



Neutral Citation Number: [2023] EWHC 702 (Admin)

Case No: CO/3508/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 March 2023

Before:
HHJ KAREN WALDEN-SMITH
sitting as a Judge of the High Court

Between:

THE KING
(on the application of W)

Claimant

- and -

LONDON BOROUGH OF LAMBETH

Defendant

- and -

- (1) SECRETARY OF STATE FOR EDUCATION**
**(2) SECRETARY OF STATE FOR LEVELLING
UP, HOUSING AND COMMUNITIES**

**Interested
Parties**

JAMIE BURTON KC and CONNOR JOHNSTON (instructed by **SIMPSON MILLAR**)
for the **Claimant**

JOSHUA SWIRSKY (instructed by **THE LONDON BOROUGH OF LAMBETH**)
for the **Defendant**

Hearing Date: 15 March 2023

Approved Judgment

Introduction

1. This is an application for permission to bring judicial review proceedings brought on behalf of the Claimant, W, against the Defendant, the London Borough of Lambeth. W became homeless on or around her 17th birthday when, what is said to have been a difficult relationship for some years, finally broke down and she was told that there was no room for her when her mother moved housing.
2. W has the benefit of an anonymity order granted by Lang J. when she considered this application for permission on the papers. The reason for that order is that, while W is now aged 19, the history to the claim involved issues of family breakdown and the involvement of the Defendant while she was a minor.
3. There had been an application for interim relief in the application for permission. That matter has now been resolved by the Defendant agreeing to accommodate W pending any substantive judicial review, should permission be granted.
4. The application for permission was listed for an oral hearing in order for all matters to be dealt with together. Lang J. expressed her concerns that W faced an uphill struggle in reaching the grant of permission and in obtaining an extension of time on both limbs of ground 1 as they concern events which took place in December 2020.
5. The underlying issues in this application are with respect to the housing of homeless children aged 16 or 17, such as W, under the general homelessness provisions contained within Part 7 of the Housing Act 1996 (“Part 7 of the HA 1996”), rather than pursuant to the provisions of Part 3 of the Children Act 1989, in particular section 20 (“Part 3 of the CA 1989”), as “looked after” children. It is argued on behalf of W that the Defendant has inverted the statutory hierarchy by providing precarious accommodation to vulnerable 16/17-year-olds, pursuant to the provisions of Part 7 of the HA 1996, rather than treating them as “looked after” children pursuant to Part 3 of the HA 1989.
6. In my judgment, the issues raised in this application disclose an arguable case under both Ground 1.1 and 1.2 and Ground 2 for seeking judicial review which merits full investigation at a full hearing. Insofar as an extension of time is required under either part of Ground 1, that issue is to be considered and determined at the substantive hearing once all matters have been thoroughly explored. Ground 2 is within time and no extension of time is required.

The Grounds

7. Ground 1:

The Defendant’s failure to treat her as a former relevant child is unlawful as:

- 1.1 it was not lawful to provide her with supported accommodation other than pursuant s20 Children Act 1989; and/or
- 1.2 the Defendant failed to provide her with the necessary information to allow her to make a valid and informed choice between Pt 7 and s20 accommodation

and/or failed to make sufficient inquiries to satisfy itself that the Claimant understood that choice;

and hence she was looked after for the requisite qualifying period.

Ground 2:

The Defendant's policy or practice of providing supported accommodation to homeless 16/17-year-olds under Pt 7 Housing Act 1996 is unlawful.

The Background

8. W was born on 4 December 2003 and has had a chaotic upbringing. She has provided a witness statement which sets out her history, which can be summarised as follows. She is one of 8 siblings. Her mother was abused by her father and the family was often moving and was regularly without sufficient money.
9. W moved between primary schools and was engaged with social services for a long time. She reports good relationships with certain social workers, and fond memories of occasions when they took her out or made a fuss of her in some way. She was a talented football player, once playing for the Arsenal Academy, and continues to play for a team in the women's league. She was excluded from her school when she was 14 and sent to a Pupil Referral Unit, which unfortunately marked a further deterioration in her behaviour. During this time, she was continuing to play football and managed to obtain two GCSEs which then enabled her to continue with studying biology at college.
10. The relationship between W and her mother, which had been fractious throughout, completely broke down around W's 17th birthday. W links this to her sexuality, her mother having made homophobic comments to her for some time. Her mother would not accept W's female partner visiting her and she was told by her mother that when she moved to a smaller house, there would be no room for W. W then contacted social services, she believes before her 17th birthday. In due course, W was seen by a social worker who gave her, she says, an option to go into care or to live in supported accommodation. She did not wish to go into care as "it sounded like a children's home, like the one Tracy Beaker grew up in" and that the supported accommodation option route "appeared to be the only realistic option for me".

Timing of the Challenge

11. The Defendant submits that W is out of time for her challenges, which the Defendant says are limited to being with respect to a decision made in December 2020. Even taking the start date for the proceedings as her 18th birthday, that was December 2021. In either case the application to bring judicial review proceedings is nowhere close to being within three months of the action being challenged and has not been made promptly. It is said by the Defendant that W has simply changed her mind about what she wants, long after she was accommodated in supported accommodation pursuant to the provisions of Part 7 of the HA 1996. Lang J. expressed her concern about the time it has taken to bring this challenge after the decisions of December 2020.

12. W contends that she had no knowledge of the issue or that there was potential illegality until she spoke to a friend who received legal assistance which was in May or June 2022 and that she did not obtain legal advice until June 2022. The essence of her claim is that she was not aware of what she had lost out on, which forms the basis of her challenge under Ground 1, and it is said on her behalf that she should not be prohibited from raising the challenge now that she is aware of this issue, which is one of complexity. Further, it is said on her behalf that in order to bring this challenge it required her to have legal advice and costs protection through public funding before she could commence proceedings. W's representatives say that they have acted with reasonable diligence in bringing this claim as promptly as they could.
13. While it is a strong argument on the part of W that she could not realistically bring proceedings at any time before she knew of what she was missing out on, and that she required legal advice and representation, the application for permission to bring judicial review proceedings was not brought until September 2022 which was still not prompt. Both *R (Kigen) v Secretary of State for the Home Department* [2016] 1 WLR 623 and *R (Hysaj) v Secretary of State for the Home Department* [2015] 1WLR 2472, relied upon by the Defendant, have relevance in the circumstances of this case. A failure to lodge the necessary application can mean the claim cannot proceed for being out of time, and awaiting the decision of whether public funding will be made available is not a justification for delay. This is a public law challenge and the reason for tight time limits in judicial review proceedings is so that public bodies can act, knowing that decisions that have been made are no longer subject to potential challenge.
14. The challenge under Ground 2 is a challenge to policy and while, inevitably, concerned with what happened to W in December 2020 it has a wider ambit, with reliance placed upon the available statistics which supports a contention that this Defendant has been accommodating the majority of its 16 and 17-year-olds under Part 7 of the HA 1996 rather than Part 3 of the CA 1989.
15. Ground 2 is not out of time, the challenge being one relating to the ongoing exercise of a policy which is alleged by W's representatives to run counter to the statutory hierarchy. I accept that both challenges under Ground 1.1 and 1.2 are of wide importance and overlap with the issues in Ground 2. In all the circumstances, it is appropriate to allow the challenges under Ground 1.1 to proceed to a substantive hearing with an extension of time and for determination as to whether there should be an extension of time for ground 1.2 to be determined at that hearing given the issues engaged.

The Challenge

Ground 1.2

16. Pursuant to the second limb of Ground 1, W challenges a continuing state of affairs – namely a failure to perform statutory duties under the CA 1989. That failure is said to arise from the decision-making process between 11 December 2020 and 30 December 2020, that is between the recorded first contact between W and the Defendant with respect to her accommodation and when the assessment was completed upon W.
17. The relevant guidance contained in *Homeless 16/17* provides that it is essential for the young person being fully consulted and understanding the implications of being

accommodated by children's services and becoming "looked after" which requires the provision of realistic and full information about the package of support that a young person can expect as a looked after child.

18. The Defendant contends that the written evidence available establishes that she was so advised and the judicial review is not the correct forum for arguing disputes of fact.
19. It is for W to establish that the information provided to her did not fulfil the obligation to provide full consultation and to ensure full understanding of the implications of being "looked after". The leaflet "Your Options" provided to W in accordance with the Defendant's policy did not explain the rights available to a "looked after" child pursuant to Part 3 of the CA 1989, including support, financial assistance and accommodation, and it is (at least) arguable that there was not full consultation and that she was not fully informed when making the decision to accept the provision of accommodation pursuant to Part 7 of the HA 1996. The record of why W had decided to accept supported accommodation, namely good independent skills and that she did not want to be accommodated by the local authority, but did want to be considered for supported accommodation, is contradictory. The wish for independent living in supported accommodation is consistent with being accommodated pursuant to Part 3 of the CA 1989. Why W stated that she did not want to be accommodated by the Defendant suggests potential confusion, which was not clarified or investigated by the Defendant. The desire for supported accommodation rather than being in a care home or foster care is a natural one for a 16/17-year-olds. However, supported accommodation is likely to be the most appropriate accommodation to be provided pursuant to the Part 3 of the CA 1989 in any event. Consequently, the diversion to Part 7 of the HA 199 is arguably an avoidance of the Defendant's responsibilities to W who needed "more than a roof" over her head when she requested support.
20. In the circumstances, subject to an extension of time being granted at the substantive hearing, the challenge to the decision on the basis that the Defendant failed to provide the Claimant sufficient information to make an informed decision between accepting accommodation provided pursuant to Part 3 of the CA 1989 or Part 7 of the HA 1996, is one which should proceed to a substantive hearing. There is evidence which arguably establishes that W did not understand the consequences of her decision and that she was not acting with informed consent. The Defendant's joint protocol plan for June 2022 expressly sets out that young people can be offered supported accommodation only in "exceptional circumstances" pursuant to the provisions of Part 3 of the CA 1989 whereas those who choose to be accommodated under Part 7 of the HA will usually be offered supported accommodation. That paragraph was not included in the relevant June 2019 protocol.

Ground 1.1 and Ground 2

21. W further challenges the policy applied to her in December 2020, under Grounds 1.1 and 2. The current policy (June 2022, version 5.1) "*LB Lambeth joint protocol for 16/17-year-olds who are homeless or at risk of homelessness*" was in its further iteration in June 2019 which was the relevant version for December 2020. In paragraph 7.1 of the 2019 policy it is set out that if the initial screening process confirms that the young person is homeless or at risk of homelessness then a Child and Family assessment will be carried out under section 17 of the CA 1989 to find out whether there are additional

needs requiring children social care intervention and assistance under the Child in Need framework other than housing “*At this stage, the young person will be offered a joint interview by the social worker and housing officer to assess their housing needs and to explain housing options available to them*”. In paragraph 7.6 of the policy, it is set out that it is necessary to explain clearly the accommodation options, and the young person’s wishes and feelings regarding such provision and that the “*discussion must cover the difference between being accommodated under Section 20 of the Children Act 1989, including the support they would receive as a care leaver, and being accommodated under Part VII of the Housing Act 1996...*”.

22. The Housing Option Explained leaflet sets out that by choosing to be accommodated by the Housing Department under Part VII of the Housing Act 1996 the housing department will provide accommodation which “*meets your needs and to prevent you from being homeless. It will be in supported housing.*” By choosing to be looked after under section 20 of the Children Act 1989, Lambeth’s Children’s Services can provide you with accommodation in a placement which meets the assessed needs which could be in a foster care placement, a residential children’s home, supported housing or supported lodgings with a host family.
23. *R(G) v Southwark LBC* [2009] UKHL 26 recognises that a child, even one on the verge of adulthood, was considered and treated by Parliament as a vulnerable person to whom the state, in the form of the relevant local authority, owed a duty which went wider than the mere provision of accommodation; that if a child aged 16 or 17 who had applied for accommodation under section 20 of the 1989 Act satisfied all the criteria under section 20(1), the local children’s services authority owed the child a duty to provide him with accommodation under section 20. In *R(M) v Hammersmith and Fulham* [2009] UKHL 26, Baroness Hale made it clear that a local authority cannot avoid its responsibilities under Part 3 of the CA 1989 by shifting them on to the housing department: “*the clear intention of the legislation is that these children need more than a roof over their heads and that local children’s services authorities cannot avoid their responsibilities towards this challenging age group by passing them over to the local housing authorities.*”
24. It is possible for a competent 16/17-year-olds young person to refuse the support of a local authority and not be coerced into accepting it. However, it is arguable that such a refusal, which must be properly informed, relates to refusal of any support from the local authority children services– both services and accommodation - and not simply services. Providing accommodation pursuant to Part 7 of the HA 1996 is arguably shifting responsibilities onto the housing department and thereby avoiding the responsibilities of the children’s services, which includes providing ongoing care and support after 18 years together with accommodation (which could be supported accommodation). While the Guidance of the Secretary of State for Education “Prevention of homelessness and provision of accommodation for 16 and 17- year old young people who may be homeless and/or require accommodation” provides that a young person who has chosen Part 7 HA 1996 accommodation, is entitled to supported accommodation, that does not deal with the other protections afforded by Part 3 of the CA 1989 which the Defendant suggests are not available to W as she has been accommodated under Part 7 of the HA 1996. As a person seeking support, in the form of accommodation, it is arguable that W was accommodated pursuant to the provisions of Part 3 of the CA 1989 despite the categorisation of the accommodation as being pursuant to Part 7 of the HA 1996

25. Counsel for W provided further submissions on 23 March 2023 with respect to an announcement of the Parliamentary Under Secretary of State (Minister for Children, Families and Wellbeing). Having considered the counter-submissions made on behalf of the Defendant, I am not satisfied that this announcement supports the arguability of W's case. It will be open for the parties to argue (or dispute) the contention that it is unlawful to provide supported accommodation to 16 and 17-year-olds pursuant to obligations under Part 7 of the HA 1996, thereby avoiding the support that ought to be provided to 16/17-year-olds pursuant to Part 3 of the CA 1989.
26. Grounds 1.1 and 2 raise important points of wide implication whereby it is arguable that the Defendant has been wrongly relying on the exception of informed refusal when that informed exception is limited to allowing an older child (a 16 or 17-year-old) to refuse any support of the local authority. It is at least arguable that supported accommodation for 16 and 17-year-olds is to be provided under Part 3 of the CA 1989 and not under Part 7 of the HA 1996. Under Part 7 of the HA 1989, the accommodation offered discharges the local authority's housing duties and once the offer of accommodation is accepted there is thereafter no statutory oversight and the child loses the protections and benefits provided pursuant to Part 3 of the CA 1989. In those circumstances, it is arguable that the purpose of the statutory scheme to give support beyond accommodation is being subverted by reason of supported accommodation being offered under Part 7 of the HA 1996.

Conclusion

27. For the reasons set out herein, permission is granted to bring proceedings for judicial review pursuant to Grounds 1.1 and 1.2 and Ground 2. The challenge on Ground 1.2 being dependent upon permission being granted at the substantive hearing.
28. I would be grateful if the parties could agree a form of wording for directions to progress this matter swiftly. I understand that there will be no issue in obtaining a day's listing within a relatively short period of time.