

Neutral Citation Number: [2013] EWHC 3155 (Admin)

Case No: CO/13059/2013

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

Birmingham Civil Justice Centre
Bull Street Birmingham B4 6DS

Date: 17/10/2013

Before :

HHJ DAVID COOKE

Between :

R (oao Elisa Nfuni)	<u>Claimant</u>
- and -	
Solihull Metropolitan Borough Council	<u>Defendant</u>

Shu Shin Luh (instructed by **Public Law Solicitors**) for the **Claimant**
Bryan McGuire QC (instructed by **The Solicitor, Solihull MBC**) for the **Defendant**

Hearing date: 1 October 2013

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
HHJ DAVID COOKE

HHJ David Cooke :

1. This is a rolled up hearing, ordered by HHJ Davies QC on 16 September 2013, in respect of the claimant's challenge by way of judicial review to decisions of the defendant council dated 25 June 2013 and 5 September 2013.
2. The claimant was born on 11 June 1992 and is a national of the Democratic Republic of Congo. She arrived in the UK in January 2009 aged 16 and claimed asylum. From then on she was accommodated and looked after by the defendant council. Her claim for asylum was refused in June 2009 but she was given discretionary leave to remain until 10 December 2009. An application to extend this leave was refused in May 2011, and her appeals dismissed in July and December 2011. In February 2012 she made a further claim for asylum, which was refused (after some delay partly caused by the insolvency of her original immigration solicitor) on 12 August 2013. Her new immigration solicitor has sent a protocol letter threatening a judicial review of that decision, but as at the date of the hearing before me no claim had been issued.
3. After her 18th birthday in June 2000 the claimant was owed duties by the council pursuant to s 23C Children Act 1989 as what is inelegantly described in the legislation as a "former relevant child", including a duty pursuant to subsection 23C(4) to provide specified financial assistance in connection with education or training "to the extent that [her] welfare and [her] educational or training needs require it". In most cases, those duties last until the former relevant child is 21 (June 2013 in this case), but they may continue thereafter pursuant to s 23C(7) "if the former relevant child's pathway plan sets out a programme of education or training which extends beyond [her] twenty-first birthday... for so long as [she] continues to pursue that programme". Even if the duty under s 23C has come to an end, the council has further duties under s 23CA if before she reaches age 25 the former relevant child informs the council that she "is pursuing or wishes to pursue a programme of education or training". The duties include, by subsection (4) the duty "to give [specified financial assistance in connection with the desired education or training] ...to the extent that [her] education or training needs require it".
4. The first decision challenged was conveyed in a letter dated 25 June 2013 sent by the claimant's Personal Adviser saying:

“ I am writing to inform you that as of Friday 26 July, Solihull MBC will terminate the funding for the above property that you are currently living in.

I do understand that this will be unnerving for you, but I assure you that I will support you through the whole process. As you will no longer be in our care, then an application to NASS for support will need to be made ...”
5. This letter therefore gave approximately one month's notice of the withdrawal of funding for the claimant's residential accommodation, envisaging that in that time she would make an application for support from NASS, i.e. discretionary funding provided by the Secretary of State under the National Assistance Act to failed asylum seekers. It was immediately challenged in correspondence by the claimant's solicitors who argued that the claimant's pathway plan provided for a programme of education

continuing after her 21st birthday pursuant to which she had made a UCAS application the previous November for university courses in midwifery, the outcome of which was awaited, and that this had the effect of extending the duties owed under section 23C.

6. In the event the claimant did not receive any offers for the midwifery courses she had applied for, but was able to secure an offer in clearing of a place at College on a Foundation Course in Early Years which she informed the defendant that she wished to take up. This was not related to midwifery, but one which was capable of counting towards a university degree. The second decision challenged was made by way of letter dated 5 September 2013 saying:

“ Educational Need.

Since the Pathway Plan review of February 2013 your client's fresh submissions for leave to remain in the UK have been rejected by the Home Office... In response to this change of circumstances MBC has reviewed its Pathway Plan. A copy of this is attached.

The personal adviser... met with your client on the 30 August and sought her views. Your client is clear in her wish to continue education and is frustrated by the difficulties imposed by her immigration status. Having had regard to all the relevant circumstances including your client's immigration status the Pathway Plan review continues to reflect that your client does not currently have an educational need to embark on a two-year foundation degree as she contemplates....

Even if your client is able to establish that she falls within s23C on the grounds that her Pathway Plan sets out a programme of education which extends beyond her 21st birthday, in order for your client to secure support beyond the age of 21 Solihull MBC must be satisfied that both her "welfare and educational needs" require that support.

In *R (Kebede) v Newcastle CC* [2013] EWCA Civ 960 the Court of Appeal noted:

" 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."

In light of the above, and your client's current immigration status, the position of Solihull MBC remains that your client does not have an educational need to embark upon her foundation course.”

7. The claimant seeks an order quashing both decisions and setting aside the Pathway Plan referred to in the 5 September letter, which concluded that there was no educational need to pursue the foundation course. The grounds of challenge are set out in the detailed statement of facts and grounds attached to the claim form and in the claimant's skeleton argument. These documents are lengthy and impassioned. Her case boils down to this:
 - i) the council was wrong to conclude that its duty under section 23C came to an end on the claimant's 21st birthday, because her pathway plan at that stage provided for a programme of education, which she was still pursuing
 - ii) whether or not that was the case, the council was wrong in law to conclude that the claimant had no educational need to pursue the course she now wished to embark on by reason of her immigration status, with the result that the council was obliged to continue funding her accommodation and education under either section 23C or section 23CA as the case might be.
8. The first issue is a matter of construction of the pathway plan as it stood immediately prior to the claimant's 18th birthday. The then most recent review of that plan had been in February 2013, but I was referred to a number of previous versions, all of which Ms Luh submitted recognised that the plan or "trajectory" was for the claimant to continue in higher education well after age 21 notwithstanding that the uncertainties of her immigration status were well known.
9. On 9 October 2009 a social worker prepared a report to be considered at a statutory review on 30 October 2009. This recorded information about her education to date. A section headed "pathway planning" referred to the claimant's wishes in relation to her living arrangements, but not her education. A separate section headed "Education" recorded that she was bright and academically able and had completed an ESOL (English for Speakers of Other Languages) course and that although she had secured a place on a "Young Learners Course" "Elisa thought that she wanted to study to work towards becoming a Teacher or Worker with Children (maybe even a Social worker!). Elisa now studies Health and Social Care at ... Matthew Boulton College ...". A section headed "Legal Issues" referred to the refusal of her asylum claim and the grant of discretionary leave to remain, noting that the social worker would support her in instructing her legal representatives to apply for an extension. The final sections headed "Assessment (or placement and future needs)" and "Social Worker's proposed plan" said nothing specific about education but noted that "Elisa has shown that she is a committed and able student with aspirations to achieve. Elisa has already started to think about courses that she could take following year one of her Health and Social Care course to progress towards her goal of working within Health and Social Care arena with young children. I will offer support, guidance and signposting."
10. The review document itself recorded under "Education" that the claimant attended Matthew Bolton College "and continues to [do] extremely well with her studies. She told us she would like to go to university and studied to become a nurse or teacher." There was a note under "Legal Status" that the claimant "will continue to be supported

in making a claim for asylum by [her social worker] and her legal representative." In the "Recommendations" section the only matter mentioned under "Education" was that the social worker would discuss with her manager the claimant's request for provision of a laptop and memory stick.

11. The social worker's report for a further review in March 2010 recorded under "Education" that the claimant took her studies very seriously and had high aspirations to achieve, noting that "Elisa's passion is working with children and she hopes to train as a professional within the Public Sector, at the moment she has thought about becoming a Nurse, Midwife, Social Worker or Teacher. Her current studies will give her the foundation to get the fundamental knowledge which could lead to any of these professions... As part of the Pathway Planning process, Elisa and I have thought about future education options and Elisa feels that she would like to change college and perhaps investigate attending South Birmingham College... Elisa is thinking that from September 2010 she will enrol on Health and Social Care Level III which will act as an Access Course to a route to university. Should she be able to follow this route (above all, subject to her immigration status) then she would be looking at commencing university in September 2012." The final sections of the report noted that the social worker would continue to support the claimant "to look at and make applications for Health and Social Care courses" and "in thinking about future education-i.e. attend college open days, plan trips to local universities".
12. The first Pathway Plan document, commencing March 2009 noted that the claimant was awaiting the result of her application for discretionary leave to remain. In a section headed "Education/Training" it was noted that the claimant's "Aims/Goals" were to have a professional career working with children and to attend university, and in a table of actions to be taken of the next 12 months that she would continue on her existing course at Matthew Bolton College and make an application for a Health and social Care course to commence in September 2010.
13. A Pathway Plan Review document dated October 2011 noted that the claimant was appealing against the refusal of her application for extension of leave to remain and in a section dealing with education that "Elisa would like to go on to study at university but has not formed an idea of the subject she would like to study. She is pleased to be gaining experience of working with children in different settings so that she will be able to make a more informed choice of what sort of work she will eventually enjoy and hence which university course is at best... Elisa hopes to apply to study at university next year. There is unfortunately uncertainty with Elisa's Home Office case whilst she awaits news regarding her appeal. Elisa will need to have "settled status" in the UK before she will be accepted by student finance. Discuss plans for next academic year
 - if Elisa's status remains the same
 - if Elisa is granted leave to remain
 - if Elisa is refused leave to remain"
14. A section dealing with financial support recorded that if the claimant's appeal was successful the council "will be able to support Elisa financially whilst she takes out the full loan and grant in student finance to complete a course in higher education" but

that if her appeal was refused she would be supported by the council "until she reached the age of 21. Other means of support after the age of 21 would need to be explored through NASS section 4 support or otherwise."

15. A similar review document dated July 2012 noted that the claimant had made applications to university and was almost certainly going to achieve the entry qualifications required "however places have not been available due to her present immigration status. This is a great disappointment to Elisa and she is still hoping that if her application is accepted before September she may get a placement through clearing. However she is aware that this is very unlikely and we discussed and agreed contingency plans (see below)." The section dealing with suggested further actions recorded that the claimant would apply for a place at university if she received a positive outcome to her application for asylum, but that if it was still pending she would explore the possibility of doing further A-levels or other courses at college. In relation to finance, "if above courses are chargeable [a social worker] to explore whether department would be willing to meet costs or whether Entraide or other charity could assist...". A later section dealing with financial support recorded that it was agreed Elisa to continue to receive financial support from Solihull (up until age 21)." It was noted that her asylum appeal had been turned down but that her solicitor had submitted a fresh claim. Later in the document there is what appears to be a note of her tactics in relation to the immigration claim, which the social workers intended to assist: "if Elisa is not able to access any education a more proactive approach to be taken in chasing up progress of fresh claim i.e. [social worker] to make an appointment for she and Elisa to see [solicitor] to discuss. If Elisa is able to access education Elisa will not actively chase up decision until after December."
16. The last review was in February 2013. By that time the claimant had made the UCAS application that was still outstanding when she reached 21 in June 2013. The review document noted that "Elisa has managed to get on an access course at Matthew Bolton College in September. This is a challenging course but Elisa is conscientious and capable and is doing very well. This will enable Elisa to apply for nursing or midwifery courses at university... although Elisa has applied to universities she is likely to have difficulty accessing a course due to not having immigration status. Additionally at present she does not have the right to work." It recorded the intention that "If Elisa is successful in gaining a place in university she needs to be supported to explore funding option. "
17. Insofar as the documents discussed plans in relation to the claimant's future education, it was plainly in very general terms and heavily conditional upon the outcome of her various immigration applications. Furthermore, it is hard to avoid the conclusion that the council's overall approach was that it would provide support on a general personal basis for the claimant's ambitions but was acting on the assumption that at least from the age of 21 primary responsibility for funding the claimant's accommodation and education would fall on others, subject to the possibility of application for some discretionary funding from the council in addition to student loans, and that questions about whether the claimant should or should not pursue a particular course would be decided by others dependent on her immigration status, such as an universities or colleges that might offer her a place, or student funding authorities that might offer her a loan. It does not seem to have addressed seriously the question whether there was any reason why the claimant should not continue to pursue her wishes until a late

stage, perhaps when it began to be appreciated that the council's duties under Children Act might extend to providing all the funding for accommodation and educational expenses.

18. Mr McGuire's primary submission was that the pathway plan did not "set out a programme of education" unless it identified a particular course that it was intended the claimant should follow. Alternatively if that was too strict a test, he said there must at least be something that could properly be called a "programme" but in this case the documents showed nothing more than a recording of the claimant's wishes and desires in respect of matters that would depend on the outcome of the immigration applications and decisions of other bodies. The first submission is, it seems to me, overly prescriptive. As Ms Luh was keen to stress, the role of the Council is as a corporate parent and although no doubt its approach to decision taking will be very much more structured and formalised than a natural parent's would be, it is in my view appropriate to have regard to the considerations and approach that a natural parent would have in interpreting the obligations that are placed on the council.
19. Any parent considering the future education of their child will appreciate that there are uncertainties involved in making applications to higher education institutions. An applicant may or may not be offered a course at their first choice of institution, or for their first choice of subject. Depending on the circumstances of the case, any plan formulated may be in specific or general terms. It could for instance be as specific as to say that the child will apply for a particular course at a particular institution, with no identified fallback position. It could be expressed more generally, for instance that the child will apply for courses in a specific subject at a range of institutions so as to maximise the chances of acceptance whatever his or her school exam results might be. In principle, if the natural or corporate parent is prepared to be sufficiently indulgent, or took the view that any or almost any form of additional education would be of some benefit to the child, it could be expressed more widely still. But I think that Mr McGuire is right to say that there must still be something which can properly be called a "programme", and that this must consist of a step or series of identifiable steps that the parent has decided that it approves or intends that the child should follow.
20. I do not seek to set out any exhaustive definition of what a "programme" is, where there is no such definition in the statute. But it seems to me that, firstly, the mere recording of the child's wishes and aspirations without more would not amount to such program, since it would not say anything about the approval or intention of the parent. Secondly, the more general or conditional the terms in which any educational possibilities are expressed, the less likely it is that these can properly be described as a programme since they might not in truth be properly viewed as decisions or firm intentions as to what the child should do.
21. This is because any responsible parent must consider in relation to education, among other things, what the child is realistically capable of achieving (whether in terms of qualifying for admission to a course or following it through to completion) and benefiting from (for example in terms of qualification for a particular career, or by way of general advantage in obtaining employment, or simply in terms of personal development).

22. Thus for instance if a pathway plan recorded that a child harboured ambitions to be a doctor and intended to apply for medicine degrees, but the local authority thought that he was not likely to be unable to obtain the necessary academic qualifications or perhaps did not have the health, character or ability to complete the course, it could not in my view sensibly be said that this was a plan setting out a programme of medical education.
23. The facts of the present case seemed to me to be highly marginal. Having re-read the documents however, I have come to the conclusion that the plan as reviewed in February 2013 can properly be regarded as setting out a programme of education insofar as it records that the claimant has made applications to university for midwifery courses and appears to proceed on the basis that the authority approves and intends that she should follow one of those courses if she is successful in obtaining a place notwithstanding her immigration difficulties. It is true that reservations are expressed in relation to the funding position, but these are not so expressed as to be preconditions of approval. There may have been a misapprehension that the council would not be responsible for providing that funding, but that does not seem to me to be a reason for saying that the council did not approve or intend that the claimant should follow the university course she had applied for.
24. It does not however appear to me that this conclusion is of any significant advantage to the claimant. No doubt she could be said to be "pursuing" the programme set out while she was awaiting the results of her application. She had however been notified that her applications for degree courses in midwifery had all been rejected during July 2013, before the decision to terminate funding of her accommodation took effect. Thereafter, she made fresh applications for places on different courses at a "foundation" level in the clearing system. Although there had been some general recognition in previous versions of the pathway plan that she might wish to pursue other options if not successful in obtaining a university place, in my judgment these were in too general terms. The council as a responsible parent could not in my view sensibly be interpreted as having given a carte blanche approval for her to follow any course that she might be able to obtain without having had the opportunity to review for itself what its benefits might be in pursuit of her eventual educational or career goals.
25. In my judgment, therefore, from the moment her applications for the university degree course were refused she ceased to follow the programme set out in her pathway plan and the council's duties under section 23C came to an end.
26. If that is right, the council was obliged to consider under section 23CA whether her educational needs required that she be provided with assistance to follow the proposed new course. The decision is that of the Council, and if it lawfully concludes that it is not satisfied that she has an educational need that requires funding to follow the new course, there is no obligation to provide assistance. Even if I am wrong in relation to the pathway plan, essentially the same question arises in that the obligation to provide financial assistance under s 23C is imposed "to the extent that [her] welfare and [her] educational and training needs require it". It was accepted that the pathway plan is a document that is subject to amendment, and not disputed in principle that if the council lawfully assessed that the claimant had no sufficient educational need to follow a programme of education set out in that plan, the plan could be properly amended so as to remove that programme. If that was done, the obligation to provide

financial assistance, whether by reference to welfare or educational needs, would come to an end.

27. Ms Luh was obliged to concede that the claimant's immigration status was a relevant factor in consideration of educational need, for the reasons set out in the passage from *Kebede* quoted in the council's decision letter, namely that it is relevant to whether the claimant would be able to complete the course she has started on or obtain any benefit from it in terms of her employment or subsequent education if she was required to leave the country. She made a considerable number of submissions as to why however she said it was unlawful for the council to reach the conclusion it did on the basis of the claimant's present immigration status. Given the number of those submissions and the way they are set out in her documents, there is a danger that I may miss some of the points made, but the principal ones seem to me to be as follows.
28. Firstly she said that the immigration status was still not clear, the claimant was pursuing an argument that she was entitled to make a fresh application and that her previous applications had been inadequately considered. She had been advised that she had reasonable prospects of success in such an application. There was understood to be at present a general stay on removal of women to the Congo. She referred to authority, in other contexts, that assessment of the prospects of success in immigration cases was not the expertise of welfare authorities, which should therefore leave those decisions to immigration courts or tribunals. But given that the prospect of being able to complete the course is a matter relevant to educational need, it is something that the council is entitled and obliged to take into account. The weight to be given to it is a matter for the council as decision taker and not the court on review, unless the decision taken can be shown to have been *Wednesbury* unreasonable or perverse.
29. The view that the council took that her status was uncertain such that there was very considerable doubt as to whether she would be able to complete or make any use of the course cannot in my judgement be said to be perverse in circumstances where the claimant's applications have been rejected on numerous occasions both by the Secretary of State and on appeal with the result that she has no lawful status in this country and is in principle required to leave. Her prospects of remaining are at best uncertain and unfathomable. It is not clear whether any present policy of staying removal to the Congo was drawn to the council's attention before the decision letter, but even if it was it would necessarily be a potentially reversible position.
30. Ms Luh submitted that the council must be wrong to take account of uncertain immigration status in the way that it had, because if it was right then no person whose immigration status was in any way uncertain could ever be said to have an educational need. That seems to me entirely wrong. The Council is required to take its view of whether an educational need has been shown by reference to all the circumstances including any matters (such as but not limited to immigration status) which might affect the ability of a person to complete or make use of a course that they wish to undertake. The degree of risk presented is a matter for the council to assess and, short of perversity, that view cannot be overturned on review.
31. It was said that immigration status was the only factor considered by the council, whereas there was a requirement to consider all the circumstances of the case and take the immigration status into account in conducting a balanced assessment as to whether there was an educational need. But the council came to its decision after receiving a

considerable volume of correspondence from the claimant's solicitors setting out her position, issuing a letter to her indicating that it was "minded to" reach the decision it did and holding a meeting between the claimant and her social worker at which the matter was discussed. It is not realistic to think that the council did not have in mind the circumstances of the case that were known to it and recorded in its files and previous pathway plans, or the representations that had been made on the claimant's behalf. Further, as Mr McGuire submitted, the council is not required to set out in writing every possible consideration or to give any detailed consideration to matters that cannot on any footing be relevant to educational need or outweigh the principal matter under consideration. The claimant relied to a considerable extent on allegations that if the council withdrew its funding the claimant would necessarily be left homeless and destitute, but these were matters that related to her welfare and not her educational needs, and in any event were incorrect since if the council's duty to support the claimant has complained, she is entitled to apply for NASS funding.

32. Ms Luh said that it had not been doubted in any of the previous assessments that the claimant had an educational need to undertake further and higher education that she wished to, or that she would not derive any benefit from it. Even if she was not able to complete the course, she could obtain personal benefit from having undertaken the education as far as she was able to. However the earlier assessments cannot it seems to me be taken as indicating any considered view of the claimant's educational needs in the present circumstances. They show that she was considered to be academically capable of undertaking further and possibly higher education, and would be given personal support in order to make applications to achieve the immigration status and funding that would be required if they were to be followed, recognising the considerable uncertainty over whether this could be achieved. They cannot be interpreted as an assessment that she had an educational need to follow a particular course that was not under consideration at the time in circumstances where the uncertainties over her immigration status had not been resolved, and indeed had intensified, at the time she came to commence it.
33. I accept that in principle it could be said that diligently following any education confers some benefit in personal, intellectual or developmental terms, even if it does not lead to completion of the course or obtaining a qualification. But the fact that some benefits may be realised does not necessarily amount to an "educational need", still less an educational need that "requires" the provision of funding by the council. Ms Luh submitted in her skeleton argument that "unless hopeless or unrealistic, a care leaver who expresses the wish to pursue a programme of education should be determined to have an educational need for which the duty to assist under [s23C] subsists." I emphatically reject that proposition which has the effect that the subjective wishes of the care leaver would be the only effective consideration. It is for the council as decision taker to weigh up the benefit to be achieved and whether it requires financial support. A decision that any benefit that the claimant might obtain even if required to leave the country before she could complete or make any use of her course was too ephemeral could not be said to be perverse.
34. Ms Luh stressed the position of the council as corporate parent and referred to guidance to decision makers requiring them to consider whether any proposal "would be good enough for my own child". She drew attention to the objectives of Parliament in enacting the "leaving care" regime, being to prevent young people from

being effectively abandoned at the age of 18 and to give them the degree of care and support that a responsible parent would continue to give at that age. But this is seems to me takes her argument no further forward. It is patently an argument based on the merits, suggesting that the council gave excessive weight to the risks deriving from the immigration status and insufficient weight to the possible benefit that the claimant might achieve, if she were allowed to pursue the course and her immigration status was resolved in her favour. Short of perversity, which is not shown in this case, such considerations cannot be entertained on judicial review.

35. I consider that this claim was arguable, but that in the end no error of law has been shown on the part of the council. Accordingly the order I shall make is that permission is given, but the claim is dismissed.
36. I am told that the claimant is presently attending her desired course, without commitment by the council to pay the fees, but that the college requires to know by 18 October whether the fees will be paid or not. In the circumstances, I authorise the Council, if necessary, to make and communicate a decision as to payment of those fees before this judgment is formally handed down, provided it does not disclose to any person other than the parties the content of the draft judgment.