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CO/9807/2008

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice

Strand

London WC2A 2LL

Friday, 10 February 2012

B e f o r e:

MRS JUSTICE THIRLWALL

- - - - - - - - - - - -

Between:

THE QUEEN ON THE APPLICATION OF R

Claimant

v

LONDON BOROUGH OF CROYDON

Defendant

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Mr D Suterwalla (instructed by Harter and Loveless) appeared on behalf of the **Claimant**

Miss C Rowlands (instructed by DMH Stallard) appeared on behalf of the **Defendant**

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J U D G M E N T

MRS JUSTICE THIRLWALL: The claimant is a national of Afghanistan. He seeks judicial review of the refusal by the defendant to treat him as a 'former relevant child' within the meaning of section 23C of the Children Act 1989. Were he to be so treated he would be entitled to a range of services under the Children Act. The defendant resists the claim.

Background

2.

The claimant left his home country when he was 3 years old. On his account his parents were killed and he escaped with an uncle with whom he lived for several years in Iran. In May 2008, after an arduous journey, he arrived in the United Kingdom. On 22 May he presented himself at the United Kingdom Border Agency ("UKBA") in Croydon and claimed asylum. At that time he said he was 15 years old. The UKBA referred him to the defendant for assessment of his age. Assuming, as I do, that the UKBA acted in accordance with the Home Secretary's 2007 Policy on Age Dispute Cases, it follows that UKBA staff formed the view that his appearance or demeanour "very strongly" suggested that he was 18 or over at that time. The defendant provided the claimant with accommodation in a shared house with other young people until they carried out an assessment of his age.

3.
On 27 May 2008, the defendant assessed him to be over 18 years old. It therefore referred him back to the UKBA who, through the National Asylum Support Service (NASS) provided him with accommodation and you subsistence support. For some time he lived in a hostel with adults. After that he was moved to different addresses. He currently lives in north west London. NASS continues to provide his accommodation and subsistence money.

4.
On 23 June 2008, the Secretary of State notified the claimant that consideration of his asylum application was to be referred to Greece under the Dublin II Regulations. On 23 September 2008, Greece was deemed to be the Member State responsible for the consideration of the claimant's asylum application by default under Article 21C of the Dublin II Regulation. The claimant's asylum claim in the United Kingdom was refused and certified on safe third country grounds by virtue of part 2, paragraph 3 (2) of the Asylum and Immigration (Treatment of Claimants, etc.Act) 2004. On 15 October 2008, the claimant filed an application for judicial review challenging i) the failure/refusal of Croydon on 25 September 2008 to undertake a reassessment of the claimant's age or to determine him to be a child and ii)the decision of the Secretary of State, dated 21 August 2008, that the claimant was aged 18 or over.

5.
The claimant's application was effectively stayed, or at least stalled, behind other age assessment cases which were then being considered, first in the Court of Appeal, and then in the Supreme Court.

6.
On 13 September 2010, in the light of the judgment of the House of Lords in R(A) London Borough Croydon [2009] UKSC 8, the court granted the claimant permission to amend his grounds to apply for substantive consideration of the question of his age. On 28 September 2010, the claimant withdrew his judicial review application against the Secretary of State, upon the Secretary of State undertaking to withdraw the claimant's third country certification and to consider his asylum application substantively. The claim for asylum was subsequently considered and refused on 18 February 2011. His appeal stands adjourned.

7.
On 22 November 2010, the court granted the claimant permission to apply for judicial review and directed that the matter be listed for a fact-finding hearing to determine his age. In the meantime, for a prolonged period during 2009 and then again during 2010, the defendant promised a further assessment of the claimant's age. This was eventually carried out on 9 December 2010. It concluded that the claimant was an adult; 18 years plus.

8.

The fact-finding hearing took place before Kenneth Parker J on 24 and 25 May of last year. It was the defendant's case that the claimant was at least 21 years old by that stage. It was the claimant's case that he was still under 18. In a detailed judgment, dated 14 June 2011, Kenneth Parker J accepted Croydon's second age assessment, dated 9 December 2010, that the claimant was 18 plus as at that date. He concluded that the "only safe conclusion" that he could reach was that the claimant's date of birth was 9 December 1992.

9.
In an order dated 14 June 2011, Kenneth Parker J gave the claimant liberty to amend his claim to raise any further claim arising from the judgment of the court in respect of Croydon's obligations under the Children Act 1989. Accordingly, the claimant filed supplementary grounds claiming that he should be treated as a "former relevant child" because the effect of the judgment of Kenneth Parker J was that he, the claimant, was only 15 years and 6 months old when he first came to the attention of Croydon's Children's Services Department.

10.
The matter eventually came before Lang J on 19 December and had to be adjourned. It was listed before me last week for permission, presumably on the basis that the amended claim raised new grounds. The claim was plainly arguable and I gave permission to claim judicial review at the outset of the hearing. The hearing was devoted to the argument on the substance of the claim.

11.
The relevant statutory provisions are not in dispute. They are to be found in The Children Act 1989 and the Care Leavers (England) Regulations (2010), which replaced the Children (Leaving Care) (England) Regulations of 2001.

12.
Section 20 of the Children Act is headed 'Provision of accommodation for children: general'. By Section 20:

"(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."

13.
I interpose that a child means a person under the age of 18, (see section 105 (1) of the Act). It was not in dispute, in this case, that a child without accommodation is a child in need. If authority for that is required it is to be found in the case of R v Northavon District Council ex p Smith [1994] 2 AC 402, 406.

14.

Section 22 of the Children Act states:

"(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 —

...(b)provided with accommodation by the authority in the exercise of any functions (in particular those under this Act) which [are social services functions within the meaning of] the Local Authority Social Services Act 1970 [apart from functions under sections 23B and 24B]."

15.
Section 22C is headed ‘ways in which looked after children are to be accommodated and maintained’. By subsection (1):

> “(1)This section applies where a local authority are looking after a child ("C").
>
> (2)The local authority must make arrangements for C to live with a person who falls within subsection (3) (but subject to subsection (4)).
>
> (3)A person ("P") falls within this subsection if -
>
> (a)P is a parent of C;
>
> (b)P is not a parent of C but has parental responsibility for C; or
>
> (c)in a case where C is in the care of the local authority and there was a residence order in force with respect to C immediately before the care order was made, P was a person in whose favour the residence order was made.
>
> (4)Subsection (2) does not require the local authority to make arrangements of the kind mentioned in that subsection if doing so —
>
> a)would not be consistent with C's welfare; or
>
> b)would not be reasonably practicable.
>
> (5)If the local authority are unable to make arrangements under subsection (2), they must place C in the placement which is, in their opinion, the most appropriate placement available.
>
> (6)In subsection (5) "placement" means—
>
> (a)placement with an individual who is a relative, friend or other person connected with C and who is also a local authority foster parent;
>
> (b)placement with a local authority foster parent who does not fall within paragraph (a);
>
> (c)placement in a children's home in respect of which a person is registered under Part 2 of the Care Standards Act 2000; or
>
> (d)subject to section 22D, placement in accordance with other arrangements which comply with any regulations made for the purposes of this section.
>
> (7)In determining the most appropriate placement for C, the local authority must, subject to the other provisions of this Part (in particular, to their duties under section 22) -

(a)give preference to a placement falling within paragraph (a) of subsection (6) over placements falling within the other paragraphs of that subsection;

(b)comply, so far as is reasonably practicable in all the circumstances of C's case, with the requirements of subsection (8); and

(c)comply with subsection (9) unless that is not reasonably practicable.

(8)The local authority must ensure that the placement is such that -

(a)it allows C to live near C's home;

(b)it does not disrupt C's education or training;

(c)if C has a sibling for whom the local authority are also providing accommodation, it enables C and the sibling to live together;

(d)if C is disabled, the accommodation provided is suitable to C's particular needs.

(9)The placement must be such that C is provided with accommodation within the local authority's area".

16.
Section 23 is headed 'Provision of accommodation and maintenance by local authority for children whom they are looking after'. By subsection 27(1):

(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.

17.
Paragraph 19B of Schedule 2 to the Children Act 1989 places certain duties on local authorities in relation to "an eligible child whom they are looking after". An eligible child is a child aged 16 or 17 (paragraph 19B (2)(a)) who has been looked after by a local authority for a cumulative total of 13 weeks beginning after the age of 14 and ending after the age of 16 (see paragraph 19B (2)(b))

18.
A local authority has the following duties towards an eligible child. It must:

(a)
appoint a personal adviser.

(b)
carry out an assessment of his needs for when the local authority is looking after the child and when they cease to look after him.

(c)
prepare a pathway plan to deal with the child's transition to life after being looked after.

(d)
keep that plan under regular review.

19.
Section 23A of the Children Act also places duties upon local authorities towards "relevant children". A relevant child is a child who is no longer being looked after by a local authority but prior to ceasing to being looked after was an eligible child.

20.
Pursuant to section 23B of the Children Act 1989, a local authority must appoint a personal adviser if they have not already done so and carry out an assessment of needs and prepare a pathway plan if they have not already done so. The pathway plan must be kept under regular review and must safeguard and promote the child's welfare by, if necessary, maintaining the child: providing him with suitable accommodation and other support, including the provision of money.

21.
Section 23C of the Children Act places duties upon local authorities in respect of "former relevant children". This is either a young person who has turned 18 and, prior to doing so, was either a relevant child or an eligible child. The duties are in similar terms to those owed to a relevant child, perhaps unsurprisingly. The duties remain until the young person reaches the age of 21 or, in some cases, 24. Additionally, under section 23C(4)(c), a local authority is under a duty to give a former relevant child such assistance "to the extent that his welfare requires it". This provision has been held to extend to a duty to provide a former relevant child with accommodation where necessary. Again, if authority is required for that, it can be found in the case of R(O) v Barking and Dagenham London Borough Council [2011] 1 WLR at 1283.

22.
It is plain from that substantial and detailed statutory framework that the consequences for a young person of having been treated as a relevant child or an eligible child, and then a former relevant child, are of great practical importance.

The parties' positions

23.
The claimant, through Mr Suterwalla, puts his case in three ways:

(i)That the accommodation provided by NASS from 2008 to the time the claimant was 18 should be deemed to have been provided by the defendant in discharge of its duty under section 20. This would mean that the claimant was in fact "looked after" and that at the age of 18 he would have become a former relevant child.

(ii)
Alternatively, if the defendant did not provide the accommodation, then it failed to discharge its duty under section 20. That failure was unlawful. The court should declare it unlawful and require the defendant to treat the claimant as it would have been obliged to treat him had it conducted itself lawfully in the period up to his 18th birthday. The defendant has wide powers under the Local Government Act 2000 in addition to the powers to which I have already referred under the Children Act and indeed under the Leaving Care Regulations and can take steps (a) to remedy the consequences of its unlawful conduct and (b) effectively to discharge its responsibilities in the manner owed to a former relevant child. Mr Suterwalla argues that it should be directed to do so.

(iii)

Even if the first two arguments fail, in the light of the defendant's prolonged unlawful conduct, the court should declare that the Council should treat the claimant as a former relevant child.

24.
The defendant's response is short and to the point. Miss Rowlands submits:

(i)The court must deal with fact, not fiction. The reality is that the defendant did not provide the claimant with accommodation under section 20. Accordingly, he was never a "looked after child". Therefore he could not and cannot be a former relevant child within the meaning of the Children Act 1989.

(ii)
The Council did not act unlawfully at any stage. Section 20 required the defendant to carry out a Merton compliant assessment of his age. The defendant carried out such an assessment. That, submits Miss Rowlands, is sufficient to discharge the section 20 duty. Thus there was no breach of section 20 and there has been no unlawful conduct by the defendant. Given that the Council has not acted unlawfully and that, as a matter of fact, the defendant was never a looked after child, there is no basis upon which the defendant should or could be directed to treat him as though he were a former relevant child.

(iii)
Given the matters set out at (i) and (ii) to which I have just referred, there is, he submits, no basis upon which the court could properly direct the defendant to treat the claimant as a former relevant child.

25.
Notwithstanding the order in which the submissions were made, it seems to me that the starting point for a satisfactory analysis of this case is whether or not the defendant has acted unlawfully.
Mr Suterwalla submits that, in failing to discharge its duty under section 20 the defendant has acted unlawfully. Miss Rowlands contends that the duty owed to the claimant under section 20 was to carry out a Merton compliant age assessment. Doing so amounted to a discharge of the duty under section 20.

26.
Miss Rowlands sought to support her submission by relying on the first of a series of steps which were set out by Ward LJ in R(a) v Croydon London Borough Council [2009] LGR 24, paragraph 75 and approved by Baroness Hale in R(G) v Southwark London Borough Council [2009] 1 WLR 1299. At paragraph 28 Baroness Hale said:

"Section 20(1) entails a series of judgments, helpfully set out by Ward LJ in R(A) v Croydon London Borough Council [2009] LGR 24, 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 case.

(2)Is the applicant a child in need..."

She then continued dealing with matters which are not of direct relevance to the issues which I have to determine.

27.

Miss Rowlands argues that it would appear that Baroness Hale accepted that the first of those questions was the first in a series of judgments to be taken by a local authority. She says that it follows therefore that a decision as to the age of a child is a judgment question. Whilst I understand the argument, it cannot, in my judgment, be right. Section 20 is not engaged in respect of an adult. It arises only where a local authority is dealing with a child. An assessment of age is necessary where the authority doubts that the young person is a child. It is done to ensure that Children's Services resources are provided to those for whom they are designed and not to adults. It cannot, in my view, be characterised as a stage in what might be described as the section 20 process.

28.
The decision about whether the young person is a child must be taken before the section 20 duty arises. In the Croydon case in the Supreme Court, their Lordships said in terms that the question of whether a child was in need (my underlining) was a question of judgment for the local authority, but the question whether a person was or was not a child depended entirely on the objective fact of a person's age:

"26.
These days, Parliamentary draftsmen are more alive to this kind of debate. The 1989 Act draws a clear and sensible distinction between different kinds of question. The question whether a child is "in need" requires a number of different value judgments. What would be a reasonable standard of health or development for this particular child? How likely is he to achieve it? What services might bring that standard up to a reasonable level? What amounts to a significant impairment of health or development? How likely is that? What services might avoid it? Questions like this are sometimes decided by the courts in the course of care or other proceedings under the Act. Courts are quite used to deciding them upon the 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.

27.
But the question whether a person is a "child" is a different kind of question. There is a right or a wrong answer. It may be difficult to determine what that answer is. The decision-makers may have to do their best on the basis of less than perfect or conclusive evidence. But that is true of many questions of fact which regularly come before the courts. That does not prevent them from being questions for the courts rather than for other kinds of decision makers."

29.
It follows, therefore, that the question of whether or not a person is a child is a fact precedent to the exercise of a local authority's powers or the discharge of its duties under the Act. In my judgment the argument that the age assessment constituted discharge of a section 20 duty is hopeless and I reject it.

30.
It seems to me that the following three propositions are incontrovertible: (i) At the time the claimant came to the attention of the defendant and was assessed in May 2008, he was a child. He was 15. That is the inescapable consequence of the decision of Kenneth Parker J. (ii) The claimant was in need: that

was not disputed by Miss Rowlands. Thus he was a child in need within the meaning of section 20 of the Children Act 1989.

(iii)
He required accommodation as a result of at least one of the matters set out in subsection 20 (1) A to C and the defendant knew this.

31.
It follows therefore that the defendant was under a duty to provide accommodation for the claimant, pursuant to section 20(1), the relevant part of which I repeat for ease of reference "every local authority shall (my emphasis) provide accommodation for any child in need". Given that the defendant did not provide accommodation for him, the defendant failed to discharge its duty under section 20. It follows therefore that the defendant has acted unlawfully.

32.
It matters not that this unlawful action was the result of an honest mistake. I am fortified in that view by the observations of Carnwath LJ in SSHD v (R) [2007] EWCA at 456,where he said at paragraph 41:

"The court's proper sphere is illegality, not maladministration. If the earlier decisions were unlawful, it matters little whether that was the result of bad faith, bad luck, or sheer muddle. It is the unlawfulness, not the cause of it, which justifies the court's intervention, and provides the basis for the remedy."

33.
It follows that without more, there is a proper basis upon which the court should intervene in order to right the wrong which has been done in this case.

34.
Some considerable time was spent in argument on the first of Mr Suterwalla's submissions and I shall deal with them perhaps relatively briefly.

35.
The question of whether or not accommodation which was ostensibly not provided under section 20 by a local authority may be considered to have been so provided has been before the courts on a number of occasions. In the case of the R(M) v Hammersmith and Fulham LBC [2008] 1 WLR 535, the legal issue was defined by Baroness Hale at paragraph 34:

“In hindsight perhaps we can all agree on what ought to have happened, but the claim is that we should treat what ought to have happened as if it had actually happened. The claim is that we should treat what ought to have happened as if it had actually happened. The claim is for the extra help and support available to former relevant children even after they reach the age of 18 under section 23C of the 1989 Act.

To be a relevant child one must have first have been an eligible child, section 23 A1. To be an eligible child one must have been looked after by a loyal authority for the requisite period of time, Schedule 2 paragraph 19(B) and Leaving Care Regulations. Essentially, the argument is that the local authority were in fact acting under section 20 when they thought they were acting under section 188 of the 1996 Act”.

36.

At paragraph 44, upon which both counsel rely to support different proposals, Baroness Hale says this:

"...It is one thing to hold that the actions of a local children's services authority should be categorised according to what they should have done rather than what they may have thought whether at the time or in retrospect that they were doing. It is another thing entirely to hold that the actions of a local housing authority should be categorised according to what the children's services authority should have done had the case been drawn to their attention at the time. In all of the above cases, the children's services authority did something as a result of which the child was provided with accommodation. The question was what they had done. In this case, there is no evidence that the children's services authority did anything at all. It is impossible to read the words

'a child who is ... provided with accommodation by the authority in the exercise of any functions ... which are social services functions within the meaning of the Local Authority Social Services Act 1970 ...'

To include a child who has not been drawn to the attention of the local social services authority or provided with any accommodation or services by the authority."

She goes on to say that the position cannot be different depending on whether or not the authority is a metropolitan authority or the unitary authority.

37.
Miss Rowlands, in a submission which reflected her primary submission that the court should look at the reality and not at fiction submits that it cannot be said here that what happened could be characterised as the provision of accommodation under section 20. It was part of a system that was set up between UKBA and the London Borough of Croydon to ensure that age assessment was carried out expeditiously and that those who were deemed to be over the age of 18 would be treated as adults and dealt with by UKBA.

38.
The difficulty for Miss Rowlands is I think this: in the Hammersmith case, the claimant was unknown to the children's department of the local authority. It is easy to see that there is a difficulty in deeming something to have taken place when it could not possibly have done so. In that case the claimant had been housed under the Housing Act when she was aged 16 and 17. The housing had been provided by the housing department. But in this case the claimant, if I may put it this way, had been banging on Croydon's door for 3 years, repeatedly asserting that he was a child. The defendant was well aware of his existence and owed him a duty to accommodate him.

39.
In R (G) v Southwark LBC, the appellant claimed that he was a former relevant child on the basis that accommodation which had been provided to him by the Homeless Persons Unit was accommodation provided pursuant to section 20 of the Children Act. In that case, the House of Lords determined retrospectively that accommodation had been provided to him pursuant to section 20 of the Children Act. The claimant had been known to the local authority’s children's services department who had assessed his needs and had incorrectly concluded that his needs could be met by the housing authority. In that case, what was under scrutiny was the judgment of the local authority which was found to be defective. In this case, what is under scrutiny is the local authority's error of fact which has led to its unlawful conduct.

40.
Mr Suterwalla emphasises that it is not necessary that it should be a different limb of the same local authority who provides housing; he has drawn my attention to R(MM) v Lewisham LBC [2009] EWHC, where the claimant was being provided with accommodation at a refuge which was nothing to do with its local authority. In that case, Sir George Newman held (see paragraph 36) that the claimant was entitled to a declaration that she should have been accommodated for at least 13 weeks before she became 18 and is now a former relevant child. Mr Suterwalla submits that this supports his argument that the fact that UKBA provided the accommodation does not mean that accommodation cannot be deemed to have been provided by the local authority.

41.
I finally refer to the decision of Singh J in R(B) v Nottingham City Council. In that case the unsuccessful claimant was seeking a remedy under section 20, although the facts were rather different from the facts of this case. Singh J carried out a careful analysis of all the authorities on this topic. When dealing with the Hammersmith case, he asked this question at paragraph 61:

"...The question is: what is the true ratio of the decision in the Hammersmith case? It is plain, in my judgment, that what Baroness Hale in that passage was contrasting was the facts of the case before the Appellant Committee in which the children's services authority had done nothing at all and there was nothing as a result of which the child was provided with accommodation in that case which had been done by that authority from the other cases cited to the House of Lords. That, as it seems to me, requires there to be not only some action by the children's services authority, but also a causal nexus between that action and the result that a child is in fact provided with accommodation. In such circumstances a child will be regarded in law as having been provided with accommodation under section 20 of the 1989 Act, even though, as a matter of fact, the accommodation is provided by housing authority under the 1996 Act..."

42.
In that case, there was no such action and the appeal was dismissed. In this case, Mr Suterwalla argues that the action taken by the children's services authority was to refer the claimant back to the UKBA. Thus there was a direct causal nexus between that action and the fact that a claimant was provided with accommodation. It is difficult to disagree with that.

43.
In the course of submissions on this issue I expressed my reservation that the claimant’s submission seemed to be contrary to the reality but I am satisfied, having reviewed the authorities carefully as invited to do, that the court may deem accommodation to have been provided pursuant to Section 20 where the local authority has acted unlawfully. Were it necessary for me to do so, I would have done so here.

44.
Given my findings in respect of those two matters I do not need to go any further and consider the third argument that was raised by Mr Suterwalla. The London Borough of Croydon has known since June of last year that it had made a grave error. The error may have been made in good faith, but it was a serious error with grave consequences for this young man. I had assumed that between the decision of Parker J and the hearing before me, a period of some 7 months, the Council would have given some consideration to his plight and to whether or not the Council could or indeed should do something about him. I asked whether that had been done and I found it necessary to repeat the question more than once before I received the response from Miss Rowlands that her instructions

were that the Council would abide by the order of this court. I inferred, and it was not suggested I was in error, that the answer to my question was no. The approach of Croydon effectively has been that it has done no wrong so there was nothing to put right. That line of thinking has, in my judgment, prevented the Council from considering how to remedy the position for this young man and to have prevented it from taking what might have been thought to be the only proper option open to it, namely to treat him as if he were a former relevant child within the meaning of section 23 of the Act and provide him with the services to which he would be entitled.

45.
I am quite satisfied that the court ought to intervene in this case. Accordingly, I direct that the Council must now treat this young man as a former relevant child and provide him with the services to which he would have been entitled had he been treated as a child from May 2008 and onwards. I am not going to give the precise wording unless there is dispute between parties and I would invite them to discuss the appropriate form of words for any order.