Neutral Citation Number: [2010] EWCA Civ 460

Case No: C1/2009/0019

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
MR JUSTICE CHARLES
CO/2786/2008

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/04/2010

Before :

LORD JUSTICE DYSON
LORD JUSTICE ETHERTON
and
SIR SCOTT BAKER

- -

Between :

BIRMINGHAM CITY COUNCIL	**Appellant**
- and -	
AMALEA CLUE	**Respondent**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Interested Party**
- and -	
SHELTER	**Intervener**

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- -

Mr Jonathan COWEN (instructed by **Birmingham City Council**) for the **Appellant**
Mr Stephen KNAFLER QC and Ms NADINE FINCH (instructed by **Public Law Solicitors**) for the **Respondent**
Mr Jonathan MOFFETT (instructed by **Treasury Solicitors) for the Interested Party**
Mr Simon Cox (instructed by **Shelter**) **for the Intervener**

Hearing dates : 16 & 17 March 2010

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Judgment

Lord Justice Dyson:

1. The claimant is a Jamaican national. She was born in 1977. Her oldest daughter, Safiya, was born in Jamaica on 22 August 1994. She has three other children all of whom were born in the UK: one was born in 2004 and twins who were born in 2006. The father of the three youngest children is a British citizen. The three youngest children are therefore British citizens too.

2. The claimant and Safiya were granted leave to enter the UK as visitors for 6 months in December 2000. Their purpose was to visit the claimant's aunt. At the expiry of the 6 months period, the claimant applied for leave to remain as a student. This application was refused and the subsequent appeal was dismissed in March 2003. No steps were taken to remove her or her children.

3. They were supported by the father of the three youngest children until 2007 when the relationship between the claimant and the father broke down. In October 2007, she made an application to the UK Border Agency ("UKBA") on behalf of herself and all of the children for indefinite leave to remain, on the basis that Safiya had been living in the UK for more than 7 years.

4. After the breakdown of the claimant's relationship with the father, she and the children returned to live with her aunt until March 2008. She then applied to the Birmingham City Council ("Birmingham") for assistance. The application for indefinite leave to remain had not yet been determined. A detailed written assessment was duly made by Birmingham and sent to the claimant's solicitors on 14 August 2008. I shall need to refer to this assessment in more detail later in this judgment. In summary, Birmingham decided that it would not exercise its power under section 17 of the Children Act 1989 ("the 1989 Act") to provide support and accommodation for the claimant and her children, since they were able to return to Jamaica where they could continue to enjoy a family life. Accordingly, a refusal to provide support and accommodation would not breach their rights under article 8 of the European Convention of Human Rights ("the Convention"). But Birmingham said that it would provide assistance to the family to enable them to travel to Jamaica and might also provide a resettlement grant to assist them to settle there if necessary and appropriate.

5. The claimant thereupon issued proceedings seeking judicial review of the decision. By his judgment given on 18 November 2008, Charles J upheld the judicial review challenge. He held that Birmingham had erred in law in failing to take account of the reasons underlying DP 5/96 (in its amended form) and the presumption to which it gave rise that, where a child of a family had been resident in the UK for 7 years, indefinite leave to remain would be granted in all but exceptional cases. DP 5/96 was the policy of the Secretary of State for the Home Department applicable to children who had been in the UK for 7 years.

6. Birmingham was given permission to appeal to this court by Hughes LJ. The Secretary of State has been added as an interested party and we have also been assisted by the written submissions of Shelter.

7. In October 2009, the claimant and her family were granted indefinite leave to remain by the UKBA. The appeal has, therefore, become of academic interest only to the claimant. Nevertheless, both she and Birmingham wished the appeal to proceed on

the ground that the decision of Charles J has relevance for a significant number of other cases.

8. On 20 October 2009, this court (Arden, Scott Baker and Moses LJJ) decided that the appeal should proceed. The court identified two questions:

> "The questions are: in the scenario that a person is unlawfully present in the United Kingdom within paragraph 7 of Schedule 3 of the 2002 Act, and is destitute and would otherwise be eligible for services of a kind listed in paragraph 1 of Schedule 3, and has made an application to the Secretary of State for leave to remain that expressly or impliedly raises Convention grounds under Article 3 or 8 or some other ground, and a local authority is considering whether it is necessary to provide support or assistance by reference to paragraph 3 of Schedule 3, (1) Does Schedule 3 of the 2002 Act read with Section 6 of the Human Rights Act require or permit the local authority to reach decisions by taking into account either relevant policy of the Secretary of State in relation to leave to remain or the evaluation of the Secretary of State under the Convention? (2) Does rational and/or proportionate decision-making require the Secretary of State and the local authority to reach Convention assessments in a co-ordinated manner and at the same time? In particular, does it require the Secretary of State to expedite his consideration of applications for leave to remain (in particular in cases involving children)?"

9. At [11] of his judgment, Scott Baker LJ made it clear that the court hearing the appeal was not bound by these questions.

Statutory framework

10. Section 17 of the 1989 Act 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 level of services appropriate to those children's needs
>
> (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."

11. Schedule 3 to the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") is entitled "Withholding and Withdrawal of Support". Para 1 provides:

> "(1) A person to whom this paragraph applies shall not be eligible for support or assistance under….(g) section 17…of the Children Act 1989…"

Para 2 provides: "Paragraph 1 does not prevent the provision of support or assistance (a) to a British citizen, or (b) to a child". Para 3 provides:

> "Paragraph 1 does not prevent the exercise of a power or the performance of a duty, if and to the extent that, its exercise or performance is necessary for the purpose of avoiding a breach of—
>
> (a) a person's Convention rights".

Para 7 provides:

> "Paragraph 1 applies to a person if—
>
> (a) he is in the United Kingdom in breach of the immigration laws…, and
>
> (b) he is not an asylum-seeker."

The policies of the Secretary of State

12. The Secretary of State has published immigration policies with particular reference to the circumstances in which children may be removed from the UK. DP 5/96 was originally published in March 1996 and stated that its purpose was:

> "to define more clearly the criteria to be applied when considering whether enforcement action should proceed or be initiated against parents who have children who were either born here and are aged 10 or over or where, having come to the United Kingdom at an early age, they have accumulated 10 years or more continuous residence."

13. The policy stated that, whilst it was important that each individual case must be considered on its merits, certain factors (which it identified) were of particular relevance. As a result of a written answer in Parliament given by the Under-Secretary of State for the Home Department on 24 February 1999, the 10 year period of residence for children under the age of 19 was reduced to 7 years, "save in very exceptional circumstances". A Home Office policy modification statement stated that:

> "For the purpose of proceeding with enforcement action in a case involving a child, the general presumption is that we would not normally proceed with enforcement action in cases where a child was born here and has lived continuously to the age of 7 or over, or where, having come to the UK at an early age, they have accumulated 7 years or more continuous residence."

14. This was the policy in force at the time when the human rights assessment was made by Birmingham in August 2008 in the present case.

15. It was held by this court in *NF (Ghana) v Secretary of State for the Home Department* [2008] EWCA Civ 906 at [39] that tribunals considering the impact of DP 5/96 in relation to the passing of 7 years residence on the part of a child of the family should:

> "(1) start from the position (the presumption) that it is only in exceptional cases that indefinite leave to remain will not be given, but
>
> (2) go on to consider the extent to which any of or a balancing of all the factors mentioned in [DP 5/96] makes the case an exceptional one."

16. Policy DP 5/96 was withdrawn with effect from 9 December 2008. In a statement of that date, the Minister of State for Borders and Immigration said:

> "The fact that a child has spent a significant period of their life in the United Kingdom will continue to be an important relevant factor to be taken into account by caseworkers when evaluating whether removal of their parents is appropriate. Any decision to remove a family from the UK will continue to be made in accordance with our obligations under the European Convention on Human Rights (ECHR) and the Immigration Rules.
>
> The withdrawal of DP 5/96 and replacing it with consideration under the Immigration Rules and Article 8 of the ECHR will ensure a fairer, more consistent approach to all cases involving children, whether accompanied or unaccompanied, across UKBA."

17. Under transitional arrangements, DP 5/96 continues to apply "where the UKBA have acknowledged in writing that they have received an application which relies on DP 5/96". Such an acknowledgement was received in the present case. DP 5/96 is, therefore, the applicable policy for present purposes.

Effect on outstanding applications for leave to remain of the departure of an applicant from the UK

18. Para 34J of the Immigration Rules HC 395 provides:

> "where a person whose application or claim for leave to remain is being considered requests the return of his passport for the purpose of travel outside the common travel area, the application for leave shall, provided it has not already been determined, be treated as withdrawn as soon as the passport is returned in response to this request."

19. Nevertheless, the Secretary of State retains the discretion to consider an application for indefinite leave to remain even though an individual has left the UK. The position

is, therefore, less stark than where a person has an outstanding appeal under the 2002 Act, section 104(4) of which provides: "An appeal under section 82(1) shall be treated as abandoned if the appellant….(b) leaves the United Kingdom."

The human rights assessment

20. The assessment runs to 19 pages. It recites the family history in some detail. It describes the extended family in Jamaica and New York; the arrival of the claimant and Safiya in the UK; and the history and situation of the family in the UK. At p 13, there is a heading "**Article 8—Respect for Privacy of Family Life".** The assessment states that the claimant and her family have lost all contact with maternal and paternal family relatives in the UK. Consequently, the claimant and her children are the "effective family….and they do not need to remain in the UK to preserve this". The assessment then refers to the family in Jamaica and states that the opportunity to renew connections with the wider family in Jamaica would enhance the life of the children. It continues at p 15:

> "There is no assurance that members [of] the extended family do still live in Jamaica or that if they do they can be located given that contact with them has been severed already. However their presence is not essential to preserve family life for Amalea and her 4 children in that country.
>
> I therefore conclude that it is not necessary to provide financial support and accommodation under s17 of the Children act 1989 to prevent a breach of rights under Article 8 of the ECHR.
>
> Although Amalea has reported that neither she nor her children have contact with any other family member in the UK I do not consider that the position in relation to the provision of support would alter were any contact to be resumed as I understand that Article 8 does not allow individuals to choose to remain in a particular country, and that the existence of a family life does not require state support to maintain that family life in a particular location. I have also been advised that were the authority's decision effectively to require one, or all, members of the family to leave the UK, that would not necessarily constitute an unlawful and disproportionate interference with Article 8 rights."

21. The assessment then considers the family's rights under article 3 of the ECHR and concludes at p 18:

> "In summary I am confident that the welfare of children in Jamaica is sufficiently protected so as to give me no cause for concern about the children taking up residence in Jamaica with their mother."

22. The overall conclusion is that Birmingham will not exercise its power under section 17 of the 1989 Act to accommodate the claimant and her children because they are

able to return to Jamaica "where they could continue to enjoy a family life". The assessment continues:

> "For that reason I have concluded that the Authority's refusal to support Ms Clue and the family here in Birmingham would not cause a breach of her, or the wider family's rights under the ECHR. As the failure to support Ms Clue and her children would not cause a breach of her Convention rights, the Authority's support for her, with the family, cannot be said to be "necessary" and so the Authority will not continue to accommodate Ms Clue and her children in the longer term, subject to the local authority's continuing obligations to the children in accordance with section 20 and the other material provisions of the Children Act 1989.
>
> The Authority will, however, provide assistance to Ms Clue and her children to travel to Jamaica and may also provide a resettlement grant to assist the family to settle in that country if necessary and appropriate."

The judgment of Charles J

23. Having reviewed a number of the authorities (to some of which I shall have to refer), the judge stated at [38] that he accepted that a local authority can reach its own decision pending a decision by the Secretary of State on the immigration issue. But he did not accept that "a local authority can essentially ignore the underlying issue relating to whether or not Convention rights would be interfered with as a result of a decision reached by the local authority". The "underlying issues" were the issues underlying policy DP 5/96 as amended. At [42], he put the point in this way:

> "..any decision-maker, whether it be the local authority or the court, has to have regard, when considering the balance at the second part of Article 8, to the reasons underlying the presumption and approach taken by the Secretary of State, which have been explained and set out by the Court of Appeal in the **NF** decision by reference to what Government has said. That is not being bound by the policy that creates and applies the presumption; it is having regard to the reasons which underlie that policy. Absent such an approach, there would be a lack of consistency in decision-making by public authorities as to the relevant central point: namely has there been a breach of Convention rights in respect of a family who have a child or children who have been here for 7 years".

24. At [44], the judge acknowledged that Birmingham's assessment clearly referred to the fact that the oldest child had been here for 7 years. But he said that it was common ground that, because of the advice received by the decision-maker, the assessment did not go on to consider the impact of the reasons underlying the 7 years policy and the presumption to which it gives rise. In the result, he concluded that the Council had erred in law in failing to take account of the reasons which underlie DP 5/96 as explained in *NF (Ghana).*

The parties' submissions in outline

25. Mr Cowen (supported by Mr Moffett) submits that the judge was wrong to hold that Birmingham was obliged to have regard to DP 5/96 or the reasons underlying that policy. Immigration issues are irrelevant to a local authority's consideration of Schedule 3 to the 2002 Act. A local authority must not act in breach of the Convention. In relation to article 8, this means in the present context that a local authority must not act so as to interfere with a person's right to respect for his or her private and family life. In conducting the balancing exercise required by article 8(2), the local authority must weigh the article 8 rights against the need to have regard to calls on its budget made by others whose rights it has to protect. The human rights assessment conducted by Birmingham was lawful and beyond challenge. Mr Cowen and Mr Moffett submit that two decisions of this court determine the proper approach to be adopted. These are *R (Kimani) v Lambeth Borough Council* [2003] EWCA Civ 1159, [2004] 1 WLR 272 and *R (Grant) v Lambeth Borough Council* [2004] EWCA Civ 1711, [2005] 1 WLR 1781. It will be necessary to examine these decisions in some detail.

26. Mr Knafler QC submits that a local authority should not do anything which would have the effect of pre-judging an outstanding immigration application. In deciding whether a refusal to provide accommodation and support would breach a person's article 8 rights, the local authority is not required to conduct any form of balancing exercise under article 8(2). In particular, it is not required to weigh a person's article 8(1) rights against the rights of others or more generally to have regard to budgetary considerations. Mr Knafler submits that the human rights assessment conducted by Birmingham in this case is flawed for a number of reasons which I deal with at [76] to [80] below.

The rights to respect for private life: some general comments

27. When examining *Kimani* and *Grant,* it is necessary to have in mind that article 8(1) protects two distinct rights: "Everyone has the right to respect for his private and family life". The right to private life entails considerations far wider than the right to family life. Importantly, private life includes the relationships and the social, cultural as well as the family ties that a person forms. The Grand Chamber decision of the ECtHR in *Uner v The Netherlands* (2007) 45 EHRR 14 illustrates this well and shows how the court should approach the application of article 8 in an expulsion case. This decision is illuminating even though, unlike the present case, it concerned the expulsion of a person in the public interest on the ground of his criminal record.

28. At [57], the Grand Chamber endorsed what was said in *Boultif v Switzerland* (2001) 33 EHRR 50 about the criteria which the court should apply when deciding whether the expulsion of a person by the state is necessary in a democratic society and proportionate to the legitimate aim pursued. These include the length of the applicant's stay in the country from which he is to be expelled; the nationalities of the various persons concerned; the applicant's family situation, such as the length of the marriage and other factors expressing the effectiveness of a couple's family life; and whether there are children of the marriage and, if so, their age.

29. At [58], the court said this:

> "The Court would wish to make explicit two criteria which may already be implicit in those identified in the Boultif judgment:
>
> - the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and
>
> - the solidity of social, cultural and family ties with the host country and with the country of destination.
>
> As to the first point, the Court notes that this is already reflected in its existing case law (see, for example, *Şen v. the Netherlands*, no. 31465/96, § 40, 21 December 2001, *Tuquabo-Tekle and Others v. the Netherlands*, no. 60665/00, § 47, 1 December 2005) and is in line with the Committee of Ministers' Recommendation Rec(2002)4 on the legal status of persons admitted for family reunification (see paragraph 38 above).
>
> As to the second point, it is to be noted that, although the applicant in the case of *Boultif* was already an adult when he entered Switzerland, the Court has held the "*Boultif* criteria" to apply all the more so (*à plus forte raison*) to cases concerning applicants who were born in the host country or who moved there at an early age (see *Mokrani v. France*, no. 52206/99, § 31, 15 July 2003). Indeed, the rationale behind making the duration of a person's stay in the host country one of the elements to be taken into account lies in the assumption that the longer a person has been residing in a particular country the stronger his or her ties with that country and the weaker the ties with the country of his or her nationality will be. Seen against that background, it is self-evident that the Court will have regard to the special situation of aliens who have spent most, if not all, their childhood in the host country, were brought up there and received their education there."

30. At [59], the court posed the question whether the *Boultif* criteria were sufficiently comprehensive for expulsion and/or exclusion of settled migrant cases and continued:

> "It observes in this context that not all such migrants, no matter how long they have been residing in the country from which they are to be expelled, necessarily enjoy "family life" there within the meaning of Article 8. However, as Article 8 also protects the right to establish and develop relationships with other human beings and the outside world (see *Pretty v. the United Kingdom*, no. 2346/02, § 61, ECHR 2002-III) and can sometimes embrace aspects of an individual's social identity (see *Mikulić v. Croatia*, no. 53176/99, § 53, ECHR 2002-I), it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitute part of the concept of "private life" within the meaning of

> Article 8. Regardless of the existence or otherwise of a "family life", therefore, the Court considers that the expulsion of a settled migrant constitutes interference with his or her right to respect for private life. It will depend on the circumstances of the particular case whether it is appropriate for the Court to focus on the "family life" rather than the "private life" aspect.
>
> 60. In the light of the foregoing, the Court concludes that all the above factors (see paragraphs 57-59) should be taken into account in all cases concerning settled migrants who are to be expelled and/or excluded following a criminal conviction."

31. In my judgment, it is necessary to have this guidance in mind when approaching the issues raised by the present appeal. I shall now turn to the two domestic decisions which Mr Cowen and Mr Moffett say determine this case.

R (Kimani) v Lambeth Borough Council

32. The claimant, a Kenyan national, arrived in the UK in 1998 with her four-year-old son and claimed asylum. Her claim was refused and her appeal dismissed. In 2000, she married an Irish national and applied for leave to reside in the UK as the spouse of an European Economic Area national. This application was refused on the grounds that it was said that the marriage was one of convenience. She appealed against that refusal. By the end of 2001, she had separated from her husband. For reasons which it is unnecessary to explain, Lambeth Borough Council ("Lambeth") refused to provide support for the claimant and her child. This decision was based on Lambeth's interpretation of certain regulations which are not material for present purposes. She sought judicial review of the decision on the basis that it was necessary for Lambeth to provide her with support in order to avoid a breach of her rights under the Convention. The claim was dismissed by the judge and her appeal to this court was also dismissed.

33. The judgment of this court was given by Lord Phillips of Worth Matravers MR. At [24], he said:

> "The objective of Schedule 3 [of the 2002 Act] can readily be inferred from its content. It is to discourage from coming to, remaining in and consuming the resources of the United Kingdom certain classes of person who can reasonably be expected to look to other countries for their livelihood."

34. At [26], he said:

> "We do not consider that an asylum seeker is to be equated, in the present context, with a foreign national seeking to establish a right of residence. It is not reasonable to expect an asylum seeker, who may yet establish that she has refugee status, to look for sustenance or support to her home country, where she may have a well founded fear of persecution. The same is not true of a foreign national seeking to establish a right of residence. There is no obvious reason why such a person

> should expect to receive support from this country, rather than her home state, pending the determination of her claim to a right of residence."

35. His consideration of article 8 is at [38] to [51]. It is clear from [38] that the claimant was putting her article 8 case on the basis that, if she were removed to Kenya, she would be separated from her husband and her son would be removed from his step-father. She argued that, if her support was removed, her human rights would be infringed whether she stayed in the UK or went back to Kenya. If she stayed, she would be reduced to degradation (breach of article 3) and her son would be taken into care (breach of article 8(1) right to family life). If she went back to Kenya, she and her son would be separated from her husband (breach of article 8(1) right to family life).

36. At [39], Lord Phillips said that the claimant's article 8 claim was "manifestly unsustainable" because the claimant was already separated from her husband. At [40], he said:

> "The second point is independent of the first. Respect for family life does not require that the claimant should remain in this country while her appeal is considered. The European Court of Human Rights has always respected the right of a state, subject to treaty obligations, to control the entry of non-nationals into its territory: see, for instance, *Abdulaziz v United Kingdom* (1985) 7 EHRR 471, 497. Strasbourg jurisprudence would certainly not require this country to permit a claimant, seeking to enter this country for family reasons, to be permitted to enter, or to remain here on public support, pending the resolution of her disputed claim."

37. The court's conclusion on the article 8 issue was expressed in the following terms at [49]:

> "No authority has been placed before us which bears directly on the issue we have to resolve. We must decide it as a matter of principle. We do not consider that either article 3 or article 8 imposes a duty on the state to provide the claimant with support. She has not been granted leave to enter or remain in this country. She has been permitted to remain here to pursue an appeal in which she advances, inter alia, an article 8 claim, which we consider to be clearly specious. Even if it were not, no infringement of article 8 would result from requiring her to return to her own country pending the determination of her appeal. There is no impediment to her returning to her own country. A state owes no duty under the Convention to provide support to foreign nationals who are permitted to enter their territory but who are in a position freely to return home. Most people who fall into this category are given leave to enter on condition that they do not have recourse to public funds."

38. I would emphasise a number of aspects of this decision. First, the article 8 right that was considered was the right to respect for family life. It was not the distinct right to respect for private life. That is made clear by the summary of the way the claimant put her case at [38] of the judgment; the explicit references to "family life" in [39] and [40]; and the fact that the court said that the article 8 claim was manifestly unsustainable because the claimant was already separated from her husband. The court did not, therefore, consider the separate question of whether requiring a person to leave who has strong social ties with the UK as a result of his presence here for a substantial length of time would of itself amount to an interference with his right to private life here.

39. Secondly, the court seems to have been of the view that the essential question was whether it was reasonable to expect a claimant to look for sustenance or support to his home country. Thus, at [24], Lord Phillips said that the objective of Schedule 3 to the 2002 Act is to discourage classes of persons who can *reasonably* be expected to look to other countries for their livelihood. At [26], he said that it was not *reasonable* to expect an asylum-seeker with an outstanding claim for asylum to look to his or her home country for sustenance or support. At [40], he said that Strasbourg jurisprudence would not require this country to permit a claimant, seeking to enter the UK for family reasons, to be permitted to enter or to remain here on public support pending the resolution of his claim. Implicit in this is the proposition that it is reasonable to expect such a claimant to return to his country of origin *because the claim can be pursued from that country.* Indeed, that was the position at the time of the decision in *Kimani.* It was, therefore, reasonable to require the claimant to return pending the determination of the appeal. The same point appears from [49] where the court said that no infringement of article 8 would result from requiring the claimant to return *pending the determination of the appeal.*

40. Thirdly, the penultimate sentence of [49] should not be misunderstood. The court said that a state owes no duty under the Convention to provide support to foreign nationals who are permitted to enter their territory "but who are in a position *freely* to return home" (emphasis added). What is meant by "freely"? Asylum seekers who have outstanding applications for asylum clearly cannot be required to return home although, in one sense, they are "free" to do so. Similarly, as I have said, it is implicit in the reasoning of the court that a person who it is not reasonable to require to return home is not "free" to return home in the sense in which the court was using the word "free".

41. In my judgment, *Kimani* is distinguishable from the present case because (i) it was concerned with a claim based on an alleged breach of the right to family life and not private life; and (ii) it was reasonable in that case to require the claimant to return to Kenya and to pursue her pending appeal from there. In the present case, if the claimant and her children had been required to return to Jamaica, they would have lost the right to pursue their application for indefinite leave to remain.

42. Mr Knafler also submits that *Kimani* (and indeed *Grant)* should in any event be viewed with caution. That is because, he contends, they were influenced by *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840 and other similar cases which held that only exceptionally should an applicant for leave to remain be able to have his claim for leave to remain dealt with in the UK, thereby circumventing the requirement under the rules that entry clearance should be obtained

from abroad. Mr Knafler submits that this approach has been superseded by what Lord Brown of Eaton-under-Heywood said in *Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40, [2008] 1 WLR 1420 at [44]:

> "Rather it seems to me that only comparatively rarely, certainly in family cases involving children, should an article 8 appeal be dismissed on the basis that it would be proportionate and more appropriate for the appellant to apply for leave from abroad."

Chikwamba is clearly an important decision in relation to the discharge by the Secretary of State of his immigration functions. But it is not concerned with the very different role of a local authority in relation to Schedule 3 to the 2002 Act. I do not consider that *Kimani* or *Grant* have been undermined by *Chikwamba.* In my judgment, they remain binding on this court and should be followed unless they can be distinguished.

R (Grant) v Lambeth Borough Council.

43. The claimant in this case was a Jamaican national. She entered the UK as a visitor in 1992 and applied unsuccessfully for leave to remain. She married a British national in 1995 and again applied unsuccessfully for leave to remain. In 1998, she was joined by two children from a previous marriage. In 2000, she gave birth to a son, a British national, by her current marriage. In 2002, having separated from her husband, she made an application to Lambeth for housing support. In 2003, she made a fresh application for leave to remain indefinitely on compassionate grounds. Lambeth stated that it had no long-term obligation to provide assistance. It considered that it was in the best interests of the claimant and her family to return to Jamaica. It offered to pay their travel costs and to accommodate them pending their departure. The claimant sought judicial review of that decision. She succeeded before Mitting J. It seems that the basis on which she succeeded was that Lambeth did not have the power to provide the claimant with the means to travel to Jamaica. Lambeth appealed.

44. In this court, the principal judgment was given by Kennedy LJ. In his recitation of the facts, he noted that the children went to local schools. He also noted that, if the claimant were to return to Jamaica, her application for indefinite leave to remain would automatically lapse. He said at [5] that the application "would have to be renewed from Jamaica". I assume that by this he meant that the claimant would have to make an application for indefinite leave to *enter*.

45. Kennedy LJ accepted the submission on behalf of Lambeth that, as a matter of interpretation of the relevant statutory provisions, it did have the power to make travel arrangements. He also accepted the submission recorded at [22] that:

> "The claimant and her children could not provide for themselves and were in need, but the local authority had limited resources subject to heavy demands, and it could enable the claimant and her children to maintain their rights under article 8 of the Convention and avoid destitution by making arrangements for (1) them to travel to her homeland, and (2) their accommodation for a short time until the travel arrangements could take effect."

46. At [25], Kennedy LJ referred to what he described as a "more general point" made by Mr Knafler on behalf of the claimant. This was that where a claimant has an arguable claim for leave to remain (based on long residence in that case), she should not be required to abandon it by leaving the jurisdiction. Kennedy LJ then referred to a number of authorities, including *Kimani* and said at the end of [30] that none of these authorities supported the general point which Mr Knafler was making. With respect to Kennedy LJ, I find it surprising that he was able to dismiss this general point in this way, particularly in view of the emphasis that was placed by the court in *Kimani* on the fact that it was reasonable to require the claimant in that case to return to Kenya with her family from where she would be able to pursue her pending appeal.

47. Kennedy LJ expressed his conclusion at [31] in these terms:

> "In my judgment, for the reasons I have given when dealing with the submissions made by Mr Knafler, the submissions made by Mr Béar on behalf of Lambeth are correct, and I would therefore allow this appeal, set aside the judgment of the judge and dismiss the claim for relief. It is to my mind important to recognise from the outset, and not to lose sight of, the fact that the claimant and her two elder children are illegally here, and have no right to be accommodated. The claimant cannot create such a right by making an application for leave to remain, or by appealing against a decision which has gone against her. On the other hand Lambeth, which has provided her with accommodation thus far, cannot act in such a way as to interfere with her Convention rights. The offer it has made seems to me to safeguard those rights. At present, in my judgment, it need do no more."

48. With respect to Kennedy LJ, the fact that the claimant and her children were in the UK unlawfully is not legally relevant to the question whether the refusal by a local authority to provide assistance was impermissible on the grounds that it would breach their Convention rights. As is made clear by Schedule 3 para 3, para 1 does not prevent the performance of a duty if and to the extent that its performance is necessary for the purpose of avoiding a breach of a person's Convention rights *notwithstanding* that the person is in the UK in breach of the immigration laws and the case is a para 7 case.

49. In any event, there was only the most exiguous reference to the Convention in *Grant* at all. Mr Knafler appeared for the claimant in *Grant.* He did not put his case on the basis that there would be a breach of article 8 if the claimant and her family were required to return to Jamaica. He told us that he put the claim on general domestic law principles, supported by some reference to ECtHR cases on the "fairness principle". Certainly, the "general point" summarised at [25] did not depend on a Convention claim. Nor did what Kennedy LJ described at [20] as Mr Knafler's "principal submission". I do, however, accept that it was submitted on behalf of Lambeth that it would *not* be in breach of article 8 if it made travel arrangements and, as I have said, Kennedy LJ accepted all of Lambeth's submissions. But the fact remains that the claimant's judicial review claim was not based on Convention grounds. This may explain why Kennedy LJ made no assessment of the strength of any claim that a breach of the right to respect for family life and/or private life would

result from the family being required to return to Jamaica. He did not state whether any article 8(2) issues were in play and, if so, how he dealt with them. In my judgment, therefore, *Grant* is not a clear authority for any proposition in relation to article 8 at all.

50. Having dealt with the two principal authorities on which Mr Cowen and Mr Moffett rely, I must now consider the issues as a matter of principle.

Discussion

51. The background to the problems raised by this appeal is explained by Carey Baff in her two witness statements. She is Operations Manager of Heart of Birmingham, Children and Families Team, Birmingham Children, Young People and Families Directorate, Birmingham City Council. She says that there are many families in the same position as the claimant and her family. The cost of supporting these families is substantial. In her second statement dated 22 February 2010, she says that, in the financial year ending March 2009, Birmingham spent £2.24 million in the provision of accommodation and subsistence to families with no recourse to public funds and that, in the first 9 months of the current financial year, it spent £1.4 million for the same purpose. Payments to overstayers with children such as the claimant come out of Birmingham's Children Social Care Budget. It follows that these payments have a direct impact on the resources available for Children's Social Care. She says at para 17 of her second statement: "the stark reality is that costs for people with no recourse to public finds is at the expense of other services the local authority is either required or expected to provide." The problem has been caused in large measure by the long time that it has taken the UKBA to deal with applications for leave to remain.

52. The Secretary of State is alive to the problems created for local authorities like Birmingham by delays in dealing with applications for leave to remain. He has recently decided to prioritise the applications of persons such as the claimant and her family. I refer to this further at [84] and following below.

53. The issues that arise in the present case concern a person who (i) is unlawfully present in the UK within the meaning of para 7 of Schedule 3; (ii) is destitute and would (apart from Schedule 3) be eligible for services of the kind listed in para 1 of Schedule 3; and (iii) has made an application to the Secretary of State for leave to remain which expressly or implicitly raises grounds under the Convention.

54. When a local authority considers whether to provide assistance to a person pursuant to Schedule 3, it must first decide whether para 6 or 7 applies ie whether the person was, but no longer is, an asylum-seeker who has failed to co-operate with removal directions issued in respect of him (para 6) or he is in the UK in breach of the immigration laws or is an asylum-seeker (para 7). Secondly, if para 6 or 7 do apply, the local authority must decide whether and, if so, the extent to which it is necessary to exercise a power or perform a duty for the purpose of avoiding a breach of a person's Convention rights. Where there is available to a local authority a range of different types of assistance that would avoid a breach of Convention rights, the local authority should identify what types of assistance it may provide to avoid a breach of Convention rights and then choose between them.

55. If the withholding of assistance would not in any event cause a person to suffer from destitution amounting to a breach of Convention rights (typically article 3), the local authority's investigation ends there. The local authority must, therefore, investigate whether there are available to the claimant other sources of accommodation and support. But if it is satisfied that there are no other sources of assistance which would save the claimant from destitution amounting to a breach of a Convention right, then it must consider the matter further. It must then decide whether there is an impediment to the claimant returning to his country of origin.

56. Where the only potential impediment is practical in nature, such as where the person concerned is unable to fund his return, it is open to a local authority to avoid a breach of Convention rights by arranging transport back to the person's country of origin: see *Grant.*

57. Where, however, the potential impediment is legal in nature, in that it is said that a breach of Convention rights would occur if the person were required to return, Mr Moffett submits that it is necessary to distinguish between two classes of case. The first class comprises cases where a person alleges that the consequences of return would be a breach of his article 8 rights in the UK: for example, it would involve an interference with his family life in the UK by breaking up his family, or it would result in an interference with his private life in the UK. The second class of case comprises cases where a person alleges that the consequence of a return would be a breach of Convention rights in the country of origin.

58. Mr Knafler submits that there is no sharp distinction between domestic article 8 cases and foreign cases. He points out that some cases are of a hybrid nature. Thus the removal of a person from country A to country B may both violate his right to respect for his private and family life in country A and also violate the same right by depriving him of family life or impeding his enjoyment of private life in country B: see per Lord Bingham in *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323 at [18]. I acknowledge the validity of this point. Nevertheless, for present purposes I am content to adopt Mr Moffett's shorthand description of the categories of these two classes as "domestic article 8 cases" and "risk on return cases" respectively. I shall concentrate on domestic article 8 cases, since the present case falls into that category.

59. In a domestic article 8 case where the claimant has not applied for leave to remain and a local authority is considering whether article 8 constitutes an impediment to a person's return to his country of origin, it must consider whether the applicant enjoys a private or family life in the UK within the meaning of article 8(1) and, if so, whether a return to his country of origin would constitute an interference with that right. Much will depend on the facts of the particular case. Thus, *prima facie,* the return of a married couple who had an established family life in their country of origin and have no children and have been in the UK for a short time is unlikely to amount to an interference with their right to family life. On the other hand, the position of a family with children who have been in the UK for a long time is likely to be quite different. *Prima facie,* to require the return of such a family, and particularly where the children have spent their formative years in the UK, does amount to interference with their right to private life: see *Uner.*

60. But the question raised by this appeal is what the local authority should do where an application for leave to remain has been made expressly or implicitly on Convention grounds. In answering this question, it is necessary to recognise that there is a fundamental difference between the social services functions of a local authority and the immigration functions of the Secretary of State. This distinction was articulated by Hale LJ in *R v Wandsworth Borough Council ex p O* [2000] 1 WLR 2539 at p 2557C:

> "I conclude, therefore, that there is no general principle of legality excluding certain people from access to social services, as opposed to specific statutory provisions which may do so. This is scarcely surprising. Local social services authorities are skilled at assessing need and arranging the appropriate services. That is their statutory duty under section 47 of the Community Care Act 1990. It is also the professional skill of social workers. They are not and never have been professionals in making moral judgments as between particular people with identical needs. They have no particular skills or facilities for assessing whether or not a person is subject to immigration control or has a real choice about whether or not to return to his home country. It is the Secretary of State, through the Immigration and Nationality Directorate, who knows the individual's immigration status, has routine access to the local country information which might make such judgments possible, and has the power to determine whether or not a person should be allowed to remain here, and to remove him if he should not.
>
> Further, as Simon Brown LJ has demonstrated, immigration status is a complex matter. To arrive at a definition of those whose presence here was so questionable as to give rise to an assumption of ineligibility for services would be a difficult task. Should it depend upon whether or not a criminal offence is committed (bearing in mind that the offence in question is not a particularly serious one); or upon whether or not the person concerned can currently be removed from the country immediately (which is more complicated still); or upon whether or not the person currently has a permission to be here which does not preclude his resort to such services? Where does the question of choice between staying and returning come into the equation?
>
> It makes much more sense both in practice and in principle to leave the task of deciding upon need to the provider of health, education or social services, and the task of deciding whether or not a person should be allowed to remain here to take advantage of those services to the immigration authorities."

61. It is true that, as a result of Schedule 3 of the 2002 Act, local authorities *are* now required to make an assessment of immigration status in certain respects. For example, as I have already said, they must decide whether an applicant is in the UK in

breach of the immigration laws (para 7(a)) or is an asylum-seeker (para 7(b)) or was, but no longer is, an asylum-seeker who has failed to comply with removal directions (para 6). Nevertheless, it would be contrary to the division of functions provided by Parliament to require local authorities to decide for the purposes of Schedule 3 of the 2002 Act whether a non asylum-seeking applicant to whom para 6 does not apply is entitled to leave to remain. That question is a matter for the Secretary of State to decide in accordance with the immigration rules and his immigration policies.

62. I find it difficult to conceive of circumstances in which a local authority could properly justify a refusal to provide assistance where to do so would deny to the claimant the right to pursue an arguable application for leave to remain on Convention grounds. The second reason given in *Kimani* for upholding the local authority's refusal to provide assistance was that there was no infringement of article 8 in requiring the claimant to return to Kenya pending the determination of her appeal. She could continue to prosecute her appeal and to require her to return to Kenya pending the determination of her appeal did not infringe her article 8 rights. It is implicit in this reasoning that, if she had been *unable* to prosecute her appeal from Kenya, there would have been a legal impediment to requiring her to return.

63. I accept the submission of Mr Knafler that, in enacting Schedule 3, Parliament cannot reasonably have intended to confer a general power on local authorities to pre-empt the determination by the Secretary of State of applications for leave to remain. In my judgment, save in hopeless or abusive cases, the duty imposed on local authorities to act so as to avoid a breach of an applicant's Convention rights does not require or entitle them to decide how the Secretary of State will determine an application for leave to remain or, in effect, determine such an application themselves by making it impossible for the applicant to pursue it. This last point was considered by this court in *R (M) v Islington Borough Council* [2004] EWCA Civ 235, [2005] 1 WLR 884. At [46], Buxton LJ (with whom Maurice Kay and Waller LJJ agreed on this point) said:

> "I for my part would find it difficult not to see an offer of tickets with an alternative of no accommodation (made not for social reasons but in an attempt to enforce immigration control other than by the issuing of removal directions) as an unjustifiable interference with the article 8 rights both of Mrs M and her child".

64. At [57], Maurice Kay LJ said:

> "Again it is common knowledge, and was in 2002, that there are many circumstances in which that wait may last for months or even years. The case of M is an obvious example. She is pursuing an appeal against the refusal to grant her indefinite leave to remain. Her case is not obviously hopeless or abusive. The Secretary of State did not certify it so as to curtail her appeal rights and the Immigration Appeal Tribunal has given her leave to appeal, thereby accepting that her appeal has a real prospect of success. Whilst her appeal is pending, she must remain in this country because the appeal would be treated as abandoned if she left the country: section 104 of the 2002 Act. In all these circumstances, there is no question of the Secretary

> of State issuing removal directions unless and until the appeal process has been exhausted and has ended in failure."

65. It is true that the position under para 34J of HC 395 is not as stark as under section 104 of the 2002 Act: see [18] and [19] above. But there is no material before us to suggest that the Secretary of State routinely exercises his discretion to determine an application for leave to remain notwithstanding that the applicant has left the UK. Accordingly, local authorities should approach their task on the footing that if, by withholding assistance, they require a person to return to his country of origin, that person's application for leave to remain will be treated by the Secretary of State as withdrawn.

66. I conclude, therefore, that when applying Schedule 3, a local authority should not consider the merits of an outstanding application for leave to remain. It is required to be satisfied that the application is not "obviously hopeless or abusive" to use the words of Maurice Kay LJ. Such an application would, for example, be one which is not an application for leave to remain at all, or which is merely a repetition of an application which has already been rejected. But obviously hopeless or abusive cases apart, in my judgment a local authority which is faced with an application for assistance pending the determination of an arguable application for leave to remain on Convention grounds, should not refuse assistance if that would have the effect of requiring the person to leave the UK thereby forfeiting his claim. This is the approach adopted by Lloyd-Jones J in *R (AW, DAY) v Croydon LBC* [2005] EWHC 2950 (Admin), (2006) 10 CCLR at [74] to [76] and Andrew Nicol QC (sitting as a deputy high court judge) in *R (PB) v Haringey LBC* [2006] EWHC 225 (Admin), (2007) 10 CCLR 99 at [60] and *Binomugisha v Southwark LBC* [2006] EWHC 2254 (Admin), [2007] FLR 916 at [53].

67. Such an approach is also consistent with the statement in the Strasbourg jurisprudence that "the Convention is intended to guarantee not rights that are theoretical or illusory, but rights that are practical and effective": see *Artico v Italy* (1981) EHRR 1 at [33]. Mr Knafler relies on a number of Strasbourg decisions, in particular *Ciliz v The Netherlands* [2000] 2 FLR 469 where the ECtHR held that it was incompatible with article 8 for the immigration authorities to pre-judge and pre-empt family law contact proceedings by expelling the immigrant father before their conclusion. At [66], the court said:

> "[The court] recalls in this respect that the Convention does not in principle prohibit Contracting States from regulating the entry and length of stay of aliens (see the *Berrehab* judgment referred to above, at 330-331, para 28). Nevertheless, the Court also reiterates that, whilst Art 8 contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded by Art 8."

68. At [71], the court said that the authorities not only pre-judged the outcome of the contact proceedings by expelling the father when they did, but more importantly "they denied the applicant all possibility of any meaningful further involvement in those proceedings for which his availability for trial meetings in particular was obviously of essential importance". It is true that, as Mr Moffett points out, the decision of the

immigration authorities in *Ciliz* was different in kind from the decision by Birmingham which is under challenge in the present case. But the effect of both decisions was to deny the applicant the possibility of asserting his article 8 rights in any meaningful way. In *Ciliz*, he could not effectively participate in the contact proceedings. In the present case, if the claimant was required to leave the UK, her claim for indefinite leave to remain would be abandoned.

69. There was debate before us as to how article 8(2) should be applied by a local authority where a person satisfies the three conditions identified at [53] above. The role of article 8(2) in relation to the immigration functions of the Secretary of State for the Home Department is now reasonably well understood: see *R (on the application of Razgar) v Secretary of State for the Home Department* [2004] UKHL 27, [2004] 2 AC 368 and *Huang v Secretary of State for Home Department* [2007] UKHL 11, [2007] 2 AC 167. The justification relied on by the Secretary of State is the implementation of a firm and orderly immigration policy.

70. But as I have said, a local authority considering whether to provide assistance does not carry out the same article 8 exercise as that conducted by the Secretary of State on an application for leave to remain. The local authority and the Secretary of State take different types of decisions under different legislative schemes. Immigration policies are relevant to the determination by the Secretary of State of an application for leave to remain on article 8 grounds. They are not relevant to a local authority's consideration of the question whether it should provide assistance.

71. So how should a local authority apply article 8(2) in a case which satisfies the three conditions to which I have referred? Mr Moffett and Mr Cowen submit that a local authority's justification for interfering with a person's article 8(1) rights is the proper and efficient application of its limited social services budget. Local authorities have finite social services budgets on which many calls are made. The justification for interfering with an individual's article 8(1) rights will be the need to ensure the proper and efficient application of those budgets. Counsel rely on the language of article 8(2) of the Convention: "There shall be no interference by a public authority with the exercise of this right except such as is…necessary in a democratic society in the interests of….the economic well-being of the country….or for the protection of the rights and freedoms of others". On the other hand, Mr Knafler submits that the financial situation of a local authority is irrelevant and cannot properly be taken into account.

72. I accept the submission of Mr Knafler that, where the three conditions identified at [53] above are satisfied, the financial situation of the local authority is irrelevant. Were the position to be otherwise, a person's application for leave to remain would, in effect, be rejected on the basis that a local authority applies article 8(2) on one set of criteria (weighing the various calls on its budget), where the same application might be allowed by the Secretary of State (the person whose statutory function it is to determine such applications) on a wholly different set of criteria (weighing the need to maintain a firm and orderly immigration policy). That is obviously incoherent. But it is also unfair and arbitrary. It is unfair and arbitrary because it means that the outcome of a person's application for leave to remain depends on the budgetary priorities of the particular local authority to which the claim for assistance is made. The outcome of the application for leave to remain may be different if the claim for assistance is made to a different local authority whose budgetary priorities are

different. The disposal of applications for leave to remain should not depend on the vagaries of the budgetary considerations of local authorities.

73. Different considerations apply where the person who is applying for assistance from the local authority does *not* have an outstanding application for leave to remain. In that situation, the local authority is entitled to have regard to the calls of others on its budget in deciding whether an interference with a person's article 8 rights would be justified and proportionate within the meaning of article 8(2).

74. It is worth standing back from detail of the jurisprudence and asking why local authorities such as Birmingham refuse to provide assistance to persons such as the claimant and her children. Ms Baff puts the point clearly in her second statement:

> "30. I am therefore very conscious of the consequences of some of my decisions…for adults and children who have lived in this country for a considerable period of time where leave to remain is likely to be granted and they nevertheless leave a familiar environment including schools, friends and sometimes family as a result of assessment. As a social worker with experience of working with families, I am very much aware of the needs of children, to be given the security of knowledge of where they will be raised and the prospect of established roots and relationships in that country.
>
> 31. However, as more fully explained above, I have to make these difficult decisions applying the appropriate framework, taking into account the other demands from other people with significant needs on the local authority's budget and having regard to the fact that families do move for economic reasons."

75. Thus, Ms Baff is saying that, even in a case where Birmingham recognises that the article 8(1) rights of a family are strong and the application for leave to remain is likely to be granted by the Secretary of State, she may invoke article 8(2) by reference to the even more pressing claims of others on the budget. This unsatisfactory state of affairs is brought about by the fact that it has routinely taken so long for the Secretary of State to deal with applications for leave to remain and the Government has not provided local authorities with sufficient resources to enable them to provide assistance pending the determination of applications for leave to remain. The problem will be mitigated, if not overcome, by the steps which the Secretary of State has decided to take to prioritise cases such as those of the claimant and her family: see [84] and following below. For the reasons that I have given, local authorities may not invoke article 8(2) by reference to budgetary considerations and the rights of others if the effect of so doing will be to require an applicant to return to his country of origin and thereby forfeit his claim for indefinite leave to remain. I now turn to consider the decision that was made by Birmingham in the present case. I have summarised the essential parts of the human rights assessment at [20] to [22] above.

The human rights assessment in this case

76. The first question that Birmingham should have considered was whether the claimant and her family were destitute. If they were satisfied that they were destitute, it

follows from what I have already said that, upon learning that the claimant had made an application for indefinite leave to remain on grounds which expressly or implicitly raised article 8 of the Convention, they should then have considered whether the application was abusive or hopeless. If they considered that the application was not abusive or hopeless, they should not have refused assistance pending the determination of the application.

77. In the human rights assessment made in the present case, Birmingham seem to have accepted that the claimant and her family were destitute in the UK. At pp 15 to 18, the assessment noted that the claimant stated that she had no source of support from friends or family in the UK and that "without support from the Local Authority she would have neither accommodation for her or her family or means of providing food and other essential[s] for living". On the other hand, it was noted that she would not be destitute in Jamaica. The assessment did not, however, take account of the application for leave to remain, let alone state that it was abusive or hopeless. It clearly was neither abusive nor hopeless.

78. For this short reason, I would hold that, despite the obvious care with which it was conducted, the assessment was unlawful. Even if it was legitimate for Birmingham to disregard the application for leave to remain and it was entitled and required to decide for itself whether the withholding of assistance would breach the Convention rights of the claimant and her family, I would still have been of the view that the assessment was unlawful. The whole emphasis of the assessment was on the issue of respect for the right to *family* life. The heading under which article 8 is discussed is "**Article 8—Respect for Privacy of Family Life".** There was no recognition of the fact that Safiya had been in the UK for more than 7 years and during her formative years, so that she would have been entitled to the benefit of the 7 years' concession in DP 5/96. Mr Cowen points to the fact that Safiya entered the UK in 2001 and this was recorded in the history summarised in the earlier part of the assessment as were the details of the births of the other children. He also submits that the court should not make an overly critical analysis of an assessment which was made by social workers and not lawyers: see *R (Ireneschild) v Lambeth LBC* [2007] EWCA Civ 234, [2007] All ER (D) 286 at [57].

79. I acknowledge the dangers of interpreting documents prepared by social workers as if they are legal instruments. But there is no indication that Birmingham recognised that to require the claimant and her family to return to Jamaica would interfere with the family's right to *private* life (their relationships and social, cultural and family ties in the UK) or that they understood that the private life rights of children who were born in the UK or came here at an early age were of particular weight: see *Uner* at [57]. The focus of the assessment was on the right to family life and whether that family life could be maintained in Jamaica. Accordingly, even if Birmingham were right to assess the merits of the family's Convention claims in detail, in my judgment they did not do this properly.

80. It follows that, although the judge was right to criticise the assessment as failing to carry out a proper balancing exercise, it will be clear that I do not agree with his reasoning and approach. The error did not lie in Birmingham's failure to take account of the reasons which underlay the 7 years' policy as explained in *NF(Ghana).* The 7 years' policy was a relevant factor for the Secretary of State to take into account. For the reasons that I have given, it was not relevant to the issue that Birmingham had to

resolve, namely whether the withholding of assistance would cause a breach of the Convention rights of the claimant and her family.

The 6 hypothetical "scenarios"

81. Birmingham and those representing the claimant have agreed 6 hypothetical "scenarios" whose facts differ from those of the present case, but which illustrate the kinds of cases that local authorities have to decide under Schedule 3 to the 2002 Act. We have been asked to express an opinion in relation to each of the "scenarios" to assist Birmingham for the future. I do not think that we should do so. It is one thing, even where it has become academic to do so, to decide a particular case in which there has been a real decision. It is quite a different matter for the court to give what is, in effect, an advisory opinion as to the legal position on hypothetical facts where there has been no decision by the primary decision-maker. That is not the function of the courts: see, for example, *R (Rushbridger) v Attorney General* [2003] UKHL 38, [2004] 1 AC 357 at [35] per Lord Hutton. Still less is it the function of the Court of Appeal where no such advisory opinion has been given by the court below.

82. Nevertheless, I believe that what I have said in relation to the present case will provide some guidance to local authorities which can be applied to other cases.

The second issue: does rational and/or proportionate decision-making require the Secretary of State and the local authority to make Convention assessments in a co-ordinated manner and at the same time?

83. The facts of the present case have exposed the problem that has been created for local authorities by delays on the part of UKBA in dealing with applications for leave to remain by persons in the position of the claimant and her family. In an ideal world, the UKBA would be made aware of all cases which fall into this category and prioritise them so as to reduce the period during which assistance has to be provided by the local authority pending determination of the application for leave to remain. In her witness statement of 22 January 2010, Emily Miles, Director of the Case Resolution Directorate ("CRD") in the UKBA, explained the practical difficulties of doing this. Nevertheless, she described at para 40 the three ways in which UKBA had been working to achieve increased co-operation and liaison with local authorities. These were: (i) by working with the No Recourse to Public Funds Network in order to improve the way that local authorities hold data, to improve the information that can then be shared with UKBA, and to enable UKBA to use this information to work better with local authorities in the future; (ii) by establishing local immigration teams that can liaise with local authorities on an area-by-area basis; and (iii) by looking to revise the legislative framework in the long-term.

84. The prospect of this hearing has concentrated the minds of the CRD further. A letter dated 12 March 2010 from the Treasury Solicitor to the Civil Appeals Office sets out the current position. The letters states that the CRD has "taken ownership" of a number of non-asylum cases which fall into the category in which the claimant's case falls. The letter continues:

> "In preparation for consideration of these cases, my client has reviewed its priorities and has decided to prioritise consideration of cases supported by local authorities because

> individuals in this category are not eligible for asylum support. It will therefore prioritise local authority supported cases which fall within either the non asylum cases or its existing asylum casework.
>
> In paragraph 52 of her witness statement, Ms Miles referred to section 55 of the Borders Citizenship and Immigration Act 2009 and the publication of guidance on that duty. In pursuance of that duty, the Case Resolution Directorate reviewed its asylum caseload in order to identify and conclude the few remaining cases involving unaccompanied asylum seeking children with outstanding applications. This work was done in liaison with the local authorities concerned. CRD will turn its attention to reviewing its operations in relation to prioritising and expediting consideration of cases in order to ensure that it achieves timely decision making for children. This review is part of the overall process of ensuring that UKBA discharges its immigration functions consistently with its duty to have regard to the need to promote and safeguard the welfare of children. "

85. The Secretary of State has summarised his position in the following terms: (i) the CRD will prioritise the consideration of cases involving applicants who are supported by local authorities in the same way as it prioritises the cases of applicants who are supported by the Secretary of State; and (ii) he will review the decision-making processes in the CRD, having regard to the need to safeguard and promote the welfare of children who are in the UK and having regard to his statutory guidance (including para 2.20 thereof, which states that "every effort must….be made to achieve timely decisions for [children]").

86. It seems to me that this goes a long way towards meeting the concerns expressed on behalf of Birmingham and Shelter. In these circumstances, I do not consider it to be appropriate to grant the claimant any relief in respect of the issues raised by the second issue. No declaration has been sought in these proceedings challenging the lawfulness of the decision-making processes of the Secretary of State. The issue was not before Charles J. Furthermore, the UKBA is now subject to section 55 of the Borders, Citizenship and Immigration Act 2009 which came into force on 2 November 2009. Section 55(1) requires the Secretary of State to make arrangements to ensure that immigration functions are discharged having regard to the need to safeguard and promote the welfare of children in the UK and the Secretary of State has published guidance on that duty. None of this was in force during the time that is relevant to the current proceedings.

87. Nevertheless, it is right that I should record the steps that the Secretary of State has agreed to take to mitigate the problems that have been exposed by cases such as the present.

Overall conclusion

88. For the reasons that I have given, I would dismiss the appeal. The judge was right to quash the human rights assessment made by Birmingham in relation to the claim for

assistance by the claimant and her family, although I have reached that conclusion for different reasons from his. It is not appropriate to grant any relief in relation to the decision-making processes of the Secretary of State either in this case or more generally.

Sir Scott Baker

89. I agree.

Lord Justice Etherton

90. I also agree.