Neutral Citation Number: [2004] EWCA Civ 535

Case No: C1/2003/2615

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT LIST

[2003] EWHC 2798 (Admin)

Mr Justice Ouseley

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 4th May 2004

Before :

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES

LORD JUSTICE RIX

and

LORD JUSTICE CARNWATH

- -

Between :

THE QUEEN ON THE APPLICATION OF "O" **Appella**

- and -

THE LONDON BOROUGH OF HARINGEY **Respond**

- and -

Interested P

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

- -

- -

Mr Stephen Knafler (instructed by **Anthony Gold**) for the **Appellant**

Mr Hilton Harrop-Griffiths (instructed by **London Borough of Haringey**) for **The London Borough of Haringey**

Miss Elisabeth Laing (instructed by **The Treasury Solicitor**) for **the Secretary of State for the Home Department**

Hearing date: Monday 29th March 2004

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Judgment

Lord Justice Carnwath

1.
These are appeals against Ouseley J's decision upon an application for judicial review. They concern the responsibility of the National Asylum Support Service ("NASS") for "infirm" asylum seekers with

dependent children, under the arrangements established by the Secretary of State under Part VI of the Immigration and Asylum Act 1999 ("the 1999 Act").

2.
The applicant is a 39-year-old Ugandan citizen who is HIV positive. She has two children aged 3 and 5. She has been in this country for 8 years, having come originally to join her husband, who was lawfully in the country. In November 2002, she left the matrimonial home due to domestic violence. Since then the London Borough of Haringey has provided her and her two sons with accommodation and subsistence. In January 2003 she sought exceptional leave to remain, on the grounds that her removal to Uganda would breach her rights under Article 3 of the Human Rights Convention, because she would be unable to receive medical treatment there necessary to save her life. This application remains undetermined. Accordingly she is currently an "asylum-seeker" for the purposes of the relevant provisions.

3.
The appellants are the applicant herself, and the Secretary of State. They maintain that responsibility for the whole family rests on Haringey, principally relying on section 21 of the National Assistance Act 1948 ("the 1948 Act"). The Judge decided that the responsibility for the whole family falls on NASS under the 1999 Act.

4.
Haringey accepts (differing in this respect from the Judge) that it owes a duty to the applicant herself. In this it follows Lord Hoffmann in R (Westminster City Council) v NASS [2002] 1WLR 2956:

> "….only the able bodied destitute are excluded from the powers and duties of section 21(1)(a). The infirm destitute remain within. Their need for care and attention arises because they are infirm as well as because they are destitute." (para 32)

Under this terminology, O is an "infirm destitute". However, Haringey submits that it has no duty under section 21 (or any other provision) to support O's dependent children, who are therefore the responsibility of the NASS under the 1999 Act. It accepts that in practice the children should live with their mother. The issue therefore is not where they should live but who should pay for them.

The legislation

5.
The 1999 Act applies to asylum seekers generally. It was introduced following the 1998 White Paper "Firmer, Fairer, Faster – A Modern Approach to Immigration and Asylum". The background was described by Lord Hoffmann in the Westminster case.

6.
The White Paper proposed creating a national state-financed and operated asylum system by the creation of NASS as a division of the Home Office. Paragraph 8.23 of the White Paper referred to the proposed new "safety net", and the consequences for the 1948 Act:-

> "The 1948 Act will be amended to make clear that social services departments should not carry the burden of looking after healthy and able bodied asylum seekers. This role will fall to the new national support machinery"

Paragraph 8.24 explained the position in relation to "Families and unaccompanied children":

> “Families and unaccompanied children account for a relatively small proportion of asylum applicants, around 15%. The Government will ensure that in providing a safety net for asylum seekers the needs of children are fully respected and their welfare and rights safeguarded. Appropriate access to education will continue to be afforded to the children of asylum seekers. Provision will continue to be made under the Children Act 1989 and the Children (Scotland) Act 1995 for unaccompanied children claiming asylum, but social services departments will no longer be expected to provide for asylum seeking families in the absence of special needs requiring a social services response. Where the need can be demonstrated, families will be provided with safety net support. The Government recognises that this will involve additional considerations to those which apply to single adults, and special care will be taken to ensure that provision for accommodation, clothing, food and other living essentials is sufficient and flexible enough to support the children’s well-being during the period when their asylum application is under consideration.”

These proposals were given effect in the 1999 Act. The material provisions are as follows.

7.
Section 95 provides:

> “(1)
> The Secretary of State may provide, or arrange for the provision of, support for –”
>
> (a)
> asylum seekers, or
>
> (b)
> dependants of asylum seekers,
>
> who appear to the Secretary of State to be destitute or to be likely to become destitute within such period as may be prescribed.
>
> ……
>
> (3)
> For the purposes of this section a person is destitute if –
>
> (a)
> he does not have adequate accommodation or any means of obtaining it (whether or not his other essential living needs are met; or
>
> (b)
> he has adequate accommodation or the means of obtaining it, but cannot meet his other essential living needs.
>
> (4)
> If a person has dependants, subsection (3) is to be read as if the references to him were references to him and his dependants taken together…”

8.
Section 122 is headed “Support for children”. The relevant provisions are:

> “(1)

In this section ‘eligible person’ means a person who appears to the Secretary of State to be a person for whom support may be provided under section 95.

(2)
Subsections (3) and (4) apply if an application for support under section 95 has been made by an eligible person whose household includes a dependant under the age of 18 (‘the child’).

(3)
If it appears to the Secretary of State that adequate accommodation is not being provided for the child, he must exercise his powers under section 95 by offering, and if his offer is accepted by providing or arranging for the provision of, adequate accommodation for the child as part of the eligible person’s household.

(4)
If it appears to the Secretary of State that essential living needs of the child are not being met, he must exercise his powers under section 95 by offering, and if his offer is accepted by providing or arranging for the provision of, essential living needs for the child as part of the eligible person’s household.

(5)
No local authority may provide assistance under any of the child welfare provisions in respect of a dependant under the age of 18, or any member of his family, at any time when-

(a)
the Secretary of State is complying with this section in relation to him or:

(b)
there are reasonable grounds for believing that-

(i)
the person concerned is a person for whom support may be provided under section 95; and

(ii)
the Secretary of State would be required to comply with this section if that person had made an application under section 95.

(6)
‘Assistance’ means the provision of accommodation or of any essential living needs.

(7)
‘The child welfare provisions’ means –

(a)
Section 17 of the Children Act 1989 (local authority support for children and their families)….”

9.
The relevant parts of section 21 of the National Assistance Act 1948, as amended, are:

“(1)

Subject to and in accordance with the provision of this Part of the Act, a local authority may with the approval of the Secretary of State, and to such extent as he may direct shall, make arrangements for providing -

(a)
residential accommodation for persons aged eighteen or over who by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them; and

(aa) residential accommodation for expectant and nursing mothers who are in need of care and attention which is not otherwise available to them.

(1A) A person to whom section 115 of the Immigration and Asylum Act 1999 (exclusion from benefits) applies may not be provided with residential accommodation under subsection (1)(a) if his need for care and attention has arisen solely -

(a)
because he is destitute; or

(b)
because of the physical effects, or anticipated physical effects, of his being destitute.

(1B) Subsections (3) and (5) to (8) of section 95 of the Immigration and Asylum Act 1999, and paragraph 2 of Schedule 8 to that Act, apply for the purposes of subsection (1A) as they apply for the purposes of that section, but for the references in subsections (5) and (7) of that section and in that paragraph to the Secretary of State substitute references to a local authority.

(2)
In making any such arrangements a local authority shall have regard to the welfare of all persons for whom accommodation is provided, and in particular to the need for providing accommodation of different descriptions suited to different descriptions of such persons as are mentioned in the last foregoing subsection….

(5)
References in this Act to accommodation under this Part thereof shall be construed…as including references to board and other services, amenities and requisites provided in connection with the accommodation except where in the opinion of the authority managing the premises their provision is unnecessary…

(8)
….nothing in this section shall authorise or require a local authority to make any provision authorised or required to be made (whether by that or by any other authority) by or under any enactment not contained in this Part of this Act…".

10.
Reference must also be made to certain provisions of sections 17 and 20 of the Children Act 1989. Section 17 provides:

(1)
It shall be the general duty of every local authority (in addition to the other duties imposed on them by this Part) -

(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 levels of services appropriate to those children's needs…

(3)
Any service provided by an authority in the exercise of functions conferred on them by this section may be provided for the family of a particular child in need or for any member of his family, if it provided with a view to safeguarding the child's welfare…

(6)
The services provided by a local authority in the exercise of functions conferred on them by this section may include providing accommodation and giving assistance in kind or, in exceptional circumstances, in cash…

(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…

and 'family' in relation to such a child includes any person who has parental responsibility for the child and any other person with whom he has been living."

Section 20 provides:

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

(a)
there being no person who has parental responsibility for him;

(b)
his being lost or having been abandoned; or

(c)
the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation and care…

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

The Asylum Support Regulations

11.

The Asylum Support Regulations 2000 SI 704 (which govern asylum support from NASS) were made under paragraph 2 of Schedule 8. They provide so far as relevant:

> "5(1) Subject to paragraph (2), where an application in accordance with regulation 3(3) is for asylum support for the applicant and one or more dependants of his, in applying section 95(1) of the Act the Secretary of State must decide whether the applicant and all those dependants, taken together, are destitute or likely to become destitute within the period prescribed by regulation 7…
>
> 6(1) This regulation applies where it falls to the Secretary of State to determine for the purposes of section 95(1) of the Act whether -
>
> (a)
> a person applying for asylum support, or such an applicant and any dependants of his …
>
> is or are destitute or are likely to become so within the period prescribed by regulation 7.
>
> (2)
> In this regulation "the principal" means the applicant for asylum support…
>
> (3)
> The Secretary of State must ignore –
>
> (a)
> any asylum support,…
>
> which the principal or any dependant of his is provided with, or where the question is whether destitution is likely within a particular period, might be provided with in that period.

(4)
But he must take into account - …

(b)
any other support which is available to the principal or any dependant of his, or might reasonably be expected to be available in that period; ….

12(1) This regulation applies where it falls to the Secretary of State to decide the level or kind of asylum support to be provided for - …

(a)
a person applying for asylum support, or such an applicant and any dependants of his ….

(3)
The Secretary of State must take into account …

(b)
support which is or might reasonably be expected to be available to principal or any dependant of his, …

otherwise than by way of asylum support.

16(1) This regulation applies where, in deciding the level of asylum support to be provided for a person who … will be a supported person, the Secretary of State is required to take into account income, support or assets as mentioned in regulation 12(3).

(2)
The Secretary of State may-

(a)
set the asylum support at a level which does not reflect the income, support or assets, and

(b)
require from that person payment by way of contributions towards the cost of the provision for him of asylum support."

12.
Regulation 23 applies regulation 6(3) to (6) for the purpose of various enactments, including section 21(1A) of the 1948 Act. The effect is that, in determining whether a person is "destitute" for the purpose of section 21(1A) the authority cannot take the availability of asylum support from NASS into account (see the Westminster case in the Court of Appeal: 33 HLR 938 para 25-7 per Simon Brown LJ).

The test under regulation 6(4)

13.
Before leaving the regulations, I should comment briefly on the wording of regulation 6(4), in the light of a point which arose in argument. The enabling statutory provision is paragraph 2(1)(b) of Schedule 8 to the 1999 Act, under which the regulations could provide for the Secretary of State to take into account support "which is … or might reasonably be expected to be" available to the claimant or his or her dependants.

14.
Regulation 6(4) does not follow that precise wording. It deals with two separate aspects of section 95(1): first whether a person is destitute, and secondly (if not) whether he is "likely to become destitute within such a period as may be prescribed". Regulation 7 prescribes the period for that purpose as 14 days (other than in the case of a "supported person"). Accordingly, regulation 6(3) requires the Secretary of State to ignore any asylum support which the family "is provided with" or

> "where the question is whether destitution is likely within a particular period, might be provided within that period."

Similarly, regulation 6(4) requires him to take into account any other support which "is available" to the family or "might reasonably be expected to be so available in that period".

15.
Thus, where one is dealing, as we are in this case, with the question whether a person is destitute (rather than whether he will become so within 14 days), the relevant question is simply whether other support is available, not whether the Secretary of State might reasonably think it would be available. (By contrast, under regulation 12(3)(b), where the question is the level of support to be given to someone accepted as destitute, the question is put more broadly: "support which is or might reasonably be expected to be available to the principal or any dependant of his.")

16.

I mention this, because at one time during the argument it occurred to me that the issue might be one for the judgment of the Secretary of State reviewable only on Wednesbury grounds. However I think that was based on a mis-reading of the relevant regulations. The point was accurately expressed by Lord Hoffmann (para 40):-

> "Regulation 6(4) says that when it falls to the Secretary of State to determine for the purposes of section 95(1) whether a person applying for asylum support is destitute, he must take into account 'any other support' which is available to him. As an infirm destitute asylum seeker, support was available to (the claimant) under section 21 therefore she could not be deemed destitute for the purposes of section 95(1)." (emphasis added)

17.
This distinction is I think of some importance in the present discussion. In deciding whether a person is destitute, it is not enough that the authority may have a power or discretion to provide accommodation or other support, or that the Secretary of State might reasonably expect them to do so. The question is whether the family has "the means" to obtain that support (section 95(3)) or whether it "is available" to them. These words to my mind, at least where the source of the support is a public authority, connote a legal entitlement or enforceable expectation that the support will be given.

Previous history of section 21

18.
The background to section 21(1)(a), in the context of the 1999 Act, was explained by Lord Hoffmann in the Westminster case. As he said, until 1997 it had been "a relatively quiet backwater" of the social welfare system, dealing largely with residential homes principally for the elderly and mentally ill.

19.
Thirty years ago there was a similar period of excitement over the scope of section 21(1)(b) (temporary accommodation for persons in urgent need), which was pressed into service to meet the needs of the homeless (see e.g. Southwark LB v Williams [1971] Ch 734; Roberts v Dorset County Council [1976] 75 LGR 462). That particular crisis was resolved by the repeal of section 21(1)(b) and its replacement by the homeless persons legislation.

20.
A further important change to the scope of section 21 came with the Children Act 1989. The 1989 Act amended section 21(1)(a) so as to limit the duty to persons "aged 18 or over". This was the corollary of the comprehensive provision dealing with "local authority support for children and families" contained in Part III of the 1989 Act. Since then, it is quite clear that the authority owes no direct duty to children under section 21. As Hale LJ said in R (Wahid) v Tower Hamlets LBC 5 CCLR 239 (having analysed the scope of section 21 in terms commended by Lord Hoffmann in the Westminster case para 26), the local authority's duty is to the claimant "and not to the other members of his family" (para 34).

21.
In 1997, however, the Court of Appeal decided that healthy asylum seekers who were deprived by the Asylum and Immigration Act 1996 of ordinary forms of income and housing support could seek assistance under section 21(1), because being without accommodation or subsistence they would soon become in need of "care and attention" unless something were done (R v Hammersmith and Fulham

LBC ex p M [1997] 30 HLR 10). This shifted the burden of dealing with such cases on to hard-pressed social services departments of local authorities, particularly in areas close to the channel ports and the Inner London boroughs.

22.
As Lord Hoffmann noted, the effect of the decision in ex p M was to bring within section 21 two distinct classes of asylum seekers. He categorised them as:-

i)
“The able-bodied destitute”: that is, able-bodied asylum seekers who qualified solely because, as a result of the 1996 Act, they were likely to become in need of care and attention (as highlighted by ex p M itself);

ii)
“The infirm destitute”: that is, asylum seekers who had some infirmity which required the local authority to provide them with care and attention, but who would not ordinarily have needed to be provided with accommodation under section 21 because it would have been provided in other ways, for example under the homelessness legislation.

23.
Following the Westminster case, certain matters are now clear and common ground:

i)
The single able-bodied destitute is the responsibility of NASS. This is because any need for “care and attention” under section 21 arises “solely” from his destitution, and he is therefore excluded from that section by section 21(1A).

ii)
The same applies to an able-bodied destitute who has dependent children even if the children are themselves disabled. This was decided by this Court in R (A) v NASS and Waltham Forest LBC [2003] EWCA Civ 1473. Furthermore in such a case any responsibility of the authority for the children under section 17 of the 1989 Act is excluded by section 122(5) of the 1999 Act.

iii)
A single infirm destitute is the responsibility of the local authority under section 21 of the 1948 Act and is therefore excluded from the responsibility of NASS under the 1999 Act. This was the effect of the decision of the House of Lords in Westminster. The exclusion from the 1999 Act is the result of the regulations, which require the support available from other sources to be taken into account in determining whether the applicant is “destitute” for the purpose of section 95. The House of Lords held that the 1999 Act was “residual” in effect and “did not intend to create overlapping responsibilities” (para 41).

24.
The present case concerns an infirm destitute with dependent children. It is to be noted that the applicant in the Westminster case had a dependent child (a 13-year-old daughter), and that when assessing her community care needs the authority assessed the needs of her and her daughter together. In that respect the facts were similar to those of the present case. However, the legal issues were discussed solely in terms of the position of the applicant herself, and no separate point appears to have been raised by Westminster in relation to the position of the children. Accordingly, it is not suggested that the decision in that case is determinative of the position in the present case.

The Judge's reasoning

25.
The Judge summarily rejected the basis of Haringey's case, which was that there should be divided responsibilities in respect of the mother and the children. He was persuaded that "the administrative complexities of any form of shared responsibility" made it unlikely that Parliament intended such an outcome without providing any specific mechanism for its implementation:

> "To require two sets of applications to two bodies, under different Acts with differing criteria with the scope for reasonable but differing assessments would be potentially fraught with delay, uncertainty, and litigation over bureaucratic differences even greater than those so often found in this area. …" (para 54-55).

Accordingly he considered the real contest to be between full responsibility for the family falling on the local authority (as proposed by the claimant and by the Secretary of State), or full responsibility for the family falling on the Secretary of State. Although he recognised that the latter alternative was not supported by any of the counsel before him, he considered that it would be wrong for him to declare the law on an issue affecting many people "to be what I do not believe it to be" (para 61). (I should note that he also thought that "the possibility of shared financial responsibility" had been "ended" by certain passages in the judgment of Waller LJ in R(A) v NASS and Waltham Forest LBC (para 56). However, Miss Laing accepts that those passages are not directly relevant to the present case. I do not myself read them as intended to establish any general proposition outside the circumstances of that case.)

26.
He saw the starting-point as being the 1999 Act not the 1948 Act. He emphasised that under section 95(3) and (4) consideration had to be given to the provision of the asylum seekers and dependants together, thus treating the family as a whole. At the same time section 122(5) excluded the local authority's powers to provide assistance for the child or any member of the family under section 17 of the 1989 Act. This he saw as "clearly part of a legislative structure to place responsibility for children, with their household, on NASS." He recognised that regulation 6(4) required account to be taken of support available under the 1948 Act, but in his view the obligations of the Council under that Act were owed exclusively to the mother not the children. In his view the "intent and effect" of the 1999 Act was that provision of asylum support for families with dependent children should be governed by section 122 alone. He referred also to Article 8 of the ECHR (Protection of family life) and the "stark" contrast between the duties owed to children under section 122 and the terms of section 21 from which children are wholly excluded (with the limited exception of those of "nursing mothers").

27.
The analysis in the previous paragraph is , I think, broadly accepted by Mr Harrop-Griffiths for Haringey. However, it is in paragraph 66 that he feels obliged to part company with the Judge's reasoning. In that paragraph the Judge said that there is no power to provide accommodation for children under section 21, and that accordingly the obligation to provide for the children must fall on NASS, and with it the obligation to provide for the parents:-

> "If the parent is still an 'eligible person' within section 95, then the obligation is owed to the child as part of that 'eligible person's' household, and hence to the adult whose dependant the child is. Any theoretical availability of section 21 for the parent alone then becomes irrelevant. The circle of statutory provisions, each applying only if the other is not available, is thus broken. Accommodation, care and attention would 'otherwise be

available' to the parent; the section 21(1A) exclusion only of those whose needs arise 'solely' from destitution does not operate to include within section 21(1A) those who fall outside it anyway. The adequacy of accommodation then has to be judged against all their needs, including the parent's needs, under sections 122(3) and 95(3)…".

28.
The reason that Mr Harrop-Griffiths feels unable to support this is that, even in relation to someone who has been accepted as destitute within the NASS scheme, the duty of the authority under section 21(1) is not excluded in relation to an "infirm destitute". In deciding whether such a person is in need of care and attention under section 21(1) the authority has to disregard any asylum support (s 21(1B) and regulation 23, as explained in Westminster in the Court of Appeal – see para 12 above). Further, under regulation 12 the support to which O is entitled from the authority under section 21(1) must be taken into account in fixing the level of support to be given under the NASS scheme. With respect to the Judge, I can see no answer to that point.

29.
For this reason, although Haringey would no doubt wish to support the Judge's reasoning if they could, they feel bound to accept their obligation to the applicant herself. The debate as far as they are concerned relates to the support, or the cost of the support, given to the children. Accordingly, the remainder of this judgment is concerned with that issue.

The issues between the parties

30.
Although the statutory scheme is complex the remaining issue is a relatively narrow one. Miss Laing for the Secretary of State, supported by Mr Knafler for the applicant, submits that the Judge went wrong at the first stage in deciding whether section 95 applied at all. The question at that stage, whether the application is made in the first instance to NASS or to the authority, is whether the asylum seeker is "destitute". That requires a decision whether the asylum seeker and his or her dependants "taken together" have adequate accommodation or the means of obtaining it and the ability to meet other essential living needs. In deciding that question account must be taken of what is available under section 21 of the 1948 Act or the Children Act 1989. In their submissions, accommodation was available to the claimant under section 21 of the 1948 Act and to her dependants under either that section or under the 1989 Act. Accordingly, the Judge should have held that the claimant was not destitute. If this was correct then she was not an "eligible person" for the purposes of section 122 and accordingly NASS had no responsibility either for her or for her dependants.

31.
Most of this analysis is uncontentious. In particular Mr Harrop-Griffiths accepts that, following the Westminster case, the claimant taken on her own would not have been treated as destitute, because she had the right to support including accommodation under section 21. He submits, however, that no such support was available for the children, whether under section 21 or the Children Act. Accordingly the family taken together (as required by section 95(4)) does not have adequate accommodation or any means of obtaining it, and is therefore destitute within the meaning of section 95(3).

32.
Although the argument centred mainly on the availability of accommodation, there was a subsidiary question whether, even if accommodation should be taken as available for the family, they were able to meet their "essential living needs" (including such things as children's clothing), so far as not

directly related to the provision of accommodation. It will be convenient to consider, first, the issue of accommodation, and then, so far as it still arises, the question of living expenses.

Availability of accommodation

33.
It is clear from section 95(4) that in considering whether the claimant is destitute, her family has to be looked at as a unit. The question is whether any entitlement or expectation of the family to accommodation from the authority, either under section 21 of the 1948 Act or under the 1989 Act, has the effect that the family has adequate accommodation or the means of obtaining it.

34.
The Secretary of State's case is that once a duty is owed to the mother under section 21, the authority is in practice obliged to provide accommodation also for the children. As Miss Laing says:-

> "…The local authority in deciding what accommodation to provide had to have regard to her welfare, and in particular to the need for providing accommodation of a description suited to her needs. That, coupled with the local authority's obligation to respect the Article 8 rights of parent and child, produces the result that in providing such accommodation, the local authority would have power (a power which in these circumstances could only be rationally exercised in one way) to accommodate the children with the parent under section 21."

Similarly, Mr Knafler says:-

> "Social Services authorities are under a duty to provide accommodation and other services of a kind that meet the welfare needs of those who qualify for residential accommodation, including any welfare need to live with other family members."

They accept that there is no authority directly supporting this approach, but they are able to cite a number of cases (not least the Westminster case itself) which appear to have proceeded on that assumption.

35.
The Judge accepted that there were cases which appeared to support this approach, but felt able to distinguish them:-

> "27.
> Accommodation for the family including children was required in R v Wigan MBC ex p Tammadge [1998] 1CCLR 580. But as Mr Harrop-Griffiths pointed out in that case the availability of section 17 Children Act powers was seen as a parallel power and there was no discussion about whether there was any limit on section 21, because the resultant care for the family as a whole would be unaffected by the statutory route. What was at issue was what was required. Mr Knafler pointed out that in R v Islington BC ex p Batantu [2001] 4 CCLR 45, where family accommodation was required to be provided under section 21, Mr Harrop-Griffiths, then appearing for Islington LBC, had not argued that the children fell outside its scope. Although there the unsatisfactory nature of the housing was part of the need for care, the reality however is that in that case, section 17 would have been available for the children and the issue was again not the statutory route, but the extent of the obligation; there was no immigration control overlay."

In his conclusions he returned to this point:

> “69.
> Does a power to provide for the children nonetheless exist under section 21? I consider, leaving aside the immigration control overlay here, that although a power does exist enabling local authorities to accommodate dependent children with an adult qualifying for section 21 care and attention, that power does not arise under section 21 itself. Section 21(1)(a), first, by its very terms does not apply to minors; the ambit of section 21 is thus constrained and there is no need for any further express prohibition on providing for children, in order for the want of power to provide for them to be shown. A power to accommodate children arises under the Children Act under sections 17 and 20; section 21(8) of the 1948 Act then, second, precludes any such power arising under section 21(1)(a), even apart from the effect of the insertion of the words “aged eighteen or over.” Children and their parents are thus accommodated together, as a family, where there is no immigration control overlay, through a combination of section 21 of the 1948 Act (for the adult) and the 1989 Act (for the minor children). This, it seems to me, is the correct analysis of the decisions in Tammadge and Batantu.
>
> 70.
> Given that combination or distribution of powers, there is no need for section 21 to be given any particularly strained reading in order that, by itself, it should meet Article 8 ECHR.”

Section 21(1)(a) - conclusion

36.
In my view, the Judge’s approach on this aspect is broadly correct. In saying that, I would certainly not wish the scope of the authority’s important powers under section 21 to be artificially constrained by asylum considerations. As Lord Hoffmann said, until it was pressed into service by the Court of Appeal to meet the specific needs of destitute asylum seekers, it gave rise to little controversy; as far as possible that should continue.

37.
The appellants accept that section 21 imposes no direct duty on the authority in relation to the children. However, they submit, in making arrangements to provide for the needs of the mother having regard to her welfare, the authority cannot rationally exclude the children.

38.
Mr Knafler in particular relies on R v Avon County Council ex p M [1983] 2 CCLR 185, where Henry J approved an approach which treated “need” in section 21 as including “psychological as well as educational, social and medical needs” (p 194 – 195). The same approach was followed by the Court of Appeal in Khana v Southwark LBC [2001] 4 CCLR 267, [2001] EWCA Civ 999, where the claimant’s needs were met by providing accommodation not only to her but also her husband, Mr Karim. The claimant was a 91-year-old Iraqi Kurd with serious infirmities, and no knowledge of English, and incapable of managing her own affairs. Mr Karim was aged 71 and also spoke no English, but with his daughter and other family members he acted as her primary carer. The authority accepted that accommodation should be provided for him, but not for the daughter. This decision was upheld by the Court of Appeal. Mance LJ, with whom the other members of the Court agreed, said:-

> "In some circumstances, instanced by R v Avon County Council ex p M [1994] 2 FLR 1004, a person may have a need (in ex p M psychological in nature), as distinct from a preference, to reside in a particular place. Here, it seems to me that Mrs Khana (through her advisers and representatives) is in reality seeking to insist, as against Southwark, on the – no doubt strongly held – preferences or beliefs of Mrs Khana and her family as to what community services should be provided to Mrs Khana and in what way. Under the relevant legislation and guidance, Southwark must take into account Mrs Khana's and Mr Karim's beliefs and preferences, but the assessment of any needs regarding, inter alia, accommodation and how to provide for them rests ultimately with Southwark."

39.
I do not think either of these cases assists the appellant's argument. The facts of M were very different, involving a man of 22 with Down's syndrome, and only his own needs were in issue. In Khana there was no issue as to the power to accommodate Mr Karim as his wife's carer. That was hardly surprising given the problems of providing care and attention for a 91-year-old woman living in a foreign country. It provides no assistance in considering whether there is any obligation to accommodate children under section 21 itself.

40.
Mr Knafler relies on Khana as exemplifying the fact in his words that "living with others is of the essence of residential care". As he puts it:-

> "Such arrangements are consistent with the ethos of residential care, which centrally promotes both the welfare of the resident and the creation of a domestic environment that is as homely and normal as possible… Where the central aim of residential care is to engender a quasi-family life, it would be both paradoxical and regressive to hold that there is not even a 'reasonable expectation' that accommodation arrangements under section 21 of the 1948 Act will permit actual, ordinary family life, where that is consistent with the welfare of the resident."

Few would quarrel with that as a general proposition. However the question is whether it is the function of section 21 to achieve it.

41.
In my view Ouseley J's analysis was correct. Section 21 is concerned with meeting the needs of the claimant to whom a duty is owed under that section. The importance of children being accommodated where possible with their parents is obvious, and is recognised in Part III of the 1989 Act. However to regard that as a need of the mother which is to be met under section 21 is stretching that section beyond its natural meaning. Taken together the two statutes provide authorities with all the powers they need to meet the needs of the family as a whole, and to avoid any risk of breaching Article 8.

42.
The precise scope of the authority's powers under section 21 is not directly in issue in this case. However, I am satisfied that even if the authority has power in some circumstances to accommodate the children of a claimant under that section, it is not an entitlement or enforceable expectation. It cannot be said that under section 21, the family as a whole has the "means of obtaining" adequate accommodation or that such accommodation "is available" to them.

Accommodation under the Children Act 1989

43.
The appellants submit in the alternative that the children have the means of obtaining accommodation by virtue of section 17 or section 20 of the 1989 Act. I think Miss Laing implicitly recognises the difficulties of relying on section 17 on its own since in her skeleton she says:

> "Whether section 17 imposes the duty or not, it is clear that section 20 does impose a duty on the local authority".

44.
Section 17 imposes a general duty on authorities to safeguard the welfare of children in need and so far as consistent with that, to promote the upbringing of such children by their families. It is specifically provided that any service provided under the section may be provided for the family as a whole (s 17 (3)). In R (G) v Barnet LBC [2003] UKHL 57, the House of Lords held by a majority that section 17 does not impose a duty enforceable by individual children, but rather

> "duties of a general character which are intended to be for the benefit of children in need in the local Social Services authority's area in general" (para 91, per Lord Hope).

Lord Hope described the 1989 Act as intended to provide "a clear and consistent code for the whole area of child law" (para 66), and he noted the importance which under the Act is to be attached "to the promotion of the upbringing of children in need by their families." (para 68). However, he also referred to the DHSS review of childcare law which was taken into account in the White Paper which preceded the Act:-

> "We believe the provisions should be stated clearly in general terms of making services available at an appropriate level to the needs of the area rather than in terms of duties owed to individual children or families, in order to leave local authorities a wide flexibility to decide what is appropriate in particular cases while providing for a reasonable overall level of provision. It is for local authorities to decide on their priorities within the resources available to them." (emphasis added)

45.
Against that background, Miss Laing was right in my view not to press too strongly the suggestion that section 17 could be relied on, as a basis for holding that the children in this case had the means of obtaining accommodation. Indeed, as Mr Harrop-Griffiths points out, if that were its effect it might nullify all those parts of the NASS legislation which are designed specifically to govern the obligations in respect of asylum seekers with children. The terms of section 17 are wide enough for the needs of any children of a destitute asylum seeker to be brought within its scope, and arguably to impose an obligation on the authority to support them as a family. Conversely, the specific exclusion of section 17 from cases within the NASS scheme is, as the Judge thought (para 67), a strong indication that the general responsibility for asylum-seeking families rests on NASS not on local authorities. This indeed is consistent with the approach of the White Paper which preceded the Act (see above).

46.
Furthermore, consideration of section 17 to some extent reinforces the Judge's conclusions on section 21. As Lord Hope noted, the terms of section 17 reflect the importance attached to the family unit in that context. It would have been open to Parliament, when amending section 21 so as to exclude children from its scope, to have introduced a specific saving for circumstances where the family needed to be looked at as a whole. The absence of such provision is perhaps another indication that

Parliament regarded it as inappropriate, given the new code for support for children and families provided by the 1989 Act.

47.
Faced with that difficulty Miss Laing relies on section 20 of the 1989 Act, which undoubtedly does impose on the authority a specific duty to provide accommodation for individual children in need, within the circumstances defined by the section. Miss Laing relies on section 20(1)(c) which imposes such a duty where the child requires accommodation as the result of -

> "…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."

The other circumstances covered by the subsection are where there is no-one who has parental responsibility for the child or where the child has been lost or abandoned. In the Barnet case, Lord Hope referred to section 20(1)(c) which, he said, had to be read in the light of the general duties set out in section 17(1), among which was the duty to safeguard and promote the welfare of the child. Thus, in his view it would make no difference that the carer had been prevented from providing accommodation by his or her own actions (for example having refused offers of accommodation from the authority).

48.
A child to whom the authority is providing accommodation under section 20 comes within the definition of "a child who is looked after by a local authority" (s 22(1)(b)). This brings into play a detailed code of responsibility, under which the authority has, among other things, a duty to promote the welfare of the child, to take account of the wishes of the child and his parents, and to provide accommodation and maintenance by placing him with a relative or other suitable person or in a children's home or making other appropriate arrangements (see section 22(3-4); section 23(1-2)). Provision is made by regulations governing the circumstances in which such a child may live with a parent or a person who has parental responsibility for the child; subject to such regulations the authority is required to make arrangements to enable the child to live with such a person or a relative or friend "unless that would not be reasonably practicable or consistent with his welfare" (s 23(6)). It is to be noted, however, that the section 20 scheme is voluntary, to the extent that a person who has parental responsibility may take back the child at any time (s 20(8)).

49.
Miss Laing submits that these provisions, taken with the guidance provided in the Barnet case, show that a duty would be owed by the local authority under section 20 to the child to accommodate him, and that, if the parent already had accommodation,

> "Section 17 and/or the structure of section 23 create a presumption that the child would be accommodated with such a parent, particularly when the Article 8 rights of parent and child are taken into account."

50.
Again, I would be reluctant in the context of this case to embark on any detailed examination of the precise ambit of these provisions. Section 20(1), as Mr Harrop-Griffiths points out, is concerned principally with cases where there is no parent who is able or willing to take responsibility for looking after the child, and for that reason brings into play a detailed code governing the responsibilities of the authority in such cases. In theory it could be extended to a case where, as here, the mother is entitled to accommodation under section 21, but has no right under that section to accommodation for

the children, and is therefore “prevented” from providing them with suitable accommodation. However, it is an entirely separate duty owed to the child, and unsurprisingly given the context, includes no presumption that the accommodation will be provided with the parent. It may be said to be a form of support which is “available” to the child, but it seems very artificial to describe it as a means by which the family (that is, the asylum seeker and her dependants taken together) have the means of obtaining accommodation within the meaning of section 95(3).

51.
Furthermore Miss Laing’s reliance on section 23 seems to me to read too much into that section. Lord Hope, in the Barnet case (para 104), noted that under section 23(6) the person with whom the child may be able to live may include relatives other than parents and other persons connected with him. He said:

> “The width of this class of person indicates that what Parliament had in mind when it was enacting this provision was that these were persons who already had accommodation of their own. The fact that the duty is qualified by reference to what is reasonably practicable and consistent with the child’s welfare is entirely consistent with this approach. It permits the local authority to have regard to the nature of the accommodation which that person is able to provide before it takes its decision as to whether and if so with whom the child is to be accommodated under this section. It is not concerned with the resources of the local authority, because the duty does not extend to the provision of accommodation for that person at its own cost or from its own resources.”

Thus, under section 23, far from the family as a unit having any right to accommodation, the accommodation otherwise available to the parent is simply one of the factors taken into account in deciding how and with whom the child’s needs are to be met. As Ouseley J said, section 23(6) does not impose a duty on an authority looking after a child to provide accommodation to a child’s parent to enable the child to live with the parent nor does the Barnet decision contemplate the use of the Children Act as a means of obtaining family accommodation which was not available under the Housing Acts (para 46-48).

52.
I conclude therefore that, although accommodation is available to the mother under section 21 of the 1948 Act, neither that provision nor anything in the Children Act 1989 has the effect that accommodation is available to her and her children taken together, nor that they have the means of obtaining it. It follows that she is “destitute” within the meaning of section 95.

Essential living needs

53.
Before Ouseley J the argument concentrated on the question of accommodation. It seems to have been assumed that, if the authority were required to accommodate the mother and the children under section 21, other living expenses would automatically be included. This no doubt was in reliance on section 21(5), which provides that references to “accommodation” are to be construed as including “references to board and other services, amenities and requisites provided in connection with the accommodation …”. In the course of the argument I raised the question whether this would extend to expenses unrelated to the provision of accommodation, such as clothing for the parent and the children.

54.
Mr Harrop-Griffiths was able to refer us to a very recent decision of this Court which deals with this precise point: R (Khan) v Oxfordshire County Council [2004] EWCA Civ 309. Mrs Khan challenged the decisions of the council to refuse to provide her with accommodation under section 21(1((a) of the 1948 Act, and to refuse to give her financial assistance under section 2 of the Local Government Act 2000. At the relevant time she was an asylum seeker, and therefore not entitled to normal benefits. Section 2 of the 2000 Act is a general provision giving authorities a wide range of powers including powers for the provision of financial assistance to individuals, but it is subject to the general restriction that it does not enable a local authority to do anything which they are "unable to do by virtue of any prohibition, restriction or limitation on their powers" (contained in any other Act). The Court held that the provision of accommodation was prohibited by section 21(1A). However it was argued on behalf of Mrs Khan that that prohibition had no impact on the giving of financial assistance which was not covered by the section 21(1)(a) power. In this context Dyson LJ, giving the leading judgment, referred to section 21(5) which he accepted gave "accommodation" a very wide meaning. He said:

> "So it includes food, and other things which are necessary in connection with the accommodation. There must be a link between what is provided and the physical accommodation or premises. In my view it is clear that the definition of accommodation, wide though it is, does not extend to all of a person's essential living needs. An obvious example is clothes. It is not possible to say that, if provided, clothes would be services, amenities or requisites provided in connection with the accommodation. They have nothing to do with the accommodation."

55.
In answer to this Mr Knafler first referred to section 22 of the 1948 Act, which provides for charges for accommodation provided under section 21, but in doing so takes account of the ability of the claimant to pay and her need to meet other personal expenses. That does not appear to throw any light on the means available to the claimant to meet her essential living needs. He also sought to rely on the wide power to provide assistance under the 2000 Act, as discussed in the Oxfordshire case. I am doubtful that it would be right to rely on an Act passed in 2000 to resolve an issue as to the scheme of the 1999 Act. In any event, the 2000 Act is far from providing any duty on the authority to meet living needs. Accordingly I do not see how the possibility of assistance under that Act can be said to amount to support "available" to the claimant for the purposes of deciding whether she is destitute.

56.
The more convincing answer made by Mr Knafler is that, if the only shortfall in relation to the support necessary for the family is the money required to pay for clothing, then that is something which could be provided by the NASS scheme as in effect a "top-up" payment under regulation 12. That appears to me a sensible approach. However, it does not assist the appellant's case in relation to the issue whether the applicant is "destitute". For that purpose it is not enough that the family has adequate accommodation or the means of obtaining it, if it does not have the means of meeting other essential living needs. Once it is accepted that the means of providing for clothing are not available, then it must follow that the family is destitute and within the NASS scheme, even if the support derived directly from the scheme is limited to topping up living expenses.

The statutory scheme

57.
Indeed, the “living expenses” issue to my mind provides some general assistance in understanding the statutory scheme. The threshold for inclusion within the NASS scheme is a low one. Any deficiency in essential living needs, whether of accommodation or living expenses, is sufficient to bring the asylum seeker within the scheme. The fact that some part of those needs (even as important a part as accommodation) is met from other sources does not prevent the claimant being treated as “destitute” for the purpose of section 95. On the other hand, once she is within the scheme, the availability of other resources is taken into account in deciding what provision is required from NASS itself. The “care and attention” required for the mother will still be the responsibility of the local authority under section 21. As has been seen, for that purpose the authority cannot avoid responsibility by relying on the availability of asylum support.

58.
On the other hand section 122 ensures that the children will be provided for under the NASS scheme, rather than under the general duties of the authority under section 17, which are expressly displaced. If it appears to the Secretary of State either that accommodation is not being provided for the child, or that the child’s essential living needs are not being met, he must exercise his powers by “providing or arranging” for the provision of the relevant support to the child “as part of the eligible person’s household” (s 122(3)(4)).

59.
It is true that, in fulfilling that duty, he is required by regulation 12 to take account of any support which “is or might reasonably be expected” to be available from other sources. I have already noted that this wording is broader than the corresponding provision in regulation 6(4) (para 15 above). It might therefore be argued that, even if Haringey is not under any enforceable duty to provide support for the children, so long as it has power to do so (whether as part of the care provided to the mother under section 21, or under one of the provisions of the 1989 Act relied on by the appellants), it may in practice “reasonably be expected” to provide that support.

60.
However, to accept that argument would in my view be to allow the subordinate legislation to undermine the clear scheme of the Act. One thing which shines out from section 122 is the overriding responsibility imposed on the Secretary of State for ensuring the provision of necessary support for dependent children, as part of the asylum-seeker’s household. That is underlined by the removal of the authority’s corresponding “child welfare” functions under section 17 of the 1989 Act. The reason for referring to that section in particular, no doubt, is because it is the one which embodies the corresponding general duty of the authority to safeguard the welfare of children along with their families. Although the possibility of local authority support being extended to the children under other provisions is not expressly excluded, it cannot in my view have been intended that such potential sources could be brought in indirectly through regulation 12. That would blur the clear allocation of responsibility for children which section 122 was designed to achieve.

61.
The result is that the authority retain responsibility under section 21 for providing accommodation for the mother, having regard to her welfare needs. Their general responsibility for the children under the 1989 Act is displaced by the duty imposed upon NASS by section 122. NASS must fulfil that duty by making arrangements for them to be supported “as part of (her) household”. In practice, as Haringey accepts, this will mean that the whole family will be accommodated by Haringey, but with a financial contribution from NASS to represent the children’s share.

62.
Ouseley J thought that such a division of responsibilities between the local authority and NASS would create undesirable complications. However, it is an inherent part of the scheme that the responsibility of NASS may in practice be discharged by “arrangements” with other bodies, rather than by direct provision. Furthermore, section 99 contains specific power for local authorities to provide support in accordance with arrangements made by the Secretary of State under section 95; and section 100 enables him to request assistance in the exercise of his powers under section 95, and to require the authority to co-operate with such requests.

63.
Before the Judge, Haringey contended that the Secretary of State’s responsibility for the children -

> “could and would be met by a sensible financial arrangement between the two public bodies to cover the cost of the single unit accommodation which mother and children would occupy.” (judgment para 8).

That remains Haringey’s position. Notwithstanding the concerns of the Judge about the practical complexities to which that would give rise, I do not see why they should not be overcome with reasonable co-operation, as the Act envisages. Nor do I understand Miss Laing to suggest otherwise.

Conclusion

64.
For these reasons I consider that Haringey is correct. The Judge was right to reject the appellant’s case, insofar as it relied on a power to support the children derived from section 21 itself or the Children Act 1989. He was right also to hold that the family was “destitute” within section 95 and therefore entitled to support under the NASS scheme. He was wrong, however, to conclude that this placed the total responsibility on the Secretary of State. The authority’s duty to the mother under section 21(1)(a) remains, notwithstanding the NASS scheme, and must be taken into account in determining the support to be provided under that scheme. On the other hand, it is the Secretary of State’s duty under section 122 to make arrangements to provide the necessary support for the children as part of her household.

65.
I would therefore dismiss these appeals though differing in some respects from the judge. I would invite the parties to agree an appropriate form of order in the light of this judgment.

Lord Justice Rix

66.
I agree

The Lord Chief Justice

67.
I also agree.