Neutral Citation Number: [2017] EWCA CIV 26

Case No: A2/2015/3251

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Sir Robert Francis Q.C. sitting as a deputy High Court Judge
HQ13X03397

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/01/2017

Before :

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
(SIR BRIAN LEVESON)
LORD JUSTICE McFARLANE
LORD JUSTICE BURNETT

- -

Between :

LONDON BOROUGH OF HACKNEY	**Appellant**
- and -	
(1) JOHN WILLIAMS	
(2) ADENIKE WILLIAMS	**Respondent**

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- -

Ali Reza Sinai (instructed by Dawn Carter-McDonald, Legal and Democratic Services, London Borough of Hackney) for the Appellant
Christine Cooper and **Eirwen Pierrot** (instructed by Sky Solicitors, Ilford) for the Respondents

Hearing date : 23 November 2016

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Approved Judgment

Sir Brian Leveson P:

1. Between 5 July and 6 September 2007, the London Borough of Hackney ("Hackney") took the eight children of Mr John Williams and his wife, Mrs Adenike Williams, and, by keeping them in foster care, looked after them. Using different means of complaint, in the 9 years that have followed, the Williams have pursued Hackney though its complaint procedures, the Local Government Ombudsman (which itself involved an application for judicial review) and, thereafter, by means of civil litigation claiming misfeasance in public office, race discrimination, negligence and breach of duty owed pursuant to s. 6 of the Human Rights Act 1998 ("the 1998 Act") and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"). After a trial lasting some 6 days before Sir Robert Francis Q.C., sitting as a deputy judge of the High Court, he dismissed the actions for misfeasance, discrimination and negligence but found that Hackney had failed to comply with its statutory duty under the Children Act 1989 ("the 1989 Act") and were liable to pay damages for breach of Article 8 of the ECHR. Hackney now appeal to this court.

2. Before embarking on an account of the facts or the issues, it is worth introducing the issues in the case by echoing an observation made by Sir Robert in these terms:

> "If ever there was a case illustrating the challenges that face children, parents, public authorities, and the courts when concerns are raised about safety and welfare of children, it is this."

The Facts

3. Mr and Mrs Williams were married and lived in a modest three-bedroom flat with their eight children, aged 14, 12, 11, 9, 7, 5, 2 years and 8 months old: their identities are protected by order of the court. On 5 July 2007, one of the older children was arrested on suspicion of shoplifting chocolate bars. The child told the security guard that he needed money for food; when seen by the police, he said that he had been beaten by his father with a belt, and that this was the explanation for a bruise on his face. Not surprisingly, the police interviewed Mr Williams about what they had been told. At the same time, as the relevant social services department, Hackney, was informed and a social worker attended the police station.

4. As a result of what they had learned, the police visited the Williams' home. The flat was in a poor, unhygienic state, with accumulations of dirt, an absence of food in the fridge, and an extremely dirty toilet; the children appeared dirty and unkempt. Sticks or twigs were found bound together which, at the least, suggested that they may have been used for the purposes of (or to threaten) corporal punishment. In the light of the Sir Robert's findings (not challenged in this court although the subject of contest at trial), it is unnecessary to outline the full extent of what the police and Hackney saw (reflected in photographs taken at or around that time) although it is important to underline the finding that the condition of the flat had not arisen suddenly or only as a consequence of recent difficulties. There is now no suggestion that urgent and immediate action was not merited and, indeed, required.

5. When interviewed, Mr Williams disputed the allegation of violence initially made to the police. He admitted that he did smack his children, but, in the case of three of them, on a few occasions only. He said that he never smacked or used a belt to hit the face of the child who had complained that he had done so; further, responding to a later allegation made by the same child to doctors, Mr Williams said he "did not recollect" punching this child in the face. In relation to a row that had previously occurred, Mr Williams said that he could not remember if the child had any resulting injuries. In a later interview, Mr Williams made no comment, but Mrs Williams stated that there was food for the children in the freezer.

6. In the light of what they had seen, the police decided that the home was not in a fit state to be accommodation for the children, and as a result, they took all eight children into police protection under s. 46 of the 1989 Act. As to the initial complaint, Sir Robert heard the evidence of another child (now adult) who agreed that Mr Williams had hit his children. He concluded:

> "17. … There was, however, evidence before me that he did hit his children in the course of disciplining them. One of the adult children who gave evidence before me agreed that this was so …
>
> 18. I am satisfied on the evidence before me that Mr Williams did administer what he believed to be justifiable discipline to his children, which included on occasion the use of a belt. It is distinctly possible that a belt was used on or shortly before 5 July, although the circumstances and the extent to which it was used cannot now be reliably established …"

7. Sir Robert also expressed himself satisfied that the children presented as possibly neglected, and that the home (described by a social worker as "extremely dirty and unhygienic") was not a suitable environment in which to accommodate children of any age and clearly in an unsuitable state to do so, even if an adult to care for them had been identified. Although the children had a 100% attendance and punctuality record at school, Sir Robert went on that this could not outweigh the strength of the evidence of the actual observations which he considered to have been substantially accurately described by the social worker. He concluded:

> "Further, it was clearly reasonable for her and her colleagues to believe that such a state of affairs could not have come about during a few days or even weeks previously."

8. Thus, the action of the police pursuant to s. 46 of the 1989 Act (which expired after 72 hours) was not and is not criticised. Neither was the fact that both Mr and Mrs Williams were granted bail to return to the police station at a later date, after further inquiries had been undertaken. It is common ground that it was a condition of bail for each parent that no unsupervised contact was permitted with any of the eight children (explained in the order "to prevent interference with victims"). No doubt because of their distressed state at the time, in each case, the bail form was unsigned but marked "incapable" (consistent, Sir Robert concluded, with their evidence that they were in a "dazed state" when they left the police station).

9. Hackney then took all eight children into foster care and Sir Robert found that it was justified in considering that the allegations were evidence of a risk to the safety of the children which social services could not ignore in determining whether to exercise their statutory powers. He went on to say that, throughout the period with which he was concerned, there were no realistic alternatives available and that Hackney had "probably take[n] sufficient steps on 5 July 2007 to satisfy themselves of that position at the time". Over the next three days (before the 72 hour period of police protection expired), Hackney had to decide whether to commence proceedings for an emergency protection order or interim care order (under ss. 44 and 38 of the 1989 Act respectively) or whether to try to work with the parents to resolve the problems that had clearly arisen informally and without bringing statutory powers into play. They decided on the latter course, doubtless because it was less intrusive and more likely to bring about an early resolution of the issues which had generated concern.

10. The next morning, on 6 July, Mr and Mrs Williams went to Hackney and met the involved social workers. Following discussion (the nature and extent of which was itself subject to considerable evidence and challenge), on the face of it, the parents agreed to work with Hackney and signed a form of "safeguarding agreement" which purported to authorise Hackney to continue to accommodate the children away from their parents. The relevant provisions of the document are as follows:

> "This document was drawn up on Friday 6th of July 2007 and is a Safeguarding Agreement concerning the child mentioned above.
>
> This Safeguarding Agreement was drawn up in relation to all of the children. Although the agreement is not legally binding, it may have significance, should there be any court procedures in the future.
>
> We, Mr & Mrs Williams parents to all the above children, agree to the following:
>
> 1. That all the children will remain in their foster placements for the present time.
>
> 2. When contact takes place you will encourage the children to return to their placements and ensure [sic] them that this is a safe place.
>
> 3. That we will behave appropriately while contact is taking place, ie assure the children that we love and care for them, show them affection.
>
> 4. That we will not discuss with any of the children what has happened.
>
> 5. To continue to comply with Hackney Children's Social Care."

In addition to this "agreement", Mr and Mrs Williams signed forms for each of their eight children containing consent for medical treatment, should that be required.

11. Without going into the detailed evidence, it is sufficient to say that, where it conflicted with the account of Mr and Mrs Williams, Sir Robert preferred the account to be gained from contemporaneous records, as supplemented by the evidence of the two social workers who, at the relevant time, were employed by Hackney. However, he noted that Mr and Mrs Williams "were vulnerable people without advice facing two officials vested with the powers of the state to take their children away, possibly indefinitely".

12. Regarding the "agreement", the material facts are that:

    i) Hackney had, as a matter of urgency, found themselves having to accommodate eight children, who themselves were showing signs of distress, against a background of serious allegations of physical abuse, and a home which was at that moment, without doubt, unfit for accommodating children;

    ii) Mr and Mrs Williams were not in a position to offer the care they wanted to without being in breach of the bail conditions;

    iii) Mr Williams stated that he was happy for his children to remain in care but that he preferred to work with Hackney rather than against Hackney;

    iv) Mr Williams stated that Mr and Mrs Williams would agree to the children remaining accommodated and for them all to be medicated as long as they could attend the medicals;

    v) Mr and Mrs Williams completed the section 20 forms (albeit not referred to as such), signed the "agreement" and the forms giving medical consent;

    vi) A social worker for Hackney described that its practice was to explain that there were two options open for Mr and Mrs Williams, either their consent could be obtained, or Hackney could make a court application, but Hackney followed the former approach wherever possible in order to work in cooperation with parents;

    vii) It was possible that it was not explained that Mr and Mrs Williams could withdraw their consent at any time;

    viii) It was made clear that the children would not be returned until the investigation was completed, and that it was assessed that it was safe for the children to do so;

    ix) It may not have been mentioned that there was the option of children staying with family or friends; and

    x) Mr and Mrs Williams' right to take their children home at the end of the 72 hour period of police protection (subject to any application to the court) may not have been explained.

13. Mr and Mrs Williams quickly obtained legal advice and it is abundantly clear that solicitors instructed by Mr Williams (Mrs Williams having instructed different solicitors who did not become involved at this stage) understood what had happened and the legal framework within which Hackney had been operating.

14. On 13 July, Mr Williams' solicitors wrote two letters to Hackney. The first recited their understanding that it had appeared that Mr Williams gave his consent to the children remaining accommodated under s. 20 of the 1989 Act, making it clear that the parents were very keen to have their children returned as soon as it was thought possible, but indicating that they would co-operate with any further assessment. The second letter was in these terms:

> "Mr Williams wishes us to give you formal notice of his intention to withdraw consent to the accommodation of his children under Section 20 of the Children Act 1989. He wishes to continue to work cooperatively with the Local Authority and will therefore agree to their continued accommodation for a further 10 days, to Monday 23rd July 2007 in order that the Local Authority can make any further investigations necessary to plan for the stable rehabilitation of the children to their parent's care."

15. On 16 July, Hackney's Children's Resources Panel ("the Panel") noted:

> "The home was dirty, cluttered, mattresses had foam ripped out, and there was no food or clean clothes. Twigs and canes wrapped together with string were found in each room (allegedly used for beatings) … There were concerns about [sic] eldest child who reported punishments when interviewed. Marks were found on other children but inconclusive. However, with regards [sic] the children's health and their schooling no concerns were raised."

16. The Panel decided that the children should return home, a child protection conference should be held, the police should be spoken to regarding procedure and bail conditions, and the housing association should be spoken to regarding getting the house in order.

17. A note dated 18th July 2007, prepared by a social worker for Hackney, records that:

> "In regard to the family home, Mr Williams told me that the flat has 3 bedrooms, a bathroom, living room and kitchen. He explained that [two female children] are in one room and share a double bed, while [another female child] sleeps in a single bed. He explained that in the other room [two male children] have a single bed and that currently [another two male children] were sharing a single bed … In regard to [the youngest child aged less than one year old] Mr and Mrs Williams told me that she sleeps in their bed. I informed them that for safety reasons, it would be more appropriate for [that child] to have her own cot."

18. An email dated 19 July noted that it had been decided there was not enough evidence for the children to remain in care and the following day Mr Williams' solicitors relayed Mr Williams' understanding that Hackney would be willing to return the children were it not for the bail condition, saying that it would be 'highly unusual' for the police to prevent children from returning home if the return was approved by social services. They made it clear that if it was wished for the children to remain in foster care, they awaited an application for an interim care order to which Hackney responded that it appeared 'highly likely' they would proceed to a hearing.

19. The Panel decided in a further meeting, on 23 July, that Mr and Mrs Williams' bail conditions needed to be resolved/changed in order for the children to return home as soon as possible. Also on that day, Mr Williams' solicitors wrote to Hackney stating that:

> "As of 13th July the London Borough of Hackney were given 10 days written notice that that consent to his children remaining [sic] accommodation was withdrawn as effective from Monday 23rd July … Given that their consent to the children remaining accommodated has been formally withdrawn, giving plenty of notice for you to make other arrangements and, if necessary issue on notice proceedings, you currently have no legal basis upon which to keep these children in the care of the Local Authority."

20. On 24 July, Hackney wrote to Mr Williams' solicitors to the effect that the local authority was in the process of undertaking a s. 47 investigation. The letter went on that:

> "… the outcome of the initial investigation is that the local authority are not minded to take care proceedings and the plan is to return the children home once the investigation is completed and satisfactory responses are received from the initial enquires of the school, health visitor and any other external agencies who are being asked for information …
>
> Unfortunately the local authority are unable to provide you with a date as to when the children will be returned home as we are instructed that the bail conditions that were placed on your clients are that the children should not be left unsupervised with your clients and no unsupervised contact should take place. This therefore has a significant impact on the local authority's plans and abilities to return the children home to your clients.
>
> We therefore trust that your clients will not seek to remove the children from the care of the local authority until clarification can be contained with regards to the police bail conditions."

21. On 31 July, the core assessment of the Panel was that the children were not thought to be at continuing risk of significant harm. There are issues about the accuracy of the

information provided by Hackney to the police in the weeks that followed and, although requested to do so, Hackney did not confirm in writing to the police that the bail conditions were hindering the return of the children. On the contrary, over this period information was passed to the police which, in a number of respects, Sir Robert considered was "substantially inaccurate or was not an adequate basis for concern". Having spoken about the reassuring information that was provided, he observed:

> "However, there remained outstanding serious allegations of physical abuse, and the correction of the appalling state of the family home. The underlying causes of that were far from fully explored. Finally, whatever the theoretical possibilities for accommodating the children in compliance with the bail conditions, I accept the practical reality was that without reliable evidence of satisfactory alternative accommodation, releasing them from foster care arguably gave rise to risks for the children which a court might want to explore. Nonetheless no opportunity was given to a court to consider these matters, and, importantly, to the parents to offer their proposals to an impartial tribunal."

22. Suffice to say that it was only on 6 September that the police agreed to vary the bail conditions and that, although criminal solicitors were engaged by both parents, at no time before then was any application made to the court to vary the terms of police bail. In the event, the children returned to live with their parents on 11 September.

23. At no time have Mr and Mrs Williams challenged the lawfulness of the decisions made by the police, first, to issue the initial act pursuant to s.46 of the 1989 Act, second, as to the conditions attached to bail and, third, to refuse to vary those conditions until 6 September 2007, although they ascribe that refusal to an unwillingness on the part of Hackney to support the change of bail conditions and to the fact (as they contend) that the social workers deliberately misled the police during the course of that summer.

Procedural History

24. On 5 October 2007, after a criminal investigation, Mr and Mrs Williams were charged with, and then indicted on charges of assault occasioning actual bodily harm, common assault (upon one of their sons) and multiple charges of neglect in relation to each of their eight children, all of whom were under 16, with the youngest under two years old. In October 2008, the Crown Prosecution Service ("CPS") decided that it would no longer be in the public interest to require Mr and Mrs Williams' children to testify against their parents. As a result, no evidence was offered, and criminal proceedings were discontinued. Sir Robert noted the observations of the Crown Court judge who said:

> "Whilst there is little doubt that conditions at home were chaotic, the Williams have accepted the help that they were offered and, within a remarkably short period of time, have turned around a difficult and dangerous situation to one where all departments of Social Services are content and positive about the future. In my judgement, this is not a case for

> punishment – the future for this very large family lies in the family staying together and pulling together over the years to come."

25. The parents are, of course, presumed innocent of any criminal offence but it is important to provide the appropriate context for these remarks. At the time that the criminal proceedings were due to come to trial, the children had been returned to their care for over a year and whatever difficulties had been experienced had been resolved. It does not appear that the judge was criticising the investigation or the bringing of charges: he was doing no more than reflecting the obvious sense in that view of the case and the fact that the circumstances were such that criminal intervention by the state was no longer appropriate.

26. Mr and Mrs Williams then complained about how their case was handled by Hackney and started processes which lasted a period of nearly six years and which, at one stage, involved an application, initially pursued in person, for judicial review. The final decision was issued by the Local Government Ombudsman ("LGO") on 22nd April 2013. The upshot of this final review was that Hackney had been at fault in failing to record Mr and Mrs Williams' consent and in failing to explain the process to them.

27. Sir Robert's material findings can be summarised in this way.

    i) Mr Williams did hit his children, at times with a belt, and bearing in mind the condition of their home, Hackney was justified in considering that these allegations and what was evident when the premises were visited constituted evidence of a risk to the safety of the children, which could not be ignored by Hackney when determining whether or not to exercise their statutory powers.

    ii) Police bail conditions, preventing Mr and Mrs Williams from having any unsupervised access to their children, were at least a practical impediment to the return of the children to their parents.

    iii) When entering into an agreement with Hackney, Mr and Mrs Williams had the capacity to understand what they were told and the consequences of the decision they were being asked to make.

    iv) Mr and Mrs Williams were not fully informed when Hackney sought consent to accommodate their children, in particular, that Mr and Mrs Williams retained the right to take their children away from Hackney accommodation at any time.

    v) Throughout the period of care, no realistic alternatives to Hackney accommodation, such as extended family members or friends, were provided by Mr or Mrs Williams for the care of any of the children.

    vi) The overall thinking was that the children needed to be kept in foster care while investigations were completed, and the bail position resolved.

28. Taking the view that Hackney should have apologised for their treatment of them (if for no other reason), Mr and Mrs Williams issued a claim in the High Court, seeking

damages for misfeasance in public office, negligence, religious discrimination and for breach of their Article 8 rights.

29. Dealing first with limitation, having considered the legal position, Sir Robert considered that there was no prejudice to either party arising out of the time that the matter had taken to arrive at the hearing so that it was appropriate to extend the time limit within which the claim under the Human Rights Act 1998 could be brought beyond the primary limitation period of 12 months prescribed by s. 7(5) of the Act. Although nearly six years had elapsed since the relevant events, throughout this period, Mr and Mrs Williams had been attempting to obtain redress through local government complaints and reference to the Local Government Ombudsman.

30. Sir Robert went on to conclude that retention of the children after the initial 72 hour period of police protection was unlawful and, in assessing damages, he took the view that there were facts that made the non-consensual separation of the children from their parents more distressing than would normally be expected. These were that:

    i) one child fractured an arm whilst in foster care, and there was a delay in reporting this to Mr and Mrs Williams;

    ii) another child was burnt by hot water whilst taking a shower; and

    iii) most of the children were moved to different foster carers, several times in two cases, whilst in accommodation provided by Hackney.

31. As I have recounted, in a decision dated 17 September 2015, the only successful claim (which led to an award of £10,000 to each of Mr and Mrs Williams) was pursuant to s. 6 and s. 8 of the Human Rights Act 1998 in relation to breach of statutory duty under the 1989 Act and their rights under Article 8 ECHR. In addition, Hackney was ordered to pay 75% of their costs.

32. Hackney now appeal Sir Robert's conclusions and contend that the continued fostering of the eight children beyond the period of 72 hours (using s. 20 of the 1989 Act) was lawful; that it was inappropriate to extend the limitation period for bringing the Human Rights Act claim and that the damages were, in any event, excessive. There is a supplementary appeal in relation to costs which was adjourned until the resolution of the other grounds of appeal.

The Legislative Framework

33. Having identified the relevant facts found at trial, the law and the appropriate practice both in 2007 and now falls for consideration. Before dealing with the rights and responsibilities of the police, it is appropriate to start with the powers and duties of the local authority.

34. The 1989 Act contains coercive powers but s. 20 is not intended to and does not create powers of compulsion: it falls within Part III of the Act, the essence of which is an emphasis on the fact that the assumption of responsibility for care and the provision of accommodation in these circumstances is voluntary. As it is at the centre of this appeal, it is appropriate to set this provision out in full:

"(1) 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.

(2) Where a local authority provide accommodation under subsection (1) for a child who is ordinarily resident in the area of another local authority, that other local authority may take over the provision of accommodation for the child within—

(a) three months of being notified in writing that the child is being provided with accommodation; or

(b) such other longer period as may be prescribed.

(3) Every local authority shall provide accommodation for any child in need within their area 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.

(4) 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.

(5) A local authority may provide accommodation for any person who has reached the age of sixteen but is under twenty-one in any community home which takes children who have reached the age of sixteen if they consider that to do so would safeguard or promote his welfare.

(6) Before providing accommodation under this section, a local authority shall, so far as is reasonably practicable and consistent with the child's welfare—

(a) ascertain the child's wishes [and feelings] regarding the provision of accommodation; and

(b) give due consideration (having regard to his age and understanding) to such wishes [and feelings] of the child as they have been able to ascertain.

> (7) A local authority may not provide accommodation under this section for any child if any person who—
>
> (a) has parental responsibility for him; and
>
> (b) is willing and able to—
>
> (i) provide accommodation for him; or
>
> (ii) arrange for accommodation to be provided for him, objects.
>
> (8) Any person who has parental responsibility for a child may at any time remove the child from accommodation provided by or on behalf of the local authority under this section.
>
> (9) Subsections (7) and (8) do not apply while any person—
>
> (a) in whose favour a residence order is in force with respect to the child;
>
> (aa) who is a special guardian of the child; or
>
> (b) who has care of the child by virtue of an order made in the exercise of the High Court's inherent jurisdiction with respect to children, agrees to the child being looked after in accommodation provided by or on behalf of the local authority.
>
> (10) Where there is more than one such person as is mentioned in subsection (9), all of them must agree.
>
> (11) Subsections (7) and (8) do not apply where a child who has reached the age of sixteen agrees to being provided with accommodation under this section."

35. As the trial judge correctly identified, s. 20 of the 1989 Act imposes a duty on the relevant local authority to provide accommodation to children if the conditions of subsection (1) or (3) are met; and a discretion to do so if the conditions of subsection (4) or (5) apply. Under s. 20(7), a local authority may not provide accommodation for a child if any person who has parental responsibility for that child objects, and is willing and able to provide accommodation for the child, or arrange for accommodation to be provided.

36. Under section 20(8), anyone with parental responsibility "may at any time remove the child from accommodation provided by or on behalf of the local authority". There is no requirement that notice is given to the local authority of this intention to remove their child from voluntary accommodation. The power of immediate removal maintains the vital distinction between voluntary assumption of care and the provision of accommodation, on the one hand, and compulsory care, on the other.

37. Thus, a local authority cannot prevent the exercise of this parental right to remove the child, even if the right is inappropriately exercised, because this parental right is explicitly granted in statute, by virtue of s. 20(8) of the 1989 Act. Where the local authority considers that this right is being inappropriately exercised, and the child is likely to suffer significant harm, the local authority could apply to the court for the exercise of compulsory powers under an Emergency Protection Order ("EPO") pursuant to s. 44 of the 1989 Act, the relevant parts of which provide:

> "(1) Where any person ("the applicant") applies to the court for an order to be made under this section with respect to a child, the court may make the order if, but only if, it is satisfied that—
>
> (a) there is reasonable cause to believe that the child is likely to suffer significant harm if—
>
> (i) he is not removed to accommodation provided by or on behalf of the applicant; or
>
> (ii) he does not remain in the place in which he is then being accommodated ... ...
>
> (4) While an order under this section ("an emergency protection order") is in force it—
>
> (a) operates as a direction to any person who is in a position to do so to comply with any request to produce the child to the applicant;
>
> (b) authorises—
>
> (i) the removal of the child at any time to accommodation provided by or on behalf of the applicant and his being kept there; or
>
> (ii) the prevention of the child's removal from any hospital, or other place, in which he was being accommodated immediately before the making of the order; and
>
> (c) gives the applicant parental responsibility for the child."

38. Quite apart from the powers and duties of the local authority, s. 46 of the 1989 Act also gives the police power to take coercive action in order to protect children where there is cause to believe they are likely to suffer significant harm. That provision is as follows:

> "(1) Where a constable has reasonable cause to believe that a child would otherwise be likely to suffer significant harm, he may (a) remove the child to suitable accommodation and keep him there …

(2) As soon as is reasonably practicable after taking a child into police protection, the constable concerned shall

(a) inform the local authority within whose area the child was found of the steps that have been, and are proposed to be, taken with respect to the child under this section and the reasons for taking them

(b) give details to the authority within whose area the child is ordinarily resident ("the appropriate authority") of the place at which the child is being accommodated

(c) Inform the child (if he appears capable of understanding)

(i) of the steps that have been taken with respect to him under this section and of the reasons for taking them; and

(ii) of the further steps that may be taken with respect to him under this section

(d) take such steps as are reasonably practicable to discover the wishes and feelings of the child

(e) secure that the case is inquired into by an officer designated for the purposes of this section …

(f) where the child was taken into police protection by being taken to accommodation which is not provided

(i) by or on behalf of a local authority …

secure that he is moved to accommodation which is so provided.

(4) As soon as is reasonably practicable after taking a child into police protection, the constable concerned shall take such steps as are reasonably practicable to inform

(a) the child's parents …

of the steps that he has taken under this section with respect to the child. The reasons for taking them and further steps that may be taken with respect to him under this section

(5) On completing any inquiry under subsection (3)(e), the officer conducting it shall release the child from police protection unless he considers that there is still reasonable cause for believing that the child would be likely to suffer significant harm if released.

> (6) No child may be kept in police protection for more than 72 hours.
>
> (7) While a child is being kept in police protection, the designated officer may apply on behalf of the appropriate authority for an emergency protection order to be made under section 44 with respect to the child.
>
> (8) An application may be made under subsection (7) whether or not the authority know of it or agree to it being made.
>
> (10) Where a child has been taken into police protection the designated officer shall allow
>
> (a) the child's parents …
>
> to have such contact (if any) with the child as, in the opinion of the designated officer, is both reasonable and in the child's best interests.
>
> (11) Where a child who has been taken into police protection is in accommodation provided by or on behalf of the appropriate authority, subsection (10) shall have effect as if it referred to the authority rather than to the designated officer."

39. "Harm" is defined in s. 31(9) as "ill-treatment or the impairment of health or development" including, for example, impairment suffered from seeing or hearing the ill-treatment of another. Whether harm is "significant" is to be determined in accordance with s. 31(10) (see s. 105) which provides:

> "Where the question of whether harm suffered by a child is significant turns on the child's health or development, his health or development shall be compared with that which could reasonably be expected of a similar child."

40. It was common ground at trial that a child cannot be kept in police protection for more than 72 hours. Should a longer period of time be necessary, the police, the local authority or, indeed, 'any person' may apply for an EPO: see s. 44(1) of the 1989 Act. Alternatively, the local authority (or the NSPCC) may issue care proceedings under s. 31 and apply within those proceedings for an interim care order under s. 38 of the 1989 Act.

41. Before passing from the relevant legislation, it is worth adding that bail was granted to Mr and Mrs Williams by the relevant custody officer pending further investigation: this was pursuant to s. 37 of the Police and Criminal Evidence Act 1984 ("PACE 1984"); the conditions were imposed by virtue of s. 47 the same Act. Breach of a condition of bail is not a criminal offence, however, the police may re-arrest any person who breaches the terms of his or her bail; this can lead to a remand in custody or a further grant of bail on the same or different conditions. It is also relevant to this appeal that the police may vary the conditions upon which the custody officer has granted bail and, at any time, Mr and Mrs Williams had the right to apply to a

magistrates' court to vary their conditions of bail: see s. 47(1D) and (1E) of PACE 1984. Their solicitors were well aware of his right and referred to it in correspondence although it is important to recognise that they (like the Williams) are likely to have wanted to reach an accommodation with the police and Hackney rather than become involved in contentious proceedings.

Section 20 Accommodation: Judicial Guidance

42. The thrust of the case advanced by Mr and Mrs Williams was that Hackney's use of s. 20 of the 1989 Act was unlawful. Although on the face of it, by the document signed on 6 July 2007, Mr and Mrs Williams had consented to their children remaining in foster placements "for the present time", this consent, they argued, was unfairly obtained and not true consent of any sort. To that end, they relied on the guidance provided in *Coventry City Council v C* [2013] EWHC 2190 (Fam) per Hedley J. Given its importance to this case, it will be necessary to analyse the judgment of Hedley J in some detail, but before doing so I need to refer to the significant decision by Munby J in *R (G) v Nottingham City Council and Nottingham University Hospitals NHS Trust* [2008] EWHC 400 (Admin) which preceded it.

43. In early 2008 Munby J (as he then was) considered s. 20 of the 1989 Act in the context of the actions of a local authority and health professionals who had removed a new born baby from his mother, without any court order, soon after birth. Following an urgent hearing within judicial review proceedings which dealt with the pressing issue of immediate arrangements for the baby's care, Munby J gave a short reserved judgment ([2008] EWHC 152 (Admin)) in which he offered a brief summary of the legal structure governing the removal of a child from parental care which included the following (at paragraph 15):

> 'The law is perfectly clear but requires re-emphasis. Whatever the impression a casual reader might gain from reading some newspaper reports, no local authority and no social worker has any power to remove a child from its parent or, without the agreement of the parent, to take a child into care, unless they have first obtained an order from a family court authorising that step: …'

44. Following a further hearing in the Administrative Court, Munby J delivered a more substantial judgment (*R (G) v Nottingham City Council and Nottingham University Hospitals NHS Trust* [2008] EWHC 400 (Admin)) in which the local authority case was described as being in part based upon an assertion that removal was justified under s. 20(7) because the mother did not 'object'; a proposition that was roundly dismissed by the judge. It is worth setting out the relevant parts of this judgment extensively:

> '48. Against this asserted factual background it was submitted on behalf of the local authority that the birth plan was a plan to accommodate K within the meaning of section 20 of the Children Act 1989, that it was "not opposed by the mother", that in these circumstances K was being accommodated by the local authority within the meaning of section 20, and that

accordingly the period of accommodation was not unlawful as a matter of domestic law.

…

51. … there seemed to me to be a much more fundamental objection to the case which the local authority was seeking to advance. The argument that K had been lawfully accommodated by the local authority with the *consent* of the mother was in reality founded on nothing more than the assertion that the mother knew and understood the details of the birth plan (in both its original and its amended form) and that she did not "raise objection" to it, just as it was likewise asserted that, following the birth, she had not "raised objection" to the removal of her new-born baby.

52. No authority of any kind was produced in support of these surprising propositions, that a mother could be said to have given her consent to the removal of her baby merely because, knowing of the local authority's plan, she did not object to it and because, when the moment of separation arrived, she did not actively resist. I am not surprised. They are, with respect to those propounding them, as divorced from legal substance as they are remote from the emotional – and dare a man be permitted to say it – the hormonal realities of the human condition. Our law has long recognised that women in the aftermath of birth may not be as able to act wisely as at other times. It is, after all, compassionate regard for those realities which underlies statutory provisions as disparate as section 1 of the Infanticide Act 1938 and section 52(3) of the Adoption and Children Act 2002.

53. I do not wish to be misunderstood. I am not suggesting that consent to the accommodation of a child in accordance with section 20 is required by law to be in writing – though, that said, a prudent local authority would surely always wish to ensure that an alleged parental consent in such a case is properly recorded in writing and evidenced by the parent's signature. Nor am I disputing that there may be cases where a child has in fact, and without parental objection, been accommodated by a local authority for such a period as might entitle a court to infer that the parent had in fact consented.

54. But the local authority here seemed to be going far beyond this. It seemed to be conflating absence of objection with actual consent – a doctrine which at least in this context is, in my judgment, entirely contrary to principle and which, moreover, contains within it the potential for the most pernicious consequences, not least because there are probably many mothers who believe, quite erroneously, that a local authority

> has power, without any court order, to do what the local authority did in this case.
>
> 55. To equate helpless acquiescence with consent when a parent is confronted in circumstances such as this with the misuse (or perhaps on another occasion the misrepresentation) of non-existent authority by an agent of the State is, in my judgment, both unprincipled and, indeed, fraught with potential danger.
>
> 56. What the local authority and the NHS Trust did to G and K was unlawful absent consent by G. Let it be assumed that G did not object … As I observed during the hearing, the fact that she did not object does not mean that she consented. Even on the local authority's own case the fact is that G did not consent.'

On the basis of that analysis of the law, Munby J went on to grant the application for judicial review and to declare that the local authority's action in removing the baby had been unlawful.

45. It was four years after the *Nottingham* case that Hedley J was also required to consider the legality of the removal of a baby from her mother at birth in the *Coventry City Council* case which featured prominently in the present decision. The case before Hedley J concerned a young mother ("C") described as being vulnerable and devoid of any parenting instinct or intuition. She had three children who, having been subject of placement orders, had been placed for adoption. When she became pregnant again, to the knowledge of C (and her solicitor), the local authority decided that the child would be removed before C was discharged from hospital. When admitted to hospital as an emergency, however, C had to consent to life-sustaining surgery, consider whether to accept pain relief including morphine (to which she thought she was allergic) and whether to consent under s. 20 of the 1989 Act. She consented to the operation but, at some stage, prior to agreeing to pain relief, refused s. 20 consent. At that stage, C did not have legal advice: although her solicitor knew of her admission to hospital, the attempts that the solicitor made to contact her failed. Hedley J observed that the social worker was encouraging her to give consent and a friend similarly encouraged her. Having eventually agreed to pain relief and been given morphine, when calmer and more comfortable, C did provide s. 20 consent.

46. At paragraphs 25 to 28 of his judgment Hedley J summarised the policy underpinning s. 20 of the 1989 Act as follows:

> '25. Section 20 appears in Part III of the Act; that Part is entitled 'Local Authority support for children and families.' With the exception of Section 25 that Part contains no compulsive powers. Those are found in Parts IV (Sections 31-42) and V (Sections 43-52). The emphasis in Part III is on partnership and it involves no compulsory curtailment of parental responsibility.
>
> 26. All parties accept the importance of this and acknowledge that any attempt to restrict the use of Section 20 runs the risk

> both of undermining the partnership element in Part III and of encroaching on a parent's right to exercise parental responsibility in any way they see fit to promote the welfare of their child. I recognise and accept that.
>
> 27. However, the use of Section 20 is not unrestricted and must not be compulsion in disguise. In order for such an agreement to be lawful, the parent must have the requisite capacity to make that agreement. All consents given under Section 20 must be considered in the light of Sections 1-3 of the Mental Capacity Act 2005.
>
> 28. Moreover, even where there is capacity, it is essential that any consent so obtained is properly informed and, at least where it results in detriment to the giver's personal interest, is fairly obtained. That is implicit in a due regard for the giver's rights under Articles 6 and 8 of the European Convention on Human Rights.'

47. Hedley J considered the view of the social worker who decided that the mother had capacity (about which he expressed surprise: see [41]). He referred to the need for informed consent and the involvement of her solicitor ([43-44]). He then offered guidance to social workers in respect of obtaining consent under s. 20 "from a parent … immediately or soon after birth". This guidance, which was seen and (by implication) approved by Sir James Munby P before judgment was handed down ([2]), was in these terms (at [46]):

> "The following can perhaps be offered as the more important aspects –
>
> i) Every parent has the right, if capacitous, to exercise their parental responsibility to consent under Section 20 to have their child accommodated by the local authority and every local authority has power under Section 20(4) so to accommodate provided that it is consistent with the welfare of the child.
>
> ii) Every social worker obtaining such a consent is under a personal duty (the outcome of which may not be dictated to them by others) to be satisfied that the person giving the consent does not lack the capacity to do so.
>
> iii) In taking any such consent the social worker must actively address the issue of capacity and take into account all the circumstances prevailing at the time and consider the questions raised by Section 3 of the 2005 Act, and in particular the mother's capacity at that time to use and weigh all the relevant information.
>
> iv) If the social worker has doubts about capacity no further attempt should be made to obtain consent on that occasion and

advice should be sought from the social work team leader or management.

v) If the social worker is satisfied that the person whose consent is sought does not lack capacity, the social worker must be satisfied that the consent is fully informed:

a) Does the parent fully understand the consequences of giving such a consent?

b) Does the parent fully appreciate the range of choice available and the consequences of refusal as well as giving consent?

c) Is the parent in possession of all the facts and issues material to the giving of consent?

vi) If not satisfied that the answers to a) – c) above are all 'yes', no further attempt should be made to obtain consent on that occasion and advice should be sought as above and the social work team should further consider taking legal advice if thought necessary.

vii) If the social worker is satisfied that the consent is fully informed then it is necessary to be further satisfied that the giving of such consent and the subsequent removal is both fair and proportionate.

viii) In considering that it may be necessary to ask:

a) what is the current physical and psychological state of the parent?

b) If they have a solicitor, have they been encouraged to seek legal advice and/or advice from family or friends?

c) Is it necessary for the safety of the child for her to be removed at this time?

d) Would it be fairer in this case for this matter to be the subject of a court order rather than an agreement?

ix) If having done all this and, if necessary, having taken further advice (as above and including where necessary legal advice), the social worker then considers that a fully informed consent has been received from a capacitous mother in circumstances where removal is necessary and proportionate, consent may be acted upon.

In the light of the foregoing, local authorities may want to approach with great care the obtaining of Section 20 agreements from mothers in the aftermath of birth, especially where there is

> no immediate danger to the child and where probably no order would be made."

48. Although obviously highly relevant to any consideration of the exercise of power under this section, it is important to underline the circumstances in which these principles came to be enunciated and the critical importance of identifying the guidance as good practice which does not, in fact, have the force of law. This guidance was issued six years after the events with which this case has been concerned and Hedley J emphasised that his observations were focused on the situation where guidance was appropriate in relation to a s. 20 consent being obtained from a parent to the removal of a child immediately or soon after birth (see [29], [45] and [46]) particularly where there are issues of capacity and vulnerability of the parent (who, in that case, was recovering from the effect of giving birth).

49. The circumstances in this case, however, were very different. Thus:

    i) Mr and Mrs Williams were married adults, supporting each other, with capacity to consent;

    ii) They were the subject of criminal allegations in circumstances when their home was simply not fit to accommodate their children and they were unable to arrange alternative accommodation;

    iii) In any event, the conditions of their bail (as then prevailing), prevented them from accommodating their children;

    iv) Given all the circumstances, it is difficult to see what argument could have been erected at that time against the making of an EPO or an interim care order had the Williams refused to provide consent;

50. Further, Hedley J was particularly concerned that the parent did not have the benefit of legal advice. He made it clear that a social worker "must have regard to the vulnerability of the parent" and that "the failure to encourage the mother to speak to her solicitor may also have affected fairness" (see [44]). In this case, 6 July 2007 was a Friday and, on any showing, Mr and Mrs Williams obtained legal advice from a firm of solicitors shortly thereafter. These solicitors were aware that Mr Williams' children were being accommodated under s. 20 of the 1989 Act, and were clearly in a position to advise Mr and Mrs Williams of their right to withdraw consent. In the correspondence that followed, although it was contended that Hackney had no lawful authority to retain the children after notice of objection was given under s. 20(7), there was no challenge to the basis of or the circumstances in which consent had been obtained.

51. On the other hand, one further point needs to be made. Having provided the caveat that "the balance of this judgment is essentially limited to that situation, the one that arose in this case," Hedley J offered, at [29], that "some observations will have a more general application". He went on to say that "willingness to consent cannot be inferred from silence, submission or even acquiescence"; it was, he said, "a positive stance" (see [44]). It follows that a solicitor's letter cannot ratify consent retrospectively and that acquiescence does not amount to an agreement.

52. In the period since the *Coventry City Council* case, the use of s. 20 has been considered in this court in three cases. These are: *Re B (Looked after child)* [2013] EWCA Civ 964 (sub nom *Redcar and Cleveland Borough Council v Others*); *Re W (Children)* [2014] EWCA Civ 1065; and *Re N (Adoption: Jurisdiction)* [2015] EWCA 1112. It is necessary to consider, albeit in short terms, aspects of the judgments in each of these three cases at this stage.

53. The issue in *Re B (Looked after child)* concerned local authority funding with respect to a child who was living with her grandparents under an interim residence order. The grandparents argued that the child had been placed with them under s. 20 and that they were entitled to funds from the local authority on the basis that she was a 'looked after child' under s. 22 of the 1989 Act; the local authority resisted that argument. On the facts of the case, Black LJ, giving the lead judgment with which Richards LJ and I agreed, concluded that at all times the parents were objecting to the local authority providing accommodation for their child and therefore, because of s. 20(7), the placement could not have been under s. 20. In terms of clarification or development of the law, the decision in *Re B*, which focusses on 'objection' rather than express 'consent', does not stray beyond the clear wording of the Act. What is of note, however, is the passing observation made by Black LJ (at [34]) in these terms:

> "I raised the question during the appeal hearing as to whether a parent who is inadequate is in fact "willing and able to …provide accommodation" but it did not excite much argument. That is explained, I think, by there being a common understanding that where parents in fact object to a local authority providing accommodation, a local authority will have to have recourse to care proceedings if they seek to accommodate a child and any debate as to whether the parents are "able" to provide accommodation is to be had in that context, not in the context of section 20. That accords with the overall structure of the Children Act 1989 and is the interpretation I would presently support. It follows that section 20(7)(b)(i) covered the situation here, but even if it did not, section 20(7)(b)(ii) did because the parents were willing and able to arrange for the grandparents to provide accommodation."

Black LJ's observation again underlines that her approach which was to focus on whether a parent 'objects' rather than a positive requirement of express consent.

54. In *Re W (Children)* [2014] EWCA Civ 1065 the issue, once again, related to children who were living with their grandparents. Sir James Munby P, giving the lead judgment, having identified (at [20]) four separate potentially significant issues, concluded ([23]) that the appeal could be disposed of by focussing on only one ground, namely, whether the judge should have adjourned the case to obtain a welfare report, which therefore has no legal relevance to the issue that is now before this court. Before concluding his judgment, Sir James did, however, go on to say something about another of the identified issues which did concern s. 20. The parents had been required to sign an 'Agreement' which included the phrase 'this is not a legal agreement however; [sic] it may be used in court as evidence if needed'. The local authority had declined the court's invitation to intervene and Sir James recorded

that their absence made it impossible to get to the bottom of the issues relating to s. 20 that had been raised. He did however deprecate the wording of the 'Agreement' with the implied threat as to court proceedings that it contained, thereby endorsing Hedley J's observation in the *Coventry* case [paragraph 27] that the use of s. 20 'must not be compulsion in disguise'. Sir James went on to say [paragraph 34]:

> '… any such agreement requires consent, not mere "submission in the face of asserted State authority' (quoting from his own judgment in the *Nottingham* case at paragraph 61 and Hedley J in the *Coventry* case at paragraph 44).

55. Black LJ agreed with the judgment of the President, as did Tomlinson LJ who added (at [41]):

> 'It may not have been intended in this way, but the "Agreement" … is to my mind almost comical in the manner in which it apparently proclaims that it has been entered into under something approaching duress. The mother's consent was needed – or putting it another way the local authority could not "place" the children with the paternal grandmother if the mother objected: section 20(7). The preamble to the Agreement engagingly acknowledges that the Agreement has been "complied" (sc imposed?) for the purpose of ensuring that the mother does not object to the children being accommodated with their paternal grandmother. There must be a suspicion that the reason that the mother did not object was because she was made to understand that if her agreement was not forthcoming, public law proceedings would have been instigated. I cannot believe that section 20 was enacted in order to permit a local authority to assume control over the lives of the mother and her children in this way.'

56. The third recent Court of Appeal decision to have considered s. 20 is *Re N (Adoption: Jurisdiction)* [2015] EWCA 1112; a wide-ranging case that was principally focussed upon the court's jurisdiction to make placement for adoption orders with respect to foreign national children. Any issue concerning s. 20 was therefore peripheral and arose from the fact that the local authority had not issued care proceedings for some eight months, but had maintained the children in s. 20 accommodation in foster care during that period. Where, (at [63]), Sir James Munby P listed the six issues that arose for determination; s. 20 did not feature in that list and only came to be referred to under the heading of 'other matters' at [157] onwards. The President cited a number of recent first instance decisions (including the present case) in which local authorities had been held to have misused the statutory powers conferred by s. 20 rather than bringing the case to court in care proceedings.

57. At [162], the President identified that the recent case-law illustrated some four separate problems which are 'all too often seen in combination'. Drawing a list from the judgment, adumbrated for ease of reference, these were:

a) Failure by the local authority to obtain informed consent from parent(s) at the outset;

b) The form in which the consent is recorded;

c) Arrangements under s. 20 being allowed to continue for too long;

d) Reluctance of local authorities to return children to parents immediately upon a withdrawal of parental consent.

For the purposes of this appeal, it is items (a) and (d) on that list which are of primary interest.

58. In relation (a) Sir James identified the problem (at [163]) as follows:

> 'The first relates to the failure of the local authority to obtain informed consent from the parent(s) at the outset. A local authority cannot use its powers under section 20 if a parent "objects": see section 20(7). So where, as here, the child's parent is known and in contact with the local authority, the local authority requires the consent of the parent. We dealt with the point in *Re W (Children)* [2014] EWCA Civ 1065, para 34:
>
> > "as Hedley J put it in *Coventry City Council v C, B, CA and CH* [2012] EWHC 2190 (Fam), [2013] 2 FLR 987, para 27, the use of section 20 "must not be compulsion in disguise". And any such agreement requires genuine consent, not mere "submission in the face of asserted State authority": *R (G) v Nottingham City Council and Nottingham University Hospital* [2008] EWHC 400 (Admin), [2008] 1 FLR 1668, para 61, and *Coventry City Council v C, B, CA and CH* [2012] EWHC 2190 (Fam), [2013] 2 FLR 987, para 44."

He then stated that in this connection 'local authorities and their employees *must* heed the guidance set out by Hedley J' (emphasis in original) in the *Coventry* case.

59. In relation to item (d), after setting out the terms of s. 20(8), Sir James stated (at [169]):

> 'This means what it says. A local authority which fails to permit a parent to remove a child in circumstances within section 20(8) acts unlawfully, exposes itself to proceedings at the suit of the parent and may even be guilty of a criminal offence. A parent in that position could bring a claim against the local authority for judicial review or, indeed, seek an immediate writ of habeas corpus against the local authority. I should add that I am exceedingly sceptical as to whether a parent can lawfully contract out of section 20(8) in advance, as by agreeing with the local authority to give a specified period of notice before exercising their section 20(8) right.'

60. In conclusion, Sir James set out further requirements of good practice, in addition to those identified by Hedley J before stating [171]:

> 'The misuse and abuse of section 20 in this context is not just a matter of bad practice. It is wrong; it is a denial of the fundamental rights of both the parent and the child; it will no longer be tolerated; and it must stop. Judges will and must be alert to the problem and pro-active in putting an end to it. From now on, local authorities which use section 20 as a prelude to care proceedings for lengthy periods or which fail to follow the good practice I have identified, can expect to be subjected to probing questioning by the court. If the answers are not satisfactory, the local authority can expect stringent criticism and possible exposure to successful claims for damages.'

61. The concurring judgments of the other members of the court, Black LJ and Sir Richard Aikens, made additional observations upon certain of the issues in the case but did not expressly deal with s. 20 of the 1989 Act.

Children Act 1989, s. 20: Discussion

62. Having now reviewed the existing case-law, all of which post-dates the removal of Mr and Mrs Williams' children in 2007, it is necessary to determine what, as a matter of law, as opposed to subsequently identified good practice, was required before the local authority were permitted to accommodate the Williams children under s. 20 of the 1989 Act.

63. The starting point must be the wording of the statute itself. Subject to the provisions relating to parental objection and/or removal in s. 20(7) and (8), the question is whether, upon the expiry of the period of police protection, s. 20(1)(c) applied to the Williams children in that the person who had been caring for them was 'prevented (whether or not permanently, and for whatever reason) from providing [them] with suitable accommodation or care' as a result of the bail conditions. If the relevant parent was so prevented, the local authority was under a duty ('shall provide') accommodation for the children (again subject to parental objection and/or removal) by virtue of s. 20(1).

64. It is next necessary to consider s. 20(7) which (to repeat for convenience) is in the following terms:

> '(7) A local authority may not provide accommodation under this section for any child if any person who:
>
> (a) has parental responsibility for him; and
>
> (b) is willing and able to:
>
> (i) provide accommodation for him; or
>
> (ii) arrange for accommodation to be provided for him,
>
> objects.'

65. A number of points arise with respect to s. 20(7). Firstly, where the circumstances described in the sub-section apply, there is a bar upon a local authority providing accommodation for a child under s. 20.

66. Secondly, for s. 20(7) to apply, the person with parental responsibility must be 'willing and able' to provide, or arrange for, accommodation. In the present case there was no suggestion from the parents of any alternative private arrangement for accommodation other than a return to their direct care. The issue in the case is whether, as a consequence of the bail conditions, they were 'able' to accommodate themselves back in the family home.

67. The reason for the parents being 'prevented' (for the purposes of s. 20(1)(c) of the 1989 Act) from caring for the children was that it was a term of their bail that they had no unsupervised contact with them. This was a condition lawfully imposed on their bail and which, over the weeks following the expiry of police protection, was not the subject of any application to the court for its discharge (as it could have been). These were proceedings over which the local authority had no control and were not even parties. It is sufficient to say that, in my judgment, it would have been wrong for the local authority to conduct itself in a way that was inconsistent with what was known to be a term of the parents' bail. Furthermore, at least at the beginning, the accommodation was not 'suitable' for the purposes of s. 20(1)(c) because of its state.

68. The third point to make with respect to s. 20(7) is of more general application and relates to the single word 'objects'. The word 'consent' does not appear within s. 20. There is no express statutory requirement upon a local authority to obtain a positive expression of consent from a parent before accommodating a child under the various provisions in s. 20(1), (3), (4) and (5), let alone any requirement for such consent to be in writing and subject to any of the various refinements that have been described in the case-law to which I have referred. Nothing that is said in this judgment is intended in any manner to detract from or alter the terms of the good practice guidance that has been given, principally by Sir James Munby P and Hedley J, in these cases; the obvious wisdom and good sense of their words are plain to see. The present case is, however, a claim for damages pursuant to s. 8 of the Human Rights Act 1998, in relation to breach of statutory duty under s. 20 of the 1989 Act and breach of rights under Article 8 of the ECHR. Insofar as breach of statutory duty under s. 20 is concerned it is necessary, in my view, for a claimant to go further than establishing that the actions of the local authority fell short of what, subsequently identified, 'good practice' might require; the authority must be seen to have acted in breach of the terms of the statute.

69. It is therefore necessary to consider whether the previous case-law has authoritatively held, in a manner that is binding on this court, that positive parental consent is required, as a matter of construction of the statute, before a local authority may accommodate a child under s. 20. In terms of first instance decisions, the judgment of Munby J at paragraphs 48 to 56 of the *Nottingham* case dismisses the local authority argument based upon a lack of parental objection and holds that what is required is parental consent (albeit that, as a matter of law, it is said that such consent is not required to be in writing and might, in circumstances, even be implied). On the face of it, Munby J's decision on this point may have been determinative and have led to his overall conclusion that the local authority acted unlawfully. It is perhaps unfortunate, however, that the judgment does not descend to consideration of the statutory wording

of s. 20(7), which is not set out, and does not engage with the fact that it is the word 'objects' that is used (and upon which the local authority presumably relied) as opposed to the word 'consent' which was held to be what the statute requires.

70. The need for 'consent' having been established in the *Nottingham* case, it is of no surprise, particularly given the respect and authority that will have been afforded to a judgment of Munby J, that no issue has, apparently, been taken on the point until the present appeal and that judges of the Family Division have approached their decisions on that basis. The guidance offered by Hedley J, with the apparent approval and subsequent endorsement of Sir James Munby as President of the Division, was built upon the premise that express consent was required.

71. Of the three Court of Appeal decisions, the judgment of Black LJ in *Re B* falls squarely within the language of s. 20(7) with the focus on 'objects' rather than consent. In *Re W*, whilst the court plainly deprecated the form and wording of the purported written 'Agreement', any issue relating to s. 20 was expressly not concluded in those proceedings firstly because the appeal was determined on an entirely different basis and secondly because the absence of the local authority robbed the court of the opportunity for full argument.

72. Finally, in *Re N*, the judgment of Sir James Munby P does repeat his conclusion that parental consent is required by the statute; this can most conveniently be seen from two sentences (from [163]):

> "A local authority cannot use its powers under section 20 if a parent "objects": see section 20(7). So where, as here, the child's parent is known and in contact with the local authority, the local authority requires the consent of the parent."

73. In considering this passage in the President's extensive judgment in *Re N*, it is necessary to be clear that any issues relating to s. 20 were very much at the periphery of that case, the focus of which was the jurisdiction of the English Family Court to make orders leading to adoption with respect to foreign nationals. It seems plain that the section of the judgment as to the working out of arrangements for s. 20 accommodation arose from concern, evidenced by a raft of recent first instance decisions, as to social work practice in general. No issue in the case of *Re N* turned on the interpretation of s. 20, or, indeed, on any matter with respect to s. 20. It is apparent that Sir James was using the opportunity provided by the fact that the children in *Re N* had been accommodated for eight months before the local authority issued care proceedings as a hook upon which to hang some, no doubt timely, firmly worded and important good practice guidance. Despite the respect that this court undoubtedly has for the opinion of a judge of such authority on these matters, the short judicial statement (in [163]) following a hearing at which the interpretation of s. 20 was not in issue cannot be binding upon this court where the focus is directly upon s. 20 and where there has been full argument.

74. I recognise that, in the context of the cases that he was then considering, it may well have been appropriate for Sir James to equate the obligation on a local authority not to use its powers under section 20 if a parent 'objects' as meaning, effectively, that when the parent is known and in contact with the authority, consent is required but, in my judgment, it would be wrong to elevate the requirement of consent into a rule of law

that operates in all circumstances. In this case, the parents had the benefit of solicitors experienced in both family and criminal law. Their ability to apply to remove the prohibition on contact with the children was well known and emphasised by the solicitors in correspondence. The local authority was not responsible for the bail condition and had no obligation to take proactive steps to have it removed. If the solicitors had wanted the local authority to express a view, an appropriate official could have been requested to do so by the court or been the subject of a witness summons to attend.

75. On any showing, it was not for the local authority to aid and abet the flouting of the bail condition and it is not sufficient to argue that the local authority should have sought to persuade the police to modify the condition. The only inference to be drawn from the fact that the condition remained in place was that the parents (no doubt on advice) were prepared to negotiate with the police rather than risk a conflict in court. In those circumstances, for the period that the bail condition remained in place, they were not in a position to provide accommodation for them within s. 20(7)(b)(ii) of the 1989 Act and were thus not in a position legally to object whether or not they formally consented.

76. Thus, the continued existence of the bail condition had the twin consequence that Mr and Mrs Williams, firstly, were 'prevented … for whatever reason' from providing suitable accommodation and care for their children (s 20(1) of the 1989 Act) and, secondly, were not 'able' to provide accommodation for them in order to trigger their statutory right to object (s 20(7) *ibid*). It is entirely understandable that Sir Robert felt constrained by the weight of the decisions to which I have referred to conclude that s. 20 of the 1989 Act required Hackney to prove informed consent to the continued separation of the children from their parents. In my judgment, he was wrong to do so, not least because the statute does not require such consent to be established. In the circumstances, I would reverse his finding that the retention of the children after the period of 72 hours was unlawful and, equally, that such retention constitutes a breach of the parents' Article 8 rights. On the basis of the lawfully imposed bail conditions, the interference was in accordance with the law and necessary for the protection of the health or the rights and freedoms of others. It follows that there was no breach of s. 6 of the 1998 Act and damages should not have been awarded under s. 8.

77. Before passing from the issue of s. 20 of the 1989 Act and consideration of the guidance given by Sir James Munby P, Hedley J and others in the Family Division cases to which I have referred, I wish to stress that nothing that is said in this judgment is intended to, or should be read as, altering the content and effect of that guidance in family cases. The focus of the court in the present appeal is on the bottom-line legal requirements that are established by s 20 and within which a local authority must act. The guidance given in the family court, which has built upon that bottom-line in the period since the Williams' children were removed, identifies clear, cooperative and sensible ways in which a voluntary arrangement can be made between a parent and a local authority when a child may need to be accommodated; it is, in short, good practice guidance and a description of the process that the family court expects to be followed. For reasons of good administration, the practice guidance should continue to be followed, notwithstanding the limits of the underlying legal requirements in s 20 that I have identified but a failure to follow it does not, of itself, give rise to an actionable wrong, or found a claim for judicial review.

Limitation

78. Although s. 7(5)(a) of the 1998 Act prescribes a period of one year for proceedings to be commenced, beginning with the date on which the act complained of took place, s. 7(5)(b) permits the extension of that year to such longer period as the court or tribunal considers equitable having regard to all the circumstances. Sir Robert considered it equitable to extend time on the basis that the final decision of the Local Government Ombudsman was issued less than three months before proceedings were commenced and it was "reasonable for [the Williams] to await the final outcome of the process before issuing these proceedings". He explained:

> "One of the complaints considered was the alleged failure to return the children when the parents 'withdrew their consent' referred to as 'complaint 3' within the Ombudsman's report. The Ombudsman's conclusion was that [Hackney] had been at fault in failing to record the [parents'] consent and in failing to explain the process to them. While this outcome did not entirely satisfy the [parents], there was a sufficient overlap with the subject matter of this claim for it to have been justifiable to await the Ombudsman's final decision. Furthermore, the continuation of the complaints process meant that [Hackney] had a continuous reason to maintain their records and indeed recollections of this case."

79. Sir Robert accepted that recollection will have been hampered "to some extent" by the passage of time but observed that it had been very largely possible to assess the merits of the claim by reference to Hackney's documentation. Finally, he considered the evidence of breach sufficiently cogent to justify the claim being brought out of time; "their entitlement to a remedy outweighs such prejudice as may exist".

80. On behalf of Hackney, it is argued that there was good reason for not encouraging extensions of statutory time limits because of a complaint to the Local Government Ombudsman because additional delays were inconsistent with the purpose of a limitation period in the first place. They were particularly difficult for local authorities which were involved in the costly and time consuming process created by the Ombudsman and, given that the process is free and easy to initiate, there was no incentive to do otherwise than pursue it. The time taken was outside the local authority's control and given that the investigating officers were not necessarily legally trained, they could not resolve complex issues of fact or law. Without the powers available in litigation or the power to award remedies available to the court, and without being binding, there was no justification for concluding that the outcome would achieve closure. All these features were evident in this case which was prolonged by repeated complaints and judicial review.

81. Furthermore, it is submitted that there was, in fact, prejudice in this case. By the time the litigation had been commenced, disclosure from Mr Williams' then solicitors produced very little in relation to communications with the police and nothing from the police (all of which were highly material to the issues in the case). Mrs Williams' original solicitors' file was not located and therefore nothing from them was available. Further, there are some issues as to Sir Robert's findings on the oral evidence.

82. On behalf of Mr and Mrs Williams, it is argued that Sir Robert was perfectly entitled to exercise his discretion in the way that he did. Furthermore, Ms Cooper referred to *R (Anufrijeva) v London Borough of Southwark* [2003] EWCA Civ 1406 as authority for the proposition (in the context of judicial review) that where damages are sought under the 1998 Act, a complaint to the LGO should be preferred to litigation, at least in the first instance.

83. That decision was the first to be concerned with the power to award damages under the 1998 Act and, in the part of the judgment to which reference has been made, the disproportionate nature of the costs involved in pursuing what would be comparatively modest damages. The full citation (from which Ms Cooper extracts only part) is:

> "80. The reality is that a claim for damages under the HRA in respect of maladministration, whether brought as a free-standing claim or ancillary to a claim for other substantive relief, if pursued in court by adversarial proceedings, is likely to cost substantially more to try than the amount of any damages that are likely to be awarded. Furthermore, as we have made plain, there will often be no certainty that an entitlement to damages will be established at all.
>
> 81. What can be done to avoid a repetition of this situation in future proceedings? Based on the experience available at present we suggest as follows in relation to proceedings which include a claim for damages for maladministration under the HRA:
>
> i) The courts should look critically at any attempt to recover damages under the HRA for maladministration by any procedure other than judicial review in the Administrative Court.
>
> ii) A claim for damages alone cannot be brought by judicial review (Part 54. 3(2)) but in this case the proceedings should still be brought in the Administrative Court by an ordinary claim.
>
> iii) Before giving permission to apply for judicial review, the Administrative Court judge should require the claimant to explain why it would not be more appropriate to use any available internal complaint procedure or proceed by making a claim to the PCA or LGO at least in the first instance. The complaint procedures of the PCA and the LGO are designed to deal economically (the claimant pays no costs and does not require a lawyer) and expeditiously with claims for compensation for maladministration. (From inquiries the court has made it is apparent that the time scale of resolving complaints compares favourably with that of litigation.)

> iv) If there is a legitimate claim for other relief, permission should if appropriate be limited to that relief and consideration given to deferring permission for the damages claim, adjourning or staying that claim until use has been made of ADR, whether by a reference to a mediator or an ombudsman or otherwise, or remitting that claim to a district judge or master if it cannot be dismissed summarily on grounds that in any event an award of damages is not required to achieve just satisfaction.
>
> v) It is hoped that with the assistance of this judgment, in future claims that have to be determined by the courts can be determined by the appropriate level of judge in a summary manner by the judge reading the relevant evidence. The citing of more than three authorities should be justified and the hearing should be limited to half a day except in exceptional circumstances.
>
> vi) There are no doubt other ways in which the proportionate resolution of this type of claim for damages can be achieved. We encourage their use and do not intend to be prescriptive. What we want to avoid is any repetition of what has happened in the court below in relation to each of these appeals and before us, when we have been deluged with extensive written and oral arguments and citation from numerous lever arch files crammed to overflowing with authorities. The exercise that has taken place may be justifiable on one occasion but it will be difficult to justify again.

84. This was not the course followed in this case and I have little doubt that the costs incurred in the various proceedings upon which Mr and Mrs Williams have embarked far exceeds whatever sum might have been awarded as damages or compensation. Far from encouraging complaints always first to be pursued through the Ombudsman, the court was encouraging a proportionate approach to cases of this sort. Bearing in mind that all but one of the complaints brought by Mr and Mrs Williams were rejected and that I, for my part, would also reject the claim under the 1998 Act for breach of Article 8 rights flowing from breach of s. 20 of the 1989 Act, the same can be said in this case. Certainly, once Mr and Mrs Williams found it necessary to proceed by way of judicial review in the Ombudsman process, in my view, there was no justification for not pursuing whatever relief they sought by way of civil process.

85. As for the approach to the exercise of discretion, Sir Robert correctly referred to the decision of the Supreme Court in *Rabone v Pennine NHS Trust* [2012] UKSC 1 which (per Lord Dyson at [75]), identifies the principles which should guide the court in these terms:

> "The relevant principles are not in dispute. The court has a wide discretion in determining whether it is equitable to extend time in the particular circumstances of the case. It will often be appropriate to take into account factors of the type listed in

> section 33(3) of the Limitation Act 1980 as being relevant when deciding whether to extend time for a domestic law action in respect of personal injury or death. These may include the length of and reasons for the delay in issuing the proceedings; the extent to which, having regard to the delay, the evidence in the case is or is likely to be less cogent than it would have been if the proceedings had been issued within the one-year period; and the conduct of the public authority after the right of claim arose, including the extent (if any) to which it responded to requests reasonably made by the claimant for information for the purpose of ascertaining facts which are or might be relevant. However, I agree with what the Court of Appeal said in *Dunn v Parole Board* [2009] 1 WLR 728 , paras 31, 43 and 48 that the words of section 7(5)(b) of the HRA mean what they say and the court should not attempt to rewrite them. There can be no question of interpreting section 7(5)(b) as if it contained the language of section 33(3) of the Limitation Act 1980."

86. It is right to add that Mr and Mrs Williams were also pursuing claims in misfeasance and negligence, the limitation period for which is 6 years. Thus, whatever prejudice was suffered in relation to the 1998 Act claim was also unavoidable in the other claims. In fact, of course, these claims were dismissed and had the 1998 Act claim stood on its own (as, in fact, it did), for my part, I would not have extended limitation by nearly five years not only because I do not accept that the approach adopted by Mr and Mrs Williams (to pursue the LGO through numerous challenges and judicial review) although entirely within their rights, should have justified an extension of time of this length for civil proceedings. Further, I would have accepted that there was prejudice in the unavailability of evidence from the solicitors and the police in relation to events touching upon the question of the bail conditions. Recognising, however, that the exercise of discretion fell to Sir Robert as the trial judge, given my findings on the s. 20 issue (which means that the action fails in any event), it is not necessary to express a concluded view about whether it was so far outside the ambit of his discretion that it ought to be reversed.

Damages

87. A further ground of appeal arises as to the quantum of the claim if it was established. The approach to damages is identified in *R (Anufrijeva) v London Borough of Southwark* to which I have already referred. Sir Robert was also referred to *Re H (A Child: Breach of Convention Rights: Damages)* [2014] EWHC 3563, *TP and KM* [2001] 1 FLR 549, *PC and S v United Kingdom* [2002] 2 FLR 631, *Venema v Netherlands* [2003] 1 FCR 153, *AD v United Kingdom* [2010] ECHR 28680/06. Given that the question is now academic in this case, I do not consider it appropriate to embark on an analysis either of the decisions or quantum not least because a decision would first have to be made as to the precise nature and extent of any breach of Article 8. Suffice to say that, bearing in mind that it was not in issue that the children were rightly taken from their parents' home on 5 July 2007, that by reason of the bail conditions, were prohibited unsupervised contact with them in any event and that it was open to the parents to apply to the court to vary those conditions but they

failed to do so (for whatever reason), had the matter fallen for decision, I would not have awarded a sum even approaching £10,000 to each of Mr and Mrs Williams. Damages in cases such as these will have to be considered in greater detail should an appropriate case arise.

Conclusion

88. Although I commend Sir Robert Francis Q.C. for the careful consideration which he gave to the issues in this case, I respectfully disagree with his conclusions for the reasons which I have expressed. In my judgment, along with all the other claims, the claim brought under Article 6 of the 1998 Act for breach of s. 20 of the 1989 Act should have been dismissed and I would allow the appeal accordingly.

Lord Justice McFarlane :

89. I am in full agreement with all that my Lord, Sir Brian Leveson P, has said in his judgment. This claim for damages for breach of statutory duty must be determined on the basis of the clear wording of the statute. I also wish to add my express endorsement of the message given by my Lord (at paragraphs 68 and 77); nothing that we have said is intended to dilute or amend the good practice guidance, which sits above the bare statutory requirements as set out by Sir James Munby P and Hedley J in the sequence of cases to which my Lord has referred.

Lord Justice Burnett :

90. I agree with both judgments.