

HOUSE OF LORDS

SESSION 2007–08

[2008] UKHL 14

on appeal from: [2006] EWCA Civ 917

[2007] LGR 127

OPINIONS
OF THE LORDS OF APPEAL
FOR JUDGMENT IN THE CAUSE

**R (on the application of M) (FC) (Appellant) v London Borough of
Hammersmith and Fulham (Respondents)**

Appellate Committee

Lord Hoffmann
Lord Scott of Foscote
Lord Walker of Gestingthorpe
Baroness Hale of Richmond
Lord Brown of Eaton-under-Heywood

Counsel

Appellants:
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Respondents:
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of Hammersmith and Fulham)

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LORD HOFFMANN

My Lords,

1. I have had the advantage of reading in draft the speech of my noble and learned friend Baroness Hale of Richmond. For the reasons she gives, with which I agree, I too would dismiss this appeal.

LORD SCOTT OF FOSCOTE

My Lords,

2. I have had the advantage of reading in draft the opinion of my noble and learned friend Baroness Hale of Richmond and for the reasons she gives, with which I am in full agreement, I too would dismiss this appeal.

LORD WALKER OF GESTINGTHORPE

My Lords,

3. I have had the privilege of reading in draft the opinion of my noble and learned friend Baroness Hale of Richmond. I am in full agreement with it, and I too would dismiss this appeal.

BARONESS HALE OF RICHMOND

My Lords,

4. Any parent of teenagers aged 16 and 17 knows how difficult they can be. But they also know that, however much those teenagers are struggling to discover their own identities and lead independent lives, they also depend upon the love and the support of their parents. As the Green Paper, *Care Matters: Transforming the Lives of Children and Young People in Care* (2006, Cm 6932, para 7.2) put it:

“For most young people the idea of being left unsupported at that age would be alien. They have a sense of security and know that their parents will always be there for them. Few young people ever really ‘leave’ the care of their parents. They may leave home, and on average do so at the age of 24, but they know that their families are only ever a phone call away and stand ready to offer financial support and advice, or a place to stay if they need it.”

This case is about the respective responsibilities of local authority children’s and housing services towards children aged 16 and 17 who are unable to live with their families. In the end, it comes down to a short point of construction: what is meant by ‘a child who is looked after by a local authority’, as defined in section 22(1) of the Children Act 1989? But the clear intention of the legislation is that these children need more than a roof over their heads and that local children’s services authorities cannot avoid their responsibilities towards this challenging age group by passing them over to the local housing authorities.

What happened in this case

5. M is the youngest of her mother’s five children by different fathers. The family spent many years in unsettled and temporary accommodation. On her own account the mother (who had spent her own childhood in local authority care) had tremendous difficulty controlling her children. M was excluded from school at the age of 14 and never returned. Her mother has been ill for many years with a stomach complaint which was eventually diagnosed as an inoperable malignant tumour. M was expected to look after her mother but at the

same time left 'to get on with her own thing without supervision'. Early in 2005 she became involved with the criminal justice system. Soon afterwards, the relationship with her mother broke down.

6. On the mother's account, M went with the mother's Macmillan nurse to seek help from the local children's services department and was turned away; but there is no record of any such visit. However, there is a record of a visit by M to the local authority's housing department on 4 February 2005, shortly before her 17th birthday. She bore a letter from her mother 'to whom it may concern'. This stated that M 'is no longer able to stay in my home as she has broken every rule laid down to her' and asking help for M 'by placing her in her own home'. The first part of a 'First Approach: Needs Assessment and Referral Form' was filled in but no more: the manager speculates that M was sent away to ask for proof that her mother was entitled to exclude her from the home and did not return.

7. M next approached the Housing Department on 5 April 2005, bearing another letter from her mother:

"I go into hospital on 6th April 2005 for treatment on a tumour I have. I am not prepared for [M] to be one of the factors that halt my treatment because of her behaviour. I am not willing to try with her anymore. She has ongoing Court Cases and a lot of social problems. I myself have tried but I cannot help. So I hope you can be of some assistance with the housing needs for [M]."

Once again, the housing department sent her home, this time with a letter to her mother stating that she should give her daughter at least 28 days' notice to leave. The mother replied immediately, saying that she had already done so two months ago and that her home would be locked up when she went into hospital the following day. Back at the housing office, M explained that she was on bail for various offences, so (after contacting the Youth Offending Team) she was advised to inform the police that she had lost her bail address.

8. The following day, 6 April 2005, M was in court and needed a bail address as she could not go home. Her solicitor persuaded the housing department to provide her with temporary accommodation in a bed and breakfast hotel and to fax the court to that effect. M signed a licence agreement with the local authority that same day. The 'Needs

Assessment' form completed by the officer recorded that she was currently not on any income, was a young person at risk, an offender and an ex or current offender.

9. Despite that, there is no record of any referral to the local authority's children's services department. There was a referral to a mediation service, with a view to exploring the possibility of M going back to her mother's home. The mediator left two telephone messages for M and sent one letter but received no response. Accordingly the local authority cancelled her licence with effect from 25 April but reinstated it that same day when M agreed to see the mediator. She did so the following day, but when they contacted the mother, she made it clear that she was not prepared to engage in mediation or to have M at home any more. The local authority therefore continued to provide M with temporary accommodation at the hotel. She was interviewed about her housing application in May, but once again no inquiries were made of the children's services department, or at that stage of the Youth Offending Team. In July she was moved to a hostel for 16 and 17 year olds, but in October she was evicted for breaking the hostel rules. She went to stay with her sister, who lived with her eight month old baby in one bed-roomed accommodation not suitable for three people.

10. The later history is not strictly relevant to the issues we have to decide but it seems clear that the lack of suitable supported accommodation played an important part in M's encounters with the criminal justice system, not least because she required a settled address for electronic tagging. It is not easy to disentangle the threads of the story from the documents on the housing department file. When first accommodated in April 2005, M was on bail for an offence of robbery committed in January that year. In May she was given a 9 month referral order for that offence. Shortly before that, however, she committed an offence of witness intimidation and in October 2005 she was placed under a Community Punishment and Rehabilitation Order for that offence. The pre-sentence report commented that 'her succession of temporary bed & breakfast placements have meant that [M] has more recently had little sense of permanency, and has had to adapt to cope with independence beyond her skills'. Initially she seemed to be doing well with that order. However, in November 2005, she also became subject to a 12 month Supervision Order with an Intensive Supervision and Surveillance Programme for offences committed in 2004. She was not up to keeping track of the demands of both orders and in December she was back in court for breach. By then her sister had evicted her and the local authority had given her further temporary accommodation. But once again she faced eviction from that accommodation for breaking the

rules. The bench clearly did not want to send her into custody and on 21 December adjourned the case to see whether her accommodation problems could be resolved. She was summarily evicted the very next day having been assaulted by an unauthorised guest (said to be an ex boyfriend) and went to stay with her mother. Unfortunately she could not see a housing officer before her next appearance in court in January 2006, when she was sentenced to a four month detention and training order. While in custody she discovered that she was pregnant. She also reached the age of 18.

11. Proceedings for judicial review were launched while M was still in custody. The main aim was to obtain suitable accommodation for her before she was released; allied to this was a claim that M was owed duties by the children's services department of the local authority, under the Children Act 1989 as amended by the Children (Leaving Care) Act 2000 (the 1989 Act); among these would be the appointment of a social worker and personal adviser. The local authority did not deny that she might be owed duties under the Housing Act 1996 (the 1996 Act) but did deny that any duties were owed under the 1989 Act.

12. Permission to move for judicial review was refused in the High Court but granted by Neuberger LJ when granting permission to appeal. Accordingly the case was tried by the Court of Appeal, which dismissed both the claim and the appeal: [2006] EWCA Civ 917; [2007] HLR 54. As Wall LJ began, the case 'raises a short but important point on the inter-relationship between the provisions of Part III of the Children Act 1989, headed "Local Authority Support for Children and Families", and the homelessness provisions of Part VII of the Housing Act 1996, in particular ss 188 and 189, headed "Interim duty to accommodate"'.

The Housing Act duties

13. Part VII of the 1996 Act contains statutory provisions relating to those who are homeless. Similar provisions were first enacted in the Housing (Homeless Persons) Act 1977 (later consolidated in the Housing Act 1985 part III). Duties are placed on the local housing authority; in non-metropolitan counties, this is the district council; in unitary authorities, such as the London Boroughs, it is the Borough Council: see Housing Act 1985, s 1. Where an applicant presents himself to the authority and the authority have reason to believe that he may be homeless or threatened with homelessness, they must make such inquiries as are necessary to satisfy themselves whether he is eligible for

assistance and if so what duty, if any, is owed to him under Part VII of the 1996 Act: 1996 Act, s 184(1). The fullest duty is owed once the authority ‘are satisfied that an applicant is homeless, eligible for assistance and has a priority need, and are not satisfied that he became homeless intentionally’: see 1996 Act, section 193(1). An interim duty to provide accommodation is owed in the circumstances laid down in section 188(1):

“If the local housing authority have reason to believe that an applicant may be homeless, eligible for assistance and have a priority need, they shall secure that accommodation is available for his occupation pending a decision as to the duty (if any) owed to him under the following provisions of this Part.”

14. Eligibility is defined in section 185 and is not in issue here. Priority need is dealt with in section 189. Section 189(1) defines a basic list of categories of people in priority need but section 189(2) allows the Secretary of State by order to add to (or subtract from) that list. article 3 of the Homelessness (Priority Need for Accommodation) (England) Order 2002 (SI 2002/2051) (the Priority Need Order) defines one such additional category as follows:

“(1) A person (other than a person to whom paragraph (2) below applies) aged sixteen or seventeen who is not a relevant child for the purposes of section 23A of the Children Act 1989.

(2) This paragraph applies to a person to whom a local authority owe a duty to provide accommodation under section 20 of that Act (provision of accommodation for children in need).”

15. Thus, in the longer term, the Children Act duties supersede the Housing Act duties towards a 16 or 17 year old young person. A local housing authority could not be satisfied that a 16 or 17 year old was in priority need for the purposes of section 193(1) of the 1996 Act if they were satisfied that the local children’s authority owed a duty to accommodate that young person under the 1989 Act. But the interim duty in section 188 might arise where the housing authority had ‘reason to believe’ that a 16 or 17 year old was in priority need and did not yet know whether or not the Children Act duties were owed.

The Children Act duties

16. The Children Act duties are owed by local social services' authorities (now known for this purpose as children's services authorities). In non-metropolitan counties, this is the county council. In unitary authorities, such as the London boroughs, this is the Borough Council. The principal duty to provide accommodation is set out in section 20(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.”

This duty is now owed to children up to the age of 18 (its predecessors in the Children Act 1948 and Child Care Act 1980 applied only up to the age of 17) but section 20(3) provides an additional duty towards 16 and 17 year olds:

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

There is also a power, in section 20(4), to provide accommodation for any child “if they consider that to do so would safeguard or promote the child's welfare” but that would not be a duty covered by article 3(2) of the Priority Need Order.

17. It is fundamental to the scheme of the 1989 Act that the local authority cannot provide accommodation under section 20 if any person, who has parental responsibility for the child and is willing and able to provide or arrange accommodation for her, objects: see 1989 Act, section 20(7). Accommodation under section 20 replaced what was previously known as ‘voluntary care’ under the Children Act 1948 as consolidated in the Child Care Act 1980. The child is also given a voice

in the decision, but not a decisive one. Before providing accommodation, the local authority must, so far as practicable and consistent with her welfare, ascertain the child's wishes 'regarding the provision of accommodation' and give due consideration to them having regard to her age and understanding: 1989 Act, section 20(6). This must relate to the initial decision to accommodate, given that there is also an obligation to ascertain and take account of the wishes of both parent and child regarding any decision relating to a child whom they are already looking after or proposing to look after: 1989 Act, section 22(4), (5).

18. A 'child in need' is defined in section 17(10):

"For the purposes of this Part a child shall 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,..."

Section 17 and Schedule 2 to the Act require the children's authorities to provide a very wide range of services to safeguard and promote the welfare of children in need, and if possible to enable them to be brought up by their own families. They include, for example, providing accommodation for children and their families (section 17(6)) and taking reasonable steps to encourage children not to commit criminal offences (section 17(2) and Schedule 2, para 7). 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. But, unlike the specific duties in section 20, which are owed to the individual child, the wider duties in section 17 and Schedule 2 are target duties owed to the whole community rather than to individual children: see *R (G) v Barnet London Borough Council* [2003] UKHL 57, [2004] 2 AC 208.

19. Once a child is accommodated under section 20, she becomes a 'looked after' child, as defined in section 22(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 –

(a) in their care; or

(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 17, 23B and 24B.”

A child ‘in care’ under paragraph (a) is one who is in the care of a local authority by virtue of a care order or the equivalent: see 1989 Act, section 105(1). The prime example of a child who is provided with accommodation under paragraph (b) is a child accommodated under section 20.

20. Once a child is ‘looked after’ by a local authority, a great many other duties arise. These include, crucially, the duty to safeguard and promote her welfare and to maintain her in other respects apart from providing accommodation for her: 1989 Act, sections 22(3) and 23(1)(b). It would not be consistent with those duties, for example, to place a young person in a bed and breakfast hotel or hostel accommodation without providing her with enough money for food and other essentials. Although the local authority do not have ‘parental responsibility’ for a child who is accommodated under section 20, they are nevertheless replacing to some extent the role played by a parent in the child’s life, and are expected to look after the child in all the ways that a good parent would.

21. Particularly relevant in this case are the duties towards older children inserted by the Children (Leaving Care) Act 2000. The aim was to supply for those older children the same sort of continuing support and guidance which children can normally expect from their own families as they move from childhood to adulthood.

22. A child who is still being looked after by the local authority is ‘eligible’ for these extra services if she is aged sixteen or seventeen and has been looked after for a total of 13 weeks or more since the age of 14: see 1989 Act, Schedule 2, para 19B(2), and Children (Leaving Care) (England) Regulations 2001, SI 2001/2874 reg 3(1) (the Leaving Care Regulations). The basic requirement is to carry out an assessment of the young person’s future needs, to prepare a detailed pathway plan for her, covering matters such as accommodation, education, financial support

and preparation for independent living, and to arrange for her to have a personal adviser: see 1989 Act, Schedule 2, paras 19B(4) and 19C, Leaving Care Regulations, regs 7, 8, 12 and Schedule.

23. If an 'eligible child' ceases to be looked after by a local authority, but is still aged sixteen or seventeen, she becomes a 'relevant child': 1989 Act, section 23A(1). The local authority must take reasonable steps to keep in touch with her, appoint a personal adviser, assess her needs and prepare a pathway plan if she does not already have these. There is also a specific duty to support her, unless they are satisfied that her welfare does not require it, by maintaining her, providing her with or maintaining her in suitable accommodation, and assisting her with education, training and employment: 1989 Act, section 23B and Leaving Care Regulations. Once a 'relevant child' reaches 18 (or a child ceases to be looked after at that age), the local authority still owe duties towards such a 'former relevant child', to advise and to provide various forms of assistance, especially with employment, education and training: 1989 Act, sections 23C, 24B.

24. Thus there is all the difference in the world between the services which an eligible, relevant or former relevant child can expect from her local children's services authority, to make up for the lack of proper parental support and guidance within the family, and the sort of help which a young homeless person, even if in priority need, can expect from her local housing authority. This is not surprising as the skills and resources available to each department are so different. But it means that a huge amount depends upon whether or not she was a 'looked after' child for the required total of 13 weeks, beginning some time after she reached 14 and ending some time after she reached 16. So it would also not be surprising if some local authorities took steps to avoid this (the Children's Commissioner for England is currently sponsoring research into local authority practice towards the 14–18 age group: see childRIGHT, July/August 2007, p 8).

What ought to have happened in this case

25. The *Homelessness Code of Guidance for Local Authorities* (Office of the Deputy Prime Minister, 2002, para 8.37) which was current at the time was clear:

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

The present Code (Department for Communities and Local Government, 2006, para 10.39) is even stronger. A framework for joint assessment ‘will need to be established’. But, having contacted the children’s services authority, the housing authority should, where necessary, “provide interim accommodation under section 188, pending clarification”.

26. Of course, the Codes are not naïve. They recognise the risk of collusion and fabrication (2002, para 8.39; 2006, para 12.11). They also recognise that children in this age group are usually better off with their families, that temporary disagreements and estrangements are not unusual, and that reconciliation should be considered (2002, para 8.38; 2006, para 12.7); but also that in some cases relationships may have broken down irretrievably and in others it may not be safe or desirable for the young person to remain at home (2002, para 8.38; 2006, para 12.8), thus ‘any mediation or reconciliation will need careful brokering and housing authorities may wish to seek the assistance of social services in all such cases’ (2006, para 12.9; in the earlier version this was positively recommended, 2002, para 8.38).

27. The 2006 code spells out some points in more detail. It emphasises that 16 and 17 year olds who are homeless and estranged from their family will be particularly vulnerable and in need of support (para 12.12); that housing solutions are likely to be unsuccessful if the necessary support is not provided, so close liaison with social services and other support agencies ‘will be essential’ (para 12.13); and that bed and breakfast accommodation is unlikely to be suitable for 16 and 17 year olds who are in need of support (para 12.14). This case is a good illustration of the wisdom of this guidance. One of the reasons that M was evicted from the hostel for 16 and 17 year olds in October 2005 was her failure to co-operate with her support worker.

28. Applying the 2002 Code (a fortiori the 2006 version) to the facts of this case, this was clearly a case of uncertainty as to whether M was a child in need. When she presented herself to the housing department for the second time in April 2005, the housing department knew enough to suggest that she might well be a ‘child in need’. They knew that she was not currently on any income, that she was a young person at risk, that she was on bail for various criminal offences. They also knew enough to suggest that the reason she might need accommodation was that the person who had been caring for her was prevented from providing her with suitable accommodation or care. They knew that her mother was seriously ill, certainly unwilling and possibly unable to cope with her any longer. It was foreseeable that without suitable accommodation and support she might have difficulty complying with her bail conditions, let alone with the more intensive requirements she might face under a community punishment or supervision order. By the time of her assessment interview in May, she was still without benefits and was obviously having difficulty coping with the demands of independent living.

29. The housing department should have made a referral to the children’s services department, at the latest after the assessment interview in May. They could not be satisfied that she was in priority need for the purposes of their longer term obligations unless they had at least considered whether she was owed the duty under section 20 of the 1989 Act. The children’s services department should then have conducted an assessment in accordance with the *Framework for the Assessment of Children in Need and their Families* (Department of Health, 2000) and the local authority’s own practice guidance.

30. In the chapter dealing with inter-agency assessment, the Department of Health give the following guidance about the respective responsibilities of housing and social services departments, in para 5.72:

“Social services departments have a duty under section 20(3) of the Children Act 1989 to accommodate any child in need aged 16 and 17 whose welfare is likely to be seriously prejudiced without the provision of accommodation. At the same time, Housing Authorities are required under the Housing Act 1996 to secure accommodation for people who are homeless, eligible for assistance and in priority need. Homeless young people may frequently come to the notice of both housing and social services and will need to be assessed to establish whether they should be

provided with accommodation. There is a danger that in these circumstances young people may be passed from one agency to another and it is important therefore that joint protocols are agreed between housing and social services in the matter of how and by whom they are to be assessed.”

31. Thus the statutory guidance given to both housing and social services departments stresses the need for joint protocols for assessing the needs of homeless 16 and 17 year olds. This is needed, not only to avoid a young person being passed from pillar to post, but also to ensure that the most appropriate agency takes responsibility for her. The 2002 Priority Need Order clearly contemplates that, if the criteria in section 20 of the 1989 Act are met, social services rather than housing should take the long term responsibility. Such a young person has needs over and above the simple need for a roof over her head and these can better be met by the social services. Unless the problem is relatively short term, she will then become an eligible child, and social services accommodation will also bring with it the additional responsibilities to help and support her in the transition to independent adult living. It was not intended that social services should be able to avoid those responsibilities by looking to the housing authority to accommodate the child.

32. Sadly, there was no joint protocol in this case. Everyone in the housing department seems to have assumed that it was a housing department responsibility or nothing. No doubt they were doing their best in trying circumstances. Teenagers are not the easiest of people to deal with, although everyone records that M was pleasant and co-operative in interviews. Her difficulties were in learning how to lead a responsible and independent life at such a young age and at a time of enormous strain for the whole family. She also needed a settled place to live in order to meet the stringent demands placed upon her by the criminal justice system. The Youth Offending Team did identify these needs during the autumn of 2005, but again it seems to have been taken for granted that accommodation was a housing rather than a social services responsibility.

33. We have no evidence of a deliberate policy in this London Borough to avoid its responsibilities under the 1989 Act by shifting them onto the housing department. Such a policy (while understandable in view of the heavy burdens now imposed by the 1989 Act) would be unlawful. But equally there is no evidence of a commitment to ensure that the needs of these young people are properly identified and the most

appropriate services made available. Wall LJ emphasised the point, at paras 73 and 74 of his judgment:

“It is self-evident that most troubled 16 and 17 year old children will be unaware of the services available to assist them, and it is equally self-evident that the onus is not on children in need to identify and request the services they require.

Furthermore, any system can deal with the compliant. Young people in the position of M, who have had wretched childhoods, or who have been otherwise abused or neglected as children, and who have gone on to commit criminal offences, may well, like M, fail to co-operate with any investigation by the council into their circumstances. That fact does not, in my judgment, either of itself and as a matter of law, absolve local authorities of their duty both to investigate and to put in place the services which children such as M require.”

I agree. I have no doubt that the housing services department should have referred the case to the children’s services department and little doubt that, on the facts as we know them, the children’s services department should have accepted responsibility for her. M was not just a ‘hale and hearty 17 year old’ (as the local authority argued in the court below) but a deeply troubled young person with need for far more than a roof over her head.

The legal issue in this case

34. In hindsight, perhaps we can all agree on what ought to have happened. But the claim is that we should treat what ought to have happened as if it had actually happened. The claim is for the extra help and support available to former relevant children, even after they reach the age of 18, under section 23C of the 1989 Act. To be a relevant child, one must first have been an eligible child: section 23A(1). To be an eligible child one must have been ‘looked after’ by a local authority for the requisite period of time: Schedule 2, para 19B(1) and Leaving Care Regulations. Who then is a ‘looked after’ child? As M was never a child in care, the question is whether she was accommodated in the exercise of the local authority’s social services functions, and specifically their functions under section 20 of the 1989 Act. Essentially the argument is that the local authority were in fact acting under section 20 when they thought they were acting under section 188 of the 1996 Act.

35. In the Court of Appeal, it was accepted in argument that in order for M to succeed it had to be shown that the decision to accommodate her under section 188 of the 1996 Act on 6 April 2005 was unlawful. If that decision was unlawful, given that the council did in fact accommodate her on that date, they must have been acting under section 20 of the 1989 Act. The Court of Appeal rejected that argument and rightly so. The duty in section 188 arises whenever the local housing authority 'have reason to believe that an applicant may be homeless, eligible for assistance and have a priority need'. By no means all 16 and 17 year olds will be entitled to accommodation under section 20 or 23B of the 1989 Act and thus excluded from the categories of those in priority need under the 1996 Act. In my view, the 2006 Homelessness Code is correct to advise that, once it appears to the housing department of a local authority that a 16 or 17 year old may be homeless, that authority should accommodate her under section 188 pending clarification of whether the local children's services authority owe a duty to provide her with accommodation under section 20.

36. The threshold in section 188 is designedly low. The housing authority should provide the accommodation when it is needed and then make further inquiries. In non-unitary authorities, the district council have no power to accommodate the young person under the 1989 Act. Clearly the housing officer in the district council should arrange temporary accommodation if it is needed and then contact the county council to discuss referral for assessment by social services. The position in unitary authorities cannot be different from that in non-unitary authorities. The council's housing functions are delegated to the housing department and the council's social services functions in respect of children are delegated to the children's services department. Neither has the power to carry out the other's functions. Each has a statutory duty to co-operate with the other. That is why they should have clear protocols for co-operation and joint assessment in cases such as this.

37. Before the House, Mr Jan Luba QC has argued that, once it became clear to the local authority that the criteria in section 20 applied, the child must be taken to have been accommodated under that section. Even if it was not immediately apparent on 6th April 2005 that M was a child in need whose mother was prevented from providing her with suitable accommodation or care, it had certainly become apparent during the authority's inquiries into her housing application. The authority could not avoid their obligations under the 1989 Act by putting a different label on what they had done. He draws support for that argument from four cases decided in the courts below, since the decision

of the Court of Appeal in this case: chronologically, *Southwark London Borough Council v D* [2007] EWCA Civ 182, [2007] 1 FLR 2181; *H v Wandsworth London Borough Council* [2007] EWHC 1082 (Admin), (2007) 10 CCLR 441; *R (S) v Sutton London Borough Council* [2007] EWCA Civ 790; and *R (L) v Nottinghamshire County Council* [2007] EWHC 2364 (Admin).

38. In *Southwark London Borough Council v D* [2007] EWCA Civ 182, [2007] 1 FLR 2181, a local authority social worker had arranged for a child, who could no longer live with her father because he was violent towards her, to live with a woman who had been her father's partner. The question was whether the local authority had simply facilitated a private fostering arrangement, in which case they had no duty to maintain the child, or whether they had accommodated her under section 20, in which case they did. As the social worker had prevented the father from taking the child home from school, had taken the lead in making the arrangements, and had told the woman that financial arrangements would be made for her, it was not difficult to conclude that the authority had in fact been discharging their duties under section 20 and could not escape their financial liabilities.

39. In *H v Wandsworth London Borough Council* [2007] EWHC 1082 (Admin), (2007) 10 CCLR 441, there were three linked cases about unaccompanied asylum-seeking children for whom the local social services authorities had provided or arranged accommodation and who now claimed to be entitled to support as former relevant children. The local authorities argued that they had provided accommodation under section 17 rather than section 20 of the 1989 Act. It was held that, if the section 20 duty arose, the local authority could not 'finesse it away' by claiming to exercise a different power.

40. The Court of Appeal 'found help' from the *Wandsworth* decision in reaching a very similar conclusion in *R (S) v Sutton London Borough Council* [2007] EWCA Civ 790. In that case there was no dispute that the local authority owed the section 20(1) duty towards a 17 year old girl who was about to be released from a Secure Training Centre. But the authority argued that the duty no longer applied because she had agreed to go to a hostel for homeless women under the homelessness legislation. However the authority conceded that she could have been accommodated there under the Children Act and the Court of Appeal held that she had in fact been placed there in fulfilment of their Children Act obligations. This meant, of course, that they continued to owe her obligations after she reached the age of 18.

41. Lastly, in *R (L) v Nottinghamshire County Council* [2007] EWHC 2364 (Admin), the issue was what the local authority had been doing when a social worker arranged for a seriously troubled young person who had been evicted from her mother's home to live for a few days in an hotel. As she had previously been looked after by the local authority for some time, this would be sufficient for her to become a relevant child. It was common ground that the classification or definition of what was being done by the council at the time, particularly where there was no assessment and the relevant matters were not in mind, could not possibly be determinative as to what had occurred. The child was clearly a child in need, there had been a continuous duty to accommodate her under section 20, and she was therefore a former relevant child.

Conclusion

42. It is not necessary, for the purpose of deciding this appeal, to express a view on whether any or all of these cases were rightly decided. For my part, I am entirely sympathetic to the proposition that where a local children's services authority provide or arrange accommodation for a child, and the circumstances are such that they should have taken action under section 20 of the 1989 Act, they cannot side-step the further obligations which result from that duty by recording or arguing that they were in fact acting under section 17 or some other legislation. The label which they choose to put upon what they have done cannot be the end of the matter. But in most of these cases that proposition was not controversial. The controversy was about whether the section 20 duty had arisen at all.

43. For what it is worth, it will be obvious from what has gone before that I agree with the broad approach to the interpretation of when a parent is 'prevented' from providing suitable accommodation or care under section 20(1)(c), which was favoured by Michael Burton J in the *Nottinghamshire* case and by Stanley Burnton J at first instance in the *Sutton London Borough Council* case [2007] EWCA 1196 (Admin), [2007] 2 FLR 849, rather than with the narrow approach favoured by Lloyd LJ in this case. This mother may not have been prevented from providing her daughter with any accommodation or care but she was surely prevented from providing her with suitable accommodation or care. On the other hand, as will also be obvious from what has gone before, 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 of 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 herself. The whole object of the 1989 Act was to draw a clear distinction between voluntary and compulsory powers and to require that compulsion could only be used after due process of law.

44. But that is by the way. It is one thing to hold that the actions of a local children's services authority should be categorised according to what they should have done rather than what they may have thought, whether at the time or in retrospect, that they were doing. It is another thing entirely to hold that the actions of a local housing authority should be categorised according to what the children's services authority should have done had the case been drawn to their attention at the time. In all of the above cases, the children's services authority did something as a result of which the child was provided with accommodation. The question was what they had done. In this case, there is no evidence that the children's services authority did anything at all. It is impossible to read the words 'a child who is...provided with accommodation by the authority in the exercise of any functions...which are social services functions within the meaning of the Local Authority Social Services Act 1970...' to include a child who has not been drawn to the attention of the local social services authority or provided with any accommodation or other services by that authority. Once again, had this been a non-metropolitan authority, the housing authority could not have provided accommodation under section 20 and the social services authority could not have provided interim accommodation under section 188. The position cannot be different as between the unitary and the non-unitary authorities.

45. In the result, therefore, this appeal must be dismissed. This does not mean that the local children's services authority have no responsibilities towards this young woman and her child. The child may well be a 'child in need' for whom services should be made available in order to safeguard and promote her welfare. The object of those services should be, so far as consistent with that duty, to promote the upbringing of the child with her family, so that her young mother will be able to give her the care, and the accommodation, that she needs.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

46. I have had the advantage of reading in draft the speech of my noble and learned friend Baroness Hale of Richmond. For the reasons she gives, with which I agree, I too would dismiss this appeal.