

Case No: QBACF 01/0273/C

Neutral Citation Number: [2001] EWCA Civ 540

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
(HOOPER J.)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 11th April 2001

B e f o r e :

LORD JUSTICE WARD

LORD JUSTICE MAY

and

LORD JUSTICE RIX

G'S APPLICATION FOR JUDICIAL REVIEW

(Transcript of the Handed Down Judgment of
Smith Bernal Reporting Limited, 190 Fleet Street
London EC4A 2AG
Tel No: 020 7421 4040, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Michael Supperstone Q.C. and H. Harrop-Griffiths (instructed by **London Borough of Barnet**
for the Appellant)

John Howell Q .C. and Stephen Knafler (instructed by **Messrs Bindman & Partners** for the
Respondent)

Judgment

LORD JUSTICE WARD:

Introduction.

1.

This appeal from an order made by Hooper J. on 18th January 2001 gives rise to important questions about the obligations of a local authority under the [Children Act 1989](#) to provide accommodation and financial support for a child in need in its area when the mother herself is not entitled to housing for the homeless under the [Housing Act 1996](#) nor to housing benefit nor to income support. Income support is, of course, paid by central government, and although housing benefit is paid by the housing

authority, it is to a large extent reimbursed from central government funds. On the other hand, if the local authority have to meet the cost of housing and maintaining not only a child but also his mother by virtue of its obligations under the Children Act, as this mother insists they must, then the funds of the Social Services Departments may be seriously depleted with little chance of central government refunding this drain on their precious resources. The local authorities are, therefore, seriously concerned as to how they can afford to meet this kind of demand as well as the multitude of other calls upon their Social Services Department. Whatever the rights and wrongs of their predicament, experience in the Family Division and in this court supports the view that they never seem to have enough money to do what they wish to do, and frequently they say they do not have enough money to do even what they have to do. The appellant, the London Borough of Barnet is reconciled to meeting its lawful obligations, but it invites the court to limit them.

The Facts.

2.

The facts which give rise to this appeal can be quite shortly stated. The respondent to the appeal, whom I shall call "the mother", is RG who is a Dutch national of Somali origin. On 9th May 1999 she gave birth to her son, B, who is now nearly two years old. Because the case concerns him, we direct that it be reported under initials only so as to preserve the anonymity of the mother and child. The mother had lived with her mother in Holland for about seven years and in recent times had been in receipt of state benefits. On 30th May 2000 she was issued with a Dutch passport and on 16th June 2000 she entered the United Kingdom from the Netherlands. She gave two main reasons for her coming here. The first was that the Somali community in Holland showed great hostility to her as an unmarried mother, her mother was ashamed of her and being ostracised and vilified, the respondent's mother eventually asked her to leave her home. The second reason she gave was that she came to the United Kingdom to search for the father of her child who had abandoned them as soon as he heard of her pregnancy and who was now believed to be living here.

3.

Hooper J. said this: -

"The local authority made a number of enquiries seeking information about her situation in Holland. Contact was made with her social worker in Holland. The local authority reached the conclusion that the reasons she gave for leaving Holland are not true. The local authority also reached the conclusion that if she were to return to Holland with her son, she and her son would be properly looked after by the Social Services in Holland. During the course of the hearing Mr Knafler on behalf of the claimant accepted, for the purposes of argument, that these conclusions could not be challenged as conclusions which a reasonable decision maker could not have reached. I therefore approach this case on the basis that there is no good reason why the claimant should not return to Holland with her son and that if she were to return she and her son would be properly looked after.

She has given as a reason for wanting to come to this country that she is searching for B's father who she says she believes is in this country. Following enquiries the defendant has doubts that she is telling the truth about this. There is evidence from Holland that she does not know who the father is. It was accepted by Mr Knafler, for the purposes of argument, that the local authority was reasonably entitled to reach the conclusion that it did about this suggested reason for coming to this country."

Those concessions are similarly made by Mr Howell Q.C. for the purposes of this appeal.

4.

On her arrival in this country, the mother and her child stayed at first with a friend in the Somali community here. When she was no longer able to avail herself of that hospitality, she applied to the Housing Department of the local authority which accepted that she was threatened with homelessness but held that she was not eligible for assistance with housing because she failed the necessary habitual residence test. She was not eligible for income support for similar reasons. Not being eligible for income support, she was also not eligible for housing benefit. She then applied to the respondent's central asylum team who, without reference to the Social Services Department, expressed the view that no duty was owed under the [Children Act 1989](#), a decision which it should be said in fairness to the local authority was immediately denounced by the Social Services manager. On 28th June 2000 the mother, helped by her solicitors, made representations to the out-of-hours duty social worker who agreed to provide accommodation and subsistence for the mother and child pending a Children Act assessment. Such assessment was conducted the following day and after further enquiries there was a further review of her position on 4th July. The social workers informed the mother of their conclusions that B was not a child in need because the long term needs of the child could best be met in settled accommodation with the provision of the full benefit entitlement and/or parental income that would be available to the mother in Holland, there being little or no prospect of such settled accommodation or full benefits or income being available to them here for at least about six months. She was offered her fares to return to Holland with B but that offer was refused. The mother was told that the local authority would continue to meet her and her son's short-term needs by providing accommodation and subsistence money for a further seven days only to enable her to make arrangements to return to Holland.

5.

The mother immediately sought permission to apply for Judicial Review to quash that decision. On 11th July Maurice Kay J., having heard counsel on behalf of the mother, the local authority not being represented, ordered that permission be granted and he ordered the local authority to continue to provide accommodation and subsistence to the mother at the accommodation provided for her by them. Eventually on 2nd October 2000 Turner J. made no order on that application for Judicial Review on an undertaking by the local authority not to terminate the prevailing provision for the mother pending the completion of the assessment without giving seven days' notice.

6.

As a result of that assessment the Social Services Department wrote to the mother on 9th October 2000 in these terms: -

"I am writing to confirm the outcome of your office visit on Wednesday, 4th October 2000 and to give you seven days' notice of our decision to end your support and accommodation.

We are aware that you and B need accommodation and money to live from, and you are not at present entitled to benefits in this country, although we are aware that you would be visiting the DSS on Thursday 12th October.

We continue to believe that it is in the best interests of you and B for you both to return to Holland where you are entitled to accommodation and benefits immediately. We also believe that it would be better for you both to be in an environment where you have family support and can speak the language. We have heard about your reasons for being in London and why you do not wish to return to Holland, however we do not accept that these are completely truthful, and we do not think that they constitute a valid reason why you may not return to Holland.

We therefore told you that the weekly payments will stop. You may collect the payment on Thursday 12th October to cover you until Monday 16th October which will be the last payment. The hotel booking will end on the same day, with your last night being Sunday 15th October.

We offered you the fares back to Holland. You refused this, however the offer will continue to be open. You, or your representatives, should contact the office to access this. If you continue to remain here we are concerned that B would not have access to accommodation or subsistence. We offered to provide B with accommodation without yourself. You indicated that you did not wish to consider this. This offer too remains open.

If your circumstances change and you or your representatives wish for us to re-consider our services to you, then you will need to contact this office."

7.

The mother immediately applied for Judicial Review to quash that decision and on 18th January 2001 Hooper J. granted her that relief. He gave permission to the local authority to appeal because:-

"It is in the public interest that this be considered by the Court of Appeal given the possible financial implications."

In the course of his judgment the judge said:-

"There is no dispute that the claimant is a good mother, ignoring her refusal to return to Holland. Apart from that refusal there is no issue as to her suitability to look after the child. Nor can there be any doubt that it would not be in this child's best interests to remove him at this young age from his mother. If the claimant remains in England and the defendant pursues the course outlined in the challenge letter, B will be put into the care of foster parents."

That remains the common ground for the purposes of this appeal.

The Statutory Background.

8.

The relevant provisions of the [Children Act 1989](#) are as follows:-

"PART III

LOCAL AUTHORITY SUPPORT FOR CHILDREN AND FAMILIES

Provision of services for children and their families.

17. Provision of services for children in need, their families and others.

(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.

(2) For the purpose principally of facilitating the discharge of their general duty under this section, every local authority shall have the specific duties and powers set out in Part I of Schedule 2.

(3) Any service provided by an authority in exercise of the functions conferred on them by this section may be provided for the family of a particular child in need or for any member of his family, if it is provided with a view to safeguarding or promoting the child's welfare.

...

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

...

(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 person with whom he has been living.

...

Provision of accommodation for children.

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.

...

(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.

...

(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,
- objects.

...

Duties of local authorities in relation to children looked after by them.

22. General duty of local authority in relation to children looked after by them.

(1) In [this Act](#), any reference to a child who is looked after by a local authority is a reference to a child who is -

- (a) in their care; or
- (b) provided with accommodation by the authority in the exercise of any functions (in particular those under [this Act](#)) which stand referred to their social services committee under the [Local Authority Social Services Act 1970](#).

(2) In subsection (1) “accommodation” means accommodation which is provided for a continuous period of more than 24 hours.

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

- (a) to safeguard and promote his welfare; and
- (b) to make use of such services available for children cared for by their own parents as appears to the authority reasonable in his case.

...

23. Provision of accommodation and maintenance by local authority for children whom they are looking after.

(1) It shall be the duty of any local authority looking after a child -

- (a) when he is in their care, to provide accommodation for him; and
- (b) to maintain him in other respects apart from providing accommodation for him.

(2) A local authority shall provide accommodation and maintenance for any child whom they are looking after by -

- (a) placing him (subject to sub-section (5) and any regulations made by the Secretary of State) with -
 - (i) family;
 - (ii) a relative of his; or
 - (iii) any other suitable person,

on such terms as to payment by the authority and otherwise as the authority may determine.

...

(f) Making such other arrangements as

(i) seem appropriate to them; and

(ii) comply with any regulations made by the Secretary of State;

(3) Any person with whom a child has been placed under sub-[section \(2\)](#)(a) is referred to in [this Act](#) as a local authority foster parent unless he falls within subsection (4).

(4) A person falls within this subsection if he is -

(a) a parent of the child;

...

(6) Subject to any regulations made by the Secretary of State for the purposes of this sub-section, a local authority looking after a child shall make arrangements to enable him to live with -

(a) any person falling within sub-section (4); or

(b) a relative, friend or other person connected with him,

unless that would not be reasonably practicable or consistent with his welfare."

We are told that no regulations have been made by the Secretary of State for the purposes of subsection (6) of section 23.

9.

Part I of Schedule 2 to [the Act](#) deals with "provision of services for families". It covers such matters as the identification of children in need and provision of information, children's services plans, the maintenance of a register of disabled children, assessment of children's needs, provision of accommodation in order to protect a child from ill-treatment at the hands of another, provision for disabled children, provision for a range of services for children living with their families, family centres and the maintenance of the family home. Perhaps the only material provision is in paragraph 7 which provides that:-

"Every local authority shall take reasonable steps designed -

(a) to reduce the need to bring -

(i) proceedings for care or supervision orders with respect to children within their area ..."

10.

Part II of Schedule 2 deals with children looked after by local authorities and paragraph 19 provides as follows:-

"(1) A local authority may only arrange for, or assist in arranging for, any child in their care to live outside England and Wales with the approval of the court.

(2) A local authority may, with the approval of every person who has parental responsibility for the child arrange for, or assist in arranging for, any other child looked after by them to live outside England and Wales."

11.

[Section 2](#) of the [Local Authority Social Services Act 1970](#) provides:-

“(1) Every local authority shall establish a social services committee and, subject to subsection (3) below, there shall stand referred to that committee all matters relating to the discharge by the authority of -

(a) their functions under the enactments specified in the first column of Schedule 1 to [this Act](#) (being the functions which are described in general terms in the second column of that schedule) ...”

The whole of the Children Act, insofar as it confers functions on a local authority within the meaning of [that Act](#), is specified in the first column of Schedule 1 and the functions described in general terms in the second column of that Schedule are the functions under Part III of [the Act](#) (Local Authority Support for Children and Families).

The judgment under appeal.

12.

Hooper J. identified the issue he had to resolve to be:-

“What are the obligations of a local authority under the [Children Act 1989](#) towards a young child who is within the area of the local authority because a parent refuses without good reason to take the child to a place outside the area of the local authority where the child would be properly looked after?”

In his judgment he drew support from R v Hammersmith and Fulham LBC ex parte Damoah [1999] 2 C.C.L.R. 18. He recorded the submission of Mr Harrop-Griffiths that:-

“As a general principle, it cannot be right that a mother who can reasonably have access to the means of meeting (the needs of her child) but refuses to pursue this, should be able to rely on this refusal as the basis for the child’s need and so in effect require a local authority to provide her with such support.”

He concluded:-

“I have considerable sympathy with this submission. However, if the child is “in need” by virtue of section 17(10) (and it is conceded by Mr Harrop-Griffiths that B is) and if it is in the best interests of the child to live with his mother (as it is in this case), it seems to me that the local authority, exercising its Children Act powers, has no alternative but to place him with his mother assuming that it is reasonably practicable to do so. Given the duties imposed on the local authority under section 17(1)(a) and (b) and the powers granted to it by Section 23 and bearing in mind the decision in Damoah, it is difficult to see what other course is open to the local authority even though the mother (as in this case) is, in the view of the local authority, acting in an unreasonable manner. It may be that the local authorities would be better advised to take the course suggested by Kay J. in Damoah, namely make the offer of free travel and indicate that, should the offer not be accepted, the local authority would reconsider its position in the light of its obligations under the Children Act. For these reasons this application succeeds.”

The submissions before us.

13.

Mr Supperstone Q.C., who now appears with Mr Harrop-Griffiths for the local authority, submits in summary that section 17(3) and (6) give the local authority power to provide accommodation for the mother and child and subsistence for them but do not impose a duty to do so; the duty to provide accommodation under section 20(1) is a duty to provide accommodation for the child only; section 23(6) only applies if the local authority are looking after the child but as the local authority are

entitled to refuse to provide accommodation for the child, he will no longer be looked after and so section 23(6) does not apply; in any event it would not be reasonably practicable or consistent with B's welfare to make arrangements for him to live with his mother in the circumstances in which she finds herself; and paragraph 19 does not apply. He submits that the true issue should be posed in this way: if the local authority are entitled to conclude that it is in the best interests of B to return to Holland, can they lawfully make an offer to facilitate that happening. He submits that in taking their decision, the local authority have acted lawfully.

14.

Mr Howell Q.C. who now appears with Mr Knafler for the mother submits that the local authority have not lawfully discharged their Part III functions because their decision is inconsistent with section 23(6) and with section 17(1)(b). He submits it is irrelevant whether an offer is made to accommodate B alone pursuant to section 20. He submits that the local authority is not empowered to make the arrangements for the child to live abroad by virtue of paragraph 19 of the schedule.

15.

The submissions are well developed in the skeleton arguments and I hope this brief summary does justice to the cogency of the interesting arguments deployed before us.

[Section 17 of the Act.](#)

16.

[Section 17\(1\)](#) imposes a general duty on the local authority, in addition to other duties imposed upon them, firstly to safeguard and promote the welfare of children in the area who are in need and secondly so far as is consistent with their duty to promote the upbringing of such children by their families. It is to be observed, however, that the duty is performed by providing a range and level of services appropriate to those children's needs. Given that there is a wide range of choice, it has to be inferred that there is power to do one or more of many things to meet the general duty. None of the specific duties set out in Part I of Schedule 2 seem to me to apply, though Mr Howell did contend that the duty under paragraph 7 of the First Schedule to take reasonable steps designed to reduce the need to bring care proceedings imposes a specific duty to provide accommodation not only for the child alone but for the child with the mother. I reject that submission. Paragraph 7 envisages a resort to a wide range of the reasonable steps which may obviate care proceedings being instituted. Accommodating the child alone under section 20 is one such step. Arranging for the mother and child to return to Holland where they can be accommodated and where the welfare of the child is ultimately best served is another such step.

17.

Mr Howell referred us to *R v Northavon D.C. ex parte Smith* [1994] 2 A.C. 402 to support his case under [section 17](#). One must, however, take note of the facts in that case. There the applicant and his wife whose five children lived with them were refused housing under Part III of the [Housing Act 1985](#) because the housing authority found that although they were in priority need, they had become homeless intentionally. The applicant went next door to the Social Services Department who were satisfied that the children were in need but they concluded they had no duty to provide financial assistance. The Social Services Department, invoking their powers under [section 27](#) of the [Children Act 1989](#), decided to request the help of the local housing authority by their giving urgent consideration either to the provision of assistance for an appropriate full tenancy of a type and description which was commensurate with the family's housing needs or to an extension of the occupancy of their temporary accommodation. The housing authority declined to do so and the

applicant applied for the judicial review of the housing authority's decision, not the Social Services' decision. The case is, therefore, authority for the Local Authorities Housing Act obligations and references to the Children Act duties are strictly obiter.

18.

At p.406 Lord Templeman observed:-

"If Mr Smith and his family were ejected by the housing authority from their temporary accommodation on 20th January 1993, his children would be in need. By [section 17\(3\)](#) a Social Services authority has power to provide services for the family of a particular child in need. By [section 17\(6\)](#) the Social Services authority were entitled to give assistance in cash to safeguard and promote the welfare of children." (Emphasis added by me).

At p.410 he said:-

"The provisions of [section 27](#) of the Children Act of 1989 ... imposed on the housing authority a duty to ascertain whether the housing authority could, without unduly prejudicing the discharge of their functions, provide a solution or co-operate in securing a solution to the problems of the Smith family to the extent necessary to prevent the children from suffering from lack of accommodation. ... There might have been no solution which did not impose on the housing authority a financial burden which they considered unduly prejudicial to the discharge of their functions. Mr Smith might have been an unacceptable tenant. Failing any acceptable solution, it would have been the duty of the Social Services authority to protect the children by providing financial assistance towards the accommodation of the family or by exercising the other powers available to the Social Services under the [Children Act 1989](#)." (Again the emphasis is mine.)

It is to be observed firstly that whereas Lord Templeman in the latter passage spoke of the duty of the Social Services, he had in the earlier passages referred to the powers provided by [section 17\(3\)](#) and (6).

19.

In my judgment the use of the permissive "may" as opposed to the peremptory "shall" in subsections (3) and (6) makes it plain that the local authority has power to provide for the family and power to give assistance in kind or in cash, but the local authority are not under any duty to do so. In my judgment the duty to promote the upbringing of children with their families, widely expressed as it is in [section 17\(1\)](#), is met by providing financial assistance for the return of mother and child to Holland because, as is conceded, it was reasonable for the local authority to conclude that that was the best way of meeting all of the child's needs not least because it is in Holland that the wider family, especially grandmother, are established.

20.

I do not read the second passage of Lord Templeman's speech to suggest that the only way in which the local authority perform their general duty to protect children in need is by providing financial assistance towards the accommodation of the family. As the quoted sentence makes plain, that is but one way in which the local authority may choose to act and it is clear that the duty may be satisfied by "exercising the other powers available to the Social Services authority under the Children Act".

21.

We were also referred to Attorney-General, ex rel. Tilley v Wandsworth L.B.C. [\[1981\] 1 W.L.R. 854](#). In this case the local authority had resolved that in those cases where intentional homelessness had been

determined by it in respect of a family with young children and subsequently an approach was made to its Social Services Department, assistance with alternative housing should not be provided under the provisions of the [Children and Young Persons Act 1963](#) although consideration should be given to the reception into care of the children should their circumstances warrant it. [Section 1\(1\)](#) of the [Children and Young Persons Act 1963](#) was a forerunner of what is now contained in Part III of the Children Act but it is couched in very different language and expresses a very different philosophy. [Section 1\(1\)](#) provided:-

“It shall be the duty of every local authority to make available such ... assistance as may promote the welfare of children by diminishing the need to receive children into or keep them in care under the [Children Act 1948](#) ... and any provision made by a local authority under this subsection may, if the local authority think fit, include provision for giving assistance in kind or, in exceptional circumstances, in cash.”

One sees quite plainly the genesis of [Section 17](#). Templeman L.J., as he then was, held at p.857:-

“To my mind, the word “assistance” in [section 1\(1\)](#) of [the Act](#) of 1963 clearly includes the provision of accommodation and then provides that the general powers of a local authority shall include specific powers. (Emphasis added).

So once again the categorisation is of powers not duties. I also note that at p.858 Templeman L.J. said this:-

“Children’s needs, and their welfare, depend on a variety of factors. When the council are considering the exercise of their powers and duties under [the Act](#) of 1963 one of the factors that they must take into account is the history of the family, including any history of intentional homelessness. The council must not take intentional homelessness into account for the purpose of punishing the child or punishing the parents of the child, but must take it into account in asking: “What is the best way, in the interests of this child, of exercising the powers which are given to us?””

In the appeal before us there is no *Wednesbury* challenge to the reasonableness or rationality of the local authority’s conclusions only to the lawfulness of the choices they made.

22.

I conclude without any difficulty at all that the local authority did not act unlawfully in refusing to provide assistance in kind or in cash for the mother so as to provide for accommodation for herself and B. [Sections 17\(3\)](#) and (6) do not impose such a duty on them. On the other hand the offer of assistance for her to return to Holland does fall within [section 17](#) because on the view of the facts taken by the social workers, that was an offer of a service designed to promote B’s upbringing by his family. There being no *Wednesbury* challenge, the decision was within the range of the powers of the local authority. It satisfies Lord Templeman’s test. There is no substance in the challenge to the lawfulness of the decision made pursuant to [section 17](#).

23.

Nothing in those conclusions is contrary to *Damoah*; on the contrary *Damoah* supports my view of the meaning of [section 17](#). There a Swedish national had travelled to England with her young sons intending to make a new life in this country. Like the claimant here, she was ineligible for income support or for housing under the Housing Acts. She was temporarily provided with bed and breakfast accommodation and a subsistence allowance under the Children Act. The decision taken by the Social Services Department in that case was to do no more than offer to fund the return of the children to

Sweden and on the judge's findings "it expressly excluded the use of some of its powers under [the Act](#) in the event that the applicant did not accept the offer". Kay J. had no difficulty at all in concluding that in deciding to limit its powers in that way the local authority was in breach of its duties to the children under [the Act](#). He summarised his general conclusions as follows:-

"A local authority may in discharge of its duties under Part III of [the Act](#) make an offer to the parent of a child it determines to be in need to give financial assistance for the family to return to a country from where they have come and where it believes the needs of the child will be best met. It is wrong, however, for the local authority to decide to withdraw all further assistance for the child in the event that the parent declines to accept the offer and it must clearly follow that it is wrong for it to threaten such a course of action even if it has made no such decision."

24.

It seems to me that the local authority here have heeded the warnings of Kay J. and followed his judgment to the letter. The decision here is very different from the decision there. Upon a proper analysis of the October 9th letter, the local authority were informing the applicant:-

(1) That they had decided to end their support and accommodation in seven days' time, consistent with the undertaking they gave Turner J.

(2) They explained where they believed the best interests of B lay.

(3) They offered the mother her fares back to Holland, an offer which was left open.

(4) If the mother insisted on remaining here without access to accommodation or subsistence, then the local authority offered to provide B with accommodation without the mother and that offer was also to remain open.

(5) Finally the local authority indicated that if the mother's circumstances changed and she wished them to reconsider their services, she could apply accordingly.

25.

On that analysis a lawful decision to provide fares was taken, alternatives were suggested, no door was shut and no threats were made. In other words this local authority did follow the course suggested by Kay J. and I reject the judge's view at the conclusion of his judgment that they had not done so.

Section 20.

26.

The duty here is to provide accommodation for any child in need who appears to require accommodation as a result of his mother being prevented for whatever reason from providing him with suitable accommodation. The duty is quite clearly on the plain literal language of the section a duty to provide accommodation for the child, not for the parent and the child. In their decision letter the Social Services Department took account of the mother's likely continuing refusal to accept the offer of fares to return back to Holland. Given the decision that the hotel accommodation was to end a week later, it was in my judgment a proper exercise of their powers and a due fulfilment of their duty to offer accommodation for B without mother. Indeed, Mr Howell does not contend otherwise.

Section 23.

27.

Subsection 2 provides a range of ways in which the local authority may provide accommodation for a child whom they are looking after. That ranges from placing him with a family and a family as defined in section 17(10) includes any person who has parental responsibility for the child, so must include the mother. At the other end of the range the local authority may make such other arrangements as seem appropriate to them and in between there is the more usual placement with a foster parent or placement in some community home, voluntary home or registered children's home.

28.

It must be noted that the section applies to children whom the local authority are looking after. Section 22 provides that a reference to a child who is looked after by the local authority is a reference to a child who is provided with accommodation by the authority in the exercise of any functions (in particular those under this Act) which stand referred to their Social Services Committee. Whilst the mother and a child were staying in their bed and breakfast accommodation which is accommodation provided for them, if only in the sense of being paid for, by the local authority, then the child was nonetheless provided with accommodation in the exercise of one of the functions which stood referred to the Social Services Committee. The mother and B were there by virtue of powers exercised under section 17(3) and 17(6). Mr Supperstone submits that it is the mother rather than the child who is being provided with that accommodation. I cannot accept that submission. The accommodation was for both of them and it is impossible to separate one from the other. Mr Supperstone's next submission is that the local authority's decision is that at the expiration of the seven days notice they would not provide any accommodation for B and section 23 does not apply as from the cessation of that provision. At first blush that seemed an attractive argument. Mr Howell contends, however, that as the local authority offered to accommodate B alone under section 20, that makes him a child who is looked after by the local authority. He submits that section 23 is a regulatory provision to enable the local authority to decide what accommodation to provide. There has necessarily, he submits, to be some interval of time between the decision to provide some accommodation, the decision precisely what accommodation to offer from the range provided in section 23(2) and the child actually taking up that accommodation for a continuous period of more than twenty-four hours as required by section 22(2). In my view Mr Howell is right, sections 22 and 23 have to be construed purposively and so a child should be taken to be provided with accommodation from the moment a decision is taken to place him for a continuous period of more than twenty four hours at one of the places prescribed by section 23(2). Mr Howell submits that since the local authority decided that if the mother would not return to Holland, it would accommodate B pursuant to section 20, then it is providing him with accommodation in the exercise of their proper functions. I shall assume, for the purpose of this argument, that section 23 does apply. I must then consider the effect of section 23(6).

29.

Mr Howell submits that upon a proper construction of section 23(6) the local authority are under a duty to accommodate both mother and child. I reject that argument for these reasons:-

(1) On his case, section 23 only applies because of the offer to accommodate B under section 20. On the proper construction I have found for section 20, the duty is to accommodate the child only, not to accommodate mother and child. On Mr Howell's construction of the operation of these sections, that duty under section 20 would immediately be transformed by virtue of section 23(6) into a duty to house both. The statute cannot be construed in a way to produce such an odd result. It must be absurd if the lawfulness of the local authority's decisions that it is unwilling any longer to accommodate the mother and child under section 17 but that it will accommodate the child, but not the mother and the child, under section 20, can be set at naught as it would be if section 23(6) meant

that the local authority suddenly had to do what a moment earlier they were not obliged to do, namely find accommodation for both together. That construction simply cannot be right. If the duty to accommodate the child (the section 20 duty) is the primary duty, and section 23 provides, as Mr Howell acknowledges, the range of choice for the performance of that duty, then that mechanistic purpose of section 23 should not be used totally to change the nature of the primary duty it is there to serve.

(2) Mr Howell places section 23(6) at the forefront of his case. In his submission section 23(6) means that the only lawful step for a local authority in circumstances like these is to offer accommodation to mother and child. If he is right, such a far reaching duty which would leave the Social Services Department with practically no discretion, would impose considerable strain on their stretched resources, and would render Part VII of the [Housing Act 1996](#) virtually irrelevant where the intentionally homeless person is a parent with young children. I would be astonished to find that such a hugely important social provision should be hidden away in the sixth subsection of the seventh section in Part III of the Children Act. The Children Act was indeed a great reforming statute but I would have expected that if the reforms went that far then they would find a more prominent place in the statutory framework and be spelt out in clearer language than is urged upon us.

(3) The duty under section 23(6) is that the local authority make arrangements to enable the child “to live with” his parents. That begs the question where B is to live with his mother. The local authority are, in my judgment, perfectly entitled to say that they have made arrangements for B to live with his mother if only she will accept their offer to go home. Subsection 6 makes no reference to the accommodation in which the child is to live with the mother and it seems to me to be a mighty jump to infer from an underlying philosophy of the Children Act that encourages children to be brought up by their parents that suddenly there is a duty on the local authority to provide the accommodation which the mother cannot herself provide. Such an onerous duty to provide housing for the mother is not, in my judgment, a necessary implication from a duty to make arrangements to enable the child to live with the mother.

(4) Under subsection 6 arrangements for the child to live with the parent must be made “unless that would not be reasonably practicable or consistent with his welfare”. In my judgment it is not reasonably practicable to make arrangements for this child to live with his mother because this mother has no accommodation at which her child can live with her. But I have already made that point. It would not be consistent with his welfare to have him living with his mother on the streets. I reject the argument that a duty to provide the necessary accommodation arises because the mother cannot cope without that help.

30.

It follows from all of the above that in my judgment the local authority did not act unlawfully in offering accommodation to B alone and in not offering accommodation to mother and child.

Paragraph 19 of Part II of the First Schedule.

31.

Mr Howell submits that if the local authority may only arrange for or assist in arranging for a child looked after by them to live outside England and Wales if the mother approves, this mother’s refusal to take her child back to Holland renders the local authority’s offer of financial assistance in her travelling there unlawful. Paragraph 19 was enacted for the purpose of ending what many would regard as the scandalous child migration schemes that led to so many children in care being sent to the Colonies because the power under the [Children Act 1948](#) given to the Secretary of State to control

that emigration was never exercised in time. I believe the last group of children were sent out to Australia in 1967 but it was not until January 1982 that any regulations were made to control this pernicious export. That is why children in care cannot be sent abroad without an order of the court and why under paragraph 19(2) children looked after by the local authority cannot be moved without the parents' approval. In any event Mr Supperstone has the answer to this submission. Accepting that offering to pay the rail fares was assisting in arranging for B to live outside England and Wales, that assistance only becomes unlawful if it is done without parental approval. If the mother were to accept the offer then there is no problem. If on the other hand, the mother rejects the offer, as this mother implacably does wishing rather to die than to go back to Holland, then her rejection of the fares puts an end to any attempt to assist in arranging for the child to live outside the jurisdiction. What is unlawful under paragraph 19 is having arrangements in place or assisting in those arrangements which will lead inexorably to the child going to live abroad. Those arrangements are not in place in this case because the mother refuses to accept the offer of help. B is not going to be sent back to Holland without the mother's approval. The action of the local authority in making the offer was of itself not in any way unlawful under paragraph 19.

Conclusion.

32.

There is, indeed, nothing unlawful in the actions of the local authority in this case. I would therefore allow the appeal against the order quashing the local authority's decision and I would dismiss the mother's application for judicial review.

LORD JUSTICE MAY: I agree.

LORD JUSTICE RIX: I also agree.

ORDER:

1.

Appeal allowed with costs here and below to be assessed by a costs Judge

2.

Mother's application for judicial review dismissed.

3.

Reporting Restrictions

4.

Leave to appeal to the House of Lords refused.

(Order does not form part of approved Judgment)