Neutral Citation Number: [2011] EWCA Civ 526

Case No: C1/2010/1290

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION, ADMINISTRATIVE COURT
MR JUSTICE McCOMBE
LOWER COURT No: CO/1598/2010

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/05/2011

Before:

LORD NEUBERGER, MASTER OF THE ROLLS

LORD JUSTICE WILSON
and
LORD JUSTICE TOULSON

- -

Between:

THE QUEEN (on the application of TG)	**Appellant**
- and -	
LONDON BOROUGH OF LAMBETH	**Respondent**
- and –	
SHELTER	**Intervener**

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Mr James Presland (instructed by **Steel and Shamash, Waterloo**) appeared for the **Appellant.**
Mr Hilton Harrop-Griffiths (instructed by its **Legal Services department**) appeared for the **Respondent.**
The Intervener made written submissions but did not appear.

Hearing dates: 12 January and 20 April 2011

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Judgment

Lord Justice Wilson:

A: INTRODUCTION

1. The appellant is a man who was born on 30 April 1989 and so has now just reached the age of 22. He appeals against an order made by Mr Justice McCombe in the Queen's Bench Division, Administrative Court, on 29 April 2010. The judge himself granted permission to appeal.

2. The judge's order was to dismiss the appellant's claim against the London Borough of Lambeth ("Lambeth") for judicial review of its decision dated 4 November 2009 that he was not a "former relevant child" within the meaning of s.23C(1) of the Children Act 1989 (" the Act of 1989") and thus that it did not owe to him the duties set out in the section.

3. The appellant's case before the judge, as before this court, was that Lambeth's decision about his status was wrong in law: he contended that on 4 November 2009 he was a "former relevant child".

4. Lambeth provided accommodation for the appellant between March and October 2006, namely for about seven months when he was aged 16 and 17. The accommodation was ostensibly provided by Lambeth as a local housing authority pursuant to its interim duty under s.188 of the Housing Act 1996 ("the Act of 1996"). But Lambeth concedes that "in all probability" the accommodation *should have been* provided by it as a children's services authority pursuant to a duty under s.20 of the Act of 1989 rather than by it as a housing authority under the Act of 1996. The appeal turns on whether, for the limited purpose which I will identify, the law therefore treats or deems the accommodation to have been provided under s.20.

5. Shelter obtained permission to intervene in the appeal on the basis first that it could file evidence; and second that it could make submissions, albeit only in writing. Its evidence, in the form of a witness statement by Mr Robb, its chief executive, and its written submissions, drafted by Mr Richard Gordon QC *pro bono*, have proved to be conspicuously helpful. My account of the facts of the present case will reveal a serious absence of co-ordination in relation to the appellant's case within Lambeth, including between its housing department and its children's services department. As I will explain, Mr Gordon's submissions have persuaded me that such absence of co-ordination was positively unlawful. Mr Robb's evidence reports the results of an enquiry by the charity's Children's Legal Services (undertaken for the purposes of its intervention in the case and with the assistance pro bono of Freshfields Bruckhaus Deringer LLP) into the existence of such procedures for co-ordination within the remaining 144 local authorities in England as would (in Shelter's submission) comply with the requirements of the law. Two-thirds of the authorities failed to respond in any way to the enquiry; and, of itself, the absence of any response on their part raises concern. The responses of the remainder suggest (says Shelter) a mixed picture of compliance and non-compliance. Irrespective of the result of this appeal, I have no doubt that, as Mr Robb argues, a substantial number of vulnerable children are still suffering from a failure of co-ordination between these two departments within a number of English local authorities. Even if it transpires that this appeal should turn on a narrow factual axis, it should serve, as Mr Robb suggests, to advertise the need for all local authorities to take urgent steps to remedy any such failure.

B: THE FACTS

6. At the age of six the appellant moved from the care of his father in Jamaica to that of his mother in Lambeth. His father has since died. In 2004, when aged 15, the appellant began to get into trouble with the police. He came to the attention of Lambeth's Youth Offending Service ("YOS"), known prior to 2005 as its Youth Offending Team. On 6 April 2005 he was sentenced to a supervision order for one year with an intensive supervision and surveillance programme; for the following year

he was therefore subject to the close attention of Lambeth's YOS. In October 2006 he was sentenced to a Community Rehabilitation Order for one year. So Lambeth's YOS had further dealings with him between October 2006 and April 2007, when he became an adult and was transferred to the probation service.

7. A person "with experience of" social work in relation to children is now a necessary member of a YOS (s.39(5)(aa) of the Crime and Disorder Act 1998, as amended) and, between March 2005 and January 2007, no less than eight social workers within Lambeth's YOS had dealings with the appellant. Between December 2005 and April 2006 the social worker who principally had dealings with him was Ms Acquah. She was an officer of the YOS who, in the words of the specification applicable to her position, had "a recognised qualification in work with children or young people". Lambeth points out that although Ms Acquah happens to have been a qualified social worker, the words of s.39(5)(aa) and of the specification did not require her to be so.

8. In January 2006 the appellant, then aged 16, told Ms Acquah that he intended to approach the Homeless Persons Unit ("the HPU") of Lambeth's housing department for the provision to him of independent accommodation. He alleged that his mother wanted him to leave the family home but Ms Acquah did not believe him.

9. On 3 March 2006 Ms Acquah spoke to the appellant's mother. Ms Acquah adjudged her to be at the end of her tether. She told Ms Acquah that the appellant had been trying to force her to state in writing that she required him to leave home; that she did not particularly wish him to do so; that, since he was insistent upon doing so, he could leave; but that, if he did so, he could not return. Thereupon Ms Acquah wrote a "Homelessness and Social Vulnerability Report". In the report Ms Acquah wrote:

> "I understand that the relationship between [the appellant] and his mother has broken down to the point that it is not advisable that they both live in the same household.
>
> … communication between [the appellant] and his mother most of the time is confrontational.
>
> … [the appellant] has now been asked to leave the family home by his mother.
>
> … This young person is in desperate need of housing and would hope that his housing need is met as he fulfils the Child in Need criteria."

Ms Acquah furnished the report to the appellant so that he could take it to the HPU. She did not refer him to Lambeth's children's services department.

10. A few days later, no doubt largely by reference to Ms Acquah's report, Lambeth's housing department provided the appellant with the accommodation under s.188 of the Act of 1996. The housing department did not refer the appellant to the children's services department.

C: LAMBETH'S FAILURE TO FOLLOW GUIDANCE

11. In 1999 the Department of Health, the Home Office and the Department of Education issued guidance entitled "Working Together to Safeguard Children" pursuant to s.7 of the Local Authority Social Services Act 1970 ("the Act of 1970"). The guidance of 1999 was replaced by guidance under the same title issued in September 2006; indeed the latter has now been replaced by guidance under the same title issued in March 2010. So it was the guidance of 1999 which was operative in March 2006 when, by Ms Acquah, Lambeth's YOS failed to refer the appellant to its children's services department. Paragraph 3.74 of the guidance of 1999 provided as follows:

> "A number of the children and young people who fall within the remit of YOTs will also be children in need, including some whose needs will include safeguarding. It is necessary, therefore, for there to be clear links, both at [Area Child Protection Committee]/YOT strategic level, as well as at child-specific operational level, between youth justice and child protection services. These links should be incorporated in each local authority's Children's Services Plan, the ACPC business plan and youth justice plan itself. At the operational level, protocols are likely to be of assistance in establishing cross-referral arrangements."

In the current guidance the equivalent paragraph, cast in somewhat different terms, is 2.147.

12. But, notwithstanding the absence of clear links between Lambeth's YOS and its children's services department, one is driven to conclude that Ms Acquah, who unfortunately has been distressed by these proceedings and who has retired, was personally at fault in not referring the appellant to that department. Although she worked in the YOS rather than in that department itself (i.e. the children and families division of Lambeth's Children and Young People's Service: see [25] below) she was a qualified social worker who had experience of work with children and young people. Her expressed conclusion was that the appellant fulfilled the "child in need" criteria. Such criteria are set out in s.17(10) of the Act of 1989. To a child in need a local authority owes a general duty under s.17(1) of the Act and, in further defined circumstances, a duty to accommodate under s.20(1) and (3) of the Act. The phrase "a child in need" therefore constitutes a term of art in the Act of 1989 which triggers duties thereunder, for the discharge of which a children's services authority is responsible. The phrase has no significance in relation to the duties under the Act of 1996, for the discharge of which a housing authority is responsible. Having concluded that he was a child in need, Ms Acquah should have referred the appellant to the department for which her conclusion would have been relevant.

13. Lambeth's other failure to follow guidance has been laid bare by the fact that, on receipt of Ms Acquah's report, the HPU of its housing department provided the appellant with accommodation pursuant to s.188 of the Act of 1996 without itself referring him to Lambeth's children's services department.

14. In 2000 the three departments of state which had issued the guidance referred to at [11] above issued further guidance, again pursuant to s.7 of the Act of 1970, entitled "Framework for the Assessment of Children in Need and their Families". Paragraph 5.72 of the guidance provided as follows:

> "Homeless young people may frequently come to the notice of both housing and social services and will need to be assessed to establish whether they should be provided with accommodation. There is a danger that in these circumstances young people may be passed from one agency to another and it is important therefore that joint protocols are agreed between housing and social services in the matter of how and by whom they are to be assessed."

Furthermore in 2002 the Office of the Deputy Prime Minister issued guidance, pursuant to s.182 of the Act of 1996, entitled "Homelessness Code of Guidance for Local Authorities". Paragraph 8.37 of the guidance provided as follows:

> "Responsibility for providing suitable accommodation for a relevant child or a child in need to whom a local authority owes a duty under section 20 of the Children Act 1989 rests with the social services authority. In all cases of uncertainty as to whether a 16 or 17 year old applicant may be a relevant child or a child in need, the housing authority should contact the relevant social services authority. It is recommended that a framework for joint assessment of 16 and 17 year olds is established by housing and social services authorities to facilitate the seamless discharge of duties and appropriate services to this client group."

15. Since March 2006 the need for a local authority to build – and use – a channel of communication between its two departments in relation to young people has been further underlined in the following guidance:

(a) "Homelessness Code of Guidance for Local Authorities" which was issued pursuant to s.182 of the Act of 1996 by the Department for Communities and Local Government ("DCLG") in July 2006 and which replaced the guidance of 2002: see paragraphs 10.39 and 12.6;

(b) "Joint working between Housing and Children's Services: Preventing homelessness and tackling its effects on children and young people" which was issued, otherwise than pursuant to statute, by the DCLG and the Department for Children, Schools and Families in May 2008: see paragraph 2.2; and

(c) "Provision of Accommodation for 16 and 17 year old young people who may be homeless and/or require accommodation" which was issued pursuant both to s.7 of the Act of 1970 and to s.182 of the Act of 1996 by the same two departments in April 2010: see paragraphs 5.2 to 5.5.

The guidance referred to at (c) above was expressed to be given in the light, among other things, of the decision of the House of Lords in *R(M) v. Hammersmith and Fulham LBC* [2008] UKHL 14, [2008] 1 WLR 535, in which the structural failure of Hammersmith in April 2005 to have devised the recommended joint protocol and the individual failure of its housing department to have referred Miss M to its children's services department were clearly advertised in the speech of Baroness Hale, from [25] to [33].

16. In the present appeal Lambeth exhibits a draft protocol, which it says will shortly be signed, between its children's services department and its housing department and which appears to follow the guidance to which I have referred. It also explains that already its practice is for any request for accommodation by a person aged 16 or 17, whether made to or through its housing department, its education department or its YOS, automatically to be referred to its children's services department. Through Mr Harrop-Griffiths Lambeth admits that in March 2006 its YOS, acting by Ms Acquah, and its housing department each wrongly failed to refer the appellant to its children's services department pursuant to the guidance set out (in the case of the YOS) at [11] above and (in the case of the housing department) at [14] above.

17. In the present case, in the course of a judgment of such clarity as I find difficult to emulate, McCombe J said:

> "Just as in *M*, with the benefit of hindsight, the Housing Department or the YOT should probably (as a matter of good practice) have referred the Claimant here to the team in charge of children's social services …"

With respect to the judge, however, I agree with Mr Gordon's criticism of the terminology of the above sentence. It is too weak. It is inaccurate to describe guidance given under s.7 of the Act of 1970, i.e. guidance under which local authorities "shall …act", as apt to be followed "probably" or only "as a matter of good practice". In the absence of a considered decision that there is good reason to deviate from it, it *must* be followed: see the classic exposition by Sedley J in *R v. Islington LBC ex p Rixon* (1998) 1 CCLR 119 at 123 J-K.

D: A FORMER RELEVANT CHILD

18. (a) The appellant seeks a declaration of his status as a "former relevant child" because, had he such status, Lambeth would have owed him from his eighteenth birthday until his twenty-first birthday, and may continue to owe him, a variety of duties under s.23C of the Act of 1989 (and possibly even under s.23CA thereof, which came into force on 1 April 2011), in particular duties to continue the appointment of a personal adviser for him and regularly to review a pathway plan for him under s.23C(3) and perhaps also to provide him with financial assistance under s.23C(4).

(b) A "former relevant child" is defined in subsection (1), and, insofar as material, it requires the appellant during his minority to have been a "relevant child".

(c) A "relevant child" is defined in s.23A(2) and, insofar as material, it requires the appellant to have been, when aged 16 or 17, a young person who

(i) had been "looked after" by Lambeth;

(ii) had ceased to be "looked after" by Lambeth; and

(iii) before ceasing to be "looked after" by Lambeth, had been an "eligible child".

(d) An "eligible child" is defined in paragraph 19B(2) of Schedule 2 to the Act and, insofar as material and in the light of the matters prescribed in Regulation 3 of the

Children (Leaving Care) (England) Regulations 2001 (SI 2001/2874), it requires the appellant to have been, when aged 16 or 17, a young person who was being "looked after" by Lambeth and whom it had "looked after" for at least 13 weeks beginning after his 14th birthday and ending after his 16th birthday.

(e) The period of Lambeth's provision of accommodation for the appellant, namely between March and October 2006, is indeed a period of at least 13 weeks beginning after his 14th birthday on 30 April 2003 and ending after his 16th birthday on 30 April 2005.

(f) A "looked after" child is defined in s.22(1) and, insofar as material, it requires the appellant to have been provided with accommodation in the exercise of any of Lambeth's social services functions, in particular those under s.20(1) or (3).

(h) So at last, and as is common ground, we reach the central question: was Lambeth's provision of accommodation to the appellant made in the exercise of its functions under s.20(1) or (3) of the Act of 1989? Only if so did he become a former relevant child on attaining his majority.

E: THE CRITERIA UNDER SECTION 20

19. If the appellant satisfied the criteria for provision of accommodation under s.20 of the Act of 1989, it is under that section, and not otherwise, that he should have been provided with it: *R (G) v. Southwark LBC* [2009] UKHL 26, [2009] 1 WLR 1299. In this regard the concession of Mr Harrop-Griffiths is slightly qualified: he says only that "in all probability" the appellant satisfied the criteria. Even as thus qualified, his concession goes far enough to enable the appellant's argument to move to its final stage. I should however refer in passing to the two grounds on which counsel's slight qualification is cast.

20. The first ground relates to the provision in s.20(1)(c) of the Act of 1989 that the appellant's requirement for accommodation should have been the result of:

> "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."

Did the appellant's mother (asks Mr Harrop-Griffiths) fall within the terms of this provision? My answer to his question is yes. "The widest possible scope must be given to this provision": *R(G) v. Barnet LBC* [2003] UKHL 57, [2004] 2 AC 208, per Lord Hope at [100]. On that footing Ms Acquah's judgement about the mother's capacity to continue to care for the appellant clearly places her within its terms. Moreover there is s.20(3), which required Lambeth to provide accommodation for the appellant if he was:

> "[a] child in need … who has reached the age of sixteen and whose welfare the authority consider is likely to be seriously prejudiced if they do not provide him with accommodation."

Subsection (3) has no requirement analogous to subsection (1)(c) and, again, although we heard no argument on it, it seems to me squarely to be satisfied by the terms in which Ms Acquah expressed herself.

21. The second ground relates to the provision in s.20(6) of the Act of 1989, which applied to its duty under subsection (3) as much as to its duty under subsection (1), that, before providing accommodation to him thereunder, Lambeth:

> "… shall, so far as is reasonably practicable and consistent with the child's welfare –
>
> (a) ascertain the child's wishes … regarding the provision of accommodation; and
>
> (b) give due consideration (having regard to his age and understanding) to [them]."

Should we (asks Mr Harrop-Griffiths) conclude that, if asked, the appellant would have expressed the wish to be accommodated under s.20 of the Act of 1989 rather than under s.188 of the Act of 1996? Even had he not expressed such a wish, his views might not have prevailed if his welfare had demanded otherwise. But my main answer to Mr Harrop-Griffiths' second question is, again, yes. A proper respect for the appellant's appreciation of self-interest yields the conclusion that, had the difference been properly explained to him, the prospective financial and other benefits available to him at least until his 21st birthday in the event of accommodation under s.20 would have secured his request for it.

22. So the appellant should have been provided with accommodation under s.20 of the Act of 1989. Now we reach the crucial issue within the central question: is the accommodation ostensibly provided to the appellant by Lambeth's housing services authority pursuant to s.188 of the Act of 1996 to be treated or deemed to have been provided under s.20 of the Act of 1989 for the purpose of determining whether Lambeth "looked after" him within the meaning of s.22?

F: "LOOKED AFTER"

23. In *R (M) v. Hammersmith and Fulham LBC*, cited above, the appellant, as here, challenged a decision that she was not a former relevant child. When aged 16 and 17, she had been accommodated by Hammersmith under s.188 of the Act of 1996 for a period of six months and for a further period. Hammersmith's housing department had wrongly failed to refer her to its children's services department; and there was little doubt that, had she been so referred, the children's services department should have accommodated her under s.20(1) of the Act of 1989. Yet, in the House of Lords as in the courts below, her challenge failed. Baroness Hale, with whom the other members of the committee agreed, said, at [44]:

> "It is one thing to hold that the actions of a local children's services authority should be categorised according to what they should have done rather than what they may have thought, whether at the time or in retrospect, that they were doing. It is another thing entirely to hold that the actions of a local housing

> authority should be categorised according to what the children's services authority should have done had the case been drawn to their attention at the time. In all of the above cases, the children's services authority did something as a result of which the child was provided with accommodation. The question was what they had done. In this case, there is no evidence that the children's services authority did anything at all. It is impossible to read the words [in s.22 of the Act of 1989] to include a child who has not been drawn to the attention of the local [children's] services authority or provided with any accommodation or other services by that authority."

24. It was the conclusion of McCombe J that in all material respects the facts of the present case were analogous to those in *M* and that, in particular, the needs of the appellant had never been drawn to the attention of Lambeth's children's services department. Predictably his conclusion followed debate in his court, replicated in our court, about the status of Ms Acquah. In this regard Mr Presland on behalf of the appellant made and makes two principal points.

25. Mr Presland's first point relates to the position of the YOS in Lambeth's administrative structure in March 2006. In October 2005, as a children's services authority and pursuant to s.18 of the Children Act 2004, Lambeth appointed a "director of children's services". At the same time it reorganised various of its departments exercising functions which related to children and young people so as to place them within a Children and Young People's Service ("CYPS") under charge of the director. One of the five divisions of the CYPS was the "children and families division" (to which I have referred as the children's services department): such was the division which exercised social services functions, in particular under the Act of 1989. Another of its divisions was the "community learning division": within that division was placed the YOS, which had previously been part of the education department. So Mr Presland argues that by March 2006 the YOS fell under the umbrella of the CYPS and under the overall charge of the director of children's services. But in my view this is an argument founded on nothing other than labels; it holds no attraction for me.

26. Mr Presland's second point is more substantial. It relates to the status of Ms Acquah within Lambeth's YOS. Ms Acquah had become a full member of the YOS in April 2005. At that time s.39(5)(b) of the Crime and Disorder Act 1998 provided that the YOS should include at least one "social worker of a local authority social services department". There is no need to debate whether Lambeth's evidence supports Mr Harrop-Griffiths' arresting refusal to accept that Ms Acquah fell within that description. More important is that, with effect from October 2005, subsection (5)(b) was replaced by subsection (5)(aa), which provided that the YOS should include at least one "person with experience of social work in relation to children nominated by the director of children's services". Here Lambeth takes a curious point. It asks the court to accept that, although she was a person with experience of social work in relation to children, Ms Acquah never fell within that description because she was never "nominated" by the director. It adds that no one has ever been "nominated" by the director. Lambeth would apparently prefer to be held in protracted breach of s.39(5)(aa) than to accept that in the months following October 2005 the continued

presence of Ms Acquah in the YOS fulfilled the revised statutory requirement. For my part, I decline to hold Lambeth to be in breach. There is no magic about a nomination for the purpose of the subsection. The director was in overall charge of the YOS – see [25] above – and my view is that, by causing Ms Acquah to remain a member of it, he nominated her for that purpose. Guidance issued in 2005 under s.18(7) of the Act of 2004 "on the roles and responsibilities of the Director of Children's Services …" explained, at paragraph 4.7, that the director was responsible for "seconding" at least one children's social worker to the YOS: the different verb confirms that nothing special was intended to be conveyed by the use in the subsection of the word "nominated".

27. McCombe J expressed his conclusion as follows:

> "Given that it has been decided in *M* that a firm line has to be drawn in resolving when a local authority is exercising its social services functions, it seems to me that the line has to be drawn by saying that the duty is not triggered until the child comes to the attention of the division of the local authority responsible for those functions in the ordinary course. The peripheral attention of a duly qualified official of a different team will not do."

28. Following protracted thought I have arrived at the opposite conclusion. We are surveying an entitlement on the part of the appellant to a package of benefits which, had Lambeth lawfully conducted itself in accordance with guidance, *should have* arisen. But *has* it arisen? I am convinced that there is no more satisfactory dividing-line than that drawn by Baroness Hale in *M* in the passage quoted at [23] above. But in relation to the facts of the present case I do not share the judge's view of where the line lies. Ms Acquah was not merely a qualified social worker with experience of social work in relation to children: her membership of the YOS reflected a statutory requirement that at least one of its members should have such experience. In the YOS she represented, as Lord Justice Toulson suggested in argument, the eyes and ears of the children and families division of the CYPS. On 3 March 2006 she wrote a report about the appellant in terms apt only for the consideration of that division. Unfortunately, however, she did not seek to dissuade the appellant from putting it only before the housing department. With respect, I disagree with the judge that the appellant has to show that the children and families division acted "in the ordinary course". For the reasons already given, my view is that the actions of Ms Acquah are properly to be imputed to the division, with the result that the case comes down on the side of Baroness Hale's line which is favourable to the appellant's claim.

29. Accordingly I would allow the appeal; would set aside the judge's dismissal of the claim for judicial review; would quash Lambeth's decision dated 4 November 2009; and, in that in my view such was the only conclusion lawfully open to Lambeth, would proceed to declare that, as from 30 April 2007 (his eighteenth birthday), the appellant has had the status of a "former relevant child" for the purposes of s.23C of the Act of 1989.

30. Whether the declaration has any relevance for the *future*, now that the appellant has attained the age of 21, is a matter upon which I hope that the parties can agree or into which they can at least devise an agreed programme of enquiry.

31. But what of the *past*? Within his claim for judicial review the appellant claims damages for Lambeth's past failures to meet various alleged entitlements on his part: namely, since April 2007, those of a "former relevant child"; from October 2006 to April 2007, those of a "relevant child"; from June 2006 (being about 13 weeks after March 2006) to October 2006, those of an "eligible child"; and, from March 2006 to June 2006, those of a child "looked after" by Lambeth. He casts his claim for damages under s.8 of the Human Rights Act 1998 and alleges that Lambeth's past failures represent an infringement of his right under Article 8 of the ECHR to respect for his private life.

32. Even had he upheld the application for judicial review, the judge would not have proceeded there and then to consider the appellant's claim for damages under the Act of 1998. Permission to proceed with that element of the claim for judicial review had – specifically – not been granted; and it had been accepted that in that event it would have been adjourned for consideration, first in relation to permission, at a future date. In such circumstances the appellant now asks this court to remit the claim for consideration at trial court level. But, if the claim for damages is not arguable, we should ourselves, instead of remitting it, refuse permission for it to proceed. Thus, following the conclusion of the substantive hearing, we decided to ask counsel to address us first in writing and then at a further short hearing on the issue whether Lambeth's past failures to meet the appellant's various entitlements under the Act of 1989 arguably amounted to an infringement of his rights under Article 8. Only if so persuaded, should we remit the claim for consideration of issues of limitation under s.7(5) of the Act (in my preliminary view probably surmountable by the appellant), of whether an award is "necessary" in order to afford just satisfaction to him under s.8(3) of the Act and, if so, of the quantum thereof. In the event counsel's written and oral submissions have been of great value.

33. It has long been established that Article 8 can impose positive obligations on public authorities. In *Marckx v. Belgium* (1979) 2 EHRR 330 the ECtHR said, at 342,

> "… the object of the article is 'essentially' that of protecting the individual against arbitrary interference by the public authorities. Nevertheless, it does not merely compel the state to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective 'respect' for family life."

34. But, although (as I will demonstrate) it has envisaged it as a possibility, the ECtHR has never held that a failure of the state to provide financial or other support to a person represented a violation of Article 8. If the consequences of such a failure are so gross as to have subjected him to inhuman or degrading treatment, Article 3 will have been violated: see the decision of the Grand Chamber in *MSS v. Belgium and Greece*, 30696/09, given on 21 January 2011. But, to date, an applicant unable to prove such gross consequences has been unable to persuade that court to treat a failure of state support as a violation of Article 8.

35. Thus in *Andersson and Kullman v. Sweden* (1986) 46 DR 251 the Commission held inadmissible an application by parents for a declaration that Sweden had infringed their rights to respect for their family life under Article 8 by discontinuing payments to them which would have enabled the mother to stay at home to look after their

children and instead by offering free places for their children in a crèche so as to enable her to go out to work. The Commission stated, at 253:

> "… the Convention does not as such guarantee the right to public assistance either in the form of financial support to maintain a certain standard of living or in the form of supplying day home care places."

In my view its reference to "a certain standard of living" was probably a reference to a standard of living above that mandated by Article 3.

36. Furthermore, in *Marzari v. Italy* (1999) 28 EHRR CD 175, the applicant, a sufferer from metabolic myopathy, contended that Italy had infringed his rights under Article 8 by offering him a flat allegedly unsuitable for him rather than by reinstating him in his previous flat, once appropriately adapted. In declaring the application inadmissible the court said, at 179 – 180:

> "… although Article 8 does not guarantee the right to have one's housing problem solved by the authorities, a refusal of the authorities to provide assistance in this respect to an individual suffering from a severe disease might in certain circumstances raise an issue under Article 8 …
>
> … no positive obligation for the local authorities can be inferred from Article 8 to provide the applicant with a specific apartment."

37. In our domestic jurisprudence, by contrast, there *is* an example of a violation of Article 8 by a failure of support. It is the decision of Sullivan J in *R (Bernard) v. Enfield LB* [2002] EWHC 2282 Admin, [2003] LGR 423. The claimants, Mr and Mrs Bernard, lived with their six children in accommodation provided by Enfield. Mrs Bernard suffered from hemiplegia following a stroke. She was scarcely mobile and could not get upstairs. She slept downstairs in the living room with her husband and two of the children. She needed help in getting to the lavatory and often failed to get there in time. Sullivan J held that for 20 months Enfield had failed to discharge its duty under s.21 of the National Assistance Act 1948 ("the Act of 1948") to place her and the family in suitable accommodation. He then turned to consider the alleged violations of Articles 3 and 8. He held, at [30] and [31], that, although the conditions in which the family lived were deplorable and the claim under it was finely balanced, he was not persuaded that Article 3 had been violated. In relation, however, to Article 8, he observed, at [32], that those entitled to care under s.21 were "a particularly vulnerable group", for whom positive measures by way of community care had to be taken in order to enable them to enjoy, so far as possible, a normal private and family life; and he held, at [34], that, in that Enfield's breach of statutory duty had condemned the claimants "to living conditions which made it virtually impossible for them to have any meaningful private or family life", their rights under Article 8 had been infringed.

38. Now I reach the valuable decision of this court in *Anufrijeva v. Southwark LBC* and *R (N) v. SSHD*, [2003] EWCA Civ 1406, [2004] 1 All ER 833. There was a third, linked case which is irrelevant. In *Anufrijeva* Southwark had failed to discharge its duty

under the Act of 1948 to provide accommodation suitable for two parents and for three children, together with a grandmother who was substantially disabled and in extremely poor health. In *N* the SSHD had wrongfully ceased to pay state benefits to an asylum-seeker as a result of which (so far as relevant) he had had to sell all his furniture and kitchen equipment and therefore to sleep on the carpet and to eat cold food. This court held that in neither case was there a violation of Article 8.

39. Very recently, in *Home Office v. Mohammed* [2011] EWCA Civ 351, Sedley LJ, at [10], expressed some doubt *obiter* about the court's treatment of the facts in *N*. The case before him related to the unlawful denial by the Home Office over several years of valid claims to asylum which had substantially handicapped the ability of the claimants to pursue a normal life in the UK; and it was common ground in this court that it was arguable that their rights under Article 8 had thereby been infringed.

40. More important than the particular facts either of *N* or of *Anufrijeva* were the general propositions which this court there advanced. It:

(a) stated at [19] that the ECtHR had always drawn back from imposing on states, by reference to Article 8, the obligation to provide a home or any other form of financial support;

(b) observed at [23] and [24] that our welfare system provided benefits which went far beyond any positive action required by the convention;

(c) commented at [33] that, while in *Marzari*, cited above, the ECtHR had recognised the possibility that Article 8 might in special circumstances require a state to provide positive welfare support such as housing, it had made plain that neither Article 8 nor even Article 3 imposed such a requirement as a matter of course; but

(d) accepted at [35] that, if a failure of support degraded a person's circumstances down to the level identified in Article 3, the latter required that it be provided.

41. The court proceeded at [43] to survey the decision of Sullivan J in *Bernard*. It held that he had been correct to accept that Article 8 was capable of giving rise to an obligation of support and that it had been open to him to hold that, on the facts before him, the article had been violated. The court observed:

> "We find it hard to conceive, however, of a situation in which the predicament of an *individual* will be such that art 8 requires him to be provided with welfare support, where his predicament is not sufficiently severe to engage art 3. Article 8 may more readily be engaged where a *family unit* is involved. Where the welfare of children is at stake, art 8 may require the provision of welfare support in a manner which enables *family life* to continue." (italics supplied).

42. Undaunted by this court's analysis of the basis of the decision in *Bernard*, Mr Presland vigorously and in one sense convincingly presses upon us the appellant's particular vulnerability from 2006 to date with a view to bringing his case within at any rate the terminology there favoured by Sullivan J. In March 2006 the appellant was aged only sixteen; his father was dead; his mother was incapable of continuing to

care for him; he had already suffered at least one criminal conviction; he had recently been excluded from school; and his literacy skills were rudimentary.

43. Although, for reasons already given. Lambeth is to be treated or deemed to have "looked after" the appellant between March and October 2006, it failed, otherwise than in respect of accommodation, to discharge its duties towards him, as a child whom it was looking after, pursuant to ss 22 and 23 of the Act of 1989. When in June 2006 he also became an "eligible child", Lambeth also failed to discharge its duties to prepare a pathway plan for him and to appoint a personal adviser for him pursuant to paragraphs 19B(4) and 19C of Schedule 2 to the Act. From October 2006, when he ceased to be looked after and became a "relevant child", and from April 2007, when, having attained the age of 18, he became a "former relevant child", Lambeth failed to discharge its duties in respect of the plan, of the adviser and, if the circumstances were as there specified, of financial and other support for the appellant pursuant to ss 23B and 23C of the Act. It is in respect of these defaults that the claim for damages is sought to be made.

44. But what would the situation of the appellant have been if Lambeth had discharged its various duties towards him? Or, to put the reverse of the same question, what was the situation of the appellant to which Lambeth's failure to discharge its duties towards him gave rise? He does not contend that from 2006 to date he suffered inhuman or degrading treatment for the purposes of Article 3. It appears that from October 2006, when he ceased to be accommodated by Lambeth, until October 2009, when a possession order was made against him, he was the holder of an assured shorthold tenancy of accommodation granted to him by the YMCA; that from then until December 2009, in response to the threat of these proceedings, Lambeth again provided him with accommodation as a children's services authority; and that since December 2009 it has done so as a housing authority under the Act of 1996. The appellant does not contend that at any material time he was on the streets or lacked the funds with which to subsist.

45. Mr Presland reasonably identifies the necessary enquiry as being into "the likely impact on the Appellant in his private and social and work life of having been given a lawful level of support". But unfortunately for Mr Presland, albeit entirely unsurprisingly, the detailed grounds of claim, including of the claim for damages, afford to him no material whatever with which to identify the likely impact of the provision to the appellant of the requisite support, still less to argue therefrom that the absence of such provision represents a violation of Article 8. It is not good enough for Mr Presland baldly to argue that the provision would be likely to have had some positive effect upon the quality of the appellant's private life. The truth is that these various duties cast by Parliament upon the state to aid the personal development of a person who is or has been an adolescent in need, which raise the bar of welfare provision to him to an appropriately high level, of which we should all be modestly proud and which in my view we should strive to retain in being notwithstanding the state's temporary financial difficulties, are the creature of statute and enforceable on that basis. A failure to discharge the duties might lead to an infringement of that person's right under Article 3; but otherwise the consequences of failure are likely to be – as in this case they certainly are – far too nebulous, far too speculative and, insofar as discernible, far too slight to lead to a conclusion that the failure infringes his right to respect for his private life under Article 8. The duties are not

manifestations of the state's obligation to satisfy the rights of its citizens under Article 8; or, to put the same point in another way, a member state of the Council of Europe which failed to make analogous provisions would not thereby infringe the rights of its citizens thereunder.

46. So, notwithstanding the orders and declaration which I have proposed at [29] above, I suggest that we should refuse to grant the appellant permission to proceed with his claim for damages.

Lord Justice Toulson:

47. I agree.

The Master of the Rolls:

48. I also agree.