Case No:C1/2013/0651

Neutral Citation Number: [2013] EWCA 960 Civ
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
Timothy Straker QC (sitting as a Deputy High Court Judge)
CO96292012.[2013] EWHC 355 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: Wednesday 31st July 2013

Before :
LORD JUSTICE LAWS
LORD JUSTICE McCOMBE
and
SIR STANLEY BURNTON

- -

Between :

The Queen on the application of	
Yonas Admasu Kebede (1)	
Abiy Admasu Kebede (2)	**Respondents**
- and -	
Newcastle City Council	**Appellant**

- -

(Transcript of the Handed Down Judgment of
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Hilton Harrop-Griffiths (instructed by **Newcastle City Council Legal Services**) for the **Appellant**
Shazia Akhtar (instructed by **Public Interest Lawyers**) for the **Respondents**

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Judgment

Sir Stanley Burnton:

Introduction

1. This is an appeal by Newcastle City Council ("Newcastle") against the order of Timothy Straker QC, (sitting as a Deputy High Court Judge), quashing Newcastle's decision in a letter dated 28 August 2012 refusing to make grants to the Respondents in respect of their university fees. It raises questions as to the proper construction and application of sections 23C(4) and 24B(2) of the Children Act 1989 ("the Act") as amended.

2. Having heard the parties' submissions, we announced our decision to dismiss the appeal, and that our reasons for doing so would be given in written judgments to be handed down subsequently. This judgment sets out my reasons for dismissing the appeal.

The facts

3. The facts relevant to this appeal are not in dispute and may be shortly stated. The Respondents are brothers and are nationals of Ethiopia. Yonas Kebede was born on 1 November 1991, and is therefore aged 21; Abiy Kebede was born on 17 May 1993, and is therefore aged 20. They came to this country in 2004. They were abandoned by their older brother, and from September 2007 were accommodated by Newcastle under section 20 of the 1989 Act. Until they reached 18, each of them was an "eligible child". On their respectively reaching the age of 18, each of them became a "former relevant child" within the meaning of the Act.

4. Both Yonas and Abiy Kebede have discretionary leave to remain in this country until 20 November 2014. They wish to take up university places. By reason of their immigration status, they are ineligible for state (i.e., central government) funding for their university fees, which may also be higher for them, as foreign nationals, than the fees charged to UK (and EU) citizens. They therefore sought funding from Newcastle. It is Newcastle's refusal to provide funding that is the object of these proceedings.

5. Section 24B(2) of the Act, which I shall set out below, requires a local authority to make a grant to a former relevant child "to enable him to meet expenses connected with his education or training". In correspondence with the solicitors acting for the Respondents, Newcastle contended that the expenses to which this provision refers are incidental expenses, such as the cost of stationery, but not the fees charged for the education or training in question. In addition, it contended that even if university fees are in scope, it was entitled to take its limited resources into account in deciding whether or not to make a grant. In a letter dated 8 August 2012, Rosemary Muffitt, its Senior Solicitor, stated:

> "Even if such fees can be expenses connected with education, the second part of the test is whether the prospective student's educational needs require it, which ultimately must be for the authority rather than him to decide. Your clients no doubt argue that they need to go to university but does the legislation require the authority to give the assistance sought … when it

would take up a very significant portion of its hard-pressed resources? Newcastle is adamant that it does not."

6. In her letter dated 28 August 2012, responding to the Respondents' letter before action, Ms Muffitt stated:

> "Firstly, there is the point about 'expenses connected with education'.
>
> Secondly, even if this phrase does cover such fees, the authority does not consider it to be an appropriate use of its scarce resources to act as a surrogate loan company when Parliament has decided that persons with your clients' immigration status should no longer have access to such assistance. In addition there is the considerable risk that the authority would not be able to enforce any loan it makes, because it would not be able to keep track of your clients and their earnings, even if they remain in the UK. …"

The legislative framework

7. Sections 23C and 24B of the Act, as amended, are so far as relevant as follows:

> "**23C Continuing functions in respect of former relevant children**
>
> (1) Each local authority shall have the duties provided for in this section towards--
>
> (a) a person who has been a relevant child for the purposes of section 23A (and would be one if he were under eighteen), and in relation to whom they were the last responsible authority; and
>
> (b) a person who was being looked after by them when he attained the age of eighteen, and immediately before ceasing to be looked after was an eligible child,
>
> and in this section such a person is referred to as a "former relevant child".
>
> ….
>
> (4) It is the duty of the local authority to give a former relevant child--
>
> (a) assistance of the kind referred to in section 24B(1), to the extent that his welfare requires it;
>
> (b) assistance of the kind referred to in section 24B(2), to the extent that his welfare and his educational or training needs require it;

(c) other assistance, to the extent that his welfare requires it.

(5) The assistance given under subsection (4)(c) may be in kind or, in exceptional circumstances, in cash.

(5A) It is the duty of the local authority to pay the relevant amount to a former relevant child who pursues higher education in accordance with a pathway plan prepared for that person.

(5B) The appropriate national authority may by regulations--

(a) prescribe the relevant amount for the purposes of subsection (5A);

(b) prescribe the meaning of "higher education" for those purposes;

(c) make provision as to the payment of the relevant amount;

(d) make provision as to the circumstances in which the relevant amount (or any part of it) may be recovered by the local authority from a former relevant child to whom a payment has been made.

(5C) The duty set out in subsection (5A) is without prejudice to that set out in subsection (4)(b).

(6) Subject to subsection (7), the duties set out in subsections (2), (3) and (4) subsist until the former relevant child reaches the age of twenty-one.

(7) If the former relevant child's pathway plan sets out a programme of education or training which extends beyond his twenty-first birthday--

(a) the duty set out in subsection (4)(b) continues to subsist for so long as the former relevant child continues to pursue that programme; and

(b) the duties set out in subsections (2) and (3) continue to subsist concurrently with that duty.

…

(9) Section 24B(5) applies in relation to a person being given assistance under subsection (4)(b) [or who is in receipt of a payment under subsection (5A)] as it applies in relation to a person to whom section 24B(3) applies.

(10) Subsections (7) to (9) of section 17 apply in relation to assistance given under this section as they apply in relation to assistance given under that section.

…

24B Employment, education and training

(1) The relevant local authority may give assistance to any person who qualifies for advice and assistance by virtue of section 24(1A) or section 24(2)(a) by contributing to expenses incurred by him in living near the place where he is, or will be, employed or seeking employment.

(2) The relevant local authority may give assistance to a person to whom subsection (3) applies by--

(a) contributing to expenses incurred by the person in question in living near the place where he is, or will be, receiving education or training; or

(b) making a grant to enable him to meet expenses connected with his education or training.

(3) This subsection applies to any person who--

(a) is under twenty-five; and

(b) qualifies for advice and assistance by virtue of [section 24(1A) or] section 24(2)(a), or would have done so if he were under twenty-one.

(4) Where a local authority are assisting a person under subsection (2) they may disregard any interruption in his attendance on the course if he resumes it as soon as is reasonably practicable.

(5) Where the local authority are satisfied that a person to whom subsection (3) applies who is in full-time further or higher education needs accommodation during a vacation because his term-time accommodation is not available to him then, they shall give him assistance by--

(a) providing him with suitable accommodation during the vacation; or

(b) paying him enough to enable him to secure such accommodation himself.

(6) The appropriate national authority may prescribe the meaning of "full-time", "further education", "higher education" and "vacation" for the purposes of subsection (5).”

8. It can be seen that in the case of a former relevant child, by virtue of section 23C(4), what would otherwise be a discretion to provide the assistance specified in section 24B(2) is a duty.

The judgment below

9. Before the judge, Newcastle submitted that, as it had contended in correspondence, the phrase "expenses connected with his education" did not extend to the fees charged by an educational institution, but was limited to incidental expenses incurred for the purposes of education. The judge addressed this submission in paragraphs 12 and 13 of his judgment:

> "12. Mr Harrop-Griffiths, for Newcastle City Council, says that meeting expenses connected with education does not, as a matter of statutory construction of section 24B(2), embrace tuition fees. I find that a very difficult argument to accept. The material words are not defined in the Act and it is not suggested that they are terms of art bearing particular meanings. They are ordinary English words, which need, in context, to be construed. If, in ordinary parlance, I say that I am meeting the expenses of, say, a relative in connection with education, it would, I suggest, be a surprise to anyone listening to learn that my apparent generosity had nothing to do with the cost of tuition. The argument is that expenses connected with someone's education presupposes that such a person is in education, and that therefore tuition fees had either been met or are not, as a matter of language, part of the expenses connected with education, which education (by definition) is in place.
>
> 13. I consider such an argument as put on behalf of the City Council cannot be accepted. First, a principal expense associated with education is the cost of tuition. There is an inseparable connection between tuition and education. I appreciate there are well known instances of the autodidact, but this does not undermine the inseparability of the connection. Second, as a matter of ordinary, natural language, tuition fees are expenses connected with education. Third, the argument falls into difficulties as soon as it is questioned. Why might a text book recommended by a tutor be an expense connected with education, but not the expense associated with the tutor? Is extra tuition an expense connected with education? If so, why not tuition? These questions all reveal that the argument cannot, to my mind, succeed."

The contentions before us and discussion

10. Before us, Mr Harrop-Griffiths repeated this submission. He submitted that the use of the word "his" immediately before "education or training" requires the prospective student to have secured the provision of education, if necessary by payment of the tuition fees; and that the phrase "expenses connected with his education or training" would have a different, and wider, meaning if the word "his" had been omitted.

Secondly, the words "connected with" denote something that is ancillary, i.e., connected with, rather than something, such as a tuition fee, that is central to the provision of education.

11. Furthermore, relying on the speech of Lord Nicholls of Birkenhead in *R v Gloucestershire County Council, ex p Barry* [1997] AC 584, Mr Harrop-Griffiths submitted that Newcastle is entitled to take its resources, or rather its lack of resources, into account in deciding whether to give assistance pursuant to section 24B(2).

12. As to the first of these submissions, in my judgment the adjective "his" simply cannot bear the weight that Newcastle seek to place on it. I see no difference between "expenses connected with education" and "expenses connected with his education": in the former case, it is obvious and implicit that the education in question must be for that of the prospective student in question. Furthermore, Newcastle's interpretation would lead to absurd distinctions, between for example a student who secured postponement of his liability for tuition fees until after his course began and a student who had to pay his fees before his course began.

13. Mr Harrop-Griffiths' contention on the meaning of "connected with" is more meritorious. The phrase "connected with", like "in connection with", may be apt to denote things that are ancillary, i.e., connected with, something else. However, I agree with the judge that in the present connection, the natural meaning of "expenses connected with his education" includes the major expense, namely the tuition fees. Moreover, I can readily understand why Parliament should have imposed a duty in relation to former relevant children where otherwise there is a discretion. It is highly unlikely, to say the least, that a former relevant child, who by definition was looked after by his local authority until the age of 18, could have the resources to pay any of the costs of tertiary education, or any fees or other costs of training, and equally unlikely that a former relevant child could have such resources. Section 24B(2) and (5) would appear to confer no practical benefit on former relevant children unless they extend to tuition fees. Lastly, it is difficult to see the point of the requirement in section 23C(4) that the prospective student's "welfare and his educational or training needs require" the assistance in question if it is limited to the costs of books and stationery and the like. That requirement most obviously relates to what is central and essential to the education or training in question.

14. For these reasons I would reject Newcastle's submissions as to the meaning of the words "expenses connected with his education".

15. The second of Newcastle's principal contentions is that it is entitled to take the restrictions on its resources into account in deciding whether to make a grant pursuant to section 24B(2)(b). Mr Harrop-Griffiths relied on what was said by Lord Nicholls of Birkenhead, giving the first speech of the majority in *Barry*. The statutory provision in question in that case was section 2 of the Chronically Sick and Disabled Persons Act 1970:

> "***Provision of welfare services***
>
> (1) Where a local authority having functions under section 29 of the National Assistance Act 1948 are satisfied in the case of

any person to whom that section applies who is ordinarily resident in their area that it is necessary in order to meet the needs of that person for that authority to make arrangements for all or any of the following matters, namely -

(*a*) the provision of practical assistance for that person in his home;

(*b*) the provision for that person of, or assistance to that person in obtaining, wireless, television, library or similar recreational facilities;

(*c*) the provision for that person of lectures, games, outings or other recreational facilities outside his home or assistance to that person in taking advantage of educational facilities available to him;

(*d*) the provision for that person of facilities for, or assistance in, travelling to and from his home for the purpose of participating in any services provided under arrangements made by the authority under the said section 29 or, with the approval of the authority, in any services provided otherwise than as aforesaid which are similar to services which could be provided under such arrangements;

(*e*) the provision of assistance for that person in arranging for the carrying out of any works of adaptation in his home or the provision of any additional facilities designed to secure his greater safety, comfort or convenience;

(*f*) facilitating the taking of holidays by that person, whether at holiday homes or otherwise and whether provided under arrangements made by the authority or otherwise;

(*g*) the provision of meals for that person whether in his home or elsewhere;

(*h*) the provision for that person of, or assistance to that person in obtaining, a telephone and any special equipment necessary to enable him to use a telephone,"

then, . . . subject . . . [. . . to the provisions of section 7(1) of the Local Authority Social Services Act 1970 (which requires local authorities in the exercise of certain functions, including functions under the said section 29, to act under the general guidance of the Secretary of State)] [and to the provisions of section 7A of that Act (which requires local authorities to exercise their social services functions in accordance with directions given by the Secretary of State)], it shall be the duty

of that authority to make those arrangements in exercise of their functions under the said section 29."

16. Lord Nicholls said, at [1997] AC 604:

> "This appeal raises an important point of interpretation of section 2(1) of the Chronically Sick and Disabled Persons Act 1970. Can a local authority properly take into account its own financial resources when assessing the needs of a disabled person under section 2(1)? The appellants, the Gloucestershire County Council and the Secretary of State for Health say yes, the respondent Mr. Barry says no. The question has given rise to a considerable difference of judicial opinion, so I shall give my conclusion in my own words.
>
> At first sight the contentions advanced on behalf of Mr. Barry are compelling. A person's needs, it was submitted, depend upon the nature and extent of his disability. They cannot be affected by, or depend upon, the local authority's ability to meet them. They cannot vary according to whether the authority has more or less money currently available. Take the case of an authority which assesses a person's needs as twice weekly help at home with laundry and cleaning. In the following year nothing changes except that the authority has less money available. If the authority's financial resources can be properly be taken into account, it would be open to the authority to re-assess that person's needs in the later year as nil. That cannot be right: the person's needs have not changed.
>
> This is an alluring argument but I am unable to accept it. It is flawed by a failure to recognise that needs for services cannot sensibly be assessed without having some regard to the cost of providing them. A person's need for a particular type or level of service cannot be decided in a vacuum from which all considerations of cost have been expelled.
>
> I turn to the statute. Under section 2(1) "needs" are to be assessed in the context of, and by reference to, the provision of certain types of assistance for promoting the welfare of disabled persons: home help, meals on wheels, holidays, home adaptation, and so forth. In deciding whether the disability of a particular person dictates a need for assistance and, if so, at what level, a social worker or anyone else must use some criteria. This is inevitably so. He will judge the needs for assistance against some standard, some criteria, whether spoken or unspoken. One important factor he will take into account will be what constitutes an acceptable standard of living today.
>
> Standards of living, however, vary widely. So do different people's ideas on the requirements of an acceptable standard of living. Thus something more concrete, capable of

being applied uniformly, is called for assessing the needs of a given disabled person under the statute. Some more precisely defined standard is required, a more readily identifiable yardstick, than individual notions of current standards of living.

Who is to set the standard? To this there can be only one answer: the relevant local authority, acting by its social services committee. The local authority sets the standards to be applied within its area. In setting the standards, or "eligibility criteria" as they have been called, the local authority must take into account current standards of living, with all the latitude inherent in this concept. The authority must also take into account the nature and extent of the disability. The authority will further take into account the manner in which, and the extent to which, quality of life would be improved by the provision of this or that service or assistance, at this or that level: for example, by home care, once a week or more frequently. The authority should also have regard to the cost of providing this or that service, at this or that level. The cost of daily home care, or of installing a ground floor lavatory for a disabled person in his home and widening the doors to take a wheelchair, may be substantial. The relative cost will be balanced against the relative benefit and the relative need for that benefit.

Thus far the position is straightforward. The next step is the crucial step. In the same way as the importance to be attached to cost varies according to the benefit to be derived from the suggested expenditure, so also must the importance of cost vary according to the means of the person called upon to pay. An amount of money may be a large sum to one person, or to one person at a particular time, but of less consequence to another person, or to the same person at a different time. Once it is accepted, as surely must be right, that cost is a relevant factor in assessing a person's needs for the services listed in section 2(1), then in deciding how much weight is to be attached to cost some evaluation or assumption has to be made about the impact which the cost will have upon the authority. Cost is of more or less significance depending upon whether the authority currently has more or less money. Thus, depending upon the authority's financial position, so the eligibility criteria, setting out the degree of disability which must exist before help will be provided with laundry or cleaning or whatever, may properly be more or less stringent."

17. It is understandable that the cost of the provision of services for a person may be relevant to the assessment of need when they include, for example, under paragraph (e), "the provision of any additional facilities designed to secure his greater … comfort or convenience." Convenience and absolute need do not go obviously hand in hand. The present context is different. The present issue arises under a different

statute. Moreover, Parliament has prescribed what is to be taken into account in assessing need and the duty to make provision. The assistance is to be given "to the extent that [the former relevant child's] welfare and his educational or training needs require it". This leaves no room for a consideration of the resources of the local authority.

18. Lastly, the test is objective: assistance is to be given to "the extent that [the former relevant child's] welfare and his educational or training needs require it". Whether and to what extent his welfare and his educational or training needs do require the assistance in question must be decided by the local authority, subject to conventional judicial review principles. Clearly, it requires input from the former relevant child, but the decision is that of the local authority. The assessment of the availability of the resources of a local authority is far more subjective. It may involve political questions as to the priority to be given to some items of expenditure as opposed to others, and similar questions as to the level of council tax to be levied or the loans to be taken.

19. For these reasons, I would reject Newcastle's contention that its resources are a relevant factor in its deciding whether to make a grant pursuant to section 24B(2) of the Act.

20. I would also reject the contention made on behalf of the Respondents by their solicitors in correspondence that the immigration status of a former relevant child is irrelevant to the question whether his welfare and his educational needs require the assistance in question. Taken to its extreme, this would mean that a person whose leave to remain expires before, or shortly after, the commencement of a university course, with no likelihood of his leave being extended, has an educational need for a course that he cannot complete. In my judgment, immigration status is manifestly relevant.

21. Conversely, it seems to me that what is an educational need must be assessed in the educational context. Education is not normally required in order to survive. It may be "needed" to obtain a necessary qualification for the work to which a person is suited; or for other reasons.

22. For the Respondents, Ms Akhtar submitted that Newcastle had in fact decided that the welfare and educational needs of the Respondents required the making of grants under section 24B(2) of the Act. She relied on the fact that Newcastle had agreed to make payments to them under section 23C(5A). However, the test for such payments differ from those applicable by reason of section 23C(4). I would reject this submission.

23. In my judgment, Newcastle have not yet decided whether or to what extent the Respondents' welfare and educational needs require the making of grants under section 23 C(4). It must now do so.

24. Accordingly, I would dismiss Newcastle's appeal. Its decision to refuse to make grants under section 24B(2)(b) will be quashed, as ordered by the judge, and we should make a declaration of its duty to make a fresh decision in accordance with the law as set out in our judgments.

Lord Justice McCombe:

25. I agree.

Lord Justice Laws:

26. I also agree.