Neutral Citation Number: [2011] EWHC 2673 (Admin)

Case No: CO/12891/2010
CO/3827/2011

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
SITTING AT NEWCASTLE-UPON-TYNE

The Law Courts
Quayside
Newcastle-upon-Tyne NE1 3LA
Handed Down at the Royal Courts of Justice
Date: 24 October 2011

Before :

LORD JUSTICE MUNBY
MR JUSTICE LANGSTAFF

- -

Between :

(1) R (VC and others)	**Claimants**
(2) R (K)	
- and -	
NEWCASTLE CITY COUNCIL	**Defendant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Interested Party**

- -
- -

Mr Stephen Broach (instructed by Ben Hoare Bell) for the Claimants
Mr Hilton Harrop-Griffiths (instructed by the Legal Services Division) for the Defendant
Ms Deok Joo Rhee (instructed by the Treasury Solicitor) for the Interested Party

Hearing dates: 18-19 April 2011

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Judgment

Lord Justice Munby :

1. These are claims for judicial review in the nature of test cases to determine the relationship between the powers and duties of the local authority (in the present cases, Newcastle City Council) and the Secretary of State for the Home Department in respect of asylum seekers and their families under, respectively, section 17 of the Children Act 1989 and sections 4 and 95 of the Immigration and Asylum Act 1999. In the one case, permission was granted by His Honour Judge Behrens (sitting as a judge of the High Court) on 25 January 2011. In the other case we granted permission on 19 April 2011, during the course of the hearing.

The facts

2. Given that what are in issue here are points of general principle, my summary of the relevant facts – which are said to be typical of a number of other cases involving the same local authority – can be relatively brief.

The facts: VC's case

3. The claimants in this case are VC and her two children, DC and JC.

4. VC arrived in the United Kingdom on 10 December 2002 and claimed asylum at Heathrow Airport. Her claim was refused on 28 January 2003 and her appeal against that decision was dismissed on 12 June 2003. In reliance upon the dismissal of her appeal, the asylum support that VC had previously been receiving under section 95 of the 1999 Act was terminated in September 2003. DC was born on 2 August 2004, at a time when VC was living with the man she subsequently married on 6 December 2004 but from whom she is now separated (they last met in May 2006). On 26 August 2004 VC made further submissions to the Secretary of State (received on 19 October 2004) relying upon Article 3. On 5 November 2004 the Secretary of State rejected the further submissions and refused to treat them as a fresh claim. On 4 January 2005, following receipt of a pre-action protocol letter, the Secretary of State accepted these submissions as a fresh claim, but refused it. VC's appeal was dismissed on 15 April 2005.

5. In August 2005, following allegations of domestic violence, the local authority began to provide the family – VC and DC – with accommodation and support pursuant to section 17 of the 1989 Act. JC was born on 13 October 2005. Child protection investigations which had begun in March 2006 eventually concluded in October 2009 with a determination that no further child protection intervention was required, though accommodation and support services under section 17 continued to be provided.

6. In July 2009 the family made an application under a 'legacy' exercise and in August 2009 entered the legacy queue on the basis that it was a pre-March 2007 case which remained unresolved. On 18 February 2011, VC, DC and JC were granted indefinite leave to remain.

7. In February 2010 the local authority had begun a review of the 49 asylum seeking families (including VC's family) which were being supported under section 17. On 1 June 2010 JC, who suffers from sickle cell problems, was assessed by the local authority as being a child in need within the meaning of section 17. On 23 June 2010 DC was similarly assessed as being a child in need. By a letter dated 9 August 2010 the local authority told VC that she should apply to the Secretary of State for support under section 4 of the 1999 Act and said that if she did not it would not be possible for it to continue supporting her on an indefinite basis under section 17. A similar letter from the local authority dated 2 November 2010 said that if she did not apply for section 4 support within two weeks her section 17 support would be terminated. A similar letter dated 3 November 2010 was sent to her legal advisers, who responded with a letter before action on 11 November 2010. The local authority reiterated its stance in a reply to the letter before action dated 19 November 2010. Following further correspondence, proceedings were issued on 16 December 2010. The local authority filed its acknowledgement of service and summary grounds of defence on 7

January 2011. On 17 January 2011 a further initial assessment by the local authority found JC to be a child in need, indeed, a child with complex needs. On 25 January 2011, as I have said, Judge Behrens granted permission. The local authority filed its detailed grounds on 15 February 2011, followed by the Secretary of State, as the interested party, on 9 March 2011. On 23 March 2011 VC filed her reply and addendum grounds.

8. At the hearing before us, on 18 April 2011, VC and her children were represented by Mr Stephen Broach, the local authority by Mr Hilton Harrop-Griffiths and the Secretary of State by Ms Deok Joo Rhee. I should record that, if not the first time ever, this was the first occasion within living memory when the Divisional Court had sat at Newcastle-upon-Tyne.

9. At the outset of the hearing, and without opposition, we gave VC permission to rely on the further ground raised in her reply and addendum grounds and to adduce certain further evidence.

10. It was only during the hearing that it emerged that the case had been brought on what turned out to be a false basis (see below) and that, on what turned out to be by common consensus the true facts, the point at issue simply did not arise. The claimants' solicitors, however, were also acting for another client, K, whose case, it was agreed, did raise the crucial issue. Being reluctant in the circumstances either to abort the hearing (which by then was well advanced) or to proceed on the basis of a case which did not in fact raise the issue on which all parties were desirous of obtaining judgment, we agreed to make orders permitting K to commence proceedings (on the basis of facts which the parties were able to agree), dispensing with all the subsequent steps that would normally follow, and giving her permission to apply. In the event, the proceedings were issued on 21 April 2011.

The facts: K's case

11. The claimant in this case is K. She has two children, J and B.

12. K arrived in the United Kingdom on 23 December 2004 and claimed asylum at Heathrow Airport. Her claim was refused on 11 January 2005 and her appeal against that decision was dismissed on 21 December 2005. In reliance upon the dismissal of her appeal, the asylum support that K had previously been receiving under section 95 of the 1999 Act was then terminated. J was born on 29 January 2008. On 18 December 2007 the local authority had began to provide support and, from 17 January 2008, accommodation, both under section 17.

13. K submitted a 'legacy' questionnaire to the Secretary of State on 5 May 2009, a further letter in support being sent by her solicitors on 20 October 2009. As at the date of the hearing, her claim was yet to be determined. I understand that she has since been granted indefinite leave to remain.

14. B was born on 5 March 2010, the local authority increasing the level of the family's support accordingly. On 7 June 2010 the local authority wrote to K saying that if she did not apply for section 4 support within two weeks her section 17 support would cease. On 10 June 2010 K applied for section 4 support. Her application was refused on 14 June 2010 and her appeal from that decision was dismissed on 30 June 2010.

(There has been no challenge to that decision.) The local authority wrote again on 3 November 2010, seemingly in ignorance of the fact that K had already made an unsuccessful application, saying that she needed to apply for section 4 support and again threatening to terminate her section 17 support. In the event, it was agreed by the local authority that her section 17 support would continue pending the outcome of VC's claim.

15. It is not said explicitly, but it is implicit, that the local authority has assessed J (and it may be also B) as being a child in need.

The statutory framework

16. Mr Harrop-Griffiths complains, as it seems to me with every justification, that the interaction between 'social services legislation' and 'asylum support legislation' has created what he calls a monstrous labyrinth. He reminds us that in *R (AW) v London Borough of Croydon* [2007] EWCA Civ 266 Laws LJ had described the task of the Court of Appeal on that occasion (para [16]) as involving quite an elaborate paper chase and had commented that

> "the distribution of responsibility which is at the core of this case could surely have been provided much more clearly and simply."

I can only agree. Mr Harrop-Griffiths laments that in many respects the paper chase here is even more elaborate. Again I can only agree.

The statutory framework: local authority support

17. These cases relate, and relate only, to the local authority's powers and duties under section 17. For reasons which will become apparent when, in due course, I come to consider the case-law, it is also necessary, however, to refer to certain other statutory functions of the local authority.

Local authority support: section 17

18. The general duty of the local authority under section 17 is set out in section 17(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."

I emphasise the words "by their families" in section 17(1)(b). The duty under section 17(1) is supplemented by the duty of the local authority under sections 11(1)(a) and (2) of the Children Act 2004 to:

> "make arrangements for ensuring that –
>
> (a) their functions are discharged having regard to the need to safeguard and promote the welfare of children; and
>
> (b) any services provided by another person pursuant to arrangements made by the person or body in the discharge of their functions are provided having regard to that need."

19. 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."

20. The ambit of the local authority's powers under section 17 is spelt out in sections 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."

21. Under section 17(1) there is a duty to assess: *R (G) v Barnet London Borough Council* [2003] UKHL 57, [2004] 2 AC 208, paras [32], [77], [106], [110], [117] (Lords Nicholls of Birkenhead, Hope of Craighead, Millett and Scott of Foscote). However, although there is a duty to assess, there is not, as such, a duty to provide the assessed services: ibid, paras [85]-[94], [106], [110], [135] (Lords Hope, Millett and Scott). A child in need may be eligible for the provision of such services but, as Lord Hope put it (para [85]), "he has no absolute right to them."

22. In this connection it is useful to bear in mind what Lord Hope went on to say (paras [92]-[93]):

> "… Section 17 refers to a range and level of services appropriate to the children's needs. It is broadly expressed, with a view to giving the greatest possible scope to the local social services authority as to what it chooses to do in the provision of these services. Although the services which the authority provides may "include" the provision of accommodation (see section 17(6)), the provision of residential accommodation to rehouse a child in need so that he can live with his family is not the principal or primary purpose of this

> legislation. Housing is the function of the local housing authority, for the acquisition and management of whose housing stock detailed provisions are contained in the Housing Acts. Provisions of that kind are entirely absent from this legislation.
>
> … A reading of that [section 17(1)] as imposing a specific duty on the local social services authority to provide residential accommodation to individual children in need who have been assessed to be in need of such accommodation would sit uneasily with the legislation in the Housing Acts. As Mr Goudie pointed out, it could have the effect of turning the social services department of the local authority into another kind of housing department, with a different set of priorities for the provision of housing for the homeless than those which section 59 of the Housing Act 1985 lays down for the local housing authority."

23. Mr Broach nonetheless sought to argue that there is such a duty, submitting that this is the effect of, in particular, paragraph 4.1 of the *Framework for the Assessment of Children in Need and their Families*. That is statutory guidance issued by the Department of Health in 2000 under section 7 of the Local Authority Social Services Act 1970. It calls for "a realistic plan of action" – a requirement much emphasised in the authorities I refer to below. He has to accept that the *Assessment Framework* featured in the argument before the House (see at pages 211, 214), but, he says, its provisions were not addressed by either Lord Hope or Lord Millett or Lord Scott in their speeches. So, he submits, it is open to us to find that the duty exists, albeit derived from the *Assessment Framework* and section 11 of the 2004 Act rather than section 17 of the 1989 Act alone.

24. In effect this is no more than a thinly veiled attempt to persuade us that on this point the decision of the House was *per incuriam*. That is no more open to us than it is to the Court of Appeal: see the magisterial rebuke administered by Lord Hailsham of St Marylebone LC to Lord Denning MR in *Broome v Cassell & Co Ltd v Broome* [1972] AC 1027, 1054. Nor, in my judgment, is Mr Broach's alternative argument any the more open to him, namely that the duty, although not absolute in all circumstance, nonetheless arises where delivery of the assessed services is feasible having regard to the local authority's available resources.

25. Any refusal to provide assessed services is, of course, amenable to challenge by way of judicial review in accordance with recognised principles of public law, one of which is that discretionary statutory powers must be exercised to promote the policy and objects of the statute: *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, 1030. In this context, as Dyson LJ remarked in *R (M) v Gateshead Metropolitan Borough Council* [2006] EWCA Civ 221, [2006] QB 650, para [42], "The broad policy and objects of Part III of the Children Act 1989 are that local authorities should provide support for children and families." Moreover, in certain circumstances Article 8 or even Article 3 may be engaged: see *R (Kiana and Musgrove)* [2010] EWHC 1002 (Admin), para [41] and, more generally, *R (Clue) v Birmingham City Council (Shelter intervening)* [2010] EWCA Civ 460, [2011] 1 WLR 99.

26. Furthermore, where the assessment is to the effect that there *is* a need for services, any decision not to provide the assessed services will no doubt, and not least because a child is involved, be subjected to strict and, it may be, sceptical scrutiny, particularly if there is no available argument based on lack of resources: cf, *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 WLR 148, paras [33], [44], [46], and *Lee v Secretary of State for the Home Department* [2011] EWCA Civ 348, paras [11]-[15].

27. But none of this is to say that there is, as such, a duty to provide the services and, in my judgment, the decision of the House in *Barnet* is clear authority that there is not.

28. But who is a "child in need"? Section 17(10) provides that:

> "For the purposes of this Part a child shall be taken to be in need if –
>
> (a) he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by a local authority under this Part;
>
> (b) his health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services; or
>
> (c) he is disabled,
>
> and "family", in relation to such a child, includes any person who has parental responsibility for the child and any other person with whom he has been living."

Section 17(11) contains wide definitions of "disabled", "development" and "health" which there is no need to set out.

29. The final words in sections 17(10)(a) and (b) are important. The duties of a local authority do not extend to all children who might be said to be "in need". Apart from a child who is "disabled" in the statutory sense, they apply only to a child who "without the provision for him of services by [the] local authority" will fall within one or other of the statutory criteria. As the Court of Appeal put it in *R (P and Q) v Secretary of State for the Home Department* [2001] EWCA Civ 1151, [2001] 1 WLR 2002, paras [95], [97]:

> "the distinguishing feature of a "child in need" for this purpose is not that he has needs – all children have needs which others must supply until they are old enough to look after themselves – but that those needs will not be properly be met without the provision of local authority social services. … The local social services authority do not have the duty, or even the power, to make a global assessment of a child's needs, still less to determine what would be in the best interests of any individual

> child. The authority have the duty to assess the child's need for their own services."

30. It follows that a child who in the colloquial sense is in need may not be in need in the statutory sense if his relevant needs are being met by some third party, for example, by a family member, by a charitable or other third sector agency or by another statutory body. Thus, as I said in *R (Howard League for Penal Reform) v Secretary of State for the Home Department* [2002] EWHC 2497 (Admin), [2003] 1 FLR 484, paras [150], [156], a case relating to children detained in young offender institutions:

> "the circumstances in which a local authority will be required to exercise its powers under section 17 in relation to a child detained in a YOI … may in the very nature of things be comparatively limited … I do not doubt that very large numbers indeed of the children in YOIs are, in one sense of the phrase, "children in need" – indeed, children in desperate need. It does not follow, however, that they are, in the statutory sense, children whose "needs will not be properly be met without the provision of local authority social services".
>
> … prima facie, there is nothing unreasonable or unlawful about a local authority taking the view that, whilst a child is in a YOI, his or her needs for services would (at least ordinarily) be adequately met by the facilities provided by the Prison Service."

31. An illustration of this principle in operation is provided by *R (S) v Plymouth City Council* [2009] EWHC 1499 (Admin), where the local authority sought, without any objection in principle to its approach, to arrange for the provision of the accommodation which a section 17 assessment had identified as needed for a child and his family, either through the public sector under the Housing Act 1996 or, alternatively, in the private market.

32. Consistently with this, section 17(8) provides that:

> "Before giving any assistance … , a local authority shall have regard to the means of the child concerned and of each of his parents."

33. There is much learning as to how the assessment process is to be undertaken. Mr Broach referred us in this connection to cases such as *R (AB and SB) v Nottingham CC* [2001] EWHC Admin 235, (2001) 4 CCLR 295, *R (J) v Caerphilly County Borough Council* [2005] EWHC 586 (Admin), [2005] 2 FLR 860, *R (G) v Nottingham City Council and Nottingham University Hospitals* [2008] EWHC 400 (Admin), (2008) 11 CCLR 280, *R (S) v Plymouth City Council* [2009] EWHC 1499 (Admin), and *R (B) v Barnet LBC* [2009] EWHC 2842 (Admin), (2009) 12 CCLR 679. I need not go through the cases, for nothing turns on them, except to draw attention to three points.

34. In the first place the authorities, reflecting the requirements of the *Assessment Framework*, emphasise the need for the assessment to embody "a realistic plan of

action." That is an aspect of the duty to assess and, indeed, a critical factor in determining whether that duty has been properly performed. But it does not, as Mr Broach would have it, imply that there is also a duty to implement the plan, in other words to provide the services. These authorities do not, merely because they rightly emphasise the need for a realistic plan of action, qualify what was said by the House in *Barnet*. How can they? *Barnet*, as I have said, makes clear that there is, as such, no duty to provide the assessed services.

35. The second point appears from *R (K) v Manchester City Council* [2006] EWHC 3164 (Admin), (2007) 10 CCLR 87, para [39], which makes clear that the assessment must address not only the child's immediate, current circumstances but also any imminent changes in those circumstances.

36. The third point emerges from *R (B) v Barnet LBC* [2009] EWHC 2842 (Admin), (2009) 12 CCLR 679, where the assessment contemplated the provision of some of the relevant services by an outside agency, in that case Barnardos. The assessment was struck down on the ground that it provided no realistic plan of action for meeting the child's assessed needs, one of the reasons being (para [34]) that the relevant Barnardos project was not yet open. Although this was treated as a reason why the assessment itself was unlawful, it seems to me to illustrate a wider point. If a local authority is to say that a child who would otherwise be, in the statutory sense, a child in need is not, because his relevant needs are being met by some third party, then the authority must demonstrate that the third party is actually able and willing (or if not willing can be compelled) to provide the relevant services.

Local authority support: other statutory powers

37. In certain circumstances, which do not arise in the present cases, a local authority is under a statutory duty to provide accommodation for a child in need: sections 20(1) and 23(1) of the Children Act 1989. In relation to a child accommodated under section 20 or in the care of the local authority (referred to in section 22(1) as a "looked after" child), section 22(3)(a) imposes on the local authority "the duty … to safeguard and promote his welfare". That duty is more onerous than that imposed by section 11 of the 2004 Act in relation to children in need who are not "looked after" children, though it is not as stringent as that imposed on the court under section 1(1)(a) of the 1989 Act. Section 23(6) provides that any local authority looking after a child "shall" make arrangements to enable him to live with his parent (or other person who has parental responsibility) "unless that would not be reasonably practicable or consistent with his welfare."

38. In contrast with children accommodated under section 17, a child accommodated under section 20, in common with all other "looked after" children, is generally speaking, and subject to certain qualifying conditions which there is no need to consider, entitled as a "relevant child" or "former relevant child" as defined in sections 23A(2) and 23C(1) of the 1989 Act to the benefit of the "leaving care" provisions in Part III of the 1989 Act.

39. The only aspect of this which is relevant for present purposes is section 23C(4) which provides that:

> "It is the duty of the local authority to give a former relevant child –
>
> (a) assistance of the kind referred to in section 24B(1), to the extent that his welfare requires it;
>
> (b) assistance of the kind referred to in section 24B(2), to the extent that his welfare and his educational or training needs require it;
>
> (c) other assistance, to the extent that his welfare requires it."

Section 24B(1) empowers the local authority to give assistance in certain circumstances by contributing to expenses incurred by a young person in living near the place where he is, or will be, employed or seeking employment; section 24B(2) empowers the local authority to give assistance in certain circumstances by contributing to expenses incurred by a young person in living near the place where he is, or will be, receiving education or training or by making a grant to enable him to meet expenses connected with his education or training. "Assistance" for this purpose includes the provision of accommodation: *R (SO) v Barking and Dagenham LBC* [2010] EWCA Civ 1101, [2011] HLR 63, para [30].

40. I should refer also to section 21(1)(a) of the National Assistance Act 1948 which provides that:

> "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 … 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."

I need not go into the details but it is common ground that the Secretary of State has issued directions which, so far as material for present purposes, turn the power under section 21(1)(a) into a mandatory – "shall" – duty.

<u>The statutory framework: asylum support</u>

41. Section 95 of the Immigration and Asylum Act 1999 empowers the Secretary of State to support asylum seekers and their dependents. "Asylum seeker" is defined for this purpose by section 94(1) as meaning:

> "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".

Section 4(2) empowers the Secretary of State to support a person (who it is convenient to refer to as a failed asylum seeker):

> "if –
>
> (a) he was (but is no longer) an asylum-seeker, and
>
> (b) his claim for asylum was rejected."

It is important to note (and the significance of this in the present case will become apparent in due course) that section 94(5) provides an extended definition of "asylum-seeker" for this purpose:

> "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."

In other words, the effect of section 94(5) is that if a person who makes an asylum claim has a dependent child under 18 at the date the application is (negatively) determined, that person continues to be treated as an "asylum seeker" for the purposes of Part VI, and thus continues to be eligible for section 95 financial support, until the child reaches the age of 18, notwithstanding that otherwise the parent would be regarded as a 'failed asylum seeker'.

42. Both under section 95 and under section 4, eligibility for support is defined by reference to destitution. Section 95 provides that:

> "(3) For the purposes of this section, a person is destitute if –
>
> (a) he does not have adequate accommodation or any means of obtaining it (whether or not his other essential living needs are met); or
>
> (b) he has adequate accommodation or the means of obtaining it, but cannot meet his other essential living needs.
>
> (4) If a person has dependants, subsection (3) is to be read as if the references to him were references to him and his dependants taken together."

Regulation 6(4) of The Asylum Support Regulations 2000, SI 2000/704, provides that where it falls to the Secretary of State to determine for the purposes of section 95 whether someone is destitute or likely to become so within the period prescribed by regulation 7, he

> "must take into account –
>
> (a) any other income which the principal, or any dependant of his, has or might reasonably be expected to have in that period;

> (b) any other support which is available to the principal or any dependant of his, or might reasonably be expected to be so available in that period; and
>
> (c) any assets mentioned in paragraph (5) … which are available to the principal or any dependant of his … or might reasonably be expected to be so available in that period."

The same definition is applied for the purposes of section 4 by regulation 2 of the Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005, SI 2005/930.

43. Section 54 and Schedule 3 to the Nationality, Immigration and Asylum Act 2002 remove from eligibility for support under sections 4 and 95 of the 1999 Act various asylum seekers or failed asylum seekers, as does section 55 of the 2002 Act. There is no need to explore these provisions in any detail, because they do not apply to prevent the provision of support or assistance to a child (Schedule 3, paragraph 2(1)(b) and section 55(5)(b) respectively) or to prevent the exercise of a power or the performance of a duty if, and to the extent that, it is necessary for the purpose of avoiding a breach of a person's Convention rights (Schedule 3, paragraph 3(a) and section 55(5)(a)).

Asylum support: support for asylum seekers

44. Section 95(1) provides that:

> "The Secretary of State may provide, or arrange for the provision of, support for –
>
> (a) asylum-seekers, or
>
> (b) dependants of asylum-seekers,
>
> who appear to the Secretary of State to be destitute or to be likely to become destitute within such period as may be prescribed."

Section 96 details the manner in which section 95 support may be provided:

> "(1) Support may be provided under section 95 –
>
> (a) by providing accommodation appearing to the Secretary of State to be adequate for the needs of the supported person and his dependants (if any);
>
> (b) by providing what appear to the Secretary of State to be essential living needs of the supported person and his dependants (if any);
>
> …
>
> (2) If the Secretary of State considers that the circumstances of a particular case are exceptional, he may

> provide support under section 95 in such other ways as he considers necessary to enable the supported person and his dependants (if any) to be supported."

45. Section 122 imposes a *duty* where there are dependent children under the age of 18:

> "(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."

46. The Secretary of State is also under the more general duty imposed by sections 55(1)(a) and (2)(a) of the Borders, Citizenship and Immigration Act 2009 to:

> "make arrangements for ensuring that [any functions of the Secretary of State in relation to immigration, asylum or nationality] are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom."

This, again, reflects the obligation of the United Kingdom under Article 3 of the Convention on the Rights of the Child.

<u>Asylum support: support for failed asylum seekers</u>

47. Section 4 provides so far as material as follows:

> "(2) The Secretary of State may provide, or arrange for the provision of, facilities for the accommodation of a person if –
>
> (a) he was (but is no longer) an asylum-seeker, and
>
> (b) his claim for asylum was rejected.
>
> (3) The Secretary of State may provide, or arrange for the provision of, facilities for the accommodation of a dependant of a person for whom facilities may be provided under subsection (2)."

Section 4 continues by conferring on the Secretary of State wide powers to make regulations:

> "(5) The Secretary of State may make regulations specifying criteria to be used in determining –

> (a) whether or not to provide accommodation, or arrange for the provision of accommodation, for a person under this section;
>
> (b) whether or not to continue to provide accommodation, or arrange for the provision of accommodation, for a person under this section.
>
> …
>
> (10) The Secretary of State may make regulations permitting a person who is provided with accommodation under this section to be supplied also with services or facilities of a specified kind.
>
> (11) Regulations under subsection (10) –
>
> (a) may, in particular, permit a person to be supplied with a voucher which may be exchanged for goods or services,
>
> (b) may not permit a person to be supplied with money,
>
> (c) may restrict the extent or value of services or facilities to be provided, and
>
> (d) may confer discretion."

The Immigration and Asylum (Provision of Services or Facilities) Regulations 2007, SI 2007/3627, made pursuant to sections 4(10) and (11), permit the Secretary of State to supply or provide certain specified facilities and vouchers which there is no need for me to particularise.

48. Regulation 3 of the Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005, SI 2005/930, provides that:

> "(1) Subject to regulations 4 and 6, the criteria to be used in determining the matters referred to in paragraphs (a) and (b) of section 4(5) of the 1999 Act in respect of a person falling within section 4(2) or (3) of that Act are –
>
> (a) that he appears to the Secretary of State to be destitute, and
>
> (b) that one or more of the conditions set out in paragraph (2) are satisfied in relation to him.
>
> (2) Those conditions are that –
>
> (a) he is taking all reasonable steps to leave the United Kingdom … ;

> (b) he is unable to leave the United Kingdom by reason of a physical impediment to travel or for some other medical reason;
>
> (c) he is unable to leave the United Kingdom because in the opinion of the Secretary of State there is currently no viable route of return available;
>
> (d) he has made an application for judicial review of a decision in relation to his asylum claim – (i) in England and Wales, and has been granted permission to proceed pursuant to Part 54 of the Civil Procedure Rules 1998 … ;
>
> (e) the provision of accommodation is necessary for the purpose of avoiding a breach of a person's Convention rights … "

The statutory framework: the relationship between local authority and asylum support

49. Most asylum-seekers and failed asylum seekers are excluded from receiving 'mainstream benefits': see section 115 of the Immigration and Asylum Act 1999 and section 185 of the Housing Act 1996. However, and crucially for present purposes, support under section 17 of the 1989 Act (like support under section 21 of the 1948 Act) is not caught by this general exclusion. Accordingly, any exclusion from such support in the case of asylum-seekers or failed asylum seekers and/or their dependent children must be found elsewhere.

50. I go first to section 54 and Schedule 3 to the 2002 Act. The effect of section 54 and Schedule 3, paragraphs 1(1)(a) and (g), is to provide that certain classes of asylum-seeker or failed asylum-seeker defined in Schedule 3, paragraphs 4, 5, 6, 7 and 7A, shall not be eligible for support under section 21 of the 1948 Act (schedule 3, paragraph 1(1)(a)) or under section 17 of the 1989 Act, so far as exercisable in relation to adults (Schedule 3, paragraph 1(1)(g)). However, Schedule 3, paragraph 2(1)(b), provides that paragraph 1 does not prevent the provision of support or assistance to a child and Schedule 3, paragraph 3(a), provides that paragraph 1 does not prevent the exercise of a power or the performance of a duty if, and to the extent that, it is necessary for the purpose of avoiding a breach of a person's Convention rights.

51. Section 21(1A) of the 1948 Act provides that a person to whom section 115 of the 1999 Act applies may not be provided with residential accommodation under section 24(1)(a) of the 1948 Act:

> "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."

Section 21(1B) incorporates for this purpose the definition of destitution in section 95(3) of the 1999 Act. Regulation 6(4) of the 2000 Regulations is applied by regulation 23 when it falls to an authority to determine for the purposes of section 21(1A) of the 1948 Act whether a person is destitute: see regulations 23(1)(a), (2) and (3).

52. More directly important for present purposes, however, is section 122 of the 1999 Act, which provides that:

> "(5) No local authority may provide assistance under any of the child welfare provisions in respect of a dependant under the age of 18, or any member of his family, at any time when –
>
> (a) the Secretary of State is complying with this section in relation to him; or
>
> (b) there are reasonable grounds for believing that –
>
> (i) the person concerned is a person for whom support may be provided under section 95; and
>
> (ii) the Secretary of State would be required to comply with this section if that person had made an application under section 95.
>
> (6) "Assistance" means the provision of accommodation or of any essential living needs.
>
> (7) "The child welfare provisions" means –
>
> (a) section 17 of the Children Act 1989 (local authority support for children and their families)…"

53. The effect of this, as will be appreciated, is to oust the local authority's powers under section 17 of the 1989 Act where the Secretary of State is complying (or there are reasonable grounds for believing that, if asked, the Secretary of State would be required to comply) with section 95. But it is important to note that there is no comparable provision in relation to section 4. In other words, a local authority is potentially in a weaker position in a section 4 case (as here) than in a section 95 case.

The statutory framework: its application to the facts

54. Before turning to consider the case-law it will be convenient to see how the statutory framework applies to the facts.

55. It was only during the course of the hearing that VC's application based upon Article 3 came to light. Prior to that it had been understood on all sides that her only relevant asylum claim had been finally determined on 12 June 2003, *before* the birth of her first child, DC, on 2 August 2004. On that basis, she was a failed asylum seeker in relation to whom the deeming provision in section 94(5) of the 1999 Act did *not* apply. Accordingly, there was no question (so it was thought) of any support for VC and her family under section 95. The question was seen as being whether she was

entitled to support under section 4. The revelation of the Article 3 claim, made *after* DC's birth, showed this analysis to be demonstrably flawed.

56. In a joint note date 20 April 2011 which they helpfully provided for us, counsel agreed that:

i) From the date when VC's Article 3 submissions were accepted as a fresh claim by the Secretary of State (4 January 2005) VC again became an asylum seeker entitled to section 95 support.

ii) As DC had by then been born, section 94(5) applied even though the fresh claim was dismissed. VC therefore retained the status of an asylum seeker until indefinite leave to remain was granted on 18 February 2011.

iii) As a consequence, during the period from 4 January 2005 until 18 February 2011,

a) VC was not eligible for support under section 4 as she was not a failed asylum seeker

b) Subject to satisfying the destitution criteria for eligibility, VC and her children (as her dependants) were eligible for support under section 95;

c) By virtue of section 122(5)(b)(ii) of the 1999 Act the local authority did not have the power to provide VC and her family with accommodation or support under section 17.

In short, VC's claim for judicial review based, however put, on the proposition that the local authority was obliged to provide accommodation and support under section 17, could not have succeeded.

57. In contrast, K's only asylum claim was dismissed on 21 December 2005, *before* the birth of her first child J on 29 January 2008. On that basis, she is a failed asylum seeker in relation to whom the deeming provision in section 94(5) of the 1999 Act does *not* apply. Accordingly, there is no question of any support for K and her family under section 95. The question is whether she is entitled to support under section 4 and/or under section 17.

The case-law

58. I turn to the case-law.

59. The first case is *R (Westminster City Council) v National Asylum Support Service* [2002] UKHL 38, [2001] 1 WLR 2956, where what was in issue was the relationship between the local authority's functions under section 21 of the 1948 Act and the Secretary of State's functions under section 95 of the 1999 Act. Lord Hoffmann gave the main speech. He said (para [38]) that the power under section 95:

> "is *residual* and cannot be exercised if the asylum seeker is entitled to accommodation under some other provision. In such a case, he or she is deemed not to be destitute."

Referring to the 2000 Regulations he said (para [40]):

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

He elaborated (para [41]):

> "The clear purpose of the 1999 Act was to take away an area of responsibility from the local authorities and give it to the Secretary of State. It did not intend to create overlapping responsibilities. Westminster complains that Parliament should have taken away the whole of the additional burden which fell upon local authorities as a result of the 1996 Act. It should not have confined itself to the able bodied destitute. But it seems to me inescapable that this is what the new section 21(1A) of the 1948 Act has done. As Simon Brown LJ said in the Court of Appeal ((2001) 4 CCLR 143, 151, para 29) what was the point of section 21(1A) if not to draw the line between the responsibilities of local authorities and those of the Secretary of State?"

60. Lord Hoffmann summarised his conclusions (para [49]):

> "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. The first question for your Lordships is whether in those circumstances she comes prima facie within section 21(1)(a) and, if so, the second is whether she is excluded by section 21(1A). In my opinion, the answers to these questions are yes and no respectively. The third question is whether the existence of a duty under section 21 excludes Mrs Y-Ahmed from consideration for asylum support. Again, in agreement with the Court of Appeal, I think that the answer is yes."

61. The second case is *R (O) v Haringey LBC and the Secretary of State for the Home Department* [2004] EWCA Civ 535, [2004] HLR 788. Here, what was in issue was the relationship between the local authority's functions under section 21 of the 1948 Act and sections 17 and 20 of the 1989 Act and the Secretary of State's functions under section 95 of the 1999 Act. The case involved an asylum seeking mother and her two children. Carnwath LJ (with whom Rix LJ and Lord Woolf CJ agreed) held, following *Westminster,* that the local authority owed a duty under section 21 to the

mother. But (paras [35], [41]) he held that that duty did not extend to her children. Referring to regulation 6(4) of the 2000 Regulations he said (para [15]):

> "where one is dealing, as we are in this case, with the question whether a person *is* destitute … , the relevant question is simply whether other support *is* available, not whether the Secretary of State might reasonably think it would be available."

He went on (para [17]):

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

62. Applying this approach in the context of the argument that the availability of support under section 21 had the effect of throwing the liability on to the local authority rather than the Secretary of State, Carnwath LJ concluded as follows (para [42]):

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

63. Carnwath LJ then turned to consider the alternative argument that by virtue of section 17 of the 1989 Act the children had for the purposes of section 95(3) the means of obtaining accommodation. Noting (para [44]) that in *Barnet* the House of Lords had held that section 17 did not impose a duty enforceable by individual children, he continued (paras [45]-[46]):

> "Against that background, Miss Laing was right in my view not to press too strongly the suggestion that section 17 could be relied on, as a basis for holding that the children in this case had the means of obtaining accommodation. Indeed, as Mr Harrop-Griffiths points out, if that were its effect it might nullify all those parts of the NASS legislation which are designed specifically to govern the obligations in respect of asylum seekers with children. The terms of section 17 are wide enough for the needs of any children of a destitute asylum seeker to be brought within its scope, and arguably to impose an obligation on the authority to support them as a family.

> Conversely, the specific exclusion of section 17 from cases within the NASS scheme is … a strong indication that the general responsibility for asylum-seeking families rests on NASS not on local authorities …
>
> … It would have been open to Parliament, when amending section 21 so as to exclude children from its scope, to have introduced a specific saving for circumstances where the family needed to be looked at as a whole. The absence of such provision is perhaps another indication that Parliament regarded it as inappropriate, given the new code for support for children and families provided by the 1989 Act."

64. Finally, Carnwath LJ turned to consider the alternative argument based on section 20, read in conjunction with section 23, of the 1989 Act, a provision which, as he observed (para [47]), "undoubtedly does impose on the authority a specific duty to provide accommodation for individual children in need, within the circumstances defined by the section." Rejecting the argument, he said (paras [50]-[51]):

> "… it is an entirely separate duty owed to the child, and unsurprisingly given the context, includes no presumption that the accommodation will be provided with the parent. It may be said to be a form of support which is "available" to the child, but it seems very artificial to describe it as a means by which the family (that is, the asylum seeker and her dependants taken together) have the means of obtaining accommodation within the meaning of section 95(3).
>
> … under section 23, far from the family as a unit having any right to accommodation, the accommodation otherwise available to the parent is simply one of the factors taken into account in deciding how and with whom the child's needs are to be met … section 23(6) does not impose a duty on an authority looking after a child to provide accommodation to a child's parent to enable the child to live with the parent nor does the *Barnet* decision contemplate the use of the Children Act as a means of obtaining family accommodation which was not available under the Housing Acts".

65. He concluded therefore (para [52]) that:

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

His overall conclusion (para [64]) was that:

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

66. The next case is *R (W) v Croydon London Borough Council, R (A) v Hackney London Borough Council* [2005] EWHC 2950 (Admin), (2006) 9 CCLR 252, where what was in issue was the relationship between the local authority's functions under section 21 of the 1948 Act and the Secretary of State's functions under section 4 of the 1999 Act. Lloyd-Jones J observed (paras [51]-[52]):

> "Section 4(2) of the 1999 Act is intended to empower the Secretary of State to provide or arrange for the provision of accommodation to failed asylum-seekers …
>
> By contrast, a very different statutory function is performed by section 21 of the 1948 Act. Its purpose is to meet the needs of those who are in need of care and attention which is not otherwise available to them, by reason of age, illness, disability or any other circumstances. In the case of persons subject to immigration control section 21(1A) applies more restrictive criteria. Nevertheless, the purpose of section 21 remains to meet the needs of those who are assessed to be in such need. The purpose of section 21(1)(a) is not to provide accommodation for those who need accommodation per se but to provide accommodation for those who are in need of care and attention. The provision of accommodation is not an end in itself but the means by which care and attention can be provided."

His conclusion, so far as relevant for present purposes, was (para [56]):

> "where a person is assessed as in need of care and attention under sections 21(1) and (1A), there is a duty on the local authority to exercise its powers or perform its duties to the extent necessary to avoid a breach of Convention rights. It is not open to a local authority to refuse to provide support which it would otherwise be required to provide, on the ground that accommodation could be provided by the Secretary of State under section 4 which would prevent a breach of Convention rights. Section 4 of the 1999 Act is intended to perform a

> different function: the provision of accommodation to able-bodied former asylum-seekers who satisfy the criteria."

His decision was affirmed by the Court of Appeal: *R (W) v Croydon London Borough Council, R (A) v Hackney London Borough Council* [2007] EWCA Civ 266, [2007] 1 WLR 3168.

67. The final case is *R (SO) v Barking and Dagenham LBC* [2010] EWCA Civ 1101, [2011] HLR 63, where what was in issue was the relationship between the local authority's functions under section 23C(4)(c) of the 1989 Act and the Secretary of State's functions under section 95 of the 1999 Act. Tomlinson LJ (with whom Leveson and Jacob LJJ agreed) summarised the problem (paras [32]-[33]):

> "The conundrum which arises is whether, when the local authority is considering whether it is under a duty to provide accommodation under s.23C(4)(c) to a former relevant child asylum seeker, it may take into account the possibility that support may be given by NASS, pursuant to s.95. A similar conundrum arises if an application for support by way of accommodation is first made by a former relevant child asylum seeker to NASS rather than to the local authority. Must the Secretary of State take into account the support which the local authority might reasonably be expected to give, pursuant to s.23C(4)(c)? Unless the circle can be squared, there is the opportunity for each body to decline to give support by reference to the possibility that the other would do so.
>
> The same conundrum arises concerning the inter-relation of the powers and duties of a local authority under s.21 of the National Assistance Act 1948 to provide accommodation to the infirm destitute and the power of the Secretary of State to give support under s.95. It arose in *R (Westminster City Council) v NASS* [2002] 1 WLR 2956."

He accepted the argument (para [37]) that Lord Hoffmann's analysis in *Westminster* applied by way of analogy and that, just as the Secretary of State's power under section 95 was residual, so too, as had been held in *R (W) v Croydon London Borough Council*, was his power under section 4.

68. His conclusion, therefore (para [40]), was that:

> "since the powers under s.95 (and s.4) of the Immigration and Asylum Act 1999 are residual, and cannot be exercised if the asylum seeker (or failed asylum seeker) is entitled to accommodation under some other provision, a local authority is not entitled, when considering [for the purposes of section 23C(4)(c)] whether a former relevant child's welfare requires that he be accommodated by it, to take into account the possibility of support from NASS."

69. As will be appreciated, there is no authority directly bearing upon the case where (as here) what is in issue is the relationship between a local authority's functions under section 17 of the 1989 Act and the Secretary of State's functions under section 4 of the 1999 Act.

The issues

70. Broadly speaking, the question raised for our determination is as to which public authority must take responsibility for providing accommodation and support to children in need within migrant families who are not entitled to support under section 95 of the 1999 Act. The local authority contends that it is entitled to terminate support being provided to families pursuant to section 17 of the 1989 Act on the basis that those families can access support under section 4 of the 1999 Act. By extension, says Mr Broach, the local authority's case is that it would be entitled to refuse to support destitute families eligible for section 4 support.

71. The claimants, supported in part by the Secretary of State, seek to make good three contentions:

i) First, says Mr Broach, at the time when the local authority decided to terminate the claimants' section 17 support, the children were "in need".

ii) Second, he says (and in this he is supported by Ms Rhee), it was unlawful for the local authority to terminate the claimants' section 17 support by reference to the potential availability of section 4 support. That being, so he asserts, the *only* basis for the local authority's decision, it follows, he says, that the decision was unlawful.

iii) Third, he says, a local authority approached by a migrant family seeking accommodation and support must provide such support in order to comply with its obligations under domestic and Convention law and cannot avoid this duty by reference to the potential availability of section 4 support. The duty, if not absolute, at the very least arises whenever the circumstances are such as to trigger the obligations identified in *R (Clue) v Birmingham City Council (Shelter intervening)* [2010] EWCA Civ 460, [2011] 1 WLR 99.

For her part, Ms Rhee seeks to make good a further proposition:

iv) The Secretary of State is entitled to refuse to provide section 4 support to a new applicant family on the basis that they are not "destitute", being entitled to support from a local authority under section 17.

Issues (iii) and (iv) do not, of course, arise directly on the facts of the cases before us. The prior question therefore arises as to whether we should embark upon a consideration of these points at all or whether we should not leave them to be resolved as and when they arise on the facts of a particular case.

The arguments

72. Much of the debate before us was framed in terms of Carnwath LJ's reference to "legal entitlement or enforceable expectation." Mr Broach, as we have seen, sought to

persuade us that section 17 imposes a duty. I have dealt with that submission already. Mr Harrop-Griffiths was very clear in his submissions. The effect of the case-law, he says is that the Secretary of State's power to provide support, whether under section 95 or section 4, can only properly be described as residual if the applicant is *entitled* to equivalent support under some other statutory provision. Both in *R (Westminster City Council) v National Asylum Support Service* [2002] UKHL 38, [2001] 1 WLR 2956, and again in *R (SO) v Barking and Dagenham LBC* [2010] EWCA Civ 1101, [2011] HLR 63, the applicant was entitled to support, because the local authority owed a duty. That is why, he says, in those cases the Secretary of State succeeded.

73. In contrast, he says, the contest in the present cases is not between a duty and a power (which if it was he concedes the Secretary of State would again win) but, at least on the face of it, between a power and a power. Assuming that Parliament did not intend the powers to be exactly equal and therefore overlapping, the task is to determine as a matter of statutory interpretation whose power is dominant and whose is residual. The answer to that question, he submits, is provided by Carnwath LJ's analysis, which demonstrates that it is the section 17 power which is residual. He relies in particular upon the passage in para [17] of Carnwath LJ's judgment which I have already set out. In essence, he says, the Secretary of State cannot take into account support that *may* be provided by a local authority in the exercise of a *power*. Moreover, he says, section 4 creates more than a mere power: the language of section 4(2) is indicative of expectation, if not entitlement; and section 103(2A) of the 1999 Act, which gives a right of appeal against a refusal by the Secretary of State to provide section 4 support, empowers the First-tier Tribunal (Asylum Support) to substitute its own decision for that of the Secretary of State.

74. Mr Broach addressed us in some detail (as did the claimants' evidence) in support of the proposition that there are important practical differences between section 17 and section 4 support, indeed that section 4 support is, as it was put in para 8.18 of the July 1998 White Paper *Fairer, Faster and Firmer – A Modern Approach to Immigration and Asylum*, Cm 4018, support as a "last resort" or, as the Parliamentary Joint Committee on Human Rights put it (Fourteenth Report, June 2004, paras 17-18), "emergency state assistance". As the Deputy Judge expressed it in *R (Kiana) v Secretary of State for the Home Department* [2010] EWHC 1002 (Admin), para [51], it is "deliberately limited in order to minimise the incentive for economic migration through the asylum support system."

75. Thus, Mr Broach pointed to the specific prohibition in relation to the provision of cash support under section 4 (see for example sections 4(10) and (11) of the 1999 Act), so that financial assistance is provided in the form of the Azure card. He pointed to the fact that, in contrast to section 95, there is no requirement for accommodation provided pursuant to section 4 to be "adequate" and noted that section 4 accommodation is offered on an entirely 'no choice' basis. He pointed to the relevant guidance from the Secretary of State on dispersal of section 4 recipients (Policy Bulletin 31) as explicitly presuming that neither relationships with family and friends nor a child being settled in school are sufficient reason not to disperse the family. He pointed to what he said were the inadequacies of and the difficulties in accessing the extra support available under the Immigration and Asylum (Provision of Services or Facilities) Regulations 2007. He pointed to the local authority's acceptance that life

for the claimants and their families would have been "more difficult" if they had been forced to switch to section 4 support.

76. Mr Broach submits that it was unlawful for the local authority to decide to terminate their section 17 support for the following reasons: First, the decision was not consistent with the local authority's obligations to safeguard and promote the children's welfare as children in need, for it is, he says, for the reasons already indicated, undoubtedly detrimental for children to be supported under section 4 rather than section 17. Seeking to move children onto this system cannot comply with a duty to safeguard and *promote* children's welfare, which requires the taking of active steps. Second, the decision was implemented on a 'blanket' basis without any attempt to assess the needs of individual children. Third, the decision was not consistent with the purpose of Part III of the 1989 Act, which is that local authorities should provide support for children and families, and thus failed to promote the policy and objects of the Act: see *Padfield v Minister of Agriculture Fisheries and Food* [1968] AC 997, 1030. Fourth, so long as the claimants were being supported by the local authority there was no power for the Secretary of State to provide section 4 support as they were not destitute. Unless the local authority is prepared to argue – and it never has – that the claimants should be left without any support, it follows that it cannot simply withdraw support without there being anything else in place. Finally, the decision to withdraw support constituted a breach of the claimants' rights under Article 8, being, he says, incapable of justification under Article 8(2) because disproportionate in failing to strike a fair balance between the claimants' interests and the wider public interest. In this connection he pointed to the speech of Baroness Hale of Richmond in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 WLR 148, para [24].

77. In much the same way, Mr Broach submits that, since the duties and powers of the local authority under section 17 have primacy over those of the Secretary of State under section 4, if a destitute migrant family approaches a children's services department seeking support, it is not open to the local authority to refuse to provide such support by reference to the potential availability of section 4 support. A local authority, he says, cannot have regard to the potential availability of section 4 support, for the duty to provide such support arises only if the person is destitute, and when the Secretary of State decides this question she must take into account the availability of any other support: see Regulation 6(4) of the 2000 Regulations. He seeks support in this connection from what Tomlinson LJ said in *R (SO) v Barking and Dagenham LBC* [2010] EWCA Civ 1101, [2011] HLR 63, in the passage at para [40] which I have already set out. He points to the fact that, in contrast to the position under section 95, Parliament has not excluded families who are or may be eligible for support under section 4 from local authority support under section 17 – and this, he says, despite numerous opportunities for such amendments to be made (including, he suggests, by the Adoption and Children Act 2002 and the Nationality, Immigration and Asylum Act 2002). Thus, he says, the intention of Parliament is clearly that local authorities may have duties to accommodate and support such families.

78. All that said, however, Mr Broach had to accept that the provision of section 4 support is caught by section 55 of the 2009 Act, so that the Secretary of State has to discharge his functions under section 4 having regard to the need to safeguard and promote the welfare of children involved.

79. For his part, Mr Harrop-Griffiths pointed to what was said in paragraph 8.24 of *Fairer, Faster and Firmer*. Provision for unaccompanied asylum-seeking children would continue to be made under the 1989 Act,

> " … but social services departments will no longer be expected to provide for asylum seeking families in the absence of special needs requiring a social services response."

The latter aim, he says, was to be achieved by means of section 122 of the 1999 Act which, he submits, makes the division of responsibility between local authorities and the Secretary of State entirely clear in respect of these families. He says that if the claimants and the Secretary of State are correct it would mean that not only would a social services department be a surrogate housing department but also a surrogate Benefits Agency and/or, what is of even more significance here, a surrogate support service for failed asylum-seekers and their children – the very thing which Lord Hope made clear it is not. Moreover, he says, if the claimants and the Secretary of State are correct there would be no scope whatsoever for supporting children, within a family, under section 4; they could always insist on a local authority doing so, because the Secretary of State could always refuse to support.

80. On the contrary, he says, it is clear the Secretary of State should have and indeed has the dominant power and that the local authority acted lawfully in requiring the claimants to apply for section 4 support. He ends with the lament that it is unfortunate that the Secretary of State considers it more appropriate for local authorities rather than central government to take on a burden that is national but without making any specific grants in respect of this; a state of affairs, he suggests, that is to the detriment not only of other members of their communities, because of the diversion of resources, but also of failed asylum-seekers themselves and their children, whose cases would no doubt be resolved far more quickly if the Secretary of State had instead to pay for their support.

81. Ms Rhee's case is that the aims of section 17 and section 4 are clearly different. The fact that a failed asylum seeker might be deemed eligible for section 4 support cannot therefore, absent any express legislative restrictions, displace the ordinary discharge of the local authority's functions under section 17 in respect of the dependent child of such a person. Indeed, where a family headed by a failed asylum seeker includes children "in need", the legislative scheme points, she says, to the fact that section 17 is intended to be the principal power under which assistance is to be provided. And that, she says, is what the case-law indicates.

Discussion

82. There is one issue that I can clear out of the way at the outset: the question of whether the children we are here concerned with are children "in need" in the statutory sense. This is not, in the first instance, a matter for judicial determination at all. Parliament has imposed the decision-making function upon the local authority and it is not for the judges to usurp a function imposed by Parliament on others. The judicial function is limited to judicial review, and then only on recognised grounds of public law challenge. But in any event it is not in fact an issue in the present case, for the local authority, as we have seen, has assessed the children as being in need and it is, of course, on that basis that it has been providing services and support under section 17.

83. Mr Harrop-Griffiths says that it was entirely reasonable for the local authority to carry out a general review of support for families who had no recourse to public funds and to then decide, as it was put in its evidence, to "... fully re-assess all the children involved in their own right." He asserts that the children's individual circumstances were fully taken into account and "in effect" (his phrase) it was decided there was no good reason to exclude them from the general approach, which was to encourage parents to apply for support from the Secretary of State. "There is", he continues, "no proper basis for criticism if [the local authority] is right about the division of responsibility for accommodation and essential living needs."

84. I cannot agree. The documentation we have been shown does not, in my judgment, demonstrate the kind of detailed child-by-child assessment that would be required to justify the local authority's decision. The reality is that the basis upon which, so it is said, they are no longer in need is because of the asserted availability of support under section 4. So the question on this aspect of the case reduces itself to this: does the mere fact that support under section 4 is (or may be) available mean that without more ado – without any more elaborate process of re-assessment – it is open to the local authority to say that a child who was previously in need is now, *ipso facto*, no longer in need.

85. That takes me to the wider issues which lie at the heart of this case.

86. There are, in my judgment, a number of what Ms Rhee calls key legislative indicators which together point to the conclusion to which I have come, that, in contrast to section 17, section 4 is a residuary power and that the mere fact that support is or may be available under section 4 does not of itself exonerate a local authority from what would otherwise be its powers and duties under section 17.

87. First, there is the contrast not merely between the level of support available under section 17 and section 4 but also between the very different purposes of the two statutory schemes. Ms Rhee accurately describes section 4 as providing "an austere regime, effectively of last resort, which is made available to failed asylum seekers to provide a minimum level of humanitarian support". Section 17 in contrast is capable of providing a significantly more advantageous source of support, its purpose being to promote the welfare and best interests of children in need. As she says, section 4 support is intended to provide the minimum support necessary to avoid breach of a person's Convention rights; section 17 support is to be provided by reference to the assessed needs of the child. In short, as she puts it, section 4 and section 17 establish two discrete regimes established for different purposes.

88. Second, there is the striking fact that, in contrast to the position under section 95, Parliament has not excluded families who are or may be eligible for support under section 4 from local authority support under section 17.

89. Third, there is the careful exclusion of children from the ambit of the provisions in Schedule 3 to the 2002 Act removing various asylum seekers or failed asylum seekers from eligibility for support under section 17. As Ms Rhee says, this is of central importance, being a clear legislative indication that even children of failed asylum seekers should be entitled to access section 17 support. Accordingly, as she points out, any exclusion from section 17 support for the dependent children of failed asylum seekers must, if it exists, be found elsewhere. Yet, as we have seen, in contrast to the

position of dependent children of asylum seekers, there is no such exclusion in place in respect of dependent children of failed asylum seekers. If a child is being provided with support under section 95, the legislative scheme gives priority to the provision of section 95 support over section 17 support: sections 122(3), (5). Not so in relation to support under section 4. So, it is to be inferred that the legislative intent is that where section 4 and section 17 are both theoretically engaged, the more advantageous support regime under section 17 is to apply.

90. This conclusion is entirely consistent with, even if it is not mandated by, the case-law to which I have referred.

91. It is convenient first to consider the situation where a failed asylum seeker, who is therefore *not* eligible for section 95 support, seeks support under section 17 on the ground that her child is "in need." The local authority has a duty to assess the child. The result of that assessment is either a determination that the child is, indeed, "in need" or that he is not. In the latter event, absent a successful judicial review, *cadit questio*. If, on the other hand, the child is assessed as being "in need", then the local authority must decide whether or not to provide the assessed services and support. Can it decline to do so, on the basis that section 4 support is or may be available? Consistently with what I have already said it will not be able to justify the non-provision of assessed services and support under section 17 on the ground that section 4 support is available unless it can be shown, first, that the Secretary of State is actually able and willing (or if not willing can be compelled) to provide section 4 support, *and*, second, that section 4 support will suffice to meet the child's assessed needs. Given the residual nature of the Secretary of State's functions under section 4, the local authority may well have difficulty in establishing the first. Given the very significant difference between what is provided under section 4 and what is very likely to have been assessed as required for the purposes of section 17, the local authority is unlikely to be able to establish the second.

92. In practical terms, and whatever the theoretical possibilities, a local authority faced with a child who is assessed as being "in need" is, I suspect, very unlikely in the general run of such cases to be able to justify non-intervention by reliance upon section 4.

93. I turn to the case where, as here, the local authority has not merely assessed the child as being "in need" but is actually providing services and support on that basis under section 17. Can it decide to discontinue such provision, on the basis that section 4 support is or may be available? In principle, the answer must be the same. It can do so if it can be shown, first, that the Secretary of State is actually able and willing (or if not willing can be compelled) to provide section 4 support, *and*, second, that section 4 support will suffice to meet the child's assessed needs. But the task facing the local authority here is, if anything, even more difficult than in the previous situation, for the Secretary of State, as we have seen, cannot provide support under section 4 unless the family is "destitute", and it is difficult to envisage that being so if the local authority is actually providing services and support under section 17.

94. Again, in practical terms, and whatever the theoretical possibilities, a local authority supporting a child who is assessed as being "in need" is very unlikely in the general run of such cases to be able to justify the discontinuance of such support by reliance upon section 4.

95. Be that as it may, in the circumstances of the present cases, and insofar as we have seen any evidence in respect of K and her family,[1] the local authority has, in my judgment, wholly failed to demonstrate that any support which might be available under section 4 would be adequate to meet the assessed needs of any of these children. On that ground this application for judicial review must, in my judgment, succeed. Mr Broach makes good his proposition (ii). He does so, it will be noted, without any need for reliance upon the Convention.

96. It will be noted that I have not gone all the way that Mr Broach would have us go in relation to his proposition (iii), nor have I addressed Ms Rhee's proposition (iv). Those are matters best left, in my judgment, to decision as and when the need arises. There is no need to address the Convention here, and I prefer not to. Ms Rhee's argument in relation to proposition (iv) involves questions of some nicety in relation to the decisions in *R (O) v Haringey LBC and the Secretary of State for the Home Department* [2004] EWCA Civ 535, [2004] HLR 788, and *R (SO) v Barking and Dagenham LBC* [2010] EWCA Civ 1101, [2011] HLR 63, which there is no need for us to address here and which again I prefer to leave for decision as and when the need arises.

97. I invite counsel to draft appropriate forms of declaration.

Mr Justice Langstaff :

98. I agree, for the reasons expressed by my lord, Lord Justice Munby. Although the relevant statutory provisions, and their relationship one with another, are tortuous, the answer to the present case is clear once the residuary nature of support under section 4 is appreciated. As he has said, it is therefore unnecessary to delve into the further questions raised in the submissions of counsel.

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[1] In the circumstances which I have described in paragraph [10] above the parties understandably proceeded on the basis that it was sufficient to provide us with only fairly limited information about K and her children.