Neutral Citation Number: [2023] EWHC 826 (Admin)

Case No: CO/1623/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 April 2023

Before :

MR JUSTICE MOSTYN

- -

Between :

TT	**Claimant**
- and -	
Essex County Council	**Defendant**

- -
- -

Tessa Buchanan (instructed by **Coram Children's Legal Centre**) for the **claimant**
Nicholas O'Brien (instructed by **in-house legal team**) for the **defendant**

Hearing date: 21 March 2023

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Approved Judgment

This judgment has been anonymised and its terms may be reported without further restriction. However, a reporting restriction order is in force. This prohibits in any report identification of the claimant directly or indirectly. All persons, including representatives of the media must comply with this order. Breach of it will amount to contempt of court.

Mr Justice Mostyn:

1. This is my judgment on the application made on 6 May 2022 by the claimant for judicial review of the following conduct by the defendant on and after 22 June 2021:

> (1) its refusal to accept that the claimant is an "eligible child" pursuant to Para 19B(2) of Schedule 2 to the Children Act 1989 ("the Act");
>
> (2) its unlawful failure to comply with the duties owed to the claimant as an eligible child;
>
> (3) in the alternative, its refusal to accept that the claimant is a "relevant child" under s23A(2) of the Act and its unlawful failure to comply with the duties owed to her as such; and
>
> (4) its unlawful policy pursuant to which accommodation provided under the Essex Young People's Partnership ("EYPP") is held (*sic, semble* asserted) not to be provided under s.20 of the Children Act 1989.

2. The remedy or relief sought by the claimant is pleaded in the claim form thus:

> (i) Findings and/or a declaration that the claimant is an eligible child. In the alternative, findings and/or a declaration that the claimant is a relevant child.
>
> (ii) An order requiring the defendant to comply with the duties owed to the claimant as an eligible (or alternatively a relevant) child.
>
> (iii) An order quashing the Child and Family Assessments of 1 September 2021 and 11 March 2022.
>
> (iv) Findings and/or a declaration that the EYPP can be used to accommodate children under s.20 of the Children Act 1989 and that the EYPP has been operating unlawfully.

3. The claimant was born in March 2005, and therefore turned 18 only three weeks ago. She had a very troubled childhood and was known to the defendant's social services department. In 2019 she was made the subject of a child in need plan. From that point until June 2021 she ran away, or was excluded, from her family home repeatedly. On 19 June 2021 the claimant's mother referred the claimant to the defendant's social services. The claimant was in fact at that point staying with a friend, who could not put her up any longer. On 22 June 2021, following a meeting with a social worker of the defendant, the claimant was accommodated in what has been described as a EYPP "crash pad" in Bernard Brett House ("BBH") in Colchester. On 19 November 2021 the claimant moved to the YMCA, also in Colchester, where she remains.

4. I shall first explain why I agreed to hear this claim notwithstanding its academic status.

The academic status of this claim

5. The claimant's objective when she launched these proceedings was to establish that she had the status of an "eligible child" with the enhanced entitlement to care and support from the defendant that the law affords to a child of that status, or if not, then at the very least a "relevant child". However, in March 2023 the claimant turned 18 with the result that irrespective of whether she was an eligible or a relevant child, her status became that of a "former relevant child" pursuant to s23C of the Act, which itself carries with it certain support obligations on the part of the defendant until the claimant is 25.

6. The defendant does not agree that the claimant has that formal status of a "former relevant child" because it disputes that she was ever either a relevant or eligible child because it maintains that she was never "looked after" by it. It has, nonetheless, formally agreed with the claimant, and has solemnly stated on the record to the court, that it will treat her exactly as if she had that status.

7. In consequence at the start of the hearing Mr O'Brien for the defendant submitted to me that the claim should not be heard as it was now academic in the sense described by Elizabeth Laing LJ in *L, M and P v Devon County Council* [2021] EWCA Civ 358 at [50]:

> "Judicial review is a flexible and practical procedure. All remedies in judicial review are discretionary, including declarations (a substantial topic on which we received no distinct submissions). The Administrative Court has at its disposal a range of doctrines, with discretionary elements, to control access to its scarce resources. They include the doctrine that judicial review will not generally be available where there is a suitable alternative remedy, and its approach to timeliness. The discipline of not entertaining academic claims is part of this armoury. It enables the court to avoid hearings in cases in which, although the issue may be arguable, the court's intervention is not required, because the claimant has obtained, by one means or another, all the practical relief which the Court could give him."

8. In response, Ms Buchanan for the claimant contested this. She argued that the claimant has not received all the practical relief which she seeks. The relief she seeks includes a declaration spelling out the past unlawful treatment she says was meted out to her by the defendant before she turned 18.

9. To be awarded a declaration the claimant has to show that there is "a real and present dispute between the parties before the court as to the existence or extent of a legal right between them": see *The Bank Of New York Mellon, London Branch v Essar Steel India Ltd* [2018] EWHC 3177 (Ch) at [21(1)] per Marcus Smith J. This suggests that an event which is firmly in the past would not amount to a special reason. Similarly, in *L, M and P v Devon County Council* at [65] Peter Jackson LJ noted that the outcome in that case was "of potential future significance for the claimants, as opposed to being a dispute that is now, so far as they are concerned, in the past" and that this militated in favour of hearing that case. Inferentially, Peter Jackson LJ was saying that there would not be a good reason to hear the case if the dispute between the parties was closed and now only of historical interest.

10. In my judgment, a declaration can be made in respect of a past wrong which has been made good, but there would have to be exceptionally good reasons for the court to exercise its discretion to do so.

11. A wish to have a declaration is obviously not of itself a special reason.

12. In this case where the status of the claimant as a former relevant child has been, practically speaking, guaranteed, my preliminary ruling was that there is no real and present dispute between the parties giving rise to a special reason, which is personal to the claimant, for a declaration to be made. The claimant has thus received all the practical relief reasonably attainable by her. Her claim is therefore academic in the sense used by Elizabeth Laing LJ.

13. Therefore, if the claim was to be heard, the claimant had to satisfy the test laid down in the speech of Lord Slynn of Hadley in *R v Home Secretary ex p Salem* [1999] AC 450 at p 457:

> "My Lords, I accept, as both counsel agree, that in a cause where there is an issue involving a public authority as to a question of public law, your Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a lis to be decided which will directly affect the rights and obligations of the parties inter se. The decisions in the *Sun Life* case and *Ainsbury v. Millington* (and the reference to the latter in Rule 42 of the Practice Directions Applicable to Civil Appeals (January 1996) of your Lordships' House) must be read accordingly as limited to disputes concerning private law rights between the parties to the case.
>
> The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future."

14. I was satisfied that the claim gave rise to a hitherto unaddressed point of statutory construction which required the consideration of some Supreme Court case-law. Further, the main point of controversy is not now fixed in the past as there are at least 75 children aged 16 or 17 in Essex being accommodated under a regime which the claimant contends is unlawful and which is driven only by the aim of saving ratepayers' money, which, it is argued, is not a legitimate objective.

15. Having heard counsel, I ruled that it was in the public interest to hear this claim notwithstanding that it was now academic. I therefore heard it and am grateful for the excellent oral advocacy of both counsel.

16. Following the conclusion of her submissions Ms Buchanan has produced a revised set of declarations, which in fact go a lot further than the relief for which the claimant contended in her application. The revision seeks declarations as follows:

> "1. For the purposes of s. 22(1)(b) of the Children Act 1989, accommodation provided to 16- and 17-year-old young people through the EYPP is provided by the defendant.
>
> 2. Where, in respect of any young person, the criteria under s. 20(1) or (3) of the Children Act 1989 are met and accommodation is available through the EYPP, the defendant cannot refuse to provide that accommodation to the young person under s. 20 of the Children Act 1989 or offer to provide such accommodation only on the basis that it is not provided under s. 20 of the Children Act 1989.
>
> 3. The defendant has acted unlawfully by informing young people that they can be accommodated through the EYPP but that such accommodation is not and/or cannot be provided to them under s. 20 of the Children Act 1989, thus requiring young people to choose between accommodation provided under the EYPP and accommodation provided under s. 20 of the Children Act 1989.
>
> 4. The defendant has acted unlawfully by:
>
> a. Failing to provide young people with information relevant to becoming accommodated under s. 20 of the Children Act 1989;
>
> b. Failing to make information relevant to becoming accommodated under s. 20 of the Children Act 1989 available for young people to take away and consider;
>
> c. Failing to provide young people with an independent advocate;
>
> d. Advising young people that the only accommodation available under s. 20 of the Children Act 1989 is foster care; and
>
> e. Failing to provide young people with the opportunity to consider and reflect on whether to accept accommodation under s. 20 of the Children Act 1989."

17. I will not be making formal declarations for the reasons set out above. In my judgment, where an academic claim is determined, it is not appropriate for the court to do anything more than to record its findings and decisions in its judgment. Plainly no positive prohibitory or mandatory orders or formal declarations should be made. Such orders or declarations would be wholly inconsistent with the claim being academic. Obviously, I

will take into account Ms Buchanan's proposed form of declaration as a summary of the case that the claimant now advances to me.

The legal issue

18. For the purposes of this case the relevant statutory provisions are set out immediately below. (The emphases have been added by me).

> **"Sec 17 Children Act 1989:**
> (10) 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.
>
> (11) For the purposes of this Part, a child is disabled if he is blind, deaf or dumb or suffers from mental disorder of any kind or is substantially and permanently handicapped by illness, injury or congenital deformity or such other disability as may be prescribed; and in this Part:
>
> "development" means physical, intellectual, emotional, social or behavioural development; and
>
> "health" means physical or mental health.
>
> **Sec 20(1) Children Act 1989:**
> "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
> …
> (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."
>
> **Sec 22 Children Act 1989:**
> (1) In this section, any reference to a child who is **looked after** by a local authority is a reference to a child who is:
> …

(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 apart from functions under sections 23B and 24B.

(2) In subsection (1) "accommodation" means accommodation which is provided for a **continuous period of more than 24 hours**.

Para 19B(2) of Schedule 2 to the Children Act 1989:
"**eligible child**" means … a child who:
(a) is aged sixteen or seventeen; and
(b) has been **looked after** by a local authority for a prescribed period, or periods amounting in all to a prescribed period, which began after he reached a prescribed age and ended after he reached the age of sixteen.

The Children (Leaving Care) (England) Regulations 2001 (SI 2001/2874), reg 3(1):
For the purposes of paragraph 19B(2)(b) of Schedule 2 to the Act, the prescribed period is 13 weeks and the prescribed age is 14.

Sec 23A(2) of the Children Act 1989:
"**relevant child**" means … a child who:
(a) is not being looked after by any local authority in England …;
(b) was, before last ceasing to be looked after, an eligible child for the purposes of paragraph 19B of Schedule 2; and
(c) is aged sixteen or seventeen.

Homelessness (Priority Need for Accommodation) (England) Order 2002 (SI 2002/2051), art 3

This gives a priority need for accommodation under the Housing Act 1996 to 16 and 17 year-olds other than those for whom local social services authorities have responsibility, namely, relevant children for the purposes of the Children Act 1989 or children in need to whom a duty is owed under section 20 of that Act."

19. So, an eligible child is a child:

i) who is 16 or 17; and

ii) whose carer cannot provide the child with accommodation; and

iii) whose development would be impaired without the provision of accommodation by the local authority; and

iv) who therefore must be provided with accommodation by the local authority under s.20; and

v) has been thus accommodated for a period or periods of at least 13 weeks in total, commencing no later than age 14.

20. A relevant child is a child who is 16 or 17 and who was, but is no longer, an eligible child.

21. These provisions clearly do not oblige a relevant child (i.e. a homeless 16+ child in need) to be accommodated under s.20. Such a child can agree otherwise with the local authority. This is not as counterintuitive as it sounds. Section 20 accommodation might be far more restrictive than non-s.20 accommodation. But housing authorities are not allowed to prioritise accommodation under the Housing Act for a relevant child. This suggests that normally housing for such a child should be provided under s.20.

22. These conclusions are to some extent contradictory. How can a relevant child choose to be accommodated otherwise than under s. 20 if the local authority cannot normally offer it to her? Similarly, how can a local authority present a relevant child with a fair choice between s.20 and non-s.20 accommodation if it should normally house such a child under s.20? The authorities and government guidance show, however, that notwithstanding this contradiction it is possible for relevant children to be given this choice.

23. In *R (M) v Hammersmith and Fulham LBC* [2008] 1 WLR 535 Baroness Hale stated at [4]:

> "… 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."

And at [24]:

> "Thus there is all the difference in the world between the services which an eligible, relevant or former relevant child can expect from her local children's services authority, to make up for the lack of proper parental support and guidance within the family, and the sort of help which a young homeless person, even if in priority need, can expect from her local housing authority. This is not surprising as the skills and resources available to each department are so different. But it means that a huge amount depends upon whether or not she was a "looked after" child for the required total of 13 weeks, beginning some time after she reached 14 and ending some time after she reached 16. So it would also not be surprising if some local authorities took steps to avoid this."

And at [31]:

> "Thus the statutory guidance given to both housing and social services departments stresses the need for joint protocols for assessing the needs of homeless 16 and 17 year olds. This is needed, not only to avoid a young person being passed from pillar to post, but also to ensure that the most appropriate agency takes responsibility for her. The 2002 Priority Need Order clearly contemplates that, if the criteria in section 20 of the 1989 Act are met, social services rather than housing should take the long-term responsibility. Such a young person has needs over and above the simple need for a roof over her head and these can better be met by the social services. Unless the problem is relatively short-term, she will then become an eligible child, and social services accommodation will also bring with it the additional responsibilities to help and support her in the transition to independent adult living. It was not intended that social services should be able to avoid those responsibilities by looking to the housing authority to accommodate the child."

24. In *R (G) v Southwark LBC* [2009] 1 WLR 1299 Baroness Hale stated at [9]:

> "This same "labelling" problem arose in other cases where the children's authority had arranged accommodation for a child but was reluctant to accept that it had done so under section 20: see *R (L) v Nottinghamshire County Council* [2007] ACD 372; *R (D) v Southwark London Borough Council* [2007] 1 FLR 2181; *R (S) v Sutton London Borough Council* (2007) 10 CCLR 615. The message of those cases is that if the section 20 duty has arisen and the children's authority have provided accommodation for the child, they cannot "sidestep" the issue by claiming to have acted under some other power."

And at [28(vi))]:

> "On the other hand, as explained in the *Hammersmith and Fulham* case [2008] 1 WLR 535, it is unlikely that Parliament intended that local authorities should be able to oblige a competent 16- or 17- year old to accept a service which he does not want. This is supported by section 20(11), which provides that a child who has reached 16 may agree to be accommodated even if his parent objects or wishes to remove him. It is a service, not a coercive intervention. Whether one reaches the same result via a broader construction of section 20(6) or via the more direct route, that **there is nothing in section 20 which allows the local authority to force their services upon older and competent children who do not want them,** may not matter very much. It is not an issue in this case, because A wanted to be accommodated under section 20. **But a homeless 16- or 17-year-old who did not want to be accommodated under section 20 would be another example of a child in priority need under the 2002 Order."** (emphasis added)

And at [42]:

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

25. The Government Guidance on the **Prevention of homelessness and provision of accommodation for 16 and 17 year-old young people who may be homeless and/or require accommodation**[1], also recognises that a relevant child can agree not to be accommodated in s. 20 accommodation. It states:

> 3.41 **Where a young person says they do not wish to be accommodated, a local authority should reach the conclusion that the young person's wishes are decisive only as part of an overall judgment of their assessed welfare needs and the type and location of accommodation that will meet those needs**.
>
> 3.42 **It will be essential that the young person is fully consulted about and understands the implications of being accommodated by children's services and becoming looked after.** The social worker leading the assessment must provide realistic and full information about the package of support that the young person can expect as a looked after child and, subsequently, as a 'former relevant' care leaver (as defined in section 23C (1) of 1989 Act). If they are not looked after for the prescribed period, the young person leaving care would be a 'person qualifying for advice and assistance' as set out in section 24 of the 1989 Act.
>
> 3.43 **Children's services should also ensure that the young person receives accurate information about what assistance may be available to them if they do not become looked after**, including from housing services under Part 7 of the 1996 Act. This will include any entitlement for assistance under Part 7. In particular the considerations a young person needs to be made aware of are:
>
> a. duties on housing services to undertake an assessment, develop a personalised housing plan and to take steps to help the

[1] Published on 1 April 2010. Last updated on 30 April 2018.

> applicant retain or secure accommodation (sections 195 and section 189B of the 1996 Act),
>
> b. the requirement on the applicant to cooperate and for applicants to take steps themselves as set out in a personalised plan (section 193B and section 193C of the 1996 Act),
>
> c. the 'accommodation offer' under the relief duty – suitable accommodation which has a reasonable prospect of being available for occupation for at least 6 months (section 189B and section 195 of the 1996 Act),
>
> d. the implications of turning down offers of accommodation that are suitable (section 193A of the Housing Act 1996),
>
> e. the possible risk of being found or becoming homeless intentionally in the future (section 191 of the 1996 Act),
>
> f. their right to request a review of decisions (section 202 of the 1996 Act).
>
> 3.44 **This information should be provided in a 'young person friendly' format at the start of the assessment process and be available for the young person to take away for full consideration and to help them seek advice.**
>
> 3.45 Where there is any doubt about a 16 or 17 year old's capacity to judge what may be in their best interests, e.g. whether they should be accommodated under section 20 of the 1989 Act or seek alternative assistance, there will need to be further discussion involving children's services, housing services, the young person concerned and their family where safe and appropriate, to reach agreement on the way forward. (emphasis added)

Making the choice

26. Ms Buchanan does not, and indeed could not, dispute that a 16+ homeless child can agree with a local authority to be accommodated otherwise than under s. 20. She also agrees that a 16+ child in need can enter s. 20 accommodation but later opt out of it

27. When seeking to reach such an agreement with a 16+ child in need I can see there might be a temptation for the local authority to put up an illusion of a choice but which in fact is no choice at all – the classic Hobson's choice. The merits of the alternatives might be presented in such a partisan way as to ensure that the child repudiates the s.20 choice. Of course, as Baroness Hale points out, there is a strong financial motive on financially straitened local authorities to save money wherever possible, and to avoid the responsibility of providing support to a 16-year-old until she is 25 would obviously save great sums.

28. Therefore, for the purposes of reaching such an agreement the local authority must present the alternatives neutrally and impartially. It must not apply spin or other undue pressure to solicit the non-section 20 choice by the child. Ideally, as the Guidance says at para 3.44, the way in which the alternatives are presented should be recorded in a clear memorandum written in plain child-friendly English which the child is given the chance to take away to read and consider before making a final decision. If child's final decision is in favour of non-section-20 accommodation, the child should sign and date the memorandum.

29. In the absence of such a signed memorandum, the Court will have to consider in future challenges of this type - as I will do in this case - whether, on the facts of a particular case, a local authority has the power to offer the particular accommodation under consideration to the particular relevant child other than under s. 20, and, if it can, whether on the specific facts the child agreed to accept it. Plainly, the spectre looms of much further unwelcome litigation of the type that is before me.

A potential problem

30. A potential problem is that, sometimes (one would think quite often, if not usually) there is insufficient time for the 16/17-year-old to be apprised in sufficient detail and depth of the necessary information for her to make the fair and free choice whether she wants to go to section 20 or non-section 20 accommodation. Therefore she has to be placed on an emergency basis in local authority accommodation before she has reached a decision.

31. According to Ms Buchanan, if that happens, then as a matter of law, the child is instantly placed in s. 20 accommodation. If she is right, then the pass is sold and the opportunity for the child to make the fair choice is lost. The opportunity later to opt-out of s 20 status seems to me to be entirely hypothetical. It is a world away from the child making a free and fair choice when dispassionately presented with the two options.

32. In my opinion this potential problem can be sensibly resolved by a fair, purposive reading down of the legislation in such a way that allows an emergency short-term placing of a 16- or 17-year-old in local authority accommodation without necessarily forfeiting the opportunity for that child and the local authority to agree that she will be accommodated otherwise than under section 20. The legal effect of such a placing during this period of reflection should be seen as entirely neutral, so that the ability of the child to make a free and fair choice is maintained and not compromised. I cannot accept that the perceived will of Parliament is so obtuse as not to allow a short period in which the child can be temporarily put up in local authority accommodation but at the same time have her right to make a free and fair choice against section 20 accommodation preserved.

33. Ms Buchanan suggests that to identify an implied proviso to this end in the legislation is contrary to authority and government guidance. With respect, it does nothing of the sort. She darkly submits that there is no "rational" basis for this reading of the legislation and that it is "capable of operating to the significant detriment of homeless children." I do not understand how it can be said (other than rhetorically) that by giving these 16+ children the meaningful right to make the fair choice provided for in the legislation (and acknowledged by the Supreme Court and the Government Guidance) could be capable of so operating.

34. If Ms Buchanan is right, and to identify such an implied term is beyond the reach of legitimate statutory construction, then I respectfully suggest that the Government should consider amending the legislation to include expressly a proviso to that end.

This case

35. The core issues in this case are expressed by Ms Buchanan in paras 2 and 3 of her revised declaration:

> "Where, in respect of any young person, the criteria under s. 20(1) or (3) of the Children Act 1989 are met and accommodation is available through the EYPP, the defendant cannot refuse to provide that accommodation to the young person under s. 20 of the Children Act 1989 or offer to provide such accommodation only on the basis that it is not provided under s. 20 of the Children Act 1989."

And:

> "The defendant has acted unlawfully by informing young people that they can be accommodated through the EYPP but that such accommodation is not and/or cannot be provided to them under s. 20 of the Children Act 1989, thus requiring young people to choose between accommodation provided under the EYPP and accommodation provided under s. 20 of the Children Act 1989."

36. Put shortly, Ms Buchanan's argument is that (i) the defendant cannot stipulate that EYPP accommodation is only available to children aged 16+ on a non-section-20 basis and (ii) it cannot invite children in need aged 16+ to choose between staying in such non-section-20 accommodation and being looked after in section 20 accommodation.

37. I do not agree with these propositions. On the facts of this case I do not agree that the placing of the claimant in BBH was in local authority accommodation under s.20. Further, on the facts, I accept that the claimant is to be taken as having agreed to be accommodated in BBH on a non-section 20 basis.

38. My reasons are as follows. I shall first explain the formal basis whereby accommodation is made available to vulnerable young people through the EYPP.

39. The defendant and Nacro have entered into a contract under which Nacro as provider ("the provider"), assisted by Peabody as a subcontractor, makes available accommodation and ancillary support services for vulnerable young people aged 16+. It is well known that Nacro has, over more than 50 years, developed specialist housing knowledge and expertise in delivering housing solutions for vulnerable groups.

40. The terms of the contract state that housing related support services for young people aged 16+ are to be supplied by Nacro in connection with the defendant's requirements for the provision of "the Goods and/or Services". The "Services" include provision of accommodation for "16 and 17 years olds at risk of homelessness". The consideration for the provision by Nacro of these Services (among other things) is a payment to it by the defendant of £2.5 million per annum.

41. The young people residing in such accommodation enter into separate agreements with the provider under which they pay rent to the provider from their income, which is almost invariably state benefits.

42. The accommodation is made available to these vulnerable young people via the EYPP. The EYPP, an unincorporated local government organisation, was established by the defendant and local housing authorities in 2017. It operates in four quadrants: North, East, South and West Essex. Each quadrant has its own Gateway, and each Gateway has its own manager. The managers are social workers employed by the defendant. The relevant quadrant in this case is North Essex.

43. To access such accommodation a young person must be referred to the relevant EYPP Gateway. The referral will be made by the defendant's social services or by a housing authority in Essex. On receipt of a referral, the Gateway manager will triage it and either reject it, request more information, or accept it. If the Gateway manager accepts the referral, it is passed on to the provider. The provider will either reject the referral, request more information about it, or accept it. If the provider rejects the referral, the young person may appeal the rejection.

44. The foundational documentation of the EYPP states unambiguously that:

> "The service will not accept young people with Section 20 [of the Children Act 1989] status as it is not a service for Looked After Children."

45. BBH is EYPP accommodation. As explained above, it is available to those who are referred there by social services or housing authorities in Essex. It is not intended to, and does not, provide "accommodation", for "looked after" children. It goes without saying that BBH is not a registered children's home.

46. At the meeting on 22 June 2021 the defendant's social worker explained very clearly to the claimant exactly what accommodation under s. 20 would entail. It was emphasised that she would have an allocated social worker and an Independent Reviewing Officer. She was told that section 20 accommodation may be in foster care or semi-independent accommodation. The social worker did not hold back in emphasising how prescriptive and regulated the claimant's life would be if she were accommodated under section 20. By contrast, if she went to BBH she would be given money and basically left her own devices without interference, provided that she obeyed the house rules. The claimant was told explicitly that "Essex Young People's Partnership accommodation is not section 20 accommodation." Although this presentation by the social worker was not as neutral and impartial as it should have been, it did not, in my judgment, cross the line into improper or undue pressure.

47. As stated above, on 22 June 2021 the claimant went, entirely voluntarily, to a "crash pad" at BBH offered by the defendant.

48. Ms Buchanan's submission is that:

    i) the claimant was a child in need;

    ii) her mother could not accommodate her;

iii) her development would be impaired if she were not accommodated by the defendant;

iv) In consequence, a duty was imposed on the defendant to accommodate the claimant under sec 20; therefore

v) as a matter of law her placement in BBH had to be pursuant to section 20 (and no amount of alternative labelling can say otherwise); and

vi) once the claimant had thus been accommodated under s. 20 that status would remain until she decided to exercise the right to opt out (which I consider to be an entirely hypothetical right (see above)).

49. Ms Buchanan referred me to (*R (B) v Nottingham City Council* [2011] EWHC 2933 (Admin) at [64] where Singh J stated:

> "It seems to me that there was, on the facts of the Lambeth case, both some action by the social services authority and a causal nexus between that action and the provision of accommodation by the housing authority."

She also referred to the *Hammersmith* case where Baroness Hale stated at [44]:

> "It is one thing to hold that the actions of a local children's services authority should be categorised according to what they should have done rather than what they may have thought, whether at the time or in retrospect, that they were doing. It is another thing entirely to hold that the actions of a local housing authority should be categorised according to what the children's services authority should have done had the case been drawn to their attention at the time. In all of the above cases, the children's services authority did something as a result of which the child was provided with accommodation. The question was what they had done."

50. In my judgment these dicta do no more than to tell me that I have to make the necessary factual findings, including as to the claimant's state of mind, concerning the footing on which the claimant was provided with accommodation on 22 June 2021. None of the arguments advanced by Ms Buchanan tell me much about the claimant's state of mind when she agreed to go to BBH.

51. The first question I have to answer is whether the defendant was entitled to stipulate that the accommodation provided at BBH via EYPP was for all its residents otherwise than under s. 20.

52. Ms Buchanan emphasises that the services provided at BBH only exist because of the contract to which I have referred above between the defendant and Nacro, and that all referrals of 16- and 17-year-olds to BBH must go through the Gateway before they will be sent to BBH via the provider. That is perfectly true. But I remind myself that BBH is not a registered children's home.

53. In my judgment, the defendant was entitled to make that stipulation provided that the claimant was given a meaningful alternative choice of s.20 accommodation elsewhere. She was given that choice.

54. The argument of Ms Buchanan, when taken to its logical conclusion, is that notwithstanding that the legislation, the Supreme Court, and government guidance all say that local authorities have the power to offer accommodation to a 16+ child in need other than under s.20, they cannot lawfully ever exercise that power.

55. I completely disagree.

56. Ultimately, my conclusion on this point is very simple. The law permits the defendant to offer a 16+ child in need the fair choice between accommodation under s. 20 or otherwise than under s. 20. And that is what it did.

57. The next question I have to answer is whether the claimant is to be taken as making the choice in favour of non-section 20 accommodation at BBH. The claimant says that she never made the free choice against section 20 accommodation. Her case is that (i) she never agreed to be accommodated on a non-section 20 footing; (ii) therefore, after 13 weeks at BBH (i.e. from 21 September 2021) she became an eligible child; and (iii) she took that status with her when she went to the YMCA on 19 November 2021.

58. Mr O'Brien points out that following the meeting on 22 June 2021 between the claimant and the defendant's social worker, it remained for the provider to decide whether it would accept the referral, or not. This shows, he argues, that the placing at BBH was not in the defendant's gift. He submits that the claimant went to BBH on an entirely voluntary basis knowing that the defendant had explicitly stipulated that it was not section 20 accommodation. If the defendant was lawfully entitled to stipulate that EYPP accommodation was only available on a non-section -20 basis, as I have found, and the claimant voluntarily took such accommodation fully aware of that stipulation, it is hard for her to argue that she should not be taken as having agreed to accommodation on that footing.

59. Further, Mr O'Brien points out that the claimant applied for universal credit to fund the arrangements at BBH. Looked after children are not permitted to claim universal credit.

60. In my judgment this last point is of some weight because it gives rise to the principle of law made famous by Lord Denning MR in *Tinker v Tinker* [1970] P 136, CA that you cannot say to two government organs, one of which is the court, completely contradictory things about the same subject matter. At 141 he stated:

> "I am quite clear that the husband cannot have it both ways. So he is on the horns of a dilemma. He cannot say that the house is his own and, at one and the same time, say that it is his wife's. As against his wife, he wants to say that it belongs to *him.* As against his creditors, that it belongs to her. That simply will not do."

61. In her submissions Ms Buchanan argued:

> "The fact that the defendant requires young people accommodated via the EYPP to claim benefits to pay for the accommodation does not mean it is not provided under s20 CA 1989: that is a consequence of the defendant's unlawful labelling of the accommodation as not being under s. 20 CA 1989, it does not itself determine under which mechanism the accommodation is provided. "

This submission does not, in my judgment, recognise sufficiently (a) that the claimant was lawfully entitled to agree to be accommodated at BBH on a non-section 20 footing; or (b) that the provider as the owner or leaseholder of BBH was entitled to stipulate that its young residents occupied its premises on that footing and paid their rent from benefits which they were lawfully entitled to claim. From the point of view of the provider the payment of rent by a resident from her benefits is not a "a consequence of the defendant's unlawful labelling of the accommodation as not being under s. 20 CA 1989." This implies that the provider is complicit in serious illegality. As far as the provider is concerned all of its residents have agreed to be accommodated on a non-section 20 footing and are lawfully claiming benefits from which they pay their rent. And it was on that basis, and only that basis, that the provider agreed to accept the claimant.

62. Having seen this judgment in draft Ms Buchanan has argued that there is no evidence that the provider agreed to accept the claimant only on the basis that she was not accommodated under s. 20 and was to pay her rent from benefits. She further argues that the stipulation that EYPP accommodation was not available under s.20 was imposed by the defendant, not by the provider. This argument is, with respect, devoid of any realism. It is obvious that the provider knew and condoned the foundational principle of the EYPP referred to above at para 44. Further, at all material times the provider obviously knew that all its residents at BBH were paying their rent from universal credit. It strains credulity to breaking point to imagine that any of them had private means with which to pay rent. The provider obviously knew that looked-after children cannot claim universal credit. Therefore it knew that these children agreed that they were not being looked-after.

63. What cannot be gainsaid is that when the claimant applied for universal credit she positively by her conduct asserted that she was not a looked after child, yet to this court in these proceedings she asserts that she was all along a looked after child. That simply will not do.

64. Weighing the factors set out above leads me to find clearly that the claimant is to be taken to have agreed to being accommodated at BBH on a non-section 20 footing.

65. I further agree with Mr O'Brien that the arrangements at BBH are not "provided by the local authority".

66. I turn to the YMCA. It is not local authority accommodation. It is a private provider which offers licence/tenancy agreements to members of the public who must pay rent for the services offered. It provides support and guidance to the young people or adults who live there. There is no need for a referral from local authorities whether in the form of housing or social services. It is not registered as a children's home. The evidence does not suggest that the defendant sourced that accommodation for the claimant.

Rather, the evidence suggests that the claimant found that accommodation under her own steam, although she was supported and accompanied by the defendant's social worker in actually arranging it. The social worker liaised on the claimant's behalf with the Head of Housing at YMCA to confirm that the claimant could move there, but that does not in my opinion amount to the defendant "providing the accommodation". Again, the rent for the accommodation was funded by the claimant through Universal Credit, which she was not entitled to claim if she was a "looked after child". I cannot see how the accommodation at the YMCA could possibly have been under section 20.

67. I therefore do not consider it likely (i.e. more likely than not) that at any point from 22 June 2021 to her eighteenth birthday the claimant was either an eligible child or a relevant child, and I therefore find, on the balance of probability, that at no point after 22 June 2021 did she have either status.

68. While this conclusion will, no doubt, be disappointing to the claimant I reiterate that it makes no practical difference to her whatsoever given the agreement made by the defendant referred to at para 6 above.

69. The claimant has appointed herself the champion of a large number of 16- and 17-year-olds living in non-section 20 accommodation in Essex. The claimant asks me to find that the defendant has been practising an unlawful policy of coercing these children into making agreements against section 20 accommodation. I do not find there was any such "policy" although based on my study of the other cases (the paperwork of which has been made available to this court), and of the evidence given by the claimant's witnesses, I do conclude that sometimes the choices have not been presented as neutrally and impartially as they should have been.

70. That is as far as I am prepared to go in this judgment. I am not prepared on the written evidence identified by Ms Buchanan, which has not been tested by cross-examination, to make the very serious findings of unlawful conduct as sought in her proposed declarations at paras 3 and 4. There are myriad issues of fact surrounding the alleged unlawful conduct of the defendant which it is neither practical nor just for me to determine. Nor is it necessary for me to do so in my judgment on this academic claim. In such a judgment it will rarely, if ever, be necessary to do more than to identify past problems and to spell out the remedial standards for the future, which is what I have done.

71. My formal decision on the claim for judicial review as pleaded in para 1 above is:

> (1) I am satisfied that the defendant correctly declined to recognise that the claimant was an "eligible child" pursuant to Para 19B(2) of Schedule 2 to the Children Act 1989 ("the Act");
>
> (2) The defendant did not therefore unlawfully fail to comply with the duties owed to the claimant as an eligible child;
>
> (3) I am satisfied that the defendant correctly declined to recognise that the claimant was a "relevant child" under s23A(2) of the Act and therefore did not unlawfully fail to comply with the duties owed to her as such; and

> (4) I am not satisfied, and thus do not find, that the defendant at the material time operated an unlawful policy pursuant to which accommodation provided under the Essex Young People's Partnership ("EYPP") was asserted not to be provided under s.20 of the Children Act 1989.

72. The claim for judicial review is therefore dismissed. The order will record the formal agreement of the defendant referred to above at para 6.

The continued anonymisation of the claimant

73. On 6 July 2022 Ellenbogen J ordered that the claimant should be anonymised in these proceedings but specifically provided that (i) there would be liberty to all parties and to the media to apply for a variation or discharge of the order and (ii) the order was to be subject to review at the substantive hearing. Her reasons were as follows:

> "The claimant is 17 years old and the claim is concerned with sensitive personal information about her private and family life. In those circumstances, I consider it appropriate to grant anonymity at this stage; the potentially competing rights to freedom of expression and a fair trial (the principle of open justice) are protected by the liberty to apply provision at paragraph 4(c), which extends to the defendant and would include representatives of the Press and other media, as interested parties. The anonymity orders are subject to review by the judge at the hearing of her claim."

74. *Scott v Scott* [1913] AC 417 confirmed an exemption from the glare of open justice for "wards and lunatics" who were the subject of the proceedings. This exemption was confirmed by s.12(1)(a) of the Administration of Justice Act 1960 for proceedings under the inherent jurisdiction of the High Court with respect to minors, or which were brought under the Children Act 1989 or the Adoption and Children Act 2002, or which otherwise related wholly or mainly to the maintenance or upbringing of a minor. In such proceedings the minor is almost invariably anonymised. Anonymisation has been progressively extended to cover minors involved in almost every type of litigation. In this very court anonymity is now routinely sought for minors involved in proceedings about housing, education, specialist care and asylum. Indeed, CPR 39.3(f) gives as an example of a of class of case where a private hearing may be ordered as one where "(d) [it] is necessary to protect the interests of any child or protected party". However, a few weeks ago the claimant turned 18 and lost the special privileges given in litigation to minors. For the purposes of the applicable principles she is now as much an adult as anyone over that age.

75. The latest word on the subject of anonymisation is the illuminating judgment of Warby LJ in *R (MNL) v Westminster Magistrates' Court* [2023] EWHC 587 (Admin) at [43] where he stated:

> (1) **The starting point is the common law principle of open justice**, authoritatively expounded in *Scott v Scott* and subsequent authorities at the highest level. The judge was right to begin here. The summary of the common law principles which

he adopted from the argument of Mr Bentham is not materially different from the summary in the Judicial College Guide, approved in *Rai* (CA).

(2) **The general principles that (a) justice is administered in public and (b) everything said in court is reportable both encompass the mention of names**. As a rule, "[t]he public has a right to know, not only what is going on in our courts, but also who the principal actors are": *R (C) v Secretary of State for Justice* [2016] UKSC 2, [2016] 1 WLR 444 [36] (Baroness Hale). In this case, it is clear that but for the claimant's late request for a derogation from these principles the NCA would have named him in open court. Its decision to do otherwise was a purely executive act which has no bearing on the propriety of the judge's decisions to grant and then lift anonymity. Those were decisions about what the law required. It would have been irrelevant if the NCA had consented to an anonymity order, as parties cannot waive or give up the rights of the public: see the Practice Guidance at paragraph 16.

(3) **When considering the application for derogation in this case the judge was right to identify and apply a test of necessity**. Under the common law as it existed prior to the entry into force of the Human Rights Act 1998, anonymity could only be justified where this was strictly necessary "in the interests of justice": see *Khuja* [14]. This was and remains an exception of narrow scope: see the tests cited in *Clifford v Millicom* at [31]-[32]. It has never been suggested that this case meets that standard. The claimant's case rests on the common law privacy right derived from Article 8, to which the Supreme Court referred in *Khuja.* But in that context too **the applicant for anonymity has to show that this is necessary in pursuit of the legitimate aim on which he relies.**

(4) **The threshold question is whether the measure in question – here, allowing the disclosure of the claimant's name and consequent publicity - would amount to an interference with the claimant's right to respect for his private and family life. This requires proof that the effects would attain a "certain level of seriousness"**: *ZXC* (SC) [55], *Javadov* [39]. It was the very essence of the claimant's case – as to which the judge was in no doubt - that the reputational impact of disclosure would amount to a very serious interference with his Convention rights. In my view it is clear that the judge accepted throughout that the threshold test was satisfied. His reasoning cannot be understood in any other way.

(5) **The next stage is the balancing exercise. Both the judge's decisions expressly turned on whether it was "necessary and proportionate" to grant anonymity**. That language clearly reflects a Convention analysis and the balancing process which

> the judge was required to undertake. The question implicit in the judge's reasoning process is whether the consequences of disclosure would be so serious an interference with the claimant's rights that it was necessary and proportionate to interfere with the ordinary rule of open justice. **It is clear enough, in my view, that he was engaging in a process of evaluating the claimant's case against the weighty imperatives of open justice**.
>
> (6) **It is in that context that the judge rightly addressed the question of whether the claimant had adduced "clear and cogent evidence".** He was considering whether it had been shown that the balance fell in favour of anonymity. The cases all show that **this question is not to be answered on the basis of "rival generalities" but instead by a close examination of the weight to be given to the specific rights that are at stake on the facts of the case.** That is why "clear and cogent evidence" is needed. This requirement reflects both the older common law authorities and the more modern cases. In *Scott v Scott* at p438 Viscount Haldane held that the court had no power to depart from open justice "unless it be strictly necessary"; the applicant "must make out his case strictly, and bring it up to the standard which the underlying principle requires". *Rai* (CA) is authority that the same is true of a case that relies on Article 8. The Practice Guidance is to the same effect and cites many modern authorities in support of that proposition. These include *JIH v News Group Newspapers Ltd* [2011] 1 WLR 1645 where, in an often-cited passage, Lord Neuberger of Abbotsbury said at [22]:
>
> "Where, as here, the basis for any claimed restriction ultimately rests on a judicial assessment, it is therefore essential that (a) the judge is first satisfied that the facts and circumstances of the case are sufficiently strong to justify encroaching on the open justice rule …"
>
> (7) In my opinion, the closing passage of the judgment under review reflects the conclusion arrived at by the judge after conducting the necessary balancing process. This was that, in the light of all the facts and circumstances that were apparent to him at that time, the derogation from open justice that anonymity would represent was no longer shown to be justified as both necessary for the protection of the claimant's Article 8 rights and proportionate to that aim." (emphasis added)

76. I consider that these principles, which should be applied on any application for anonymity, whether by a party, a witness, a professional or a non-party, can be summarised as follows:

    i) The starting point is the common law principle of open justice. Open justice means not only that justice is administered in public but that everything said in

court is reportable including the mention of names. These are weighty imperatives.

ii) An anonymity application if granted is a derogation from the common law principle.

iii) On such an application the judge must apply a test of necessity in an intensely focussed balancing exercise.

iv) The judge must be satisfied in that exercise by clear and cogent evidence adduced by the applicant that it is necessary and proportionate, in order to enable justice to be done, to grant anonymity.

v) The decision is not to be made on the basis of rival generalities but instead by a close examination of the weight to be given to the specific rights that are at stake on the facts of the case. Hence the need for clear and cogent evidence.

77. In this case the claimant had not come to the hearing prepared to deal with a review of the anonymity order in the changed circumstances. Nor had she filed any "clear and cogent" evidence in support of her expressed wish to have the anonymity continued. I gave her a week to file such evidence and continued the order in the meantime.

78. In her duly filed evidence the claimant says:

i) She is entitled to statutory protection from identification in respect of a certain matter, and its consequences, as described in her first witness statement at paras 29 – 32, and in her third witness statement at paras 11 – 14 ("the certain matter"). For obvious reasons I cannot be more explicit in this open judgment. I can say that to name her in this judgment may possibly result in the force of her statutory protection being diminished, with adverse consequences;

ii) If she were named there is a risk that she would face possible retribution from certain members of her family; and

iii) She suffers from acute mental health problems and there is a possibility that they would be aggravated if her name were bandied about in the media.

79. The question is whether I accept that this evidence moves the balance against the weighty imperative of open justice sufficiently to justify the continuation of the anonymisation of the claimant. The constitutional imperative of open justice is of vital societal importance. The reason for that does not need to be repeated here.

80. Most litigation is upsetting. Much litigation involves revelation of personal matters that people would generally not want bandied about publicly. These personal matters might extend to conduct by which, if revealed, the actors would be not merely embarrassed, but ashamed or humiliated. But if you are an adult, the full reportability of such material is, save in exceptional circumstances, the price you pay for bringing your case for public adjudication in the state's courts. In my judgment, this principle of exceptionality applies particularly forcefully where you are a claimant who has a choice whether to instigate a case in court. The principle may be applied slightly less rigorously against a defendant who is sued and dragged into court against his or her will.

81. Sometimes, there are aspects of the evidence which are so private, or so sensitive, or would be so prejudicial were they to be reported, that they can be discretely identified, carved out and a limited reporting restriction order ("RRO") made in respect of them. I made such a decision in *Gallagher v Gallagher (No.1) (Reporting Restrictions)* [2022] EWFC 52 where I prohibited in any report of that case the naming of the minor children, the publication of photographs of them, identification of their schools or the place where they live, together with two separate confidential financial matters.

82. In principle, it is my judgment in this case, and generally, that the parties to proceedings should be named unless there is a very good reason not to. This is the starting point in the balancing exercise. The naming of the parties to a piece of litigation is, as I have said, a fundamental constitutional requirement for the promotion and preservation of the rule of law. But I need to make clear that if I were to allow the claimant's name to be stated in any report of this case I would certainly go on to make a limited RRO which prohibits in any report of these proceedings or of this judgment:

    i) any details of the claimant's dysfunctional childhood or of the litigation between her parents;

    ii) the address of, and the reasons why she left, her home on 22 June 2021; or

    iii) any mention of the certain matter or its consequences.

    And I would further prohibit any non-party from obtaining from the court file any document other than this judgment and the skeleton arguments of counsel.

83. Such an order would to all intents and purposes have the result that in any report of this case nothing about the claimant could be reported apart from her name and the very limited information about her backstory contained in this judgment.

84. I would be surprised if any newspaper or other media outlet considered it sufficiently newsworthy in any report about this case to identify the claimant, let alone to give details about her personal life. The case is about the construction of a highly technical piece of legislation. Underlying it there is, I suppose, a story worth telling about why the defendant has sought to save ratepayers' money in the way that it has. But that story does not depend for its newsworthiness on identifying the claimant.

85. What just tips the balance in favour of continuation of the existing RRO is the risk, which I assess to be very small, that the limited prohibitions which I have mooted may not work to prevent one or other of the feared risks eventuating. It is trite law that the greater the degree of harm that might eventuate, the lower the degree of risk that is needed to be shown in order to obtain a prohibitory order.

86. Accordingly, and with a considerable degree of apprehension that I may well be wrong, I have reached the conclusion that the restriction of the media's freedom of expression to report the claimant' name is just outweighed by the possible harm that she would suffer should one of the feared risks eventuate, notwithstanding the limited prohibitions that would accompany the freedom to report her name were I to allow it.

87. I will therefore continue the RRO made by Ellenbogen J. However my firm view is that no RRO should be made without an end-date unless there are very good reasons indeed

justifying an indefinite order: see my own judgment in *R (MNL) v Westminster Magistrates' Court* at [78]. I therefore rule that the existing order will continue for just over two years until 1 April 2025, with liberty to the claimant to apply prior to its expiration for it to be extended. In that event the claimant would need to file clear and cogent evidence why justice required an extension.

88. After having seen this judgment in draft Ms Buchanan has asked me to give reasons why I imposed a end-date on the RRO. I confess I was taken aback by the question. A RRO which imposes anonymity is a serious derogation from the principle of open justice. Where the court imposes one the question it must ask itself is not (as Ms Buchanan would have it) "is a there a good reason why this order be have an end-date?" but, rather, "has the claimant shown a good reason why this order should last indefinitely?" In my judgment the starting point should always be that the order has an end-date, with the burden being on the applicant to demonstrate by clear and cogent evidence why the order should last indefinitely. I received no evidence at all showing that the passage of time itself, pushing these events further and further into the past and out of the reach of human memories, would not obviate the need for anonymity.

89. If, at a hearing for an extension made shortly before the expiration of the order, the claimant has adduced clear and cogent evidence in support then the court will no doubt consider making that order, on that evidence, at that time[2].

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[2] I have noted that in the very recent decision of *Abbasi & Anor v Newcastle Upon Tyne Hospitals NHS Foundation Trust* [2023] EWCA Civ 331 the Court of Appeal commended the decision of Lieven J in that case to limit the duration of the anonymity given to Newcastle NHS Foundation Trust and placing the onus on the Trust to seek an extension.