Neutral Citation Number: [2023] EWHC 464 (Admin)

Case No: CO/1133/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 February 2023

Before:
Dexter Dias KC
(sitting as a Deputy High Court Judge)

- -

Between:

THE KING (on the application of CVN) **[anonymity order granted 30 June 2022;** **amended 31 January 2023]**	**Claimant**
- and -	
LONDON BOROUGH OF CROYDON	**Defendant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Interested Party**

- -
- -

Ms Galina Ward KC for the **claimant**
Mr Francis Hoar for the **defendant**

Hearing date: 31 January 2023
Draft judgment circulated to parties: 15 February 2023 (returned 22 February 2023)
Sent for electronic hand down: 22 February 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 28 February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

[In the following text (B123) indicates the page of the trial bundle. "C" (claimant) or "D" (defendant) followed by (123) indicates the paragraph of the skeleton arguments of parties.]

Dexter Dias KC :
(sitting as a Deputy High Court Judge)

1. This is the judgment of the court.

2. It is divided into nine sections and two appendices, as set out in the table immediately above, to explain the court's line of reasoning.

3. I must add that I granted an anonymity order to protect the claimant's right to respect for private and family life under Art. 8 European Convention on Human Rights ("ECHR"): see Appendix A.

§I. INTRODUCTION

4. This is an application for judicial review and this the judgment of the substantive hearing in the claim that came before me on 31 January 2023.

5. The claimant CVN, who arrived on these shores as an unaccompanied child seeking asylum, but who has now exhausted his appeal rights, challenges the decision of the defendant the London Borough of Croydon on 23 February 2022 to end accommodation and other leaving care support it had been providing him for several years. He says the removal of such support is unlawful.

6. Two prime questions are sharply raised by this case. First, what are our public obligations to young people transitioning into adulthood, who were once looked-after children for child protection purposes, but who are present in the United Kingdom in breach of immigration rules? Does the kind of support they are entitled to expect as former looked-after children get "switched off" when their asylum appeal rights are exhausted, or are there continuing obligations to prevent breaches of their rights under the ECHR? If so, which rights, and for what purpose? **("Issue 1")** Second, when is interference with the right to education of such young people granted by Article 2 Protocol 1 of the ECHR ("A2P1") justified, that is proportionate? **("Issue 2")**

7. Both these issues are of great personal importance to CVN and of wider public importance. What is of particular forensic interest in this case is that there is no directly decided authority on the key question raised in either issue. The context of the case is not without controversy - the always-evolving treatment in this country of migrants and those seeking asylum. In *R (Westminster City Council) v NASS* [2002] UKHL 38, Lord Hoffmann said it with great frankness:

> "there was a time when the welfare state did not look at your passport or ask why you were here … [20]
>
> "As immigration became a political issue, this changed … Voters became concerned that the welfare state should not be a honey pot which attracted the wretched of the earth. They acknowledged a social duty to fellow citizens in need but not a duty on the same scale to the world at large." [21]

8. Twenty years later, this controversy has, if anything, intensified. This former looked-after child finds himself somewhere in the middle of it. He comes from this "world at large", from Albania. But the true answer to his current situation lies not in reading the current political climate, but in reading the law. It lies in a systematic and dispassionate exercise in statutory interpretation, to which I turn shortly.

9. The parties to the claim are as follows: the claimant CVN is represented by Ms Galina Ward KC. The defendant is the London Borough of Croydon, represented by Mr Francis Hoar of counsel. The interested party is the Secretary of State for the Home Department. She was not represented, and I received no submissions on her behalf. I must pay tribute to the exceptional assistance of counsel in this important case – always focused, insightful and succinct.

10. So who is CVN? On 25 October 2018, he arrived in the UK as an unaccompanied child from his home country of Albania. He was then 17 years old and thus a child in law. Two weeks later, on 9 November 2018 he applied for asylum on the basis that he would face persecution in Albania due to his sexuality. He said that he was gay. He had begun to become aware of his true sexual orientation from about the age of 13. He maintains that in Albania homosexuality is regarded as "an illness". There came a point in 2018 when he says that although he "loves his home country", he could take it no longer and had to leave Albania. First, he got on a lorry to Macedonia and then continued a tortuous journey via Montenegro, Serbia, Hungary, Germany and Belgium, that would end in the UK.

11. His asylum claim was refused by the Home Office on 9 December 2019, a year after he made it. In part the Secretary of State relied upon the decision of the Upper Tribunal ("UT") in *BF (Tirana - gay men) Albania* [2019] UKUT 93 (IAC).[1] That was a case where the UT found that it would not be "unduly harsh" to return an openly gay man to Tirana, Albania. CVN's claim was then dismissed by the First Tier Tribunal on 21 April 2021, which refused leave to appeal on 21 May 2021, as did the Upper Tribunal on 4 August 2021. Thus by early August 2021, he became "ARE", appeal rights exhausted. On 23 February 2022 the defendant local authority sent him a letter containing a critical decision it had made about him. It was based on its human rights assessment ("HRA") of him dated 22 February. The defendant stated that as CVN was now a "failed asylum seeker", it would refuse him accommodation and other support under s.23C of the Children Act 1989. This is the **"impugned decision"**. The claimant seeks to quash this decision and be granted a declaration in terms I will specify.

12. Permission to apply for judicial review was granted by David Pittaway QC, sitting as a Judge of the High Court, following an oral hearing on 19 May 2022 (B113-

[1] The UT's country guidance included the following: "*(v) An openly gay man may face discrimination in Tirana, particularly in the areas of employment and healthcare. However, whether considered individually or cumulatively, in general the level of such discrimination is not sufficiently serious to amount to persecution. Discrimination on grounds of sexual orientation is unlawful in Albania and there are avenues to seek redress. Same-sex relationships are not legally recognised in Albania. However, there is no evidence that this causes serious legal difficulties for relationships between openly gay men. (vi) In general, it will not be unduly harsh for an openly gay man to relocate to Tirana, but each case must be assessed on its own facts, taking into account an individual's particular circumstances, including education, health and the reason why relocation is being addressed.*"

14). I heard the substantive hearing of this claim on 31 January 2023 and this judgment provides my reasons for the court's decision.

13. I turn to the impugned decision, noting that CVN is now 21 years old and engaged in an English language course. As will be seen, the fact that he has now passed his 21st birthday is of considerable legal importance.

§II. IMPUGNED DECISION

14. The letter that the defendant sent CVN on 23 February 2022 was from the "People Department", part of the "Leaving Care Service". A personal adviser called Shqipe Gecaj writes (B330-31):

> "We have recently reviewed and assessed your continuous support and advice under the new duties within the Children and Social Work Act 2017. After careful consideration, we regret to say that you no longer fall under the categories of care leavers that are eligible for leaving care support under this duty due to your current immigration status in the UK. Our decision is based on Schedule 3 of the Nationality, Immigration and Asylum Act 2002 which makes particular categories of people ineligible to receive leaving care support because of their immigration status.
>
> "You have not been recognised by the Home Office as having any valid form of leave to remain, and have become "Appeal Rights Exhausted" (ARE) in the UK. Hence, you fall into the 4th category of "ineligible person" listed in Schedule 3. In these circumstances, the local authority will only be able to continue to provide support to the extent necessary to avoid a breach of your rights under the European Convention on Human Rights where appropriate."

15. The human rights assessment ("HRA") upon which this letter was based must be taken to be part and parcel of the decision. It states (B317-23):

> "There is now an obligation on the Local Authority to consider a return [the CVN's] country of origin as no application to the Home Office is outstanding.
>
> "If the offer of return to country of origin is refused, then, any human rights breach caused by [the Claimant] remaining in the UK without support will not be of a result of poor decision making by [the Defendant], leaving care service, but rather, a decision made by [the Claimant]. There is no duty under the European Convention on Human Rights to support foreign nationals who are freely able to return home (*R (Kimani) v LB Lambeth* 2003))."

16. It is these two documents that are the prime focus of the claimant's challenge to the impugned decision.

§III. GROUNDS

17. In his Summary of Facts and Grounds dated 30 March 2022, the claimant sought permission on four grounds:

    i) The Defendant erred in law in relying on the possibility of the Claimant returning to Albania in order to avoid a breach of his Convention rights;

    ii) The Defendant erred in law in relying on the availability of support under section 4 of the Immigration and Asylum Act 1999 to avoid a breach of the Claimant's Convention rights;

    iii) The continuation of support under the 1989 Act was necessary in order to avoid a breach of the Claimant's rights under Article 3 [ECHR];

    iv) The continuation of support under the 1989 Act was necessary in order to avoid a breach of the Claimant's rights under Article 8 [ECHR].

18. Following its acknowledgement of service on 12 April 2022, the defendant conceded Ground 2. That is because in cases of destitution, the relevant local authority cannot refuse accommodation assistance based on the possibility of s.4 support from the Secretary of State via the National Asylum Support Service. Such central support is a "residual" solution, and not available if the relevant local authority on the ground has power to assist. The local authority must consider its powers first. At this juncture in late April 2022, as encapsulated by the claimant's Reply dated 20 April, the essential ground of resistance was the defendant's insistence that the claimant could return to Albania (essentially mirroring the HRA). This position prevailed until the very eve of the substantive hearing before me. I should add that in the interim, on 26 April 2022 permission was refused on the papers by Richard Hermer QC, sitting as a Deputy High Court Judge. On 17 June 2022, the claimant renewed at an oral hearing before David Pittaway QC, sitting in the same capacity. The judge granted permission. On Friday 27 January 2023 – the pre-penultimate business day before the hearing - the defendant's solicitors informed the court and the claimant that the defendant no longer relied on CVN's ability to return to Albania. The grounds of resistance were now two-fold:

    i) That upon withdrawal of accommodation assistance by the defendant, there was no power available to the defendant to prevent the destitution of the claimant since the exceptional power under Schedule 3 Paragraph 3 [of the Nationality Immigration and Asylum Act 2002 ("NIAA")] is confined to assistance for the originating purpose of the power. In CVN's case that is education (thus the power was not exercisable for "welfare"/destitution relief);

    ii) That A2P1 is a "weak right" and interference with it by withdrawal of accommodation is proportionate.

19. These two matters, suitably refined, became the focus of the dispute in the case.

§IV. LAW

20. The legal provisions in this case are complex. They consist of an intricate matrix of rights, duties and powers. The orthodox approach is to cite the relevant provisions verbatim in the body of the judgment. My sense is that in this case this will little assist an interested reader understand what the law is and why. Therefore, in Appendix B, I provide the full statutory citations reduced to a flowchart. But for the body of the judgment, I have tried to provide a clear roadmap of how we arrive at the contested questions as expressed in Issues 1 and 2 below.

21. There are nine relevant statutory provisions that span three different statutes. The Appendix B flowchart shows how these provisions fit together. But here I provide what is necessarily a brief summation.

    i) By s.23(4) of the Children Act 1989, one of the "continuing functions" of the relevant local authority towards a "former relevant (looked-after) child" is the duty to give assistance to the extent that his welfare and education (or training) needs require it [I immediately add that this case is not about training but education, and thus generally references hereafter are to education];

    ii) By s.24B(2) of the same act, the assistance provided can be by paying for accommodation and/or grants for living expenses [I will focus on accommodation, but it includes associated living expenses – parties agree that in this case the one goes with the other];

    iii) By s.23C(6), the duty prima facie ends at the person's 21st birthday;

    iv) By s.23C(7), however, where the former relevant child's pathway plan [broadly a plan drawn up with the personal advisor detailing future needs, entitlements and support] sets out a programme of education beyond his 21st birthday, the duty continues as long the person continues to pursue the programme (this is limited by ss.(3) to the 25th birthday);

    v) However, by Schedule 3 Paragraph 1 of the NIAA 2002, a person eligible for s.23C and s.24B support can be made ineligible if he falls into one of the specified classes of ineligibility (there is no doubt that Schedule 3 introduces a bespoke statutory regime creating various categories of ineligibility) ;

    vi) Schedule 3 Paragraph 7 states that the "fourth class" of ineligible person is someone unlawfully in the United Kingdom, in breach of immigration rules and who is not an asylum seeker;

    vii) However, Schedule 3 Paragraph 3 provides an exception to that ineligibility if the power to provide assistance is necessary to prevent a breach of the person's "Convention rights";

    viii) By s.113 of NIAA, Convention rights must be construed as being those in s.1 of the Human Rights Act 1998 ("HRA 1998");

ix) Section 1, HRA 1998 states that the term Convention rights means Arts. 2-12 and 14 of the ECHR and Arts. 1-3 of its Protocol No. 1.

22. Before I turn to the issues, I must explain why a breach of Art. 3 ECHR is taken so seriously. It is one of the centrepiece human rights protections in the Convention. It not qualified, and provides:

ARTICLE 3

Prohibition of torture

> No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

23. What inhuman and degrading amounts to for the purposes of Art. 3 was clearly explained by Lord Bingham in *R v Secretary of State for the Home Department ex parte Limbuela and others* [2005] UKHL 66. At [7], he said:

> "Treatment is inhuman and degrading if, to a seriously detrimental extent, it denies the most basic needs of any human being. As in all Art. 3 cases, the treatment, to be proscribed, must achieve a minimum standard of severity … But I have no doubt that the threshold may be crossed if a late applicant with no means and no alternative sources of support, unable to support himself, is, by the deliberate action of the state, denied shelter, food or the most basic necessities of life."

24. I turn to the right to education. Article 2 to Protocol No. 1 of the ECHR provides:

> "No person shall be denied the right to education."

25. It is essential to note how the right is formulated. It is a negative formulation. The Guide produced by the European Court of Human Rights (last updated 31 August 2022) states that the right:

> "is distinguished by its negative wording which means that the Contracting Parties do not recognise such a right to education as would require them to establish at their own expense, or to subsidise, education of any particular type or at any particular level." [2]

26. This precept was explained in greater detail in *Belgian Linguistics (No.2)* (1968) 1 EHRR 252, to which I must in due course turn.

27. I flesh out the law and its implications as I analyse the issues in the case, and it is to these I must turn.

§V. ISSUES

28. The skeleton arguments of counsel contained various formulations of the issues parties invited the court to decide. As I indicated at the outset of the substantive hearing, due to the shifting position, principally of the defendant, these skeleton

[2] https://www.echr.coe.int/documents/guide_art_2_protocol_1_eng.pdf (B3, p5).

arguments necessarily contained large tracts of struck out passages and ultimately unnecessary argument. It was necessary to carefully delimit the remaining scope of the case. Having carefully considered the law, I determined that the true issues the court should decide were as below. They are agreed by parties. During the course of oral argument, answers to several of these questions were teased out and conceded, not always immediately. That further narrowed the contest. I add the now-agreed answers and XXX for the questions the court still had to determine. The legal underpinnings to the questions are included as footnotes to avoid cluttering the text with elaborate statutory references.

Issue 1: Power to prevent breaches of Convention rights[3]

(1) Does the defendant have a duty to provide the claimant with assistance in the form of payment for accommodation near the place where he is or will be in education or training and make a grant to meet expenses connected with his education or training beyond his 21st birthday?[4] **Yes**.

(2) Is the claimant prima facie ineligible for such assistance due to being in the United Kingdom in breach of immigration laws?[5] **Yes**.

(3) Despite the claimant's prima facie ineligibility, is the defendant nonetheless required to perform the duty referred to at (1), if and to the extent that this is necessary, to avoid a breach of:

a) (a) any of the claimant's ECHR rights, including those protected by Art. 3 and Art. 8 ECHR?[6] **XXX**.

b) (b) Only his right to education protected by Article 2 Protocol 1 ECHR? **XXX**

(4) If the answer to (3)(a) is yes, is it necessary for the defendant to provide the claimant with accommodation to support his education to prevent a breach of his Art. 3 ECHR rights? **Yes**.

Issue 2: Article 2 Protocol 1

ii) Does the claimant have an Article 2 Protocol 1 right to education? **Yes**.

iii) Is removal of accommodation support an interference with the claimant's right to education? **Yes**.

iv) Is the interference in (2) proportionate? **XXX**.

[3] Paragraph 3 Schedule 3, Nationality, Asylum and Immigration Act 2002.
[4] Section 23C(4)(b) and (7) and s.24B(2) Children Act 1989.
[5] Paragraphs 1 and 7 of Schedule 3, Nationality, Asylum and Immigration Act 2002.
[6] Paragraph 3 Schedule 3 and s.113 Nationality, Asylum and Immigration Act 2002; Section 1 Human Rights Act 1998.

Relief

(1) Should the defendant's impugned decision be quashed? **XXX**.

(2) Should the court grant declaratory relief? **XXX**.

(3) What should be the terms of the declaration? **XXX**

29. I add a necessary qualification to Issue 1. The claimant's pleaded case relied upon potential breaches of both Art. 3 and Art. 8 ECHR. During the course of argument, it became evident that if the claimant succeeded in establishing that the defendant had to exercise its power to avoid breaches of both articles, then the necessity to prevent a breach of Art. 3 would be sufficient to quash the impugned decision (accepted by the defendant in Issue 1/Q4). Therefore, if the court found in favour of the claimant on Issue 1/Q3, it was unnecessary for the court to determine whether it was necessary for the defendant to exercise the power to prevent a breach of Art. 8. However, as Ms Ward points out, there may be cases where on the facts it would be necessary to determine the Art. 8 point separately. That is not this case.

30. What it comes to is this: on Issue 1, I must determine Q3 only. This is an exercise in statutory interpretation. On Issue 2, the court must decide Q3 only. This is a fact-sensitive proportionality evaluation. The court must then consider what discretionary relief flows from these determinations – if any.

§VI. ANALYSIS: ISSUE 1

Power to prevent breaches of "Convention rights"

31. On this issue, I must determine Q3 only.

32. Parties agree that while ordinarily the defendant would have a duty of support for the claimant as a former relevant child, he is at the same time prima facie ineligible for that support due to his immigration status. However, there is an exception to that ineligibility provided by Paragraph 3 of Schedule 3 – if the support power (note here now power not duty) is necessary to prevent a breach of the former relevant child's "Convention rights". Here is the key dispute. What is meant in the statute by Convention rights?

33. The claimant's position is straightforward: the words mean what the statute says. The relevant local authority must exercise its power if necessary to prevent a breach of any of the Convention rights listed in s.1 Human Rights Act 1998. Against this, the defendant argues that the true context of the Schedule 3 Paragraph 3 exception is, as Mr Hoar termed it, a "collection of connected statutes and statutory provisions". Thus the submission is that one must interpret Paragraph 3 as part of a wider statutory scheme. If a person is prima facie ineligible by being in breach of immigration rules, the exceptional power in Paragraph 3 is only exercisable for the originating purpose of the power. In CVN's case, the defendant argues, the s.23C(4)(b) power is only exercisable to provide assistance for "welfare and education needs". Thus it is not exercisable to prevent breaches of rights such as Art. 3 by destitution. If that were ever

available, it would have been as pure welfare assistance under s.23C(4)(c). But not now. Subsection 6 makes it crystal clear that such assistance ceases when the person reaches their 21st birthday. The defendant argues that the purpose of this "carefully structured" statutory scheme is to render people such as CVN in breach of immigration rules ineligible for local authority accommodation assistance. That purpose is "subverted" (again to use Mr Hoar's term) if the power could be used for wider welfare relief. Thus in his graphic phrase, the exception in Paragraph 3 is "wholly parasitic" on the originating purpose. The power is "dependent on educational needs". That prohibits the provision from being used to prevent destitution in CVN's case. Thus the interpretation pressed by the claimant does produce interpretive "absurdity" and is thus an invalid and impermissible statutory interpretation. The defendant made a further point. If there is no Convention right to education in CVN's case – and it is submitted that the A2P1 right to education is a notoriously "weak" right - then the Paragraph 3 exception could not be invoked to provide exceptional assistance.

34. I will deal with the last point first. As will be evident from the formulation of the issues and the answers already provided by parties, the defendant would ultimately concede during the course of the hearing that CVN did have a right to education under the Convention – the Article 2 Protocol 1 right. It is conceded by the affirmative answer to the question at Issue 2/Q1. Thus that element in the defendant's resistance falls away completely on Issue 1. I now turn to the question of the correct and principled approach to statutory interpretation. During the course of argument, I directed both counsel to the case of *R* (*Project for the Registration of Children as British Citizens and O) v Secretary of State for the Home Department* [2022] UKSC 3 ("*PRC*"). Neither had cited it in their skeleton arguments. While both were naturally familiar with this important recent decision of the Supreme Court (delivered February 2022), I felt it right to give them an opportunity to consider the case over the short adjournment and develop submissions accordingly. I now set out what I conclude is the correct approach to interpreting the statutory provisions in this case.

The modern approach to statutory interpretation

35. The act of statutory interpretation is no more and no less than an exercise in "seeking the meaning of the words which Parliament used" (*Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613 per Lord Reid of Drem). This is because while the words used by Parliament are a question of fact, the meaning of those words is a question of law (see Bennion §22.1, *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020)). In *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] AC 349, 396, Lord Nicholls of Birkenhead put it this way:

> "Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context."

36. What "context"? Lord Hodge DPSC explained in *PRC* at [29]:

> "A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context."

37. This is the approach I have adopted. I have looked at Schedule 3 Paragraph 3 of the NIAA in the context of (1) the entirety of Schedule 3; (2) along with the sections in the main body of the Children Act 1989 dealing with duties to former relevant children (commonly called the leaving care provisions); (3) the relevant local authority's continuing duties of leaving care support; (4) the Human Rights Act 1998. It seems to me that the question of what "Convention rights" means is reducible to an analysis of the following four factors:

    (1) Plain reading (of statutory text);

    (2) Ambiguity;

    (3) Absurdity (justification for departure from plain meaning);

    (4) Public interest (in clarity about the meaning of statutes).

On (a): plain reading

38. The words chosen by Parliament in Paragraph 3 are "Convention rights" – plural. Unless that choice is a careless and previously unnoticed slip by the drafters, rights in the plural can be taken to have been chosen and endorsed by the legislature for a reason. The Interpretation section of the NIAA is s.113. It provides:

> 113 Interpretation
>
> a) In this Part, unless a contrary intention appears—
>
> …
>
> "the Human Rights Convention" has the same meaning as "the Convention" in the Human Rights Act 1998 and **"Convention rights" shall be construed in accordance with section 1 of that Act.**
>
> (emphasis provided)

39. Let me say that prima facie I have not been able to detect any "contrary intention" that "appears" in the NIAA to indicate that Convention rights means anything different to what are the express words of the statute. One therefore proceeds to consider section 1 of the Human Rights Act 1998 itself. It states in terms:

> **1 The Convention Rights.**
>
> (1) In this Act "the Convention rights" means the rights and fundamental freedoms set out in—
>
> (a) Articles 2 to 12 and 14 of the Convention,

(b) Articles 1 to 3 of the First Protocol,

40. Thus, on plain linguistic reading, Schedule 3 Paragraph 3 authorises the relevant local authority to exercise its Children Act 1989 powers to prevent breaches of Arts. 2 to 12 and 14 as well as Arts. 1 to 3 of the First Protocol. Support for the validity of such a "plain text" interpretation comes from the Supreme Court in *PRC*. Lord Hodge stated at [31] that:

> "Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered."

41. He cited Lord Nicholls in *Spath Holme* in what Lord Hodge said was "an important passage" (*PRC* [31]). Lord Nicholls stated at 396:

> "Thus, when courts say that such-and-such a meaning 'cannot be what Parliament intended', they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning."

42. Therefore, what could Parliament reasonably be taken to have meant when it used the words "Convention rights"? Can it reasonably have been taken to mean "right singular" or that one must read in an implied (unexpressed) limitation that rights are restricted to the original purpose the power was exercisable for (the defendant's interpretation)? One further problem I shall return to is this: if the relevant right is to be confined to a single one ("only to prevent interference with the right to education, if one exists" – again, defendant's case), on what legitimate basis in the statute or elsewhere is that circumscribing to occur? What is the test?

43. In *PRC* the Supreme Court clarified the prime rule of statutory interpretation. It is well known. The "natural and ordinary meaning" of statutory words is set down as the starting-point of interpretation in various editions of *Bennion*. It is said at §22.1(1):

> "The starting-point in statutory interpretation is to consider the ordinary meaning of a word or phrase."

44. It is put by Lord Hodge like this at *PRC* [29]: the words that Parliament has chosen to enact are:

> "therefore the primary source by which meaning is to be ascertained."

45. Therefore, if the words are clear and unambiguous, there is no need to look further. No need to consider secondary material such as White Papers, Hansard debates and so on. Such "external aids to interpretation" should therefore only play a "secondary role" (ibid. [30]), if at all.

46. I find that the natural and ordinary meaning of "Convention rights" is plainly the rights set out in s.1 HRA 1998.

On (b): ambiguity

47. That natural meaning is subject to the question of ambiguity. As Lord Hodge said at [30]:

> " … none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity."

48. Thus, is there is any ambiguity about the meaning of "Convention rights" – especially when it has been subject to statutory definition in the Human Rights Act 1998?

49. It was unclear to me what ambiguity exists in the words "Convention rights" as defined by s.1, Human Rights Act 1998. The defendant was asked to specify whether there was ambiguity and, if so, what it was. Mr Hoar ultimately accepted that on their face the words "Convention rights" were not ambiguous. I am thus left with this position: Convention rights for the purposes of Paragraph 3 means all the Convention rights listed in s.1 Human Rights Act 1998. As Mr Hoar ultimately accepted, "any of the Convention rights in s.1 could be engaged". That includes Art. 3. Unambiguous words should prima facie be interpreted unambiguously. On the face of it, Paragraph 3 can be used to prevent breaches of Art. 3 if certain conditions apply. But that is not the end of the matter.

On (c): absurdity

50. However, the prime rule of interpretation is disapplied if a plain reading produces absurdity. This became the meat of the defendant's argument: the s.23C(4)(b) power is about providing educational assistance and not relief from destitution. If such assistance is prohibited after the 21st birthday by ss.(6) and rendered ineligible by Schedule 3 Paragraphs 1 and 7 for those in breach of immigration rules, how could it legitimately be reintroduced via the "back door" of Paragraph 3? The difficulty for the court, it was submitted by the defendant, is that the "mischief or purpose of Paragraph 3 is not set out".

51. I am not convinced that the premise of the defendant's argument is correct. The clear words of the enabling provision at s.23C(4)(b) make it plain that the relevant local authority has a *duty* to provide assistance to the extent that the "*welfare and* educational needs" of the person require it. What does the word welfare add? Why is it there? If the originating purpose of this power was strictly confined to educational assistance, as the defendant maintains, the provision could have said precisely that – and only that. It does not. I judge that Parliament has included welfare in ss.(4)(b) for an obvious reason. It is interesting to note what the rest of the subsections in subsection (4) say:

> (4) It is the duty of the local authority to give a former relevant child—
>
> (a) assistance of the kind referred to in section 24B(1), **to the extent that his welfare requires it**;
>
> (b) assistance of the kind referred to in section 24B(2), **to the extent that his welfare and his educational or training needs require it**;

(c) other assistance, **to the extent that his welfare requires it**.

(emphasis provided)

52. What is plain is the dominant theme of welfare. Thus subsection (4)(a), which deals with employment assistance for a former relevant child mentions welfare. Subsection (4)(c) is the "pure" welfare provision. All three subsections mention welfare. The employment and pure welfare subsections become inapplicable at the 21st birthday; they "fall away", as Ms Ward succinctly put it. But ss.(4)(b), the educational assistance provision can continue until the 25th birthday (ss.24B(3)(a)). That is simply a recognition by Parliament that further education courses can continue past the artificial watershed of a 21st birthday. But why did Parliament connect welfare need to educational need in ss.(4)(b) at all?

53. In *R (Sabiri) v Croydon LBC* [2012] EWHC 1236 (Admin), this court found at [51] that paying for accommodation could properly come within the s.23C(4)(b) ambit. That is not disputed between parties. What is significant for the purposes of the instant case is the purpose identified by the court. It can be found at [52]:

> "the local authority should stand in the place of a parent for those who lack a natural parent, who would normally fund those accommodation expenses."

54. Being of equivalent tribunal tier, this decision is not binding on me. But I do find it highly persuasive. It emphasises that the purpose of these leaving care provisions in respect of former relevant children: for the relevant local authority to act as their "corporate parent" and provide the support that natural parents would have done. A former relevant child should not be penalised or disadvantaged by a lack of parental support. Of course, in CVN's case, his are 1500 miles away and, on his case, not supportive. What strengthens my conviction that this is the correct interpretative approach is a careful reading of a further case: *R (Westminster City Council) v National Asylum Support Service ("NASS")* [2002] UKHL 38. I now turn to this.

55. *NASS* involved the construal of different statutory provisions. That must be said immediately. However, I judge that they are closely analogous to those pertinent to the instant legal problem. In *NASS*, a Kurdish woman sought asylum in the United Kingdom with her daughter. The mother lived with a number of disabilities, including a serious spinal condition. On leaving hospital, she became destitute. Thus, she sought accommodation assistance from Westminster City Council, her relevant local authority. It refused to fund the accommodation, stating this was the duty of the Secretary of State, acting through the newly formed NASS. When the Secretary of State refused assistance, the Council relented and provided accommodation, but brought a claim by way judicial review. The relevant statutory provision was s.21(1)(a) of the National Assistance Act 1948 ("NAA"). It provided (until amended) that a local authority:

> "… shall make arrangements for providing - (a) residential accommodation for persons aged 18 or over who by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them."

56. This statute was subsequently amended by the Immigration and Asylum Act 1999 ("IAA"), a similar immigration-related statute to the one in play in this case, the NIAA 2002. The legal effect of s.116 of the IAA was in *NASS* to exclude asylum seekers from entitlement to accommodation under the 1948 Act (by inserting a new s.21A into the National Assistance Act). This is very similar, of course, to the ineligibility of those who are in breach of immigration rules for s.23C(4) Children Act 1989 assistance, prohibited through Schedule 3 Paragraphs 1 and 7 of the NIAA. But the similarities do not end there.

57. What the House of Lords held in *NASS* was that the ineligibility was limited to those asylum seekers who sought accommodation solely because they were destitute. Lord Slynn said at [17] that:

> "the only limitation of a local authority's liability to provide accommodation is where the need is "solely" due to destitution or its effects."

58. Lord Hoffmann said at [49] that accommodation assistance by the local authority was required because this particular asylum seeker "has a need for care and attention which has not arisen solely because she is destitute but also (and largely) because she is ill". It is clear from *NASS* that if the application for accommodation had been exclusively based on destitution, it would have failed due to the IAA prohibiting amendment. But where there was a need based on two purposes, which included the avoidance of destitution, then the local authority duty to provide assistance remained intact. However, the "other" reason for the application must be part of the empowering provision's purposes. Put another way: "pure" or solely destitution claims must fail. That was, as Lord Slynn put it at [17], "the only limitation" on the local authority's liability to provide accommodation.

59. The case of *R (SO) v. Barking & Dagenham LBC* [2010] EWCA Civ 1101 is cited by the defendant in support of its resistance to the claim (D34-37). This was a case that focused on s.23C(4)(c), the welfare subsection. The judgment of the Court of Appeal was given by Tomlinson LJ. One of the questions in the appeal was whether ss.4(c) contained within it the power for the local authority to provide accommodation in the welfare interests of the former relevant child. The trial judge held not. The Court of Appeal held that he was wrong ([30]).[7] However, it is the previous paragraph that is of significance to the instant case – and indeed the paragraph cited and relied upon by the defendant.

> 29. Notwithstanding the assistance given to us by counsel in relation to the shape of this and associated legislation, I confess that I find it difficult to discern in the Leaving Care Provisions a

[7] Per Tomlinson LJ at [30]: "The critical point, in my judgment, is the use by the draftsman in sub-section (c) of language which had already twice been construed by this court in a similar context as encompassing the provision of accommodation. I agree with Mr Drabble that it is in such circumstances in the highest degree unlikely that the draftsman would, in 2000, use the identical language in order to particularise the nature of "other assistance" if that assistance was not intended to extend to the provision of accommodation. … Accordingly, in my view the judge erred in holding that the sub-section affords to a local authority no power to provide accommodation to a former relevant child."

> clear parliamentary intention so far as concerns the power of a local authority to provide accommodation to former relevant children. It is however true to say that if s.23C(4)(c) encompasses the provision of accommodation, sub-sections (a) and (b) are not entirely redundant. Sub-section (a) enables a local authority to provide assistance with accommodation which is near to a place of employment or a place where employment will be sought, **which might go beyond what the former relevant child's welfare alone might require**. The same is true, mutatis mutandis, of sub-section (b), which also enables a local authority to take into account the former relevant child's educational or training needs, **which again might go beyond what mere welfare might require.** It follows that on the Appellant's construction there is a significant overlap between the powers granted by ss.23C(4)(a) and (b) and 23C(4)(c), but not complete redundancy. (emphasis provided)

60. Thus the court held that the provision of accommodation for welfare purposes fell under subsection (c). I do not understand that to be in doubt before me. But it is what the Court of Appeal said about the other two subsections that is of significance to this case. Tomlinson LJ makes clear that subsection (a) enables the local authority to look at welfare in the context of employment needs. If the needs of the former relevant child's employment required accommodation support that "might go beyond" welfare "alone", then that additional support could be justified. The same is true of educational support that "might go beyond what mere welfare might require". What I take this to mean is that there can be accommodation assistance that is be permitted under ss.4(c). But in respect of ss.4(a) and ss.4(b), the accommodation assistance must be connected to the employment or educational needs of the former relevant child and is thus wider than welfare "alone". I deduce that the local authority is required in such cases to consider the welfare needs of the former relevant child in the wider context of their connection to employment or educational needs, as may arise. Nothing more, nothing less. I take nothing from this judgment that would enable me to conclude that because the accommodation is "wholly parasitic" of the educational needs, to use the defendant's term (D38), the only Convention right that should be protected is A2P1. I judge such a submission to be a misreading of *SO*, should that be the defendant's argument.

61. I turn back to the instant case. I am clear that if "sole" purpose of accommodation is to prevent destitution and nothing else, CVN's claim would fail. But here the situation is far more nuanced. There is an intricate connection between his educational and welfare (accommodation) needs. I judge that it would be absurd to ignore the express inclusion of "welfare" in ss.(4)(b). What Parliament is plainly intending is that where there is the necessity to provide welfare assistance by way of accommodation and/or living expenses to support the educational needs, that is a statutorily legitimate exercise of the local authority's power. There is one sense in which Mr Hoar is correct: if a person were past her or his 21st birthday and stopped attending the educational programme, I cannot conceive how that the power to prevent destitution (breach of Art. 3) would be exercisable through Paragraph 3. It would be a purely welfare matter and prohibited (the ss.6

cut-off at 21st birthday). Such a pure welfare need post-21st birthday could not be met because there is no educational need connected to it.

62. I thus conclude that there is no absurdity in taking into account welfare and educational needs together. Further, I find that I must. Sections 23 and 24 Children Act 1989 (variously) are plainly corporate parenting provisions. The title of s.23 is "Advice and assistance for certain children and young people". The duty falls on the child's or former relevant child's "responsible" local authority and that is the authority that "last looked after the child" (s.23A(4)). Looking after the welfare of the child/former relevant child is vital but must be expressly authorised by statute (s23C(6) ordinarily limits the duty to the 21st birthday, for example). One must also inject a measure of realism. If the withdrawing of accommodation assistance would render CVN destitute and that would materially and significantly hamper his ability to continue with his educational course, then the exceptional power in Paragraph 3 is exercisable by the defendant to prevent that fundamental breach of Art. 3, a Convention rights included by Parliament within the scope of the power *because of its link to the claimant's education*. That, I find, is precisely the position here. When pressed, the defendant accepted that if accommodation were withdrawn, CVN would be destitute. The defendant accepted that destitution is a breach of the Art. 3 right, which is directed at preventing inhuman and degrading treatment. The defendant accepted that if CVN were a former relevant child without status problems beyond his 21st birthday, it would be necessary for the defendant to provide him with accommodation assistance to prevent destitution should he be continuing with his education. Once the court makes a ruling as a matter of law that Art. 3 is included in the Paragraph 3 Convention rights, it is necessary for the defendant to act to prevent a breach of Art. 3 precisely *because* it is connected to his educational needs and thus his right to education (A2P1).

63. There is no authority to support the defendant's submission that the educational assistance power is only ever exercisable for educational purposes – the originating purpose of the s23C(4) provision (as characterised by the defendant). In my judgment, such a construction would amount to a gloss on the plain words of the statute. It would also ignore the express inclusion by Parliament of the word "welfare". I reject such an artificial construction.

On (d): public interest

64. There is a high public interest in the public being readily able to discern what the law is. Thus having clarity about what the words of a statute mean is fundamental. This is so members of the public can regulate their conduct in light of the law. We are taken ("assumed") to know what the law is, and ignorance of the law does not excuse.[8] Moreover, we live in what Lord Burrows, writing extra-judicially, noted as the "age of statutes", an era where statutes are "swallowing up our common law".[9] Thus there exists a high importance for the law expressed in an Act of Parliament to be clear to a reasonably intelligent member of the public, if

[8] The Latin maxim to this effect may even be preceded by the Greeks. In English law, it found early and then frequent expression. See, for example, *Mildmay's Case* (1584) 1 Co Rep 175a at 177b; then affirmed by both Hale (*Pleas of the Crown*, 1680, p.42) and Blackstone (*Commentaries*, 1772, Vol. IV, p27).

necessary with the assistance of advisers, simply by reading the statute. If it can be avoided, there should no necessity for reading authoritative, but to lay people often difficult to understand, judgments from the senior courts. This, it seems to me, is a constituent element of the principles of legality and the rule of law itself. Lord Hodge explained in *PRC* at [29], again drawing on Lord Nicholls:

> "There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in *Spath Holme*, 397:
>
> > 'Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament.'"

65. Therefore, when Parliament says "rights" in a statutory provision, a member of the public is reasonably entitled to understand that as meaning rights plural as defined in the interpretation section (s.113, NIAA) and not something else. It should be capable of including all the rights set out in the statute. Equally, there should not be some implied and unexpressed limitation on the exercise of the relevant local authority's power to prevent breaches of those (multiply available) rights – save for what is obvious and clear in the words of the statute.

(e) Conclusion Issue 1 / Q3

66. Issue 1 is settled. The answer lies in the intimate connection between welfare and educational needs in ss.(4)(b). It is necessary to prevent breaches of Art. 3 if, and to the extent, that they are connected to the claimant's continuing educational needs when the breach of Art. 3 would materially jeopardise the person's ability to effectively access and engage in education and hence enjoy his Article 2 Protocol 1 right to education.

67. I find that Art. 3 ECHR is included in the "Convention rights" referred to in Schedule 3 Paragraph 3 of NIAA. Therefore, the defendant has made significant public law error. It did not consider if its assistance power was exercisable to prevent a breach of Art. 3 as connected to the claimant's educational needs (and associated breach of right to education under A2P1).

68. Given that ruling of law, it is strictly unnecessary to determine the Issue 2 question. I have heard no argument that the defendant's impugned decision could survive a material Issue 1 public law error. There is no proportionality balancing exercise for Art. 3. It is an unqualified right (*Chahal v United Kingdom* (1996) 23 EHRR 413).[10]– Contrast that with, for example, Art. 8, where the conditions for exceptions to the privacy rights within it are set out – and the A2P1 right to education, as will be seen shortly. No such qualification exists for Art. 3. Therefore, once engaged, the State (here operating through the local authority) has

[9] Prefatory remarks, pp. (i), (xv), Burrows, Andrew (2018) *Thinking about Statutes: Interpretation, Interaction, Improvement (The Hamlyn Lectures)*, Cambridge: Cambridge University Press.
[10] In similar vein, see also *Sufi v United Kingdom* (2012) 54 EHRR 9 confirming *Ahmed v Austria* (1996) 24 EHRR 278.

a duty to prevent its breach. The Convention emphasises that the State "shall secure" (Art. 1) the right not to be subjected to inhuman and degrading treatment. In this case, the defendant local authority has completely failed to consider this.

§VII. ANALYSIS: ISSUE 2

Proportionality of breach of A2P1

On Issue 2, I must only determine Q3.

69. I deal with this issue less comprehensively than I otherwise would have done because the claimant has succeeded on Issue 1. There is no proportionality analysis performed by the local authority and I am being asked to make a proportionality assessment in that forensic void. Both parties invite the court to make the assessment.

70. I only consider proportionality in respect of A2P1. In contrast to Art. 3, A2P1 *is* a limited right. States can legitimately interfere with it ("restrict" it, in Convention parlance). The nature of this right to education is not designed to compel the State to establish any particular kind of educational system. It is essentially about access. Or more precisely: fair and equal access to such educational facilities as exist. Access must be looked at in the round. It must involve a consideration of meaningful or effective access. This point was made with great force in *Lester & Pannick, Human Rights Law and Practice* [1999], in a summation approved by the Court of Appeal in *R (Holub) v SSHD* [2001] 1 WLR 1359) at [25]:

> "The general right to education comprises four separate rights (none of which is absolute): (i) a right of access to such educational establishments as exist; (ii) a right to an effective (but not the most effective possible) education; (iii) a right to official recognition of academic qualifications ... As regards the right to an effective education, for the right to education to be meaningful the quality of the education must reach a minimum standard."[11]

71. Note the emphasis on right of access and not just right to education but effective education. Although the defendant's skeleton cast doubt over whether the claimant did have a right to education, at the oral hearing, the defendant conceded that the claimant did have such a right. Further, when asked whether that right would be infringed by removal of accommodation and associated support, the defendant once more conceded. That was, it seems to me, inevitable. Access to education must be effective. If a person is destitute, it is impossible to conceive how that would not significantly impact her or his ability to meaningfully access education. Therefore, the question the court was left with was the one of proportionality. It is important to be clear what is meant by that. The test was laid out plainly by Lord Reed in *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39. He stated at [71] that:

> "An assessment of proportionality inevitably involves a value judgment at the stage at which a balance has to be struck between the

[11] *Lester and Pannick*, paras 4.20.4, 4.20.6.

> importance of the objective pursued and the value of the right intruded upon."

Lord Reed continued at [74]:

> "It is necessary to determine, (1) Whether the objective of the measure is sufficiently important to justify the limitation of a protected right. (2) Whether the measure is rationally connected to the objective. (3) Whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective. (4) Whether balancing severity of a measure's effects on the rights of the person to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter".

72. That the *Bank Mellat* proportionality rubric applies to interferences with Article 2 Protocol 1 rights is not in doubt. In *Tigere v SSBIS* [2015] 1 WLR 3820 (SC), Baroness Hale at [33] cites *Bank Mellat*.[12]

73. It is for the defendant to demonstrate that the interference in this case is not disproportionate (a double negative test). In argument, the defendant relied upon the following six factors:

    (1) The claimant only starting a course in September 2022, that is, four years after being in the United Kingdom from 2018;

    (2) The accommodation was not provided because of proximity to the course he is presently enrolled in;

    (3) The thrust of *Belgian Linguistics* and *Ali v Head Teacher and Governors of Lord Grey School* [2006] 2 AC 363, that the right to education is "weak";

    (4) That there is a high margin of discretion in matters of resource allocation (*R (Hurley and Moore) v Secretary of State for Business Innovation and Skills* [2012] EWHC 201 (Admin) at [64]);

    (5) That the "benefit" of his [CVN's] course to society is "not great";

    (6) That he is ARE and thus not of settled status.

74. Ms Ward strongly refutes the relevance and validity of each of these points. I now provide my analysis.

75. **On (1)**: I do not see how the delay in CVN's starting the course survives the filed evidence in the case. The claimant states (B138 at §12):

> "I wanted to improve my English and maths – but I found the process difficult and overwhelming and needed support with this. When I was a bit older and more settled, in early 2020, I tried to enrol myself in

[12] Cf. *Taratino v Italy* (2013) 57 EHRR 26 where a very similar formulation was used in an A2P1 case.

> Lambeth College, but again I found it difficult to navigate online applications myself without assistance during the Covid-19 lockdown, as I couldn't understand all the instructions that are in English. After a lot of effort, I did manage to complete the application, and I did a test about my level of English prior to enrolment. However, on 4 September 2020 the College sent me a text message to tell me that they had no spaces left on the ESOL course starting that year."

76. The defendant did not ask for the claimant to be available to be cross-examined. It has filed no evidence that contradicts or undermines what he says. As I indicated to counsel, I find no reason to doubt the claimant's evidence. Indeed, his lack of facility in English is precisely why he is engaging with a course of study presently. There is nothing in this point.

77. **On (2)**: the fact that the accommodation was not provided to be near to the college he is studying at takes matters no further. He is enrolled at Croydon College. His accommodation is nearby. It meets the statutory test for s.23C(4)(b)/s.24B(2) support.

78. **On (3)**: the defendant relies on the passage in *Belgian Linguistics* at p.27, B3:

> "The negative formulation indicates … that the Contracting States do not recognise such a right to education as would require them to establish at their own expense, or to subsidise, education of any particular type or at any particular level…
>
> "There neither was, nor is now, any question of requiring each State to establish such a system, but merely of guaranteeing to persons subject to the jurisdiction of the Contracting Parties the right, in principle, to avail themselves of the means of instruction existing at a given time."

79. The course at Croydon College is plainly a "means of instruction existing at a given time". The "weak" right that Lord Bingham spoke of in *Ali* at [24]-[25] was a reference to matters such as a right to education at a particular institution preferred by a claimant. But that is not the case here. I do not understand Lord Bingham to mean that the right is not important, but that it is limited. It is limited in that the right does not prescribe any particular shape to the educational system and states have a wide margin of appreciation about that. But I reject the notion that once the right is possessed by a person, that right of fair and equal access can be brushed aside without good reason. I fail to see any such good reason here to justify such wholesale infringement of the claimant's right to effective and meaningful access to the educational facilities that do exist in Croydon and that are relevant to him and that he is attending.

80. **On (4)**: the defendant relied on the well-known precept of Lady Hale in *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19 that in certain matters of evaluation and judgment, the court recognises that the decision-maker has a high margin of discretion. That case was a judicial review of the refusal by the Belfast City Council to issue licences for shops to sell pornographic material. The claimant complained of a breach of its Art. 10 ECHR right to freedom of expression. Lady Hale said at [37]:

> "the court has to decide whether the authority has violated the convention rights. In doing so, it is bound to acknowledge that the local authority is much better placed than the court to decide whether the right of sex shop owners to sell pornographic literature and images should be restricted - for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights of others."

81. Here indeed is a high margin of discretion. The defendant relies upon that in making decisions about the interference with CVN's right to education. However, the fact is that the defendant did not perform a balancing exercise in proportionality terms. It concluded that it need not because it decided that the claimant was free to leave the United Kingdom. Subsequently, it has resiled from that position. In fact, if one reads on in the *Miss Behavin'* judgment from the part relied upon by the defendant, Lady Hale continues [ibid.]:

> "But the views of the local authority are bound to carry less weight where the local authority has made no attempt to address that question. Had the Belfast City Council expressly set itself the task of balancing the rights of individuals to sell and buy pornographic literature and images against the interests of the wider community, a court would find it hard to upset the balance which the local authority had struck. But where there is no indication that this has been done, the court has no alternative but to strike the balance for itself, giving due weight to the judgments made by those who are in much closer touch with the people and the places involved than the court could ever be."

82. I find myself in an analogous position. The weight I can attach to the "views" (to use Lady Hale's word) expressed by the defendant now in the absence of any meaningful evaluation are correspondingly limited. Lady Hale cited Lord Bingham in *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100, 116G at [31]:

> "If, in such a case, it appears that such a body has conscientiously paid attention to all human rights considerations, no doubt a challenger's task will be the harder."

83. There has been no such conscientious attention from the local authority. My judgment is that a glaring weakness in the defendant's case on Issue 2 is that it has totally failed to make a proportionality assessment. It therefore has been able to put very little by way of evidence before the court in support of its case. Mr Hoar, to his credit, has sought to gather such strands as are available from the filed material. Even taken together, the result is vaporous. Precisely the kind of evidence that the court would need to reach a fair, reasonable and safe conclusion about whether the interference with a person's Convention right is necessary and proportionate is missing. I know nothing about the other demands on the many ratepayers of Croydon. There has been no balancing exercise or assessment of the competing claims on the funds by the claimant and any other competing person or group of people. I am clear that should the claimant lose accommodation and associated support, he will cease to be able to engage in education effectively as a

destitute person. I judge this to be a very serious breach of his Article 2 Protocol 1 right to education. In fact, it is an effective negation of it. What can be put in the balance against that? I have been provided with scant evidence. In fact, none of any weight. Ms Ward asks "what pressing social need" can be invoked to justify the interference. It is hard to identify what there is. In theory, protecting council funds arises. But here the court is deprived of the very assistance it would need to make an informed judgment in the defendant's favour. I have been told nothing about competing demands and needs as no evidence has been produced and no assessment made.

84. **On (5)**: the defendant submits that this objective is not of great "benefit" to society compared to secondary education. Mr Hoar put it this way: this is further education and at "the lower end of the scale". I disagree. The comparison misses the point. I must proceed on the basis that the claimant remains for the present in the United Kingdom. It is of benefit to society that those residing here speak English. Indeed, that is why there are English proficiency tests ("SELTs" Secure English Language Tests) for those applying for visas, visa extensions and citizenship. There is material benefit to this country in having someone residing here being proficient in English. I also take the claimant's point that we are increasingly moving towards a "knowledge-based society", as the ECtHR stated in *Ponomaryov v Bulgaria* (2014) 59 EHRR 20. The court stated at [57]:

> "…the Court is mindful of the fact that with more and more countries now moving towards what has been described as a "knowledge-based" society, secondary education plays an ever-increasing role in personal development and in the social and personal integration of the individuals concerned…"

85. That was in 2014 and in the near-decade since, this growing importance of knowledge has only intensified. I find this factor to be of little assistance to the defendant.

86. **On (6)**: the fact that the claimant has unsettled status is one factor that must be weighed. But what weight should be allocated to it? If there were to be a principled decision that people with unsettled status should have, to use Mr Hoar's vivid phrase, "inferior" access to education, there would need to be a proper assessment of the competing claims. Art. 14 ECHR enshrines in the Convention the right "not to be discriminated against in the enjoyment of rights and freedoms set out in the Convention". The right to education is one such right. It is not an absolute right. It can be qualified or infringed. But if that were to happen, the State would need to provide solid evidence and a sound basis to depart from what Lord Bingham termed "fair and non-discriminatory access" to the system of state education (*Ali* at [24]). None of any substance has been put before the court. To give weight to this factor without the materials for proper analysis has all the hallmarks of capriciousness and arbitrary use of power.

Conclusion Issue 2/ Q3

87. Stepping back then, and applying the proportionality test in *Bank Mellat*, I reach the following conclusions:

i) The protection of ratepayers' money is a sufficiently important objective to be *capable* of justifying interference with the protected but qualified right to education;

ii) Not funding accommodation and associated support for a person with unsettled status is rationally connected to that objective in that it furthers the end;

iii) I am just, on balance, able to accept that it is not clear what less intrusive measure could be adopted by the relevant local authority short of withdrawing funding without unacceptably compromising the objective of protecting the ratepayers' funds;

iv) However, and despite the foregoing three factors, when performing the necessary balancing exercise at Stage 4, I judge that the withdrawal of funding would have a severe effect on the claimant's right to education and effective access to it and this far outweighs the objective of protecting ratepayer resources, asserted as it without any meaningful detail or particularity.

88. Therefore, I find that defendant has not demonstrated that the interference is not disproportionate. The burden is on the State to demonstrate proportionality (*R (Quila) v Secretary of State for the Home Department* [2012] 3 WLR 836 at [44]) or a lack of disproportionality. The defendant has failed to meet that burden. Being asked to judge this matter afresh, I have no hesitation in concluding that the interference would be disproportionate. Put another way: I find it necessary for accommodation and associated expenses to continue to be paid to avoid a disproportionate breach of (or interference with) the claimant's right to education and effective access to it.

§VIII. RELIEF

89. As a result of my conclusion on Issue 1 / Q3, there is a public law error. However, judicial review is a discretionary remedy.[13] Some errors are central and pivotal, but others are not material and would have made no real difference to outcome if not made.

(a) Section 31(2A)

90. To allow for the latter possibility, Parliament passed s.31(2A) of the Senior Courts Act 1981. This provides:

> (2A) The High Court—
>
> (a) must refuse to grant relief on an application for judicial review, and
>
> …

[13] See, for example, *R v Panel on Take-overs and Mergers ex p. Guinness PLC* [1990] 1 QB 146 at 177E, per Lord Donaldson MR.

> if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.

91. In the defendant's skeleton argument (D72), reliance was placed on s.31(2A) in respect of the Art. 8 breach. But the court is no longer determining this question. Mr Hoar wishes to advance a similar argument in respect of Article 2 Protocol 1. Although not making that sufficiently clear in his skeleton, I granted permission to advance the argument, but ensured Ms Ward was given sufficient opportunity to respond. She did, energetically.

92. Section 31(2A) is mandatory in its effect ("must") if the court finds it "highly likely" that defendant's conduct complained of (here error of law) would make "no substantial difference" to the outcome. If this argument were advanced in respect of Art. 3, I fail to see how it could survive the defendant's at-court concession in respect of Issue 1 / Q4, that it would be necessary to exercise the power to provide accommodation and associated support to prevent a breach of the claimant's Art. 3 ECHR rights. As a result, the argument was not advanced during the hearing. I would have unhesitatingly ruled against it. But what about A2P1?

93. In post-trial correspondence, when clarification was sought, Mr Hoar agreed that in respect of A2P1 "no decision was made". The argument must be that (a) the "complained of conduct" is the failure to assess the right to education, which (b) resulted in the decision not to grant support. However, it is then argued, that (c) if the A2P1 right was considered, the decision would be the same – no support. Thus upon a proper consideration of A2P1, it is "highly likely" that there would be no "substantially different" outcome – there would still be no support. I cannot accept that argument.

94. First, the test is "highly likely". I find that this high threshold has not remotely been met. Second, once it is accepted (as the defendant does) that CVN has a right to education and removal of accommodation support would infringe it, it would be for the defendant to demonstrate that this interference with A2P1 is not disproportionate. As I have already indicated, my judgment is that removing accommodation and associated support would be a serious interference with the right as it would severely hamper the claimant's ability to effectively access and participate in education. I reject the defendant's section 31(2A) argument. I now move on to the heads of relief.

b) Heads of relief

95. As indicated, when exercising the court's discretion on relief, the court must ask whether the legal error was "material". That means it was an error that strongly connected to and affected the decision itself. Lord Browne-Wilkinson said in *R v Hull University Visitor ex p. Page* [1993] AC 682 at 702C:

> "a relevant error of law, i.e. an error in the actual making of the decision which affected the decision itself."

96. **Quashing order.** Here the decision to withdraw accommodation and associated support suffered from the legal fallacy that it was unnecessary to consider breaches of the claimant's Art. 3 rights. That was wrong in law. Fundamentally so. I heard no argument against the granting of a quashing order should the error of law pleaded by the claimant be found. Here I find that the public law error here was so stark and decisive that there cannot be any credible course but to quash the decision. The decision cannot survive the error.

97. **Declaration**. Although declarations are often sought about matters of wide public interest, they are also permissible for matters that are highly personal to the claimant (*R (Y) v London Borough of Hillingdon* [2011] EWHC 1477 (Admin)). Here I judge that the declaration sought is entirely appropriate. It is this:

    a) It is necessary for the Defendant to continue to pay for the claimant's accommodation and provide subsistence support to the claimant under section 23C(4)(b) of the Children Act 1989 to avoid a breach of his rights under Article 3 ECHR and thus support his continuing education.

98. It makes unmistakably clear to the defendant the legal consequences of the court's clarification of the applicable law as it affects the claimant. A declaration is not coercive; it cannot be enforced. But public bodies are expected to comply with the law as declared by the court (Judicial Review Guide 2022 ("JRG") §12.5.2). I have no reason to doubt that this local authority will abide by the court's ruling. Naturally, the underlying factual situation could change. If the claimant's humanitarian claim fails, for example. But that is for another day. It is permissible to grant a declaration in combination with other remedies such as a quashing order (JRG §12.5.3). I grant the declaration sought by the claimant in addition to the quashing order.

§IX. DISPOSAL

99. I now revisit the list of issues previously identified (§V.) and provide the complete answer. For ease of identification, the answers the court has provided are underlined.

Issue 1: Power to prevent breaches of Convention rights[14]

(1) Does the defendant have a duty to provide the claimant with assistance in the form of payment for accommodation near the place where he is or will be in education or training and make a grant to meet expenses connected with his education or training beyond his 21st birthday?[15] **Yes**.

(2) Is the claimant prima facie ineligible for such assistance due to being in the United Kingdom in breach of immigration laws?[16] **Yes**.

[14] Paragraph 3 Schedule 3, Nationality, Asylum and Immigration Act 2002.
[15] Section 23C(4)(b) and (7) and section 24B(2) Children Act 1989.
[16] Paragraphs 1 and 7 Schedule 3, Nationality, Asylum and Immigration Act 2002.

(3) Despite the claimant's prima facie ineligibility, is the defendant nonetheless required to perform the duty referred to at (1), if and to the extent that this is necessary, to avoid a breach of:

a) (a) any of the claimant's ECHR rights, including those protected by Art. 3 and Art. 8 ECHR?[17] **Yes**.

b) (b) Only his right to education protected by Article 2 Protocol 1 ECHR? **No (in the sense of not *only* Article 2 Protocol 1, but wider Convention rights as per s.1 Human Rights Act 1998)**

(4) If the answer to (3)(a) is yes, is it necessary for the defendant to provide the claimant with accommodation to support his education to prevent a breach of his Art. 3 ECHR rights? **Yes**.

Issue 2: Article 2 Protocol 1

(1) Does the claimant have an Article 2 Protocol 1 right to education? **Yes**.

(2) Is removal of accommodation support an interference with the claimant's right to education? **Yes**.

(3) Is the interference in (2) proportionate? **No**.

Relief

(1) Should the defendant's impugned decision be quashed? **Yes**.

(2) Should the court grant declaratory relief? **Yes**.

(3) What should be the terms of the declaration? **It is necessary for the Defendant to continue to pay for the claimant's accommodation and provide subsistence support to the claimant under section 23C(4)(b) of the Children Act 1989 to avoid a breach of his rights under Article 3 ECHR and thus support his continuing education.**

100. I emphasise, as previously mentioned, that on the facts of this case I did not have to determine prevention of Art. 8 breach – the failure to consider the necessity of preventing a breach of Art. 3 was sufficient to quash the impugned decision. I indicated to parties that consequential orders can be dealt with by way of written submission. This conclusion was fortified by the excellence of the skeleton arguments previously submitted. I judge that an oral hearing is not proportionate. Counsel do not dissent.

101. Lord Hoffmann put it with great clarity in the *Alconbury* case (*R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23 at [73]). He said:

[17] Paragraph 3 Schedule 3 and s.113 Nationality, Asylum and Immigration Act 2002; Section 1 Human Rights Act 1998.

> "when ministers or officials make decisions affecting the rights of individuals, they must do so in accordance with the law. The legality of what they do must be subject to review by independent and impartial tribunals."

102. Here officials in the local authority did not act in accordance with the law, but contrary to it. Reviewing the defendant's decision independently and impartially, I quash it. It is legally flawed. I grant a declaration about how the local authority should deal with the rights of this vulnerable young adult. CVN's future – including his immigration status – remains unresolved. Until it is, the law that affects his case must be properly applied. I remind myself of the purpose of the s.23C powers. It was succinctly put by Christopher Clarke LJ in *R (GE (Eritrea)) v Secretary of State for the Home Department* [2014] EWCA Civ 1490 at [17] as follows:

> "The purpose of these provisions is to ensure that a relevant or eligible child is not simply left without support the moment he reaches his 18th birthday but receives the same sort of support and guidance which children can normally expect from their own families as and when they become adults."

103. The London Borough of Croydon stands as CVN's corporate parent in the absence of his own. The court expects this local authority to perform its statutory duty. That is to continue to fund CVN's accommodation and associated living expenses to support his education by preventing him becoming destitute. Destitution would significantly impair his ability to access and engage in education. That must be prevented from happening. This is how the defendant local authority fulfils its duty to act in accordance with the law.

104. That is my judgment.

Appendix A: Anonymity order

1. An anonymity order was granted because the court determined that:

    (1) Non-disclosure of the identity of the claimant is necessary (a) to secure the proper administration of justice and (b) to protect his right to respect for private and family life under Art. 8 of the European Convention on Human Rights ("ECHR"); and

    (2) There is no sufficient countervailing public interest in disclosure (CPR 39.2(4)).

2. Pursuant to the 'Practice Guidance: Publication of Privacy and Anonymity Orders' issued by the Master of the Rolls dated 16 April 2019, a copy of the anonymity order is published on the Judicial Website of the High Court of Justice (www.judiciary.uk).

IN THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT

CLAIM NO: CO/1133/2022

BEFORE DEXTER DIAS KC
SITTING AS A DEPUTY HIGH COURT JUDGE

***B E T W E E N*:**

THE KING
(on the application of CVN)

Claimant

-and-

LONDON BOROUGH OF CROYDON

Defendant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Interested Party

ANONYMITY ORDER

Order made by Dexter Dias KC, sitting as a Deputy High Court Judge on 31 January 2023

UPON hearing counsel for the Claimant and for the Defendant at the substantive hearing of the application for judicial review on 31 January 2023

AND UPON it appearing to the Court that the current anonymity provision may give rise to a risk of the Claimant being identified upon publication of the judgment

IT IS ORDERED THAT:

1. Paragraph 1 of the Order of Mr Justice Bourne dated 31 March 2022 is varied to the extent that, pursuant to CPR 39.2, the Claimant shall be referred to in these proceedings and any report thereof as CVN.

Appendix B: Statutory Flowchart

Particularly relevant provisions are underlined and in bold. There are nine key steps in the statutory framework.

Step 1

Children Act 1989

23C Continuing functions in respect of former relevant children.

(1) Each local authority shall have the duties provided for in this section towards—

(a) a person who has been a relevant child for the purposes of section 23A (and would be one if he were under eighteen), and in relation to whom they were the last responsible authority; and

(b) a person who was being looked after by them when he attained the age of eighteen, and immediately before ceasing to be looked after was an eligible child,

and in this section such a person is referred to as a "former relevant child".

(4) It is the duty of the local authority to give a former relevant child—

(a) assistance of the kind referred to in section 24B(1), to the extent that his welfare requires it;

(b) assistance of the kind referred to in section 24B(2), to the extent that his welfare and his educational or training needs require it;

(c) other assistance, to the extent that his welfare requires it.

Step 2

Children Act 1989

24B Employment, education and training.

(2) The relevant local authority **may give assistance** to a person to whom subsection (3) applies by—

(a) contributing to expenses incurred by the person in question in living near the place where he is, or will be, receiving education or training; or

(b) making a grant to enable him to meet expenses connected with his education or training.

(3) This subsection applies to any person who—

(a) is under **[**twenty-five**]** ; and

(b) qualifies for advice and assistance by virtue of **[**section 24(1A) or**]** section 24(2)(a), or would have done so if he were under twenty-one.

Step 3

Children Act 1989

23C

(6) Subject to subsection (7), the duties set out in subsections (2), (3) and (4) subsist **until the former relevant child reaches the age of twenty-one.**

Step 4

Children Act 1989

23C

(7) If the former relevant child's pathway plan sets out a programme of education or training which **extends beyond his twenty-first birthday—**

(a) the duty set out in subsection (4)(b) continues to subsist **for so long as the former relevant child continues to pursue that programme;** and

(b) the duties set out in subsections (2) and (3) continue to subsist concurrently with that duty.

Step 5

Nationality, Immigration and Asylum Act 2002

SCHEDULE 3
WITHHOLDING AND WITHDRAWAL OF SUPPORT

Ineligibility for support

1(1) A person to whom this paragraph applies **shall not be eligible for support or assistance under—**

…

(a) section 17, **23C … 24A or 24B of the Children Act 1989** (c. 41) (welfare and other powers which can be exercised in relation to adults)

Step 6

Nationality, Immigration and Asylum Act 2002

Fourth class of ineligible person: person unlawfully in United Kingdom

7 Paragraph 1 applies to a person if—

(a) **he is in the United Kingdom in breach of the immigration laws** within the meaning of **[**section 50A of the British Nationality Act 1981**]**, and

(b) he is **not an asylum-seeker.**

Step 7

Nationality, Immigration and Asylum Act 2002

Exceptions

3 Paragraph 1 does not prevent the exercise of a power or the performance of a duty if, and to the extent that, **its exercise or performance is necessary for the purpose of avoiding a breach of—**

(a) a person's Convention rights

Step 8

Nationality Immigration and Asylum Act 2002

113 Interpretation

(1) In this Part, **unless a contrary intention appears**—

…

"the Human Rights Convention" has the same meaning as "the Convention" in the Human Rights Act 1998 and "Convention rights" shall be construed in accordance with section 1 of that Act

Step 9

Human Rights Act 1998

The Convention Rights.

(1) In this Act **"the Convention rights"** means the rights and fundamental freedoms set out in—

(a) **Articles 2 to 12 and 14 of the Convention,**

(b) Articles 1 to 3 of the First Protocol