Neutral Citation Number: [2025] EWCA Civ 4

Case No: CA-2024-001867

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
Upper Tribunal Judge Ward
AC-2023-LON-000636
[2024] EWHC 264 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 January 2025

Before :

LORD JUSTICE BAKER
LORD JUSTICE LEWIS
and
LORD JUSTICE JEREMY BAKER

- -

Between :

THE KING (on behalf of TW)	**Appellant**
- and –	
ESSEX COUNTY COUNCIL	**Respondent**

- -
- -

Mathew Purchase KC and Alexander Laing (instructed by **Coram Children's Legal Centre**) for the **Appellant**
Jonathan Moffett KC and Ben Mitchell (instructed by **Essex Legal Services**) for the **Respondent**

Hearing date : 21 November 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on Monday 20 January 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE BAKER :

1. The issue arising on this appeal is whether the respondent local authority, when carrying out a child and family assessment in 2021, acted irrationally in failing to determine the appellant, then aged 16, to be a "child in need" within the meaning of s.17 of the Children Act 1989. Had he been so determined, he would subsequently have been treated as a "former relevant child" within the meaning of s.23C of the Act, a status which would have brought him within the ambit of specific duties owed by the local authority under that section.

The statutory provisions

2. Part III of the Children Act 1989 is headed "Support for Children and Families provided by Local Authorities in England". The following provisions in Part III are relevant to this appeal.

3. S.17 is headed "Provision of services for children in need, their families and others". S.17(1) provides:

> "It shall be the general duty of every local authority (in addition to the other duties imposed on them by this Part)—
>
> (a) to safeguard and promote the welfare of children within their area who are in need; and
>
> (b) so far as is consistent with that duty, to promote the upbringing of such children by their families,
>
> by providing a range and level of services appropriate to those children's needs."

4. A "child in need" is defined in s.17(10) to include (so far as relevant to this appeal):

> "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,
>
> …."

Under s.17(11), "development" is defined as meaning "physical, emotional, social or behavioural development" and "health" as meaning "physical or mental health".

5. S.20 is headed "Provision of accommodation for children: general". S.20(1) provides:

> "Every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation as a result of—
>
> (a) there being no person who has parental responsibility for him;
>
> (b) his being lost or having been abandoned; or
>
> (c) the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care."

S.20(4) provides:

> "A local authority may provide accommodation for any child within their area (even though a person who has parental responsibility for him is able to provide him with accommodation) if they consider that to do so would safeguard or promote the child's welfare."

6. S.22, headed "General duty of local authority in relation to children looked after by them", includes the following provisions:

> "(1) In this Act, any reference to a child who is looked after by a local authority is a reference to a child who is—
>
> (a) in their care; or
>
> (b) provided with accommodation by the authority in the exercise of any functions (in particular those under this Act) …
>
> (2) In subsection (1) "accommodation" means accommodation which is provided for a continuous period of more than 24 hours.
>
> (3) It shall be the duty of a local authority looking after any child—
>
> (a) to safeguard and promote his welfare; and
>
> (b) to make such use of services available for children cared for by their own parents as appears to the authority reasonable in his case."

7. S.22C of the Act makes provision for ways in which a looked after child, C, is to be accommodated and maintained. S.22C(2) to (4) provide that a local authority must make arrangements for C to live with persons falling within certain categories

(including parents and others with parental responsibility) unless such arrangements would not be consistent with their welfare or reasonably practicable. S.22C(5) provides that, if the local authority is unable to make such arrangements, they "must place C in the placement which is, in their opinion, the most appropriate placement available." S.22C(6) defines "placement" for the purposes of subsection (5) as covering a variety of placements (relatives, friends, foster carers etc) including, under paragraph (d) "…placement in accordance with other arrangements which comply with any regulations made for the purpose of this section".

8. Ss.23A and 23B of the Act impose functions on a local authority in respect of a "relevant child", defined in s.23A(2), so far as relevant to this appeal, as being 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 within the meaning of paragraph 19B of Schedule 2 [of the Act], and
>
> (c) is aged 16 or 17."

Schedule 2 paragraph 19B(2) defines an "eligible child" as a person who is aged 16 or 17 and 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 16. Under regulation 40 of the Care Planning, Placement and Case Review (England) Regulations 2010, the prescribed period is 13 weeks and the prescribed age 14.

9. S.23C of the Act imposes continuing duties on a local authority in respect of a "former relevant child", defined in s.23C(1) as (a) a person who has been a relevant child for the purposes of s.23A (and would be one if he were under 18) and in relation to whom they were the last responsible authority and (b) a person who was being looked after by them when he attained the age of 18, and immediately before ceasing to be looked after was an eligible child. The duties set out in s.23C(2) to (5A) include, in certain circumstances, a duty to provide financial assistance. Under s.23C(6), those duties subsist until the former relevant child reaches the age of 21, but may extend beyond that in circumstances defined in ss.23C(7), 23CZB, 23CA, 23D and 23E, which sections make further provision for support for, inter alia, former relevant children.

10. The Children Act 2004 imposes further obligations on local authorities to provide services to children and young people. S.10 of the 2004 Act provides inter alia:

> "(1) Each local authority in England must make arrangements to promote co-operation between
>
> (a) the authority;
>
> (b) each of the authority's relevant partners; and

> (c) such other persons or bodies as the authority consider appropriate, being persons or bodies of any nature who exercise functions or are engaged in activities in relation to children in the authority's area.
>
> (2) The arrangements are to be made with a view to improving the well-being of children in the authority's area so far as relating to–
>
> (a) physical and mental health and emotional well-being;
>
> (b) protection from harm and neglect;
>
> …
>
> (e) social and economic well-being."

Summary of facts

11. In 2017, pursuant to its powers under s.10 of the 2004 Act, the local authority entered into a contract with Nacro Ltd ("Nacro") to provide support and accommodation to young people via a scheme called Essex Young People's Partnership ("EYPP"). The service specification for the EYPP contract included provision of accommodation for young people who were (inter alia) aged 16 and 17 years of age and at risk of homelessness. The local authority evidence before the judge was that the purpose of EYPP was to broaden the range of support and accommodation that was available to young people in its area, other than children in need. On the expiry of the contract in 2022, it was replaced by a new contact between the local authority and Nacro providing for a new scheme called Essex Nacro Education Support and Transition ("Essex NEST").

12. TW was born in 2004. When he was a young child, his parents' relationship broke down and thereafter he lived with his mother and her new partner. On several occasions from the age of 9, he was referred to local authority social services because of concerns that he was being neglected or abused.

13. In 2018, when TW was 14 years old, his mother died. Initially, he continued to live with his stepfather. In early 2021, however, when TW was 16, his relationship with his stepfather broke down and, following an altercation to which the police were called, TW left the property. Thereafter, he divided his time staying some nights with his elder brother and his girlfriend and other nights with his biological father. Neither property contained a spare bedroom so in both properties TW slept on a sofa.

14. Following the incident at the stepfather's home, the police referred TW to the local authority. A social worker, SM, was assigned to carry out a child and family assessment which she completed on 27 May 2021. She recorded that TW had experienced a number of problems since his mother's death. He had neglected his health and failed to seek medical attention on occasions. SM noted that he had "struggled with his mental health particularly after the passing of his mother". She recorded that "TW is aware he has not properly processed the loss and trauma of his mum passing away but does not feel ready to do so whilst he does not have a place to

stay he considers safe and stable". Of the current arrangements where TW was staying between the two properties and sleeping on sofas, SM observed that, "whilst this is ok in the short term, it is not an ideal long term arrangement".

15. In the concluding section of her assessment, under the heading "What are we worried about?", SM noted that TW "does not have a stable place to live in the long term"; that his relationship with his stepfather had broken down; that he had not processed the loss and trauma of losing his mother; that he was not in education, training or employment, and that he had a limited support network. Under the heading: "What will make things safer for the child/young person?", she wrote: "TW to be supported to access stable housing… to access and engage with education and/or training, [and] to access mental health and emotional wellbeing services".

16. Under the heading "Social worker's recommendations, including reason and outline plan if appropriate", SM wrote:

> "TW has experienced trauma of having an unwell mother, the passing on of his mother and feelings of rejection from his stepfather since his mother passed on. With support from emotional wellbeing services, TW will have improved outcomes in his adulthood.
>
> TW had basic life skills but with support from his dad, brother and adults involved in his care, he has greater chances of further developing his independent living skills in preparation for adulthood.
>
> In light of the above I have recommendedthat TW be supported to access housing through Essex Young People's Partnership with additional support from Family Solutions."

Family Solutions is the local authority's scheme for providing support under s.10 of the 2004 Act.

17. The assessment concluded with the manager's decision:

> "TW is not currently assessed as being a child in need. He has support of his brother and father who are supporting him and have helped him to develop his independence skills and to apply for benefits. The housing situation is not a long term option and TW will be supported to have a joint housing meeting with consideration for a referral through EYPP. I agree a recommendation of a step down to family solutions who can continue to support TW to get set up in the housing provision, look at budgeting plans and help him to access any additional services that may be needed."

18. On 10 June 2021, TW attended a meeting with SM and a member of the borough council housing department. They discussed his "potential housing options", including support with accommodation through s.20 and under the EYPP. According to the note of the meeting, SM advised him in detail about the options, although in his

statement in these proceedings TW said that he did not recall being given the detailed information recorded in the note. The note concluded by recording that TW said that he "does not want be in care as there were too many rules". He said he wanted to be supported to access housing through EYPP.

19. On 25 June 2021, TW moved into a property run by EYPP, "B House", where he stayed for just over a year. On 9 July 2021, the case was closed by children's services, with a record that the case was "stepped down to Family Solutions for ongoing support". Thereafter he was allocated a Family Solutions worker and received various kinds of support, for example with morning routines, shopping, and applying for courses.

20. In May 2022, shortly before his 18th birthday, TW was served with a notice to quit the property and moved out in July. Family Solutions closed his case. He resumed sleeping on sofas at his father's flat and other properties occupied by friends. In his statement, TW described a number of personal difficulties he experienced during this period, in particular with his mental health. It is his case that he was badly let down by the local authority who, he maintains, failed to give him the support he needed during his teenage years. The local authority did not regard him as a "former relevant child" and therefore did not provide the support they are obliged to provide to persons in that category under s.23C.

21. In June 2022, solicitors acting on his behalf sent a letter before action to the local authority under the Judicial Review Pre-Action Protocol asserting that he was a former relevant child or alternatively that the local authority should exercise its discretion to treat him as such.

22. On 3 February 2023, TW issued a claim for judicial review, on the following grounds:

    (1) The local authority was acting unlawfully by refusing to accept that he was a former relevant child.

    (2) As a result of the local authority's unlawful refusal to accept that TW was a former relevant child, it was unlawfully failing to comply with its duties under ss.23C-23E of the 1989 Act.

    (3) The local authority was operating an unlawful policy and/or practice whereby accommodation made available to young people pursuant to its contractual arrangements with Nacro, under a scheme originally entitled EYPP but now known as Essex NEST, is held not to be provided or available under s.20 of the 1989 Act.

    (4) In the alternative to Grounds 1 and 2, if it is found that the local authority has acted unlawfully in respect of TW but that for any reason TW was not a former relevant child as a matter of law, then the local authority's refusal to exercise its discretion to treat him as a former relevant child was unlawful.

23. A rolled-up hearing to consider both permission and, if granted, the substantive claim took place before Upper Tribunal Judge Ward sitting as a High Court Judge on 1 and 2 November 2023 ("the judge"). Judgment was handed down on 9 February 2024.

The appellant was granted permission on all grounds but ultimately his substantive claim for judicial review was dismissed.

The judgment

24. In an introduction to the judgment (reported at [2024] EWHC 264 (Admin)) in which he set out the issues, the judge (at paragraph 6) succinctly summarised TW's case:

> "The Claimant's case is that he became a looked after child on 26 June 2021, 24 hours after being accommodated. He became an eligible child on 25 September 2021, 13 weeks later. On turning 18 in May 2022 he became a former relevant child."

He then set out the relevant statutory provisions, and also identified relevant statutory guidance, "Prevention of homelessness and provision of accommodation for 16 and 17 year old young people who may be homeless and/or require accommodation" (Ministry of Housing, Communities and Local Government and Department for Education, 2018) ("the National Guidance"), issued under s.7 of the Local Authority Social Services Act 1970 and s.182 of the Housing Act 1996.

25. In summarising the relevant facts, the judge described the Essex NEST scheme and its predecessor EYPP, quoting parts of the contractual documents. He then set out details of TW's background, a summary of the local authority's actions, and an account of how TW had been accommodated.

26. Dealing with the first two grounds of the claim, he identified two issues:

> "a. Was the Defendant's decision that the Claimant was not a child in need lawful?
>
> b. Did the Claimant reject accommodation under section 20 of the 1989 Act and/or was the Defendant lawfully entitled to conclude that he had done so?"

27. In this context, at paragraphs 71-2, he made the following observation on the interpretation of s.17(10):

> "71. …. The questions posed by the statute are whether the child is "unlikely" to achieve or maintain (etc.) a "reasonable" standard without the provision of the relevant services. That involves deciding whether the negative "unlikely" is made out. It is only a "reasonable" standard which has to be achieved. Both suggest that the test under section 17(10)(a) will not lightly be met. Further, weight has to be given to the final words of section 17(10)(a). As the Divisional Court said in *R (VC) v Newcastle City Council* [2011] EWHC 2673 (Admin) at [29]:
>
> > "The duties of a local authority do not extend to all children who might be said to be "in need". Apart from a child who is 'disabled' in the statutory sense, they apply only to a child who 'without the provision for him of services by [the] local

> authority' will fall within one or other of the statutory criteria."
>
> 72. Whether the conditions of the section are met is for the local authority, subject to judicial review. Thus the issue for me is whether the Defendant's conclusion is irrational."

28. He also drew on a passage from paragraph 3.2 of the National Guidance cited by counsel for the local authority:

> "If the young person is at risk of becoming homeless in the future, for example because of conflict within the family home, it will be for children's services to determine what support is required depending on the circumstances and the needs of the young person and their family. Where there is no immediate threat of homelessness intervention may be more appropriately led by early help services, whereas, if there is an imminent threat of homelessness or if the young person is actually homeless, a child in need assessment must be carried out and the child accommodated under section 20."

At paragraph 85, he added:

> "Whether in the terms of para.3.2 of the National Guidance, the Claimant was "at risk of becoming homeless in the future" with "no immediate threat of homelessness", or there was "an imminent threat of homelessness" or he was "actually homeless" was a matter for the Defendant (subject to public law)."

29. On the facts of this case, this led the judge to the following evaluation (at paragraph 86):

> "The Claimant in each of the locations had a bare licence. Effectively he was dependent on his father and on his brother/brother's girlfriend not to terminate the corresponding licence. The Claimant was likely to become homeless at some point between the date of the assessment and turning 18 in May 2022 and the question was, when. The licences were informal and dependent for their maintenance on considerations of familial love and support and on the ability of those concerned to get on. These were pre-eminently issues for a professional social worker who had taken steps adequately to inform themselves. As the National Guidance para.3.16 puts it, "Determining who is in need and the extent of any needs requires professional judgment by social workers…". SM had met those concerned and had heard from them and had had the opportunity to witness their interactions with the Claimant and was in consequence well-placed to assess these issues on behalf of the Defendant in the exercise of her professional judgment. I consider that, in the light of SM's evidence, the Defendant was

> entitled to conclude that the Claimant was not homeless and therefore that was not a factor which would support a conclusion that the Claimant was a "child in need"."

30. The judge rejected a submission that, by including a discussion of the implications of s.20 in the explanation given to TW on 10 June 2021, the local authority was conceding that he was eligible for s.20 accommodation, because "both parties knew that he had been assessed as not being so eligible". He also rejected a submission that any weight could be placed on the fact that, on 25 June 2021, SM had completed a request for a one-off payment of £30 be made to TW, stating on the form that it was "s.17 cash". He noted that "such a payment could only be made under s.17 if the Claimant was, indeed, considered to be a child in need" and that the "overwhelming evidence" was that he was not so considered, adding that "it may well be" that the attribution of the payment to s.17 was "mistaken". He concluded on the first issue (paragraph 95):

> "As a rationality challenge, the bar is set high and the challenge does not clear it. In my judgment, the resourceful and ably-presented arguments on behalf of the Claimant are fundamentally inviting the Court to substitute a different view of the severity of the Claimant's circumstances from that reached on behalf of the Defendant. That is not the Court's role in these proceedings."

31. Turning to the second issue, the judge accepted that it had been TW's "genuine wish, on the degree of understanding that he had, that he did not want the status of a looked after child". In the judge's view,

> "His rationale for not wanting to be subject to the restrictions going with being "in care" (which in a strict sense, he would not have been, there being no care order involved) in my view is to be understood as a wish to avoid the degree of regulation that would accompany s.20 status."

He concluded:

> "When one considers the provisions of, for instance, s.22 of the 1989 Act and, indeed, the information imparted by SM about the consequences of s.20 status, what was intended by the Claimant's position, even if imperfectly articulated and one which may well not be considered by others to have been objectively in his best interests, is in my view evident."

32. Under ground 3, the judge identified the issues as follows:

> "a. Is accommodation provided under the EYPP/Essex NEST provided by the Defendant pursuant to section 20 of the 1989 Act?

> b. Is the Defendant entitled to stipulate and/or recognise that accommodation provided under the EYPP/Essex NEST is not available under section 20 of the 1989 Act?"

33. On a preliminary point, the judge accepted a submission by the local authority's counsel that, as TW had failed on issue (a) under grounds 1 and 2, he lacked standing for the purposes of ground 3. Having heard full argument, however, he proceeded to set out his conclusions on the merits of the ground.

34. He concluded that it was clear from the documentation filed in evidence relating to the Essex NEST contract that, when the contract was re-tendered, the Defendant's purpose was to make provision for cohorts including 16-17 year olds who were not looked after children or who had said no to that status. He added:

> "That the Defendant in the context of settling other proceedings has conceded in a few cases that residence in BB House for a short while was to be taken as being under s.20 does not alter the intended purpose of the procurement."

In contrast he noted that there was nothing in the EYPP documentation which says, in terms, that accommodating children under s.20 was excluded. But he recorded that he had been told at the hearing that "there was not thought to have been any material change in the structure of the arrangements". He also noted a provision, not in the EYPP contract but included in the Essex NEST contract, specifying the cohorts of young people for whom support would be provided under the contract, that when a young person under 18 becomes a looked after child after moving into Essex NEST accommodation, social services would move them into appropriate accommodation for looked after children and "housing related support" accommodation would "cease to be available for them". He concluded:

> "the aim of the variation was to preserve the availability of the accommodation and linked services for those in the Defendant's targeted cohorts (which would have excluded referrals under s.20 in the first place) in the face of an unexpected change of circumstances. I therefore reach the conclusion that, like the NEST arrangements, the EYPP arrangements were not provided under s.20."

35. The judge also rejected a submission on behalf of TW based on s.22C(5) of the 1989 Act that, since the local authority clearly did consider that B House was "the most appropriate placement available", in a s.20 case a placement there should be made under s.20. He observed:

> "The difficulty with this submission in my view is that it gives inadequate weight to both "appropriate" and "available". On my findings, B House was not and is not generally "available" for placements under section 20. The primacy of section 20 in cases where a duty under the section is owed does not affect that. Therefore, at any rate when there are other placements that are available under section 20, a placement at B House would

> not, save perhaps in exceptional circumstances, be "appropriate"."

He concluded that the fact was that Essex NEST accommodation (and before that EYPP accommodation) was not available under s.20 and further rejected a submission that, by contracting in this way the local authority was unlawfully fettering its discretion because the evidence showed that it had sufficient s.20 accommodation resources elsewhere.

36. Finally, he recorded the concession made on behalf of TW that the discretion to treat a person as a former relevant child only arose if there had been a flawed assessment so that ground 4 was contingent on the outcome of the other grounds. Given his conclusion on those grounds, the local authority had been entitled to conclude that it was not obliged to treat TW as if he were a former relevant child.

The appeal

37. The grounds of appeal to this Court as summarised in the appellant's skeleton argument were as follows:

(1) In respect of grounds 1 and 2 before the judge, he was wrong in law and/or in fact to conclude that the local authority's May 2021 decision that TW was not a child in need was lawful.

(2) For the reasons set out under grounds 1 and 2 before the judge, TW does have standing in respect of ground 3 and the judge's conclusion that he did not was wrong.

(3) The judge was wrong in law and/or in fact to find that EYPP / Essex NEST was not provided by the local authority pursuant to s.20.

(4) The judge was wrong to dismiss ground 4 in circumstances in which that was predicated on his conclusions on grounds 1 to 3.

Two other grounds of appeal included in the appeal notice were abandoned.

38. At the start of the hearing before us, Mr Mathew Purchase KC sought to add a further ground of appeal, namely that the judge erred by failing to hold that TW was a former relevant child because he falls to be treated as having been accommodated under s.20(4). This proposed amendment was advanced orally, without written notice – indeed, counsel for the local authority was only informed of the application to amend on the morning of the hearing and only learned of the precise terms of the amendment when they were read out in court. Mr Purchase, who had been instructed at a relatively late stage, frankly accepted that he had only spotted this point on the day before the appeal but argued that his client, for whom this case was important, should not be disadvantaged, and that the issue was a pure question of law, namely whether TW fell within s.20(4). On behalf of the local authority, Mr Jonathan Moffett KC opposed the application to amend, and after hearing submissions we dismissed it, indicating our reasons for doing so would be set out in this judgment.

39. The proposed amendment, raised at the very last moment, involved a completely new point. As my Lord Lewis LJ observed in the hearing, it was in all probability a matter

on which evidence would be needed. At the very least, having not been considered at any stage prior to the day of the appeal hearing, it was impossible to say whether it required evidence or not. Furthermore, the legal issue raised under the proposed amendment was substantial. Any proper analysis of the issue would involve careful consideration by the legal representatives and the Court of the subsection, in the context of the statutory scheme, and possibly of analogous situations and provisions. For those reasons, an adjournment would have been unavoidable. In the circumstances, it would have been entirely wrong and contrary to established principles to allow such a fundamental amendment on the morning of the hearing: *Singh v Dass* [2019] EWCA Civ 360, paragraphs 15 to 18; *Notting Hill Finance Ltd. v Sheikh* [2019] EWCA Civ 1337, paragraph 26.

40. After we announced our decision refusing the application to amend, Mr Purchase refined his case on the appeal, on the basis of what he characterised as two concessions by the local authority. First, it was no longer contended by the local authority that TW was not accommodated under s.20 because he rejected it under s.20. Secondly, it was accepted by the local authority that, if TW was a child in need, the accommodation was provided under s.20, whatever label had been attached to it at the time. Mr Purchase accepted that it followed that the questions (1) whether the local authority was entitled to designate the accommodation provided to TW as not provided under s.20 and (2) whether the local authority's refusal to exercise its discretion to treat him as a former relevant child was unlawful were both now academic. As a result, the issues raised under the original grounds 3 and 4 before the judge were not pursued. Accordingly, it was agreed between counsel that the only issue for this Court was whether the judge was wrong to conclude that it was not irrational for the local authority to conclude that he was not a child in need.

41. Mr Purchase accepted that establishing irrationality involved crossing a high threshold. His case was that the decision was irrational because any consideration of whether the child was a child in need involved consideration of the longer term, not merely his immediate circumstances. In this case, a proper consideration of TW's future prospects at the date of the decision would have led the local authority to accept that he was a child in need.

42. Mr Purchase submitted that, when assessing whether a child was a child in need, a decision-maker had to look to the future and consider what was likely, or unlikely, to happen without the provision of local authority services and support. It is not lawful to exclude homelessness as a relevant consideration on the basis that the individual is not currently homeless or under "imminent threat" of becoming so. The statute requires the opposite: it requires consideration of what is likely to happen moving forwards.

43. In support of the proposition that any assessment of whether a child is "in need" is not confined to his immediate situation but extends to consideration of his future, Mr Purchase cited the decision of Lloyd-Jones J (as he then was) in *R (K) v Manchester City Council* [2006] EWHC 3164 (Admin) and in particular his observations at paragraphs 39 to 40 that

> "A lawful assessment under section 17 of the Children Act must necessarily examine not only the immediate, current circumstances of the child concerned but must also look to

> imminent changes in those circumstances …. these limbs in section 17(10) [i.e. in paragraphs (a) and (b)] necessarily look to the future. The question relates to the possibility of K achieving or maintaining a reasonable standard of health or development without the provision of services. In order properly to consider that, the authority must have regard to imminent changes in the circumstances of the child concerned."

These observations were endorsed by Munby LJ, sitting in the Divisional Court in *R (VC) v Newcastle City Council* [2011] EWHC 2673 (Admin) at paragraph 29.

44. Mr Purchase acknowledged that Lloyd-Jones J only referred to "imminent" changes. He submitted, however, that there was no reason to confine the category of future developments which fell to be considered to those which were "imminent". In the *Manchester* case, the court had been concerned with what would happen when the young person was released from custody eight months after the decision. There was nothing in the language of s.17(10) to suggest that the decision-maker's analysis was confined to imminent or immediate risks. Neither Lloyd-Jones J in the *Manchester* case nor Munby LJ in the *Newcastle* case said that the decision-maker need only look at imminent changes.

45. Mr Purchase submitted that to disregard future harm, or to confine consideration of future risks to those which were imminent, was contrary to the whole scheme of the 1989 Act. He cited the observation of Lord Hope of Craighead in *R (G) v Barnet LBC* at paragraph 66 that the aim of the Act was "to provide a clear and consistent code for the whole area of child law". He contended that s.17(10) should therefore be interpreted in a way that was consistent with other provisions of the Act, in particular the threshold criteria for making a care order under s.31(2). In *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33, the Supreme Court had confirmed that the test to be applied when determining whether there was a likelihood of significant harm sufficient to cross the threshold under s.31(2) was whether there was "a real possibility, a possibility that could not sensibly be ignored". He cited in particular the observation of Baroness Hale of Richmond at paragraph 189 in *Re B* that:

> "The Act does not set limits on when the harm may be likely to occur and clearly the court is entitled to look to the medium and longer term as well as to the child's immediate future."

Mr Purchase submitted that the same test should be applied when assessing likelihood of harm under other provisions of the Act, including the likelihood of impairment of development or health under s.17(10). The question under that subsection was therefore whether there was a real possibility that TW's future health or development would be significantly impaired without the provision of local authority services.

46. It was his case that the judge wrongly applied a higher test, in particular at paragraph 71 of his judgment quoted above, indicated by his observation that the test "will not lightly be met". In making that observation, the judge applied an inapposite gloss to the wording of the statute, which had the effect of raising the threshold to a level higher than the subsection required. Had the judge applied the correct test, he would have found that the only conclusion open to the local authority decision-maker was

that there was a real possibility that TW's health and future development would be impaired without local authority support and that he was therefore a child in need.

47. Mr Purchase submitted that, when deciding whether or not a decision was irrational, you had to look at the whole of the evidence, not merely the specific summary of the basis on which the decision was made. In particular, he relied on the evidence within the assessment that TW's current accommodation with his father and brother was not a long-term option and that his mental health problems were both serious and related to his housing situation. Mr Purchase pointed to the observations in the assessment that TW had neglected his health since his mother's death and did not feel able to process the trauma of losing his mother until he had a stable and safe place to live. Although he was able to sleep on the sofa at his father's and brother's properties, the absence of stable accommodation had an ongoing and adverse impact on his mental health. On the basis of the forward-looking assessment of needs mandated by s.17(10), TW required accommodation under s.20(1) at the date of the decision. The problems he was likely to experience at a later date were attributable to his current circumstances. Given his vulnerabilities, it was not open to the local authority to conclude that his current accommodation arrangements, moving from one sofa to another in two different properties, were suitable.

48. Mr Purchase further submitted that, when one looked at the actions taken by the local authority, it was clear that he was in fact treated as a child in need. It was significant that, during the meeting with TW on 10 June 2021, the social worker had included support with accommodation through s.20 as one of the "potential housing options". It was also significant that a one-off payment of £30 to TW requested by the social worker had been described as "s.17 cash". The judge's reasoning for disregarding this – that it "may well be mistaken" – was speculation for which there was no evidential basis.

49. Although the accommodation at B House was nominally provided by EYPP, Mr Purchase argued that, in fact, it was the local authority who provided the accommodation as well as ancillary support services. It was the local authority who entered into the contractual arrangements pursuant to which the accommodation was provided. It was the local authority who referred TW to EYPP pursuant to those arrangements. It was the local authority who assessed whether he met the needs threshold to be eligible for the accommodation. And after he moved to B House, it was the local authority who provided him with further support, which he described as the sort of support a parent would provide to a teenage child. It was the provision of services by the local authority that prevented the damage to TW's health and development. The fact that he was a young man with needs which the local authority helped to meet illustrated that the decision that he was not a child in need was irrational. The steps which the local authority took to provide support for TW were taken because he was in fact a child in need. The only rational conclusion was that TW was a child in need who was in fact provided with accommodation under s.20(1), accommodation which, Mr Purchase submitted, fell within the category of placement permitted by s.22C(6)(d).

50. Finally, Mr Purchase submitted that there was no policy reason for restricting the interpretation of "child in need". On the contrary, there were strong arguments for a broad interpretation, given the scope of the general duty on local authorities under s.17(1) to "safeguard and promote the welfare of children within their area who are in

need". He cited the observations of Baroness Hale in *R (M) v Hammersmith and Fulham LBC* [2008] UKHL 14, which involved the interpretation of the phrase "looked after child" under s.22 of the Act. At paragraph 4, she warned that

> "the clear intention of the legislation is that these children need more than a roof over their heads and that local children's services authorities cannot avoid their responsibilities towards this challenging age group by passing them over to the local housing authorities."

Having set out the relevant statutory obligations on the two authorities, she observed (at paragraph 24) that

> "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."

In those circumstances, she added:

> "it would also not be surprising if some local authorities took steps to avoid this."

51. Mr Purchase refuted any suggestion that the interpretation of the statute for which he contended would open the floodgates to claims for support to young people who fell within the definition of "former relevant children". S.17(10) was only a threshold. The level of support to be provided to such children under the statutory and regulatory provisions involved the exercise of discretion which, subject to review by the Administrative Court, was a matter for each local authority on the facts of the case.

52. In response, Mr Jonathan Moffett KC stressed that the claim was a pure rationality challenge and that, for the appeal to succeed, this Court would have to satisfied that there had been only one rational decision open to the local authority in this case. He submitted that the local authority's decision that TW was not a child in need was entirely rational. The question whether a child is a child in need is a matter for the relevant local authority to decide, subject to any public law challenge. It is not a question for a court itself to determine: *R (VC) v Newcastle City Council*, supra, per Munby LJ at paragraph 82. Assessing whether a child is a child in need turns on a number of different evaluative judgements, on which there are no clear-cut right or wrong answers: *R (A) v Croydon LBC* [2009] UKSC 8, [2009] 1 WLR 2557, paragraphs 26 and 28 per Baroness Hale. That assessment necessarily involved consideration of what other support is available.

53. Mr Moffett submitted that the approach adopted by the local authority when considering the availability of other support in this case was entirely in keeping with the National Guidance and in particular paragraph 3.2 cited by the judge, which provided:

> "Where there is no immediate threat of homelessness intervention may be more appropriately led by early help services, whereas if there is an imminent threat of homelessness or if the young person is actually homeless, a child in need assessment must be carried out and the child accommodated under section 20."

Mr Moffett referred the Court to other government guidance ("Working Together to Safeguard Children", 2023), in which "early help" is defined in the following terms (at paragraph 118):

> "Early help is support for children of all ages that improves a family's resilience and outcomes or reduces the chance of a problem getting worse. It is not an individual service, but a system of support delivered by local authorities and their partners working together and taking collective responsibility to provide the right provision in their area. Some early help is provided through "universal services", such as education and health services. They are universal services because they are available to all families, regardless of their needs. Other early help services are coordinated by a local authority and/or their partners to address specific concerns within a family and can be described as targeted early help. Examples of these include parenting support, mental health support, youth services, youth offending teams and housing and employment services. Early help may be appropriate for children and families who have several needs, or whose circumstances might make them more vulnerable. It is a voluntary approach, requiring the family's consent to receive support and services offered. These may be provided before and/or after statutory intervention."

54. It was Mr Moffett's submission that the statutory guidance was encouraging local authorities to do what the local authority did in this case. He submitted that the logic of the appellant's argument was that the statutory guidance was unlawful, but the issue of legality was not before the Court. Mr Purchase conceded that early intervention to prevent a child becoming a child in need was entirely legitimate, but submitted that the guidance was misleading if it meant that early intervention did not amount to the provision of services under s.17(10) in circumstances where it was established that, without those services, there was a real possibility that the child would suffer significant impairment to his health or development. If on the facts a child's circumstances fall under s.17(10), any services provided to him by the local authority were provided to him as a child in need.

55. Mr Moffett observed that, in one sense, every child is a child in need of support from someone. The definition of child in need under s.17(10), however, is confined to those children who are unlikely to achieve or maintain a reasonable standard of health or development without the provision of services under Part III of the Act: *R (P) v Secretary of State for the Home Dept, R (Q) v Secretary of State for the Home Dept* [2001] EWCA Civ 1151 at paragraph 95. In carrying out the assessment, the local authority is obliged to take into account support otherwise available: *R (VC) v Newcastle City Council*, supra, per Munby LJ at paragraph 30. Mr Moffett submitted

that, in carrying out that exercise, there was no conceptual reason to exclude support which might be provided by other agencies or by the local authority under other provisions.

56. Mr Moffett accepted that in some respects the assessment would often, if not always, be forward-looking. But that involved the sort of predictive judgment which a local authority was equipped to make. In the present case, the local authority was particularly well-equipped to make those evaluative judgements, as the social worker had had the opportunity to meet TW and observe him in his family environment on three occasions. As a matter of fact, TW was not homeless at the date of the assessment and decision. Although he had fallen out with his stepfather, he continued to be accommodated and supported by other family members. His accommodation, although not perfect, was regarded as "ok in the short term". He needed a place to live but his need was not urgent. In those circumstances, it was entirely rational to refer him to EYPP to meet his accommodation needs and arrange for additional support to be met by the Family Solutions team.

57. Responding to the appellant's challenges to the judgment, Mr Moffett first submitted that the judge could not be criticised for not addressing the argument that s.17(10) was forward-looking when the case before him had been put on a different basis – that TW was homeless at the date of the assessment. Mr Purchase refuted this assertion in reply, pointing to passages in the judgment which indicated that the point had indeed been raised. Mr Moffett's second response was that, in any event, even taking a forward-looking approach, the judge's ultimate conclusion was correct. The appellant could not show that the only rational decision open to the local authority was that TW was a child in need. The identified risk arose out of physical constraints on accommodation which could be met through EYPP. Other support was going to be provided by family members and through Early Help. There was nothing to lead the local authority to think that he was going to need the extra suite of support that would come through being designated a child in need.

58. Mr Moffett refuted the suggestion that by rejecting the appellant's argument this Court would be giving the green light to local authorities to avoid their statutory obligations. Any such attempted avoidance would be susceptible to a *Padfield* challenge. In this case, there was no suggestion that the social worker or the manager were seeking to avoid the local authority's obligations or take any steps that were anything other than in the interests of the child.

Discussion and conclusion

59. In my view the judge's conclusion on the rationality issue under grounds 1 and 2 is unassailable. As he observed, "the bar is set high and the challenge does not clear it."

60. The clearest statement of the law relating to the assessment of whether a child is a child in need is by Baroness Hale in *R (A) v Croydon LBC*, supra. The issue in that case was whether each of the claimants, who had sought asylum on arrival in this country, was under the age of 18 and therefore capable of being a child in need under s.17(10) and therefore entitled to be accommodated under s.20(1). At paragraphs 26 and 27, Baroness Hale drew a distinction between the assessment of, on the one hand, whether a child was a child in need and, on the other hand, whether the person was a child at all.

> "26. The 1989 Act draws a clear and sensible distinction between different kinds of question. The question whether a child is "in need" requires a number of different value judgments. What would be a reasonable standard of health or development for this particular child? How likely is he to achieve it? What services might bring that standard up to a reasonable level? What amounts to a significant impairment of health or development? How likely is that? What services might avoid it? Questions like this are sometimes decided by the courts in the course of care or other proceedings under the Act. Courts are quite used to deciding them upon the evidence for the purpose of deciding what order, if any, to make. But where the issue is not, what order should the court make, but what service should the local authority provide, it is entirely reasonable to assume that Parliament intended such evaluative questions to be determined by the public authority, subject to the control of the courts on the ordinary principles of judicial review. Within the limits of fair process and "Wednesbury reasonableness" there are no clear cut right or wrong answers.
>
> 27. But the question whether a person is a "child" is a different kind of question. There is a right or a wrong answer. It may be difficult to determine what that answer is. The decision-makers may have to do their best on the basis of less than perfect or conclusive evidence. But that is true of many questions of fact which regularly come before the courts. That does not prevent them from being questions for the courts rather than for other kinds of decision-makers."

61. The principle that the evaluation of whether a child is a child in need is a matter for professional judgment by the local authority is reflected in the National Guidance. Paragraph 3.16 provides:

> "Determining who is in need and the extent of any needs requires professional judgment by social workers, informed by consultation with other professionals familiar with the circumstances of the individual young person and their family."

That was precisely what happened in the present case. On the evidence put before him, the judge concluded:

> "SM had met those concerned and had heard from them and had had the opportunity to witness their interactions with the Claimant and was in consequence well-placed to assess these issues on behalf of the Defendant in the exercise of her professional judgment."

Having considered her assessment, I agree that SM carried out a thorough analysis of all issues relevant to determining whether TW was a child in need.

62. It should be noted that paragraph 3.16 of the national guidance goes on to say:

> "where a young person is excluded from home and is, for example, staying with various friends, or sleeping in a car, it is extremely likely that they will be a child in need."

In this case, TW had been excluded from his stepfather's home. Although he was not sleeping with friends or in a car, he was dividing his time between two properties occupied by family members and sleeping on a sofa in each property. Those circumstances might have led the local authority to conclude that he was a child in need, particularly given his other vulnerabilities. But after SM's careful analysis, the manager concluded that he was not a child in need, for the reasons set out above. That conclusion was one which the manager was entitled to reach on the basis of SM's assessment. It was not irrational.

63. I accept that the language of s.17(10) is "forward-looking". The assessment of what is likely or unlikely necessarily involves looking to the future. But SM's assessment was manifestly focused in that direction. The key findings cited above are for the most part all forward-looking. Her finding about TW's current sleeping arrangement was that "whilst this is ok in the short term, it is not an ideal long term arrangement". Her answers to the question "What will make things safer?" were all directed to future provision, as were her recommendations. Her evaluation, accepted by the decision-maker, was that TW's future needs could be met through accessing housing via EYPP with additional support from Family Solutions without the provision of services by the local authority under Part III of the Act.

64. The provision of services to prevent a child becoming a child in need is expressly prescribed in the National Guidance. It was plainly open to the local authority, following the Guidance and in particular paragraph 3.2, to conclude that TW fell into the category of a young person needing early help. Although he had a range of needs and specific vulnerabilities, there was no "imminent threat of homelessness". He needed support to "reduce the chance of a problem getting worse" and the local authority was able to coordinate early help services to meet those concerns. It was therefore entirely rational for the local authority to conclude that there was no requirement for services to be provided under Part III of the Act.

65. So far as Mr Purchase's other submissions are concerned, I am doubtful whether there is anything to be gained from the proposition that the word "unlikely" in s.17(10) should be interpreted by reference to the meaning of "likelihood" applied by family courts when considering whether the threshold for intervention under s.31(2) of the Act is crossed. It would not be helpful to introduce a gloss into the clear statutory language of s.17(10) which social workers have to follow on a daily basis. In any event, there was nothing in Mr Purchase's submission on this issue which persuaded me that the judge had fallen into error.

66. I do not read the judge's observation at paragraph 71 of his judgment – that the words "unlikely" and "reasonable" in s.17(10)(a) suggest that the test "will not be lightly met" – as indicating that he was applying too high a hurdle. Furthermore, as is clear from the rest of that paragraph, he was very properly following the guidance given by Munby LJ in *R (VC) v Newcastle*, which in turn was based on the statement by this Court in *R (P) v Secretary of State for the Home Dept*, supra. As this Court said in the latter case (at paragraph 95):

> "the distinguishing feature of a 'child in need' for this purpose is not that he has needs - all children have needs which others must supply until they are old enough to look after themselves - but that those needs will not be properly met without the provision of local authority social services."

67. In my view the judge was entitled to reject the arguments that the fact that SM had discussed s.20 accommodation with TW on 10 June 2021, and described the payment of £30 to him on 25 June 2021 as "s.17 cash", indicated that he was in reality being treated as a child in need. The fact that it was the local authority who had entered the contractual arrangement with EYPP and referred TW to that agency for accommodation did not mean it was treating him as a child in need. The support subsequently provided by the local authority was via the Family Solutions team, not under s.17. On the totality of the evidence, and in particular the very clear terms of the social work assessment and the manager's decision, the judge was entitled to conclude that the local authority treated TW as not being a child in need.

68. It was plainly open to the manager to conclude on the evidence that TW's needs would not be met without the provision of services under Part III and that he was therefore a child in need. But the appellant has fallen well short of demonstrating that that was the only rational conclusion open to the manager. In those circumstances, the judge was right to dismiss the application for judicial review.

69. From TW's point of view, it is of course very unfortunate that he was not designated a child in need because he is not entitled to be treated as a "former relevant child" and receive the benefits which would flow from that status. As Baroness Hale warned in *R (M) v Hammersmith and Fulham LBC*, there is plainly a risk that some cash-strapped local authorities may seek to avoid their responsibilities under Part III of the Act. But there is no basis for thinking that this local authority has taken that course in this case. Its decision was reached rationally after a careful assessment and was plainly in line with national guidance.

70. For those reasons, I would dismiss this appeal.

LORD JUSTICE LEWIS

71. I agree.

LORD JUSTICE JEREMY BAKER

72. I also agree.