Case No: CO/1291/2009

Neutral Citation Number: [2010] EWHC 2113 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/07/2010

Before:

THE HON MRS JUSTICE DOBBS DBE

- -

Between:

THE QUEEN ON THE APPLICATION OF BIRARA — **Claimant**

- and –

LONDON BOROUGH OF HOUNSLOW — **Defendant**

- -

Mr A Berry (instructed by **Maxwell Gillett**) for the **Claimant**
Mr T Harrop-Griffiths (instructed by **LB Hounslow Legal Dept**) for the **Defendant**

Hearing dates: 16/07/2010

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Judgment

Mrs Justice Dobbs:

1. This is an application for judicial review, permission having been granted by the single judge on 24th February 2010.
2. The Claimant, a national of Rwanda or DRC seeks to challenge the decision of the Defendant council dated 7th October 2009.

Background

3. The Claimant was born on 6th March 1988. She is 22 years old. She entered this country on 27th March 2005 and claimed asylum, such application being refused and her appeal being dismissed on 11th July 2005. Fresh representations to remain were made on 27th April 2007 supplemented by further submissions in August 2008. By the time that this claim was issued, no decision had been reached by the SSHD. The Defendant council provided her with support and accommodation under section 20 of the Children Act 1989 until she was 18 and continued to provide support and accommodation thereafter, although the Defendant had warned the Claimant that support would cease on her 21st birthday. Over that period, the Defendant had prepared a number of pathway plans as well as a human rights and mental health assessments.
4. In September 2008, the Claimant gave birth to a son. Before the son was born, the Claimant had been studying English as a second language. In July 2006 she achieved level 1 ESOL and in July 2007 level 2 ESOL. She started the level 3 course in September 2007 and attendance records in November 2007 show that her attendance in that first quarter was good. However, she did not take the exams due to the birth of her son. In January 2009, the Claimant decided to return to education. In February 2009 the council wrote to the Claimant indicating that they would cease support on her 21st birthday. Her solicitors took issue with this decision and wrote a letter before claim on 2nd March 2009 and thereafter substantial correspondence ensued, culminating in the decision letter of 7th October. Meanwhile, a further pathway plan was completed in April 2009 just after the Claimants 21st birthday.
5. The Claimant registered and enrolled at Hammersmith College for the 2009 /2010 ESOL level 3 course. She was due to start on 15th September 2009 but did not attend as she could not afford child-care costs. She was receiving £93.50 every two weeks from social services and a further £40 for her son as well as being accommodated.

The issues

6. The two main issues underlying the challenge to the decision of 7th October 2009 relate to the "child leaving care" duties of the Defendant, the extent of those duties and the relationship between the statutory regime for local authorities to support children leaving care under the Children Act 1989 and the power of the SSHD to provide accommodation to failed asylum seekers under the Immigration and Asylum Act 1989.

The Decision of 7th October 2009.

> "Dear Sirs,
> Re: Chantal Birara
> We write further to your letters dated 22 September 2009, 24 September 2009 and 1 October 2009.
> We confirm that our client's did not agree to a programme of education that extended beyond your client's 21st birthday, on the 6th March 2009. We enclose copies of pathway plans dated November 2008 and April 2009, which make this entirely clear,

as does that dated April 2008. There are no leaving care duties owed to her.

Your client paying her friend to provide childcare while your client is at college does not come within the scope of section 24(2) of the Children Act, in that it does not amount to a contribution to expenses incurred in her living near the college or to the making of a grant to enable her to meet expenses connected with her education.

In any event the authority considers your client comes within the terms of paragraph 7 of Schedule 3 to the Nationality, Immigration and Asylum Act 2002 in that she is in the UK in breach of the immigration laws and is not an asylum-seeker. It can only provide support for her if, and to the extent that, this is necessary in order to avoid a breach of human rights. It does not consider that paying for childcare comes within this exception. Further, as is clear from the community care assessment completed on the 29th June 2009, no duty is owed to your client under section 21 of the National Assistance Act 1948.

Your client should now apply to NASS for support under section 4 of the Immigration and Asylum Act 1999. The authority hereby gives her notice that it will cease supporting her on the 21st October, which should give her sufficient time in which to apply and obtain a decision. If she refuses to apply then please within the next 7 days explain why.

Yours faithfully

Signed: Kirti Shori

For Borough Solicitor"

THE LAW

The Defendant's continuing education duty to the Claimant

7. The essential issue to be determined is whether there was a leaving care duty owed to the Claimant under section 23C of the Children Act 1989, once the Claimant attained the age of 21. To answer the question, it is necessary to look at what the duties of the local authority are in light of the fact that the Claimant is undisputedly a "former relevant child," and whether it carried out its duties under the legislation

The duties in respect of a "former relevant child"

8. Set against the general background approach regarding children who are and have been "looked after" by the local authority, the starting point is Section 23C of the 1989 Act, which sets out the continuing functions of the local authority in respect of a "former relevant child".

9. **Section 23C (2)** provides that it is the authority's duty to take reasonable steps to keep in touch with a former relevant child or, if it loses touch with him, to re-establish contact. Subsection 3 provides that the authority should continue the appointment of a personal adviser for a former relevant child and continue to keep his pathway plan under regular review.

10. **Section 23C(4)(b)** provides that it is the authority's duty to give a former relevant child "... assistance of the kind referred to in section 24B(2), to the extent that his welfare and his educational and training needs require it"

11. **Section 23C (6)** reads "subject to subsection (7) the duties under subsections (2) (3) and (4) subsist until the former relevant child reaches the age of 21."

12. **Section 23C(7)** reads:

> "If [a] former relevant child's pathway plan sets out a programme of education or training which extends beyond his twenty-first birthday –
>
> (a) the duty set out in subsection (4) (b) continues to subsist for so long as [he] continues to pursue that programme; and
>
> (b) the duties set out in subsections (2) and (3) continue to subsist concurrently with that duty".

13. **Section 23C(8)** reads:

> "For the purposes of subsection (7)(a) there shall be disregarded any interruption in a former relevant child's pursuance of a programme of education or training if the local authority are satisfied that he will resume as soon as is reasonably practicable"

14. Paragraph 5j Explanatory Notes to the Children (Leaving Care) Act 2000 ('CLCA') reads:

> "Education and training support The responsible local authority must assist a former relevant child ... with the costs of education and training up to the end of the agreed programme, even if that takes the young person past the age of 21, to the extent that his welfare and educational and training needs require it."

15. Paragraph 22 of Chapter 8 of the Leaving care Guidance sets out how a duty to provide this assistance runs until the young person *"... has completed the programme of education and training agreed with the responsible authority and set out in the Pathway Plan."*

16. The effect of the foregoing is that the local authority has certain duties towards the former relevant child and these duties cease on the former relevant child's 21st birthday, unless there is set out in the agreed pathway plan a programme of education and training which extends beyond that person's 21st birthday.

The requirements of the pathway plan

17. Paragraph 19B (4) of Schedule 2 to the 1989 Act provides that for each eligible child the relevant authority must carry an assessment of his needs *"... with a view to determining what advice, assistance and support it would be appropriate for them to provide him under this Act ..."* while still looking after him and after they cease to look after him and must then prepare a pathway plan for him.

18. Paragraph 19B (5) of the same schedule provides that the local authority shall keep the pathway plan under regular review.

19. **Section 23B(3)** of the 1989 Act reads:

> "It is the duty of each local authority, in relation to any relevant child who does not already have a pathway plan prepared for the purposes of paragraph 19B of Schedule 2 –
>
> a) To carry out an assessment of his needs with a view to determining what advice, assistance and support it would be appropriate for them to provide him under this Part; and
>
> b) To prepare a pathway plan for him".

20. **Section 23E(1)** reads:

> "In this Part, a reference to a 'pathway plan' is to a plan setting out –

(a) in the case of a plan prepared under paragraph 19B of Schedule 2 –

(i) the advice, assistance and support which the local authority intend to provide a child under this Part, both while they are looking after him and later; and

(ii) when they might cease to look after him; ...

and dealing with such other matters (if any) as may be prescribed".

21. Regulation 7 of the Leaving Care Regulations 2001 provides that where an eligible child or a relevant child does not already have a Pathway Plan, the responsible authority must assess his needs taking account of, inter alia, the child's need for education, training or employment.

22. By regulation 8(1) a pathway plan must include in particular the matters referred to in the schedule to these regulations. These matters include a detailed plan for the education or training of the child or young person. Regulation 8(2) provides that the pathway plan must, in relation to each of the matters referred to in the schedule, set out *"... the manner in which the responsible authority proposes to meet the needs of the child ..."*

23. Regulation 9 provides for review of the pathway plans. Paragraph 22 of Chapter 8 of The Leaving Care Guidance indicates that the plan should be reviewed and revised at least every six months.

24. Chapter 5, paragraph 20 of the Leaving Care Guidance makes it clear that

> "the Pathway Plan should be pivotal to the process whereby young people map out their future, articulating their aspirations and identifying interim goals along the way to realising their ambitions….. It [local authority] should look ahead at least as far as the young person's 21st birthday and will be in place beyond that where the person is in a programme of education or training which takes them past that age"

25. Pulling these strands together, the effect is that the local authority has to do an assessment of the relevant child's needs in order to determine what support it would be appropriate to give that person to meet those needs, and having done such an assessment, to set out in the pathway plan the agreed programme of education and training, and, in relation to each matter referred to, the manner in which the local authority proposes to meet those needs.

26. Before going through the pathway plans in this case, apart from what has already been cited from the legislation and guidance about the detail required in the pathway plan, the observations of Munby J (as he then was) in the case of R (J by his litigation friend MW) v Caerphilly County Borough Council) [2005] EWHC 586 (Admin) @ paragraph 46 are instructive. At paragraph 45 Munby J quotes from paragraph 7.7 of the Children Leaving Care Act Guidance " *The Pathway Plan should be explicit in setting out the objectives and actions needed to achieve these; this should include who is responsible for achieving each action and time scale for achieving it".* At paragraph 46 he said this *"A care plan is more than a statement of strategic objectives – though all too often even these are expressed in the vacuous terms. A care plan is – or ought to be a detailed operational plan. Just how detailed will depend upon the circumstances of the particular case. Sometimes a very high level of detail will be essential. But whatever the level of detail which the individual case may call for, any care plan worth its name ought to set out the operational objectives with sufficient detail including the "how, who, what and when" – to enable the care plan itself to be*

used as a means of checking whether or not the objectives are being met. Nothing less is called for in a pathway plan. Indeed the Regulations as we have seen, mandate a high level of detail

27. Blake J in the case of R on the application of C v London Borough of Lambeth [2008] EWHC 1230 (Admin) @ paragraph 36 said: "that would require in my judgement, some details as to what qualifications would be needed to be obtained and roughly by when if a diploma as a nursery nurse or in child care generally was to be pursued as a realistic employment goal for the Claimant".

THE SUBMISSIONS

28. The **Claimant** has made detailed submissions in the lengthy skeleton argument as developed in court. Distilled, they amount to the following:

    i) The Claimant contends that she is a former relevant child – this is not disputed – to whom the Defendant owes a continuing education duty to provide assistance, notwithstanding that she is over 21. Further the Claimant submits that the council has the primary duty to support her, because the relationship between the "children leaving care" provisions of the 1989 Act and section 4 of the 1999 Immigration and Asylum Act is such, that obligations to support children leaving care arise primarily under the 1989 Act and that section 4 of the 1999 Act is merely a residual power to provide accommodation to avoid destitution in circumstances where there is no obligation under the 1989 Act. The Claimant also submits that the pathway plans are defective, by virtue of the failure properly to set out her educational needs, the timescale needed to achieve the needs and how those needs were to be met and by whom. The Defendant's policy not to fund cases such as the Claimants beyond the age of 21, insofar as it is relied on in the decision and the grounds of defence, is unlawful. The Claimant submits:

        a) not only should the decision of the 7th October 2009 be quashed but also the pathway plans from November 2008 because a) they are predicated on a false premise, namely that the Claimant was not lawfully in the country and was excluded from support and b) they are inadequate plans.

        b) The Defendant cannot rely on the unlawful/inadequate pathway plan to argue that such a plan did not set out the programme and that the Defendant did not agree to such a programme of support.

        c) Under section 24C(4) of the 1989 Act the Defendant has a duty to give assistance of the kind specified to the extent that the Claimant's educational needs require it and the duty continues if the pathway plan sets out a programme of education beyond the 21st birthday - 23C(7), which it was obvious in this case that it would.

        d) The Defendant cannot rely on its education policy which unlawfully fetters its functional competence and statutory obligations. In any event, the Defendant has failed to consider the exercise its discretion in light of the exceptional circumstances.

        e) As for what should be provided by the Defendant, the Claimant needs accommodation and support to meet her educational needs. Section 24B of the 1989 Act provides two forms of support and either or both may be given – the Defendant could contribute to all or some of the expenses.

        f) The duty to provide support under the 1989 Act is the primary source of accommodation and support for former relevant children who have

educational needs to be met. Section 4 of the 1999 Act is a residual power where failed asylum seekers are destitute.

29. The Defendant accepts that the Claimant is a "former relevant child" for the purposes of the 1989 Act and that it owed her all the duties set out under section 23C of the Act, but denies that the duty continues after her 21st birthday, because the Defendant had not agreed, in line with its policy, to support the Claimant beyond the age of 21.

30. In the alternative, the Defendant denies that, even if an education duty is owed to the Claimant, it must provide the Claimant with accommodation and subsistence, because such is available from the SSHD under section 4 of 1999 Act. Further, even if such an education duty is owed to the Claimant, it is denied that it must meet the cost of child care as the child's father could reasonably be expected to provide such care or pay for it.

Developed, the **Defendant's** response is as follows:

i) Under section 23E of the 1989 Act, the principal function of the pathway plan is to set out the advice, assistance and support that a local authority intends to provide. The Defendant indicated that it will not provide the Claimant with assistance under 24B (2) because the statute does not oblige it to do so just because the Claimant wishes to be on a course beyond the age of 21. This is because the explanatory note and guidance make it clear that a requirement for the programme of education has to be agreed with the authority. If such a programme is not agreed, the Claimant can complain or judicially review it.

ii) The Defendant is entitled to take into account the cost of such a provision. The Defendant has limited resources and channels those resources on higher education. The Defendant has balanced the need for the Claimant to be in education after the age of 21, the associated welfare needs, the costs and the needs of others.

iii) The needs referred to in 23C (4) are not vital and must be relative to the costs of meeting them and relevant to the needs of others.

31. In the alternative, if the extent of the duty falls to be determined, the Defendant makes the following submissions:

i) under section 24B(2), " contributing" means precisely what it says and cannot mean payment in full;

ii) 24B(2) contributing to expenses incurred by the person living near the place where he is or will be receiving education or training cannot mean *payment for or* provision of accommodation- if this had been the meaning, parliament would have so specified - see e.g. section 24A(5)

iii) This position is supported by the Guidance which says that the local authority does not have the primary role in providing financial support for care leavers. It is also clear from the relationship between the local authority and NASS in relation to former relevant children who are asylum seekers. (See paragraph 10 of chapter one of the guidance and 5.3 and 5.4 of the HO Policy Bulletin 29.)

iv) At best the Defendant can only contribute to C's living expenses and not provide accommodation for her.

v) The Claimant can obtain support under section 4 of NASS. If she is concerned about dispersal she can make representations and even if removed to another area, the Defendant could make a contribution to the living expenses.

The Pathway Plans

32. I turn to the pathway plans in this case. The first plan was prepared on 23rd June 2006. So far as education and training was concerned, the Claimant had not had a meeting with an education officer and had not decided what she wanted to do

although we do know that she was attending college for level 1 ESOL due to English not being her native tongue.

33. The second plan is dated 29th June 2006. The Claimant has a different personal adviser. The Claimant wanted to be a nurse. She was attending college doing English ESOL although no level is identified. She was also studying maths although no course or level is identified. Under the heading.

> "Outline in detail the proposed tasks and steps to be taken by each professional and individual concerned in this plan to further the opportunities for the young person to achieve their goals"

it is recorded that the Claimant is to continue her ESOL and to enrol for September 2006, presumably for ESOL, although this is not identified, to enquire about a health and social care course and to continue maths. No course or level is identified and other key skill options are not identified. She was also to do some voluntary work.

34. The plan dated 22nd January 2007 is in similar vein, setting out that the Claimant is studying for level 2 ESOL which is to continue until June 2007; that the Claimant is to enquire about a health and social care course in September and to ask about any changes in legislation for ESOL and other courses. There is no reference to maths or other key skills referred to in previous plan, so it is not clear if any qualification had been obtained or course completed.

35. The early documents are headed "proposal (to be reviewed by asylum team)" with a subheading "The Pathway Plan" then below that heading an exposition of the function of what a pathway plan is. What is clear from the plans is that there is an agreed objective, namely, for the Claimant to become a nurse and that the Claimant will need to improve her English and to do a health and social care course to achieve that objective. The plans do not however set out the steps required as suggested by Blake J. What is equally obvious is that any necessary training to become a nurse will stretch past the Claimant's 21st birthday, even though the requisite steps and time lines had not be set out in the document. Even the acquisition of competent English skills would take her at least to her 21st birthday.

36. There is no suggestion in the early documents that the authority would not support the Claimant beyond her 21st birthday, nor is there any policy document attached to the plans to alert the Claimant to this. This is important, as Chapter 9 of the "Leaving Care" guidance emphasises the importance of the authority setting out what areas they would normally provide funding and ensure that the young person is clear about the funding owed to them by the authority, particularly as there may be competing interests for those funds.

37. What is noticeable about the plans is that having identified the aim of being a nurse, the documents merely record from plan to plan the next step. There is no overall scheme developed from the time the objective is identified so that one can see the necessary progression to attainment of that objection and, on review, evaluation of progress.

38. There is also no clear identification in those early plans of what provision is being made to the Claimant by the local authority, so far as accommodation, subsistence and financial support for the Claimant's education, or indeed whether it is from any other source. Therefore there is no express indication of what the local authority has agreed to fund, or any limitations on funding, whether it be as a result of policy or otherwise.

39. One of the reasons for this deficiency is doubtless the way the document is structured. It combines what you would expect to see in an assessment, namely questions and

answers about the Claimant's accommodation, education, mental and physical health, interspersed with the list of the proposed tasks and steps to be taken.

40. The next plan was not prepared until April 2008. By that time the Claimant was 20. She had a different personal adviser. The format of the pathway plan had changed. The new form represents, it would seem, efforts to conform to the requirements of the legislation as there are instructions to the effect that details should be set out, noting who will be responsible for each action, when it will be carried out and by whom and how progress will be monitored. There is a financial section which sets out the assistance being provided to the Claimant under the relevant headings.

41. Despite the instructions given in the standard form, the actual form filling, so far as the Claimant's education is concerned, is inadequate. More importantly, it is predicated on the basis that, as the Claimant's appeal rights were exhausted, she was in danger of her asylum support being stopped after the local authority had concluded its Human Rights assessment (an assessment which need not have been carried) out and that the Claimant could be deported. The writer of the plan and the asylum team made an error in not understanding that the Claimant would not be deported imminently in light of her fresh submissions, despite being fully aware that fresh submissions had been made in April 2007.

42. The focus of the plan was on what the Claimant needed to do to prevent her becoming homeless or destitute. There was therefore no proper exposition of the educational plan to provide the identified needs consequent on the agreed objective of the Claimant becoming a nurse. There was no consideration of the further steps necessary to satisfy those needs. Nor was there an evaluation of the Claimant's progress in pursuance of the objective.

43. Whilst the immigration status of the Claimant is something that the council can take into account when considering what support to provide, as the "Leaving Care" guidance sets out in Chapter 2 paragraph 7, as counsel for the Claimant rightly notes, the authority became sidetracked, wrongly, by the issue of the Claimant's immigration status and failed to focus properly on her educational needs and their achievement. All that was recorded was that the Claimant would like to apply for college in September. For what it does not say. It goes on to observe that enrolment would depend on accessing hardship funds for help with child care costs.

44. By the pathway plan of November 2008, where again there is a change of personal adviser, it is clear that as a result of the human rights assessment, the asylum team decided to withdraw support to the Claimant on the basis that she was a failed asylum seeker. The error about the status of the Claimant persisted. This is despite the fact that the local authority knew of the fresh submissions and had asked for copies of them which were sent to the Defendant on the 18th November.

45. The plan notes that the Claimant's legal advisers were challenging the decision to withdraw support but noted that, in any event, support could only continue until she was 21. The plan also notes that the Claimant was pregnant. As a result, like the previous plans, there was no proper detailed exposition of what was needed to achieve the originally agreed objective, nor is there any consideration of the impact of the pregnancy on her studies. It simply states that level 3 ESOL is necessary before embarking on future academic studies which are identified.

46. The last plan is dated April 2009. The Claimant has, yet again, a different personal adviser. The plan notes that the Unaccompanied Minors Asylum Team had stopped its support to the Claimant because of her age and because she was not in higher education. Whilst this plan does acknowledge the need for the Claimant to finish level 3 ESOL to start nursing, it indicates that it is difficult for her to pursue her

studies due to appeal rights being exhausted. Her ability to study would depend on whether any college could give her adequate funding to cover child care and personal expenses. There is no evaluation of the Claimant's progress or, in this case, lack of it due to her pregnancy. The bar to the Claimant's progression and her studies is put down to her immigration status. Again, the incorrect assumption creeping in.

47. The Claimant challenges the pathway plans on the grounds of inadequacy and breach of statutory duty and submits that they should be quashed and by way of remedy that the Defendant ordered to prepare another pathway plan.

48. The Defendant, whilst accepting that the plans are not ideal, does not necessarily accept that the plans are deficient. Counsel for the Defendant submitted that there may be a number of reasons why the plans are not particularly detailed: (a) because the local authority was not going to fund the Claimant beyond her 21st birthday and/or (b) because of her immigration status, something which the local authority was entitled to take into account.

49. However, counsel for the Defendant does accept that there is no indication in the plans that either of these possibilities is expressed as being the reason for the brevity of the plans. He makes the point that, in any event, at no time did the Defendant agree in the plans to fund the Claimant beyond her 21st birthday and that this is clear from the last three plans. It is submitted that what is in the plans has to be what the local authority has agreed to provide for.

50. Whilst it is accepted that the author of the plans did proceed on mistaken assumptions with regard to the Claimant's immigration status and that a human rights assessment was not necessary, it is submitted that this is irrelevant, as are any defects in the plans, because the Defendant relied on its policy only to fund beyond 21 in certain limited circumstances, such policy being resources driven.

51. Counsel for the Defendant makes the point that, even though the education duty to the Claimant no longer exists, she could apply to the Defendant for support now, and the Defendant could consider it under its powers and in its discretion.

Decision on Issue 1

52. I can deal with two of the issues raised in the decision letter quite shortly. The Defendant erred when coming to the conclusion that the Claimant fell within paragraph 7 to Schedule 3 of the 2002 Act. She does not, as she claimed asylum at port. Secondly, no point is now taken about the issue about whether child care costs could come within the scope of section 24(2) of the Children Act 1989. It is accepted that they could.

53. I turn to the pathway plans. As must be clear from the detailed analysis of the pathway plans, it is the court's judgment that they are inadequate. As already noted, there has never been any overall plan setting out in sufficient detail the steps that the Claimant needed to take in order to qualify as a nurse. Nor is one able to see the overall progress made on review. Each plan in this case merely sets out the steps to be taken after each review, rather than showing the overall picture and the progress made along the path together with the evaluation.

54. In my judgment, a pathway plan should live up to its name. It should be a document which sets out the pathway to the achievement of the agreed goal. The plan should set out the start and the end of the path, identifying points along that path which represent the steps to be taken and in due course taken, and objectives to be achieved and in due course achieved. Each review of the plan would show therefore the point along the path which the young person had reached, an evaluation of the progress made, the further steps to be taken and modification to the steps or targets if deemed

necessary. An examination of the plan would enable the reader to see the progress made from start to date and ultimately to finish.

55. If the pathway plans in this case had been prepared properly, one would have been able to see the progress made by the Claimant and also, importantly, the lack of progress in 2008 consequent on the Claimant becoming pregnant. The plan could then have been adjusted accordingly to take account of this new development. It might also perhaps have focussed the local authority's mind on the fact that the Claimant had lost a year of study due to unforeseen circumstances.

56. It is correct to say that the Defendant did not specifically agree to support a particular course of training from November 2008 or indeed from April 2008. It is also correct to say that reference was made to the policy and the plan of 2008. However, in my judgment the Defendant cannot rely on the lacunae and deficiencies in the plans to justify its stance.

57. Contrary to what the Defendant submitted, it is apparent from the misunderstanding of the Claimant's immigration status that, no proper regard was paid to the objective identified in the June 2006 plan, where it was obvious that the necessary steps, even though not identified, would take the Claimant beyond her 21st birthday. As already noted, there is nothing in the documentation to suggest that the plans were deliberately brief, due either to the Claimant's immigration status or because funding was to cease on the Claimant's 21st birthday.

58. Moreover, if the Defendant is right about the pathway plan representing an agreed plan of what was to be provided for by the local authority and that the plans were adequate, then it is arguable that, inferentially, in the earlier reports, the local authority <u>had</u> agreed to support the Claimant to qualify as a nurse, because it identified her needs in order to become a nurse, as being to improve her English by doing ESOL qualifications and to do a health and social care course which would have taken the Claimant past her 21st birthday.

59. As already noted the problem with the early plans in particular is due in large part to the layout of the document. This format, the court is told, was provided to the local authority by the relevant government department.

60. The Defendant places great store and reliance on its policy as being the reason for declining further to support this Claimant. Accordingly, on the question of policy it is interesting to note that there was no mention of the policy in the letter terminating support, dated 17th February 2009 which reads as follows:

> "We are writing to advise you that the Asylum Team will be closing your client's case on the 6th March 2009 when your client turns 21. You are also aware that the Children (Leaving Care) Act 2002 [sic] prevents the local authority from continuing to provide your client with financial assistance."

That statement, without qualification, is inaccurate and counsel for the Defendant accepts this. The letter was challenged by the Claimant's lawyers and correspondence took place over the ensuing months. The issue of the disruption to the Claimant's education because of her pregnancy was raised in a letter to the Defendant of 2nd March 2009. In acknowledging that letter the Defendant, in its response of 5th March, did not address that issue. The matter was addressed in the letter of 26th March as follows:

> "With regard to education post 21, it should be noted that the local authority only supports a young person in education post 21 if it is considered to be higher education which ESOL is not. We are sure you are aware that higher education refers to a

> degree course/post graduate work. You refer to section 24B (3) (A) of the Children Leaving Care Act 2000 and state that there **could be** a continuing obligation to Miss Birara while she is under 24 with regard to her education. This is not a duty but a power. It is acknowledged that your client's course was disrupted by her pregnancy. However we also understand that your client's course can be accessed relatively easy even with breaks/disruptions."

There was then further correspondence which lead to the decision letter under challenge. The acknowledgement of service makes the same point as the letter as do the detailed grounds of defence.

61. I turn to the Defendant's policy. Paragraph 9 of the policy then in force states:

> "Support that starts after 21 for a course that is not higher education will only be agreed in extreme circumstances (even if this could lead to entry to a higher education course that starts after 21)."

The policy was amended in June 2009 and reads as follows:

> "9. Support that starts after 21 for a course that is not higher education will only be agreed in exceptional circumstances (even if it could lead to entry to a higher education course that starts after 21)
>
> 10. In exceptional circumstances Hounslow will support young people to finish a course leading to a qualification at a lower level subject to paragraphs 1 and 2 if the young person becomes 21 in the final academic year of the course of study.
>
> 11. In exceptional circumstances Hounslow may support young people to finish a course of higher education beyond the age of 24 the young person becoming 24 in the final academic year of study."

Below paragraph 11 is a definition or certainly guidance on exceptional circumstances:

> "Exceptional circumstances may include unavoidable absence from education through a prolonged illness or hospitalisation, pregnancy or child birth, significant disability or other events that prevent study for the majority of an academic year. It could also include prolonged courses of study such as medicine or veterinary medicine."

62. In the light of the foregoing, the assertion in the letter of 26th March, without more, was inaccurate, as there is an expressed discretion to assist in cases not involving higher education (see paragraph 9). It is accepted by the Defendant that it has such a discretion. The reference in the letter to the course being "easily accessible" does nothing to answer the issue in question which was: in the light of the disruption to the Claimant's education by virtue of her pregnancy and her son's birth, should the local authority exercise its discretion to support the Claimant in her educational needs even though she had turned 21? The Defendant has sought to defend its policy on the issue of funding past the age of 21 for higher education only, on the grounds of the need to take into account costs, resources and competing interests. As a result the court's attention was drawn by the parties to a number of authorities in support of their competing contentions about whether or not resources can be taken into account when

assessing and providing for the Claimant's educational needs and the requirements necessary to meet those needs.

63. However, whatever the underlying motivation for the Defendant's policy, it does not overcome the fact that the Defendant has failed to consider its discretion under the policy, in light of the Claimant's pregnancy and the subsequent birth. No doubt, this omission, in some measure, was contributed to by the inadequacy of the plans. Counsel for the Defendant invites the court to infer from the statements of Mr Spencer about resources that the discretion was considered. I find myself unable to accede to that invitation. The discretion is spelled out clearly in the policy.

64. Moreover, counsel for the Defendant accepts that even if there were not such an express clause in the policy, the Defendant would have a discretion in any event not to follow the policy document in certain circumstances. If the discretion had been properly considered, reference would have been made to it in correspondence or the statements. The issue is raised by the Claimant's solicitors in their letter of 3rd March. The Claimant's solicitors reminded the Defendant's solicitors of the issue again in a letter dated 22nd September. The Defendant did not properly address this outstanding issue either in the decision letter or any subsequent letter, not even in the letter dated 26th October 2009 where, for the first time, the Defendant provided a copy of the policy to the Claimant's solicitors. The pathway plan of November 2008, in which the policy and the pregnancy are mentioned, does not mention the discretion. Thus, whether it is in relation to the discretion set out in the policy, or a general discretion, the issue was not properly considered.

65. From what has gone before, I conclude that the Defendant erred in its decision that it did not owe a continuing education duty to the Claimant because (a) the pathway plans were deficient due to their lack of detail and clarity; (b) decisions were made by the Defendant based on incorrect assumptions as to the immigration status of the Claimant and these decisions overshadowed any significant consideration of the Claimant's educational needs; (c) in so far reliance is placed on the Defendant's own policy, the Defendant failed to have proper regard to that policy; failed properly or at all to consider if it could act outside the policy in the particular circumstances of the Claimant. Most of these failures of duty occurred before the Claimant's 21st birthday and although the decision complained of is that of October 2009, after her 21st birthday, the failures infect the subsequent decision.

66. Even if I had taken a more generous view of the pathway plans as urged by the Defendant, the Defendant has no sustainable response to the discretion point. In the circumstances of the court's findings, there is no need, and I do not intend, to determine the lawfulness or otherwise of the policy. This case is very fact specific and has no wide-ranging ramifications for other cases involving policy decisions.

67. I propose to grant relief in the form of preparation of a new pathway plan, the terms of which I will discuss with counsel. But before doing so I turn to the outstanding issue, namely the extent of the Defendant's duties and the relationship between the 1989 and 1999 Acts.

68. At the hearing the Secretary of State, the interested party, through no fault of its own, was unrepresented and had not filed any submissions, but had asked the case be adjourned in light of an outstanding case in the Court of Appeal. The Claimant and the Defendant strongly resisted this course of action on the grounds that the case in question did not have a direct bearing on the issues to be decided by this court. The case proceeded in the absence of the interested party therefore. Due to lack of court time the case was adjourned part-heard. The court directed that certain enquiries be made. The most important information received in the interim was that from the

interested party, who has indicated that a decision has been made to grant the Claimant indefinite leave to remain. She will now have access to mainstream benefits. The extent of the benefits will depend on a number of factors including whether she is to be in full-time education.

69. The issue of the relationship between the two Acts is now rendered academic. Given that the precise details as what entitlements will accrue to the Claimant as a result of her change of status are unknown and following discussion with counsel, it was agreed that the court need only determine the first issue. In any event, the Secretary of State had not been present to make representations and it would be wrong, in my judgment, to make a ruling in the absence of submissions from a party which may be directly affected by the ruling.

70. In the light of the Claimant's change of status and the relief that will be ordered, it is to be hoped that there can be some sensible resolution to this case without the need for any further hearings at significant public expense.

71. There then followed discussion about the form of order and submissions on costs.

72. MRS JUSTICE DOBBS: This is an application by the Claimant for its costs to be paid by the Defendant on the basis, simply put, that the Claimant has succeeded in the claim.

73. The Defendant resists the application that it should pay 100 per cent of the Claimant’s costs for a number of reasons, but mainly in relation to the way the case has been conducted by the Claimant. Firstly, because the Claimant's main criticisms lay against the existence of the Defendant's policy that resources were relevant matters to take into account in relation to its education duty, and this is not an issue it has succeeded on.

74. Secondly, that the Claimant’s submissions that the local authority, having a continuing education duty to the Claimant, was obliged effectively to support the Claimant fully, save for any assistance it might get under section 4 of NASS from the Secretary of State, although not decided, was without merit.

75. Thirdly, although the Claimant won on the discretion point, this was an issue that was never pleaded in the grounds. It was an issue that was not raised until the end of the Claimant's submissions. It is also pointed out that the Claimant was clearly wrong in its argument in relation to NASS provision that Home Office policy bulletin 29 applied.

76. In response, Mr Berry says that he should not be deprived of 100 per cent of his costs because, as it turned out, the court did not need to decide some of the points that were raised; that the information provided by the Secretary of State at a later junction should not mean that the Claimant is penalised for any inaccuracies that may have been put before the court.

77. I accept the Defendant's submission, that one has to look at this issue of costs in the overall context of the litigation. The Claimant has succeeded on the first half of the claim, it not being necessary to determine the second half of the claim.

78. However, it is correct to say that the issue of discretion, whilst it was raised generally, the specific discretion relied on in paragraph 9 of the policy was never pleaded. In fact, leave was not sought for any amendment to the grounds and it was raised right at the end of the Claimant's submissions.

79. It is also right to say that counsel for the Claimant spent some considerable time on what I call the “NASS” issue, that did not need to be determined and part of that argument was, as it turns out, on a fallacious basis. Even though the Secretary of State did not participate, if running such an argument, counsel has to take the responsibility for ensuring that the correct policy documents are in front of the court,

and the correct factual situation. The Defendant had pointed out that one particular policy document that had been provided by the Claimant did not apply, but nonetheless the Claimant persisted.

80. It seems to me therefore, without making any judgment as to the merit of the arguments in the second part of this case, that it would be unfair to impose 100 per cent costs on the Defendant. I propose therefore to order that the Defendant pay 80 per cent of the Claimant's costs in this case.

81. MR BERRY: My Lady just one more thing. We need detailed assessment for public funding purposes.

82. MRS JUSTICE DOBBS: You had already mentioned that, and it is so ordered.