Neutral Citation Number: [2013] EWHC 344 (Admin)

Case No: CO/9409/2011

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/02/2013

Before:

JOHN POWELL QC SITTING AS A DEPUTY HIGH COURT JUDGE

- -

Between:

THE QUEEN **On the Application of** **EAT** **(Acting by her mother and litigation friend Ms. N)**	**Claimant**
- and -	
LONDON BOROUGH OF NEWHAM	**Defendant**

- -
- -

Ms. Shu Shin Luh (instructed by **Coram Children's Legal Centre**) for the **Claimant**
Mr Hilton Harrop-Griffiths (instructed by **The Legal department of the London Borough of Newham**) for the D**efendant**

Hearing dates: 13 and 18 February 2013

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Judgment

JOHN POWELL QC:

THE ISSUE

1. The issue in this case is whether the Defendant local authority, the London Borough of Newham ("**Newham**"), is obliged to provide support, including accommodation, to the Claimant and her mother pursuant to section 17 of the Children's Act 1989 ("**CA 1989**"), pending determination of the mother's appeal against the refusal by the United Kingdom Border Agency ("**UKBA**"), acting on behalf of the Secretary of State for the Home Department, of her application for indefinite leave to remain in the UK ("**ILR application**"). It is contended for Newham that it is prohibited from providing such support by reason of section 122(5) of the Immigration and Asylum Act 1999 ("**IAA 1999**"), given the terms of the ILR application. Resolution of the issue involves the proper interpretation of relevant provisions in the IAA 1999 and the proper characterisation of the basis of the claim made by the mother in her ILR application, in particular whether a claim was made by her under article 3 of the European Convention on Human Rights ("**ECHR**").

THE FACTS

2. The issue arises in the context of a claim for judicial review of Newham's refusal to provide support and accommodation. The claim is brought by the Claimant acting by her mother and litigation friend, ("**Ms. N**").

3. The Claimant was born on 9 February 2011. Her claim for judicial review was issued on 30 September 2011. She suffers from sickle cell anaemia. This is a condition which is punctuated by unpredictable and frequent crises. Haemoglobin in her red blood cells crystallises, becomes deformed and obstructs blood flow in the body, causing severe pain. This pain may become so severe as to require hospital treatment. She has been admitted to hospital on several occasions. She has regular reviews with a consultant hematologist. As a result of her complex medical needs, the Claimant requires stability and routine. Her medication requires refrigeration. Medical reports stress the need for stable and secure accommodation in order to keep her medical condition under control.

4. Ms. N is a Ugandan national who came to the UK in 2001 on a student visa and subsequently extended her stay on several occasions. She made an application for indefinite leave to remain in 2007 which was refused. She subsequently had a relationship for two years with the Claimant's father. The relationship between him and Ms. N broke down. They have very little contact now. He does not provide the Claimant or her mother with any support.

5. Ms. N and the Claimant lived for some time in a shared house in the Newham area. When the Claimant was born in February 2011, Ms. N realised that the shared living arrangement was unsuitable for an infant and especially one with complex medical needs. She sought advice from Newham's housing department and applied for housing benefit, council tax benefit and maternity pay. In reliance upon advice given to her by Newham as to her eligibility for statutory benefits, she secured accommodation in a privately rented flat. Her benefits were stopped because she was not eligible for mainstream benefits.

6. Ms. N had no money and could not pay the rent. In August 2011, she and the Claimant had to leave the flat. Ms. N had incurred rent arrears, was unable to pay an energy bill and had run up significant debt trying to manage her daughter's medical and developmental needs. They stayed for a short time with a friend of Ms. N at a three bedroom flat in the area of the London Borough of Hackney ("**Hackney**"). They were asked to leave by 3 September 2011 since the flat was too small to house the friend and her two children, as well as Ms. N and the Claimant.

7. In the meantime Ms. N sought assistance for accommodation from Hackney housing department, but without success. Hackney maintained that she was not eligible for social housing on account of her uncertain immigration status. The Claimant was referred to Hackney's children's services department for assessment on account of her complex medical condition and the likelihood of her being a "*child in need*" within the meaning of section 17 of the CA 1989.

8. A core and risk assessment was completed by Hackney on 7 September 2011. The conclusion was that the Claimant was undoubtedly a child in need. The assessment report found that Ms. N was a good parent but that the risk for the Claimant remained

high as she and her mother were homeless and in need of support and accommodation. Medical reports demonstrated the Claimant's need for stability and routine to ensure her well-being on account of her sickle cell diagnosis and the need for her medication to be stored in a refrigerator. Medical reports were also recorded to the effect that they raised concerns for the instability of accommodation and the impact this had on the Claimant's medical needs and her mother's emotional capacity to respond to these needs on account of the stressors.

9. On 8 September, the Claimant and her mother were referred by the children services department of Hackney to that of Newham. They were provided with temporary (B&B) accommodation by Newham pending an initial assessment by its own social workers.

10. That initial assessment was carried out by Newham on 16 September 2011. Similar conclusions were reached to those reached by Hackney: the Claimant was a child in need and one whose vulnerability was such that she was unlikely to reach or maintain a satisfactory level of health or development without the provision of services. It was noted that Ms. N's application for leave to remain was being considered by the Home Office and that she could be provided with funds to return to Uganda. It was recommended, however, that Newham should provide accommodation. This was approved by senior management on 16 September 2011.

11. By letter dated 19 September 2011, however, Newham notified Ms. N that it would cease to provide and fund accommodation on 30 September 2011. It offered her help to return to Uganda, together with the Claimant. Contemporaneously, Ms. N's application for leave to remain in the UK was returned to her by the UKBA on account of her non-payment of the application fee. She did not have money to pay the fee.

12. Ms. N instructed solicitors, Coram Children's Legal Centre to act for the Claimant. They, by letter dated 22 September 2012, challenged Newham's decision to withdraw accommodation and took issue with the suggestion that Ms. N alone or with her daughter could return to Uganda. They requested Newham to continue to provide support and accommodation. The request was rejected by Newham. It maintained its decision to terminate accommodation on 30 September 2011. By letter dated 27 September 2011, Newham reiterated its offer to support Ms. N with her repatriation to Uganda and to accommodate the Claimant under section 20 of the CA 1989.

13. A claim against Newham was issued on behalf of the Claimant on 30 September 2011. Judicial review was sought of Newham's decision to cease to provide accommodation. An injunction was also sought. It was granted the same day by HH Judge Patrick Curran Q.C. sitting as a Deputy High Court Judge. He made an interim order that Newham be restrained from evicting the Claimant and her mother from the accommodation provided until the determination of the claim or further order.

14. By its Acknowledgment of Service and Summary Grounds of Defence filed on 18 October 2011, Newham accepted that the Claimant was a "*child in need*" within the meaning of section 17(10) of the CA 1989. However, it maintained that it was prohibited from providing support and assistance to Ms. N by the Nationality, Immigration and Asylum Act 2002 ("**NIAA 2002**") unless and to the extent that its provision was necessary to avoid a breach of her ECHR rights. This was the effect of

provisions contained in Schedule 3 (paras. 1, 2, 3 and 7) of that Act. It maintained that there was no breach of her ECHR rights and specifically no breach of her rights under article 8 because there was no outstanding application by her for leave to remain. Reference was made to relevant caselaw, especially *R (Clue) v. Birmingham City Council* [2010] EWCA 460 ("***Clue***") (especially at para. 73).

15. On 12 December 2011, Elisabeth Laing Q.C. sitting as a Deputy High Court Judge granted permission to the Claimant to pursue her claim for judicial review. She directed that the order restraining the eviction of the Claimant and her mother continue until judgment or further order. She gave three reasons for her decision. First, it was arguable that Newham's decision under challenge would breach Ms. N's ECHR rights. Secondly, it was arguable that Newham had not considered the rights of both the Claimant and her mother under article 8 of the ECHR and the proportionality of the decision not to provide accommodation. Thirdly, there was material before the decision maker which suggested that the Claimant might be a Portuguese citizen (through her father) and that it was arguable that Newham had not taken reasonable steps to inform itself of the factual position in this respect or of the implications of any facts in its decision that there was no breach of Ms. N's ECHR rights.

16. Newham's detailed grounds of resistance, filed on 16 February 2012, maintained its original position. It also maintained that either Ms. N should return to Uganda together with the Claimant or it would provide the Claimant alone with accommodation (pursuant to section 20 of the CA 1989). Enclosed with the grounds of resistance was a core assessment dated 14 February 2012.

17. The ILR application was submitted to the UKBA on behalf of Ms. N by her solicitors, Hardings, under cover of a letter dated 31 May 2012. Enclosed with the letter were various documents, including a completed standard ("*SET(O)*") application form, Ms. N's witness statement dated 25 May 2012 and medical reports relating to the Claimant.

18. For reasons stated below, whether the ILR application incorporated a claim under article 3 of the ECHR is critical to the determination of the issue between the parties to the present dispute. In the covering letter Ms. N's solicitors described her ILR application as made "*outside the rules*", i.e. the Immigration Rules, "*due to the exceptional circumstances of the case*". The letter also included the following statements referenced to enclosed documents: "*The child has complex ongoing care needs … and may well not survive if she is sent with the applicant to the applicant's country of origin, Uganda*" and "*The act of removal would put her daughter's life at risk …as she could die on the plane without expert medical attention*."

19. Neither in the letter nor in documents enclosed with it is there express mention of article 3 of the ECHR. In contrast article 8 of the ECHR is expressly considered. The five questions identified by Lord Bingham in *R(Ragar) v. Home Secretary* [2004] 2 AC 368 as needing to be addressed in relation to an Art. 8 objection to removal from the UK are addressed and answered in favour of Ms. N. There follows two paragraphs under the heading "*Best Interests of the child*". The first paragraph alleges "*the legal requirement for the Secretary of State to give primary consideration to the best interests of the child*" by reference to section 55 of the Borders, Citizenship and Immigration Act 2009 and caselaw. The second paragraph reiterates the Claimant's need for "*complex medical treatment*" and its availability to her in the UK but not in

Uganda. The letter concludes with a request for the Secretary of State to exercise her discretion to grant indefinite leave to remain "*due to the exceptional circumstances of this case*".

20. The UKBA (acting on behalf of the Secretary of State) refused Ms. N's ILR application by letter 10 January 2013 ("**the UKBA refusal letter**"). The letter records her application as having been "*considered under the provisions of Article 3 Medical of the ECHR*". The conclusion reached was that her removal from the UK would not result in breach of its obligations under article 3. The following points were advanced in the letter. First, no medical evidence had been advanced that Ms. N's removal to Uganda "*would be*" as distinct from "*may be*" detrimental to the Claimant's health. Second, for removal to result in a breach of article 3 in a medical case, there would need to be a total absence of medical treatment available to the Claimant in Uganda. Third, the fact that Ms. N would be unable to afford to pay for treatment for her daughter in Uganda did not make the circumstances exceptional so as to entitle Ms. N to stay in the UK.

21. The UKBA refusal letter goes on to record consideration of whether Ms. N merited indefinite leave to remain on the basis of any family or private life rights, resulting in a negative conclusion. That consideration is by reference to those rights to the extent provided for in the Immigration Rules. While there is no express mention of article 8 of the ECHR, this is clearly addressed in that there is reference to consideration having been given to "*rights in respect of any family/private life you may have established in the UK*".

22. Ms. N lodged an appeal against the refusal on 22 January 2013, pursuant to section 82 of the NIAA 2002. This appeal remains outstanding. In her grounds of appeal it is expressly alleged that her removal from the UK amounts to a breach of article 8 of the ECHR. There is no suggestion that her removal would also be in breach of article 3 of the ECHR.

23. Ms. N informed Newham of her application for indefinite leave to remain in early June 2012. There is no evidence of Newham having reviewed the Claimant's and her mother's eligibility for support *after* the ILR application, at least not until early February 2013 in the case of Ms. N. It was submitted on behalf of the Claimant, relying on *Clue*, that on making the application to the UKBA which was not manifestly unfounded, she and her mother were eligible for support.

24. In fact Newham has continued to provide accommodation for Ms. N and the Claimant after the interim order of 30 September 2011. Until 9 January 2013 this was at a room in a bed and breakfast placement. Since then they have been accommodated in a one bedroom flat. Until August 2012, Newham provided no other support, including no support for food, basic toiletries or clothing. Ms. N has relied heavily on charitable donations of food parcels from RAMP, a local area charity which supports migrant families. It was said on behalf of the Claimant that the food parcels did not contain food that would be suitable for a baby girl and Ms. N had no money to buy nappies for her daughter. She had to rely on the benevolence of acquaintances and charitable donations to help her meet the basic hygiene and nutritional needs of her child.

25. In August 2012, Newham started to provide support to Ms. N by way of a weekly payment of £30 for mother and baby. It was not disputed that this was below the level

which central government considers necessary for a single destitute failed asylum-seeker who had exhausted all appeal rights (£35.39 per week). The weekly payment was increased in early February 2013 to £70 per week. It was not disputed that this is below the government rate for a failed "*asylum-seeker*" mother and her child. In her witness statement Ms. N maintains that she continues to struggle to make ends meet and that she relies on charitable donations to top up money received from Newham.

26. By the time of the first day of the hearing of the Claimant's claim for judicial review on 13 February 2013, the focus of dispute with Newham had shifted. This was consequent upon Newham's receipt and consideration of the UKBA refusal letter and email exchanges between the parties' solicitor on 11 February 2013. By email on that day timed 13.16 to the Claimant's solicitors, Newham's solicitor proffered a draft consent order to settle the Claimant's application of judicial review. The draft order incorporated recitals to the effect that Ms. N had made an ILR application to the UKBA "*which was recorded and considered by the UKBA as including a claim under Article 3 of the ECHR*" and that she "*agree[d] that she [wa]s an asylum-seeker for the purpose of Part VI of [IAA 1999]*". The Claimant's solicitors responded (email timed 15.18) rejecting the proposed consent order on the basis that it was not accepted that Ms. N was an asylum seeker. In the event the parties were unable to agree a consent order.

27. As apparent from a later email on the same day (timed 18.48) from Newham's solicitor to the Claimant's solicitors, Newham at that stage had not received and thus considered a copy of Ms. N's ILR application itself - as distinct from the UKBA refusal letter and her grounds of appeal (which had been provided to Newham on 6 February 2013). The relevant recitals in the proffered but rejected consent order do not reflect the ILR application. However, Ms. N's ILR application (including her solicitor's covering letter) was provided by 12 February 2012. It did not cause Newham to change its view. It maintained its position that Ms. N had made a claim under article 3 of the ECHR on the basis of both Ms. N's ILR application and the UKBA refusal letter. Hence the submission on its behalf that it is prohibited from providing support by section 122(5) of the IAA 1999.

RELEVANT LEGAL FRAMEWORK

28. The main legal provisions engaged are section 17 of the CA 1989, sections 94, 95 and 122 of the IAA 1999 and articles 3 and 8 of the ECHR.

The CA 1989

29. Part III of the CA 1989 concerns local authority support for children and their families. The "*general duty*" of a local authority is set out in section17(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."*

30. There is now no dispute that the Claimant is a "*child in need*" as defined in section 17(10) of the CA 1989.

> "*For the purposes of [Part III] a child is to 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 [Part III] or*
> *(b) his health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services; or*
> *(c) he is disabled*
> *and 'family', in relation to such a child, including any person who has parental responsibility for the child and any other person with whom he has been living.*"

31. The general duty under section 17(1) CA 1989 is supplemented by the duty of the local authority under section 11 of the Children Act 2004 to make arrangements having regard to the need to safeguard and promote the welfare of children.

32. These various duties reflect the obligation of the United Kingdom under article 3 of the United Nations Convention on the Rights of the Child, which provides that:

> *"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."*

33. The ambit of the local authority's powers under section 17 CA 1989 is spelt out in section 17(3) and (6):

> *"(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 is provided with a view to safeguarding or promoting 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 cash."*
> [emphasis added]

34. Paragraph 3 of Schedule 2 to the CA 1989 provides that "*where it appears to a local authority that a child within their area is in need, the authority may assess his needs for the purposes of this Act at the same time as any assessment of his needs is made* ...". This discretion becomes a duty by virtue of guidance issued pursuant to section 7 of the Local Authority Social Services Act 1970, entitled "*Framework for the Assessment of Children in Need and their Families".*

35. As to the level of support under section 17(6) of the CA 1989, this must be based on the assessment of the family's needs.

The IAA 1999

36. Prior to this Act, asylum-seekers and their dependants were, like British nationals, eligible for mainstream welfare benefits whilst their claims were being considered by the Secretary of State for the Home Department. The IAA 1999 introduced a new national system of support for asylum-seekers and their dependants. This reflected the aim of ensuring that genuine asylum-seekers were not left destitute whilst at the same time containing the cost to the public purse of providing for asylum seekers: see Home Office White Paper: *Fairer, Faster, Firmer: A Modern Approach to Asylum and Immigration (Cm 4018 July 1998).*

37. Part VI of the IAA 1999 is entitled "*Support for Asylum-Seekers*". Section 94 contains interpretative provisions for the purposes of Part VI, including the following:

> "(1) *In this Part :-*
>
> *"asylum-seeker" means a person who is not under 18 and has made a claim for asylum which has been recorded by the Secretary of State but which has not been determined.*
>
> *"claim for asylum" means a claim that it would be contrary to the United Kingdom's obligations under the Refugee Convention or under Article 3 of the Human Rights Convention, for the claimant to be removed from, or required to leave, the United Kingdom.*
>
> *"dependant", in relation to an asylum-seeker or a supported person, means a person in the United Kingdom who— …(b) is a child of his, or of his spouse, who is under 18 and dependent on him; … (e) whose claim has not been determined.*
>
> *(2) References in this Part to support provided under section 95 include references to support which is provided under arrangements made by the Secretary of State under that section.*
>
> *(3) For the purposes of this Part, a claim for asylum is determined at the end of such period beginning—*
>
> *(a) on the day on which the Secretary of State notifies the claimant of his decision on the claim, or*
>
> *(b) if the claimant has appealed against the Secretary of State's decision, on the day on which the appeal is disposed of,*
>
> *as may be prescribed.*
>
> *(4) An appeal is disposed of when it is no longer pending for the purposes of the Immigration Acts or the Special Immigration Appeals Commission Act 1997.*
>
> *(5) If an asylum-seeker's household includes a child who is under 18 and a dependant of his, he is to be treated (for the purposes of this Part) as continuing to be an asylum-seeker while—*
>
> *(a) the child is under 18; and*
>
> *(b) he and the child remain in the United Kingdom.*"

38. Section 95(1) entitled "*Persons for whom support may be provided*" states: "*The Secretary of State may provide, or arrange for provision of, support for –(a) Asylum-seekers, or (b) Dependents 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.*"

39. Section 122 is entitled "*Support for children*" and contains in subsection (5) the prohibition which is at the heart of the dispute between the parties to this case. Section 122 provides, so far as relevant:

> *"(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."*

40. Terms used in section 122 are defined, including "*assistance*" to mean "*the provision of accommodation or of any essential living needs*" (section 122(6)) and "*the child welfare provisions*" to include "*section 17 of the [CA 1989] (local authority support for children and their families*)" (section 122(7)).

41. The NIAA 2002 provides for the substitution of section 122 of the IAA 1999 as originally enacted with other provisions, from a date to be specified by the Secretary of State by an order made under section 162 of the 2002 Act. No such order has yet been made. Hence section 122 of the IAA 1999 still applies as originally enacted.

Articles 3 & 8 of the ECHR

42. Article 3 of the ECHR entitled "*Prohibition of torture*" provides: "*No one shall be subjected to torture or to inhuman or degrading treatment or punishment*". The prohibition is not subject to any exception or qualification.

43. Article 8 of the ECHR is entitled "*Right to respect for private and family life*". Article 8(1) provides: "*Everyone has the right to respect for his private and family life, his home and his correspondence*". This right, however, is qualified by Article 8(2): "*There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others*."

THE RELEVANT UKBA GUIDANCE

44. Counsel for both the Claimant and Newham, each referred to guidance issued by the UKBA, valid from 5 October 2012, entitled "*Human rights claims on medical grounds*' and expressed to be based on articles 3 and 8 of the ECHR ("**the relevant UKBA guidance**"). Its stated purpose is to tell its caseworkers how to recognise and consider applications for permission to stay in the UK "*based on human rights claims on medical grounds*" (page 4).

45. Among passages referred to by counsel were the following:

    a. the statement that applicants can claim "*leave on article 3 or article 8 medical grounds*" by submitting application forms (including a SET(O) form) in order to apply for indefinite leave to remain on the basis of 6 or 10 years' discretionary leave to remain or "*other leave outside the Immigration Rules on medical grounds*" (page 4);
    b. the statement that an article 3 or article 8 medical claim may be referred to specifically in the application or the covering letter or it may be implied (page 6);
    c. the section explaining how to work out whether such a claim was implied (pages 6 and 7);
    d. the section dealing with considering article 3 medical claims (pages 12 and 13);
    e. the section dealing with considering article 8 medical claims (pages 14 and 15).

46. Counsel for the Claimant emphasised the following statements:

    a. "*To work out whether a claim has been implied, you must check the application form, covering letter (if any) and supporting documents for [enumerated] indicators*" (page 6);

    b. "*When you think an application is an implied human rights (medical) claim, or its is unclear what basis the applicant is applying under, you must*

        ● *request the applicant or their representative [sic] clarify the basis of their [sic] claim in writing*" (page 7). (There is no evidence of the UKBA having requested clarification in this case.)

c. UKBA policy was based on caselaw including the "*key case*" of *N* (viz. *N v. United Kingdom* ([2005] UKHL 31 and App. no. 26565/05) (page 12).

d. The European Court in *N* "*confirmed that cases where the applicant can resist removal and be granted leave to remain on article 3 grounds are exceptional*" (page 12).

e. *"Following this case, UK Border Agency policy is to accept that an applicant's article 3 (medical) rights would be breached by removal to their country of origin only if:*

- *their illness has reached such a critical stage (the applicant is dying) that it would be inhuman treatment to:*
  - *deprive them of the care they are currently receiving, and*
  - *to send them home to an early death (unless there is care available there to enable them to die with dignity"* (page 12).

f. "*… it will be 'rare' for a case to meet the 'exceptional case' test. As of 5 October 2012, no case has been successful in the UK courts or the ECtHR on this basis. You must refer a decision to grant on this basis to a senior caseworker."* (page 13).

47. Reference was also made to the following statement in the context of considering article 8 medical grounds: "*Article 8 deals with respect for private life, including moral and physical integrity. The consequences to an applicant's health of removing them from the UK could in principle engage article 8. However, such cases will be rare and, in most cases, it is unlikely that article 8 will add anything decisive to a claim under article 3 when the same facts are relied on*" (page 14). The passage reflected the observation by the European Court of Human Rights in *Bensaid v United Kingdom* App no. 44599/98 ("***Bensaid***") at para. 46 that treatment not reaching the severity of article 3 treatment may breach article 8 in its private life aspect where there were sufficient adverse effects on physical and moral integrity.

SUBMISSIONS

48. The definition of "*asylum seeker*" in section 94(1) of the IAA 1999 involves both a "*claim for asylum*" being "*made*" and the claim being "*recorded*" by the UKBA on behalf of Secretary of State. The key question disputed was whether Ms. N had "*made*" a "*claim for asylum*" under article 3 of the ECHR by means of her ILR application letter. The case for the Claimant was that she had not; the case for Newham was that she had. It is convenient to set out submissions made by Mr Harrop-Griffiths for Newham before those of Ms Luh for the Claimant. I am grateful to both counsel for their able submissions.

Submissions for Newham

49. First, there was nothing in Part VI of the IAA 1999 to explain or indicate what was meant for the purposes of section 94(1) by a claim being "*made*" or "*recorded*". Both concepts must be taken as intended to encompass the making and consideration of an

application that it would be wrong to remove the applicant (and/or her dependant) from the UK because she would suffer if she had to return to her home country, whether or not there is any explicit reference to article 3 of the ECHR (or the Refugee Convention). It was the substance of the application rather than the form that was important.

50. Second, the claim was clearly "*recorded*" as a claim for asylum based on article 3 of the ECHR since the UKBA refusal specifically addresses such a claim. Reference was made to the observations of Collins in J. in *R (Niagatu) v SSHD* [2004] EWHC 1806 at [22] to the effect that "*recorded*" must have meant something different from "*received*". Collins J. continued: "*The question really turns on whether what was put before the Secretary of State can be said to have amounted to a claim for asylum. For the reasons that I have given, in my judgment, it does require the Secretary of State to decide the initial question as to whether it should be regarded as a claim for asylum before any right to support within s 95 can arise*".

51. Third, the ILR application letter in substance raised what Mr Harrop-Griffiths characterised as the article 3 issue that the Claimant might well not survive if she had to go with her mother to Uganda, even though it did not specify that article.

52. Fourth, in the circumstances the UKBA was perfectly entitled to treat the claim as one "*made*" under article 3.

53. Fifth, taking into account section 95(1) and section 122(1)-(4) IAA 1999, there were for the purposes of section 122(5)(b) IAA 1999 reasonable grounds for believing that the UKBA would provide asylum support for the Claimant and her mother, so that Newham was prohibited from providing support under section 17 of the CA 1989.

54. Without prejudice to Newham's case based on section 122 IAA 1999, Mr Harrop-Griffiths stated that Newham would continue to provide support pending the outcome of an application for asylum support by Ms. N, as long as such an application were made expeditiously and pursued vigorously.

Submissions for the Claimant

55. Ms Luh first addressed the scope of articles 3 and 8 of the ECHR.

56. In relation to article 3, she made two submissions which were not controversial.

57. First, although article 3 does not expressly prohibit non-refoulement of a person to his country of origin, such a prohibition was inherent in the article in circumstances where there were substantial grounds for believing that that person would be in danger of being subjected to torture or to inhuman or degrading treatment or punishment: *Soering v UK* . App no 14038/88 (1989).

58. Second, the threshold for establishing a breach under article 3 on medical grounds is very high, requiring very exceptional circumstances as stated in *N v UK*, App no 26565/05 (2008) by reference to the earlier case of *D v United Kingdom (1997) App no 30240/96*; see also MacDonald's Immigration Law & Practice at 8.53A. She drew attention to the UKBA's guidance noted at para. 45f above. The position is summarised at paras. 42 and 43 of the judgment of European Court in *N v UK* :

" In summary, the Court observes that since D v United Kingdom it has consistently applied the following principles..... The fact that the applicant's circumstances, including his life expectancy, would be significantly reduced if he were to be removed from the Contracting State is not sufficient in itself to give rise to breach of Article 3. The decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the Contracting State may raise an issue under Article 3, but only in a very exceptional case, where the humanitarian grounds against the removal are compelling. In the D case the very exceptional circumstances were that the applicant was critically ill and appeared to be close to death, could not be guaranteed any nursing or medical care in his country of origin and had no family there willing or able to care for him or provide him with even a basic level of food, shelter or social support.

The Court does not exclude that there may be other very exceptional cases where the humanitarian considerations are equally compelling. However, it considers that it should maintain the high threshold set in D v the United Kingdom and applied in its subsequent case-law, which it regards as correct in principle, given that in such cases the alleged future harm would emanate not from the intentional acts or omissions of public authorities or non-State bodies, but instead from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country." (underlining added to sentences emphasised by Ms Luh).

59. As to article 8 she made the following submissions.

60. First, article 8 was of wide ambit (much wider than article 3), requiring the consideration of multiple factors inherent to the protection of private and family life. These needed to considered in the round and not in isolation of each other. She referred to *Huang v Secretary of State for the Home Department* [2007] UKHL 11 [2007] 2 AC 167 ("***Huang***") at paras. 18 and 20, *Beoku-Betts v Secretary of State for the Home Department* [2009] AC 115 at para. 20 and *ZH (Tanzania) [2011] UKSC 4* at paras. 23-25 and 33.

61. Second, health (and the treatment of ill-health) was a factor which might fall to be considered in an article 8 claim. She referred to the judgment of the European Court of Human Rights in *Bensaid* at para. 46: "*Not every act or measure which adversely affects moral or physical integrity will interfere with the right to respect to private life guaranteed by Article 8. However the Court's case-law does not exclude that treatment which does not reach the severity of Article 3 treatment may nonetheless breach Article 8 in its private-life aspect where there are sufficiently adverse effects on physical and moral integrity.*"

62. As to the asylum support regime under Part VI of the IAA 1999, she made two submissions.

63. First, it is not designed with children as the main applicant for support, as apparent from the definition of an "*asylum seeke*r" being a person who is not under 18: section 94(1) of the IAA 1999. The ILR application was made by the Claimant's mother. It is her application and whether that is a "*claim for asylum*" which determines the nature of her entitlement to support.

64. Secondly, Part VI of the IAA 1999 exists to protect (by provision of welfare support) those persons who have made international protection claims to the Secretary of State, which raise risks of refoulement, persecution, ill-treatment, torture whilst their claims are pending in the UK. For those persons, Part VI allocates responsibility for the provision of support to the Secretary of State.

65. Ms Luh made the following points in support of her core submission that Ms. N had not made a claim under article 3 of the ECHR.

66. First, the word "*made*" in the phrase "*made a claim for asylum*" in the definition of "*asylum-seeker*" in section 94(1) IAA 1999 must be afforded its natural meaning. It is an active word which requires some action on the part of the claimant for asylum. She gave two examples of such a claim being made. The first was a claim by a claimant who expressly stated that she faced a breach of article 3 if returned to her country of origin. The second was a person who stated *"I cannot return to my country of origin because I may be beaten up, tortured, persecuted*", even though she did not expressly refer to article 3. It had never been suggested by Ms. N or on behalf of the Claimant that Ms. N would face such risks.

67. Second, the factual matrix was such that Ms. N's ILR application fell far below the high threshold for an article 3 claim.

68. Third, Ms. N's ILR application was drafted by experienced immigration solicitors. The fact that they did not invoke article 3 reflected their appreciation of the high threshold for a claim based on breach of that article and their correct conclusion that Ms. N's case did not surmount that threshold.

69. Fourth, although the UKBA chose to consider Ms. N's ILR application under article 3, it concluded correctly that there was no basis for a claim for breach of that article.

70. Fifth, Ms. N's ILR application was based upon article 8, as apparent from her solicitors' covering letter and her witness statement. Both letter and witness statement invoked considerations characteristic of an article 8 claim, including (but not only) medical grounds. There are references to Ms. N having no social network in Uganda, being settled in the UK with her social network here. Ms. N asserted that it was in the Claimant's best interests to remain in the UK in order to maintain contact with her father. Although both letter and statement raise concerns that medical care in Uganda would be inadequate for the Claimant's needs medical needs, such concerns were not alone invoked as distinct from being (properly) invoked together with other factors in support of an article 8 claim.

71. Sixth, the UKBA's guidance considered as a whole was inconsistent with characterisation of Ms. N's ILR application as including a claim for breach of article 3. The statements in the guidance noted at para. 47 above were referred to in support of this submission. Although it was apparent that the UKBA caseworker considered that the ILR application was an implied human rights (medical) claim), there was no evidence of the UKBA having sought clarification from Ms. N or her solicitor as to the basis of her claim in writing. Concerns as to the health of the Claimant were relevant factors for UKBA to consider under article 8, consistently with *Bensaid* and *Huang*.

72. Seventh, the UKBA letter could not be relied upon in order to deem Ms. N as having made a claim for breach of article 3. It is a case of the UKBA seeking to be overly comprehensive in rejecting Ms. N's ILR application. In this case its consideration of article 3 was unnecessary and incorrect.

73. Eighth, the approach advanced in argument on behalf of Newham involved a local authority considering the merits of an ILR application, inconsistently with Dyson L.J.'s s judgment in *Clue* at paras. 60 and 61. Assessment of a person's immigrations status was a matter for the Secretary of State (or the UKBA on her behalf) and not local authority social workers.

CONCLUSIONS

74. Part VI of the CA 1989, which includes section 17, provides for a regime of local authority support for children and their families. Part VI of the IAA 1999, which includes sections 94, 95 and 122, provides for a regime of support for asylum seekers and their dependants by the Secretary of State. In its operation, the IAA 1999 is less generous than the CA regime. The issue in this case pertains to the prohibition in section 122(5) IAA 1999, which is designed to prevent overlap between the two regimes as regards the provision of accommodation and essential living needs.

75. As apparent from the terms of section 122(5), the prohibition pertains to the two alternative circumstances stated in (a) and (b) thereof. The circumstance in (a) is relatively straightforward, i.e. when the Secretary of State is complying with his obligations under section 122(3) and (4) to provide adequate accommodation and essential living needs. The circumstance in (b) is less straightforward. It requires the formation of a belief that the conditions stated in (i) and (ii) of (b) are both satisfied. It is apparent from the context that the relevant belief is that of the local authority. However, it must be a belief based on "*reasonable grounds*". That is an objective criterion. It follows that a belief not based on reasonable grounds is open to challenge by way of judicial review. That said, the criterion of a belief held on reasonable grounds admits of a margin of error in the sense that a belief that certain conditions exist when in fact they do not may nevertheless be a belief held on reasonable grounds. The choice of criterion is plainly a pragmatic choice reflecting recognition of the difficulties of a judgmental decision required of a local authority in frequently unclear circumstances and in anticipation of a decision to be made by the Secretary of State in respect of matters which it is for her to decide (at least formally, but in reality on her behalf by the body with specialist expertise to make the decision, the UKBA).

76. A distinctive feature of the present case is that the local authority's decision was not made *in anticipation of* a decision to be made by the Secretary of State but *on the basis of* a decision already by her (by the UKBA) in respect of the ILR application made by the Claimant's mother, Ms. N. Leaving aside for the moment whether that application incorporated a "*claim for asylum*" under article 3 of the ECHR, as apparent from the UKBA refusal letter, that article was specifically considered and a decision made that her removal from the UK would not result in a breach of the UK's obligations under that article.

77. I conclude that no "*claim for asylum*" was made by Ms. N's ILR application and in the circumstances there were no reasonable grounds for believing that such a claim had been made such as to engage the prohibition in section 122(5) of the IAA 1999.

78. The word "*claim*" is not defined in the IAA 1999. I make two observations. First, it is apparent from the term "*claim for asylum*" and the reference in the definition of "*asylum-seeker*" to "*a person who …has made a claim for asylum*", that the word "*claim*" is there used in the sense of an assertion of a right: see *Australia and New Zealand Bank Ltd. v. Colonial & Legal Wharves Ltd.* [1960] 2 Lloyd's Rep 241 at 245 per McNair J. Secondly, as observed by Devlin J. in *West Wake Price & Co v. Ching* [1957] 1 W.L.R. 45, at 55 and 57: "*I think that the primary meaning of the word 'claim' – whether used in a popular sense or in a strict legal sense - is such as to attach it to the object that is claimed; and is not the same thing as the cause of action by which the claim may be supported or as the grounds on which it may be based.*" The context was very different (a professional indemnity policy) from the present context, but Devlin J.'s observation serves to highlight the fact that the object being claimed ("*asylum*") is incorporated in the defined term itself "*claim for asylum*" and the grounds upon which the claim is based forms the content of the definition of that term. Thus the meaning of the term "*claim for asylum*" incorporates both the object being claimed and the grounds upon which it is based.

79. Those observations are relevant to the nature of a local authority's consideration under section 122(5)(b) of the IAA 1999 whether there are reasonable grounds for believing that person has made a "*claim for asylum*" such as to trigger the prohibition in that section. Thus it needs to consider whether the "*person concerned*" (Ms. N in this instance) has asserted a right for asylum on the grounds of either the Refugee Convention or article 3 of the ECHR. Usually (albeit not in this case) the local authority in considering the issue will be doing so *before* any resolution of the relevant application of the person concerned to the Secretary of State. Even where (as in this case) the local authority has received and considered the decision of the Secretary of State, it is apparent from the word in "*claim for asylum*" and to a "*claim*" "*made*" in the definition of "*asylum-seeker*" that the focus of the local authority's consideration must be what was asserted by the relevant application. Thus where (as here) the local authority obtains the relevant application, it must consider it before reaching its decision as to support.

80. Newham originally reached its conclusion that it was prohibited from providing support under section 17 of the CA 1989 on the basis of the UKBA decision letter. However, I am satisfied that on later receipt of Ms. N's ILR application (including the covering letter and attached documents) it considered her application but it maintained its original decision. Nevertheless, I am persuaded that, taking together both her ILR application and the UKBA refusal letter, Newham did *not* have reasonable grounds to believe that she had made a "*claim for asylum*" based on article 3 of the ECHR. I so conclude for the following reasons.

81. First, she did not in her ILR application expressly make a claim based on article 3. Second, she did not by her application, fairly read, impliedly make a claim. It is apparent from the covering letter that it was drafted by experienced immigration solicitors well aware of the distinction between a claim based on article 3 and one based on article 8. In particular, there is specific mention of article 8 but no mention of article 3. Thirdly, the UKBA letter does not state that Ms. N had made a claim for breach of article 3 as distinct from stating that her claim had been considered under article 3. The consideration of article 3 by the UKBA reflects a comprehensive "*belt and braces*" approach to the rejection of the ILR application. While of course

recognising that a claim for asylum based on article 3 may be made which is rejected by the UKBA, this is not such a case. While also recognising that in deciding whether Newham had reasonable grounds for its decision allowance must be made for a margin of error, on the particular facts I conclude that its decision went beyond that margin and that it did not have reasonable grounds for its decision. In deciding that a claim for asylum based on article 3 had been made, Newham did not sufficiently focus on Ms. N's ILR application.

82. In summary I conclude that Newham was not prohibited from providing support for the Claimant and her mother pursuant to section 17 of the CA 1989 by reason of section 122(5) of the IAA 1999. The Claimant's challenge to Newham's refusal to provide such support succeeds.