Case No: CO/7378/2011

Neutral Citation Number: [2013] EWHC 2186 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 July 2013

Before :

MR C M G OCKELTON, VICE PRESIDENT OF THE UPPER TRIBUNAL
(SITTING AS A DEPUTY HIGH COURT JUDGE)

- -

Between :

The Queen on the application of GE	**Claimant**
- and -	
1. The Secretary of State for the Home Department **2. Bedford Borough Council**	**Defendant**

- -
- -

Joshua Dubin (instructed by **Scott Moncrieff Harbour & Sinclair Solicitors**) for the **Claimant**
Paul Greatorex (instructed by **Bedford Borough Council**) for the **Second Defendant**

Hearing date: 23 May 2013

- -

Judgment

Mr C M G Ockelton :

1. The Claimant is a national of Eritrea. She came to the United Kingdom in May 2011. She said that she was a child, born on 27 September 1994, and that she had a fear of persecution if returned to Eritrea. The Secretary of State decided to treat her as an adult, and refused her claim to asylum. The latter decision was made on 11 July 2011. The Secretary of State proposed to remove the claimant to Italy under Dublin II arrangements. Thus there was no effective statutory appeal.

2. The claimant commenced these proceedings against the Secretary of State only, challenging the treatment of her as an adult, her detention, and the proposal to remove her to Italy. On 3 August 2011, on the claimant's application, Supperstone J ordered the Secretary of State not to remove the claimant from the United Kingdom pending determination of these proceedings or further order.

3. On 21 September 2011 Lindblom J ordered that Bedford Borough Council ("the Council") be joined as the second defendant and made other procedural orders. Further orders were made by Sir Michael Harrison and Thirlwall J. The claimant's application for further interim relief was heard by Thirlwall J on 20 October 2011. She granted that application in so far as she ordered the claimant's release from detention, but she refused it in so far as it sought the claimant's release to the care of the Council. Instead, she ordered that the Secretary of State provide the claimant with NASS support and accommodation.

4. There were further interim orders. On 26 March 2012, Foskett J stayed the claim against the Secretary of State pending the application for permission against the Council, or if permission be granted, the final outcome of the substantive fact-finding hearing on the claimant's age. On 5 December 2012, Walker J granted permission against the second defendant.

5. Because of the passage of time, although the claimant's claim is that she was a child when she arrived in the United Kingdom, she is now clearly over eighteen.

6. The claimant's present claim is that the Council presently owes her duties as a "former relevant child" under ss.23C and following of the Children Act 1989. As she is now admittedly over 18, it is clear that the Council presently owes her none of the duties that local authorities have to minors.

7. During the time that the claimant claimed she was a minor, there were age assessments conducted by the Council: but the Council performed none of the duties that it owed to her by statute if she was a minor. For the avoidance of doubt I note that carrying out an age assessment is not itself such a duty: see R (R) v London Borough of Croydon [2013] EWHC 4243 (Admin) at [29] per Thirlwall J.

8. That presents a difficulty for the claimant, because the duties owed to a "former relevant child" are set out in the statue as duties owed to a person over 18 who, during his or her minority, had received services in pursuance of those statutory duties.

9. Mr Dubin's argument therefore is, and has to be, that the duties owed to a person as a "former relevant child" are owed not only to a person who in fact received services during his or her minority, but also a person who ought to have received such

services. If (and only if) he can establish that, the claimant's actual age is relevant to these proceedings against the Council. If he cannot establish it, the claimant's actual age is irrelevant: whatever may have been the position in the past, the Council owes her no duties now. In my judgement, therefore, and as submitted by the Council, it is appropriate to consider the interpretation of the statutory provisions as a matter preliminary to the assessment of the claimant's age.

10. My conclusion is that the claimant is not a "former relevant child". I reach that conclusion for three reasons: the clear words of the statute do not include a person with her history; there is no authority compelling a contrary conclusion; and the scheme of the Children Act 1989 does not suggest it either. I shall expand on each of those reasons in turn.

(a) Statutory Provisions

11. Part III of the Children Act 1989 is headed "Local Authority Support for Children and Families". It begins by setting out a series of duties owed to "children in need", including a duty to safeguard and promote their welfare, for which purposes there are powers and specific duties set out in Part 1 of Schedule 2 to the Act. There is what amounts to a definition of a child in need in s.17(10). Section 20 requires a local authority to provide accommodation for a child in need if there is no-one with parental responsibility for the child. Section 22(1) defines a "looked after" child. For present purposes a "looked after" child is a child who is "provided with accommodation by the [local] authority in the exercise of any functions (in particular those in this Act) which are Social Services functions". Section 23 imposes a duty of maintenance in respect of a looked after child; and there are other duties.

12. Sections 23A-E are amongst the provisions added by the Children (Leaving Care) Act 2000. Section 23A defines a "relevant child" as a child aged sixteen or seventeen who is not a "looked after" child but has been a "looked after" child who had been "looked after" for at least thirteen weeks between his fourteenth and sixteenth birthdays (this is the effect of the reference to paragraph 19B of Schedule 2 in s.23A(2)(b), taking into account the relevant regulations).

13. Section 23C is headed "Continuing Functions in Respect of Former Relevant Children". A "former relevant child" is defined in subs.(1) as follows:

> "(a) a person who has been a relevant child for the purposes of s.23A (and would be one if he were under 18), and in relation to whom [the local authority was] the last responsible authority; and
>
> (b) a person who was being looked after by [the local authority] when he attained the age of 18, and immediately before ceasing to be looked after was an eligible child".

14. The section sets out a series of duties, including to keep in touch with every former relevant child, to continue the appointment of a personal advisor, to continue to keep the Pathway Plan under regular review, and to give other assistance of the sort set out in that section and those immediately following it. For completeness I should add that s.24 defines a "person qualifying for advice and assistance" as including a person

under twenty-one who, between the ages of sixteen and eighteen was looked after by a local authority or accommodated under various specified arrangements not relevant to this claim. A local authority owes to such a person the duties set out in ss.24A-D.

15. The duties imposed by the Act are extensive. It is, however, perfectly clear that the definitions of "looked after" child, "relevant child" and "eligible child" are by reference not to the existence of the duty but to its performance. There is no suggestion in any of those definitions that a person falls within the definition if he was entitled to assistance (in particular accommodation) which was not in fact provided to him. It would have been simple for the statute to refer to a person to whom the duties are (or have been) owed if that is what was intended. That was not done. There is thus no basis in the statutory wording for saying that a person is to be regarded as a "former relevant child" if he is able to show that the local authority owed him, during his minority, duties that were not in fact performed.

(b) The Authorities

16. In R (M) v Hammersmith and Fulham LBC [2008] UKHL14, the child presented herself as homeless to the local authority, and was provided with temporary accommodation under Part VII of the Housing Act 1996. On reaching the age of eighteen she claimed to be entitled to services as a "former relevant child". The local authority argued that the provision to her of accommodation under the Housing Act did not make her a "looked after" child because the accommodation was not "in the exercise of … Social Services functions". On the facts of the case, the local authority's argument was successful in the House of Lords, where Baroness Hale gave the only substantive judgement. She examined what ought to have happened, which was that the local authority's Housing Services Department should have referred the case to its Children's Services Department. If that had been done, there could be little doubt that accommodation would have been provided under s.20 of the Children Act 1989, with the result that the child would have been a "looked after" child. The claimant's counsel had submitted that once that was clear, any accommodation actually provided should be taken to have been provided under s.20. He cited a number of cases, which Lady Hale analysed. She concluded as follows:

> "[42] It is not necessary, for the purpose of deciding this appeal, to express a view on whether any or all of these cases were rightly decided. For my part, I am entirely sympathetic to the proposition that where a local children's services authority provide or arrange accommodation for a child, and the circumstances are such that they should have taken action under section 20 of the 1989 Act, they cannot side-step the further obligations which result from that duty by recording or arguing that they were in fact acting under section 17 or some other legislation. The label which they choose to put on what they have done cannot be the end of the matter. But in most of these cases that proposition was not controversial. The controversy was about whether the section 20 duty had arisen at all.
>
> …

> [44] … 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 services authority or provided with any accommodation or other services by that authority".

17. Those words were applied by Wilson LJ, who gave the leading judgement (with which Toulson LJ and Lord Neuberger MR agreed) in R (TG) v Lambeth LBC [2011] EWCA Civ 526. There the facts were similar save that the child, who was known to the local authority's Children and Young People's Service, and whose principal contact within that division was a particular social worker, indicated to her that he proposed to approach the Housing Department as a homeless person. The social worker did not do what she ought to have done, which would have been to analyse whether the Council had a duty to accommodate the child under s.20, but instead wrote a report supporting his application to the housing department, including an assertion that the child "fulfils the child in need criteria". The child took the report to the housing department, and was accommodated under Part VII of the Housing Act 1996. The Housing Department did not refer him to the Children's Services Department.

18. The trial judge had considered the dicta of Lady Hale in the Hammersmith case, and regarded the facts as in all material respects identical. The Court of Appeal disagreed. On the facts of the case, the actions of the claimant's contact in the local authority's Children and Young People's Service were properly to be imputed to the Social Services division of the local Authority. Wilson LJ said that he was "convinced that there is no more satisfactory dividing line" than that drawn by Lady Hale in the Hammersmith case: applying those dicta he concluded that it was not possible to say that this was a case in which "there is no evidence that the Children's Services Authority did anything at all". Because the social worker's actions were to be imputed to the Children's Services Authority, "the case comes down on the side of Baroness Hale's line which is favourable to the appellant's claim".

19. In R (B) v Nottingham City Council, Singh J was reviewing the authorities in a slightly different context, but at [61] he said this:

> "The question is: what is the true ratio of the decision in the Hammersmith case? It is plain, in my judgement, that what Baroness Hale, in that passage was contrasting was the facts of the case before the Appellate 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 the Housing Authority under the 1996 Act. "

20. For present purposes I would regard it as settled that where:

i) a local authority is shown to have had an obligation to provide accommodation under s.20, and

ii) there has been some action by, or imputable to, the Social Services Division of that authority, and

iii) the local authority in fact provided or provides accommodation; and

iv) there is a causal link between the action attributable to the Social Services Department and the provision of the accommodation,

Then the accommodation actually provided may be regarded as having been provided under s.20.

21. The question is whether accommodation provided other than by the local authority (or under arrangements that it makes) can be regarded as accommodation provided under s.20. In R (AK) v SSHD and Leicester City Council [2011] EWHC 3188 (Admin), Geraldine Andrews QC, sitting as a deputy judge of this court, rejected as unarguable the proposition that accommodation provided by UKBA, as asylum support, could be treated as accommodation provided under s.20. But that decision, to which both parties drew my attention, was on a permission application only. So far as substantive decisions are concerned, I have been referred to only two. One is the decision of Thirlwall J in R (R) v Croydon, which I mentioned earlier; the other is a case to which she refers, a decision of Sir George Newman, sitting as an additional judge of this court in 2009 in R (MM) v Lewisham LBC. No full citation was provided by (or perhaps to) Thirlwall J, and I know nothing more about the case than is contained in her summary at [40]:

> "The claimant was being provided with accommodation at a refuge which was nothing to do with its [sic] 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 thirteen weeks before she became eighteen and is now a former relevant child ".

22. Without knowing anything more of the facts of that case it is very difficult to treat it as authority. Evidently the claimant was over eighteen at the time of the decision, and evidently (according to Thirlwall J's summary) the accommodation in question was being provided at that time (the phrase is "was being provided", not "had been provided"). The full reasons for the decision that the claimant was (rather than, for example, should be treated as if she was) a former relevant child are entirely unclear.

23. I turn then to R (R) v Croydon itself. This was the latest, and, it is to be hoped, the last, judgement in a long saga. The claimant claimed asylum soon after his arrival in the United Kingdom in May 2008, saying he was fifteen years old. The UKBA referred the claimant to Croydon for assessment of his age. Croydon provided him with accommodation for a few days, but having assessed him to be eighteen years old referred him back to UKBA who provided him with accommodation and subsistence as asylum support. There was then an attempt to remove him to Greece under Dublin II arrangements. The claimant commenced judicial review proceedings in October 2008 challenging the refusal of Croydon to reassess him, and the decision of the Secretary of State to treat him as over eighteen. The claim was stayed pending the decision of the House of Lords in R (A) v London Borough of Croydon [2009] UKSC8. That was the case in which the House of Lords decided that, in such proceedings, the question whether the claimant was or was not a child was to be determined by the court on the evidence and was not merely a matter for the court's consideration of whether the decision-maker's assessment had been reached without any public law error.

24. In September 2010, following the decision in R (A) v Croydon, the Court allowed the claimant permission to amend his grounds. Permission was granted. The fact-finding hearing took place before Kenneth Parker J in May 2011. He assessed the claimant's date of birth as 9 December 1992. It followed that he was, when he arrived in the United Kingdom, the age he claimed, that is to say fifteen. He was, however, over eighteen at the time of Kenneth Parker J's judgement. The learned judge gave the claimant liberty to amend his claim to raise any further claim arising from the decision as to his age. He put in grounds claiming that he was entitled to be treated as a "former relevant child".

25. That was the matter for determination by Thirlwall J. She decided that the appropriate starting point in that case was to determine whether the local authority had acted unlawfully. On the basis of R (A) v Croydon, it had acted unlawfully: it had (whether for good reasons or bad reasons) treated a child as though he were an adult. "In this case", she said, "what is under scrutiny is the local authority's error of fact which has led to its unlawful conduct". She then cited R (MM) v Lewisham LBC, and R (B) v Nottingham City Council, to both of which I have referred above. She then accepted the argument that, in the case before her, because the action taken by the Children's Services Authority was to refer the claimant back to the UKBA, there was a direct causal nexus between that action and the fact that the claimant was provided with accommodation. She continued as follows at [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".

26. With the greatest respect, I have to express some difficulty with that passage.

27. The case before her was a case in which the claimant claimed that the accommodation provided by UKBA as asylum support entitled him to be treated as a former relevant child. It clearly was not itself accommodation within s.20, unless it were so deemed. And unless it were so deemed, the claimant could not be a "former relevant child". But the last sentence shows that the judge did not consider that it was necessary in the present case to deem the accommodation provided to the claimant to be accommodation provided under s.20.

28. It seems to me that the last sentence in paragraph 43 is intelligible only if the preceding sentence does not have the general application that it appears to have. Indeed, it is not easy to see that it could have the general application that it appears to have, because the "authorities" to which Thirlwall J refers are all cases where accommodation had in fact been provided by the local authority, with the exception of R (MM) v Lewisham LBC, which, as I have indicated she treats quite briefly. If she regarded that decision as extending the notion of s.20 accommodation beyond that in all the other cases, and apparently beyond the words of the statute, to accommodation provided other than by or under the auspices of the local authority, so justifying the general terms of her conclusion in paragraph 43, she would surely have dealt with it in more detail; and it is almost inconceivable that the defendant would have had nothing to say about it. It seems to me that the review of the authorities which Thirlwall J had undertaken, coupled with the last sentence of paragraph 43, means that there is something missing from paragraph 43, which was clearly in her mind, but that she did not express. What with the greatest respect I think she must have meant to say was that:

> "The Court may deem accommodation *provided by the Local Authority* to have been provided pursuant to section 20 where the local authority has acted unlawfully".

29. That proposition is clearly to be derived from the authorities coupled with the learned judge's own analysis of the nature of unlawfulness in this context, following R (A) v Croydon.

30. That this, and not the wider interpretation, is what she meant is confirmed by the judge's continuing as follows:

> "[44]… 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 seven 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 [for the Council] 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 judgement, 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 the parties and I would invite them to discuss the appropriate form of words for any order".

31. It is easy to see the judge's disquiet, displeasure and to a certain extent even despair. It is, however, in my judgement important to observe that she does not appear to regard the identification of the Council's error as imposing upon it either the conclusion that the claimant was a "former relevant child", or an automatic duty to treat him as though he were a "former relevant child". The Council was obliged to see what it could and should do in order to remedy the error that it had made earlier in his life. Only when it became clear to the judge that the Council was not prepared to do anything of the sort did she have to reach for a remedy in the form of a mandatory order, and evidently she selected the one close to hand, not because it was the inevitable result of Kenneth Parker J's judgement, but because the Council were clearly not going to do anything without an order of some sort.

32. For these reasons I have reached the conclusion that the decision of Thirlwall J in R (R) v Croydon provides little support for the claimant's case. In particular, it does not demonstrate that the accommodation provided by UKBA can be regarded as accommodation provided under s.20 for the purposes of assessing whether an individual is a "former relevant child"; nor does it demonstrate that such accommodation can entitle a claimant to be treated as though he were a "former relevant child".

(c) the Scheme of the Children Act 1989

33. I can deal with this very briefly. There does not seem to me to be anything in the 1989 Act that suggests that the provisions of ss.23C onwards ought to be taken to be intended to apply to a person who has not in fact received the relevant assistance from

the Council before he was eighteen. They are described as "continuing" functions, and they were added to the Act by the Children (Leaving Care) Act 2000. Both of those factors seem to indicate that they are to be seen as a process for integrating a person who has had local authority assistance into an adult world where the assistance he had as a child has to be withdrawn. Further, the specific duties under s.23C(3), to "continue" the appointment of a personal advisor and to "continue" to keep his Pathway Plan up to review, are duties which could not be performed save in the case of a person who already has a personal advisor and a Pathway Plan.

34. The provisions of ss.23C and following of the Children Act 1989 impose duties in relation to adults. They find their place in the Children Act because they are the necessary extension of assistance given to children. Nothing in their terms or in the scheme of the Act suggests that ss.23C and following of the Children Act are intended to require local authorities to give assistance to adults who have not received the relevant assistance as children.

Conclusion

35. Applying these principles to the facts of the present case, my conclusions are as follows.

36. First, although the claimant was known to the Council's Social Services department, and although she received accommodation, there was no causal connection between the two. The accommodation provided to her by UKBA was so provided not because of the Council's decision to refer her to UKBA, but because the Court ordered it.

37. The claimant received accommodation while she was, on her case, a child. That accommodation was provided by the UKBA as asylum support. The provision of accommodation other than by, or under the auspices of, the local authority is not in my judgement capable of being the provision of accommodation under s.20 and, accordingly, cannot qualify an individual as a "former relevant child" for the purposes of s.23C of the Children Act 1989.

38. For these reasons, whatever her precise actual age, the claimant is not a "former relevant child". Her claim against the Council therefore fails.

39. It follows from the above that to find, as on the undisputed evidence I do, that the claimant is over eighteen, is sufficiently exact for the purposes of the claim against the Council. Further, it would in my judgment be quite wrong to require the Council to be the defendant to any continuation of this action in which the claimant seeks a more precise age assessment, because that is something in which the Council has no interest.

40. My finding that the claimant is now over eighteen is thus all that is necessary in this part of the proceedings. The stay ordered by Foskett J on the proceedings against the Secretary of State is lifted. The claim against the Council is dismissed.