Neutral Citation Number: [2024] EWCA Civ 1545

Case No: CA-2024-000393

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
Dexter Dias KC (sitting as a Deputy High Court Judge)
[2023] EWHC 3330 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/12/2024

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE BEAN
and
LADY JUSTICE KING

- -

Between :

THE KING (on the application of DF)	**Claimant/ Appellant**
- and -	
ESSEX COUNTY COUNCIL	**Respondent**

- -
- -

Sarah Hannett KC and **Daniel Clarke** (instructed by **Coram Children's Legal Centre**) for the **Appellant**
Jonathan Auburn KC and **Raphael Hogarth** (instructed by **Essex County Council**) for the **Respondent**

Hearing dates: 16 July 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 10 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Underhill :

INTRODUCTION

1. This is an appeal, with permission given by Asplin LJ, from a decision of Mr Dexter Dias KC (now Dexter Dias J), sitting as a Deputy High Court Judge, dismissing the Claimant's application for judicial review against Essex County Council ("the Council"). The sad circumstances giving rise to the claim are set out in detail at paras. 8-29 of the Judge's judgment, but for introductory purposes I can sufficiently summarise the facts as follows.

2. The Claimant, who is the Appellant before us, is a young woman born on 8 April 2005. She had a chaotic childhood. Her parents separated when she was young. Her mother had numerous problems and for a time she lived with her father. However, after serious difficulties with him she moved back in 2019 to live with her mother. From May 2021 they lived together in a council flat in Colchester; and later that year her boyfriend moved in with them. At some point also they were joined by her mother's fiancé. The tenancy was managed on behalf of the landlord, Colchester Borough Council, by an entity known as Colchester Borough Homes ("CBH").

3. On 25 August 2022 the Claimant's mother died unexpectedly of a drug overdose. The Claimant was at that point eight-and-a-half months short of her 18th birthday. She had no parental supervision, although she had some support from family and friends. The only adult in the flat was her mother's fiancé, but he moved out in November. She was not in education, employment or training. She had no regular income, though her father occasionally gave her small sums. She already had some social work support from the Council, which is the Respondent to this appeal, because she had caring responsibilities for her mother; but following her mother's death a senior social worker was appointed. An assessment under section 17 of the Children Act 1989 was performed and some forms of support were offered, including food vouchers.

4. As regards the Claimant's accommodation, the original attitude CBH" was that the Claimant could not remain in the flat beyond the short term: she had no succession rights. A number of options were explored and discussed with her over the following months, including the possibility of returning to live with her father, although that was in the end agreed not to be possible. The Claimant was articulate and knew her own mind. She would have liked to stay in the flat, but if that was not possible she wanted to be able to stay with her boyfriend and be able to keep her mother's cats, which she regarded as "all the family she has left".

5. On 2 December 2022 CBH served a notice to quit expiring on 2 January 2023. Following the expiry of the period, however, it did not immediately proceed to take eviction proceedings and there were continuing communications between it and the Council.

6. On 17 February 2023, exceptionally and out of concern for the Claimant's welfare, CBH decided to grant her a tenancy of suitable alternative accommodation when she turned 18 and to take no steps to evict her in the meantime. On 19 April, i.e. just over a week after her 18th birthday, she accepted an offer from CBH of the tenancy of another flat, where she now lives.

7. Prior to CBH's offer, the Coram Children's Legal Centre had on 25 January 2023 sent the Council a pre-action protocol challenging its "failure … to accommodate the Claimant and provide her with services, contrary to its statutory duties under section 17 and section 20 of the Children Act 1989", together with various other related breaches. The Council's legal department replied on 1 February. The only point that it is necessary to record for our purposes was that it claimed that there was at that point "no need for [the Claimant] to leave her home yet" because her occupation would only become unlawful once CBH had obtained an eviction order and executed a warrant of possession, "the likely timescale for which exceeds a year at present". (I should say here that that analysis was not relied on before us; but it is relevant that it was the Council's position at that time.) There was some further correspondence before the issue of proceedings, but I need not refer to it.

8. The present proceedings were issued on 27 April 2023. By that time the situation had of course changed materially since Coram's pre-action protocol letter because the Claimant had turned 18 and was in the new accommodation provided by CBH. Her claim now is that as a result of the history summarised above she should be treated as a "former relevant child" within the meaning of section 23C of the Children Act 1989. That is a status, introduced by the Children (Leaving Care) Act 2000, which obliges a local authority to afford continuing support to young people who have been in local authority care and/or accommodation after they turn 18. The kinds of support from which she believes that she would benefit, and which are commonly provided under section 23C, include advice from a personal adviser about such matters as budgeting and her responsibilities as a tenant and, more generally, a "pathway plan" into adult life, including planning for education and training.

9. The Claimant was represented before us by Ms Sarah Hannett KC, leading Mr Daniel Clarke, who also appeared before the Judge. The Council was represented by Mr Jonathan Auburn KC and Mr Raphael Hogarth: before the Judge it was represented by Mr Clive Sheldon KC and Ms Zoe Gannon.

THE RELEVANT STATUTORY PROVISIONS

10. The Claimant's case requires consideration of two statutory regimes under which local authorities may be obliged to provide accommodation to 16- or 17-year old children – that is, under section 20 of the 1989 Act and Part 7 of the Housing Act 1996. It also depends on the definition of "former relevant child". It will be convenient to set out the relevant provisions at this stage.

11. I start with the accommodation duty under section 20 of the 1989 Act ("the section 20 duty"). The relevant subsections are (1) and (6). They read:

> "(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.
>
> …
>
> (6) Before providing accommodation under this section, a local authority shall, so far as is reasonably practicable and consistent with the child's welfare —
>
> (a) ascertain the child's wishes and feelings regarding the provision of accommodation; and
>
> (b) give due consideration (having regard to his age and understanding) to such wishes and feelings of the child as they have been able to ascertain."

The term "child in need" in subsection (1) is defined in section 17 (10) of the Act, as follows:

> "For the purposes of this Part a child shall be taken to be in need if—
>
> (a) he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by a local authority under this Part;
>
> (b) his health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services; or
>
> (c) he is disabled,
>
> and 'family', in relation to such a child, includes any person who has parental responsibility for the child and any other person with whom he has been living."

12. As for "former relevant child", this is defined in section 23C (1) of the 1989 Act as a person who is, immediately before they turn 18, either a "relevant child" or an "eligible child". The relevant alternative in the Claimant's case is "eligible child". That involves identifying two further definitions:

(1) An eligible child is a "looked after child" aged 16 or 17 who has been looked after for at least thirteen weeks since turning 14: see paragraph 19B (2) of Schedule 2 to the Act, read with regulation 40 of the Care Planning, Placement and Care Review (England) Regulations 2010. The date of the expiry of the notice to quit was (just) over thirteen weeks before the Claimant's 18th birthday.

(2) A looked after child is defined by section 22 (1) of the Act as follows:

> "In this section, any reference to a child who is looked after by a local authority is a reference to a child who is —
>
> (a) in their care; or

> (b) provided with accommodation by the authority in the exercise of any functions (in particular those under this Act) which are social services functions within the meaning of the Local Authority Social Services Act 1970 …"

As regards subparagraph (b), providing accommodation to a child under section 20 of the Act is a social services function within the meaning of the 1970 Act.

13. I should also mention, only because it is relevant to one of the authorities which I will have to consider, that section 17 (1) of the Act imposes on every local authority a "general duty"

> "(a) to safeguard and promote the welfare of children within their area who are in need; and
>
> (b) so far as is consistent with that duty, to promote the upbringing of such children by their families,
>
> by providing a range and level of services appropriate to those children's needs".

14. I turn to Part 7 of the 1996 Act. I need not attempt a comprehensive summary of the homelessness regime which it enacts. It is enough to say that if a local housing authority is satisfied that a person is (unintentionally) homeless, as defined in section 175, and has a "priority need", as defined in section 189, it is obliged by section 193 (2) to secure that accommodation is available for their occupation: I will refer to this as "the section 193 duty".

15. The key provision of Part 7 for the purpose of this appeal is the definition of homelessness in section 175. This reads (so far as material):

> "(1) A person is homeless if he has no accommodation available for his occupation, in the United Kingdom or elsewhere, which he —
>
> (a) is entitled to occupy by virtue of an interest in it or by virtue of an order of a court,
>
> (b) has an express or implied licence to occupy, or
>
> (c) occupies as a residence by virtue of any enactment or rule of law giving him the right to remain in occupation or restricting the right of another person to recover possession.
>
> (2) …
>
> (3) A person shall not be treated as having accommodation unless it is accommodation which it would be reasonable for him to continue to occupy."

16. The categories of person who are identified in section 189 (1) as having a priority need do not include children. However, that was changed by the Homelessness (Priority Need for Accommodation) (England) Order 2002 (made under section 189 (2), which gives the Secretary of State the power by order to specify further categories). Article 2 provides that the descriptions of person identified in the following articles have a priority need. Article 3 reads (so far as material):

> "(1) A person (other than a person to whom paragraph (2) below applies) aged sixteen or seventeen who is not a relevant child for the purposes of section 23A of the Children Act 1989 … .
>
> (2) This paragraph applies to a person to whom a local authority owe a duty to provide accommodation under section 20 of that Act (provision of accommodation for children in need) … ."

The result is that children of 16 or 17 will be owed the section 193 duty unless they are owed the section 20 duty[1]. It follows that the Order proceeds on the assumption that the section 20 duty will not be owed to all homeless children aged 16 or 17. I return to this point at para. 29 below.

17. In the interests of economy I will sometimes refer below to "section 20", "Part 7" and "section 175" without specifying the statute.

THE ISSUES

18. The Claimant's case that she is entitled to be treated as a former relevant child can be summarised as follows:

(1) In the period between (at latest[2]) the expiry of CBH's notice to quit on 2 January 2023 and her 18th birthday on 8 April, she "required accommodation" within the meaning of section 20 and accordingly should have been provided with it by the Council.

(2) If she had been provided with accommodation under section 20, she would, applying the provisions identified at para. 12 above (in particular section 22 (1) (b) of the 1989 Act), have been a looked after child; and accordingly when she turned 18 she would have qualified as a former relevant child.

(3) Although the Council did not in fact provide her with accommodation in that period it had a discretion, which she says it should have exercised in her case, to make good that failure by providing her with the services to which she would be entitled if she were a former relevant child: the authority for that proposition is the decision of this Court in *R (GE (Eritrea)) v Secretary of State for the Home Department* [2014] EWCA Civ 1490, [2015] 1 WLR 4123.

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1 That is subject to their not being "relevant children" (as defined in section 23A); but that qualification is immaterial in this case.

2 The Claimant says that she in fact required accommodation from the moment of her mother's death, but the date of the expiry of the notice to quit is sufficient for her purposes and we were not required to determine the question of her status prior to that date.

19. Only element (1) is contentious in this appeal. The Council says that the Claimant did not require accommodation in the period prior to her 18th birthday because she was able to, and did, go on living in her mother's flat. The Claimant's response falls under two broad headings, as follows:

    (A) She contends that the phrase "requires accommodation" in section 20 of the 1989 Act must as a matter of law be construed in the same way as the definition of homelessness in section 175 of the 1996 Act. As we have seen, under the latter definition a person is homeless if there is no accommodation available to them which they have a legal right to occupy. From at least the expiry of the notice to quit she had no legal right to occupy her mother's flat, and it is (now) common ground that she was therefore homeless during that period: it thus necessarily follows that she required accommodation. That case is raised by her ground 1.

    (B) Alternatively, even if the 1996 Act definition does not apply, the Council was wrong in law to conclude that she did not require accommodation within the meaning of section 20, and the Judge was wrong not so to hold, for reasons developed under her grounds 2-4. (Permission was originally granted on a ground 5, but Ms Hannett informed us that that ground was no longer being pursued.)

    I will consider the issues under those two heads.

(A) THE RELEVANCE OF THE 1996 ACT DEFINITION

20. This issue was identified before the Judge as "Issue 2" and summarised as "if C was s. 175 homeless, did she necessarily require accommodation within the meaning of s. 20 CA 1989?". The Judge addressed it at paras. 71-75 of his judgment. His conclusion, at para. 74, reads:

> "… I find that by reason of satisfying the s.175 homelessness test, the claimant did not *necessarily* require s.20 accommodation. She may do; she may not. It will depend on the specific facts of her case. However, it is not the inexorable consequence of satisfying s.175 – the first does not mandate the second. The s.20 question requires separate evaluation of a wide range of factors and not an assumption that since the s.175 test is met, the child automatically ('necessarily') requires accommodation under s.20."

    Without intending any disrespect, I will not set out his reasoning leading to that conclusion, since the issue is one of pure law and I will have to give my own reasons in any event.

21. In considering whether the Judge's conclusion was correct, it is in my view necessary to start with the fact that section 20 and section 175 are provisions of different statutes, which have different subject-matters – that is, respectively, the welfare of children and (as regards Part 7) homelessness – and unrelated legislative histories. Although there is no doubt an overlap between their potential fields of operation in the case of children, there is no indication that the provisions are intended to form part of a single statutory scheme.

22. It is also important to appreciate that the provisions specifying the circumstances in which the section 20 and section 193 duties arise (the latter incorporating the definition in section 175) not only use different terminology but are wholly differently framed. The duty under section 20 is triggered when "it appears to" the local authority that the child in question requires accommodation. That is the language of an evaluative judgment (a phrase used by Lady Hale at para. 19 of her opinion in the *Southwark* case discussed below). To similar effect, the statute contains no definition of the phrase "requires accommodation": decision-makers are evidently intended simply to apply it in accordance with what they understand to be its natural meaning – subject to the important point that before taking a decision they are required by subsection (6) to ascertain, and pay due regard to, the child's wishes. By contrast, the definition of "homeless" in section 175 depends primarily on the application of a precise formulation of whether the applicant has a legal right to occupy accommodation which is available to them. Ms Hannett fairly pointed out that there are also elements of evaluation in the section 175 test, including the question of whether it was reasonable to expect the applicant to occupy a given property. But the fact remains that Parliament provided for exercises which are structured in quite different ways.

23. On the face of it, those considerations strongly suggest that the question whether a child "requires accommodation" for the purpose of section 20 is to be answered as a matter of factual evaluation, applying that phrase in its natural and common sense meaning, and without reference to the definition of homelessness in section 175. I consider Ms Hannett's contrary arguments as follows.

24. Her broadest submission was that as a matter of the ordinary use of language being homeless and requiring accommodation are the same thing. That may be true at a high level of generality, but it does not advance the argument in this case. We are concerned not with generalities but with how those terms are used in the particular contexts of the different statutes in which they appear. If anything, the fact that different terms are used in the two statutes tends to suggest that their effect is <u>not</u> identical: Part 3 of the Housing Act 1985 (being the predecessor of Part 7 of the 1996 Act) contained a definition of homelessness in substantially identical terms to section 175 (see section 58), and Parliament could easily have adopted that definition in the 1989 Act if it chose.

25. Ms Hannett's more substantial submission was that, since the two statutes address similar subject-matters, and the homelessness provisions of the 1985 Act formed part of the context in which section 20 was enacted (and indeed the 1989 Act was part of the context in which the 1996 Act was passed), they should "dovetail" or "march hand-in-hand". She submitted that that was recognised both in the case-law and in statutory guidance. I will take the two in turn.

26. So far as the case-law is concerned, the principal authority on which Ms Hannett relied was the decision of the House of Lords in *R (G) v London Borough of Southwark* [2009] UKHL 26, [2009] 1 WLR 1299. In that case a child of 17 had been forced to leave his mother's home and had for weeks been sleeping in the back of a car or "sofa surfing" at a friend's house. On the face of it, and as the House held, he obviously "required accommodation" and so was owed the section 20 duty. However, the authority argued that it could exercise its general power to provide services under section 17 (1) by

referring him to the housing authority[3] which would be obliged to accommodate him under Part 7 as a person in priority need under article 3 (1) of the 2002 Order, in which case no duty under section 20 would arise and the exception in article 3 (2) would not apply.

27. That argument was rejected. Lady Hale (with whose opinion the other members of the House agreed) held that it was the plain intention of Parliament that, where a child of 16 or 17 required accommodation, it should be provided under section 20, with the consequence that the child would become a looked after child and attract the range of support that came with that status. She referred to *R (M) v London Borough of Hammersmith and Fulham* [2008] UKHL 14, [2008] 1 WLR 535, in which the House of Lords had held that a child who had approached an authority's housing department for accommodation should have been referred to the children's services department, observing that

> "… 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"

(see para. 5 of her opinion). At paras. 22-24 she considered the authority's submissions based on *R (G) v London Borough of Barnet* [2003] UKHL 57, [2004] 2 AC 208, which concerned the duty under section 17 of the 1989 Act. She concluded, at para. 25:

> "In my view, therefore, the *Barnet* case is, if anything, helpful to [the claimant], in highlighting the primacy of the specific duty owed to individuals in section 20 over the general duty owed to children in need and their families and its associated powers in section 17, just as the *Hammersmith and Fulham* case is helpful to [the claimant] in highlighting the primacy of the Children Act over the Housing Act in providing for children in need."

28. I do not believe that the decision or the reasoning in the *Southwark* case offer any support to the Claimant's case. They of course illustrate the fact that in many (I would imagine most) cases both the section 20 duty and the section 193 duty are potentially owed to children; but it does not say, or assume, that that will always be so. Lady Hale's decision that the section 20 duty has "primacy" means that in those cases where it arises it cannot be evaded by reference to the general duty in section 17 of the 1989 Act or to the section 193 duty. But that has no bearing on the prior question – which is the question in this appeal – of whether the child "required accommodation" in the first place and, more particularly, whether that question has to be decided by reference to the definition of homelessness in the 1996 Act. No such issue arose on the facts of the *Southwark* case.

29. Mr Auburn contended that Lady Hale's opinion in the *Southwark* case was in fact in one respect positively inconsistent with the Claimant's case. Para. 26 of her opinion reads:

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[3] In fact the responsible authority under the 1989 Act and the housing authority were the same body, but in this context they had to be treated as distinct.

> "It is true, as [counsel for the local authority] points out, that the 2002 Order assumes that there will be some homeless 16 or 17 year olds who are not owed a duty under section 20. But that is a very different thing from saying that there are children who are not owed a duty under section 20 because they are or may be owed a duty under the 1996 Act. This is circular reasoning. The 2002 Order *takes out* of priority need those children who require accommodation in the circumstances set out in section 20(1). They cannot in the same breath be put back into priority need by adjudging that they do not require accommodation at all when clearly they do."

Mr Auburn relied on the fact that in that passage Lady Hale acknowledges that the 2002 Order proceeded on the basis that the fact that a 16- or 17-year old child was homeless did not necessarily mean that they required accommodation for the purpose of section 20. Although she held that that did not assist the local authority on the facts of the *Southwark* case, that was because she was concerned with cases where the child "clearly do[es]" require accommodation. There is obvious force in this point, although I am not sure that it is sufficiently central to Lady Hale's reasoning to be treated as ratio.

30. The other point made by Ms Hannett about the case-law (in her skeleton argument, though not in her oral submissions) is that in their opinions in the *Barnet* case both Lord Nicholls and Lord Scott had referred to the duty under section 20 of the 1989 Act as a duty to provide accommodation for "homeless" children: see paras. 45 and 137 respectively. That is unsurprising, but of no authoritative value, in a case where the different terminology in the two statutes has no legal significance.

31. I turn to the statutory guidance. This takes the form of joint guidance issued in 2018 by the Secretary of State for Education and the Secretary of State for Housing Communities and Local Government under section 7 of the Local Authority Social Services Act 1970 and section 182 of the 1996 Act entitled *Prevention of Homelessness and Provision of Accommodation for 16 and 17 year old Young People who may be Homeless and/or Require Accommodation* ("the Guidance"). Ms Hannett submitted that the Guidance treated the section 20 and section 193 duties as constituting, so far as 16- and 17-year old children are concerned, a single scheme. Paras. 1.1-1.3 of the Guidance read (so far as material):

> "1.1 This joint guidance was first published in April 2010 following a number of judgements handed down by the House of Lords in cases concerning the interrelationship between the duty under section 20 of the Children Act 1989 ('the 1989 Act') and duties under Part 7 of the Housing Act 1996 ('the 1996 Act') where young people aged 16 or 17 require accommodation. …
>
> 1.2 Case law has clarified the relationship between the duty under section 20 of the Children Act 1989 ('the 1989 Act') and duties under Part 7 of the Housing Act 1996 ('the 1996 Act') in the case of 16 or 17 year olds who require accommodation. The House of Lords case *R (G) v Southwark* [2009] UKHL 26 held that, where a 16 or 17 year old is owed duties under section 20 of the 1989 Act, this takes precedence

> over the duties in the 1996 Act in providing for children in need who require accommodation. …
>
> 1.3 Whilst the section 20 Children Act 1989 duty takes precedence, housing services also have duties towards young people who are homeless or threatened with homelessness. Duties owed by each service will depend on a range of factors, including which service they initially seek help from; the outcomes of any assessments and enquiries; and the wishes and feelings of the young person and their family. **It is therefore essential that children's services and housing services work together to plan and provide services that are centred on young people and their families, and prevent young people from being passed back and forth between services** [emphasis in original] …"

Ms Hannett referred us also to chapter 3 of the Guidance, which is headed *Children's services duties towards 16 and 17 year olds who seek help because of homelessness, or being threatened with homelessness*, and more particularly to para. 3.13, which reads:

> "There are only two circumstances in which a local authority might find that a homeless young person should not be accommodated under Section 20, and may instead be owed duties under Housing Act 1996. These are where the young person is:
>
> a. not a child in need;
>
> b. a 16 or 17 year old child in need who, having been properly and fully advised of the implications and having the capacity to reach a decision, has decided that they do not want to be accommodated under section 20."

32. I do not believe that the Guidance affords any assistance to the Claimant's case on this issue. The fact that the Guidance is issued jointly by both Secretaries of State reflects the fact that in the kinds of case covered by it either duty may in principle be owed: it does not imply that that will necessarily be so in every case. The same goes for the exhortation in para. 1.3 to children's services and housing services to co-operate so as to ensure that young people are not unnecessarily "passed back and forth". Para. 1.2 does no more than summarise the effect of the *Southwark* case. As for para. 3.13, this positively recognises that there will be circumstances in which a child of 16 or 17 will be homeless but not be owed the section 20 duty. I shall have to return later to its statement that there are only two circumstances where that might be the case.

33. I take the same view of the point made by Ms Hannett in her skeleton argument that there is a statutory duty of co-operation between local housing authorities and social services departments – see section 27 of the 1989 Act and section 230 of the 1996 Act. That is no doubt so, but it is not a reason for treating the section 20 and section 193 duties as co-extensive in their application to children.

34. In summary, therefore, while both the case-law and the Guidance could be said to demonstrate that the regimes under the 1989 Act and Part 7 of the 1996 Act should in one sense "march hand-in-hand" in the case of children, that is only in the sense that in

a given case either duty might in principle be engaged and the relevant authorities will need to co-operate to identify which applies. They certainly do not demonstrate that the circumstances giving rise to the two duties are identical: in fact they appear clearly to recognise that they are not.

35. Ms Hannett also pointed out that if the Council's case were right the Claimant could be treated as not requiring accommodation even though she had, at least from the expiry of CBH's notice to quit, no legal right to remain in the flat, whereas under Part 7 she would in those circumstances be treated as homeless. She submitted that it cannot have been Parliament's intention that that a child should receive lesser protection under the 1989 Act than under the 1996 Act. I do not believe that this point falls under this part of Ms Hannett's submissions. If it is wrong to require the Claimant to occupy the flat as a trespasser (as she put it), that would be a ground for impugning the decision that she did not require accommodation, and I consider the point below in that context; but I do not think it is a reason for importing the definition in section 175 into the exercise.

36. For those reasons I would reject ground 1. I readily accept that in many cases where a child is homeless within the meaning of section 175 they will also require accommodation within the meaning of section 20: in fact, as already noted, I would expect that to be so in the great majority of cases. But, like the Judge, I do not accept that it will always and necessarily be so.

(B) THE LAWFULNESS OF THE COUNCIL'S DECISION

37. I consider the Claimant's grounds 2-4 in turn.

Ground 2: Departure from Statutory Guidance

38. Ms Hannett here relies on the statement in para. 3.13 of the Guidance, quoted at para. 31 above, that the only two circumstances in which a "homeless" child should not be accommodated under section 20 were where (a) they were not "a child in need" or (b) where (in short) they had made a fully-informed decision to refuse such accommodation. She submitted that, since the Claimant's case was not of either of those kinds, the Council's failure to treat her as requiring accommodation under section 20 was a departure from the Guidance; and that such a departure could only be lawful if it had at the time made a considered decision not to follow the Guidance, and for good reason. She referred us to para. 17 of the judgment of Wilson LJ in *R (TG) v London Borough of Lambeth* [2011] EWCA Civ 526, [2011] 4 All ER 453, where he said:

> "In the absence of a considered decision that there is good reason to deviate from [the Guidance], it *must* be followed: see the classic exposition by Sedley J in *R v Islington LBC ex p Rixon* (1998) 1 CCLR 119 at 123 J-K."

She said that, since the Judge had made no finding that the Council had ever made a decision of the requisite kind, he was obliged to find that its failure to provide the Claimant with accommodation under section 20 was unlawful.

39. The Judge appears to have accepted that there was indeed in the Claimant's case a departure from para. 3.13 of the Guidance. He does not, as Ms Hannett says, directly

address the question whether the Council appreciated at the time that that was so: it seems that this was because that question was not raised before him (see para. 42 below). As part of "Issue 2", however, he did consider for himself whether there were good reasons for the departure. In para. 75 of his judgment he says:

> "While there is (joint) statutory guidance, the prime question under s.20 is, and must remain, whether C 'requires accommodation', not whether she was homeless under s.175. Section 175 is not referred to in s.20 itself and homelessness is not part of the statutory test under s.20. Certainly, the defendant's duty is to have regard to the statutory guidance, but the guidance is not a 'source of law' (*R (Khatun) v London Borough of Newham* [2004] EWCA Civ 55 [[2005] QB 37] at [47], per Laws LJ). The question becomes whether on the specific facts, there was good reason to depart from the guidance given the reality on the ground. As will be explored further, here (1) C was living in a flat in which she had lived for 18 months and where she wished to continue living; (2) C was not under any immediate threat of eviction; (3) her situation was not precarious given that the landlord made clear that it would not seek her eviction without a court order; (4) it was highly unlikely that such order, even if sought, could be obtained before her 18th birthday; (5) the landlord took no further steps to seek an eviction order; (6) the landlord emphasised that it did not wish to exacerbate C's difficulties and stated in an internal note that it viewed C's situation with 'compassion and consideration' and did not wish to pursue 'a mandatory possession order' which would 'take a minimum of 12 months'; (7) thus the landlord exercised its discretion exceptionally while C was still a child to offer her accommodation upon her turning 18. The defendant gave clear reasons for departing from the guidance that was not determinative (*Khatun* [47]). While the guidance (§3.13) mentions only 'two circumstances' where a homeless young person should not be accommodated under s.20, this guidance must be capable of being departed from on specific and concrete facts – that is why it is guidance and not law. I cannot conceive that the guidance should operate as a forensic straitjacket inflexible to the very particular circumstances of a case."

(Those factors are, as the Judge indicated – "as will be explored further" – drawn from his findings in relation to whether it was reasonable for the Council not to conclude that the Claimant required accommodation: see paras. 47-53 below.)

40. Ms Hannett submitted that that reasoning failed to address the principle stated in *TG* (which was in fact also expressed by Laws LJ in *Khatun* in the selfsame paragraph that the Judge referred to).

41. Mr Auburn advanced several arguments in response to that submission. First, he said that it was not part of the Claimant's case before the Judge that the Council had failed to consider para. 3.13 at the time. It was not a pleaded ground of challenge, and although the Guidance had been relied on in argument below it was only in support of the Claimant's submissions under head (A). He said that if a failure to consider para. 3.13 contemporaneously had formed part of the pleaded challenge the Council would

have led evidence about what regard was had to the Guidance. Second, he submitted that there was in fact no departure from the Guidance because para. 3.13 was concerned to delimit the circumstances where an authority could legitimately decide that a child did require accommodation within the meaning of section 20 but that they should nevertheless be left to seek it under Part 7 of the 1996 Act and this was not such a case because the Council (reasonably) did not at any stage believe that the Claimant required accommodation. Third, he submitted that even if the Judge erred by failing to apply the principle enunciated by Wilson LJ in *TG* his error was immaterial, or alternatively section 31 (2A) of the Senior Courts Act 1981 should apply, because in para. 75 of the judgment he had explicitly found that "there was good reason to depart from the guidance given the reality on the ground".[4] Finally, he questioned whether there was in fact an absolute rule of the kind relied on by the Claimant. He referred us to para. 38 of the judgment of Maurice Kay LJ in *R (X) v London Borough of Tower Hamlets* [2013] EWCA Civ 904, [2013] 4 All ER 237, another case concerning departure from the Guidance, which reads:

> "The final and most important question is whether the Council has established cogent reasons justifying a departure from the statutory guidance. In one sense, any such reasons have a whiff of *ex post facto* about them because, as Lewison LJ pointed out in the course of argument, the Council's evidence does not describe a considered decision to depart from the guidance. However, I accept [counsel's] submission that a departure from the guidance may be justified by cogent reasons objectively established as such through litigation, even if they were not carefully considered at the time of departure."

42. Ms Hannett did not dispute Mr Auburn's statement that the Claimant had not raised in her original claim an argument that the Council had failed to consider para. 3.13 at the time of its decision. However, she submitted that the point had been raised below, albeit in what she described as "a roundabout way". She pointed to a footnote in the Claimant's Reply to the Summary Grounds of Resistance in which para. 3.13 is quoted. However, that reference is not in the context of a failure to consider the issue contemporaneously but rather in support of the argument that the section 20 and Part 7 regimes need to "dovetail". If anything, that tends to confirm Mr Auburn's point. The same goes for the references to para. 3.13 in which occur at para. 57 of the Claimant's skeleton argument below and para. 39 (b) of the Council's.

43. I accordingly accept that the particular point now being raised by Ms Hannett in relation to para. 3.13 of the Guidance was not advanced below. It would be open to us in principle to allow it to be taken nevertheless. However, I do not think it would be right to do so in the circumstances of this case, for the reason given by Mr Auburn. But in case it be thought that the Claimant has lost the chance to advance an obviously winning argument, I should also say that I believe that there is real force in Mr Auburn's second and third points. I am far from sure that para. 13.3 of the Guidance is intended to cover circumstances such as those of the Claimant's case, where there is no reason to believe that the Council ever thought that she required accommodation. And, even if there was a departure from the Guidance, I am not convinced that the Claimant should be entitled to substantive relief in circumstances where there were, as the Judge found, good

[4] This point was in substance raised in the Council's Respondent's Notice, albeit without specific reference to section 31A (though arguably his second point should also have been but was not).

reasons for such a departure. As for Maurice Kay LJ's observations in the *Tower Hamlets* case, Ms Hannett submitted that these were obiter, but since I would reject this point on the basis already stated I do not think it is necessary to reach a concluded view on whether there is a conflict between them and Wilson LJ's observations in *TG* or, if so, how it should be resolved.

Ground 3: Failure to Consider "Homelessness/Trespass"

44. Ms Hannett's case under this ground has some similarity to the previous point in as much as it relies on alleged deficiencies in the Council's contemporary consideration of the Claimant's situation. It can be summarised as follows. Although the Council had argued before the Judge that the Claimant had at all times following her mother's death enjoyed a licence of some kind from CBH to occupy the flat, the Judge had rejected that argument and found that, from at least the expiry of CBH's notice to quit, she occupied it as a trespasser. (It followed from that finding also that she was homeless within the meaning of Part 7, which is the origin of the label "homelessness/trespass"; but that is not in truth a distinct point on this part of the case). The fact that the Claimant was a trespasser was, she submitted, a matter which was so central to the question of whether she required accommodation that the Council was obliged to take it into account in its contemporary consideration; but since it believed that her occupation was lawful at least until an eviction order was obtained (see its responses to Coram's pre-action protocol letter – para. 7 above) it evidently never did so. The failure to accommodate her under section 20 was for that reason unlawful.

45. I cannot accept this point. As Ms Hannett accepted in her oral submissions, the only relevance of the fact that the Claimant was a trespasser to the question of whether she required accommodation was that a trespasser's occupation is potentially precarious: since she had no legal right to occupy, CBH could in principle bring proceedings for her eviction at any time. It is the risk of eviction, not the status of trespasser, that is relevant to whether she required accommodation: her occupation would have been equally precarious if she had a bare licence and there was reason to believe that CBH would terminate the licence and evict her. However, throughout the period the Council believed, with – so the Judge found – good reason, that the Claimant's occupation was not in fact precarious, whatever her legal status: see para. 75 of the judgment quoted at para. 39 above. The real question is whether that belief was reasonable, which is the subject of ground 4, and Ms Hannett was constrained to accept that ground 3 added nothing as a distinct point.

46. The Judge made what I take to be essentially the same point in para. 119 of his judgment, where he considered the issue of "homelessness/trespass" in connection with the issue of whether the Council's decision was reasonable (see para. 52 below). He acknowledged that it had not as such taken into account the fact that she had no legal right to occupy the property and so was homeless within the meaning of section 175; but he concluded:

> "I judge that if the defendant had considered that there was s.175 homelessness (what Mr Sheldon submitted would mean that the test was 'technically met') along with the fact of trespass, it would have made no material difference to the decision. I judge that even if the defendant had considered s.175 homelessness and trespass, it would be highly

> likely that the outcome for C would not have been substantially different."

In other words, the Claimant would not have been entitled to relief in any event, whether on the basis of immaterial error or pursuant to section 31 (2A) of the 1981 Act.

Ground 4: Decision not Reasonable

47. "Issue 6" before the Judge was defined as:

> "In any event, was the defendant's decision that C did not require accommodation unreasonable in all the circumstances?".

It is this which seems to me the substantive issue in this case. It is necessary to summarise the Judge's reasoning on it in a little detail.

48. At paras. 106-114 of his judgment he sets out the various communications between the Claimant, the Council, CBH and Coram that are relevant to the Council's understanding of the Claimant's accommodation needs.

49. At para. 115 he says that he accepts that "requiring accommodation under s.20 is not simply reducible to the roof over the head question", referring to the judgment of Poole J in *R (AB) v London Borough of Brent* [2021] EWHC 2843, (Admin) at para. 46 (5); and that "the principal concern on behalf of C is the 'precariousness' of her tenure and lack of status in the property".

50. At paras. 116-118 he examines the Claimant's position in three periods – (1) from her mother's death on 25 August 2022 until the expiry of the notice to quit on 2 January 2023; (2) from the expiry of the notice to quit until CBH's decision of 17 February 2023 to offer the Claimant accommodation; and (3) from that date until her 18th birthday. It is common ground that for our purposes the important period is the second: the Claimant's position was obviously less precarious until the expiry of the notice to quit and in practice not precarious at all once she received CBH's offer.

51. The Judge assesses the Claimant's position in the second period at para. 117, which reads as follows:

> "The period between expiry on 2 January and the 17 February CBH decision was a time when the landlord CBH could have gone to court to make an application to evict C. The fact is that CBH as landlord did not go to court to seek an eviction and gave no indication whatsoever that it was proposing to do so prior to the claimant's 18th birthday. After notice to quit expired, it took no steps whatsoever in that direction. It did not indicate to C or to anyone else that it was intending to obtain possession immediately and evict this child. I accept that C's continuing occupation became less certain during that 6½-week window. But if one asks whether there was any prospect of her immediate or imminent eviction, the answer is and must be no – this is a relevant factor. The defendant makes the point that the test for when a person is 'threatened with homelessness' under s.175(4) is when homelessness is 'likely within 56 days'. Here C was not 56 days from the point of eviction. The

> great likelihood is that any eviction would take significantly longer than this, even if there were any appetite for it."

52. At paras. 119-124 the Judge addressed in detail various factors in the situation which one or other party had submitted was relevant to the assessment of whether the Claimant required accommodation in period (2) – namely "homelessness/trespass" (para. 119); a problem about the door in her mother's flat (para. 120); the Claimant's need for support over and above bare accommodation (paras. 121-122); the possibility of her being able to live with her father (para. 123); and whether the Council could have offered the Claimant any other "section 20 accommodation" (para. 124). Most of these paragraphs are long, and the Judge's findings in them are not the subject of any challenge: I will accordingly not seek to summarise them. I should only quote three short passages:

(1) In para. 119 ("homelessness/trespass") the Judge accepted that from 2 January 2023 the Claimant was "in principle at risk of being sued for trespass and exposed to the risk of damages" and that that was in principle a relevant factor in considering whether she required accommodation. However, he continued:

> "But one must inject a sense of realism. The notion that a body like CBH, which itself repeatedly expressed concerns about C's position, would take civil action against a child is fanciful - everyone involved knew C was impecunious (receiving food parcels and ad hoc cash payments) and highly vulnerable. One can test the likelihood of CBH pursuing her in trespass by reflecting on what CBH actually did on 17 February: it exercised its discretion *exceptionally* in C's favour to provide her with accommodation. Thus, while it would have been proper for the defendant to have considered both s.175 homelessness and trespass, their weight and significance is highly context-relevant, given the prevailing situation on the ground and the improbable prospect of C actually being evicted before she would move into her own flat just after her 18th birthday."

(2) In para. 121 ("support") he recorded that:

> "The position is that C was receiving various types of support from the defendant, and in receipt of s.17 services. She had a social worker who liaised with her. She had contact with the Young Carer Team. Social services had a duty to maintain her. She was being provided with vouchers and food parcels (she also received a little occasional money from her father)."

In para. 122 he emphasised that he accepted that "it is not just physical accommodation that should be considered in a s.20 evaluation by a local authority".

(3) In para. 124 ("offer of reasonable alternatives") he said:

> "The defendant could not reasonably grant her the type of accommodation the claimant desired, including especially living with her boyfriend, while she was a child."

53. At paras. 125-128 the Judge drew together the threads of the previous paragraphs. The relevant parts of para. 125 read:

> "125. … If one takes C's case at its highest, which is in the post-expiry/pre-17 February period, and adds other factors such as the legal fact of being a trespasser, the risk (albeit very low) of CBH obtaining an eviction before C's 18th birthday and the levels of support being provided, I do not find that these factors taken globally are sufficient for it to 'appear' to the defendant that C 'require[s] accommodation' …".

Having explained why the Claimant could not live with her father, he continued (omitting one immaterial passage):

> "126. In the end, C did not go to live with her father and stayed in her home until beyond her 18th birthday on 8 April 2023. She collected the keys and signed the tenancy agreement for her new one-bedroom flat on 19 April. Unlike in [*R (A) v Coventry City Council* [2009] EWHC 34 (Admin), [2009] 1 FCR 501], where the child was on the 'point of being evicted' or *Brent* [see para. 49 above] where the child could be removed from the accommodation at any time, there was no immediacy or imminence of real risk here. In this case, C very firmly wanted to stay living in the home she had had lived in for two years – a very significant part of her adolescence. As the defendant assessed the situation, there was every likelihood that she was going to be able to do just that and the chances of an eviction before her 18th birthday were minimal. In the end, the overwhelmingly likely outcome (almost inevitably) came to pass - C lived in her home with the cats until beyond her 18th birthday.
>
> 127. Looking at the wider factors, as I have indicated I must, I take into account that as at 2 January 2023, C would be 18 in just over 3 months. She wanted to continue living with her boyfriend and four cats and none of the options that the defendant proposed to her would permit that. She was already receiving s.17 support. She had a social worker who liaised with her. A level of maintenance was provided by the defendant. Was s.20 accommodation something that C's circumstances required? The defendant's decision that at no point in that period up to her 18th birthday following expiry of the notice to quit, given the realities on the ground, did C require s.20 accommodation, was a reasonable decision.
>
> 128. … The point at the very heart of the matter is that the claimant did not require accommodation under s.20. It was reasonable for the defendant to reach this conclusion. Therefore, the defendant's decision was not irrational and not unlawful. Judging the defendant's decision, even during the period between 2 January and 17 February 2023 when there was less clarity, the risk of C being evicted was minimal. The defendant's decision was not 'beyond the range of responses open to a reasonable decision-maker' (*R v Ministry of Defence, ex p Smith* [1996] QB 517, 554 per Sir Thomas Bingham MR (as he then was))."

54. The Claimant's challenge to the Judge's conclusion is pleaded in ground 4 of her grounds of appeal, which reads:

> "In light of all the circumstances, the Judge was wrong to conclude that it was reasonable for [the Council] to decide that [the Claimant] did not require accommodation at any stage between the death of her mother and her turning 18."

That is, perfectly properly, in very general terms, and Ms Hannett developed a more particularised case in her skeleton argument and oral submissions. I will consider those submissions under three heads.

55. First, she made some general points by way of introduction. She cautioned against the use of hindsight: it was important to focus on the position as at 2 January 2023, at which point it was not known that CBH would make the offer that it did six weeks later. She referred us to the statements of the law contained in two first-instance decisions referred to by the Judge at para. 126 of his judgment – the *Coventry* and *Brent* cases. She relied in particular on para. 74 of the judgment of Mr Antony Edwards-Stuart QC in *Coventry* and paras. 45-46 of the judgment of Poole J in *Brent*. These make clear that a child may require accommodation if their existing accommodation is precarious or otherwise unsuitable: the question of whether a child required accommodation was not determined simply by whether they had a roof over their head.

56. The difficulty with those submissions is that all the points in question were explicitly considered by the Judge. It is clear that he judged the situation on the basis of what was known to the Council during the second period. (His reference in para. 119 to CBH's decision of 17 February 2023 is by way of confirmation of what he had already found to be the reasonableness of the Council's assessment.) He accepted that the section 20 issue was not answered by the fact that the Claimant had a roof over her head, and he also acknowledged that her occupation of the flat was in principle precarious. He referred to the authorities on which she relies but found that there was no reason on the facts of this case to believe that there was any immediate risk of her being evicted or that the property was unsuitable. In truth, this ground turns not on any error in the Judge's approach but simply on whether he was right to conclude that the Council's assessment was reasonable. That is the focus of the other two heads of Ms Hannett's submissions, to which I turn.

57. Second, she took us through the various communications between the Council, the Claimant, CBH and Coram, both in connection with the service of the notice to quit in December 2022 and following its expiry, drawing attention to statements by CBH that demonstrated that, as at the start of the relevant period (that is, on 2 January 2023), there was no reason to believe that it was not going to proceed with eviction proceedings in the fairly near future. I need only focus on the more recent. On 2 December the Council was told by the Claimant that the person who had served the notice to quit on behalf of CBH had told her that once it expired "it would take a few weeks before it would go to court"; and on 6 December it was told by Coram that the Claimant "may be ok until April but not certain". She submitted that that showed that the Judge's statement in para. 117 that CBH "gave no indication whatsoever that it was proposing to [seek her eviction] prior to the claimant's 18th birthday" was wrong. Her overall submission was that the Claimant's occupation of the flat was so obviously precarious that the only rational conclusion was that she required accommodation.

58. I do not accept that submission. The indications by CBH at the time of the service of the notice to quit are unsurprising, but it did not follow from them that when the notice expired it would in fact proceed immediately with eviction. It is clear that what the Judge meant was that there was no such indication after the notice to quit expired. That was clearly material in assessing the precariousness of her occupation. The Claimant was by then only three months away from turning 18 in any event, at which point the situation would change; and even if it did start proceedings straightaway the process would, on CBH's own predictions, take some weeks at least[5]. I can see nothing wrong in the Judge's conclusion that it was reasonable to take the view at that stage that she did not require accommodation, even if the only criterion were precariousness. It was reasonable at least to wait and see whether CBH did in fact decide to bring proceedings – which it never did.

59. Third, Ms Hannett pointed to a number of passages in the evidence that showed that the Claimant was in need of support. There were references to the dirtiness of the flat, to her use of cannabis and the fact that she was in debt to her supplier. More generally, she was a recently bereaved teenager with no regular income and not in either education or employment. If she had been accommodated by the Council under section 20, for example with a foster family, she would no doubt have received some such support. But the Judge evidently, and reasonably, attached decisive weight to the factors that he identified in para. 127 as part of "the wider picture", as quoted at para. 53 above. The Claimant was nearly 18 and could accordingly only receive section 20 accommodation for a short period. She made it quite clear did not wish to move out of her home to anywhere where she could not be with her boyfriend and her cats. The Council was of course required by section 20 (6) to have regard to her wishes.

60. For those reasons I would dismiss ground 4.

DISPOSAL AND CLOSING OBSERVATIONS

61. I would dismiss this appeal. I believe that the Judge was right to uphold the reasonableness of the Council's decision in what were an unusual set of circumstances which are unlikely to be typical of the kinds of case in which the issue of whether a child requires accommodation under section 20 arises. It is of course a pity that the fact that the Claimant did not receive section 20 accommodation means that she is not entitled to the kind of support which she could expect as a former relevant child, which I am sure would be of real value to her. But that is the result of the way Parliament has chosen to structure the relevant legislation, which inevitably leads to some arbitrary distinctions: the same result would, for example, have occurred if she had been provided with section 20 accommodation but only for a period of less than thirteen weeks before she turned 18. I should also emphasise that there is no suggestion here of the Council's decision not to provide the Claimant with section 20 accommodation being influenced by a wish to avoid having continuing obligations to her as a former relevant child.

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5 In its response to Coram's pre-action protocol letter on 1 February the Council said that it understood that obtaining possession might take CBH as long as a year, and Coram in its reply accepted that. But Ms Hannett submitted that there was no evidence that that was its understanding a month earlier, and the Judge's reasoning does not depend on that estimate.

Bean LJ:

62. I agree.

King LJ:

63. I also agree.