

**Children and Young People in Need of Accommodation**

**Remedies by way of Judicial Review**

**INTRODUCTION**

1. This workshop is intended to cover remedies for children in need of accommodation rather than families in need of accommodation . There are of course numerous important issues for families with children – not only the primary question of whether a duty is owed under Part VII Housing Act 1996 but how that duty if owed is to be discharged, and especially for children of persons from abroad e.g. Zambrano and the UK citizen children of those without a right to reside, Ibrahim and Texeira and children with an Art 12 1612/1968 right to complete their education and the eligibility of the children of failed asylum seekers whose children have joined them after their asylum application failed **R(o/a VC –v-Newcastle City Council [2012] 2 All ER 227 .** Classes of applicants of whom one might note in passing could have been in serious difficult in obtaining relief if the residence test for legal aid had been in force.
2. There have been considerable developments in the case law over the last ten years. The driver behind many of those changes was the appreciation of poor outcomes for care leavers cast out from the albeit far from ideal safety net of care they would seldom be regarded simply on the grounds of tender years and vulnerability as being in priority need for accommodation although earlier versions of the Code of Guidance had suggested that 16-18 year olds in danger of financial or sexual exploitation would be in priority need see **Kelly-v- Monklands DC (1986) SLT 169.**
3. On the other hand, many thought that outside the specific duty owed to a class of children in need under Section 20 Children Act 1989 (leaving aside of course children in care following care proceedings) that the

powers under the general duty to safeguard the welfare of children under S17 Children Act 1989 did not extend to accommodation.

4. Section 20 (1) Children Act 1989 provides:

*"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."*

*Section 20(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.*

5. This did not, however, leave much scope for unseemly squabbling between departments of local authorities as to who was responsible for accommodating children and then young people over 18 as apart from the S20 duty all too often nobody seemed to. Changes began however with the arrival of the Children (Leaving Care) Act 2000 and the duties to be found to prepare for and to provide assistance after leaving care. This included in Section 23C(4)(c) the obligation to provide such other assistance as their welfare may require.
6. Then came three cases raising the issue as to whether the power under Section 17(6) Children Act 1989 included a power to provide accommodation. This would give rise not only to the question as to the general existence or otherwise of that power but also questions as to whether an authority could choose to provide accommodation under

Section 17 or 20 Children Act 1989. If the former then it was argued that they could avoid their duties under the Children (Leaving Care) Act 2000 provisions as these only applied to children who had been looked after, accommodation or fostered. If a child over sixteen had simply been placed in S17 accommodation often it was alleged on the basis that they no longer needed “ looking after “ it was suggested therefore none of those expensive duties applied.

7. A number of basic principles are now established as a result of a number of House of Lords decisions in the 2000s.
  - (1) There was always a power to provide accommodation under S17 pursuant to that general duty albeit by the time that came to be confirmed by the House of Lords **R (o/a G) –v-Barnet LBC [2004] AC 208** express provision to that effect had been inserted into S17 by the Adoption and Children Act 2002
  - (2) If a child fell within either duty to accommodate under Section 20 Children Act 1989 (or indeed the power under Section 20(4) CA 1989 then it was under that duty they were to be accommodated not under Part VII Housing Act 1996 regardless of whether she came to the attention of social services **R (o/a G-v-Southwark LBC [2009] 1WLR 1299** or housing first **R (M) v Hammersmith and Fulham London Borough Council [2008] UKHL 14, [2008] 1 WLR 535**
  - (2) That if a child aged 16-17 positively did not want Section 20 CA 1989 accommodation foisted on them or were truly entirely independent and not in need of any other support then they would potentially fall within Para 3 Homelessness (Priority Need (England) Order 2002

## **The Homeless Child**

8. This might perhaps be a misnomer as so many homeless children aged over sixteen should be having no relationship with the homeless legislation but if you are approached by a child who needs accommodation so often because their family relationships have broken down and they have been asked to leave what is the correct approach to take.
9. It is important to remember that due to para 2(1)(b) of Schedule 3 Nationality and Immigration Act 2002 the exclusions from community care services of certain foreign nationals does not apply
10. In **G-v-Southwark LBC** Baroness Hale cited with approval a seven part test

### **(1) Are they a child?**

This raises the vexed and vexing question so well known to immigration practitioners of the age assessment. Self-evidently in the cases of UK nationals this may be easy to resolve by passport or birth certificate. It is of course now a question of fact for the court to decide whether the applicant is a child see **Adv.-Croydon [2009] 1 WLR 2557**. The approach adopted by the court is inquisitorial and there is no burden of proof on either party sees **R (o/a CJ)-v-Cardiff CC [2012] HLR 20**. If age is the main question to be decided the application for judicial review is likely to be transferred to the Upper Tribunal under Section 18 of the Tribunal, Courts and Enforcement Act 2007

### **(2) Are they a child in need?**

The duty in Section 20 is owed to a child in need, defined in Section 17(10) as meaning

*(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,*

Generally a homeless child will be a child in need see Baroness Hale's discussion at para 28 in G . As discussed above it may be that a resilient child who just wants accommodation and no other services at all could be classed as not being in need and would then fall within Para 3 of the Priority Need order and have a priority need under Part VII Housing Act 1996 instead

**(3) Is he within the local authority's area?**

Baroness Hale was very clear that there should be no more of the unedifying spectacle of local authorities judicially reviewing each other to decide who is responsible . If the child is in your area at the time accommodation is required then you provide it . There is no local connection provision . It is interesting to note that where a child has been assessed as requiring other services under Section 17 Children Act 1989 they can still be provided if as in the case of a gypsy or traveller they are still required when they are out of the area **R(o/a/J-v-Worcester City Council 2013] EWHC 3845 (Admin)**

**(4) Does he appear to the local authority to require accommodation?**

This may appear to be an obvious question with an obvious answer ? Yes of course that is why he is seeking it ? If a child does have a home

to go to or needs help in making it safe or habitable then that would be more likely to not fall within S20 . Making fostering arrangements with family or friends however does fall within Section 20 . Note also that where a mother was currently providing accommodation but did not want to do so after a child was born to her daughter it was held that it was rational to hold that the child was not in need . This strikes me as questionable as it fails to take into account the apparently likely future circumstances of need .

**(5) Are the Section 20(1) or (3) express criteria met ?**

These provisions are to be widely construed . They include the case of the parent who could care for them but now has thrown them out albeit the word prevented suggests an intervening reason rather than choice .

**(6) What are the child's wishes and feelings regarding the provision of accommodation for him .**

This is a matter to be taken into account and not only as to the type of accommodation to be offered. It is not a veto; a child self-evidently in need of other services cannot necessarily have the final say on the other hand it is not limited to the question of the type of accommodation to be provided. It also applies to the question of whether s20 accommodation should be provided at all .

**(7) How is that question to be judged ?**

In essence , this issue really only arises if the applicant does not want or apparently need S20 accommodation. If the criteria are met and the applicant wants S20 accommodation with the support which comes with it this cannot be overridden on the basis consideration has been given to their wishes but the authority has come to a different

conclusion . This is where also it might be relevant as to what sort of S20 accommodation rather than none at all

11. Good local authorities should be following the DCLG Guidance from 2010 which suggests that if an under 18 approaches the homeless department they should be provided with interim accommodation to address their immediate need but referred to children's services . Alternatively , and preferably a joint protocol should be in place so that there is children's services input in the form of an initial assessment before interim accommodation is provided especially if a hostel may be very unsuitable for the vulnerabilities of that child.
12. It may well be appropriate to explore alternatives such as mediation with parents but this is plainly not to be used as an excuse for delaying carrying out the assessment or not providing interim accommodation .
13. It is also important not to become solely fixated on services being provided under the Children Act . For many homeless 16-17 year olds indeed most that will be the proper course but a resilient and independent 16-17 may be better served by their own tenancy and security than S 20 accommodation .

### **YOUNG PERSONS**

14. For those not subject to immigration control who are under 21 and between 16-18 but is no longer looked after accommodated or fostered they will have a priority need for accommodation. This is a class of persons vulnerable to local authorities trying to reclassify the accommodation with which they were provided as being under S17 CA 1989 . For the reasons set out above this is now much more difficult .
15. Those young people may have continuing issues that prevent them getting accommodation e.g. being classified as intentionally

homelessness , in essence blacklisted by registered providers after reports of nuisance behaviour in hostels etc. .

16. It is important therefore to recall the power to accommodate under Section 23C(4)(c) Children Act 1989 see **R(o/a SO) –v-Barking and Dagenham LBC [2011] 1 WLR 1283** . It may well be appropriate to ask a local authority in particular to exercise this power if a housing department is being difficult in accommodating pending review but most importantly where any Part VII challenge is likely to fail . It is notable that the possibility of S4 or S95 support under the IAAA 1999 cannot be taken into account.
  
17. The duty is to former relevant children see Section 23 C Children Act 1989 .It is expressed as a duty not a power to provide such other assistance to the extent that his welfare requires it . Street homelessness may make it very difficult for an authority to avoid a request to provide accommodation under this section at least until they provide other assistance to assist in obtaining accommodation.

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Garden Court North Chambers

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