of the parent. However, it is possible to envisage circumstances in which a 16 or 17 year old requires accommodation for reasons which do not fall within (a), (b) or (c) above. For example, he may have been living independently for some time, with a job and somewhere to live, and without anyone caring for him at all; he may then lose his accommodation and become homeless; such a child would not fall within section 20(1) and would therefore fall within the 2002 Order and be in priority need under the 1996 Act.

(6) What are the child's wishes and feelings regarding the provision of accommodation for him? This is a reference to the requirement in section 20(6) of the 1989 Act, as amended by section 53(2) of the Children Act 2004:

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

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

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

Some have taken the view that this refers only to the child's views about the sort of accommodation he should have, rather than about whether he should be accommodated at all: see *R (S) v Sutton London Borough Council* [2007] EWHC 1196 (Admin), para 51. This is supported by the opening words, which are "before providing" rather than "before deciding whether to provide"; contrast the equivalent provision in section 17(4A), "before determining what (if any) service to provide . . ." On the other hand, as explained in *Hammersmith and Fulham*, it is unlikely that Parliament intended that local authorities should be able to oblige a competent 16 or 17 year old to accept a service which he does not want. This is supported by section 20(11), which provides that a child who has reached 16 may agree to be accommodated even if his parent objects or wishes to remove him. It is a service, not a coercive intervention. Whether one reaches the same result via a broader construction of section 20(6) or via the more direct route, that there is nothing in section 20 which allows the local authority to force their services upon older and competent children who do not want them, may not matter very much. It is not an issue in this case, because A wanted to be accommodated under section 20. But a homeless 16 or 17 year old who did not want to be accommodated under section 20 would be another example of a child in priority need under the 2002 Order.

(7) What consideration (having regard to his age and understanding) is duly to be given to those wishes and feelings? As Dyson LJ pointed out in *R (Liverpool City Council) v Hillingdon London Borough Council* [2009] EWCA Civ 43, para 32, "children are often not good judges of what is in their best interests". But that too should not be an issue here. A had been given legal advice as to which legal route to accommodation would be in his best interests. He needed help to get back into

education and get his life on track towards responsible adult independence and away from whatever influence the gang culture was exerting over him. That would be better provided for him if he were accommodated under section 20 and became an “eligible” child.

Items (8) and (9) on the list given by Ward LJ, referring to the position of people with parental responsibility, do not apply in this case because A had reached the age of 16 and agreed to being provided with accommodation under section 20. 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 “side-step” that duty by giving the accommodation a different label.

29. That is all that is required to decide this appeal. I would like, however, to offer a few observations on the interesting submissions of the Secretary of State. These were entirely clear as to the result: “In blunt terms, a local children’s services authority cannot refer a homeless child in need to the local housing authority” (para 37). However, reference was made to Local Authority Circular LAC (2003) 13, *Guidance on Accommodating Children in Need and their Families.* This Circular was issued after section 17(6) of the Children Act 1989 (para 10 above) had been amended by the Adoption and Children Act 2002. As originally enacted, this had not included express reference to providing accommodation for families and children, although it was generally understood that it did, until the decisions of the Court of Appeal in the two *Lambeth* cases cast doubt on this. Hence the words “providing accommodation and” were inserted after “include” to clarify the position (which the House of Lords confirmed in the *Barnet and Lambeth* cases to have been correct). The definition of a “looked after” child in section 22 was at the same time amended to make it clear that it did not include children who were provided with accommodation under section 17.

30. The main point of the Circular was to stress that “the power to provide accommodation under section 17 will almost always concern children needing to be accommodated with their families". This is consistent with the general duty in section 17(1)(b), to promote the upbringing of children in need by their families. However, the Circular went on to say that “there may be cases where a lone child who needs help with accommodation, but does not need to be looked after, might appropriately be assisted under section 17". Before deciding which section was the more appropriate the authority should carry out an assessment, which would include taking into account the wishes of the child. The assessment should first determine whether the child met the criteria in section 20(1). If the child had no parent or guardian in this country, perhaps because he arrived alone seeking asylum, the presumption should be that he fell within section 20, “unless the needs assessment reveals particular factors which would suggest that an alternative response would be more appropriate". He should be cared for under section 20 while the assessment was being carried out. But some older asylum seeking children had refused to become “looked after", although the Children Act was their only lawful means of support. Although the section 20(1) duty would appear to be triggered, taking into account the child’s wishes, the local authority might judge him competent to look after himself and provide support, including help with accommodation, without making him a looked after child. (The Circular goes on to discuss jointly funded placements of children in residential schools; these raise issues quite different from those in this case and I will say no more about them.)

31. The specific example given, of the unaccompanied asylum seeking child who refuses to be accommodated under section 20, is entirely consistent with the analysis in paragraph 28 above. There are other instances given in that paragraph where the section 20 duty might not arise and the child could be given help and support under section 17. But if and insofar as the Circular suggests that, even though the section 20(1) criteria are met, the authority have a choice between section 17

and section 20 which is based upon whether the child needs to be “looked after", it is incorrect. Section 20 involves an evaluative judgment on some matters but not a discretion.

32. More difficult are the Secretary of State’s submissions quoted in paragraph 20 above, to the effect that once the assessment has been completed and rehabilitation with the family failed, the child’s long term needs might best be met by the provision of support to move to independent living. We have heard no submissions from the other parties on the circumstances in which, once triggered, the duty under section 20(1) might come to an end. Presumably, it will do so if the criteria are no longer met - if the child is no longer “in need", or his parents or carers are no longer prevented from providing him with suitable accommodation or care, or if a competent child no longer wishes to be accommodated under that section. But the whole purpose of the leaving care provisions was to ensure that older children who were without family support were given just the sort of help with moving into independent living that children normally expect from their families. Authorities should therefore be slow to conclude that a child was no longer “in need” because he did not need that help or because it could be provided in other ways.

33. Finally, something should be said about co-operation between the authorities, which is stressed in all the guidance, most recently in *Joint working between Housing and Children’s Services, Preventing homelessness and tackling its effects on children and young people* (Department for Communities and Local Government, Department for Children, Schools and Families, May 2008). Section 27 of the 1989 Act empowers a children’s authority to ask other authorities, including *any* local housing authority, for “help in the exercise of any of their functions” under Part III; the requested authority must provide that help if it is compatible with their own statutory or other duties and does not unduly prejudice the discharge of any of their own functions. This does not mean that the children’s authority can avoid their responsibilities by “passing the buck” to another authority; rather that they can ask another authority to use its powers to help them discharge theirs. They can ask a housing authority, for example, to make a certain amount of suitable accommodation available for them to use in discharging their responsibility to accommodate children under section 20. Section 23(2) gives them great flexibility in the ways in which they can provide accommodation for the children they are looking after, ranging from placing them with families, relatives or other suitable people, placing them in an appropriate children’s home, or “making such other arrangements as . . . seem appropriate to them". The very flexibility of what the children’s authority can provide supports the construction which we have placed upon section 20(1).

34. For these reasons, therefore, I would allow this appeal. The result is that A was accommodated under section 20(1) of the 1989 Act on 11 September 2007, became an “eligible child” within the meaning of paragraph 19B(2) of Schedule 2, and thereafter a “ former relevant child” within the meaning of section 23C(1) of that Act.

LORD MANCE

My Lords,

35. I have had the benefit of reading in draft the speech of my noble and learned friend, Baroness Hale of Richmond. For the reasons she gives, with which I am in full agreement, I agree that this appeal should be allowed.

LORD NEUBERGER OF ABBOTSBURY

My Lords,

36. I have had the benefit of reading in draft the opinion of my noble and learned friend, Baroness Hale of Richmond. For the reasons she gives, I too would allow this appeal. However, I would like briefly to summarise my views on the interrelationship between the duty under Part VII of the Housing Act 1996 and the duty under section 20 of the Children Act 1989 in the case of children aged 16 or 17, who "require accommodation".

37. The Borough's argument, which was accepted by the majority of the Court of Appeal, is as follows. At the time A approached the Borough's children's services authority, he was a child aged 16 or 17 who was "homeless", "eligible for assistance", and not "homeless intentionally". Accordingly, he had priority need for housing under Part VII of the 1996 Act, as a result of the Homelessness (Priority Need for Accommodation) (England) Order 2002 (SI 2002/2051). Consequently, as the local housing authority thereby had a duty to house him, the children's authority could perform its duty under section 20 of the 1989 Act by making arrangements with the housing authority to ensure that A was provided with housing.

38. Apart from being inconsistent with the thrust of the reasoning of this House in *R(M) v Hammersmith and Fulham London Borough Council* [2008] UKHL 14, [2008] 1 WLR 535, I consider that this argument is unsatisfactory, for two connected reasons. First, and most importantly, the 2002 Order expressly excludes from priority those children aged 16 or 17 to whom a children's authority owes a duty under section 20 of the 1989 Act. Secondly, the argument could not have been advanced before the 2002 Order came into force.

39. The fact that children to whom a children's authority owe a section 20 duty are excluded from the ambit of the 2002 Order seems to me to render the Borough's argument circular. On the face of it, A "require[s] accommodation" and therefore must be "provide[d with] accommodation" by the children's authority under section 20 of the 1989 Act. In order to avoid that conclusion, the Borough argues that A has a priority need claim on the housing authority under the 2002 Order. But the only basis on which G falls within the scope of the 2002 Order is if the children's authority has no duty under section 20 of the 1989 Act. So, the reasoning on which the Borough relies to avoid the duty which is *prima facie* imposed by section 20 effectively involves asserting that there is no such duty.

40. Not only is this reasoning circular, but it appears to me to be inconsistent with the purpose of the 2002 Order in relation to children aged 16 and 17. Until the Order came into force, a child aged 16 or 17 would not have been treated as being in priority need under Part VII of the 1996 Act unless he or she was "vulnerable as a result of … [some] other special reason" - see section 189(1)(c). If a child of that age fell within section 20 of the 1989 Act, he or she would be provided with accommodation. However, if such a child did not fall within section 20, no accommodation would be provided, unless he or she was found to be "vulnerable" - and even then there might have been an argument that being aged 16 or 17 was not a "special reason". The purpose of the 2002 Order was, as I see it, to fill that lacuna, not to enable a children's authority to divert its duty under section 20 to the housing authority, thereby emasculating the assistance to be afforded to children of 16 or 17 who "require accommodation".

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