Neutral Citation Number: [2011] EWCA Civ 196

Case No: C1/2010/0791

**IN THE HIGH COURT OF JUSTICE**
**COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**
**Mr JUSTICE CRANSTON**
**CO/7590/2008**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/03/2011

**Before :**

**LORD JUSTICE RIX**
**LADY JUSTICE SMITH**
and
**LORD JUSTICE RICHARDS**

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**Between :**

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| **THE QUEEN ON THE APPLICATIN OF R.O.**<br>**(by his litigation friend and step father Andrew Burton)** | **Appellant** |
| **- and -** | |
| **EAST RIDING OF YORKSHIRE COUNCIL** | **Respondent** |
| **- and -** | |
| **SECRETARY OF STATE FOR EDUCATION** | **Intervener** |

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**Mr Nicholas Bowen QC and Ms Shu Shin Luh** (instructed by **Children's Legal Centre**) for the **Appellant**
**Mr Stephen Bellamy QC and Ms Sally Gore** (instructed by **Legal and Democratic Services**) for the **Respondent**
**Mr Clive Sheldon (**instructed by **Department for Education )** for the **Intervener**

Hearing dates : Monday 15th & Tuesday 16th November 2010
and supplemental written submissions dated 23rd November and 6th December 2010

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# Approved Judgment

## Lord Justice Rix :

*Introduction*

1. This appeal is about what is to happen to a teenage boy, just under 13 at the time when these proceedings started, now 15, the son of committed, capable and loving parents, who as a result of the effects on him of his severe autism (coupled with severe attention deficit hyperactivity disorder, ADHD, for which he has long been on medication), is now being schooled, I am glad to say at last happily and successfully schooled, under a special educational needs (SEN) placement, at a specialist residential school, Horton House in East Yorkshire: that is to say, this litigation is about what is to happen to him when, at the age of 18 or 19 or thereabouts, if not before, he emerges from Horton House into the wider world.

2. This question arises because, if the boy, RO, here (by his litigation friend, his stepfather) the appellant, either because of past accommodation provided to him by his local authority as a matter of respite care for the sake of his parents, and/or because of his present placement and thus his accommodation at the school, falls currently within the regime of having the status of a "looked after child" (LAC) within the Children Act 1989, as well as within the SEN regime of the Education Act 1996, then he will be entitled to receive the benefits of that LAC status from his local authority, here the respondent East Riding of Yorkshire County Council (the "council") even after he becomes an adult, and even after he leaves his school, until he is at least 21. If, however, he currently lacks LAC status, then once he leaves school and/or becomes an adult, the benefits of that previous but expired status may not be available to him.

3. His parents, out of concern for his welfare, have sought to do the best for him. When they began these proceedings, their primary objective, naturally enough, was to achieve RO's placement at Horton House or some similar specialist residential school. In the course of these proceedings they have achieved that objective, they would say as a result of the additional pressure of this litigation, the council would say as a result of a fresh SEN statement. I am not sure that that dispute, like much that is disputed between the parties, any longer matters very much. Now, however, that their primary objective has been achieved, their aim has been modified to look to RO's future, rather than or as well as his current, welfare. It may be that they were always concerned for the medium term future as well as the instant question of RO's placement, and it was just that the immediacy of the latter issue obscured the enduring question of the former. Again, I do not think that that matters very much. The question of RO's proper status under the legislation is of more importance than any temporary position taken up in pleadings or submissions in what has always been a fluid situation. It could be said that these proceedings have suffered from a superfluity of pleadings and submissions, which have sometimes served to obscure rather than elucidate the issues – although I recognise that everyone involved has been concerned to find

the right answer, sooner or later. At the end of the day, I do not think that either party has suffered any unfairness through failing to appreciate what the other party's case has been.

4. While ultimately this appeal will be decided upon the facts of this particular case, it raises an interesting and important question about the relationship of the Children Act and the Education Act. It also raises issues about a local authority's obligations and powers under section 20 of the Children Act to accommodate children, which have given rise to much litigation in recent years. Moreover, a recent and critical authority in this area, although concerned with the relationship of the Children Act with a different statute, the Housing Act 1996, *R (G) v. London Borough of Southwark* [2009] UKHL 26, [2009] 1 WLR 1299, was making its way through the courts, ultimately to the House of Lords, just as these proceedings were on foot.

5. The judge, Cranston J, held that RO's LAC status under the Children Act came to an end when he went to Horton House and that the council "is providing him accommodation at the residential school, Horton House, not under its social services functions but by virtue of a Statement of Special Educational Needs under the Education Act 1996" ([2010] EWHC 489 (Admin) at [86]). The ultimate question on this appeal by RO is whether that is right, or whether his LAC status continues.

*The critical facts*

6. The narrative of the engagement of RO's family with the council is so rich and productive of dispute that I believe that it is important to concentrate, at the beginning of this judgment rather than too far into its midst, on what I have come to regard as the critical or core facts.

7. RO was born on 28 August 1995. He is the son of Mrs and Mr O, who separated in 2005. RO no longer has contact with his father. His mother (as I shall call Mrs O in this judgment) now lives with Mr AB, whom I shall call his stepfather. I shall refer to the mother and stepfather together as RO's parents. The family unit comprises the parents, RO, an elder full sibling, DO, two younger full-siblings, AO and EO, and a half-sibling, LB. AO and EO are girls, the other siblings are boys.

8. In 2001 RO was diagnosed as suffering from ADHD. However, his autism was not diagnosed until 2007, when he was in danger of being excluded from his school, Hornsea School, and he was referred, pursuant to a core assessment by the council, to a specialist unit of the NHS Child and Adolescent Mental Health Service at West End, Hull ("West End") for a residential evaluation. RO was there for four months, from 19 February to 22 June 2007. There he came under the care of Dr Hufrize Rasool, the consultant child and adolescent psychiatrist at West End. She diagnosed RO as suffering from "childhood autism comorbid with severe combined ADHD". Her report to the council dated 15 June 2007 described RO as a very challenging young man whose difficulties were severe and pervasive. He would not be able to survive mainstream school and required an urgent assessment of his special educational needs. He was not to be seen as a child with severe conduct problems but one with complex needs which made him vulnerable. He needed "a special school" identified for him urgently. Although in that report she did not write expressly of a residential school, minutes of RO's discharge meeting held on the previous day, 14 June 2007, said Dr Rasool "will recommend a Special School with boarding facilities". However, a more formal minute of that meeting did not mention such boarding facilities but spoke of "a small structured school". It also recorded Dr Rasool's opinion that RO "is unable to cope even in small social settings such as his family. He cannot understand social values, norms and order. He has no idea of feelings or understanding of people's positions." Both minutes came from the council's disclosure.

9. Later in 2007 the council began to provide RO with weekend respite care. The first such weekend took place at the beginning of August 2007. He would go to specialist foster-carers for either one weekend or (later) two weekends a month. It is from this time that he was regarded as achieving LAC status, as a child "in need" who was being accommodated by the council under section 20 of the Children Act. A dispute has since emerged as to whether that accommodation was provided by the council by reason of its *duty* to accommodate under section 20(1)(c) of that Act, or under its *power* to accommodate under section 20(4). For the provisions of section 20, see under [70] below. Whether that issue matters, remains to be considered: but it is common ground that from this time at least RO was a child "in need" to whom LAC status applied, because of the accommodation provided to him by the council.

10. The first LAC review was held on 8 October 2007 and signed off on 12 December 2007. Its minutes recorded that for the purposes of short-break care he was "accommodated under Section 20". Thus no distinction was made between section 20(1)(c) and section 20(4). Its formal "Recommendations" referred, both under the heading of "Care Plan" and under the heading of "Education", for urgent consideration to be given to a "specialist residential" placement or provision.

11. Despite that recommendation, when a first draft SEN statement had been issued on 17 July 2007, to be followed by a second draft on 19 October 2007, both had

named a *day* school, Farrow House School, in Hull, as an appropriate placement. The mother objected, but on 29 November 2007, that is to say between the holding of the first LAC review and its signing off, the final, statutory, SEN statement was issued, naming Farrow House. Subject to appeal, that SEN statement became binding on both the parents and the council. On 30 November 2007, the stepfather emailed the council threatening legal action.

12. A few days later, on 3 December 2007, a second LAC review was held. This second review was signed off on 17 January 2008. Its minutes said that the parents were "becoming increasingly desperate", feeling that they were not being listened to about RO's needs. The Review recommended that reports were obtained from West End to support the parents' contention that Farrow House was unsuitable. The Review agreed with the parents that a "specialist ASD/ADHD resource such as New Options, still remained the most suitable". It was acknowledged that "respite care continues to work well, but in itself, is nowhere near sufficient to meet [RO's] needs, and to provide enough of a break for the family". Its formal Recommendations reflected this disquiet under both its "Care Plan" and "Education" headings.

13. On 29 January 2008 the statutory time period for appealing the SEN statement expired without an appeal having been launched by the parents. The parents nevertheless refused to send RO there. They had visited Farrow House and concluded that it could not offer RO the specialist attention he needed. It catered for children with emotional and behavioural difficulties, but lacked specialist expertise in autism.

14. There were further LAC reviews in February and June 2008. They recorded the continuing impasse which had come about: the council's education department was insisting that Farrow House was suitable, whereas the parents, with the agreement of the Review, were saying that it was not. In the meantime, RO had been out of school for some considerable time (although Hornsea School may have been providing some sessions for him) and his lack of education "has become the key issue" but was "obscuring everything else" and action was "desperately needed". It appeared that funding issues between the education and social services departments of the council were contributing to the impasse. The Recommendations continued essentially unchanged.

15. On 20 June 2008 there was a multi-agency meeting which included the parents, at which the impasse was discussed but essentially restated. The parents acknowledged that their failure to appeal the SEN statement had been a mistake, and they were considering having RO reassessed for SEN purposes, which the statute permitted six months after the first statement. The mother, clearly distressed, said that "any provision would be better than what [RO] has now as his

life is effectively ruined". The SEN manager from the education department, Mr Roy Thompson, insisted that there was no case for a *residential* placement, as "the medical reports received for the SEN suggest that [RO] requires a day provision" or at any rate that they "made no reference to residential provision". The independent reviewing officer for RO's LAC status, Mr Tony Harland, said that the educational focus of the reviews "has been unfair on the parents and [RO] as education should not be the focus".

16. Matters now came to a head. The parents took action on two fronts. On 30 June 2008 their solicitors sent a letter before action to the council by means of a pre-action protocol letter threatening judicial review. The letter complained of the council's failure to safeguard the welfare and education of RO as a child being accommodated under section 20 and of its failure to provide full-time education. Its primary claim for relief was that –

> "The Authority should accommodate the Claimant immediately under s 20 Children Act 1989 in a suitable residential educational placement to support his social care needs, and special educational needs, and ensure his safety and that of other family members."

Secondly, they applied for a statutory reassessment of RO's special educational needs, a request which the council received on 8 July 2008.

17. On 3 July 2008 the council replied to the pre-action protocol letter by asking among other things "exactly which duty or power under section 20…you say is engaged". On 9 July 2008, the parents' solicitors replied, specifying section 20(4). Their letter said that the council should fully accommodate RO under section 20(4) and had failed to do so by refusing to place him in a residential specialist educational setting. It stated that the failure was primarily that of the council's social services department, but also that of its education department. In these proceedings the council relies on that reference to section 20(4), rather than section 20(1). The response on behalf of RO is that that was an error, long corrected in the proceedings.

18. On 18 July 2008 the council noted that the parents wanted a residential placement and were supported in this by Dr Rasool. However, there was no record of Dr Rasool having recommended a residential placement, so the education department wrote to her to seek her advice. Unfortunately, no response to that enquiry was received. An email dated 22 August 2008 from Dr Rasool to the parents' solicitors set out the need for a specialist school, but again made no mention of whether it should be residential.

19. On 12 August 2008 the parents issued these judicial review proceedings. It was alleged that the council had failed to provide full-time accommodation to RO pursuant to section 20 "when the Claimant's particular circumstances plainly require such accommodation to be provided pursuant to section 20(1)(c) and/or section 20(4)". The primary relief claimed was a declaration that the council "is required to accommodate RO under section 20", and an order for his full-time accommodation pursuant to section 20. Urgent interim relief was also claimed, including full-time respite care for at least the school summer period. In its claim for urgent consideration, the claim form put the matter in this way:

> "1. The Claimant is a vulnerable 12 year old boy with complex needs manifested in diagnosed severe child autism co-morbid with severe ADHD. He is currently living with his mother, stepfather and four siblings. He is known to the Defendant social services for his needs. He has been reported as having an obsession with fire, having set his family home on fire twice, including under his brother's bed. He has attempted to simulate sex with his younger sisters, masturbated in front of them, showed his family his penis, and wiped excrement on the walls of the house. He also absconds/runs away from the family home on virtually a daily basis, leaving in the morning and coming home late at night and has been known to steal from local shops and threaten people with knives. The Defendant has known since at least January 2008 that the support and accommodation provided to the Claimant and his family is not sufficient. The Defendant's own care plan independent reviewing officer stated the urgent need for a full-time specialist residential placement to be located for the Claimant, particularly one that is skilled and experienced in dealing with children such as the Claimant, who have severe autism and ADHD."

The description of RO's behaviour in that passage is supported by the mother's first witness statement dated 27 July 2009, and by Dr Rasool's report (see at [32] – [35] below) where she sets out in her own words what the mother had told her of RO's history when he had been under her care at West End .

20. The case came before Goldring J on 14 August 2008. He ordered the council to "provide respite care for the claimant during the summer holidays". He ordered an oral hearing of the application for permission to apply for judicial review, which came before Wyn Williams J on 27 August 2008. Wyn Williams J adjourned the hearing of the claimant's application for permission, and ordered that it be heard at a "rolled up" hearing, ie with the substantive application to follow if permission were given, at the beginning of the October term. He made an order for "full-time respite". He also gave RO permission to seek an order for the council to provide a completed statutory reassessment of RO's special educational needs pursuant to section 323 of the Education Act prior to the rolled-up hearing.

21. As Cranston J put it:

> "[20] …Wyn Williams J made an order for the Council to accommodate the claimant full-time. The Croft, a children's home, was identified as suitable temporary accommodation for the claimant. During the period residing at The Croft the claimant was to attend Farrow House School.
>
> [21] When the claimant visited The Croft with his mother he refused to get out of the car. In the discussions with the social worker which followed the mother and step-father expressed distress and dissatisfaction at the claimant being accommodated full-time at The Croft and said that their concern was to obtain the right educational provision for the claimant. Ultimately they agreed to The Croft as they believed that it was the only way to get what they wanted, namely a suitable residential school for the claimant."

22. RO commenced living at The Croft on 3 September 2008 and attended Farrow House School from 4 September. None of this was a success. The police were involved on several occasions. The parents were themselves unhappy at this turn of events, and expressed the feeling that RO's claim had backfired on him and them. It appears that they regarded RO's residence at The Croft as if he had been taken into care (as they were to tell Dr Rasool when they met her on 18 September 2008), albeit that was not the case. They had never wanted to lose RO into the care system. At some point he ceased to attend Farrow House School.

23. There has been some uncertainty as to the basis on which RO's full-time accommodation at The Croft was undertaken. It was requested and ordered as "respite care". The council submits that the accommodation was provided under the inherent jurisdiction of the court to make interim orders with respect to children. (There is a reference to the court's inherent jurisdiction with respect to children in section 20(9)(b) of the Children Act.) On the other hand the council's own document, the critical Care Plan which contains or evidences the council's decision under review (see [42], [43], [48] and [52] below) refers to the respite care at The Croft as having been accommodation provided under section 20(4). I do not consider that it is necessary to determine this question.

24. The matter came back before Bennett J on 20 October 2008. In the event, it did not proceed as a rolled up hearing. Instead, the claimant was given permission to apply for judicial review on both his original grounds and on the basis of amended grounds dated 13 October 2008. A core assessment and a care plan then being undertaken and formulated by the council were ordered to be completed and served on RO's solicitors by 1 and 15 December respectively. Moreover, "without prejudice to the contention of the [council] that it is not related to these judicial review proceedings", a draft of a second SEN statement, following re-assessment, was also to be served, by 10 November 2008. Skeleton arguments were to be served on both sides, "setting out precisely" RO's and the council's cases respectively.

25. The reference in that order to the council's new core assessment and care plan, undertaken in the context of this litigation, is a reference to what are likely to be the most significant documents in this case: albeit, for that very reason, in that they were formulated under the shadow of these proceedings, they would no doubt require to be studied with particular care. For the parties had already taken up adversarial positions in circumstances where, for understandable but nevertheless regrettable reasons, a certain hostility had entered into the contest. The parents were perhaps moved by a certain bitterness of spirit which had come over them as they had struggled to do the best they could for their son, in unfamiliar surroundings. The council was perhaps moved by a certain exasperation at having to meet and defend this claim: certainly there was evidence that part of the difficulties had been engendered by internal disputes and difficulties between the social services and education departments of the council as to the funding of RO's care and educational needs.

26. Bennett J's order also provided for a two day hearing of the claim, to be heard in the new year. It concluded: "In the meantime, the Claimant shall continue to reside in the Croft and be educated at Farrow House without prejudice to the position taken by either party." RO was at The Croft, but I am not sure that he was attending Farrow House.

27. As this claim therefore wound its way towards a hearing, important developments were occurring on the ground.

28. On 19 November 2008, a draft second SEN statement was issued, and served on 24 November, specifying specialist residential provision (without naming a school). This was a breakthrough. The draft statement is not in the court bundles, but I will refer to the final second SEN statement below. The parents were invited to comment, and on 1 December 2008 they indicated a preference for Horton House School, emphasising that it was important to them that the School had clarified to them, when they had visited it, that it could be flexible about permitting RO to return home at every weekend and during the school holidays. Horton House was able to provide 52 weeks a year, 7 days a week, residence, but it was happy, as were the parents, for a pupil like RO to return home at every opportunity. They indicated their preference for Horton House on a form on which they remarked that the initial SEN statement "caters for all [RO's] diagnosed needs".

29. As the judge stated, Horton House is part of a group of community based special schools and children's homes providing specialist care and education for children and young people with special educational needs. It is similar to New Options

School, which the parents had long favoured, and which had been a school originally considered (possibly during RO's West End placement) and discussed and favoured in RO's LAC review meetings and recommendations (see at [12] above).

30. Also on 19 November 2008 there had been a case management hearing before Cranston J. It was ordered, by consent, that the draft SEN statement should be served on RO by 24 November, a completed Core Assessment by 8 December and a Care Plan by 22 December; that failing compliance with that timetable, the council be debarred from defending without leave of the court; and that the proceedings be adjourned generally 21 days after service of those documents; that if not restored it should stand withdrawn save as to costs; and that in the interim –

> "and pending the Claimant's placement at a 52 week residential school the Defendant shall continue to provide the Claimant with full time accommodation, whether at The Croft or otherwise, and education at Farrow House as under the current arrangements."

31. In the meantime, the parents for the purpose of the judicial review proceedings had obtained expert reports from Dr Rasool, from an independent social worker, Ms Heloise Dove, and from a chartered child psychologist, Ms Lindsay Towns.

32. Dr Rasool's report is dated 9 October 2008. She had interviewed RO when he had been at West End and she did so again for the purposes of her report (when Lindsay Towns sat in on the interview). Interviews with RO were elusive, for it was not easy to obtain his co-operation. She described in detail RO's stay at West End and the diagnosis of his autism then made. She also set out the mother's history of RO's conduct at home, given to her at the time of his stay at West End, including his increasing wilfulness and uncontrollability as he entered adolescence. Intelligence tests nevertheless showed that RO was "in the higher average range". The report also set out the mother's up to date account, given at a meeting with the parents on 18 September 2008, ie some 15/18 months after the West End episode. Dr Rasool wrote:

> "I asked the parents to explain how [RO's] behaviour had been since he was discharged, and as I expected nothing had changed, [RO] remained as difficult and challenging within the family home as before once he stopped attending Hornsea school. He was again out roaming the streets of Hornsea with neither parent able to manage or control him, he had taken to running or jumping out of the windows if he was stopped from leaving the home. Mother was aware that he was meeting with older boys and he often came home with rude messages and images on the phone and sexualised songs, etc. None of

> his odd, eccentric and inappropriate ways of interacting had changed, which one would not expect to, given the pervasive nature of his difficulties…"

33. Dr Rasool took the opportunity of meeting Lindsay Towns, who had visited Farrow House, to discuss with her what she had found there. She confirmed that there was very little at Farrow House to suggest that there was anyone experienced and speciality trained to deal with autistic children; and that the children there had emotional and behavioural difficulties working with which would not necessarily work with RO.

34. Dr Rasool concluded with this recommendation:

> "It is my opinion that given [RO's] complex needs and the degree of support and supervision that he is going to require, [RO] needs to be educated in a Residential Therapeutic Special School. The teaching staff teaching [RO] would have to be trained in the management and teaching of children on the Autistic Spectrum and those who have other comorbid disorders, like ADHD, which makes their behaviours even more challenging. At the same time, he needs to be looked after at the same site by Social Care staff that have continuous links with the staff who educate him and who also understand and are able to work with children on the Autistic Spectrum. The need for a residential placement therefore is as much a social care need and responsibility as an educational one and this is a case where joint funding between the Social Services and the Education Department would be entirely appropriate. Without his social needs being met appropriately any educational placement would be unlikely to be successful."

35. She said that she did not think a day school was appropriate, nor a school for children with emotional and behavioural difficulties (whom RO would try to emulate), which uses behaviour management strategies which RO was unlikely to respond to. In conclusion, it was her opinion that "without a residential placement to meet his Social care and Educational needs, this young boy is going to drift and this will be to his detriment and to the detriment of society at large in the long run." Dr Rasool repeated these views in a letter to the council on 4 November 2008.

36. Ms Towns, the chartered child psychologist, wrote a report dated 14 October 2008. She recommended an educational environment and setting that specialises in the very special and complex needs of autism co-morbid with ADHD, provides a 24 hour curriculum so that learning is holistic, and whose curriculum is all encompassing so that RO can learn skills for life in a seamless way. She therefore recommended a school able to offer him 52 week specialist provision. In the meantime, RO had not had appropriate or consistent intervention, which had

resulted in his behaviour becoming more and more out of control, since he had been able to set his own agenda. He was on the periphery of crime and delinquency, which could easily lead to drug and alcohol abuse. He was a danger to himself and others, especially family members.

37. Ms Dove, the independent social worker, wrote a report dated 22 September 2008. She also recommended a 52 week a year residential, specialist, placement, so that RO would benefit from a consistent environment on a 24 hour a day basis which "would meet both his education and his social care needs". She also drew a distinction between the techniques for dealing with children with emotional and behavioural difficulties and those with autistic disorders. She concluded:

> "69. In conclusion, it is my opinion that [RO's] need for a residential placement is as much a social care need and responsibility as an educational one and one for which joint funding would be entirely appropriate. Without his social care needs being appropriately met any educational placement would be unlikely to be successful. [RO] urgently requires the stability and security of a consistent environment which is able to address and meet both."

38. It is against this immediate background that I come finally to the crucial documents produced by the council in reassessing and determining how RO was to be cared for and educated.

39. The first is a *Core Assessment of the Needs of [RO]* dated 3 December 2008, written on behalf of the council by Ms Deborah Moore, an independent social worker, and signed off by her with a statement of truth on 5 December. She had tried to interview RO, but had failed. She did meet on two occasions with the parents. Her appendix 4 listed the documents which she had consulted, which included the three expert reports of Dr Rasool, Ms Towns and Ms Dove referred to above, and the draft second SEN statement which had by now recommended a 52 week residential placement for children with autistic spectrum disorders. Ms Moore's "Analysis and Opinion" were as follows. She found the parents to be capable, under normal circumstances, able to deliver a more than acceptable standard of care to their children. However, given RO's difficulties, "these are not normal circumstances". The family had "endured a difficult time over the last few years": they had felt "abandoned by services, until Dr Rasool gave her diagnosis". Consequently, the relationship between the parents and the social services department had become strained. As for her "Recommendations", she wrote:

> "[RO] is a young man with specific needs. Both Dr Rasool's report and the Statement of Special Educational Needs recognise the need the need for a specialised placement on educational and psycho/social grounds.

> If [RO] were provided with an appropriate placement, of a 52 week a year nature, he should maintain contact with his family by returning to their care at weekends and during the planned holiday periods.
>
> [RO's] family may benefit from support in parenting [RO] by involvement in a strong team approach involving the family and professionals, social services, education and health, in regular multi-professional meetings. The allocation of a specialist social worker, with knowledge and experience of working with Autism might have the opportunity of developing a trusting relationship with the family."

40. Michelle Kirkwood, a senior social worker employed by the council and the lead professional in RO's case since 26 November 2008, wrote an addendum dated 22 December 2008 to Ms Moore's Core Assessment. She had also countersigned the Core Assessment. She referred to occasions of police involvement concerning RO while he had been at The Croft. She concluded:

> "8. [RO's] assessed need is for a 52 week residential educational placement at a school which caters for children with Autistic spectrum disorders. The provision identified by [the parents] is that of Horton House School. It is envisaged that the school and residential provision will be able to provide [RO] with the stability and consisten[cy] that he requires within a safe environment…"

41. On the same day, 22 December 2008, the council sent to RO's solicitors the council's LAC *Care Plan* dated 19 December 2008. This document is described by the judge as containing the decision which is (or more strictly speaking has become) the subject of this judicial review (at [31]). It has also been described before us by Mr Stephen Bellamy QC, on behalf of the council, as reflecting that decision. At any rate, it is or is as close as any other document to being the document which evidences the challenged decision of the council. It is necessary therefore to give it careful attention. It is of course closely bound up with the Core Assessment upon which it is based. It is formulated on a standard printed form which states that "The Care Plan helps you make long-term arrangements for a child/young person's day-to-day care in a particular placement."

42. Question 3 asks about previous involvement of RO's family with the social services department. The answer refers briefly to that history. It included the following:

> "[RO] was accommodated under section 20(4) Children Act 1989 with Respite Foster Care at a rate of one weekend per month. This was later increased to two weekends a month.

> [RO] was accommodated under Section 20(4) Children Act 1989 on 3rd September 2008 at The Croft Residential Unit from Sunday evening to Friday evening every week…
>
> In accordance with parental wishes [RO] will return home for the Christmas period from 19th December 2008 to 4th January 2009. However, the placement at The Croft will remain available during this period for respite should [RO] require it. [RO's] placement at The Croft will also be available after the Christmas break until he commences a full-time residential educational placement in accordance with his statement of special educational needs.

Question 4 asked for an indication of the "legal basis for current work". The answer given was as follows:

> "[RO] is currently accommodated under S20(4) Children Act as ordered at the Administrative Court by Mr Justice Wyn Williams on 26th August 2008. Prior to this [RO] was in receipt of respite foster care under section 20(4) of the Act."

43. Question 5 asked: "Why does the child/young person need to be looked after now"? The answer stated:

> "[RO] is currently a looked after child in accordance with his assessed need for respite care (core assessments dated 23rd January 2007 and the core assessment started on 17th [June] 2008, a draft of which was distributed at court on 26th August 2008) and the subsequent orders of the Administrative Court for accommodation on a full-time basis.
>
> On 19th November 2008 it was ordered by the Administrative Court that [RO] remain accommodated under section 20(4) of the Children Act 1989 until he is able to start an appropriate educational provision in accordance with his revised statement of special educational needs.
>
> Horton House School has been identified by the parents and has been agreed by education and the DCSF as a suitable placement. Upon commencement of that placement, which is envisaged to start in January 2009, [RO] will cease to be a looked after child under section 20(4) of the Children Act 1989 because the assessment is that his welfare needs will be met by the educational placement under the Education Act 1996."

44. The last paragraph, and the next, are perhaps the most important passages in the material before the court.

45. Question 6 asked: "What attempts have been made to arrange for the child/young person to live with a relative or close family friend as an alternative to accommodation"? The answer given was:

> "The Local Authority has not identified any relatives or close family friends in a position to care for or offer accommodation to [RO]. It has been assessed that [RO] requires a 52-week residential placement that caters for children with autistic spectrum disorders. A placement has been identified in accordance with [RO's] revised statement of special educational needs."

46. Question 7 asks: "If additional resources were available, would accommodation be necessary?" To which the simple answer given is "Yes".

47. Question 9, headed "THE PLAN", asks "What is the overall plan for this child/young person?" A number of alternatives are then provided, with a box to tick for the appropriate plan label. All or most of them appear to contemplate either shorter or longer-term accommodation: the shorter-term options are "Time-limited assessment" and "Return to birth family within one month". One of the options is "Special residential placement (eg hospital unit)". The last box is labelled "Other" and it was this one which was ticked. The "Other" was required to be specified and the following was entered:

> "[RO] will remain in respite accommodation (subject to parental wishes for the Christmas period) until he commences a specialist residential educational placement".

48. Question 10 asked: "Explain the reasons why this particular plan has been chosen". The answer provided was:

> "[RO] is a child in need under section 17 of the Children Act 1989 and requires respite accommodation under Section 20(4) of the Act until he commences a specialist residential educational placement in accordance with his revised statement of special educational needs. The duration of the respite placement is in accordance with the order made by the Administrative Court on 19th November 2008. [RO] will cease to be looked after under the Children Act 1989 upon his admission into a 52-week residential placement, where he will be accommodated under the Education Act."

49. That is another most significant answer.

50. Question 12 asked: "What **long-term** needs does the child have which the placement must meet?" Seven issues were then listed which had to be considered, the first two of which were (a) "Ongoing physical and mental health conditions, illnesses and disabilities" and (b) "Education". The answer given was:

> "(a) [RO] has a psychiatric diagnosis of severe Attention Deficit Hyperactivity Disorder (ADHD) and severe Childhood Autism. These are both pervasive developmental disorders and particularly in relation to his Autism, his significant social and communication difficulties are unlikely to change…
>
> (b) It is assessed that [RO] attend a 52-week Residential Placement that caters for children with Autistic spectrum disorders. Horton House is the provision identified by Robert's family and has been approved by the Education Department…"

51. Question 14 asks: "What type of placement is proposed (eg foster care, residential unit)?" The answer given is:

> "It has been identified that [RO] requires a 52-week residential educational placement that caters for children with autistic spectrum disorders…

52. Question 17 asks: "If the child/young person is accommodated, what has been agreed for ending this episode?" The answer states:

> "Robert will cease to be looked after under S20(4) of the Children Act 1989 once he starts at Horton House School."

That of cause was not "agreed", because RO was at that time seeking in these proceedings to be accommodated as a looked after child.

53. Question 18 asks: "What steps will be taken if any party wishes to alter this plan?" The answer begins:

> "[The parents] would need to liaise with the Education Department in relation to any alterations regarding [RO's] residential placement at Horton House School…"

54. What is this Care Plan saying? In my judgment, it is saying the following: (i) RO is a child in need. (ii) He suffers from "pervasive developmental disorders and…his significant social and communication difficulties are unlikely to change". (iii) He has been receiving respite foster care accommodation at the weekends under section 20(4). (iii) The accommodation at The Croft has also been provided under section 20(4) as respite care. (iv) The respite care provided at weekends and at The Croft, although provided under section 20(4), has been required. There has been an "assessed need for respite care" (answer 5). (v) For the future, it has been assessed that RO "requires a 52-week residential placement that caters for children with autistic spectrum disorders". No one else is able to give RO the accommodation that he requires (answer 6). All "his welfare needs" will be met by the SEN placement (answer 5). (vi) Since his welfare needs will be met by that placement, under the Education Act 1996, he will no longer be a looked after child, and (vii) all responsibility for his future needs will be solely that of the council's education department.

55. Thus the council, qua its education department, continues or takes over the role of looking after RO and attending to his long-standing needs, in accommodation provided as part of the SEN statement, but the council, qua its social services department, renounces all future responsibility under the Children Act, once the SEN placement begins. If RO's parents have any concerns, they must address them to the (council at its) education department.

56. Other than the point, repeatedly made, that the Education Act residential placement supplants the Children Act LAC accommodation, status and regime, which is essentially a conclusion of law, there is, nevertheless, nothing in this Care Plan which seeks to discount as distinct from found upon the Core Assessment produced by Ms Moore countersigned and as amended by Ms Kirkwood. Indeed, it must be within that Core Assessment that the assessments spoken of in the Care Plan are presumably to be found.

57. The other document that I need to elaborate at this point is the final SEN statement itself. This is dated 5 January 2009. It is a statement of the council. It lists, among the material which has been taken into account, the three expert reports of Dr Rasool, Ms Towns and Ms Dove, as well as the psychological advice of Alison Shirley, an educational psychologist, and the social services advice of Andrea Wallis, a senior social worker. Ms Wallis had been previously involved in looking after RO. The statement is divided into various parts: Part 2, headed special educational needs, Part 3, headed special educational provision, Part 4,

headed appropriate school, Part 5, headed non-educational needs, and Part 6, headed non-educational provision. Under Part 2, RO is described as a boy of considerable ability who has underachieved, because of his needs which stem from his diagnosis of autism and ADHD, which produces "the complexity of difficulties and significantly undermines behavioural, social and emotional adjustment". His "Behaviour, Social and Emotional Development" is described at some length. Part 3 responds to the identified needs, with the longest passages being found again under the heading of "Behaviour, Social and Emotional Development". "Close liaison between, home, school and other support agencies to ensure a consistent approach" was called for. Parts 5 and 6 are short, being concerned only with monitoring and ongoing assessment and transport between home and school.

58. Although the majority of the statement's substance is contained under Parts 2 and 3, it is plain that the essence of RO's needs and of the means to be deployed in dealing with him stem from his behavioural, social and emotional maladjustment. The statement as a whole reflects Dr Rasool's report's advice that the need for a residential placement was as much a social care need and responsibility as an educational one; and the Core Assessment's conclusion that what was needed was "a specialised placement on educational and psycho/social grounds".

59. It is perhaps necessary to say that on behalf of the council Mr Bellamy submits that the council had always been concerned about the three expert reports obtained by RO. He says that they were obtained without the permission of the court and that when the letters of instruction were obtained on disclosure they contained a great deal of biased and misleading information. However, we have not been taken to any of the detail of any such complaint. The three reports are referred to in some detail by the judge (at [24]-[26] of his judgment) without any adverse comment. The Core Assessment refers to all three reports as being material which the writer has consulted and refers specifically to Dr Rasool as coming to the parents' aid. It is plain that Dr Rasool's recommendations for a residential specialist placement, which the other experts join in, are adopted in the Core Assessment (and in the Care Plan and SEN placement).

60. On 19 December 2008 the parents collected RO from The Croft for the Christmas holidays. They never thereafter returned him to The Croft or Farrow House. He resided with them until 23 February 2009 when he started full-time at Horton House, having been part-time from 14 January. He returns home every weekend and for the school holidays. The need for respite care has gone, but only because he is away at school for most of the time. The parents are happy with his progress.

*The outcome of the judicial review proceedings*

61. Cranston J's case management order of 19 November 2008, made after the draft second SEN statement had been issued but before it had been served, looked forward to the possibility that the achievement of the parents' ambition for RO of a residential specialist placement would make the continuation of the judicial review proceedings unnecessary. However, in the light of the December Care Plan, and the council's termination of RO's LAC status with the commencement of the SEN placement, the parents pressed ahead with these proceedings.

62. Thus, on 15 January 2009, the judicial review claim was restored. On 25 February, Lord Carlile of Berriew QC, sitting as a deputy high court judge, considered the claim unarguable and refused permission to restore. He accepted the council's submission that RO did not require accommodation under section 20, because it was being provided by Horton House under the SEN statement. Thus, he accepted the legal logic of the Care Plan's termination of RO's LAC status.

63. RO applied for permission to appeal. On 28 May 2009 Sir Richard Buxton refused permission on paper. The grounds of appeal were then amended, in part to rely on *R (G) v. Southwark,* which had been decided in the House of Lords on 20 May 2009, reversing the majority in this court, and on oral renewal, Elias LJ granted permission to appeal to bring judicial review. He said that "It seems that it was common ground that the applicant in this case was a looked after child…The central issue, as I understand it, is whether that obligation can continue notwithstanding the educational placement." Elias LJ described the point as of some importance, with which I respectfully agree.

64. Despite the amendments and refinements of the amended grounds of appeal, RO's case has, to my mind remained what it always was: that the council had been accommodating RO, part-time, as a looked after child and ought to continue to do so, but full-time, in a residential specialist placement; and that, as matters developed, now that RO had achieved that placement, his claim had become stronger rather than weaker.

65. The matter then reverted to the Administrative Court to hear the judicial review claim the bringing of which had been sanctioned by this court. Thus the matter came at last before Cranston J in January 2010. Following a two-day hearing, he gave judgment in March 2010, dismissing the claim. Ultimately, he too, like Lord Carlile, accepted the council's argument that from the time of the placement at Horton House RO's accommodation was provided under the SEN statement pursuant to the Education Act and not pursuant to the council's social service functions under section 20 of the Children Act.

66. The essence of the judge's reasoning is contained in the following passages of his judgment:

> "[70] …In my judgment, because the claimant is at Horton House, and no longer wants or receives respite accommodation, he is no longer a looked after child. That follows directly from the statutory definition of a looked after child in section 22(1)(b) of the Children Act 1989, a child provided with accommodation in the exercise of its social services functions. Social services functions, as outlined earlier, do not cover accommodation provided as a result of a Statement of Special Educational Needs under the Education Act 1996…
>
> [72] …A distinguishing feature of these cases is that the children required accommodation because they had nowhere else to live. In this case the claimant did not require accommodation in this sense, other than respite care for his parents. His parents several times confirmed that they were happy with the respite care provided and the issue earlier between them and the Council was whether he should attend a residential school…
>
> [73] Moreover, in terms of the realities it does not make sense to me to describe what the Council has done as side-stepping their duties. It is significant, as I have said, that the residential school placement was what was sought by the claimant's mother and step-father from the second part of 2007. To suggest that the provision of Horton House is an attempt by the Council to sidestep its obligations is quite contradictory. It is exactly what the family wanted…
>
> [75] …The test is not whether the claimant needs to be "looked after", but whether he receives accommodation provided by the Council in the exercise of a social service function…
>
> [82] …Because a child has been accommodated pursuant to section 20 does not mean that any different test should apply to the question whether he or she is to be accommodated under section 20 in the future. Essentially the issue as to whether a child is still a looked after child is whether he or she is accommodated pursuant to section 20 of the Children Act 1989 or is subject to a care order under section 31. The duty to take account of educational needs, section 22(3A), has no bearing on this.
>
> [83] In January 2009 the Council reached its decision on the claimant's educational needs. It was then duty bound to consider compliance with its other duties, under the Children Act 1989 and otherwise. What had happened previously was that the Council had provided respite accommodation. It was never the case that the claimant required accommodation full time, or that his mother and stepfather could not ever provide it for him. It was known that they had experienced difficulties in caring for him and wished to devote attention to their other children, whom they feared would be neglected. They

> needed a break from the claimant's care to enable them to cope better. If they took that break with the claimant still in their care, then his welfare might suffer, although this was never their intention. Thus the Council decided that they must provide respite accommodation from time to time to prevent this possibility. But they remained of the view that the family had the capacity to meet the claimant's physical and emotional needs. What they could not provide for was the care and education needed arising out of his autism, which requires specialist residential education.
>
> [84] By the time the decision was made that the claimant's placement at Horton House was to be under the Education Act, he had been in his family's care full time and not even attending school for the majority of the time, during which they had continued to care and accommodate him. There was no reason to assume that this parental ability would diminish when the claimant was in a residential school for up to 52 weeks a year. Once the Council provided Horton House, through the Statement of Special Educational Needs, it also decided that the claimant no longer needed the respite accommodation. All his accommodation needs, for 52 weeks a year, would be met by Horton House School. In the circumstances the Council approached the matter with anxious scrutiny. I cannot conclude that the Council erred in law in ceasing to regard the claimant as requiring accommodation pursuant to section 20 of the Children Act 1989, once he was to attend Horton House and no longer needed respite care."

67. In essence, the judge accepted the submission on behalf of the council that the placement at Horton House entirely replaced and supplanted any accommodation, past and, what was even more to the point, future, pursuant to (section 20 of) the Children Act, since it was henceforth to be entirely provided under the Education Act. Although the council continued to provide RO with accommodation, this was not accommodation within section 20, but solely within the Education Act. In supporting the judge's reasoning on this appeal, Mr Bellamy likened the Horton House placement to sending RO to boarding school. That is what, he submitted, the parents had wanted, and that is what they obtained. Since the parents were happy to receive RO back at home at every weekend and during the holidays, RO had simply become a weekly boarder, rather like any other such boarder at any boarding school, even if this boarding school was of a specialist kind.

*The Children Act's LAC regime*

68. The looked after child regime of the Children Act has been described in a number of authorities in recent years, and I do not propose to do so again, save in the briefest terms together with citation of the critical sections of the Act. I refer to cases such as *R (G) v. Barnet London Borough Council* [2004] 2 AC 208 (HL), *R (H) v. Wandsworth London Borough Council* [2007] 2 FLR 822 (Holman J), *R*

*(M) v. Hammersmith and Fulham London Borough Council* [2008] 1 WLR 535 (HL), *R (A) v. Croydon London Borough Council* [2009] LGR 24 (CA), and, most recently *R (G) v. Southwark London Borough Council* [2009] 1 WLR 1299 (HL).

69. The essence of the matter is that a "child in need" in the area of a local authority will become a looked after child if he or she is either taken into care by the authority (under section 31, not in issue in this case) or is provided with accommodation by the authority under either the duties or powers provided for in section 20. The test for present purposes therefore of a looked after child is the provision of accommodation under section 20.

70. Behind section 20, there lies the framework duty of section 17. Section 17(1) describes that framework duty and section 17(10)/(11) describes the concept of a child in need. Thus –

> "(1) It shall be the general duty of every local authority (in addition to the other duties imposed on them by this Part [III]) –
>
> (a) to safeguard and promote the welfare of children within their area who are in need; and
>
> (b) so far as is consistent with that duty, to promote the upbringing of such children by their families,
>
> by providing a range and level of services appropriate to those children's needs…
>
> (10) For the purposes of this Part a child shall be taken to be in need if –
>
> (a) he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by a local authority under this Part;
>
> (b) his health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services; or
>
> (c) he is disabled…
>
> (11) For the purposes of this Part, a child is disabled if he is blind, deaf or dumb or suffers from mental disorder of any kind or is substantially handicapped by illness, injury or congenital deformity or such other disability as may be prescribed; and in this Part –
>
> "development" means physical, intellectual, emotional, social or behavioural development…"

71. It is not in dispute that RO was and remains in need, probably under each of section 17(10)(a), (b) and (c).

72. Section 22 speaks to the "General duty of local authority in relation to children looked after by them", thus:

> "(1) In this Act, any reference to a child who is looked after by a local authority is a reference to a child who is –
> (a) in their care; or
> (b) provided with accommodation by the authority in the exercise of any functions (in particular those under this Act) which are social services functions within the meaning of the Local Authority Social Services Act 1970, apart from functions under section 17, 23B and 24B…
>
> (3) It shall be the duty of a local authority looking after any child –
> (a) to safeguard and promote his welfare; and
> (b) to make such use of services available for children cared for by their own parents as appears to the authority reasonable in his case.
>
> (3A) The duty of a local authority under subsection (3)(a) to safeguard and promote the welfare of a child looked after by them includes in particular a duty to promote the child's educational achievement."

73. Section 22(3A) was inserted by section 52 of the Children Act 2004. The Explanatory Notes to the 2004 Act say this about section 52:

> "226…There is evidence that this group of children [looked after children] achieve significantly less well than their peers, and that this under-performance is due at least in part to a lack of effective support from local authorities as "corporate parents" of these children.
>
> 227. The new duty will mean that local authorities will have to give particular attention to educational implications of any decision about the welfare of any child they are looking after. That might be for instance the need to organise a suitable school placement at the same time as arranging a new care placement."

74. It follows from section 22(1)(b) that what is in question in this case is the provision of accommodation in the exercise of social services functions of the authority. Section 20 is the critical provision for these purposes. It provides, as relevant, as follows:

> "(1) Every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation as a result of –

> (a) there being no person who has parental responsibility for him;
> (b) his being lost or having been abandoned;
> (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…
>
> (4) A local authority may provide accommodation for any child in need within their area (even though a person with parental responsibility for him is able to provide him with accommodation) if they consider that to do so would safeguard or promote the child's welfare."

75. Section 23(2) says that a local authority shall provide accommodation for any child they are looking after inter alia by making such arrangements as seem appropriate to them.

76. Questions have arisen as to whether accommodation provided by a local authority is properly to be regarded as being provided in performance of an authority's social services function (under section 20 of the Act) or in performance of an authority's housing function (under Part VII of the Housing Act 1996). Those questions have been discussed in the cases cited above, and led Baroness Hale of Richmond in *G v. Southwark* to describe such questions as a "labelling" problem. Thus at [9] she said:

> "The message of those cases is that if the section 20 duty has arisen and the children's authority have provided accommodation for the child, they cannot "sidestep" the issue by claiming to have acted under some other power."

77. At any rate in the context of the Children Act and the Housing Act, this labelling or sidestepping problem has been resolved in part because of the acknowledged primacy of the Children Act over the Housing Act (see, for instance, in *G v. Southwark* at [25]). One question which arises in this case is how a similar labelling or sidestepping problem is to be resolved in the context of the Children Act and the Education Act. Section 22(3A) of the former suggests that the problem of a looked after child's welfare embraces his or her education, and that, even in the context of education, the Children Act is to be regarded as the primary statute. A holistic approach to a child's welfare could hardly ignore education. Especially in the case of an autistic child, where his autism is the very thing that makes him a child in need, it is very difficult to think that his welfare, and his intellectual, emotional, social and behavioural development (see section 17(10) and (11)), can easily be separated out from his purely educational needs. As Dr Rasool recommended, a recommendation which was adopted in the December 2008 Core Assessment and led directly to the December 2008 Care Plan:

> "The need for a residential placement therefore is as much a social care need and responsibility as an educational one…"

(see at [34] and [35] above). As the Core Assessment acknowledged:

> "Both Dr Rasool's report and the Statement of Special Educational Needs recognise the need for a specialised placement on educational and psycho/social grounds"

(see at [39] above). And as the Care Plan stated (at question 5, see at [43] above):

> "the assessment is that his welfare needs will be met by the educational placement under the Education Act 1996."

Nevertheless, the judge regarded section 22(3A) as irrelevant or neutral (see his [82], cited above, and his [76]).

78. Another question which has arisen in this case is whether RO's respite care accommodation in the past, and/or any relevant accommodation at Horton House, arises under the duty to accommodate within section 20(1)(c) or only under the power to accommodate contained in section 20(4). The council denies the former, and concedes only the latter in terms of the respite care accommodation, and does not acknowledge any accommodation for the purposes of the Children Act at Horton House. In this connection, Mr Nicholas Bowen QC on behalf of RO submits that both respite care and Horton House accommodation must be regarded as provided under section 20(1)(c), on the basis that the parents were prevented "whether or not permanently, and for whatever reason" (which is written in to the heart of that subsection) from providing RO with "suitable care or accommodation". They could not suitably care or accommodate him on a permanent footing, both out of consideration for their family as a whole including RO's siblings and out of consideration for RO's own needs, since what he needed was a residential specialist placement. Mr Bowen stresses the width of "for whatever reason". He refers to what Lord Hope had said in *G v. Barnet* at [24] and [100], namely that ""Prevented…for whatever reason" in paragraph (c) is to be interpreted widely", and that "the words "for whatever reason" indicate that the widest possible scope must be given to this provision. The guiding principle is the need to safeguard and promote the child's welfare". Similarly in *M v. Hammersmith and Fulham* at [43] Baroness Hale spoke of the need for a "broad approach to the interpretation of when a parent is "prevented" from providing suitable accommodation or care…This mother may not have been prevented from providing her daughter with any accommodation or care but she was surely prevented from providing her with suitable accommodation or care". And in *G v.*

*Southwark* Baroness Hale again drew attention to the wide construction to be given to this provision (at [28](v)).

79. Mr Bowen also drew our attention to what Baroness Hale said in *G v. Southwark* about the termination of LAC status, especially having regard to the leaving care provisions designed to assist the "former relevant child" in the transition to independent living as an adult under sections 23A, 23B and 23C of the Act:

> "[32]…We have heard no submissions from the other parties on the circumstances in which, once triggered, the duty under section 20(1) might come to an end. Presumably, it will do so if the criteria are no longer met – if the child is no longer "in need", or his parents or carers are no longer prevented from providing him with suitable accommodation or care, or if a competent child no longer wishes to be accommodated under that section. But the whole purpose of the leaving care provisions was to ensure that older children who were without family support were given just the sort of help with moving into independent living that children normally expect from their families. Authorities should therefore be slow to conclude that a child will no longer be "in need" because he did not need that help or because it could be provided in other ways."

80. Finally, it is not in dispute that decisions about LAC status are a matter for the council, not for this court, which has only a standard role in the context of judicial review to ensure the legality of the council's decisions. Nevertheless, the House of Lords has made it clear that short shrift is to be given to any claim by an authority that a child who requires accommodation within section 20 can be deprived of LAC status by being provided with accommodation under another statute or "label". As Baroness Hale said at [28] in *G v. Southwark*, where Southwark took refuge in that authority's purported assessment that G only required "help with accommodation" rather than accommodation itself (see the acceptance of Southwark's position by the majority in this court in *G v. Southwark* [2008] EWCA Civ 877, [2009] 1 WLR 34):

> "(4) Does he appear to the local authority to require accommodation? In this case it is quite obvious that a sofa surfing child requires accommodation."

81. In the present case, it is not in dispute at all that RO requires accommodation. He had required respite care accommodation while he was living at home all of the time, and he requires accommodation now and in the future at a specialist school (such as Horton House). Both requirements stem from the same acknowledged facts, which are also not in dispute. Those facts are *both* that his parents cannot cope with him all of the time, for all that they are committed, capable and loving parents; *and* that he requires a residential setting for the specialist care and

education which his disabilities demand. The issue is whether the council can say that he does not require ongoing accommodation under section 20 of the Children Act, as distinct from the Education Act.

*The Education Act's SEN regime*

82. Part IV of the Education Act deals with children with special educational needs. The meaning of such needs is defined in section 312. The essence of it is a learning difficulty which causes a child to have significantly greater difficulty in learning than the majority of children of his age, or a disability which prevents or hinders him from making use of educational facilities of a kind generally provided for children of his age. Special educational provision is provision which is additional to or different from the provision made generally available in schools maintained by the authority in question. A "child" includes anyone who has not attained the age of 19 and is a registered pupil.

83. Section 323 places a duty on a local education authority to make an assessment of a child's educational needs in certain circumstances. Section 324 provides that if, in the light of that assessment, it is necessary for the authority to determine the special educational provision which any learning difficulty calls for, the authority shall make and maintain a statement of special educational needs. Such a statement shall name the type of school which the authority considers will be appropriate for the child. Section 323(5) provides:

> "Where a local education authority maintain a statement under this section, then –
> (a) unless the child's parent has made suitable arrangements, the authority –
> (i) shall arrange that the special educational provision specified in the statement is made for the child, and –
> (ii) may arrange that any non-educational provision specified in the statement is made for him in such manner as they consider appropriate…"

84. In such circumstances, subject to a successful appeal, which may be inter alia against the special educational provision specified in the statement (section 326), the statement becomes binding on all concerned. However, reviews may be requested after six months (section 328).

*The interrelationship of the Children Act and the Education Act*

85. The question may arise, and has done in this case, as to the interrelationship of the Children Act's LAC regime and the Education Act's SEN regime.

86. It would appear from the way in which, despite the terms of the December 2008 Core Assessment, the Care Plan which immediately followed it terminated RO's LAC status by reason of his SEN placement, that the council regarded the latter as supplanting the former, albeit only on the basis that his "welfare needs will be met" by the educational placement.

87. I have asked myself whether these critical documents in some way speak misleadingly about themselves or about the council's assessments. I have therefore carefully considered the three witness statements which have been filed by the council in these proceedings: one is that of Andrea Wallis, a senior social worker employed by the council who had been involved with his case since May 2008, latterly as his key worker; another that of Michelle Kirkwood, who replaced Ms Wallis as RO's key worker when the latter became unavailable through illness, and who it will be recalled countersigned the Core Assessment; and the third is that of Mike Brown, the council's "Children's Trust Manager (Strategic and Operational)". Ms Wallis's statement is dated 15 October 2008 and thus necessarily does not cover the latest events. It is relied on by the council to explain the parents' attitude to respite care, to the full time accommodation requested by them and provided at The Croft (which, being unsuitable for RO's needs, the parents considered was a move which had "effectively backfired on them"), and to their primary desire for what is called in her statement educational provision. Ms Kirkwood's statement is dated 15 December 2009, over a year later, by which time RO had been at Horton House since February 2009. Her statement was made specifically for the forthcoming hearing before Cranston J. Its burden, relied on by the council, is that respite care accommodation had been provided to the parents under section 20(4), but that in the new circumstances the parents could cope with RO at home and were indeed anxious to have him at home at every opportunity. The December 2008 Core Assessment and Care Plan were not explicitly dealt with.

88. Mr Brown's statement is also dated 15 December 2009. He says that "the main focus by his parents and the local authority was upon [RO's] need for education". He refers to the December 2008 Care Plan and says:

> "10. The decision on the care plan was made by the performance manager, Mr Barry Smith, in consultation with the childcare team. Mr Smith no longer works for the authority but I am able to confirm from the local authority's records and from my own involvement that the decision was taken that once the residential placement commenced [RO] would no longer require respite care and therefore would cease to be a looked after child. The local authority was not satisfied that after he commenced his full-time placement at Horton

> House [RO] would benefit from respite care to safeguard and promote his welfare as the parents could cope with him at weekends and holidays as they demonstrated when [RO] was at The Croft and went home at weekends and for the Christmas holiday."

89. In a longer paragraph of his statement, para 12, Mr Brown gives a list of detailed reasons "for taking the decision that [RO] no longer required accommodation pursuant to section 20(4) of the Children Act 1989 and would therefore cease to be a looked after child". I have considered them all carefully. Essentially, however, they amount to the summary given in his para 10, namely that, in the light of his placement at Horton House, RO would no longer require the section 20(4) respite care which he had been receiving. Thus it was said, for instance, that his parents no longer wanted respite care, and wanted him home, at weekends and holidays, where they were able to provide him with suitable accommodation. They were able to cope with him at home "as long as he was at school during the week". Mr Brown went further and stated that the parents were *unwilling* for RO to become a full-time looked after child, and that, given their lack of consent, it was not legally possible for RO to remain looked after. He said that when the Administrative Court ordered RO to be accommodated full time at The Croft the parents were upset and made it abundantly clear that "they did not want [RO] accommodated on a full-time basis". He then summarised the position again at his paras 10 and 12 *bis* (in fact paras 13 and 15) where he said:

> "The care plan filed on 22nd December 2008 stated clearly that [RO] would cease to be a looked after child once he commenced his full-time educational placement. In fact he had been removed from the local authority's care shortly before this care plan by his parents (on 19th December 2008)…
>
> I confirm that this is the view of the local authority because [RO] no longer requires respite care and there is no assessment of needs that would justify a finding by the local authority that [RO] required accommodation pursuant to section 20 of the Children Act 1989."

90. It is plain from these witness statements, and especially from that of Mr Brown, that the council never asked themselves whether the residential placement at Horton House was accommodation within section 20, but simply assumed that it was not, because it was provided under the Education Act. All they asked themselves was whether the respite care which they had been providing to RO was still needed, and it is understandable that in the new circumstances they concluded that it was not. All they asked themselves was whether the parents were consenting to respite care or accommodation at *The Croft* after RO returned home from The Croft on 19 December 2008, and they concluded, understandably, that they were not. In this context, it is of course true that the consent of parents who can provide or arrange to provide accommodation for their child is necessary to section 20 accommodation (see section 20(7) and (8)). And it was true that RO's

parents felt let down by RO's accommodation at The Croft, which they considered to be an unsuitable children's home, not a specialist placement. They regarded the placement at The Croft as if RO had been taken into care and put into a children's home, when they never wanted to see RO taken into care. However, it was known to the council, and cannot be disputed, that the parents' objection was to *The Croft* and not, of course, to that full-time accommodation (subject to weekends and holidays) which they were seeking for their son at a residential specialist placement. That it was the latter that they were seeking, both for their needs and above all for RO's needs, was the position that they had made clear from the beginning of their proceedings and throughout these proceedings (see for instance at para [19] above).

91. It is in this context that the issue arises, which I regard as the critical issue in this case, as to the relationship between LAC status under the Children Act and a SEN placement under the Education Act.

92. On this appeal, we have in this connection, as the judge below did not have, the advantage of written submissions made on behalf of the Secretary of State for Education by Mr Clive Sheldon. He submits that the two regimes "lie side by side…There will be children whose needs may be met by providing assistance under both regimes, and there will be circumstances where the child's needs will appropriately be met by providing assistance under only one regime. All will turn on the specific facts of the case." Thus it does not follow from the fact that a child is accommodated under either regime, that that child cannot also, or should also, be accommodated under the other regime. "The question should be determined by the authority's assessment of the needs of the child." Both his special educational needs and his social needs should be taken into account, as should the wishes and feelings of the child and his family.

93. Mr Sheldon then proposes the following test: where the placement is provided wholly or mainly to meet the child's special educational needs, it may be reasonable for the placement to be provided solely by exercising the authority's powers under Part IV of the Education Act. The rationalisation of that would be that in those circumstances the child would not "appear" to the local authority to require accommodation "as a result of" any of the matters within section 20(1)(a), (b) or (c). But even in such circumstances, the child may still require accommodation within section 20(1) or be provided with accommodation under section 20(4), for instance during school holidays; or may be supported by the local authority by its exercise of its more general powers within section 17. However, where the placement is not provided wholly or mainly to meet the child's special educational needs and the child is within section 20(1), or section 20(4) applies, then the placement may be provided under either the Children Act alone or under both Acts.

94. On behalf of the council, Mr Bellamy accepts and adopts similar submissions. Thus he agreed with the Secretary of State (Mr Bowen called it a concession) that "one statute does not oust the other. Neither has a supercessory effect". But, he submits, RO "does not need accommodation because he needs a residential school". It is simply, he says, that his parents wanted a weekly boarding school for him.

95. On behalf of RO, however, Mr Bowen submits that that accommodation is being provided within section 20(1)(c) (or section 20(4)) because the council acknowledges that a residential placement is required for RO's needs and that this is because his parents cannot cope without respite and RO cannot progress towards adult life, with or without schooling, without the care to be provided by a residential specialist establishment which is expert in dealing with severely affected autistic children.

96. What light is thrown on these submissions in the context of the interface between the two statutory regimes, in these circumstances where it is common ground that the two regimes do not exclude one another, but may lie down together?

97. The first matter to be observed perhaps is that, although the provision of accommodation is (with being taken into care) one of the two touchstones of a child entering into LAC status under the Children Act, the provision of accommodation is not mentioned in Part IV of the Education Act.

98. The second is that the importance of education to children with LAC status has been specifically underlined by the insertion of section 22(3A) into the Children Act. Not surprisingly, for education is an important part of the life of a child, the question of education is to be specifically considered as part of the "corporate parents" role which an authority has to undertake where a child enters into the LAC regime.

99. Thirdly, following the insertion of section 22(3A), new Statutory Guidance has been issued by the Department for Children, Schools and Families ("DCSF") entitled *Promoting the Educational Achievement of Looked After Children.* This Guidance has been issued under section 7 of the Local Authority Social Services Act 1970 ("LASSA 1970"), which means it must be followed save in exceptional circumstances. The following extracts are relevant:

> "13. When a child becomes looked after – either on a short-term or long-term basis – it is the duty of the Local Authority as corporate parents to safeguard and promote his or her welfare. This means that alongside planning secure

and reliable care and responding to the child's need to be well and healthy, local authorities have a specific responsibility to support his or her educational achievement…

46. Discharging the duty on a day-to-day basis means that a local authority should do at least what any good parent would do to promote their child's educational aspirations and support their achievements…

47. This means…

47.7 ensuring that the relevant local authority representative as specified in the PEP [Personal Education Plan, see paras 70/71] and Placement Plan (this could be a foster carer) attends parents' evenings and other relevant meetings, such as the annual reviews of a statement of special educational needs;…

49. When a child becomes looked after his or her local authority will arrange a suitable care placement. In doing so, the child's allocated social worker, supported by the local authority management and resources, should do everything possible to minimise disruption to the child's education…

84. The duty extends to young people preparing to leave care. In this context, where they are continuing their education in school, college and university settings, local authorities must properly discharge their duties under sections 23A to 24D of the 1989 Act and associated Regulations and statutory guidance to improve the life chances of looked after children leaving care…

**Special Educational Needs**

86. Looked after children are nine times more likely to have a statement of special educational needs than the general pupil population. The majority of looked after children will have special educational needs, and it is important that all children with SEN receive the educational provision which meets their needs. However for looked after children, many of whom will have had difficult and unstable home and school lives before coming into care, it is imperative that their needs are quickly and efficiently assessed and provided for so that the effects of any instability on their education is reduced to a minimum. Teachers, carers, social workers and other professionals should use the standard school and local authority assessments to identify any special needs and take steps to address such needs effectively.

87. Where it is agreed that the child's needs exceed those normally addressed in mainstream education provision an application for statutory assessment under the Education Act 1996 for a Statement of Special Educational Needs may be made. The authority which carries out that assessment is determined by section 321(3) of the Education Act 1996. This means that the SEN assessment should be carried out by the authority where the child lives. This may not be the same authority to which the child "belongs". In most cases a looked after child will be living with carers or in a children's home. If that is where they are ordinarily resident then it is for the authority where they are resident to carry out the SEN assessment. The local authority School

> Educational Psychologist has statutory duties associated with the identification and assessment of SEN."

100. This Guidance reflects, in my judgment, the primary role which the Children Act plays, where a looked after child is concerned, to provide for the right educational help. Sometimes or even often this happens in the absence of family support of any kind as where the child is taken into care, but the Children Act emphasises the importance of a partnership between the local authority and parents. This role is also emphasised in the earlier *Framework for the Assessment of Children in Need and their Families*, 2000, published jointly by the Department of Health, Department for Education and Employment and the Home Office. This Framework is also issued under section 7 of LASSA 1970 and has the same status as the later Guidance. Thus para 1.12 of the Framework emphasises the need for co-operation between local authorities and local education authorities, to which section 27 of the Children Act and section 322 of the Education Act refer. Paras 1.38, 2.7 and 5.52ff speak to the role of the Children Act in matters of education and special educational needs. For instance para 5.56 says:

> "Having decided that a statutory [SEN] assessment should be made, the local education authority must seek parental, educational, medical, psychological and the social services department's advice. Where a child is known to the social services department, the social worker should draw on information which has already been gathered and is on the child's file. At the same time, the social services department may decide to undertake a child in need assessment under s 17 of the Children Act 1989, to ascertain whether social services would benefit the child and family."

101. In the present case, there was of course no dislocation between the local authority concerned with social services and with education: both were departments of the council itself. But the Guidance and Framework, reflecting statute, for instance section 85 of the Children Act itself, require such departments to work together to address the needs and welfare of the child. The judge was impressed by section 85 into thinking that it reinforced his view that the council in this case was not looking after RO automatically, just because he was being accommodated in Horton House. That, however, is not the issue or RO's contention. However, section 85 is one among a number of places in both Acts where the requirement is emphasised for a joined up or holistic approach to the problem of children with needs, which may be particularly acute where two entirely different authorities are responsible under the different Acts.

102. Against the approach of the Secretary of State and of the council to the inter-connectedness of the two regimes, it would seem to me to be somewhat surprising and counter-intuitive to conclude that in this case RO's LAC status came to an end precisely when his needs, development, behavioural, emotional and social, as well

as educational, all of which had been explored and were coming to be fully acknowledged, were finally recognised as requiring the provision of a residential environment in which they would be addressed. As it is, we know, in my judgment, that the council did not apply the Secretary of State's test for asking which of one or two regimes were invoked by RO's needs and SEN placement. It simply assumed that his LAC status would automatically end with his SEN placement, once respite care ceased.

*Submissions*

103. The essential submissions may be collected here as follows.

104. On behalf of RO, Mr Bowen submitted that the period during which RO had been provided with respite care accommodation had shown him to be a child in need, a looked after child under section 20 of the Children Act, and one for whom, as was finally accepted by the council, a residential specialist placement was required. He submitted that this was common ground, and that the only remaining areas of dispute were whether (i) the respite care in the past should be regarded as provided under section 20(1)(c) as a duty, or under section 20(4) as the exercise of a power; and (ii) whether the residential placement should be regarded as continuing RO's looked after status rather than as terminating it.

105. As for (i), the section 20(1) or section 20(4) issue, he submitted that it was plain on the facts that the council regarded the parents, excellent parents as they were, as prevented by their and RO's overwhelming difficulties, as he stressed "for whatever reason", from providing RO with suitable accommodation and/or care, in particular the latter. As for the reference to section 20(4) in RO's solicitors' further particulars of their letter before action, that was simply a legal error and did not change the facts. Up to that time, the council had referred only to section 20 at large, and it was only after that time that they fell into speaking of section 20(4). In any event, RO was a looked after child with overwhelming difficulties and needs facing both him and his parents.

106. As for (ii), the Children Act or Education Act regime issue, he stressed the hegemony and holistic nature of the former, and the recognition of RO's continuing needs, which did not change their nature even if the council ultimately changed their response to them in finally recognising the inevitability of an ongoing residential specialist placement.

107. In effect, he submitted that the SEN placement, so far from terminating RO's LAC status, sealed it. In purporting to terminate that status with the end of respite care, the council had failed to consider the case of an admittedly looked after child with that anxious scrutiny which Baroness Hale had called for in *G v. Southwark*. On the contrary, they had committed that error of "side-stepping" which the House of Lords had criticised by labelling RO's on-going care as a purely SEN placement under the Education Act.

108. On behalf of the council, Mr Bellamy submitted to the contrary. As for (i), the section 20(1) or section 20(4) issue, he submitted that the respite care did not come within section 20(1)(c), or at any rate that RO did not "appear" to the council to require that respite accommodation as a result of any inability of his parents to provide him with suitable care and accommodation. The parents were excellent parents, they could cope with RO with a little bit of help, and they continued to demonstrate their ability to cope by their eagerness to have RO home with them on every available opportunity, even though in due course Horton House provided 52 week a year accommodation. As for (ii), the Children Act or Education Act issue, he adopted the position of Mr Sheldon on behalf of the Secretary of State and submitted that, whatever the theoretical and practical possibilities of the two regimes lying side by side or overlapping, on the facts of this case the answer to the question posed, whether the placement appeared to the council to be wholly or mainly as a result of RO's special educational needs, was that it was and that correspondingly it did not "appear" to the council that RO fell to be accommodated by it "as a result of" anything within section 20(1)(c).

109. Mr Bellamy submitted, moreover, that RO's claim in judicial review was forever undergoing metamorphosis, and that in its final version it was seeking to make a perversity or irrationality allegation on the facts which was as unsustainable as it was unheralded. Where there was a legitimate choice to be made in ambivalent circumstances, the council's assessment and decision-making was not to be second-guessed by the court, whose role in judicial review was limited. At the end of the day, these were capable parents whose need for some help with respite care had come to an end with the SEN placement, and that was best regarded as the fulfilment of their choice of a boarding school education for their son. The judge was right for the reasons which he had given.

110. There was much else besides in the manifold submissions before us, as the parties sought to position themselves so as to be free of opposing criticisms about their respective conduct. On the whole it seemed to me that these submissions served only to obscure rather than illuminate the essential issues which were before the court.

*Discussion*

111. It has taken time to set out the rich material which has been presented to us in this case: but having reached this point, I believe that I can resolve the issues without great elaboration.

112. It is common ground that RO was a child in need and a looked after child, even though the council only accommodated him for respite weekends once or twice a month. Following the West End placement and his late diagnosis of autism, his needs, as a severely autistic teenager with severe ADHD, who, as he entered his teenage years, had become uncontrollable by his parents, were perfectly well appreciated by the council's social services department. His place in mainstream education had become in practice an unsustainable one, and therefore there was also an important educational element in the problem. His parents were naturally concerned about his falling out of education, but they were also concerned, as was the council, about the whole problem of his emotional and behavioural development, which is well described in the papers before us. Dr Rasool, who had diagnosed his autism, recognised the need for both expert *specialist* help and the need for a *residential* environment in which his needs could be attended on a full-time basis. I am perfectly satisfied that sooner or later those needs, including the requirement of a residential placement, were plain to and plainly acknowledged by the council, even if not at first by its education department. It is sufficient to refer, for instance, to recommendations contained in the LAC reviews which were being formulated in 2007 and 2008: under the headings of both "Care" and "Education" reference was made by the team of RO's reviewers (the "Review") to the need for a "specialist residential" placement. The council's social workers were therefore concerned that its education department could not be persuaded, in the absence of a formal, written, recommendation from Dr Rasool for a residential placement, to support the cost of what was needed.

113. In due course, however, after false starts, interludes or diversions at Farrow House and The Croft, the education department as well as the social services department were persuaded of the need for that specialist residential placement. Dr Rasool's report in its essence was adopted by the council's December 2008 Core Assessment and thus by the Care Plan. I refer to my summary of those important documents at paras [32] – [35], [39] – [40] and [41] – [54] above. It is in my judgment perfectly plain that, as the Core Assessment stated, building on Dr Rasool's (and the other experts') reports:

> "Both Dr Rasool's report and the Statement of Special Educational Needs recognise the need for a specialised placement on educational and psycho/social grounds."

114. That was, of course, a residential placement. In these circumstances, it is impossible to regard the SEN placement in this case, on these particular facts, as being provided wholly or mainly to meet RO's educational needs, as distinct from being provided to meet both those needs and the needs for which he had become and was a looked after child. It was plain, and it was plain to the council, that RO required full-time accommodation in his specialist placement in order to give him the care, as well as the educational assistance, which his needs, and his parents' inability to cope with and control him, demanded. The fact that his parents were willing to have him home at weekends and during the holidays did not detract from that conclusion and that appearance to the council. The parents, in other words, could manage him, and wanted to parent him, on weekend and holiday visits: but they could not cope with him in the absence of the accommodation and care which was to be provided for him at Horton House. That was why in the litigious run-up to the Horton House placement, the parents, through RO's claim, had sought full-time respite, why a succession of judges had ordered and maintained a placement at The Croft, and why the council itself had regarded that placement as having been provided under section 20 (whether or not it was in fact provided under the inherent jurisdiction of the court, and whether or not in the event the parents, when faced by the unsuitability of The Croft, had regretted where the litigation had temporarily taken them).

115. In such circumstances, it seems to me that it hardly seems to matter whether RO's pre-Horton House LAC status was based on section 20(1)(c) or section 20(4): for in any event, the exercise of the council's power under the latter subsection was demanded by what the council recognised as RO's needs and the limits of his parents' coping abilities; and in any event, going forward, the council recognised that those needs and those limits meant that RO required his residential placement. That is what the final Care Plan repeatedly recognised. In such circumstances, where the facts, and the council's recognition of the facts, come within section 20(1)(c), it seems to me ultimately to be wrong to regard the council to have been exercising a mere power rather than their statutory duty.

116. Therefore, to the extent that the council in their final Care Plan purport to regard the SEN placement as supplanting and ending RO's status, they do seem to me to be mis-labelling the situation and to be side-stepping their Children Act responsibilities. Seeing that case-law had not previously assisted upon the interrelationship of the Children Act and the Education Act, in the way that it had done on the interrelationship of the Children Act and the Housing Act, the council's error may be said to be understandable. However, error it was. This is demonstrated by the fact that it is plain from the Care Plan, in the light of the Core Assessment, that the council simply erroneously believed that the SEN placement automatically brought RO's previous LAC status to an end. It is to my mind plain from the Care Plan itself, but this is confirmed by the council's evidence in these proceedings and particularly by Mr Brown's witness statement, that the council never stopped to think of, let alone to give anxious scrutiny to, the question whether the factors which had led to respite care, when they were carried over into the placement at Horton House, necessitated a continuation of RO's status. They

merely assumed that that status came to an end with the ending of the respite care which had brought that status into being. That indeed was one of the chief burdens of Mr Bellamy's submissions, that just as respite care accommodation had brought RO's LAC status into being, so the ending of that respite care accommodation had terminated his status. That to my mind, however, is a profound mis-reading of the situation. The respite care was merely a symptomatic consequence of RO's and his parents' needs and difficulties: those same needs and difficulties led ineluctably to the further symptomatic consequence of the provision of accommodation at the Horton House placement. Thus the ending of the former could not lead to the termination of LAC status.

117. In these circumstances, where RO's needs, social as well as educational, had driven the placement, as had been appreciated by RO's LAC review team long before the education department had fallen into line, it is impossible in my judgment to regard the Education Act's SEN regime as supplanting rather than supporting the Children Act's LAC regime. Of course it is possible to regard education as extending more broadly, as it is possible to regard care as extending more broadly. However, ultimately it is the Children Act which is intended to provide the holistic support for children in need who have, because of the provision of accommodation to them, come within the regime and status of being looked after children. Albeit the test of a looked after child is not the more general one of being in need to be looked after, rather than the more specific test of being both in need *and* taken into care or being provided with accommodation in the defined circumstances set out in section 20, nevertheless, once one of those gateways, of care or accommodation, has been met and the LAC status has been triggered, the purpose and function of that status is to ensure that the child's welfare is preserved and promoted.

118. Against that background, it is impossible to accept that the council were meeting their responsibilities when they assumed that the SEN placement supplanted and superseded RO's LAC status simply on the basis that it would meet his social as well as his educational needs. On the contrary, RO's reviews in the run-up to this litigation were recording that the question of RO's lack of current education was obscuring his real needs, which were for specialist residential help. As Mr Harland, the independent reviewing officer, had said in meeting on 20 June 2008, specialist provision rather than (mere) education (which had driven the Farrow House placement) ought to be the real focus (see [15] above). For these purposes, moreover, the organisational differences or budgets of the council's departments cannot be determinative. We do not know, and ultimately in my view it does not matter, at any rate on the facts of this case, how those budgets are operated or whether there has been a sharing or not of costs and resources between the two departments. All we know is that at one stage there was dispute between the departments as to how RO's case was to be financed between them.

119. Mr Bellamy submitted that any reliance on perversity or irrationality was an unpleaded point. However, the council's error here in my judgment was more fundamental (if that is the way to describe it). It terminated LAC status on a false (and to some extent unspoken) premise, that accommodation to be provided by the council under the SEN placement superseded RO's LAC status: whereas on the facts before them, and acknowledged by them, it was in truth continuing it. They never asked themselves the question whether RO's needs and the parents' inability to cope with them (in RO's interests), with or without respite, took them, or kept them, in the light of the accommodation to be provided at Horton House, within section 20. They merely assumed that everything that was needed, from RO's and his parents' points of view, was to be provided under an Education Act label, and therefore not under the Children Act. This was in my judgment a legal error that went beyond or was different from perversity or irrationality.

120. In any event, it seems to me that perversity or irrationality was inherent in all RO's claim and appeal documents. As his re-amended detailed grounds for judicial review, for which Elias LJ gave permission, stated:

> "7. C contends that on the particular facts of this case, in view of C's complex needs and vulnerabilities, D is not entitled to cease to look after C simply because D has found a different legislative route to providing C with the full-time residential care that professionals have said C requires since at least February 2007."

121. The document continued, in summarising the main issues, by asking (at para 9(i)):

> "Where a child has been looked after by local authority social services, can the local authority justifiably cease to look after the child where the child cannot be returned home and the criteria for accommodation under section 20 are still met (but for the local authority providing accommodation)?"

122. So far as grounds of appeal are concerned, the challenge of perversity or irrationality was extended into a complaint about the judge's own analysis, where it is said, for instance, that –

> "41. Had the learned judge carried out the requisite intensity of review, it is contended on behalf of the Appellant that the only reasonable finding open to him was that the Appellant was or should have continued to be treated as a 'looked after child' irrespective of the placement under the Statement, because that placement ought to, as a matter of law, be a s20 and s23 accommodation."

123. As I was able to say in *G v. Southwark*, where a pleading point was also taken as a would-be refuge, albeit not by respondent counsel, the complaints of illegality and irrationality become difficult to disentangle and I saw no pleading point (at [2009] 1 WLR 34 at [80]). I am unable to see one here either.

124. In terms of the judge's judgment, I would respectfully differ from his analysis in the following respects. He concluded, in accordance with the council's to my mind mistaken view, that simply "because the claimant is at Horton House, and no longer receives respite accommodation, he is no longer a looked after child" (at [70]). He again focussed on the cessation of the weekend respite care in distinguishing *M v. Hammersmith* and *G v. Southwark* when he said "A distinguishing feature of these cases is that the children required accommodation because they had nowhere else to live. In this case the claimant did not require accommodation in this sense, other than respite care for his parents" (at [72]). The judge spoke to similar effect at his [83]-[84]. That was indeed the burden of the council's submissions, but a mistaken one, for the reasons I have sought to explain above. RO did indeed require accommodation, for his own (as well as his parents' sake), and to be provided with accommodation at Horton House, and the council recognised that need as being one RO "requires". But the judge accepted the council's submission that *that* accommodation had nothing to do with the Children Act. Thus at [73], he said that "To suggest that the provision of Horton House is an attempt to sidestep its obligations is quite contradictory. It is exactly what the family wanted…". However, the fact that it is what the family wanted, and indeed what the council finally decided RO required, does not answer the complaint that the council erred in viewing the provision of that requirement as being solely under the Education Act and not also under section 20 of the Children Act.

125. In sum, on the facts which were acknowledged by the council and on their own assessments, RO required full-time accommodation at a residential specialist placement such as Horton House. Without such accommodation his parents could not have coped, but that, come the placement, was not the main point, which was RO's own needs. With RO's accommodation at Horton House, however, his parents were only too pleased, being the parents they are, to welcome RO home on every weekend and holiday occasion. Nevertheless, unless the Horton House placement is to be regarded as entirely or mainly educational, and not also substantially a matter of providing social care for RO's acknowledged psycho/social needs, it is impossible to regard RO's looked after child status as coming to an end, rather than being maintained. In my judgment, applying the Secretary of State's own test, adopted by the council on this appeal, to the facts acknowledged (but not taken account of) by the council at the time, the answer must be that the placement was as much out of consideration for RO's (and his parents') social needs as his educational needs. Although the council regarded RO's looked after status as turning entirely on whether RO continued to be accommodated in weekend respite foster placements, and his future accommodation as being simply provided for under the Education Act, this was, on the acknowledged facts, an erroneous, impossible, irrational and unlawful view

to take. They do not appear, at the end of the day, to have asked themselves what their continuing obligations under the Children Act might have been but simply to have assumed that respite care was all that concerned them under that Act, and that the rest was education and something different.

126. Given the functions and purposes of the looked after child regime of the Children Act, I am satisfied to be able to come to this conclusion. It seems to me that any other conclusion would be counter-intuitive in that context. I do not say that this has been an easy case to decide, because there has been much in it to cloud the mind. When, however, the facts and issues are clarified, and the council's error can be seen for what it was, albeit they were, as I would acknowledge, concerned ultimately to see to RO's welfare, the answer presents itself, in my judgment, as I have sought to explain it above. That probably means that little if anything will change in RO's position as long as he remains at Horton House: but at a later stage it should mean that he will be helped by the provisions of the Children Act to enter adult life. And that, as it seems to me, is as it should and was meant to be.

*Conclusion*

127. In conclusion, I would allow this appeal for the reasons stated above.

**Lady Justice Smith :**

128. I agree.

**Lord Justice Richards :**

129. At the conclusion of the oral argument in this case I was inclined to the view that the conclusion reached by Cranston J was correct, but Rix LJ's penetrating and persuasive analysis of the legal and factual material has caused me to change my mind. I agree with his judgment and have nothing useful to add to it.