Neutral Citation Number: [2024] EWHC 264 (Admin)

Case No: AC-2023-LON-000636;
CO/465/2023

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 9th February 2024

Before :

UPPER TRIBUNAL JUDGE WARD
(SITTING AS A JUDGE OF THE HIGH COURT)

- -

Between :

THE KING (on behalf of TW)	**Claimant**
- and -	
ESSEX COUNTY COUNCIL	**Defendant**
- and -	
COLCHESTER CITY COUNCIL	**Interested Party**

- -

Sarah Hannett KC and Tessa Buchanan (instructed by **Coram Children's Legal Centre**) for the Claimant
Clive Sheldon KC and Ben Mitchell (instructed by **Legal Services, Essex County Council**) for the Defendant
No attendance or representation for the Interested Party

Hearing dates: 1 and 2 November 2023 (with subsequent written submissions received on 22 December 2023)

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Approved Judgment

This judgment was handed down remotely at 10.30am on 9 February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Upper Tribunal Judge Ward :

Structure of judgment

1. The judgment is structured as follows:

Introduction

2. This matter came before the Court as a rolled-up hearing for permission and if permission granted for the substantive judicial review to follow immediately.

3. It is the latest in a series of challenges brought to aspects of the Defendant's provision for young people aged 16 and 17. Some others have settled, but in *R(TT) v Essex County Council* [2023] EWHC 806 (Admin), although the local authority agreed to treat TT exactly as if she were a "former relevant child" (as to which see below), Mostyn J proceeded to determine the issues, notwithstanding that as regards TT herself they had become academic, and dismissed TT's claim. As the Claimant has not received any assurance that the Defendant will treat him, as it had TT, as a "former relevant child", the issues for him are very much live.

4. The Claimant was born in May 2004. The Defendant completed an assessment of his needs on 27 May 2021, concluding that he was not a child in need and that he be supported to access housing through the Essex Young People's Partnership ("EYPP") and receive support through Family Solutions (a part of the Defendant). The Defendant maintains that the accommodation subsequently secured for the Claimant under the EYPP was not provided pursuant to its duty in section 20(1) of the Children Act 1989 ("the 1989 Act"). Subsequently, by an email dated 23 December 2022 in response to pre-action protocol correspondence the Defendant indicated that of its own motion it had considered the exercise of its discretion to treat the Claimant as if he were a former relevant child and declined to do so.

5. The Claimant challenges:

   i. The Defendant's decision that he is not a former relevant child ("Grounds 1 and 2");

   ii. The Defendant's policy (or practice) pursuant to which accommodation provided under the EYPP (now known as "Essex NEST") is stipulated as being unavailable under section 20 of the CA 1989 with the result that children who are accommodated via this route are held to have "rejected" section 20 ("Ground 3");

   iii. In the alternative to Grounds 1 and 2, the Defendant's decision not to exercise its discretion to treat the Claimant as a former relevant child ("Ground 4").

6. The Claimant's case is that he became a looked after child on 26 June 2021, 24 hours after being accommodated. He became an eligible child on 25 September 2021, 13 weeks later. On turning 18 in May 2022 he became a former relevant child. For the meaning of those terms, see [15]-[21].

7. As regards Grounds 1 to 3, the Claimant contends that they represent a continuing breach, and so are not out of time; or, if that be wrong, he seeks an extension of time for those grounds. There is no suggestion that Ground 4 is out of time.

8. The Defendant submits that Grounds 1 to 3 have been brought substantially out of time and there is no good reason to extend time. In any event, the decisions concerned were lawful, for the reasons given in *TT*. As regards Ground 4, the decision was lawful, applying *R (GE (Eritrea)) v SSHD* [2014] EWCA Civ 1490. There had been no earlier unlawfulness and the high threshold for compelling the exercise of discretion ("gross maladministration or conspicuous unfairness") had not been met.

Issues

9. Counsel helpfully agreed a list of issues, as follows:

Grounds 1 and 2:

a. Was the Defendant's decision that the Claimant was not a child in need lawful?

b. Did the Claimant reject accommodation under section 20 of the 1989 Act and/or was the Defendant lawfully entitled to conclude that he had done so?

Ground 3:

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

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

Ground 4:

a. Was the Defendant's decision not to exercise its discretion to treat the Claimant as a former relevant child lawful?

b. If not, should the Defendant be ordered to exercise its discretion in the Claimant's favour?

Delay:

Should permission or relief be refused on the grounds of delay?

Statutory provisions

10. It is convenient to begin with a summary of the statutory provisions for which I acknowledge my indebtedness in part to the Court of Appeal in *GE(Eritrea).*

The Children Act 1989

11. Part III of the Children Act 1989 is headed Local Authority Support for Children and Families. It sets out, or provides for, a series of duties owed to children in need. Under section 17(1)(a) it is the general duty of every local authority to safeguard and promote the welfare of children within their area who are in need by providing a range and level of services appropriate to those children's needs.

12. Section 17(10) provides that a child is to be taken to be in need if:

> "(a) he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by a local authority under this Part;
>
> (b) his health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services; or

(c) he is disabled,

… ."

13. Sub-section (11) provides so far as relevant that

"[In] this Part

"development" means physical, intellectual, emotional, social or behavioural development; and

"health" means physical or mental health."

14. Section 20 provides:

"Provision of accommodation for children: general

(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 –

…

(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.

(3) Every local authority shall provide accommodation for any child in need within their area who has reached the age of 16 and whose welfare the authority consider is likely to be seriously prejudiced if they do not provide him with accommodation.

…

(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.

…"

15. Section 22 provides:

"General duty of local authority in relation to children looked after by them

(1) In this Act, any reference to a child who is looked after by a local authority is a reference to a child who is

…

(b) provided with accommodation by the authority in the exercise of any functions (in particular those under this Act) which are social services functions within the meaning of the Local Authority Social Services Act 1970, apart from functions under sections 23B and 24B.

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

(3) It shall be the duty of a local authority looking after any child—

(a) to safeguard and promote his welfare; and

(b) to make such use of services available for children cared for by their own parents as appears to the authority reasonable in his case.

(3A) The duty of a local authority under subsection (3)(a) to safeguard and promote the welfare of a child looked after by them includes in particular a duty to promote the child's educational achievement.

(3B) A local authority must appoint at least one person for the purpose of discharging the duty imposed by virtue of subsection (3A).

(3C) A person appointed by a local authority under subsection (3B) must be an officer employed by that authority or another local authority.

(4) Before making any decision with respect to a child whom they are looking after, or proposing to look after, a local authority shall, so far as is reasonably practicable, ascertain the wishes and feelings of—

(a) the child;

(b) his parents;

(c) any person who is not a parent of his but who has parental responsibility for him; and

(d) any other person whose wishes and feelings the authority consider to be relevant,

regarding the matter to be decided.

(5) In making any such decision a local authority shall give due consideration—

> (a) having regard to his age and understanding, to such wishes and feelings of the child as they have been able to ascertain;
>
> (b) to such wishes and feelings of any person mentioned in subsection (4)(b) to (d) as they have been able to ascertain; and
>
> (c) to the child's religious persuasion, racial origin and cultural and linguistic background."

16. Section 22C stipulates that, with certain exceptions, priority is to be given to making arrangements for the child concerned to live with specified categories of people. Where that cannot be done, sub-section (5) has effect, stipulating that the local authority

> "must place C in the placement which is, in their opinion, the most appropriate placement available."

17. Sub-section (6) permits various types of placement, including "other arrangements" which comply with regulations.

18. The Children (Leaving Care) Act 2000 added sections 23A—23E to the 1989 Act. Their effect is as follows.

19. Section 23A defines a "relevant child" as a child who (a) is not being looked after by any local authority; (b) was before last ceasing to be looked after an eligible child for the purpose of paragraph 19B of Schedule 2; and (c) is aged 16 or 17. The effect of paragraph 19B of Schedule 2 and the relevant regulations (the Care Planning, Placement and Case Review (England) Regulations 2010 (SI 2010/959), regulation 40) is that, in order to be an eligible child (and hence a relevant child), a person has to have been looked after by a local authority for a cumulative total of at least 13 weeks between their fourteenth and eighteenth birthdays. The period of 13 weeks must have begun after they reached the age of 14 and ended after they reached the age of 16.

20. Section 23C is headed "Continuing functions in respect of former relevant children." A "former relevant child" is defined in subsection (1) thus:

> "(a) a person who had been a relevant child for the purposes of section 23A (and would be one if he were under 18) and in relation to whom [the local authority] was the last responsible authority; and (b) a person who was being looked after by [the local authority] when he attained the age of 18, and immediately before ceasing to be looked after was an eligible child."

21. In summary, to be a former relevant child a person must have been looked after by a local authority for a cumulative total of at least 13 weeks between 14 and 18. The period of 13 weeks must have begun after they reached the age of 14 and ended after they reached the age of 16.

22. Section 23C then sets out a series of duties including a duty on the authority to keep in touch with the former relevant child whether he or she is within their area or not (section 23C(2)(a)); if they lose touch with him, to re-establish contact (section 23C(2)(b)); to continue the appointment of a personal adviser (section 23C(3)(a)); to continue to keep his pathway plan under regular review (section 23C(3)(b)); and to give various forms of assistance as provided for in section 24B in relation to employment, education and

training or other assistance to the extent that his welfare requires it (section 23C(4)(a)—(c)), including contribution to expenses incurred in living near places of employment, education or training. These duties for the most part subsist until the former relevant child reaches the age of 21 but some of them, particularly in relation to education, may extend until he is 25.

23. The purpose of these provisions is to ensure that a relevant or eligible child is not simply left without support the moment he reaches his eighteenth birthday but receives the same sort of support and guidance which children can normally expect from their own families as and when they become adults.

24. One may thus readily see from the above the advantage to a young adult of establishing the status of being a "former relevant child". One may equally readily see that there will be resource implications for local authorities in providing services to a "former relevant child".

Children Act 2004

25. To understand fully the contentions in the case, the powers under which the Defendant considers it was acting in connection with the accommodation and associated arrangements are relevant.

26. Section 10 of the 2004 Act provides so far as relevant:

> "Co-operation to improve well-being
>
> (1) Each local authority in England must make arrangements to promote co-operation between–
>
> (a) the authority;
>
> (b) each of the authority's relevant partners; and
>
> (c) such other persons or bodies as the authority consider appropriate, being persons or bodies of any nature who exercise functions or are engaged in activities in relation to children in the authority's area.
>
> (2) The arrangements are to be made with a view to improving the well-being of children in the authority's area so far as relating to–
>
> (a) physical and mental health and emotional well-being;
>
> (b) protection from harm and neglect;
>
> (c) education, training and recreation;
>
> (d) the contribution made by them to society;
>
> (e) social and economic well-being."

27. "Relevant partners" are defined so as to include district councils (such as the Interested Party) but not NACRO, the counterparty to the EYPP/Essex NEST arrangements.

28. Section 11(2), which applies to both county councils such as the Defendant and district councils, provides:

> "(2) Each person and body to whom this section applies must make arrangements for ensuring that–
>
> (a) their functions are discharged having regard to the need to safeguard and promote the welfare of children; and
>
> (b) any services provided by another person pursuant to arrangements made by the person or body in the discharge of their functions are provided having regard to that need."

Localism Act 2011

29. Section 1 provides so far as relevant:

> "(1) A local authority has power to do anything that individuals generally may do.
>
> …
>
> (5) The generality of the power conferred by subsection (1) ("the general power") is not limited by the existence of any other power of the authority which (to any extent) overlaps the general power."

Housing Act 1996

30. Section 175 provides

> "(1) A person is homeless if he has no accommodation available for his occupation…, which he—
>
> …
>
> (b) has an express or implied licence to occupy, or
>
> …
>
> (3) A person shall not be treated as having accommodation unless it is accommodation which it would be reasonable for him to continue to occupy.
>
> (4) A person is threatened with homelessness if it is likely that he will become homeless within 56 days."

Statutory Guidance

31. There is relevant statutory guidance: Prevention of homelessness and provision of accommodation for 16 and 17 year old young people who may be homeless and/or require accommodation (Ministry of Housing, Communities and Local Government and Department for Education, 2018) ("the National Guidance"). It is issued under section 7 of the Local Authority Social Services Act 1970 and section 182 of the Housing Act 1996.

Section 7 of the 1970 Act requires local authorities, in exercising their social services functions, to act under the general guidance of the Secretary of State. Unless there are exceptional reasons in individual cases authorities are expected to comply with this guidance: see *R (Rixon) v LB Islington* [1996] EWHC 399 (Admin).

32. The National Guidance states that:

> "a. "Homeless" in relation to housing services refers to s.175 of the Housing Act 1996
>
> …
>
> d. "Threatened with homelessness" means likely to become homeless within 56 days."

33. I refer to other parts of the National Guidance below when considering the parties' submissions.

Children's Services in Essex

34. Different names are given to different parts of the service provided to children and families by the Defendant, but all are in law a part of its functions. The documentation is not wholly consistent but it appears that "Family Operations" carry out statutory assessments and interventions. It further appears that "Family Solutions" is the name given to the Defendant's "Early Help" team, which on the Defendant's case (though it is disputed) provides support otherwise than by way of statutory intervention, so as to prevent children from becoming "children in need" and is stated by the Defendant (though it is again disputed) to be provided under section 10 of the Children Act 2004 and/or section 1 of the Localism Act 2011. D-BIT is the Divisional Based Intervention Team, likewise a part of the service to children and families, which seeks to prevent individuals from entering reactive care or a custody episode.

35. The Defendant has a guidance document entitled "Effective Support for Children and Families in Essex" ("the Essex Guidance"), aimed at all those working with children and young people and their families. It provides guidance for assessing levels of need, which it places into four categories: Universal, Additional, Intensive and Specialist. In a graphic, referred to as the "Windscreen", a summary of what may be indicated by each appears: for "Intensive" the indication is "Multi-agency approach required using Shared Family Assessment and Lead Practitioner or Family team response". For "Specialist" what is indicated are "Specialist and high level interventions often involving statutory process." A "Levels of Need Table" follows, setting out "Levels and Referral Routes", "Needs", "Services (examples)" and "Outcomes" for each of the four categories mentioned above. It is, therefore, in the context of needs in the "Specialist" category that statutory processes are mentioned.

36. It is common ground that the Defendant is entitled to have such a guidance document in place, provided it does not set the bar for access to services higher than the law. Both counsel appeal to certain parts of the Essex Guidance and I refer to relevant passages below when considering submissions.

37. There is a Joint Working Protocol in place between the Defendant and district councils in its area, seeking to co-ordinate the exercise of their functions in relation to 16 and 17

year olds who are at risk of homelessness. It is entered into in pursuance of section 11 of the Children Act 2004.

Essex NEST

38. Essex NEST is a scheme for the provision of support, sometimes delivered in supported housing. It was established by the Defendant in 2017, at which point it was known as the EYPP. The scheme is delivered by way of a contract between the Defendant and a provider (currently NACRO, assisted by Peabody as a subcontractor). The original contract ("the EYPP contract") expired on 1 June 2022 and a new contract ("the NEST contract") was entered into to come into effect on the same date. Under the NEST contract, the scheme is known as Essex Nacro Education Support and Transition (but is referred to as Essex NEST). Under the scheme, NACRO provides support, sometimes free-standing and sometimes in units of accommodation of which it has secured the use in order to perform its obligations. The support is paid for by the Defendant. The accommodation is paid for by the income or benefits of the young people residing there. One of the units used is known as Bernard Brett House ("BBH").

39. The EYPP Contract recited that:

> "The Authority is a local authority as defined by section 270 of the Local Government Act 1972 and is entering into this Contract in relation to the performance of its functions in relation to the provision of housing related support services for young people aged 16+ and pursuant to its duty under section 3 of the Local Government Act 1999 to secure continuous improvement in the way in which its functions are exercised, having a regard to a combination of economy, efficiency and effectiveness and pursuant to section 1(1) of the Local Government (Contracts) Act 1997 and all other relevant statutory powers of the Authority."

40. The service specification for the EYPP contract relevantly provided:

> "This specification is for the Housing Related Support (HRS): Post 16 accommodation support for young people who are either:
>
> Aged 16 and 17 years old at risk of homelessness
>
> …"

and went on to identify three other cohorts of the intended service users.

41. Under the EYPP Contract there was nothing which in terms precluded referral of young people under section 20 to the EYPP. However, an agreed contractual variation in December 2017 provided that if a young person previously referred to the EYPP subsequently became a "looked after child", they would have to leave BBH.

42. The contract provided that:

> "In principle, the provider will be obliged to accept all referrals where assessment has demonstrated that support and accommodation is needed. However, refusals will be permissible in exceptional circumstances and decisions will be made by the

> Gateway Manager, Service and referrer to ensure alternative arrangements can be found."

43. The recitals to the NEST contract provided:

> "A. The Council is a local authority as defined by section 270 of the Local Government Act 1972 and is entering into this Agreement in relation to the performance of its functions under the Children Act 1989 as amended to care leavers aged between 18 and 21 - or 25 if in full time education. These duties include assistance with accommodation and assistance with education, employment and training. The Council has no statutory duty to provide accommodation to this cohort.
>
> B. The Council has further responsibilities to provide support as a result of the Southwark Judgement 2009 [i.e. *R(G) v Southwark LBC* [2009] 1 WLR 1299] which concerned the interplay of the homelessness legislation and the Children Act 1989 in relation to the assessment of 16 and 17 year olds. Although the Council is not under a duty to provide accommodation, it is often convenient for the support to be provided in a supported accommodation unit where the accommodation is suitable and suitable support can be on hand when it is needed."

44. The Service Specification for the NEST contract relevantly provides:

> "8.1 The contract will provide support for the following cohorts of young people:

Cohort	Information and Explanatory Notes
16-17 year olds at risk of homelessness or homeless	Those aged 16 and 17 years old and homeless / at risk of homelessness, who have been assessed by Social Care as not a Child In Need (CIN); or assessed as CIN and have made an informed decision they do not want to become a Looked After Child, they want to take responsibility for themselves in respect of their education, training, employment and accommodation. Where a young person aged under 18 becomes a Looked After Child after moving into HRS accommodation; children's social care will place them into appropriate accommodation for Looked After Children via the Council's CYPPS Team. HRS accommodation will cease to be available for them. The service will not accept young people with Section 20 status as it is not a service for Looked After Children."

The other cohorts mentioned in the Service Specification are "Care Leavers 18+", "Vulnerable Parents aged 16-21" and "Other vulnerable young people aged 18-21".

45. The NEST documentation provides that:

> "In the event that a Contractor refuses to accept a referral for a young person who is eligible for this service, the Contractor is required to provide a justification for their refusal to accommodate the affected young person via e-mail, within 2 working days of the referral. This response will be given due consideration by the Authority, prior to liaising with other providers who operate this service and operational teams to determine whether the young person can be adequately accommodated in an alternative service.… ."

46. In order to access supported accommodation under Essex NEST, a young person must first be referred to the Gateway. The referral process begins with a joint assessment meeting attended by the Defendant and the local housing authority. A referral will then be made to the Gateway by the Defendant and the local housing authority. That referral is considered by a Gateway Manager, who is a social worker employed by the Defendant. The Gateway Manager will either accept the referral, refuse the referral, or request more information. If the Gateway Manager accepts the referral, it is passed on to a provider. If the provider accepts the referral, the young person will move into the accommodation. The process was the same under the EYPP.

Evaluation of the evidence

47. In evaluating the at times conflicting evidence in this case, subject to the point considered further at [89]-[90] below, I accept the evidence of the social worker, Ms Mushayi, as reliable. It is supported by the Defendant's records. Ms Mushayi is a reasonably experienced social worker, of seven years' qualification at the time of these matters. I accept that she would not have recorded things as occurring, had they not done so. In places, her evidence depicts matters which do not present actions on behalf of the Defendant in the best light, such as in aspects of the explanation given at the meeting with Colchester Borough Housing on 10th June discussed below or the delay in writing up that meeting on the case management system, but that, if anything, adds to its credibility. In any event, no application was made to cross-examine Ms Mushayi. Subject as above, there is no inherent implausibility or inconsistency with incontrovertible evidence.

48. For the reasons above, where the evidence of the Claimant and that of Ms Mushayi conflict (as is the case for much of the Claimant's second witness statement), I prefer the evidence of Ms Mushayi.

Facts of the case

49. The Claimant's father had lived with the family until he was 6 months old. He had been around 13 when he discovered that his stepfather was not his real father. In 2018, aged around 14, he had got back in contact with his father and from 2019 had started spending time with him about once a week to try to get to know him.

50. After the Claimant's mother died on 5 August 2018, the Claimant had been living with his step-father. He had felt marginalised and neglected and by 23 February 2021 had

tried moving in with his brother. That step had prompted threats of violence from the stepfather against the brother. On 3 March 2021, the Claimant's brother confirmed that the Claimant was staying at his place but was at his "real Dad's for the night". The Claimant subsequently confirmed this, indicating that he spends a couple of nights a week with his father, the rest of the time at his brother's.

51. The homes of both the Claimant's father and his brother were one-bedroomed accommodation and the Claimant slept on the sofa in both places. Although the words "sofa surfing" were used by Ms Mushayi in her contemporaneous records, that is an inexact term and may sometimes refer to circumstances involving a much greater frequency of moving around, to a greater variety of locations and/or with greater uncertainty (see, for instance, the facts of *Southwark*) than the Claimant's move, once a week, from sleeping on the sofa at his brother's to sleeping on the sofa at his father's and back again, which is the objective reality.

52. Officers recognised that the Claimant had what was described as emergency accommodation in the short term but needed a safe and secure place to live and thus decided to carry out a statutory Children and Families Assessment, to consider whether the Claimant was a "child in need". References to "the assessment" are, unless qualified, to that assessment.

53. In a conversation whose date is unclear but which in any event preceded the assessment, the Claimant's brother informed Ms Mushayi that he was unable to have the Claimant stay with him "long term" as he did not have adequate space and that he hoped the Claimant could be supported to access housing in his own right "in the near future".

54. Three assessment visits were carried out. At the first, on 18 March 2021, Ms Mushayi (among other matters) offered the Claimant an advocate (which he declined) and indicated that the question of advocacy support would be revisited "when we have the joint housing meeting with Colchester Borough Homes". At the second, on 2 April, the brother and his girlfriend were present. The Claimant explained that he had been building a relationship with his father and that he had a positive relationship with his brother and the latter's girlfriend, describing them as being "supportive and encouraging him to get an education to improve his employment prospects when he is older." The Claimant was recorded as clearing up after himself and helping with chores and his brother confirmed that he was a good cook. He had been shown how to use the washing machine. He was expected to be back by 10pm if he had gone out. Ms Mushayi noted that the brother and his girlfriend spoke positively about the Claimant and that there was "a lot of laughter and banter among the three of them and the atmosphere being quite relaxed."

55. At the third visit, on 30 April, the Claimant's father confirmed the above information concerning his relationship with the Claimant and his own circumstances. He was aware that the Claimant needed professional help to deal with his mother's death but would need a stable place to live before the Claimant could benefit from that support. He would be there for the Claimant as much as he could. A remark that for the Claimant to be sleeping on the sofa when he stays is "not appropriate… long term" appears in a paragraph concerning "[The Claimant's father's] statement" and as such reads as a report of the father's observations.

56. The assessment of 27 May 2021, after recording (among others) the facts summarised above, noted:

> "Neither [father] nor [brother] have a spare room for [the Claimant] to sleep in. When the Claimant is in either [place], he has to sleep on the sofa; whilst this is OK in the short term, it is not an ideal long term arrangement."

57. It also noted, under the heading "What are we worried about" that the Claimant had "not processed the loss and trauma of losing his mother as a young child", was "not in education, training or employment" and had "a limited support network". Under "What will make things safer for the Child/Young person" was that he should be supported to access stable housing, to access and engage with education and training and to access mental health and emotional wellbeing services to manage his emotions.

58. The recommendation was that the Claimant be supported to access housing through EYPP with additional support from Family Solutions.

59. The decision of Ms Mushayi's manager was as follows:

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

60. Ms Mushayi "verbally discussed" the assessment with the Claimant on or before 27 May 2021. The Claimant accepts that she had told him that he was not a child in need at some point before the meeting of 10 June (below).

61. While the assessment was being carried out, there had been a number of contacts between Ms Mushayi and Colchester Borough Homes ("CBH"), the Interested Party's arm's length management organisation, concerned with steps preparatory to CBH carrying out an initial housing assessment. Ms Mushayi had explained to the Claimant on 18 March that "as part of the assessment [she] would arrange a joint housing meeting with [CBH] to explore [the Claimant's] potential housing options." By 26 May (i.e. the day before the assessment was completed and signed off) Ms Mushayi completed a "De-escalation to Family Solutions Discussion Form", indicating, inter alia, that the Claimant "is a 17 year-old who requires additional support…to live in semi-independent accommodation…." As the form had to be completed by 5pm on the Tuesday prior to the meeting at which the matter was to be discussed, and 26 May was a Wednesday, it is not apparent on the face of the form why its completion did not await the completion of the assessment.

62. On 10 June 2021 a joint meeting was held with CBH. The Claimant was provided, orally and for the first time, with an explanation by Ms Mushayi of the difference between section 20 accommodation and semi-independent living via the EYPP. Section 20 accommodation was mentioned "should the child and family assessment deem him to be a child in need." However, the assessment had deemed him not to be; both the Claimant and Ms Mushayi knew that. Notwithstanding that, the various administrative steps designed to deliver the requirements of the 1989 Act as amended in relation to looked

after children were set out, as were the various types of section 20 accommodation available, namely foster care, supported lodgings or semi-independent accommodation, with the differences of each. Reference was made to a number of the beneficial consequences attaching to having been a looked after child. Equivalent information to that provided for the various forms of section 20 accommodation was provided in relation to a referral to BBH via the EYPP and, more briefly, to a further option of CBH supporting the Claimant with accommodation via the "Joint Referral Panel". The Claimant declined an advocate and chose the EYPP option on the stated basis that he did not want the rules which tend to go with being, as he put it, "in care".

63. On 14 June 2021 Ms Mushayi completed a Supported Housing Needs Assessment ("SHNA") for the purpose of a referral to the Gateway meeting, an essential part of the referral process to BBH. This document was in a different format from the (Children and Families) assessment but was intended to be consistent with it. In particular the points-based system used by the SHNA mapped on to the categories of Universal-Additional-Intensive-Specialist used by the Essex Guidance (see [35] above). The Claimant was awarded points for, among other things, his need for emotional well-being/mental health services in respect of his bereavement and for support to explore options regarding work, training etc. Overall, he was awarded 19 points (an arithmetical error for 18 points): the discrepancy is immaterial as both figures map onto the "Intensive" category in the Essex Guidance.

64. The referral was approved by the Gateway Manager and the Claimant moved into BBH on 25 June 2021.

65. While residing in BBH, the Claimant continued to receive services from the Defendant, namely regular weekly visits from a Family Solutions worker, support from a Family Solutions worker to attend an informal interview, informal "talking support" provided by D-BIT and various episodes of assessment and planning.

Consideration of the Grounds

Grounds 1 and 2

66. As noted above, the same issues arise in relation to both Ground 1 and Ground 2. Repeated for ease of reference, they are:

    a. Was the Defendant's decision that the Claimant was not a child in need lawful?

    b. Did the Claimant reject accommodation under section 20 of the 1989 Act and/or was the Defendant lawfully entitled to conclude that he had done so?

67. In view of authorities such as *R(M) v LB Hammersmith and Fulham* [2008] UKHL 14 and *Southwark* at [31] and of the National Guidance, if the conditions for section 20 to apply were met in respect of the Claimant, the Defendant could not lawfully discharge its duty to him otherwise than by provision under that section (unless the Claimant made a valid choice to decline section 20 support). However, the Defendant's conclusion was that he was not a child in need, thus on its case meaning that a condition for section 20 to apply was not met, resulting in issue a. above.

68. Ms Hannett challenges the finding that the Claimant was not a child in need on the following grounds.

69. As to the law, she submits that the Essex Guidance, while not itself the subject of challenge, can only be applied so as to be consistent with the law. She submits that section 17(10)(a) by its very wording does not impose a high threshold while, for reasons that were not otherwise explained, sub-sections (b) and (c) impose a higher threshold. She also relies on *Hammersmith* at [18] where Baroness Hale noted that

> "the broad scope of the services which may be provided indicates the broad scope of the concept of a child "in need" for whom they may be provided."

70. Mr Sheldon counters these submissions by submitting that the threshold should be understood to be higher, because of the onerous duties which flow from it.

71. I do not find either submission a particularly helpful gloss on the statutory wording. Baroness Hale's remarks are about breadth of scope, not about setting a threshold regarding levels of need. The questions posed by the statute are whether the child is "unlikely" to achieve or maintain (etc.) a "reasonable" standard without the provision of the relevant services. That involves deciding whether the negative "unlikely" is made out. It is only a "reasonable" standard which has to be achieved. Both suggest that the test under section 17(10)(a) will not lightly be met. Further, weight has to be given to the final words of section 17(10)(a). As the Divisional Court said in *R (VC) v Newcastle City Council* [2011] EWHC 2673 (Admin) at [29]:

> "The duties of a local authority do not extend to all children who might be said to be "in need". Apart from a child who is "disabled" in the statutory sense, they apply only to a child who without the provision for him of services by [the] local authority" will fall within one or other of the statutory criteria."

72. Whether the conditions of the section are met is for the local authority, subject to judicial review. Thus the issue for me is whether the Defendant's conclusion is irrational.

73. Ms Hannett submits that it is indeed irrational for a number of reasons. First, she relies on a number of phrases extracted from case notes and correspondence, recording that the Claimant was (as it was then put) "sofa surfing" and that his accommodation was described variously as "emergency accommodation", "a short-term arrangement", "not ideal long term", as one which "cannot be sustained for the rest of his minority" and from which the claimant's brother "would like him to move out as soon as possible." She submits that "a child without accommodation is a child in need", citing *R v Northavon DC ex p Smith* [1994] 2AC 402 at 406. That however begs the question of whether the Claimant was indeed without accommodation. Nor in my judgment can a parallel be drawn between this case and the much greater level of instability experienced by the claimant in the *Southwark* case.

74. Ms Hannett also relies on *R(A) v Coventry City Council* [2009] 1 FLR 1202. At [74], Mr Edwards-Stuart QC (sitting as a Deputy High Court Judge) observed, *obiter*, that accommodation which was "too precarious and insecure" in that it was "uncertain as to duration because it is not founded on any secure financial footing" was not accommodation suitable for a 15 year old who is a child in need. The situation is a different one as it was undisputed (see [27]) that the claimant in that case was a "child in need" and the question was whether he "required accommodation" for the purposes of section 20. The dictum was, moreover, specific to the circumstances of a younger child.

75. In *R(AB and others) v Brent LBC* [2021] EWHC 2843 (Admin), the issue was, once again, whether the claimants required accommodation under section 20. Each claimant was conceded to be a child in need.

76. Ms Hannett submits that the threshold for requiring accommodation under section 20 cannot be higher than that for being a child in need under section 17. No authority was cited in support and I do not think the proposition is correct. Status under section 17 potentially depends on the assessment of a wide range of factors, any one or more of which may lead to a conclusion that a child is in need. Further, while

> "the question of whether accommodation is required must be considered in the light of the fact that the child in question is a child in need and the consequences for the child's health and development if accommodation is not provided"
>
> (per Poole J in *AB*)

it is evident from that and indeed from the terms of section 20 itself that not every child in need will require accommodation.

77. She further submits that by reason of the matters noted at [73] and other similar references, the Defendant accepted that the Claimant had no accommodation and, indeed, went on to arrange accommodation for him; and that in the light of that, the Defendant cannot now be heard to say that it did not consider him to require accommodation. However, the Defendant's considered position is to be found in the outcome of the assessment, not in individual references in case notes which were evidence gathering for that assessment and which should not be read in isolation from the evidence as a whole. Nor in my view is there any inconsistency capable of contributing to the overall submission of irrationality in the Defendant taking action by way of early help to forestall an issue regarding accommodation which on any view was plainly going to arise within the next year.

78. Mr Sheldon submits that the Defendant was entitled to conclude that the Claimant was not homeless, because he had accommodation available in two places with either an express or implied licence to occupy each, and it would be reasonable for him to continue to occupy the accommodation for the following 56 days. The assessment was consistent with the Essex Guidance, which was not itself challenged. It is the circumstances as at the date of the assessment which are relevant to consider and the manager's decision at [59] correctly focussed on the situation which "currently" prevailed.

79. He also relies on para.3.2 of the National Guidance, which states:

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

80. He referred to passages in the Essex Guidance which were consistent with the National Guidance in this regard.

81. As seen above, the National Guidance applies the Housing Act tests of "homeless" and "threatened with homelessness" "in relation to housing services". However, there is no direct statutory read-across between the Housing Act and the 1989 Act. The question is always whether the child is a "child in need", though it may be relevant to have the Housing Act position in mind. *R(DF) v Essex County Council* [2023] EWHC 3330 (Admin), referred to in post-hearing submissions, thus concerned a different point. The young person was acknowledged as being "in need" and the question was whether being homeless within the Housing Act definition was determinative of whether she "required accommodation" under section 20.

82. Ms Mushayi's enquiries were full. They involved three meetings, rather than the more usual two; she met and observed the Claimant in a variety of different settings and she met with others who were involved with the Claimant at the time.

83. As to Ms Mushayi's contact with CBH before the assessment had been completed, as noted at [67] section 20 of the 1989 Act has primacy over any other power or duty to provide accommodation, including those of housing authorities under the Housing Act 1986. It is right in view of that primacy that the Court should be alive to the potential for an authority to be seeking to divert a young person to a less onerous statutory regime. However, the Essex Guidance stresses the importance of early help and it would be nonsensical if an authority were precluded from providing early help, thereby causing a situation within section 17 (and potentially section 20) to develop which with early help could have been avoided. On any view the Claimant's housing situation could not be sustained for a prolonged period; and it was not in my view inappropriate for an experienced social worker to anticipate which way things might be going, to the point of making prudent enquiries and generally progressing matters (such as by completing the "De-escalation" form referred to at [61]), so long as an open mind was maintained for the purpose of the assessment.

84. Ms Mushayi's evidence (I have italicised a passage for ease of subsequent reference) provides useful calibration of the situation so far as accommodation was concerned:

> "I recognised in my assessment that the sleeping arrangements were not ideal long term *but in the absence of other evidence of a need for support and services from Essex CC* this was not sufficient evidence to conclude that TW was a child in need as neither TW's brother nor his father were proposing to bring the arrangement to an end in the short term. Unfortunately, many families live in less than ideal arrangements where teenage children do not have their own room, this does not mean that they require social services intervention. TW had two family members, his brother and father, who were both supporting him since he decided to move out of his stepfather's home. Again, it is not unusual for a child to move between different family member households, and this does not on its own indicate that he was a child in need."

85. Whether in the terms of para.3.2 of the National Guidance (see [79]), the Claimant was "at risk of becoming homeless in the future" with "no immediate threat of homelessness", or there was "an imminent threat of homelessness" or he was "actually homeless" was a matter for the Defendant (subject to public law).

86. The Claimant in each of the locations had a bare licence. Effectively he was dependent on his father and on his brother/brother's girlfriend not to terminate the corresponding licence. The Claimant was likely to become homeless at some point between the date of the assessment and turning 18 in May 2022 and the question was, when. The licences were informal and dependent for their maintenance on considerations of familial love and support and on the ability of those concerned to get on. These were pre-eminently issues for a professional social worker who had taken steps adequately to inform themselves. As the National Guidance para.3.16 puts it, "Determining who is in need and the extent of any needs requires professional judgment by social workers…".[1] Ms Mushayi had met those concerned and had heard from them and had had the opportunity to witness their interactions with the Claimant and was in consequence well-placed to assess these issues on behalf of the Defendant in the exercise of her professional judgment. I consider that in the light of Ms Mushayi's evidence, the Defendant was entitled to conclude that the Claimant was not homeless and therefore that was not a factor which would support a conclusion that the Claimant was a "child in need".

87. Ms Hannett also relies on the services the Claimant was assessed as needing and which, as envisaged or in modified form, he subsequently did receive from the Defendant, services which she submits were provided under the 1989 Act rather than, as submitted by the Defendant, section 10 of the 2004 Act and/or section 1 of the Localism Act 2011. Even if (without deciding) there be force in her point that section 10 does not provide power for a service which is "internal to the Defendant" (as she characterises Family Solutions), the 2011 Act would in my judgment provide the necessary power. Although Ms Hannett relies on a passage from *Bennion* saying that (to summarise) the general must yield to the specific, section 1(5) of the Localism Act is a clear statutory indication that in the case of that Act, such a principle is modified. She then submitted that if the threshold for section 17 was passed, the services contemplated by section 17 must be provided via section 17. However, the question for me in the first instance is whether the Defendant's conclusion that that threshold was not passed can survive a public law challenge.

88. Notwithstanding the above, in view of the Defendant's structure of dividing up its services to children and families and then asserting that those provided by Family Solutions are not provided under section 17 (which appears to me to assume what has to be decided), I consider it is preferable in this decision to focus on whether, even if all the services subsequently provided to the Claimant by Family Solutions and D-BIT were indeed provided under the 1989 Act, it would call into question the assessment that he was not a child in need. In doing so, I proceed on the footing that save to such extent (if any) as there was a subsequent change of circumstances, the Claimant may be taken as having been in need at the date of assessment of the services he subsequently received.

89. The italicised extract from Ms Mushayi's witness statement set out at [84] suggests that the decision that the Claimant was not a child in need was "in the absence of other evidence of a need for support and services from Essex CC…". This is at first sight a puzzling statement. It refers to Essex CC, not to any of the sub-divisions of its children's services. Plainly Ms Mushayi knew that there was an evidenced need for support with managing emotions/mental health, and for education and training: her own assessment said so. She knew that Family Solutions (part of Essex CC) would be providing at least

[1] While the paragraph goes on to provide an example of when it is extremely likely that a young person will be a child in need, I consider that the circumstances of the Claimant, staying with two family members in their homes, may properly be distinguished from the example given "staying with various friends, or sleeping in the car".

a good number of them. The statement in my view only makes sense if read, not as suggesting that there was no evidence of any need other than in relation to accommodation, but as saying that what was revealed by the evidence before her was insufficient for the Claimant's case to fall within the "Specialist" category, which alone would result in statutory intervention.

90. I am fortified to an extent in the above view by the SHNA (also compiled by Ms Mushayi) which, while not otherwise used by the Defendant as a means of assessing need, nonetheless provides a graduated analytical framework, under which those needs of the Claimant were taken into account and given considerable weight (reflected in the "Intensive" characterisation) but not enough to reach the "Specialist" category and so for statutory intervention under section 17.

91. A further criticism made by Ms Hannett is that the Essex Guidance indicates that "Children whose parents and wider family are unable to care for them" will be in need of "Specialist" services. She relies on an entry by Ms Mushayi on a form recording that neither the Claimant's brother nor his father "have space to have [him] in their care for the rest of his minority". That, however, is looking to the future. As at the date of the assessment, both family members were able to care for the Claimant. If the Defendant had done nothing and a situation had subsequently arisen where neither family member could care for him, that would have needed to be addressed, but that was not the then current situation.

92. She suggests that the "Needs" column for the "Intensive" category entirely presupposes that the child or young person concerned remains in the care of their family and so the Claimant should not have been assessed as falling within it. In my view the answer to that is that no doubt the majority of children presenting to the Defendant do have families but one could readily imply the words "if any" after "families": the document is not a statute. In any case, the Claimant did have a functioning family.

93. Nor do I accept the submission that by including a discussion of the implications of section 20 in the explanation given on 10 June, the Defendant was conceding that the Claimant was eligible for section 20 accommodation. Both parties knew that he had been assessed as not being so eligible. The explanation has the ring of having been delivered from a template, not unreasonably so as a starting point, given the complexity of the information to be conveyed, but inadequately modified for the circumstances of this particular case. There may justifiably be criticism of the presentation of the information for that (and other) reasons, but it does not imply a concession that the Claimant was eligible for section 20 accommodation.

94. Finally on this aspect, I note that on 25 June 2021, Ms Mushayi completed a request for a one-off payment of £30 to be made to the Claimant to tide him over until his universal credit came through. The form was completed on the footing that it was "Section 17-Cash". Such a payment could only be made under section 17 if the Claimant was, indeed, considered to be a child in need. The overwhelming evidence, however, is that he was not so considered. It may well be that the attribution of the payment to section 17 rather than to, say, section 1 of the Localism Act 2011 was mistaken.

95. As a rationality challenge, the bar is set high and the challenge does not clear it. In my judgment, the resourceful and ably-presented arguments on behalf of the Claimant are fundamentally inviting the Court to substitute a different view of the severity of the

Claimant's circumstances from that reached on behalf of the Defendant. That is not the Court's role in these proceedings.

96. As to the second issue (see [66b]), I accept that the Claimant indicated that he did not want an advocate and that, as he had refused one previously also, that was his settled position. I also accept that it was his genuine wish, on the degree of understanding that he had, that he did not want the status of a looked after child. His rationale for not wanting to be subject to the restrictions going with being "in care" (which in a strict sense, he would not have been, there being no care order involved) in my view is to be understood as a wish to avoid the degree of regulation that would accompany section 20 status. I do not consider that it is an answer to say, as does Ms Hannett, that such duties as there are are imposed on the local authority and not on the young person. If a local authority performs or attempts to perform the duties to which it is subject in this regard, it would be bound to involve the young person being approached and becoming embroiled in ways which may be unwelcome to that person. When one considers the provisions of, for instance, section 22 of the 1989 Act and, indeed, the information imparted by Ms Mushayi about the consequences of section 20 status, what was intended by the Claimant's position, even if imperfectly articulated and one which may well not be considered by others to have been objectively in his best interests, is in my view evident.

97. Ms Hannett's suggestion that the notes of the meeting held on 10 June do not set out the advantages of section 20 is unjustified in view of the second paragraph of the note. However, Ms Mushayi's explanation, though reasonably comprehensive on a theoretical level – albeit inadequately tailored - and given by someone with some experience of the Claimant, would have been hard for him to assimilate. Section 20 is a service not a coercive intervention (see *Southwark* at [28(vi)]) and the National Guidance (paras. 3.48 and 4.28) does envisage that some 16 and 17 year olds may decide to refuse accommodation under that section. However, para. 3.48 stresses the importance that a young person's decision to reject accommodation under section 20 "is properly informed, and has been reached after careful consideration of all the relevant information." In the present case, the explanation was confusing, in dwelling on a status which the Defendant had, to the Claimant's knowledge, already decided was inapplicable. Further, the Claimant was neither given the material in a "young person-friendly" format, nor in writing to take away, contrary in each respect to para. 3.44 of the National Guidance.

98. There are dicta in *DF* to similar effect to the National Guidance. However, I derive little assistance from that case otherwise, as there are material differences leading to the finding that the local authority was not entitled to conclude that DF had rejected section 20 accommodation, including that she was accepted as being a child in need rather than having been told she was not (as had the present Claimant) and had never expressed a preference one way or the other.

99. Had section 20 accommodation been on the table, it is at very least arguable in the light of the above that the Defendant could not claim to have done, in accordance with section 20(6) of the 1989 Act, what was "reasonably practicable and consistent with the child's welfare" to ascertain his "wishes and feelings regarding the provision of accommodation". However, in this case, the failure to comply with the Guidance in these respects adds nothing to the issue above. Even if, with the benefit of written information provided at the right time and in a young person-friendly format, the Claimant were to have decided that he would prefer section 20 accommodation, he could not have had it. The lack of materiality means that questions of the potential illegality of the failure to

comply with the National Guidance in these respects or of other inadequacy in the explanation given fall away.

100. I reach these conclusions without reliance on *Tinker v Tinker* [1970] P 136. That is not a decision which features in the jurisprudence with anything like the prominence one would expect, were it authority for a proposition of the breadth that would make it applicable to the present situation. Mr Tinker acted deliberately to place the property in his wife's name, so as to achieve a certain result (protection of the asset from business creditors). I respectfully doubt its applicability where a young person, making a choice that is inadequately informed, out of necessity and because he has been told to do so, makes a claim for a subsistence benefit. However, for the reasons above, the Defendant does not need to rely on the case in order to succeed.

Ground 3

101. To recap, the issues relevant to Ground 3 are as follows:

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

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

102. Mr Sheldon submitted that if the Claimant were to fail on issue a. under Grounds 1 and 2, he would lack standing for the purposes of Ground 3, as he also would by virtue of being over 18 at the time of challenge (and so unable to access accommodation under section 20 anyway). Ms Hannett opposes on the substantive issues under Grounds 1 and 2 and suggests, albeit somewhat faintly, that as a young person referred to EYPP, the Claimant should nonetheless have standing for Ground 3. The Claimant has failed on Grounds 1 and 2 and Mr Sheldon's submission is in my view correct. Submissions that, for instance, "it is unlawful to put a "choice" to a young person whereby he is required to choose between accommodation under section 20 and different accommodation under another provision…or to make accommodation available but exclude it from section 20…" clearly illustrate that a person such as the Claimant who has failed to establish that he is eligible for section 20 accommodation at all lacks standing. Nonetheless, I consider it desirable that, having heard full argument, and lest I be wrong in finding that the Claimant's case failed in the respects mentioned, I should so far as possible set out my conclusions.

103. Ms Hannett took a pleading point – that the Defendant had not said they were precluded by contract. The pleaded grounds referred to BBH not being intended for section 20 accommodation and relied on *TT*. In the context of judicial review proceedings, I consider that was sufficient to identify the issue.

104. NACRO secured the use of the accommodation from its sub-contractor, Peabody, for the purpose of bidding successfully to provide services under contract with the Defendant, some of which were required to be provided in accommodation. The ability of NACRO to refuse a referral where it wishes to do so is limited. The documentation does provide for a discussion to take place with a view to identifying alternative solutions (see [42] above (EYPP) and [45] (NEST)) and Loredana Grigore, a Service Manager in D-BIT, in her evidence describes a process of dialogue. Such an approach is unsurprising in the context of a contract between a local authority and a charity, working (in a loose sense)

in partnership to support vulnerable service users. Nonetheless, under the documentation the paradigm position is that access to the services and, where the services are provided at the accommodation, the accommodation as well, is controlled by the Defendant's Gateway Managers. Further, the accommodation is required to comply with the Defendant's standards. If the accommodation were provided under section 20, I would consider, respectfully differing from Mostyn J on this point, that in relation to the EYPP there would be both action by the Defendant and a causal nexus with the provision of the accommodation that it would to the necessary extent be "provided by" the Defendant (see *Hammersmith* at [44], applied in *R(B) v Nottingham City Council* [2011] EWHC 2933 at [66]-[68]).

105. However, it is not provided under section 20. I am satisfied from the tender documentation (see the recitals and the extracts from the Service Specification set out and summarised at [43] and [44]) that when the contract was retendered, the Defendant's purpose was to make provision for four cohorts including 16-17 year olds who were not looked after children or who had said no to that status. That the Defendant in the context of settling other proceedings has conceded in a few cases that residence in BBH for a short while was to be taken as being under section 20 does not alter the intended purpose of the procurement.

106. However, it is the earlier contractual arrangements which this case concerns. Although there is an explicit reference in the later NEST contract that the relevant cohort is not intended to include those assessed as not being a child in need or who have been so assessed, but have made a decision to be outside that system, there is nothing in the EYPP documentation[2] which says, in terms, that accommodating children under section 20 is excluded. I was told at the hearing that there was not thought to have been any material change in the structure of the arrangements. Further, there was the variation which said inter alia that those who became looked after children while resident in BBH would have to move out and other arrangements made for them. What does this variation suggest about the position with regard to looked after children being referred in the first place? Given that looked after children may have widely varying levels of requirement for services, it appears unlikely that the variation arose because NACRO had been content in the first place to accept referrals under s.20 of those who after 24 hours would become looked after children but did not want any extra ones as a result of existing residents becoming looked after children subsequently. Rather, it appears more likely that the aim of the variation was to preserve the availability of the accommodation and linked services for those in the Defendant's targeted cohorts (which would have excluded referrals under section 20 in the first place) in the face of an unexpected change of circumstances. I therefore reach the conclusion that, like the NEST arrangements, the EYPP arrangements were not provided under section 20.

107. Ms Hannett seeks to rely on the terms of section 22C(5) of the 1989 Act which, to recap, provides that if accommodation cannot be provided via one of the routes which are higher in the statutory hierarchy, the local authority "must place C [the child/young person] in the placement which is, in their opinion, the most appropriate placement available." She submits that the Defendant clearly did consider that BBH was "the most appropriate placement available" as they referred the Claimant there; thus, she submits in a section 20 case, a placement at BBH should be made under section 20. The difficulty with this submission in my view is that it gives inadequate weight to both "appropriate" and "available". On my findings, BBH was not and is not generally "available" for

[2] The statement cited by Mostyn J in *TT* at [44] appears to be found only in the NEST documentation.

placements under section 20. The primacy of section 20 in cases where a duty under the section is owed does not affect that. Therefore, at any rate when there are other placements that are available under section 20, a placement at BBH would not, save perhaps in exceptional circumstances, be "appropriate". *R(S) v Sutton LBC* [2007] EWCA Civ 790 is based on a concession that there was no evidence before the judge that the local authority could not have placed the young person at the property in question pursuant to predecessor statutory provisions. In my judgment, in the present case there is evidence - it is a question of how one interprets it. *R(H) v Wandsworth LBC* [2007] EWHC 1082 (Admin) appears to have been about the summary nature of the presentation of the choice to the young person. In any event, in the present case, the Claimant was not, as he knew, eligible for section 20 accommodation anyway.

108. At times, the Claimant's submission amounts, in effect, to a challenge to the Defendant's procurement decision regarding the service to be tendered which became the EYPP/NEST contracts. I do not accept that in these proceedings the Defendant is required to justify why NEST accommodation is not made available under section 20. The fact is that it is not available under that section.

109. Nor do I accept the submission on behalf of the Claimant that by contracting to provide for the four targeted cohorts and not a fifth, into which the Claimant fell, the Defendant was unlawfully fettering its discretion. Any contract entered into by a local authority will mean that it cannot use the same resources (in this case the fees paid to NACRO) for something else. What is required is that in cases falling under section 20, the Defendant must be able to provide accommodation which enables it to discharge its statutory duties. In her evidence, Carrie Woodcock, a qualified social worker who is Team Manager in the Defendant's Assessment and Intervention Team, gives details of the accommodation that is available in section 20 cases, so the needs of looked after children are provided for. If within the Defendant's powers it also makes provision for other groups, that is unobjectionable. So long as the Defendant had the power, it does not matter that they were not all specifically recited, thus the absence from the EYPP/NEST arrangements of specific reference to the Children Act 2004 and the Localism Act 2011 is not fatal.

110. I am in respectful agreement with the conclusion of Mostyn J in *TT* that there was no unlawful fettering. A number of other submissions were made to me concerning *TT*. I have dealt expressly with them when I have felt it necessary to do so.

Ground 4

111. Ms Hannett accepts that following *GE (Eritrea)* and *R(HP) v Greenwich LBC* [2023] EWHC 744 (Admin), the discretion to treat a person as a former relevant child only arises if there has been a flawed assessment and therefore that Ground 4 is contingent on the outcome of Grounds 1 to 3. It follows from my conclusion on those Grounds that the Defendant erred on the side of caution in volunteering in pre-action protocol correspondence that such a discretion arose in this case, albeit it was not prepared to exercise it in the Claimant's favour. Given my decision on the other parts of the case, it was entitled to conclude that it was not obliged to treat the Claimant as if a former relevant child.

Delay

112. No question of delay arises on Issue 3/Ground 4. In relation to Grounds 1 to 3 /Issues 1 and 2, the authorities such as *R(C) v Knowsley MBC* [2008] EWHC 2551 (Admin) and *R (T) v Hertfordshire CC* [2015] EWHC 1936 (Admin) indicate that the failure to accord "former relevant child" status constitutes a continuing breach, even though it is liable to require examination of decisions taken some time ago. However, such an approach appears to me to sit uncomfortably with the carefully calibrated approach evident in *GE (Eritrea)* and *HP* to the exercise of discretion to treat as a former relevant child, if a claimant could, years after the event, raise a substantive challenge to the decision in consequence of which they had not been treated as a looked after child. In a case where the reason why a person claims that the discretion to treat them as a former relevant child should be exercised in their favour is based on an irrational or unfair needs assessment, it may be necessary to consider that matter, possibly a considerable time after the event. But even if the assessment is found to have been unlawful in public law terms, *HP* indicates that a much wider range of factors is potentially relevant.

113. For instance, in *HP*, Fordham J observed:

> "Alongside what the local authority did in making the assessment, it is relevant for the decision-maker to think about what was done or not done by or on behalf of the affected individual. One aspect of that is whether there was a prompt challenge, and whether there was an application for interim relief (para 23(xii) above). The nature and degree of the "injustice" can properly be affected by such features. It may be said that the individual and their representatives have "done all they possibly could". In my judgment, there is a theme here which asks whether there are aggravating—or, for that matter, mitigating—features so far as the injustice is concerned."

114. At first sight, it is not easy to see how treating the withholding of former relevant child status as a continuing breach or a generous approach to extending time in cases where there is (say) a late challenge to a needs assessment can sit comfortably with the more nuanced approach of *HP* if the claim to the favourable exercise of discretion is based on a flawed needs assessment.

115. I turn to the authorities cited by Ms Hannett at the hearing. It is fair to observe that none of them both post-date *GE (Eritrea)* and concern a claim for "former relevant child" status. However, I was subsequently referred to the judgment of Calver J dated 15 December 2023 in *R(BC) v Surrey County Council* [2023] EWHC 3209 (Admin), which does both and which reiterates the continuing nature of the duties in retrospective care leaver cases, albeit without discussion of any implications for that doctrine there may be flowing from *GE (Eritrea)* or *HP*.

116. Although as will be apparent I have some reservations about the interaction between the two lines of authority, that was not a matter explored at the hearing before me and consequently I consider it would not be right to depart from the approach adopted in *BC*.

117. In any event, if it be necessary, I would extend time for the purposes of allowing the present application to be considered. Ms Hannett rightly submitted that it was necessary to consider the lawfulness of the matters raised in the context of Ground 4 and that it would be disproportionate to refuse to entertain Grounds 1 to 3 when they had to be considered anyway. Any prejudice to the Defendant will have been limited – its records

were available to it and Ms Mushayi remained in post so was readily available to give evidence – and unavoidable in the context of the Ground 4 challenge in any event.

118. The question whether there was delay bearing on remedy does not arise in view of my conclusions on Grounds 1 to 4.

Conclusion

119. I give permission on Ground 1 because it was properly arguable; on Ground 2 because had the Claimant succeeded on Ground 1, it would have been properly arguable; and on Grounds 3 and 4 because they are inextricably linked to the outcome on Grounds 1 and 2. However, for the reasons given, the application fails on all grounds and is dismissed.