Neutral Citation Number: [2009] EWCA Civ 43

Case No: C1/2008/1738

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGHT COURT OF JUSTICE, QUEEN'S BENCH DIVISION, ADMINISTRATIVE COURT
Mr James Goudie QC, sitting as a Deputy Judge of the High Court
Lower Court No: CO/5939/08

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/02/2009

Before :

LORD JUSTICE RIX
LORD JUSTICE DYSON
and
LORD JUSTICE WILSON

- -

Between :

The Queen (on the application of Liverpool City Council)	**Appellant**
- and -	
The London Borough of Hillingdon	**Respondent**
-and-	
A.K.	**Interested Party**

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Mr Bryan McGuire and Miss Peggy Etiebet (instructed by City Solicitor, Liverpool) for the Appellant
Mr Hilton Harrop-Griffiths (instructed by **Legal Services, London Borough of Hillingdon**) for the Respondent
Mr Adam Fullwood (instructed by **Jackson and Canter, Liverpool)** for the **Interested Party**

Hearing date: 16 January 2009

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Judgment

Lord Justice Dyson:

1. The principal issue that arises on this appeal is whether the London Borough of Hillingdon ("LBH") discharged its duty under section 20(1) of the Children Act 1989 ("the CA") in relation to the provision of accommodation for AK. It contends that it did and that, AK now being a child in need in the area of Liverpool City Council ("Liverpool"), the duty under section 20(1) of the CA lies on Liverpool. We are told that disputes between local authorities of the kind that have arisen in the present case are not uncommon. So far as is material, the deputy judge held that (i) LBH did discharge its duty under section 20(1), and (ii), even if it did not discharge its duty and remained responsible for the provision of accommodation for AK, Liverpool was also responsible for the provision of accommodation for AK .

The facts

2. AK is a national of Pakistan. On 7 April 2008, he arrived in the United Kingdom illegally and with a false passport. He claimed asylum in Liverpool on 9 April. On the same day, Liverpool carried out an age assessment of him in order to ascertain whether he was a child. He said that he was 15 years of age, having been born on 4 April 1993. On 9 April 2008, Liverpool assessed him as an adult with a date of birth of 4 April 1990. On the basis of that assessment and after a screening interview on 14 April with its Asylum Screening Unit, Liverpool referred him to the Home Office Agencies, the National Asylum Support Service ("NASS") and the Border and Immigration Agency.

3. AK was accommodated by NASS in the Liverpool area. He was then moved to Campsfield Detention Centre in Oxfordshire and from there to the Harmondsworth Detention Centre, which is in the area of LBH. He was interviewed at Harmondsworth on 25 April. Although both these centres are for adults, AK continued to maintain that he was a child.

4. His asylum claim was dismissed on 28 April and he appealed. An important issue in the appeal was whether AK was a child, because the fast track procedure in the Asylum and Immigration Tribunal cannot be applied to a child. AK's solicitors obtained a report from a Dr Birch dated 6 May which assessed him as being 15 years of age. Immigration Judge Kebode accepted the opinion of Dr Birch and transferred the case out of the fast track. Nevertheless, AK's appeal was dismissed by the immigration judge by a determination promulgated on 14 May.

5. Meanwhile, a dispute had arisen between LBH and Liverpool as to which authority had responsibility for AK. On 7 May, there was a telephone conversation between Beth Hearst, Team Leader of the LBH Social Services, and Deborah Shannon, a senior social worker at Liverpool. Each contended that the other's authority was responsible for AK and, in particular, for re-assessing his age. LBH contended in these proceedings that Liverpool agreed to accept responsibility for the re-assessment, but the deputy judge found that there was no such agreement. There is no appeal against that finding. It has at all material times been common ground that, in view of the conflict between the original age assessment made by Liverpool and the decision of the immigration judge to accept the opinion of Dr Birch, a re-assessment was necessary. The need for a re-assessment of age in such circumstances is recognised by para 14(b) of the "Age Assessment Joint Working Protocol between the

Immigration and Nationality Directorate and the Association of Directors of Social Services" dated 22 November 2005.

6. It is unnecessary to set out in detail the communications that passed between LBH and Liverpool during May. The dispute as to which of them was responsible for AK was not resolved. It is sufficient to note that on 13 May, the Social Services Solicitor of LBH wrote to the Assistant Solicitor to Liverpool's Supported Living and Education Group saying that Liverpool had a legal obligation to state why it accepted or disagreed with the new evidence about AK's age and claiming reimbursement "for the costs of the accommodation provided to your client on your behalf". On 14 May, Ms Hearst wrote to the Duty Manager of the Liverpool Asylum Team saying that AK had expressed a wish to return to Liverpool where he had been resident before he was detained. The letter stated that AK had told LBH that he felt safe in Liverpool, an area with which he was familiar and where he was normally resident. The letter concluded with a request that "you discharge your duties towards this young person as directed by the Children Act 1989". Revealingly, Ms Hearst states at para 14 of her witness statement:

> "Hillingdon Social Services provided accommodation under S17. No assessments were undertaken as it was our belief that we were providing accommodation only for [AK] pending Liverpool Social Services arranging to reassess him."

Liverpool did not accept that it had any duties under the CA.

7. AK's wish to return to Liverpool had been elicited from him at an interview of him on 13 May by a LBH social worker with the aid of an interpreter. Of this interview, Ms Hearst says at para 9 of her witness statement:

> "On 13 May 2008 our duty Social Worker and an interpreter spoke with [AK]. [He] was very clear that he wanted to return to Liverpool because it is the area that he knows and feels safe in. The duty Social Worker called [AK's] Solicitor who confirmed that [he] wanted to return to Liverpool and that he had written to Liverpool City Council requesting this but they had not responded."

8. There is what appears to be a full note of the interview. Under the heading "Basic care" the note contains a brief history of events after AK's arrival in the UK and a reference to the conflicting conclusions about his age. And then this:

> "He says that he likes to live in Liverpool because he has already been living in Liverpool and he knows the area. He is asked again if he has any family or friends in Liverpool, but he says he hasn't".

9. Ms Hearst says at para 12 of her statement that on 14 May, AK confirmed again his wish to return to Liverpool. LBH, therefore, decided that one of its support workers should escort him to Liverpool. On 16 May, a support worker escorted AK to Liverpool's municipal building. On her arrival, she spoke by telephone to Gail Martin, Team Manager of Liverpool's Unaccompanied Asylum Seekers' Team,

informing her of AK's presence and handed over a letter explaining the circumstances of his return.

10. Liverpool has maintained AK and provided him with accommodation since he was returned, but on the basis that he is an adult and that it has no responsibilities pursuant to the CA. The issue of AK's age remains unresolved. There has not been a further age assessment following the immigration judge's acceptance of the report of Dr Birch.

These proceedings

11. In order to resolve the impasse that had been reached between these two authorities, Liverpool issued judicial review proceedings claiming inter alia (a) a declaration that LBH (i) from 13 May 2008 at the latest was under a statutory duty to conduct an age assessment of AK and provide accommodation under section 20 of the CA pending such assessment, (ii) had acted unlawfully by ceasing to accommodate AK after 13 May and removing him to Liverpool without having conducted an age assessment of him; and (b) a mandatory order that LBH should carry out an age assessment and accommodate him whilst so doing.

The statutory material

12. The relevant provisions of the CA are in Part III which is headed "Local Authority Support for Children and Families". The particular provision with which this appeal is concerned is section 20 (as amended), which so far as material provides:

> "(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
>
> …

> (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."

13. The section 20 duty is a subset of the general duty created by section 17 which provides for the provision of services for children in need, their families and others. Section 17(1) provides that it shall be the "general duty" of every local authority "(a) to safeguard and promote the welfare of children within their area who are in need". Subsection (2) provides that "for the purpose principally of facilitating the discharge of their general duty under this section, every local authority shall have the specific duties and powers set out in Part 1 of Schedule 2." Those specific duties include the duty to take reasonable steps to identify the extent to which there are children in need within their area (para 1(1)). Para 3 of Part 1 of Schedule 3 provides that "where it appears to a local authority that a child within their area is in need, the authority may assess his needs for the purposes of this Act at the same time as any assessment of his needs is made under [specified other Acts]". Section 17(4A) is, mutatis mutandis, in the same terms as section 20(6).

14. Section 30(2) provides that:

> "(2) Any question arising under section 20(2)……as to the ordinary residence of a child shall be determined by agreement between the local authorities concerned or, in default of agreement, by the Secretary of State."

15. Finally, I should refer to section 27 which, so far as material, provides:

> "(1) Where it appears to a local authority that any authority . . . mentioned in subsection (3) could, by taking any specified action, help in the exercise of any of their functions under this Part, they may request the help of that other authority . . . , specifying the action in question.

> (2) An authority whose help is so requested shall comply with the request if it is compatible with their own statutory or other duties and obligations and does not unduly prejudice the discharge of any of their functions.
>
> (2) The authorities are—
>
> (a) any local authority
>
> …"

The judgment

16. Before the Deputy Judge, it was common ground that a further age assessment was required and that AK needed to be accommodated at least during the assessment process. It was not suggested that both authorities should carry out the assessment or that they should be jointly responsible for providing accommodation: see [49] of the judgment.

17. The deputy judge held at [66] that LBH became responsible for AK. He said "He was discharged within their area. They accommodated him from 9 May. They interviewed him on 13 May. They assisted him thereafter." He then continued:

> "67. Nonetheless, AK then left Hillingdon's area, fully in accordance with his undoubted wishes, and went where he clearly and firmly wanted to go, assisted by Hillingdon. Hillingdon's responsibility in its turn ceased once AK had returned to Liverpool.
>
> 68. Had he made the journey without Hillingdon's assistance, Hillingdon would no longer have been responsible. It makes no difference that they assisted him.
>
> 69. This is not a case of Hillingdon acting for any improper purpose. They believed, rightly or wrongly, that they were not responsible. They believed, rightly, that they were giving due consideration to AK's wishes and feelings."

18. He then considered what the position would be if, contrary to his view, LBH had not discharged its duty in escorting AK to Liverpool. He said at [71] to [77] that, even if LBH had a continuing duty under section 20, Liverpool also had that duty, since AK was in its area.

The grounds of appeal

19. Mr McGuire advances three grounds of appeal. These are that (i) LBH did not discharge its duty under section 20; (ii) since LBH had a continuing duty under section 20, Liverpool did not also have that duty, since the duty under section 20 cannot be owed to a child by more than one authority at a time; and (iii) alternatively to (ii), since LBH had a continuing duty under section 20, even if the duty can, in principle, be owed to a child by more than one authority at a time, it was not owed by

Liverpool on the facts of this case because to hold otherwise would enable LBH to take advantage of its own wrong and, for that reason, would be wrong.

The first ground: did LBH discharge its section 20 duty?

20. It is not in dispute that, by reason of AK's being within the Liverpool area, initially it was that authority which had the section 20 duty. It discharged the duty by assessing AK's age as 18. It is also not in issue that, once AK was within the area of LBH, the section 20 duty fell upon that authority.

21. In my judgment, LBH did not discharge that duty. It did not purport to discharge a duty under section 20 because it maintained the clear and consistent stance that it had no responsibility for AK under that statutory provision. I have already referred to the fact that the two authorities were in dispute as to which of them had a responsibility to assess the position: see [5] and [6] above.

22. LBH could have said that it was discharging the section 20 duty without prejudice to its contention that it had no obligation to do so. But it did not take that course. It did not even carry out a re-assessment of AK's age to satisfy itself that he was a child and the CA was engaged. Instead, it merely ascertained that AK wished to go to Liverpool and assisted him to achieve his wish maintaining throughout that the section 20 duty was on Liverpool.

23. Nevertheless, Mr Harrop-Griffiths submits that, despite its insistence that it was for Liverpool to discharge the section 20 duty, LBH did *in fact* discharge it. He says that the ascertainment by LBH of the fact that AK wished to live in and therefore be accommodated in Liverpool was of itself sufficient to discharge the section 20 duty. This submission raises the question of the relationship between section 20(1) and 20(6) which has been considered in a number of previous decisions but not, I think, authoritatively determined.

24. In *R (H, Barhanu, B) v. LBs Wandsworth, Hackney, Islington* [2007] EWHC 1082 (Admin) at [55], Holman J said:

> "…sub-section (6) operates as a prior step 'before providing accommodation', not before the duty under sub-section (1) to do so arises. In my view, sub-section (6) is obviously and primarily directed to the form and manner in which accommodation is provided… But I accept that sub-section (6) is wide enough also to include the wishes and feelings as to whether he wishes to be provided with accommodation at all. If he says he does not, then the local authority may conclude that in fact he does not 'require' accommodation, and in any event cannot force him into accommodation if he does not want it."

25. In *R (S) v. LB Sutton* [2007] EWHC 1196 (Admin) at [51], Stanley Burnton J said:

> "I certainly find it difficult to see that section 20(6), which would seem to be directed to the question what accommodation should be provided under section 20, may be used to decide whether accommodation should be provided under that section, since ex

> hypothesi the conditions for the imposition of the section 20 duty have arisen.".

26. In the same case on appeal [2007] EWCA Civ 790 Hooper LJ said at [60] that it was unnecessary to resolve whether what Stanley Burnton J had said was correct. At [65] Arden LJ said:

> "Reference is certainly made to section 20(6) but, as I read the Guidance [LAC(2003)13], only on the basis that the child's wishes will be included in the assessment which should precede a decision about accommodation under section 20 so that that decision is a properly informed one. I do not consider that the Guidance is suggesting the child's wishes can be used to displace a duty otherwise arising".

27. At [67], the Master of the Rolls said:

> "It seems to me that, whatever the true construction of [section 20(6)], it may well be appropriate for the authority to discuss the position with the child before reaching a conclusion as to whether he or she 'requires accommodation' within the meaning of section 20(1)."

28. In *R (M) v. LB Hammersmith and Fulham* [2008] UKHL 14, [2008] 1 WLR 535, at [17] Baroness Hale said in relation to section 20(6): "…The child is also given a voice in the decision, but not a decisive one…." And at [43], she said:

> "I have reservations about the narrow approach of Stanley Burnton J in the *Sutton* case to the significance of the child's wishes under section 20(6), on which the Court of Appeal declined to express a concluded view. It seems to me that there may well be cases in which there is a choice between section 17 and section 20, where the wishes of the child, at least an older child who is fully informed of the consequences of the choices before her, may determine the matter. It is most unlikely that section 20 was intended to operate compulsorily against a child who is competent to decide for himself."

29. In *R (M, A) v. LBs Lambeth, Croydon* [2008] EWHC 1364 (Admin) Bennett J said at [57]:

> "It seems to me that neither sub-section (6) nor sub-section (7) [no accommodation if parental objection] can be isolated from deciding the proper construction of section 20(1), i.e. what is the character of the duty under section 20(1)…. If a local authority were to find out, say, at the very beginning of its investigation after a young person walks into its offices, that the requirements of sub-section (7) are satisfied it would be a complete waste of time and of valuable resources of the local authority for it to undertake any of the assessments under section 20(1), i.e. age, in need under section 17(10) and requiring accommodation. Likewise, if a young person, say of 17 … vehemently disputes the provision of proposed accommodation …

> and will not accept it, then I see no practical sense in saying that the local authority is nevertheless under a (self-contained) duty arising under section 20(1)."

30. The most recent statement of the scope of what the section 20 duty entails is to be found in the judgment of Ward LJ in *The Queen on the application of A and London Borough of Croydon and others* [2008] EWCA Civ 1445 at [75]:

> "To answer the question whether decisions under section 20 of the Children Act should be entrusted to social workers, one must consider the legislative scheme as a whole. Confining myself for a moment to section 20 alone, it is immediately obvious that the decision involves a judgment being formed about a range of facts and matters such as:
>
> (1) Is the applicant a child?
>
> (2) Is the applicant a child in need?
>
> (3) Is he within the local authority's area?
>
> (4) Does he appear to the local authority to require accommodation?
>
> (5) Is that need the 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 from providing him with suitable accommodation or care?
>
> (6) What are the child's wishes regarding the provision of accommodation for him?
>
> (7) What consideration (having regard to his age and understanding) is duly to be given to those wishes?
>
> (8) Does any person with parental responsibility who is willing to provide accommodation for him object to the local authority's intervention?
>
> (9) If there is objection, does the person in whose favour a residence order is in force agree to the child being looked after by the local authority?"

31. It is clear that in some cases, there will be issues which can be resolved at an early stage of the section 20 process whose resolution may prove to be decisive. For example, if there is an issue as to whether the putative child is indeed a child, it makes sense to resolve that issue first. If he or she is not a child, then section 20 does not apply at all. Further examples are where there is an issue as to whether the child is

within the local authority's area, or whether he or she appears to be in need of accommodation as a result of any of the matters listed in section 20(1)(a), (b) or (c). A yet further example is where there is an issue as to whether section 20(7) applies. If a person who has parental responsibility for the child objects and subsection (7) (i) or (ii) is satisfied, then the authority *may not* provide accommodation under section 20. The resolution of these issues may determine the matter so that the authority is not required to go on to consider whether the child is in need of accommodation.

32. But the position in relation to subsection (6) is different. It does not provide that the child's wishes and feelings are determinative. In view of the emphasis of the CA on a child's welfare (replicated in subsection (6) itself), this is hardly surprising. Children are often not good judges of what is in their best interests. Subsection (6) is carefully drafted. The local authority is required "so far as is reasonably practicable and consistent with the child's welfare" to ascertain the child's wishes and feelings regarding the provision of accommodation and "give *due* consideration (having regard to his age and understanding) to such wishes and feelings… as they have been able to ascertain" (emphasis added). The child's wishes are to be given "due" consideration in the assessment process, no more and no less.

33. There may be cases where the child's wishes are decisive. But in my view a local authority should reach the conclusion that the child's wishes are decisive only as part of its overall judgment including an assessment of the child's welfare needs and the type and location of accommodation that will meet those needs. That is what, in effect, Arden LJ was saying in the *Sutton* case. It is also clear that this is what Ward LJ was contemplating in the *Croydon* case. He said that the section 20 decision involves a judgment being made about a range of facts and matters such as the nine that he listed, which included the subsection (6) questions.

34. Where the child is mature, articulate and intelligent and has strong and reasoned views as to why he or she wants to have a certain type of accommodation in a certain place, it may be that the local authority will be able swiftly and easily to form the view that it ought to accommodate the child in accordance with his or her wishes. I believe that this is what Baroness Hale (in the *Hammersmith and Fulham* case) and Bennett J (in the *Lambeth and Croydon* case) had in mind. But an assessment of needs will always be required. Otherwise, the authority will not be able to give due consideration to the question whether it is consistent with the child's welfare needs to accede to his or her wishes. I do not believe that Baroness Hale or Bennett J were contemplating a short-cut which would obviate the need for that consideration.

35. I can now return to the facts of the present case. LBH did not give any consideration to AK's welfare needs. They did not make any assessment of his needs. It follows that they did not make any assessment of what kind of accommodation would meet those needs. They did not take account of his age, because they did not know what it was. They did not make any assessment of his understanding. They did not make enquiry of what accommodation would be available in Liverpool and whether it would be suitable for his needs. They did not apply the nuanced approach to the wishes and feelings of a child which is mandated by section 20(6). They took the simplistic view that the fact that AK said that he wanted to live in Liverpool was determinative of the matter. This was not a proper discharge of the section 20 duty.

36. I emphasise that it would have been possible for them, having given due consideration to his wishes and feelings, to reach the conclusion, having regard to his age and understanding, that it was consistent with his welfare to provide him with accommodation in accordance with those wishes and feelings. Indeed, it would have been open to them to provide him with accommodation in the Liverpool area, if necessary invoking section 27 to enlist the help of Liverpool for that purpose.

37. I recognise that there is a distinction between a failure to perform the duty at all (case A) and a performance of the duty which is defective in the sense that it can be successfully challenged on the usual public law grounds (case B). In case A, there is a complete failure to discharge the duty and the local authority remains under a continuing obligation to discharge it. In case B, the local authority has performed the duty, albeit incorrectly. What consequences flow from its failure to perform its duty properly will depend on whether there is a challenge to its decision and, if so, what relief the court decides to grant in the exercise of its discretion.

38. It may not always easy to decide into which category a particular case falls. I am in no doubt, however, that the present case falls into the case A category. If this was an application of section 20(6), it was seriously defective for the reasons that I have given. But in my view there was no performance of the section 20 duty at all in this case. LBH did not even carry out a re-assessment of AK's age to see whether the CA applied. They regarded this is as the responsibility of Liverpool. They showed both by their words and their actions that they were not accepting that they were under a section 20 duty. In these circumstances, I do not consider that the fact that they ascertained that AK wished to live in the Liverpool area was even a defective application of section 20(6). It had nothing to do with section 20. That is why I would uphold the first ground of appeal and determine that LBH did not discharge its duty under section 20.

The second ground: concurrent duties under section 20(1)

39. Mr Harrop-Griffiths concedes that, if as I have held, LBH did not discharge its duty under section 20, then LBH continues to be under that duty and Liverpool is under no section 20 duty. Mr McGuire developed detailed submissions in support of this ground of appeal. Reference was made to sections 20(2) and 30(2) in support of the submission that the premise on which section 20 is based is that the first local authority on which the duty is placed remains responsible for the discharge of the duty and it can only transfer responsibility to another authority by operating the very limited sections 20(2) and 30(2) machinery. In view of the concession made by Mr Harrop-Griffiths, I propose to say no more about the interesting issues raised by the second ground of appeal.

The third ground of appeal

40. In view of the concession in relation to the second ground of appeal, this does not arise.

Relief

41. Mr Harrop-Griffiths accepts that if we were to uphold the first ground of appeal, we should grant the declarations referred to at [11] above. He submits, however, that

there is no need to make a mandatory order to give effect to the declarations. In view of the unfortunate history of this matter, I would make an order in the terms set out at [11] above. If LBH were to decide that AK is a child, then it would have to decide what accommodation to provide for him pursuant to its obligations under section 20. As I have said, in that event it could provide accommodation in the Liverpool area in accordance with his wishes.

Lord Justice Wilson:

42. I agree.

Lord Justice Rix:

43. I also agree, subject to one reservation, which does not affect Lord Justice Dyson's reasoning or the outcome. Mr Harrop-Griffiths, counsel for Hillingdon, conceded that, if Hillingdon had failed to discharge its section 20(1) duty, then it was liable, to the exclusion of Liverpool, for properly assessing AK's age and, if he were assessed to be a child, for providing him with accommodation if he appeared to require it within the terms of section 20. My reservation is that I am concerned that the concession that in such circumstances Hillingdon would be responsible for AK *to the exclusion of Liverpool* may have gone further than might, at any rate in other circumstances, have been necessary.

44. Of course, I see that on the facts of this case, Hillingdon's responsibility, if it had not discharged its duty, was particularly serious, for it was Hillingdon itself which had taken AK to Liverpool. In such circumstances, I can well see that, *as between Hillingdon and Liverpool*, Hillingdon's responsibility might properly be thought to be complete. However, in the absence of adversarial argument on this point, I would prefer for myself to be cautious about whether it might not after all be possible for two local authorities to have a concurrent duty to a child: on the ground that the child was a child in need in the area of each successively in circumstances where the first local authority had not discharged its duty before the second authority had acquired its duty on the child moving or being moved to its area. After all, the statute is concerned with the interests of the child before that of adjusting the responsibilities of separate local authorities. It may be that section 27 or section 30(2) might assist in such adjustments: but in circumstances falling outside those provisions, any necessary adjustments between two local authorities might have to be arranged between them without any statutory sanction which the courts could vindicate. That was a conclusion which, albeit as between two separate authorities of the same council, the House of Lords came to in *Regina v. Northavon District Council, ex parte Smith* [1994] 2 AC 402, see at 420E-H *per* Lord Templeman: "Judicial review is not the way to obtain co-operation…The authorities must together do the best they can."

45. Mr McGuire on behalf of Liverpool submitted that the court should adopt a rule whereby the first authority to acquire an (undischarged) duty to assess should alone be required to carry out that assessment, on the ground that such a rule would promote certainty and avoid the risk of any gap in care. However, I am sceptical that such a rule would avoid all disputes, and, whereas I agree that a first authority which has a duty to assess should carry out that duty, I am concerned about saying that such a duty need be exclusive. However, at the end of the day, as Dyson LJ observes, in the light

of Hillingdon's concession, it is not possible to deal with the interesting arguments raised by Mr McGuire's second ground of appeal.

46. In this connection, there is something rather unbecoming about this litigation between two local authorities, each spending public money to dispute their respective responsibilities in connection with AK. Nevertheless, I understand the points made by Mr McGuire that the issues debated in this case are of particular concern for authorities such as Liverpool and Hillingdon, which are in areas where (young) asylum seekers may find themselves: Liverpool because it is said to be the only place in the north where asylum can be claimed, and Hillingdon because of the presence in it of Heathrow airport.

47. I would observe, moreover, that, despite the joint protocol between IND and the Association of Directors of Social Services regarding age assessment, the facts of this case demonstrate a rather disturbing picture. Liverpool assessed AK to be an adult (see the assessment dated 9 April 2008, which does not appear to have been carried out by a doctor: the "outcome of the assessment was that [AK] was over the age of 18 due to his attitude, demeanour, content of interview and appearance") and so he was referred to NASS and the Border and Immigration Agency. That assessment by Liverpool has not been challenged in this litigation, but that may be because it has never been in Hillingdon's interest to do so. We know that his age was assessed to have been 15 by Dr Birch, a consultant paediatrician, who produced a detailed medical report to that effect at the request of AK's solicitors for the purpose of his asylum claim, and we also know that the immigration judge accepted Dr Birch's evidence in the AIT proceedings (albeit the immigration judge did not have Liverpool's assessment to hand.) Then, following the AIT determination, Hillingdon declined to perform a further age assessment, while disputing the evidence of Dr Birch and its acceptance by the immigration judge. In its letter to Liverpool dated 13 May 2008, Hillingdon wrote:

> "I remind you that this is not an age assessment dispute between two Local Authorities because my client department has not conducted an age assessment, therefore protocols in relation to this do not apply.
>
> You are advised that my client department does not accept the above named person as a child in need in our area. We have not had sight of any new evidence in relation to his age and remind you that we are not legally bound by a decision made by an Asylum and Immigration Tribunal Judge."

48. It seems to me that, if AK is a child, it is regrettable that the matter is still unresolved. Without a reliable assessment, the Children Act cannot begin, where its provisions are applicable, to provide help for a child in need.

49. Finally, I would mention the position of Mr Fullwood on behalf of AK. His skeleton argument favoured the judge's analysis whereby Liverpool currently bore the duty of assessment for the purposes of section 20(1). However, in his brief oral submissions he realistically accepted that at any rate the primary duty might rest with Hillingdon,

in which case he was faced with Hillingdon's acceptance that it alone owed the duty. His primary concern and submission, however, were to emphasise that AK was now well settled with a foster mother in Liverpool and that such an arrangement should not be disturbed. He saw no reason why Hillingdon, it if accepted the duty to accommodate, could not do so, with Liverpool's co-operation, in Liverpool.