

R v TAMESIDE METROPOLITAN BOROUGH COUNCIL
EX PARTE J

Queen's Bench Division

Scott Baker J

19 October 1999

Local authority – Voluntary arrangements – Parental responsibility – Child accommodated under voluntary arrangement – Local authority seeking to move her to foster family against parents' wishes – No power to do so

The child, who had multiple severe disabilities, lived with her parents until she was 9 years old. After this she was accommodated by the local authority in a residential home for disabled children because her parents were unable to cope with her any longer. The arrangement was a voluntary one under the Children Act 1989, s 20, and did not involve a care order. When the child was 12, the local authority suggested that it would be in her best interests to move her to a foster placement. The parents opposed such a move, but the local authority decided to move the child anyway and set about organising contact with a prospective foster family. The parents sought judicial review of the local authority's decision.

Held – granting judicial review and declaring that the authority had no power to place the child with foster-parents without her parents' consent – where a child was accommodated under a voluntary arrangement, parents retained parental responsibility for the child, which included the right to decide where the child lived. A local authority providing a child with accommodation under a voluntary arrangement rather than through a care order had day-to-day powers of management, but were not entitled to make the kind of decisions ultimately exercised by those with parental responsibility for a child. Accommodation under a voluntary arrangement was a matter for co-operation between the parents and the local authority; where such co-operation had broken down, the authority had no power to move the child against the express wishes of the parents, notwithstanding their duties towards children in need within its area, and, equally, parents had no right to dictate where the authority must accommodate their child. If the authority took the view that there was a risk of significant harm to the child if their own view of the child's accommodation needs did not prevail, they should apply to the court for a care order. If there was no such risk, the authority were ultimately entitled to offer parents the choice between caring for the child themselves, or agreeing to a solution acceptable to the authority.

Statutory provisions considered

Local Authority Social Services Act 1970, s 7

Children Act 1989, ss 2(1), 3, 17, 20, 22, 23, 33

Arrangements for Placement of Children (General) Regulations 1991 (SI 1991/890), reg 3(1),(4)

Case referred to in judgment

R v London Borough of Islington ex parte Rixon [1997] ELR 66, QBD

Nigel Fleming QC and *Fenella Morris* for the parents

Michael Horowitz QC, *Brenda Morris* and *Michael Glaser* for the local authority

SCOTT BAKER J: This application concerns a 13-year-old girl to whom I shall refer as J. She has multiple severe disabilities and demonstrates autistic tendencies with challenging behaviour, including persistent self-harm.

A Since September 1997 she has been living at C Avenue, a residential home for disabled children. She attends C School. Both the home and her school are near her parents' home where she lived until the age of 9 when her parents could no longer cope. The present arrangement is a voluntary one under s 20 of the Children Act 1989, ie the local authority are not looking after her pursuant to a care order.

B An impasse has been reached. The local authority wish to move J to foster-parents. A particular family has been identified. J has been having regular contact with them against her parents' wishes with a view to her moving to live with them. The parents' position is that they want J to remain where she is, or, at any rate, not go to these foster-parents. They are not implacably opposed to fostering but feel a good deal of care and research would be required if suitable foster-parents are to be identified. As J is presently doing well where she is they see no reason for her to move.

C The issue for me to decide is the extent of a local authority's powers in respect of a child whom they are looking after, but who is not formally in their care (in the sense that there is no care order) where the parents, who have parental responsibility for J, disagree with them. Can they decide that J will live with these foster-parents regardless of the parents' wishes?

D I turn now to the material facts. When J was 9 and her parents could no longer cope with looking after her (because of other pressures on the family) the local authority arranged for her to be placed at A School, a residential placement. The care plan at that point said in the section headed: 'What is the overall plan for this child?', 'Residential school until the age of 19'. In the next section headed: 'Explain the reasons why this particular plan has been chosen' is written: 'A School is a special school with residential facilities. This allows a more consistent and integrated approach towards J's education and care needs. The usual school-leaving age for children with special educational needs is 19'. Then over the page: 'The placement fulfils J's educational needs as identified in the statement. Meets her physical and disability needs. Contact with parents is maintained at weekends and holidays. J is a child with severe physical and learning disabilities and the placement is expected to meet these special needs'. Then over the page under the heading: 'What is the contingency plan if the preferred placement is not available or breaks down?' there is written: 'Negotiations will take place with LEA regarding replacement placement'. In the next section: 'For how long will child need to be looked after by the local authority?' is written: 'until nineteenth birthday'. Then the next section provides the child will be accommodated by the social services department until her eighteenth birthday or until she leaves school. Unfortunately, the placement broke down because J could not cope with the constantly changing environment of school, hostel and home.

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H In September 1997 J was placed at C Avenue and began to attend C School. A meeting took place on 15 October 1997 and the minutes record at para 4(e): 'This is expected to be a long-term placement'. And at para 11 under the heading: 'Re-unification of the child with her parents and family' is written: 'this is not planned at present, but consideration of this issue will need to be ongoing and will be re-examined at all future review meetings'.

There has been added to these minutes under the heading printed: 'Unit business manager's additional comments' 'Reference 4(e): not correct. This is a temporary placement with a view to shared care with possibly a link

family scheme'. It is signed 'D Crank'.

The precise date on which that was added to the record is not clear but what is clear is that the parents questioned it and in due course received a letter dated 9 January 1998. The letter signed by Mr Crank, the unit business manager, recorded amongst other things:

'(2) The current assessment and care plan does not indicate that the use of a family link placement would be appropriate at the present time.

(3) The Children Act 1989 requires the local authority to work in partnership with children and their families and to provide resources to enable families to meet as many of their child's needs as is practicable. Robert advises me that it is difficult to predict what future needs J may have and what part you may play in assisting us to meet them.'

On 20 August 1998 the respondent put forward the suggestion that J should be moved to a foster placement. The parents disagreed. For reasons best known to the respondent it decided to treat the parents' letter expressing their disagreement as a formal complaint. A year later that complaint has still not been dealt with. J was and is doing well at C Avenue. A psychologist's report was commissioned; Elizabeth Morrissey reported on 22 April 1999. There is a letter, the opening paragraph of which records that the psychology assessment report was requested by Pamela Jones, Assistant Director of Children and Families and David Simpson, Social Worker for Children with Disabilities. They required assessment and definition of the successful elements of C Avenue management and support of J's behaviour 'in order to inform and train potential future carers for J'.

The report in summary at its conclusion records:

'(1) C Avenue have developed a positive, consistent approach which builds on J's strengths.

(2) Building relationships with J is the key to successful management of her complex behaviour.'

It is unnecessary to read the next paragraphs of the summary but the concluding paragraph reads: 'I hope this information is useful to you in developing a training package for potential carers. I would like to end this report by emphasising how impressed I was with the positive approach, consistency and warmth exhibited by C Avenue staff towards this very complex young woman'.

There was then a review meeting that took place on 13 May 1999. The record indicates, first of all, those who were present, and that included the applicant's parents; Bev Connolly, the manager from C Avenue; Joanne Harrison, the key worker from C Avenue; David Simpson, the social worker and Tony Enticknap, the interviewing officer. The minutes records as follows:

'A family has been identified for J and the match will be considered by the fostering and adoption panel in on 3 June 1999. However, [the parents] remain implacably opposed to the care plan. They do not want a foster family for J and feel that her best interests would be served by her remaining at C Avenue. There have been meetings between [the parents]

A and David Crank and also Pam Jones.’

Then a little later:

B ‘Despite the differences of opinion the review meeting proceeded in an orderly manner and the working relationships between [the parents] and staff at C Avenue have been maintained. Under the circumstances it cannot be claimed that there is a meaningful partnership between [the parents] and the social services department. Given the strength of feeling by all parties, I consider that the commencement of introductions for J would not be in her interests. There are two dangers of premature action in this regard.

- C (a) J would likely become confused and distressed if she became aware of her parents’ reluctance to commit to the plan.
(b) She would also be disadvantaged if the introductions took place but the placement did not materialise.

The adults need to resolve their differences in a responsible manner before J’s needs can be sensitively met.’

D Then at 107: Recommendations:

- E (1) That the current arrangement for J’s care continue.
(2) That the plan for introductory visits for J to the prospective foster carers be deferred.
(3) That the parties to the agreement either mutually consent to a way forward or another method of resolving the dispute is formulated. That this issue be clarified before introductory visits for J are commenced.’

However, notwithstanding that, 11 days later Mr Crank wrote to the parents:

F ‘Dear [parents], I am writing in respect of the most recent interview concerning J, chaired by Tony Enticknap 13 May 1999. The review minutes, at recommendations 2 and 3, make the following recommendations to the Department. [And they are then recited.]

G I have taken the opportunity to discuss this matter with Pam Jones (Assistant Director, Children & Families Section) and we have formed the view that it would not be in J’s interest to introduce delay into the process which, with your full involvement, has been operational for about 12 months. For this reason, recommendations (2) and (3) are not confirmed as decisions by the department. As I discussed recently with [the father], our progress towards introducing J to her new carers remains on target and is likely to commence in July.’

H Having seen that letter following, as it did, the meeting 11 days earlier and the conclusions that that meeting reached, it is not difficult to see why the parties are presently at loggerheads with regard to what should happen to J.

The respondent did indeed start contact between J and the proposed foster-parents against the will of the applicant’s parents and contrary to their wishes and indeed, but for the grant of permission to apply for judicial review, it appears to me that they would have gone ahead with the

placement regardless. This is a very brief history of the events that have led to the present impasse.

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There is a fundamental disagreement about the basis on which J went to C Avenue. Her parents regarded it as long term. The respondent says that it was not. It is unnecessary for present purposes to explore this. Quite apart from the issue that I have to decide, namely, whether the respondent has power under the Children Act 1989 to move J to foster-parents against the wishes of her parents, the decision to move her is attacked on the grounds of rationality and breach of legitimate expectation. Further time has been set aside for a hearing in respect of these matters should it be necessary.

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I turn next to the law. By s 2(1) of the Children Act 1989, these parents each have parental responsibility for J. What is meant by parental responsibility? Section 3(1) of the Act provides:

‘In this Act “parental responsibility” means all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property.’

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Section 3(5) provides:

‘A person who—

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- (a) does not have parental responsibility for a particular child; but
- (b) has care of the child,

may (subject to the provisions of this Act) do what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting the child’s welfare.’

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The reference in subs (5) to care of a child, is to care under a care order (see s 105). J does not fall into that category in this case. It is also perhaps pertinent to refer to s 2(9) which provides that:

‘A person who has parental responsibility for a child may not surrender or transfer any part of that responsibility to another but may arrange for some or all of it to be met by one or more persons acting on his behalf.’

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Section 20 spells out the obligation on a local authority to provide accommodation for a child in need. Section 20 provides:

‘(1) Every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation as a result of [and (c) affects this case]—

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...

- (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.

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...

(4) A local authority may provide accommodation for any child within their area (even though a person who has parental responsibility for him is able to provide him with accommodation) if they consider that to do so

A would safeguard or promote the child's welfare.
...

(7) A local authority may not provide accommodation under this section for any child if any person who—

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- (a) has parental responsibility for him; and
 - (b) is willing and able to—
 - (i) provide accommodation for him; or
 - (ii) arrange for accommodation to be provided for him,
- objects.

C (8) Any person who has parental responsibility for a child may at any time remove the child from accommodation provided by or on behalf of the local authority under this section.'

Section 22 provides for the general duty of a local authority in relation to children looked after by them:

D '(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 [and this is the material part],
- (b) provided with accommodation by the authority in the exercise of any functions (in particular those under this Act) which stand referred to their social services committee under the Local Authority Social Services Act 1970.

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

- (a) to safeguard and promote his welfare ...

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

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- (a) the child;
 - (b) his parents;
 - [(c) and (d) are not relevant]

regarding the matter to be decided.

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

- (a) having regard to his age and understanding, to such wishes and feelings of the child as they have been able to ascertain;
- (b) to such wishes and feelings of any person mentioned in subsection (4)(b) to (d) as they have been able to ascertain ...'

H The remainder of the section is not material for present purposes. Section 23 deals with provision of accommodation and maintenance by the local authority for children whom they are looking after:

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

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(b) to maintain him in other respects apart from providing accommodation for him.

(2) A local authority shall provide accommodation and maintenance for any child whom they are looking after by—

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(a) placing him (subject to subsection (5) and any regulations made by the Secretary of State) with—

(i) a family...’

Then the various other possibilities which it is not necessary to recite. The definition of parental responsibility in s 3(1) includes, says Mr Fleming, and I agree, the right to decide where a child shall live. The applicants put their case in this way. The present accommodation of J at C Avenue is pursuant to an agreement between her parents and the respondent. The respondent’s proposed move of her to foster-parents would be without the parents’ consent and its effect would negate their parental responsibility as outlined in the Children Act 1989. The local authority would be acting as if it was the beneficiary of a care order in respect of the child. This is essentially a parental act that the local authority has no power to perform without the parents’ consent. Their rights to dictate the future of the child never extended beyond Part III of the Act. A care order would have given them parental responsibility (see s 33(3)), and the situation would have been different. Furthermore, the provisions of s 20 make it clear that parental responsibility continues even after a local authority has made arrangements to accommodate a child. A local authority is not empowered to accommodate a child when a person with responsibility objects and is willing and able to provide accommodation for him (see s 20(7)). And a person with parental responsibility may at any time remove a child from accommodation provided by the local authority (s 20(8)).

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Of course, that sanction is of little practical benefit to the parents in the present case because they cannot themselves accommodate J and, in practice, are dependent on the local authority for doing so. Put shortly, Mr Fleming poses the question: ‘By what power can the local authority override the views of the parents and place J with foster-parents?’. Of course, a local authority that accommodates a child pursuant to s 20 is able to exercise mundane day-to-day powers of management; but a move of the kind envisaged in this case goes much further and trespasses into the kind of decision-making that is ultimately exercised by those with parental responsibility.

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A mere power of management cannot override the wishes of the parent with parental responsibility. And the answer to the question is that nowhere in the Children Act 1989 does one find the necessary power for the local authority to override the views of the parents and place J with foster-parents. The unspoken word in Part III of the Children Act 1989 is co-operation – co-operation between the parents and the local authority to work together in the best interests of the child.

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However, what happens when a dialogue breaks down and the two sides cannot agree? The local authority’s position is that they have the ultimate

A say. That, argues Mr Horowitz, is the true construction of the legislation. The local authority cannot in the last resort be forced to do what they are unwilling to do, assuming that their decision is unassailable on *Wednesbury* grounds.

B Mr Fleming's repute is that the court is today concerned only with the issue whether there is power for the local authority to move J to foster-parents without the consent of the parents. It is unnecessary and wrong to look for a solution to J's future or a remedy within the provisions of the statute. The only question is whether there is power to move her from voluntary accommodation in a residential home to which her parents do consent to a placement with a foster family to which they do not.

C It is, incidentally, not suggested that the present arrangements are significantly inadequate, but simply that a move would be more consistent with the respondent's policy of bringing up children within a family rather than in an institution. The distinction between management decisions and decisions which ultimately require the consent of those with parental responsibility may not always be an easy one to define.

D Mr Fleming accepts a local authority has a discretion under s 23(2) as to how to fulfil its duty to provide accommodation and maintenance for a child whom they are looking after; but, he says, the discretion is not absolute. It is not empowered by the section to provide accommodation of a type which the child's parents do not consent to. Whilst a local authority may be entitled as a matter of management to choose between one residential home and another, it does not have the right to move the child to foster-parents where the parents specifically do not consent.

E What is the sanction where there is an impasse? The local authority must ask itself whether there is a risk of significant harm to the child if its view does not prevail. If there is, then the remedy is to apply to the court for a care order: if there is not, then the local authority should discuss with the parents any options that it is able to provide and seek the parents' consent. What, says Mr Horowitz, is the position where the parents simply refuse, perhaps unreasonably, everything that the local authority has to offer? It seems to me that the answer may be that the local authority will be able to argue that it has discharged its duty and the parents will have to choose whether to exercise their rights under s 20(8) or accept what the local authority has to offer. If the situation is so extreme that the parents cannot accommodate the child, then the significant harm threshold is likely to be crossed and the ultimate answer may be a care order.

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G I agree with Mr Horowitz that parents cannot dictate where the local authority must accommodate their child. Scarcity of resources is of course an ever-present problem for most local authorities. I was referred, in addition to the statute, to the Arrangements for Placement of Children (General) Regulations 1991, made under powers conferred, inter alia, by s 23 of the Children Act 1989. The material parts of reg 3 provide:

H '(1) Before they place a child the responsible authority shall, so far as is reasonably practicable, make immediate and long-term arrangements for that placement, and for promoting the welfare of the child who is to be placed.'

Regulation 3(4) separates out s 20 placements and that is what we are concerned with in this case. It reads: **A**

‘In any other case in which a child is looked after or accommodated but is not in care the arrangements shall so far as reasonably practicable be agreed by the responsible authority with—

- (a) a person with parental responsibility for the child, or **B**
- (b) if there is no such person the person who is caring for the child

before a placement is made and if that is not practicable as reasonably practicable thereafter.’

Mr Horowitz argues that reg 3(4) should be construed to mean, ‘unless the respondent authority disagrees’, and he advances a similar argument in respect of s 22; in other words, the fall-back position is that the local authority has the ultimate say if it cannot get the parents’ agreement to its proposals. In my judgment, such a construction does violence to the way the paragraph is worded and would put the case in precisely the same category as one where the child is the subject of a care order. **C**

This regulation is, in my judgment, directed to making sure agreement of the person with parental responsibility or alternatively the person who is caring for the child is timeously obtained, ie the consent must be obtained before the placement is made if that can be done, and if not, attempts must be made to obtain it afterwards. Had Mr Horowitz’s construction been intended, it seems to me the regulation would have been worded differently so as to make the intention clear. **D**

The way that Mr Fleming puts his case is entirely consistent, it seems to me, with *The Children Act 1989 Guidance and Regulations* (HMSO, 1991), vol 2. It is necessary to recite certain passages from that guidance: **E**

‘2.3 Under Voluntary Arrangements the local authority does not obtain parental responsibility for a child looked after, but is obliged to comply with the appropriate regulations.

...

2.10 One of the key principles of the Children Act is that responsible authorities should work in partnership with the parents of a child who is being looked after and also with the child himself, where he is of sufficient understanding, provided that this approach would not jeopardise his welfare. **F**

A second closely related principle is that parents and children should participate actively in the decision-making process. Partnership will only be achieved if parents are advised about and given explanations of the local authority’s power and duties and the actions the local authority may need to take, for example exchanges of information between relevant agencies. The general duties of responsible authorities in sections 22, 61, and 64 of the Children Act are primarily based on these principles. These duties require responsible authorities to consult parents and others and the child (where he is of sufficient understanding) before any decision is made affecting a child who is about to be or is already being looked after by a local authority, or who is accommodated in a voluntary home or registered children’s home. The new approach reflects the fact that **G**
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A parents always retain their parental responsibility. A local authority may limit parents' exercise of that responsibility when a child is looked after by a local authority as a result of a court order, but only if it is necessary to do so to safeguard and promote the child's welfare.

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B 2.13 The provision of accommodation for a child by the local authority under voluntary agreement with the parents will occur when the parents suggest that kind of arrangement to the local authority, specifically request such provision or accept proposals made by the local authority. The parents contribute their experience and knowledge of the child to the decision. The local authority brings a capacity to provide services, to co-ordinate the contribution of other agencies and to plan for and review the child's needs. Such placements fall within the scope of the Arrangements for Placements of Children Regulations which require the local authority to agree a plan with the parents for the placement of the child. The plan should take into account the wishes and feelings of the child where he is of sufficient understanding. The Review of Children's Cases Regulations require a review of that plan on a regular care basis. Accommodation may also be provided to a child aged 16 or over, despite parental objection if the child agrees (section 20(5) and (11) of the Act).

D 2.14 Agreements between parents and the responsible authority should reflect the fact that parents retain their parental responsibility. The responsible authority's responsibilities under these Regulations should not detract in any way from the parents' continuing parental responsibility. Their continuing involvement with the child and exercise of their responsibility should be the basis of the agreed arrangements; all concerned in the arrangements should be aware of this.

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E 2.19 Where a child is provided with accommodation under agreed voluntary arrangements the plan for the child will have been agreed with the parents. It will form the basis of a written agreement between the responsible authority and the parents.

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2.50 If agreement cannot be reached with the parents on a voluntary basis, and lack of agreement makes it impossible to implement a suitable plan, it may be appropriate to apply for an order under Parts IV or V of the Act.'

G That of course is a reference in particular to a care order. Whilst this guidance does not have the force of statute, it is issued under s 7 of the Local Authority Social Services Act 1970 and is, in my judgment, a helpful aid to the way the legislation is intended to be implemented, and it should not be departed from without good reason: see Sedley J in *R v London Borough of Islington ex parte Rixon* [1997] ELR 66, 71B.

H I therefore reach the following conclusions: the general duty of a local authority to safeguard and promote the welfare of children within their area who are in need (s 17 of the Children Act 1989) does not entitle the local authority to have the last word against the wishes of the parents to place a child who is voluntarily in their care with foster-parents. Where an issue

such as that in the present case, whether the child should remain where she is at C Avenue or go to foster-parents, cannot be resolved by agreement, the local authority has no power to move the child against the expressed wishes of the parents.

The issue goes beyond a day-to-day management question and involves the rights, responsibilities and authority the parent has in relation to the child, ie parental responsibility as defined by s 3 of the Act. There will, therefore, be an appropriate declaration to reflect my judgment as to which I will hear further submissions in a moment; and it is earnestly to be hoped that the parties will now be able to continue their discussions with regard to the future of J on what may perhaps be considered to be a rather more level playing field than the local authority has appreciated in the past.

Declaration accordingly.

Solicitors: *Peter Edwards & Co* for the parents
local authority solicitor

PHILIPPA JOHNSON
Barrister

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