Easter Term
[2013] UKSC 27
On appeal from: [2011] EWCA Civ 954

JUDGMENT

SL (FC) (Respondent) *v* Westminster City Council (Appellant)

before

Lord Neuberger, President
Lady Hale
Lord Mance
Lord Kerr
Lord Carnwath

JUDGMENT GIVEN ON

9 May 2013

Heard on 28 and 29 January 2013

Appellant
John Howell QC
Hilton Harrop-Griffiths
(Instructed by Creighton and Partners)

Respondent
Stephen Knafler QC
Jonathan Auburn
(Instructed by Deighton Pierce Glynn)

Intervener (Mind)

Kate Markus
Martha Spurrier
(Instructed by Mind Legal Unit)

Intervener (Freedom from Torture)
Adrian Berry

(Instructed by Maxwell Gillott Solicitors)

LORD CARNWATH (with whom Lord Neuberger, Lady Hale, Lord Mance and Lord Kerr agree)

Introduction

1. The short issue raised by this appeal is whether the respondent (SL), a failed asylum-seeker, was at the relevant time in need of "care and attention", requiring the provision of accommodation by the local authority under section 21(1)(a) of the National Assistance Act 1948. Burnett J decided that he was not, but that decision was reversed by the Court of Appeal, Laws LJ giving the only substantive judgment.

2. As Baroness Hale of Richmond explained in the leading authority (*R (M) v Slough Borough Council* [2008] UKHL 52, [2008] 1 WLR 1808 (*"Slough"*)), this section of the 1948 Act has for the most part been a relatively peaceful backwater of the law. She observed:

> "… until 1996, it would not have occurred to anyone that section 21(1)(a) might cover this sort of case. There was no need for it to do so. And it was not designed to do so." (para 7)

That peace was shattered in the 1990s by the pressures of tighter immigration control, and the recognition by the courts of the potential role of local authorities under section 21(1)(a) in meeting the resulting needs (see *R v Hammersmith and Fulham London Borough Council, ex parte M* (1997) 30 HLR 10). The Immigration and Asylum Act 1999, which followed a 1998 White Paper, sought to redefine the respective responsibilities of national and local government (*Slough* paras 22-24). It established a national scheme of last resort, initially administered by a new body, the National Asylum Support Service ("NASS") (later administered by the UK Border Agency on behalf of the Secretary of State), and at the same time introduced amendments limiting the application of section 21 in the case of those subject to immigration control. There followed what one commentator called an "unseemly turf war" (*Slough*, para 28) over responsibility for homeless asylum-seekers as between, on the one hand, local authorities under section 21(1)(a) of the 1948 Act and, on the other, central government under the new national scheme.

3. That led in due course to two cases in the House of Lords: *R (Westminster City Council) v National Asylum Support Service* [2002] UKHL 38, [2002] 1 WLR

2956 ("*NASS*"), and the *Slough* case. Between the two came the important decision of the House of Lords in *R (Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66, [2006] 1 AC 396, which established that even those deprived of support under the national scheme, because they had not claimed asylum as soon as reasonably practicable (see Nationality, Immigration and Asylum Act 2002, s 55(1)), must not be left subject to such a level of deprivation as would amount to inhuman or degrading treatment under human rights law (*Slough* para 23).

4. In the present case, happily, there has been no unseemly dispute between different parts of government, it having been accepted throughout, as I understand it, that if section 21(1)(a) of the 1948 Act did not apply, responsibility would fall on the Home Secretary under the national scheme. When these proceedings began, the difference was regarded as significant because of the more limited protection thought to be available under the national scheme (including the possibility of dispersal to a different area). There has been concern about the accommodation and support provided for asylum seekers since at least the Report of the Joint Committee on Human Rights on The Treatment of Asylum Seekers (Tenth Report of Session 2006-07, HL Paper 81-I, HC 60-I), and repeated, for example, in the Report of the Parliamentary Inquiry into Asylum Support for Children and Young People (The Children's Society, January 2013). That remained a potentially live issue at the time of the hearing before Burnett J in November 2010. However, it became academic following the grant in March 2011 of indefinite leave to remain. The Court of Appeal agreed to hear the appeal on the basis of the "broader questions of principle" involved. It has proceeded to this court on the same basis.

Statutory provisions

5. Section 21 of the 1948 Act (as amended in particular by the Immigration and Asylum Act 1999) provides:

> "(1) Subject to and in accordance with the provisions of this Part of this Act, a local authority may with the approval of the Secretary of State, and to such extent as he may direct shall, make arrangements for providing:
>
> > (a) residential accommodation for persons aged eighteen or over who by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them; and

> (aa) residential accommodation for expectant and nursing mothers who are in need of care and attention which is not otherwise available to them.
>
> (1A) A person to whom section 115 of the Immigration and Asylum Act 1999 (exclusion from benefits) applies may not be provided with residential accommodation under subsection (1)(a) if his need for care and attention has arisen solely -
>
> (a) because he is destitute; or
>
> (b) because of the physical effects, or anticipated physical effects, of his being destitute…
>
> (Sub-section (1B) provides that "destitute" for these purposes is defined in accordance with section 95 of the 1999 Act.)

By section 21(8), nothing in section 21 is to be taken as authorising or requiring the making of any provision authorised or required to be made under any enactment "not contained in this Part of this Act" (that is, Part III of the 1948 Act), or under the National Health Service Acts.

6. Section 29, also in Part III of the 1948 Act, deals with welfare arrangements, unrelated to the provision of accommodation. It provides for authorities, subject to approvals or directions of the Secretary of State, to make arrangements for "promoting the welfare of persons … aged eighteen or over who are blind, deaf or dumb or who suffer from mental disorder of any description (and certain other specified categories)". The duties under section 29 are supplemented by section 2 of the Chronically Sick and Disabled Persons Act 1970. Apart from the 1948 Act, local social services authorities also have a range of caring responsibilities under other statutes (eg National Health Service Act 2006, sched 20 para 3: home help and laundry facilities for households which include a person who is ill, aged or handicapped).

7. It is convenient at this stage to note certain points which I understand to be common ground in the light of the authorities. First, the requirements of section 21(1)(a) of the 1948 Act can be expressed as three cumulative conditions:

> "…first, the person must be in need of care and attention; secondly, the need must arise by reason of age, illness, disability or 'other

> circumstances' and, thirdly, the care and attention which is needed must not be available otherwise than by the provision of accommodation under section 21." (see *Slough*, per Lady Hale at para 31 citing *R (Wahid) v Tower Hamlets London Borough Council* [2002] LGR 545, para 30),

Only the first and third conditions are in issue in this case.

8. Secondly, it is clear that the words "not otherwise available…" in section 21(1)(a) govern "care and attention", not "accommodation" (*Slough*, para 16, per Lady Hale; para 50-52, per Lord Neuberger of Abbotsbury). It is equally clear now (whatever the intention of the framers of the 1948 Act) that ordinary, as opposed to special, accommodation, is not excluded:

> "It may well be that those who drafted section 21(1)(a) in 1948 assumed that it only applied to people who needed extra care and attention which could not be provided in their own homes… Be that as it may, we are required, by [the *NASS* case], to accept that people who need care and attention which could be provided in their own homes, if they had them, can fall within section 21(1)(a)." (*Slough*, para 30, per Lady Hale)

9. Finally, the national scheme is designed to be a scheme of "last resort". The regulations require the Secretary of State, in deciding whether an asylum seeker is destitute, to take into account any other support available to the asylum seeker, including support available under section 21 of the 1948 Act (Asylum Support Regulations 2000 (SI 2000/704), reg 6(4)(b); *Slough*, para 27). Conversely, the local authority, in answering the questions raised by that provision, must disregard the support which might hypothetically be available under the national scheme (see eg *R (SO) v London Borough of Barking and Dagenham* [2011] 1 WLR 1283, para 40).

The facts

10. SL, who is now aged 22, arrived in this country in 2006. He claimed asylum, because of fear of persecution in Iran on account of his sexual orientation, but the claim was refused in January 2007. He became homeless in October 2009. Following his attempted suicide in December 2009, SL was admitted as a patient at the St Charles Hospital Mental Health Unit and was discharged in April 2010. He was diagnosed as suffering from depression and post-traumatic stress disorder. Since then, his condition has been kept under review, and various psychological

and other assessments have been carried out. Continuing supervision was provided by his "care co-ordinator", Mr Adam Wyman, a social worker employed by the council. SL was accommodated at the council's expense pursuant to an interim order made by Saunders J on 16 April 2010 until April 2011, when he began to be accommodated under housing legislation following the grant of indefinite leave to remain.

11. There is no material dispute as to SL's state of health at the time of the relevant decision. An occupational therapist's report prepared in March 2010 had concluded that he was independent in all self-care needs, had no cognitive or motor difficulties, and was sociable and able to form positive relationships. Mr Wyman himself had found that SL was "an intelligent and creative young man", and that "his problems centred round his post-traumatic stress disorder, depression and anxiety". He had concluded

> "Certainly S's mental state is fluctuating and he continues to experience genuine emotional distress, including symptoms of depression, anxiety and low confidence. Unfortunately, S also exhibits broadly emotionally immature and histrionic personality symptoms that combine with his distress to put him at some risk of self-harm. In my view, however, this risk does not warrant the need for S to be looked after. In my experience, and also the view of Dr Clarke, S's consultant at St Charles, confirms that such support will likely be counter effective to that which would be considered therapeutic, associating in S's mind his recovery with the provision of dedicated mental health services, rather than coming to understand his responsibilities (with the availability of social work and counselling services) to manage both the distress he is experiencing and the set of (difficult) social circumstances he is currently facing ... He will continue to receive social work support if he will accept it."

12. On 14 April 2010 the council gave notice of its decision that SL was not in need of care and attention for the purpose of section 21(1)(a) of the 1948 Act. The letter stated that social work support would be available for SL if he wanted it; that such support would be in the form of practical assistance in arranging activities for him during the day, and also monitoring his mental state at regular appointments which would not involve visits to his home (unless a total absence of contact with any member of the Community Mental Health Team led to concerns about his mental health).

13. The arrangements subsequently put in place for SL are described in the judgment of Laws LJ [2012] PTSR 574 (paras 11-14). They included links with "counselling groups", who were organisations working with gay men and women,

and regular meetings with a "befriender" (under a service provided by the council) who saw him once a week and took him "to activities he enjoys". Laws LJ summarised the position:

> "13. Looking at the factual material in the round, the support furnished by the local authority may be summarised much as Mr Knafler summarised it: at his weekly meetings with the claimant the care co-ordinator Mr Wyman offers advice and encouragement and generally monitors his condition and progress. He has also been instrumental in arranging contact (or the renewal of contact) with the counselling groups to which I have referred, and the claimant's befriender."

He noted that SL also received medical attention including prescribed medicines, but accepted that this was excluded from consideration by section 21(8) of the 1948 Act.

The authorities

14. Laws LJ reviewed the line of cases in the higher courts following *R v Hammersmith and Fulham London Borough Council, ex p M* (1997) 30 HLR 10, and the enactment of the 1999 Act. As he explained, the courts' attempts to draw a line between section 21(1)(a) of the 1948 Act and the national scheme had led to a distinction between the "able-bodied destitute" and the "infirm destitute", the former but not the latter being excluded from consideration under section 21(1)(a).

15. Shortly after the enactment of section 21(1A), its effect was considered by the Court of Appeal in *R v Wandsworth London Borough Council, ex p O* [2000] 1 WLR 2539 ("*ex p O*"). The applicants were over-stayers with no right to accommodation unless they could bring themselves within section 21(1)(a) of the 1948 Act. They both had health problems and were destitute. The court rejected an argument that they were excluded from consideration under section 21(1)(a) by virtue of subsection (1A). Simon Brown LJ (with whom Hale and Kay LJJ agreed) summarised the applicant's argument which he accepted:

> "[I]f an applicant's need for care and attention is to any material extent made more acute by some circumstance other than the mere lack of accommodation and funds, then, despite being subject to immigration control, he qualifies for assistance. Other relevant circumstances include, of course, age, illness and disability, all of which are expressly mentioned in section 21(1) itself. If, for

> example, an immigrant, as well as being destitute, is old, ill or disabled, he is likely to be yet more vulnerable and less well able to survive than if he were merely destitute." (p 2548F-G)

16. This was followed in *R (Mani) v Lambeth London Borough Council* [2003] EWCA Civ 836, [2004] LGR 35. The applicant, a destitute asylum seeker, suffered from a disability to one leg which impaired his mobility and led to the need for help in tasks such as bed-making, cleaning and carrying shopping. The council disclaimed responsibility on the grounds that his needs were not such as to require the provision of accommodation. The courts disagreed. At the beginning of his judgment Simon Brown LJ adopted Wilson J's formulation of the relevant question:

> "Does a local authority have a duty to provide residential accommodation for a destitute asylum seeker who suffers a disability which, of itself, gives rise to a need for care and attention which falls short of calling for the provision of residential accommodation?" (para 1)

He summarised the authority's argument:

> ". . . the care and attention referred to means care and attention of a kind calling for the provision of residential accommodation. Unless the applicant's disability or infirmity is such as to give rise to an accommodation-related need for care and attention, it cannot be a disability or infirmity entitling the applicant in any circumstances to subsection 21 accommodation." (para 16)

He rejected that argument and answered the question posed by Wilson J in the affirmative. Although echoing the doubts which he had expressed in the *NASS* case (see below), Simon Brown LJ thought that the council were "well and truly caught in the coils of the existing authorities", and, like Wilson J, he felt bound to apply the logic of his own judgment in *ex p O* (para 20).

17. In the *NASS* case, the applicant was at the relevant time an infirm destitute asylum seeker, suffering from spinal cancer, and living with her 13 year old daughter. The dispute arose when NASS refused responsibility for the cost of her accommodation, and the council began judicial review proceedings. It is helpful to refer to the statement of assessed needs as described by Simon Brown LJ in the Court of Appeal (para 3):

> "Mrs Y-A is not merely destitute but suffers also from spinal myeloma for which she has been, and continues to be, treated at St Mary's Hospital, Paddington. On 23 November 2000, the appellant Council's social services department assessed her as requiring (on her discharge from hospital) assistance from a carer with her mobility indoors and outdoors, with transfer between bed, chair, bath and wheelchair, and with personal care in respect of washing, dressing and toilet. She also requires accommodation with disabled access and its own bathroom as close to St Mary's Hospital as possible and which has at least two rooms, one of them large enough to allow a carer to work around her."

Unsurprisingly, on these facts, there was no dispute that she was in need of "care and attention". The only issue was whether it was "otherwise available…"

18. Lord Hoffmann summarised the effect of section 21(1A):

> "The use [in section 21(1A) of the 1948 Act] of the word 'solely' makes it clear that only the able bodied destitute are excluded from the powers and duties of section 21(1)(a). The infirm destitute remain within. Their need for care and attention arises because they are infirm as well as because they are destitute. They would need care and attention even if they were wealthy. They would not of course need accommodation, but that is not where section 21(1A) draws the line." (*NASS*, para 32)

19. He rejected the council's argument that the applicant's need for care and attention could be satisfied in private accommodation and did not entail a need for local authority accommodation:

> "The difficulty about this argument is that it seems to me to run counter to the reasoning in *R v Hammersmith and Fulham London Borough Council, Ex p M* 30 HLR 10. The able bodied destitute asylum seekers in that case would never have been given Part III accommodation if they had not been subject to immigration control. They would have been given income support and Housing Act accommodation. They had to be given accommodation because otherwise there was nowhere else they could receive care and attention. Mr Pleming did not challenge the correctness of *Ex p M* and I do not think it would be open to him to do so, because the whole of Part VI of the 1999 Act proceeds on the assumption that it is correct. But the present seems to me an a fortiori case." (para 43)

20. At the time that the *NASS* case came before the House of Lords, *Mani* had been decided at first instance but had not reached the Court of Appeal. In the *NASS* case itself, in the Court of Appeal, Simon Brown LJ had expressed concerns about the unforeseen implications of his judgment in *ex p O* (echoed by Lady Hale in *Slough*, paras 27). Lord Hoffmann noted these concerns (para 46). He also summarised the criticisms made by counsel of the decision in *ex p O* in the light of the first instance judgment in *Mani*:

> "Mr Pleming said that this case (*Mani*) demonstrated the absurd consequences of the decision of the Court of Appeal. If Mr Mani had been an ordinary resident, his disability would never have entitled him to accommodation under a statute intended to provide institutions for the old and retreats for the mentally handicapped. His entitlement as found by Wilson J arises simply from the fact that he is an asylum seeker. Such a conclusion is inconsistent with the policy of having a national support system specifically for asylum seekers. Furthermore, the decision undermines the policy of dispersal followed by NASS, which is intended to prevent asylum seekers from gravitating to London boroughs or other local authority areas of their choice. An asylum seeker who can produce a disability, physical or mental, which makes his need for care and attention 'to any extent more acute' than that which arises merely from his destitution, can play the system and secure accommodation from the local authority of his choice." (para 48)

21. Lord Hoffmann accepted that these concerns were "not without substance", but thought that they did not arise in the case before them:

> "But the issues before your Lordships are narrow. The present case has been argued throughout on the footing that Mrs Y-Ahmed has a need for care and attention which has not arisen solely because she is destitute but also (and largely) because she is ill. It is also common ground that she has no access to any accommodation in which she can receive care and attention other than by virtue of section 21 or under Part VI of the 1999 Act…." (para 49)

Accordingly, it was not necessary in the *NASS* case to decide the correctness of the test laid down in *ex p O*, and applied in *Mani*, for determining whether the claimant's need had arisen "solely because he is destitute". Lord Hoffmann declined to express any view on this point, because it would affect the rights of everyone subject to immigration control, whether an asylum seeker or not (para 50).

22. In the *Slough* case, the principal issue was the meaning of the expression "care and attention". The claimant, who was HIV positive, and needed various prescribed medicines and a refrigerator in which to store them, was held not to be within section 21(1)(a) of the 1948 Act. As already noted, Lady Hale (who gave the leading speech) reviewed the history of the legislation and the authorities. Concerning the expression "care and attention", she noted the submissions (and concessions) of Mr Howell, for the council :

> "Mr Howell argues that there must be some meaningful content in the need for care and attention. He was at first disposed to argue that it must mean care and attention to physical needs, such as feeding, washing, toileting and the like, and not simply shopping, cooking, laundry and other home help type services. But he accepted that it had also to cater for people who did not need personal care of this sort but did need to be watched over to make sure that they did not do harm to themselves or others by what they did or failed to do. The essence, he argued, was that the person needed someone else to look after him because there were things that he could not do for himself…." (para 31)

She rejected his first approach as incompatible with the authorities and with practice over the years. It was also clear from a comparison with other statutes that "care and attention" was a wider concept than "nursing or personal care" (para 32).

23. She then gave her own view:

> "I remain of the view which I expressed in *R (Wahid) v Tower Hamlets London Borough Council* [2002] LGR 545, para 22, that the natural and ordinary meaning of the words 'care and attention' in this context is 'looking after'. Looking after means doing something for the person being cared for which he cannot or should not be expected to do for himself: it might be household tasks which an old person can no longer perform or can only perform with great difficulty; it might be protection from risks which a mentally disabled person cannot perceive; it might be personal care, such as feeding, washing or toileting. This is not an exhaustive list. The provision of medical care is expressly excluded…" (para 33)

24. That approach was consistent with the authorities and "draws a reasonable line between the 'able bodied' and the 'infirm'". It was consistent in particular with *Mani*, of which she said:

> "That case [i.e. *Mani*] was argued on the assumption that the claimant did have a need for care and attention, but not a need which required the provision of residential accommodation. Mr Mani had one leg which was half the length of the other. He had difficulty walking and when in pain he could not undertake basic tasks such as bed-making, vacuum cleaning and shopping. He did need some looking after, going beyond the mere provision of a home and the wherewithal to survive." (para 34)

She noted a possible discrepancy with the statement of Lord Woolf MR in *ex p M* (30 HLR 10, 21) that the authorities could "anticipate the deterioration which would otherwise take place" and intervene before a person's health had been damaged. That was to be interpreted, not as giving power to intervene before there was a need for care, but as recognising the need for "some sensible flexibility", allowing the authorities to intervene before "a present need… becomes a great deal worse" (para 35).

25. Lord Neuberger agreed, adding:

> "As for 'care and attention', while again it is right to caution against the risks of reformulating the statutory language, it appears to me that Hale LJ was right to say that 'in this context', the expression means 'looking after' and that 'ordinary housing is not in itself "care and attention"' - see *R (Wahid) v Tower Hamlets London Borough Council* [2002] LGR 545, para 32. I do not consider that 'care and attention' can extend to accommodation, food or money alone (or, indeed, together) without more. As a matter of ordinary language, 'care and attention' does not, of itself, involve the mere provision of physical things, even things as important as a roof over one's head, cash, or sustenance. Of course, if a person has no home or money, or, even more, if he has no access to food, he may soon become in need of care and attention, but, as already explained, that is beside the point." (para 56)

26. Finally I should refer to the judgment of Laws LJ himself in *R (Zarzour) v Hillingdon London Borough Council* [2009] EWCA Civ 1529, on which he relied in the present case. The applicant was an asylum seeker awaiting a decision on his claim. He was totally blind, and needed help with dressing and laundry, with finding his way around his accommodation, and with shopping; he could not go out safely on his own. The judge upheld his claim to judicial review, and the Court of Appeal agreed. Laws LJ said:

> "[T]he real question here is whether the council's own findings... compel a conclusion that the claimant was in need of care and attention within the meaning of section 21(1)(a) or, to put it in conventional public law terms, whether that conclusion was one which, on the facts, no reasonable council could reach." (para 13)

Applying the approach of Lady Hale in the *Slough* case, he agreed that the applicant was in need of "care and attention", and that it was at least in part "accommodation-specific" (para 18). But he added:

> "It is … important to note that it has been accepted in [*Mani*], approved by Lady Hale at paragraph 34 of [*R (M) v Slough BC*], and in [*NASS*] that the need of care and attention spoken of in section 21 was not such as necessarily to call for the provision of residential accommodation notwithstanding the fact that such provision is made by the statute the principal medium for meeting the need, and notwithstanding the further fact that, as other parts of Part III of the 1948 show, section 21 typically entails a move into local authority accommodation." (para 18)

The courts below

27. At first instance, Burnett J dismissed the application for judicial review. As is now common ground, he erred on one point (para 18), in that he took account of the Secretary of State's acceptance of responsibility to accommodate under the national scheme. However, this does not seem to me to undermine the remainder of his reasoning on the two live issues. He concluded that, important as was the social work support to SL's well being, it did not amount to "care and attention" for the purposes of section 21(1)(a) of the 1948 Act:

> "To suggest that the claimant needs 'looking after' would stretch the meaning of those words beyond their proper limit. In my judgment, it would be more accurate to say that the support that the claimant needs amounts to keeping an eye on him. That is a rather different matter. It imports the notion that whilst keeping an eye on him, if circumstances change, different or further interventions might become necessary. It is not, however, in my view, care and attention." (para 31)

On the other issue, he noted the rejection, in the *NASS* case, of the submission that section 21 did not apply where the care and attention could be provided in the

claimant's own accommodation. However, he thought the argument in the present case was different, because –

> "Assistance to this claimant is provided outside of his home, wherever that home happens to be. It is provided when he visits the Abbey Road Centre. Mrs Y-Ahmed [the claimant in *NASS*] needed the care in her own home. She had no home." (para 19)

Similarly, the applicants in *ex p M* "had to be housed under the 1948 Act to enable them to receive the care and attention that they needed" (para 21). That was not so in respect of SL.

28. In the Court of Appeal, Laws LJ reached the opposite result on both issues. He dealt shortly with the care and attention issue. Having quoted the Burnett J's conclusion, he said:

> "22. …The judge has, I think, understated the nature of the support provided by the local authority through Mr Wyman. As Mr Knafler submitted, Mr Wyman is doing something for the claimant which he cannot do for himself: he is monitoring his mental state so as to avoid if possible a relapse or deterioration. He is doing it, no doubt, principally through their weekly meetings; but also by means of the arrangements for contact (or the renewal of contact) with the two counselling groups, and with the befriender. It is to be noted that care and attention within the subsection is not limited to acts done by the local authority's employees or agents. And I have already made it clear that the subsection does not envisage any particular intensity of support in order to constitute care and attention.
>
> 23. I acknowledge that the question is to some extent a matter of impression; and also that the claimant must show that the local authority's determination was not open to a reasonable decision-maker… But in my judgment that test is met. The support provided by the local authority to the claimant qualifies as care and attention."

29. He regarded the second issue as "altogether more problematic" (para 24ff). He had earlier identified certain "broader questions" left unresolved by the speeches in *Slough*:

> "Must it be shown that the necessary care and attention cannot be given without the provision of residential accommodation? Or

> should the expression be construed as meaning that the provision of accommodation is reasonably required in order for care to be furnished in a way that fully meets the claimant's needs?... Or are there other possible meanings?" (para 15)

Of the cases following *ex p M* and the 1999 Act, he said:

> "…What has happened since is that the cases seem to have proceeded on the basis that all destitute persons are liable to be accommodated under section 21(1)(a) unless they are able bodied. Only the 'able bodied' destitute are excluded by section 21(1A). There is, so to speak, no undistributed middle between the two subsections." (para 27)

He cited the test adopted by Simon Brown LJ in *ex p O* (para 15 above), which in his view –

> "… reflects, indeed exemplifies, the division of destitute asylum seekers into two mutually exclusive classes, able-bodied and infirm. All members of the first class are covered by section 21(1A), and all members of the second by section 21(1)(a); there is no third class, no undistributed middle." (para 36)

He noted (para 32) that in the *NASS* case Lord Hoffmann had declined to comment on the correctness of the decision in *ex p O* because of its wide implications. Accordingly, the approach in *ex p O* must be taken as remaining the law for his purposes, there being nothing in *Slough* to suggest otherwise (para 35).

30. Following his own judgment in *Zarzour*, Laws LJ accepted that there must be "at least some nexus" between the care and attention and the accommodation (para 34). However, he thought that the strict distinction drawn by the cases between able-bodied and infirm destitute applicants gave no weight to the third criterion in section 21(1)(a) of the 1948 Act – "not otherwise available" (para 37). He continued:

> 38. However some force must be given to those words. The undistributed middle cannot be quite what it seems. Now, a nexus between a claimant's destitution and his infirmity may mean different things. At para 15 above I suggested two possible ways in which the expression 'care and attention which is not otherwise available' might be understood. First, it might mean that the necessary care and

attention unequivocally requires the provision of residential accommodation. Secondly, it might mean that the provision of accommodation is reasonably required in order for care to be furnished in a way that fully meets the claimant's needs. As I stated, Mr Knafler, supported by the interveners, urges the latter approach. A third possibility, though perhaps little more than a variant of the second, would be that care and attention is not 'otherwise available' unless it would be reasonably practicable and efficacious to supply it without the provision of accommodation.

39. In my judgment this third sense of 'not otherwise available' most closely reconciles the statutory condition which those words exemplify with the exhaustive division of destitute asylum seekers between the infirm and the able bodied – the undistributed middle. As I have shown, this court in *R (Mani) v Lambeth London Borough Council* [2004] LGR 35 rejected the local authority's submission that care and attention in section 21(1)(a) means "care and attention of a kind calling for the provision of residential accommodation". I take that submission in effect to mirror the first of the three meanings I have identified. As Simon Brown LJ indicated in *Mani's* case, it cannot stand with the other authorities, not least *R v Wandsworth London Borough Council, Ex P O* [2000] 1 WLR 2359. But the second meaning, favoured by Mr Knafler and the interveners, is in my judgment too far distant from the statutory language. The subsection's terms do not suggest a legislative policy by which accommodation is to be provided in order to maximise the effects of care and attention. However the third meaning, that care and attention is not otherwise available unless it would be reasonably practicable and efficacious to supply it without the provision of accommodation, can in my judgment live with existing authority. Indeed it is, I think, an implicit assumption made in the course of the learning's evolution."

31. He made clear that his conclusion was one constrained by the authorities, rather than arising from his own view of the statutory language:

"41. I should say, however, that I am troubled by this conclusion as to the proper interpretation of section 21(1)(a). The natural and ordinary meaning of the statutory words seems to me to be closer to that advanced but rejected in *Mani's* case – 'care and attention of a kind calling for the provision of residential accommodation', so that the need for care and attention is 'accommodation-related' (*Mani's* case [2004] LGR 35, para 16): the first of the three meanings I have identified. But the learning, so much of whose focus has been on the

> ‘inverted and unseemly turf war between local and national government’, has barred such a construction.”

32. Having referred again to the services provided by Mr Wyman, he concluded:

> “On the view of the law which I favour the question is whether it would be reasonably practicable and efficacious, for the purpose in hand, to supply these services without the provision of accommodation; and in asking the question the assumption has to be made that the claimant is destitute (because the potential availability of NASS accommodation has to be ignored). Approaching the matter thus, the question admits of only one sensible answer. Given the evidence of the claimant’s condition which was before the local authority it would, as Mr Knafler submitted…, be absurd to provide a programme of assistance and support through a care co-ordinator "without also providing the obviously necessary basis of stable accommodation.” (para 44)

33. As I read the judgment, the interpretation adopted by Laws LJ was his attempt to reconcile the effect of the authorities which were binding on him, with the words of section 21(1)(a). The requirement that the care and attention should be not merely available, but “practical and efficacious”, was necessary to offer a logical explanation, consistent with those authorities, for the inclusion of the “infirm destitute” as a class within section 21(1)(a), whether or not the needs of particular individuals were “accommodation-related” in the sense discussed in *Mani.*

Submissions

34. I turn to the submissions to this court. I shall not attempt more than a short summary of what I understand to be the main points, in over 100 pages of written submissions by the parties and the interveners, as developed in oral submissions.

35. Mr Howell QC, for the council, and Mr Knafler QC for SL, have both shown notable industry in researching the highways and byways of the legislative history, going back even to the presentation of the National Assistance Bill to Parliament (by Mr Aneurin Bevan MP) in November 1947. I hope I shall be forgiven for not following them on that journey. It seemed a distraction from the task of construing section 21(1)(a) in the light of its modern context, and of the relevant authorities, all of which are relatively recent. Such emphasis on the

history is unlikely to be helpful in relation to provisions which must be read in the light of changing social conditions (see *Wahid*, para 31), particularly where (as here) they have been forced into service to deal with a problem wholly unforeseeable at the time of the passing of the Act. Lady Hale's speech in the *Slough* case gives us all the history we need to understand the evolution of the statute and its present legal and social context. It is in that context that the simple statutory words must be interpreted and applied.

36. Confined to their essentials, the respective submissions can I hope be fairly summarised as follows. Mr Howell submitted that:

i) Monitoring (or assessing) an individual's condition at a weekly meeting is not itself "care and attention" for this purpose. It is rather a means of ascertaining what "care and attention" or other services (if any) the individual may need in the future.

ii) Care and attention means more than monitoring, or doing something for a person which he cannot do for himself. As Dunn LJ said in the comparable statutory context of attendance allowance (*R v National Insurance Commissioner ex p Secretary of State for Social Services* [1981] 1 WLR 1017 at 1023F) the word "attention" itself indicates –

> "something involving care, consideration and vigilance for the person being attended… a service of a close and intimate nature."

iii) On the second issue, the services provided by the council, other than accommodation, could be provided under other statutory provisions; they were therefore "otherwise available", and thus excluded from consideration by section 21(8) of the 1948 Act.

iv) Alternatively, in line with the reservations expressed by Laws LJ (para 41), and contrary to the decision of the Court of Appeal in *Mani*, the court should hold that the section applies, not to all those who need care and attention, but only to those who have an "accommodation-related need", that is those who need care and attention "of a kind which is only available to them through the provision of residential accommodation" (*Mani*, para 16).

v) In any event, as the judge found, there was no link between any need for accommodation and the services needed by SL, which were being

provided wholly independently of the place where SL was or might be living.

37. Mr Knafler submitted in summary that:

i) "Care and attention" or "looking after" included not only intimate personal care, but any other forms of personal care or practical assistance. It is enough, in Lady Hale's words, that the council is "doing something" for the person being cared for "which he cannot or should not be expected to do for himself". Monitoring SL's mental state was indeed "doing something" for him, and was no different in principle from "watching over" as described by Mr Howell's concession in *Slough*.

ii) "Care and attention" is not an "accommodation-related need". Care and attention can be provided to persons in residential accommodation under section 21(1)(a), and also to persons in their own homes under section 29 or other enactments. Longstanding local authority practice is to provide care and attention in residential accommodation when it can no longer be provided reasonably practicably and efficaciously in a person's home, or elsewhere, having regard to all the circumstances, including cost.

iii) "Not otherwise available" means, as Laws LJ held, not otherwise available in a reasonably practicable and efficacious way. In this case, SL needed care and attention because he needed accommodation, basic subsistence, personal care and practical assistance. That "package" was not available at all, otherwise than by the provision of residential accommodation. Alternatively, looking simply at the care he needed for his mental illness, and given that he was homeless and destitute, the necessary care was not available to him in any reasonably practicable and efficacious way, otherwise than by providing him with accommodation as a stable base.

38. The written submissions for the two interveners, Mind and Freedom From Torture, supported by evidence from expert witnesses, sought generally to uphold the approach of the Court of Appeal, and to counter some of the arguments put forward by the council. I note the following points:

i) "Care and attention" must be interpreted in the light of modern medical research, in particular giving equal weight to the needs of

those with mental health problems as to those with physical health problems, and attributing to "social recovery" as much importance as "clinical recovery". In that context it should be read as including all the services directed to monitoring a person's mental health, preventing decline and promoting recovery, and facilitating independence and social inclusion. The services provided by the council to SL fell into these categories, and were thus properly accepted by the Court of Appeal as coming within section 21(1)(a) of the 1948 Act.

ii) The Court of Appeal's approach to the "nexus" issue rightly reflected the important role of residential accommodation in securing the effective provision of care and attention to people with mental health problems. Delivering effective care to someone who does not have stable accommodation is "almost impossible". Lack of such accommodation can aggravate the problems and lead to the need for more intensive intervention or hospitalisation.

iii) Section 21(1)(a) of the 1948 Act should be interpreted in the light of the UN Convention on the Rights of Persons with Disabilities (ratified by the UK in June 2009). Article 26 of that treaty, in particular, requires States Parties to take effective measures to enable those with disabilities to "to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life".

iv) These considerations apply particularly to victims of torture, for whom relevant care includes psychological counselling and support provided outside accommodation, and for whom stable and appropriate accommodation are essential to make any such care effective.

Discussion

39. Applying the agreed reformulation of section 21(1)(a) of the 1948 Act, there were two questions for the council: (1) was SL in need of care and attention? (2) if so, was that care and attention "available otherwise than by the provision of accommodation under section 21"? They answered the first in the negative, and the second in the affirmative. The issue for the courts, applying ordinary judicial review principles, was whether they were reasonably entitled to take that view. In agreement with the judge on both issues, I would hold that they were.

40. In reaching this conclusion I do not in any way seek to question the evidence of the interveners as to the importance of the services they describe, including stable accommodation, both for those with mental health problems generally, and for victims of torture in particular, nor the relevance in that context of the UN Convention and the other texts to which they refer. However, acknowledgement of the importance of the services does not compel the view that they fall within the responsibilities imposed on local authorities by section 21(1)(a) of the 1948 Act. That must depend on the true construction of the words of the section in their context.

41. On the first issue, authoritative guidance as to the meaning of the expression "care and attention" is given by Lady Hale's speech in the *Slough* case. I would also read Lord Neuberger's speech as offering some helpful elaboration of the same idea. Mr Howell asked us to adopt a more restrictive approach, put in various ways, but in substance limiting it to personal care, or service "of a close and intimate nature". These submissions seemed to turn the clock back not just on previous authority, but on his own concessions (albeit, on behalf of a different council) in the *Slough* case. I do not accept that such limitations are supported by an ordinary reading of the statutory words. Even if I did, I would not regard it as appropriate for us to revisit an issue considered so recently at the highest level.

42. On the other side, Mr Knafler relies on Lady Hale's reference to "doing something" for the person being cared for "which he cannot or should not be expected to do for himself". Echoing Laws LJ, he submits that those words are wide enough to encompass monitoring SL's condition to avoid a relapse, and arranging contact with counselling groups and befrienders. This approach divorces the concept of care and attention from the overall context of section 21(1)(a). Thus isolated, the term can be given an artificially wide scope. That danger is exemplified by Mr Knafler's argument that care and attention covers all forms of social care and any form of practical assistance. This could lead to absurd results. Providing a refrigerator for *M* would in one sense have been "doing something" for him which (if he had no money) he could not do for himself. But as Lord Neuberger said, "care and attention" does not involve "the mere provision of physical things", even things as important as food and accommodation. It is wrong to elevate the words of Lady Hale in *Slough* that care and attention involves "doing something for the person which he cannot or should not be expected to do for himself" into a compendious statement of all the elements of the "care and attention" or "looking after" concept. These words were merely illustrative of an aspect of the notion of what is meant by the stipulation.

43. Nor in my view is Mr Knafler assisted by Lady Hale's reference in the *Slough* case to "watching over" (an expression attributed to Mr Howell, rather than in terms adopted by her). Even if taken literally, that to my mind implies a more direct and regular involvement than Mr Wyman's weekly sessions, which were

aptly characterised by the judge as "keeping an eye" on him. Mr Wyman's view was that the risk of self-harm did not warrant the need for SL to be "looked after"; rather, he thought that it would be "counter effective" for the council to do so, because it would detract in SL's mind from his responsibility to manage for himself. That assessment cannot be regarded as irrational.

44. What is involved in providing "care and attention" must take some colour from its association with the duty to provide residential accommodation. Clearly, in light of the authorities already discussed, it cannot be confined to that species of care and attention that can only be delivered in residential accommodation of a specialised kind but the fact that accommodation must be provided for those who are deemed to need care and attention strongly indicates that something well beyond mere monitoring of an individual's condition is required.

45. Turning to the second issue, and assuming for this purpose that Mr Wyman was meeting a need for "care and attention", was it "available otherwise than by the provision of accommodation under section 21"? Although it is unnecessary for us to decide the point, or to consider the arguments in detail, it seems to me that the simple answer must be yes, as the judge held. The services provided by the council were in no sense accommodation-related. They were entirely independent of his actual accommodation, however provided, or his need for it. They could have been provided in the same place and in the same way, whether or not he had accommodation of any particular type, or at all.

46. The Court of Appeal's contrary view depended on reading the word "available" as meaning not merely available in fact, but as implying also a requirement for the care and attention to be "reasonably practicable and efficacious". Thus, even the limited services provided by Mr Wyman could not be expected in practice to achieve their objectives unless combined with a degree of stability in his living arrangements. That indeed is the theme of the submissions for the interveners. Such a loose and indirect link is not in my view justified by the statutory language. In a slight variation on the theme, Mr Knafler submitted that in SL's case the provision of accommodation was a critical part of his social rehabilitation and that this was, by definition, an aspect of his "care and attention". However, *Slough* has decided affirmatively that the need for accommodation cannot, in itself, constitute a need for care and attention.

47. As I have explained, the line of reasoning advanced by the interveners and adopted by Laws LJ did not represent his preferred interpretation of section 21(1)(a), but was one to which he felt logically driven by authorities binding on him. At this level, it is open to us to hold that, on this part of section 21, the Court of Appeal took a wrong turning in *Mani* following the lead thought to have been given by *ex p O*. On one view the issue in *ex p O* was simply whether the infirm

destitute were excluded by section 21 (1A), not whether they satisfied the other requirements of section 21(1)(a). However, Simon Brown LJ appears to have endorsed the proposition that if an applicant's need for care and attention is to any extent made more acute by circumstances other than the lack of accommodation and funds, he "qualifies for assistance [under section 21(1)(a)]" ([2000] 1 WLR 2539 at 2548F-H). Similarly, the question in *Mani* was posed in terms which assumed that, if answered in the affirmative, it would result, without more, in the local authority being under a "duty to provide residential accommodation". I agree with Laws LJ that, to this extent, the judgments failed to give proper weight to the words "otherwise available . . ." in section 21(1)(a). In other words, there is a class of people who do have a need for care and attention which is made more acute by circumstances other than the lack of accommodation and funds but who nevertheless do not qualify for accommodation under section 21(2)(a) (what Laws LJ referred to as an 'undistributed middle').

48. The need has to be for care and attention which is not available otherwise than through the provision of such accommodation. As any guidance given on this point in this judgment is strictly *obiter*, it would be unwise to elaborate, but the care and attention obviously has to be accommodation-related. This means that it has at least to be care and attention of a sort which is normally provided in the home (whether ordinary or specialised) or will be effectively useless if the claimant has no home. So the actual result in *Mani* may well have been correct. The analysis may not be straightforward in every case. The matter is best left to the good judgement and common sense of the local authority and will not normally involve any issue of law requiring the intervention of the court.

49. I agree with Burnett J that the present case is clearly distinguishable on the facts from the *NASS* case. That case had been argued on the footing that the applicant's need for care and attention had arisen not solely because she was destitute "but also (and largely) because she (was) ill" Lord Hoffmann, para 49); and it was common ground that she had access to no other accommodation in which she could receive that care and attention (Lord Hoffmann, para 43). Furthermore, her needs (see para 17 above) affected both the nature and the location of the accommodation. In the present case, by contrast, care and attention can be, and is provided, independently of SL's need for accommodation or its location. Indeed, it was not in dispute that similar support services could be provided anywhere in the country.

Conclusion

50. For these reasons, I consider that Burnett J reached the right result for substantially the right reasons. I would accordingly allow the appeal and restore his order.