Housing Law Practitioners' Association

Minutes of the Meeting held on 18 July 2012
University of Westminster

Outside the Housing Acts:
No Recourse and Community Care

Speakers: **Ranjiv Khubber, 1 Pump Court Chambers**
Sue Willman, Deighton Pierce Glynn Solicitors

Chair: **Justin Bates, Arden Chambers**

Chair: Welcome to today's HLPA meeting. My name is Justin Bates and I am the Vice-Chair of HLPA and a barrister at Arden Chambers. Could I ask if there are any corrections to the Minutes of the last meeting on 16 May? If not I will introduce our speakers. Firstly, Ranjiv Khubber of 1 Pump Court, a well-known immigration law specialist who will be looking at the no recourse element of today's topic so housing for those who are not supposed to have recourse to public funds. We are very grateful to have him here today as he is in the Court of Appeal tomorrow dealing with what seems to be one of the most perverse decisions by the Secretary of State imaginable and as housing lawyers we are quite used to perverse decisions so that really is saying something. Secondly, Sue Willman, a long-time friend of this Association, a partner at the newly merged firm of Deighton Pierce Glynn, who will be talking to us about the community care elements of the housing provisions.

Ranjiv Khubber: What I propose to do is go through the notes that you have and amplify and summarise some of the key aspects of those notes. My notes have the main heading Outside the Housing Acts: No Recourse and Community Care. You should also have a copy of Schedule 3. What I propose to do in relation to the notes is follow the structure but separate it into six parts, if I can within the time that we have got and bearing in mind the area that I am covering. Basically, what I want to do is start by looking at the structure of Schedule 3 and how it works. Secondly, look at the impact of the judgement in *Clue v Birmingham CC* in the Court of Appeal which you are well aware of and post-*Clue* implications. Thirdly, the Human Rights protection and looking at the Human Rights protection in paragraph 3 of Schedule 3 through the recent developments in the case law, particularly *Almeida* which shows some interesting developments about the analysis of the Human Rights protection particularly in the context of a European national. Fourthly, the division of responsibility between public authorities and the issue that has been developing now with the contest as to whether it is a local authority or the Secretary of State that should assist post the decision of *VC and others v Newcastle CC*. Fifthly, the EU dimension which is in relation to *Zambrano/Dereci*. There is a tribunal decision in the Immigration and Asylum Chamber called *Sanade* which has quite an important impact in terms of the approach that it will have, or should have, to the questions of status which may be of relevance in terms of the community care set of provisions. Finally, if we have the time, I will touch on contextual considerations. All of these aspects are set out in detail in your notes and, obviously because of the time that we have, as I say what I seek to do is amplify the key parts.

So if I can start with the first part, what I want to do is just give an overview of how this aspect works. The key aspect that you need to be aware of is, obviously, Schedule 3 of the Nationality Immigration and Asylum Act 2002 and what that does is it creates a set of general exclusions from assistance for a set of Community Care or Social Welfare provisions. The generally excluded classes, in your notes I am just going from 1.1 to 1.2, are set out there and what you have are five classes, effectively, of people who are excluded. You have persons with Refugee Status abroad and their dependents, which is paragraph 4 of Schedule 3, you have citizens of an EEA state and their dependents, paragraph 5 of Schedule 3, failed asylum seekers who have failed to co-operate with removal and their dependents, fourthly persons unlawfully in the UK and, fifthly, failed asylum seekers with family, that is paragraph 7A. The fifth group there is rarely used now although it is still there as a statute and able to be used. On a practical level it is not used. So the key aspects that you need to bear in mind are really 1 to 4 and out of those the most common aspect that comes into play is the fourth class; persons unlawfully in the UK and that has become an area of considerable litigation, particularly exemplified in the case of *Clue*. But also it is interesting to note that the citizen of an EEA state is now

coming into play much more so and that is exemplified by the case of *Almeida* which I will go on to talk about, so that just by way of a general overview of the classes.

What I have mentioned at 1.3 is also an important point to bear in mind in terms of exclusion and that was a matter that was addressed in a case called *AW and others v Croydon LBC*, which I am sure many of you have read and been aware of. That relates to which category certain persons fall within who are failed asylum seekers and the reason why that case has some bearing and importance in terms of the approach to exclusion is because in that case it was concluded that asylum seekers who claim at port are persons who are regarded as not being in the UK. So you have the situation there that they will not be in the UK unlawfully because most persons or asylum seekers at port are granted temporary admission and the legal fiction in immigration law of temporary admission is that you are regarded therefore as not being in the UK unlawfully. Whereas if you do not claim at port you then become an asylum seeker; you are regarded as being in the UK unlawfully so there is that distinction created. The importance of that distinction is that those in the category of asylum seekers who were originally asylum seekers then became failed asylum seekers but did not claim at port then fall within the purview of the Schedule 3 exclusion whereas the other class do not so it is just worth bearing that in mind.

In terms of the generally excluded social welfare provisions, I have set those out in a broad way at 1.4 and, obviously, you will know from experience that the key aspects of those are Section 21 and Section 17 in particular, Section 2 of the Local Government Act less so but still worth appreciating in terms of certain contexts. Now in terms of the way in which the exclusion provisions work, you have got a general exception and you have got exemptions. The exception to exclusion relates to three classes of people and that is set out at 1.5. What that states there is that the general exclusion does not prevent provision of support to a British citizen or to a child or by virtue of certain regulations made pursuant to the section and therefore you have got three classes of people who will not be excluded social welfare provision because they fall within an exception. That obviously leaves a number who may be part of a family unit of that group so that is where the complications arise but it is worth bearing that in mind as a general exception. Then you also have the exemption from exclusion and this is perhaps the most important or the more current issue that develops in relation to these cases and that is by virtue of paragraph 3. Paragraph 3 of Schedule 3 states that paragraph 1, that is the paragraph which sets out the raft of social welfare provisions which are generally excluded, what paragraph 3 says though is that "paragraph 1 does not prevent the exercise of a power or the performance of a duty if, and to the extent that, its exercise or performance is necessary for the purposes of avoiding a breach of (a) a person's Convention Rights, or (b) a person's rights under Community Treaties." So that is an important saving in terms of the human rights implications as regards the denial of certain social welfare provisions and also the community law implications of the denial of a number of social welfare provisions.

What I would just emphasise for you there and you might want to just underline it is the key words that come into play in paragraph 3 are those words there, "necessary" and "avoid". So necessary may suggest a higher threshold but avoid suggests a preventative action and the avoid aspect of paragraph 3 was emphasised in particular in the judgement in *Limbwela*. Limbwela was obviously a case about Section 55 but, as you know, the Section 55 saving is worded in the same terms of paragraph 3 here in Schedule 3 and what was interesting there was Lord Hope emphasising that the most important aspect to appreciate in relation to this human rights saving is the use of the word avoid and to give that the full weight it should do in a human rights context. I will develop that in a little detail in due course but that is just worth bearing in mind at this stage. In addition it is also worth appreciating the Withholding and Withdrawal of Support Regulations because they permit the provision of temporary accommodation to an adult and a child or children who otherwise fall within paragraph 7 so the unlawfully in the UK class of persons may, nonetheless, be supported by a local authority for a certain period of time. That is pursuant to paragraph 3(3) of those Regulations and you have the key authority there of *M v Islington LBC*. What is important about *M v Islington* is that it was stated there by the Court of Appeal that the period when temporary accommodation can be provided can be longer than the 10 days that was given in the Home Office guidance. That is important because obviously there will be situations where there may be outstanding representations as there were in *M* which will take the Home Office typically a great deal of time longer than 10 days to resolve, looking at or finally deciding upon.

That is just the overview that I wanted to give. In relation to the case law developments the key aspects or the thematic aspects of the case law that has been emerging has really focused on the nature and scope of the protection provided by paragraph 3. Secondly the tension between the role of the Secretary of State and local authorities in relation to the issues that arise regarding exclusion and,

thirdly, the division of responsibility as between the Secretary of State in relation to support in particular Section 4 of the 1999 Act and local authorities in particular under Section 17. Now, as you probably know, the key foundation case now for these sorts of cases is *Clue* and I have set out in a summary form the judgement in *Clue* for you there in the notes, going from paragraph 1.8 onwards. In paragraph 1.11 I just wanted to touch upon the key themes that emerge from that judgement. The summary of the key aspects of the judgement are set out there and I have grouped them in terms of the key components of the lead judgement of Lord Justice Dyson, as he then was, in terms of their relevance. Looking at numerals ii and iii in paragraph 1.11, the important point that was being made in relation to the approach to these cases was a distinction between the relevance of a practical impediment to return and the relevance of a legal impediment to return. What Lord Justice Dyson was trying to emphasise there was that there is a real distinction in terms of the way in which the human rights saving can work, depending upon what the basis is for why somebody cannot leave the UK. So in that situation the important point that was sought to be emphasised was that where somebody has made outstanding representations that can constitute a legal impediment because there has to be a resolution of those issues by the relevant public authority, i.e. the Secretary of State UKBA but if there is simply a practical impediment, i.e. lack of funds to be able to return, that is not something that would always engage or at all engage the local authority to require to support in order to avoid a breach of the human rights saving.

The second main theme that emerged from the *Clue* judgement was the importance given to the fundamental difference the roles of social services and the immigration functions of the Secretary of State and that is set out in the judgement from paragraph 60 onwards. As you probably know, the key point that emerged there was that Schedule 3 does not require local authorities to make an immigration decision. That needs to be made by the Secretary of State and the correct task for local authorities when considering immigration issues under Schedule 3 is really just to look at the case in terms a minimal screening process, as it were, so it is only if a case looks clearly hopeless or abusive that the local authority can step in and make a decision which will then have an impact on whether support should be provided for the purposes of the Human Rights saving. Also in relation to the themes that emerge, another important aspect was that the court emphasised that the financial situation of a local authority is irrelevant when considering Schedule 3 and when the conditions as regards destitution and otherwise being eligible for support are satisfied. The point being made by the court there was that this arises in terms of budgetary considerations, which should not have an impact where there is a human rights protection that should be brought into play precisely because it can lead to arbitrary and inconsistent decisions up and down the country by local authorities. The qualification given to that is where Lord Justice Dyson pointed out that where there is no outstanding immigration application, different considerations can be said to apply where the person does not have an outstanding application for leave to remain. In that situation, the local authority is entitled to have regard to the calls of others on its budget in deciding whether an interference with a person's Article 8 rights would be justified and proportionate within the meaning of Article 2, and that is paragraph 73 of the judgement. The rest of the summary sets out the approach that was taken in particular in that case and, as you may recall, one of the key points that Lord Justice Dyson pointed out was that there had been a failure of the local authority to have adequate regard to the growing importance of private life as well as family life in relation to the parties affected, which was the adult parent and the children in that case.

Now in terms of subsequent developments from *Clue* there are a number of issues that arise, one of which has been the issue that I have just touched up which is what happens in a situation where somebody does make representations but they are rejected? What is the role that the local authority can take? Can it simply say that at this stage, once you have had your representations put in and you have had them rejected, we are entitled to rely on our budgetary considerations and we are entitled to deny you assistance? I think that raises a number of issues and I have set out what I would say are arguable points of importance in terms of understanding why the position is not so clear cut as regards the situation of a person who has had their representations put forward and which are rejected. As you can probably appreciate, what often happens in cases where you have an overstay or a failed asylum seeker, is that the factual scenario develops. If they have immigration legal advice they will then put in representations explaining an ongoing and developing factual situation, in particular as regards Article 8, in particular as regards the impact on the children and the developing welfare and educational importance that has accrued since any previous and more historical immigration decision. Once those representations are put in they are often looked at in terms of the fresh claim rule and I have set that out in the back of your notes just by way of a contextual reference. But what will happen eventually, maybe sooner sometimes more so than others, is that the Secretary of State will get round to looking at those representations and then make a decision. If the decision is negative that is not the end of the story in terms of the immigration context and, as I am sure you know, there is the

opportunity to pursue a judicial review action against that adverse decision, which may well result in a successful outcome, which is that the decision is quashed. The claimant is entitled to an in-country right of appeal, which is the usual consequence of a fresh claim refusal because the importance of the fresh claim representations is to permit a further consideration of the case, at least by an independent appellant body, if there is an adverse decision by the Secretary of State on the basis of the new evidence.

But the question that arises in terms of the welfare context is what should the local authority do in those cases which are non-asylum cases, because obviously asylum cases will have a different context in terms of welfare provision? But if they are particularly, for example, Article 8 cases, what should the local authority do? In my view there are a number of points here that need to be borne in mind. It seems to me that there are a number of relevant arguments to appreciate as to why the position of a local authority is not so clear cut to say that there will not be any human rights breach if there were no support provided at all. What I would point to is the important appreciation of what *Clue* was saying in terms of the judgement of Lord Justice Dyson as to no outstanding representations. There is a big difference between having no outstanding representations at all and having representations that are made which are rejected and where there is an ability to seek legal advice and to pursue a legal challenge. In my view there is an important point there about the importance that needs to be appreciated of the access to the court as a fundamental right in relation to legal redress in the context of the immigration question. So what I would say there is that the important point to appreciate is in those circumstances the way to approach that scenario is that it is not really simply a practical impediment, it is actually a legal impediment. If a claimant has immigration advisors or wishes to seek immigration advisors to challenge that decision, in my view that constitutes, arguably, a legal impediment as regards the context of the case and the rights that can accrue from it and, therefore, the protection that should be able to be relied upon under paragraph 3. Because, as you can imagine, if the Secretary of State has made an adverse decision and it proves subsequently through judicial review litigation to be a flawed decision, then that is an important decision in terms of the human rights protection that a claimant is entitled to. But if a claimant is denied the ability to pursue that legal right, then that is a very draconian impact in terms of the paragraph 3 protection which Lord Justice Dyson was pointing out was something that needs to be given important weight.

I have given some comments there about the analogy there with the Reception Directive and where I see the situation post-adverse decisions and the protection that can be provided. Obviously the Reception Directive is for asylum seekers but I think there is some analogous support there to the situation for human rights cases and Article 8 cases, because under the Reception Directive you are entitled to the benefit of the Reception Directive in terms of reception conditions, which includes support, until a final decision is made on your case and that includes a final authoritative decision on any challenge. So I think that is helpful in terms of the context of these cases where although the Reception Directive does not directly deal with Article 8, the analogy should be seen there of being able to provide effective protection to potential legal rights that exist. I have given the reference to the definition of an asylum seeker at Article 2(c) and the way in which it is intended to be defined. The definition of an asylum seeker concludes an application for asylum in respect of which a final decision has not yet been taken and the references in *ZO (Somalia)*, which is the Supreme Court's judgement on the denial of permission to work being unlawful as a matter under the Reception Directive. What was interesting there was Lord Kerr pointed out that in those situations it was important for even failed asylum seekers making fresh representations to continue to have the benefit of original asylum seekers whilst they were pursuing their fresh claims. Lord Kerr pointed to the fact that there was reference in the European guidance that protection should continue up until they had exhausted all appropriate legal remedies. So I think that is a useful kind of analogy to appreciate in terms of non asylum cases.

I have also referred to the decision of Mr Justice Stadlen, a useful and interesting decision there in relation to an asylum support context where the issue was where somebody seeks Section 4 support but they have had an adverse decision on their fresh claim and then they seek to pursue a judicial review. The question was can they be supported under the Human Rights protection under the Section 4 provisions on the basis of the fact that they are pursuing a judicial review at a stage where there has not been any grant of permission in the judicial review? Mr Justice Stadlen pointed out that in those circumstances that could fall within the human rights saving, so again another useful analogy to the position as regards an outstanding challenge that could be pursued.

That is the first part that I wanted to mention in terms of the post-*Clue* dimension. The other part focused on the analysis of the decision in *Almeida* and I have set out the background in some detail and the approach that Miss Justice Lang took in that case. That is at page 7, 1.13 of your notes. This

was a Section 21 case and Sue is going to deal with the detail of the approach to Section 21 but what I am looking at in terms of this session is the approach to the human rights saving. In an unusual and interesting scenario this involved a Portuguese national who had lawfully entered the UK who was terminally ill with severe AIDS and had a life expectancy of less than a year. An application was made for assistance to the local authority under Section 21 of the National Assistance Act and the local authority concluded that the claimant was not eligible and, further still, that the claimant would not face a breach of any human rights, say under Articles 3 or 8, if he were returned or expected to go back to Portugal in order to fend for himself and survive in his last days. Now what happened there was that the decision was quashed and a number of important points were made in the course of the judgement as regards the approach of the court to judicial review in a human rights context; the approach to Article 3 and the approach to Article 8. What I have done in the notes is that at 1.16 onwards I have set out the detail of what the court decided in relation to each of those aspects. Now obviously you can read the detail of that in your own time but what I would ask you to do is go to paragraph 1.17 of the notes, which is at page 11, where I have summarised the key aspects that I think are useful to appreciate for future cases and the implications of this case.

Points that emerge from this judgement and that are likely to be relevant for future cases include: (i). The Court's clear rejection of a narrow *Wednesbury* approach contended by the Defendant to a JK challenge in relation to potential breaches of the ECHR. Now what was interesting here was that the local authority was trying to argue that in the context of the human rights protection and the judicial review function of the court, all the court could do is look to see whether the decision of the local authority could be impugned on classic *Wednesbury* grounds. Miss Justice Lang firmly rejected that and said that was inconsistent with all the authorities, in particular the House of Lords in *Daly* and all the subsequent authorities including *Denbigh*. Now that is quite an important aspect of this judgement because what she concludes is that the approach taken by the local authority to what the court could do was simply too restrictive and was inconsistent with what the courts have decided as to what a High Court on a judicial review can do. The approach of the court in a judicial review where there is a human rights issue is much more intense in terms of scrutiny of the decision of the local authority and, in fact, in the judgement the judge goes further in terms of looking at the substantive issue itself. There is an interesting reference to what was said by Lord Bingham in the *Denbigh* case where he says that the reality of human rights issues is you look to substance not form and that was given more support through the analysis in this case. What is interesting as well is that in the judgement the judge also accepted that she could and should look at post decision evidence as regards the nature of the adverse consequences to the claimant. So quite an important aspect of the judgement, I think, in terms of procedure and the scope of review as regards what the High Court can do in a case where there is an issue in relation to human rights obligations.

The second main theme that emerges is in relation to the approach to Article 3. I have broken that down into various points at (ii) of 1.17 and I just wanted to emphasise those aspects which I think will be of use for future cases. Firstly, the court, inevitably, emphasised the relatively high threshold in order to establish a breach of Article 3 and that is per the case of *N v UK* which I am sure you are all aware of from initially the House of Lords here and then Strasbourg. But secondly, the court also emphasised that Article 3 cases require a focus on the *effect* on the applicant of the move to another country, rather than the reason or justification for the move. I think that is important to bear in mind because that leads on to the third aspect which is on that aspect, and more generally, Article 3 needs to be seen in terms of the guidance that was given in the case of *Pretty v UK* and in paragraph 52 in particular of that judgement. What happened in *Almeida* is the reference to paragraph 52 in *Pretty* and it is a very important paragraph because it shows the way in which there has to be a very careful evaluation of all the individual circumstances and consequences when one looks at a potential Article 3 breach.

The reason why I think it is important is because it is almost a very common answer to say that you have an exceptionally high threshold; it has to be a near death case which is what *D* was, which was what *Almeida* was but that is not really appreciating the full scope of Article 3 protection. I do not think that appreciates the true scope of what Strasbourg was saying and was explaining in *Pretty* because what they were doing in paragraph 52 was explaining that in a number of circumstances there may well be a meeting of that high threshold and you have to look at it in terms of an individual consideration, in particular focusing on the effect and impact on the individual in terms of their wellbeing in terms of their potential moral breakdown. I think those are important parts to appreciate because, typically in these cases and the cases that we are coming across, seeing or certainly reported are very extreme but many cases will not be that extreme; they will not be as extreme as *Almeida* and the question then arises as to where do they fit in terms of the scheme of the analysis? I think that is just important to bear in mind in terms of the approach that can be used in relation to

Article 3; it is not strictly and conclusively decided upon very extreme cases, it is a fact sensitive evaluation and it can be other cases which are not near death cases but which have a very serious impact in relation to the individual. In addition, as regards Article 3, it is worth noting that the court emphasised that one of the additional features to appreciate in this particular case was the fact that the claimant had actually been lawfully present in the UK for a number of years pursuant to his rights as an European national. Then just for your cross-reference you might want to just tag that up to paragraph 139 which is at the top of the page which is where that aspect comes from.

The third aspect that is important to appreciate in terms of the implications of this case is that Article 3 breaches can occur even in relation to an EU national being returned to another member state. The point of importance which will now emerge is the need for a detailed comparative assessment of the circumstances that would prevail if they were allowed to stay here and the circumstances that they would be facing if they were to go back. What is interesting about this case is that it required a very detailed assessment of what is this claimant is actually able to have here and what could they have there and what are the problems, bearing in mind the terminal illness for forcing someone to go back to Portugal, to go through the regime of social support in those very difficult circumstances?

The fourth aspect of the theme is Article 8, I thought I saw that coming. Article 8 was divided into 2 parts, private life with 2 components and just again to emphasise for you there the social infrastructure part in relation to the comparative assessment and private life, in relation to moral and physical integrity. You will obviously know that in many cases the principle has been established, although it has not really been able to be shown in a case, where even if you cannot show a breach of Article 3 you may be able to show a breach of Article 8 because of the adverse impact on your moral and physical integrity; the classic Strasbourg jurisprudence case of *Bensaid v UK* but on the facts very difficult to show. But it is one of those cases where the judge accepted that it fell within Article 8 as well because when you do the comparative assessment in the circumstances of this case when looking at proportionality, as in justification, the expenses incurred by a local authority had to be compared to the impact of the denial of that case; that is the extent of the consequences to the claimant severe or elsewhere on a spectrum. On the facts of the case the position was very stark but what I point to, inevitably, is that there will be many cases which are not this stark. It is going to require a much more nuance-style appreciation of how Article 8 proportionality and, indeed, Article 8 not proportionality but unqualified and absolute but high as a threshold is intending to work. So much more difficult questions will inevitably arise in other cases but important to appreciate that what you are dealing with is a spectrum in relation to Article 8 but also, I would say, a spectrum in relation to Article 8 but not in a negative way but in a positive way where a spectrum of situations including those outside near death may meet what was envisaged under paragraph 52 of the *Pretty* judgement.

That is what I wanted to say on *Almeida* and you have some notes there as regards another case of *U v Newham LBC*. *U v Newham* is helpful because it adds another dimension to these cases on Schedule 3, particularly because it looks at the issue which has been developing now with the European Court's judgment in *Zambrano*. The point perhaps to appreciate is that usually these cases would have fallen within the umbrella of the *Clue* analysis where you have an Article 8 issue with a third country national with a British citizen child. Interestingly now with *Zambrano* you have the European dimension where there is an issue as to whether not only do they have rights to be here under Article 8 but they have rights to be here under European law pursuant to the rights of the British citizen child in relation to the Treaty of the Functioning of the European Union Article 20. It is worth bearing in mind because I think that is going to develop well and it is important from a claimant perspective to appreciate the additional support that that can give to arguments as to why the paragraph 3 is permissible and should operate in a given case.

The next aspect that I wanted to briefly go on to mention is the issue of the division of responsibility between Section 17 and Section 4. I have set out in some detail there for you the judgement in *VC and others v Newcastle CC* of the Divisional Court. I will not go through the details of it now but you have a very detailed setting out of the judgement and the reasoning of Lord Justice Mumby. What I would simply point out to you there is that obviously that case was slightly unusual because that was a case where the local authority had already assessed the child as a child in need and then children in need so the issue was one where there had been an assessment under Section 17 which was positive. The issue then subsequently emerged as to whether the local authority could decide not to continue to provide support on the basis of some form of alternative provision, i.e. Section 4. Lord Justice Mumby went through the statutory hierarchy and pointed out the difference in terms of the nature of the regimes, but the important starting point in that case was obviously the fact that the local authority had actually accepted the children as children in need and had provided support and the question was how could they go back from that by way of some kind of potential reliance on Section

4? But what the court left open was the question of legal issue itself, although it said enough to show that when you are looking at this potential issue in terms of a conflict between Section 4 and Section 17 it is probably going to be very difficult for local authorities to say that Section 4 is actually the correct source of the statutory obligation, although that has been left open and the Divisional Court said that that may well be an issue that requires further detailed consideration.

The final part that I wanted to mention relates to the division of responsibility, referred to at 2.2.1 of your notes on page 17. I will not go through the detail of it but I can just indicate to you that there is an example of a situation that is arising now in relation to persons who have made claims for asylum who then withdraw their claims and then make a further claim for asylum. What happened in the case that I have given you as the example there, *X and others v SSHD and Bolton CC* is that a claim for asylum was made and was then withdrawn on the basis of legal advice that the claimant in that case, *X*, could have greater rights under European law. The European law application was rejected by the Home Office because of lack of evidence in relation to the status of the children. The claimant then made another application for asylum on the same facts as what she had hoped to put forward before and the issue arose there as to where she fell within the statutory regime. The problem that has arisen is that withdrawn claims fall within the fresh claim criteria in so far as immigration is concerned. So what the Home Office was saying is that in these cases you do not fall within Section 95 because you have withdrawn a claim and we do not accept you as an asylum seeker because we do not say that you have satisfied the fresh claim rule. You do not fall within Section 4 because you are not a failed asylum seeker whose claim has been previously determined because you withdrew it. You do not fall within Section 94(5), which is the protection for failed asylum seekers with children because your claim has never been determined by the Home Office before; you withdrew it. So the issue arose there is that faced with that block in terms of all those aspects of supports what was the position for the claimants? Could they have recourse to Section 17 or could they seek the protection of the Reception Directive outside of the normal domestic statutory provisions? The argument there is that there is a real issue as to whether the Reception Directive protects claimants in this position precisely because they are classified under the Reception Directive as asylum seekers until they have their claims finally resolved. So that is another issue; I simply point it out to you because it has certainly come up more often now where withdrawn claims actually have quite a big impact in terms of not only the immigration consequences but the welfare provisions.

The rest of my notes deal with the issue of Section 4 developments which is paragraph 2.3.1 and I will not go through that because the notes set it out in summary form. They then go on to the *Zambrano/Dereci/Sanade* dimension. I would simply say in relation to *Zambrano*, I have highlighted that briefly for you, there is clearly a number of cases that are going through the system now: there are cases in the social security dimension going to the Court of Appeal, there are cases in the immigration dimension going to the Court of Appeal and there are cases, as I am sure you will find out shortly, in the housing dimension going to the Court of Appeal. What is the true impact of *Dereci* on *Zambrano* and also the subsequent case law that has come out from the UK and in particular the Tribunal decision of *Sanade*?. *Sanade* is helpful in some respects but it has its complications in relation to the adverse impact on third country nationals, particularly in relation to deportation proceedings. What I have sought to do there in your notes is set out for you the key aspects of the judgement and the key aspects of the recent decision in *Sanade* which, I think, from a welfare perspective will be helpful to a number of cases. Finally I have set out the contextual considerations relating to the immigration rules. I will just highlight the need to be aware that the immigration rules have been changed now and there is currently a very controversial issue as regards the extent to which the new amended immigration rules are said to explain and define Article 8. So what the Home Office has sought to do with the changes in the immigration rules which happened on 9 July is say, unlike before, the immigration rules actually define the issue of proportionality under Article 8. The question that is going to arise in relation to that is the extent to which the immigration rules can actually define what Strasbourg has decided and what Strasbourg is obviously going on to decide in relation to human rights development.

Sue Willman: My talk does come with a HLPA health warning which is that shortly after I completed the notes the Government decided to publish 150 pages consolidating a new community care statute called the Care and Support Bill which means that, assuming that is passed, probably about half of what I am going to tell you will be out of date in 6 to 12 months time. However, do not all leave straight away; I will try and sprinkle some tempting titbits about the new Bill throughout my talk.

So I just started off with a reminder in the notes about the current legal framework; there are statutes, there are directions and there is guidance and that is where the confusion comes in because it is difficult to know whether the guidance is statutory guidance, is it policy guidance or is it practice

guidance? The Government plans to simplify all that; they do not like all this guidance and in future they would really like not to have any guidance at all except they realise that in emergencies they will still need to issue some guidance under the new Bill but it will be clear, whether or not it is statutory guidance, in the terms of it. Going back to the Bill itself, interestingly the Government decided to publish the White Paper and the Bill at the same time and allow 12 weeks consultation over the summer. The White Paper is full of spin, lots of nice pictures and circular and triangular diagrams and it talks about the care and support journey. More useful to try and work out what the Bill means is the Government's response to the Care Commission which was also published at the same time as one of the suite of documents. It is interesting, isn't it, having a whole new welfare provision? And it is not just a consolidating Bill; it does have some new provisions which could mean work for us lawyers and one of them is, which is for the benefit of our clients I think, there is a kind of equivalent to the Children Act best interests of the child provision which is in Clause 1, the wellbeing principle that care and support must prioritise individual wellbeing. There are also some things that we might recognise from housing law like an information and advice duty, for example.

But, sadly, they are going to get rid of Section 21 of the National Assistance Act which we have come to know and love since 1996 and I think that that may be worrying for some of the clients that we are talking about tonight because the pathway or the kind of gateway to all care is going to be through eligibility criteria. And just tucked away at the end of the White Paper is a note that says that in 2015 the Government is going to publish new eligibility criteria which sound like national criteria and will no doubt be towards the substantial and critical end of eligibility and will therefore limit access to community care provision. So at the moment the way that it works is that local authorities are responsible for arranging care under the NHS and Community Care Act and here is the list of some of those services. Then the LASSA statute requires local authorities to follow the statutory guidance which the Government has issued. The new Government does not like LASSA and they are going to get rid of that as well. I have just mentioned here in this opening framework some of the most relevant directions which we have at the moment. Community care assessment directions about the assessment procedure; well in future there are going to be regulations, of course not yet published, which are going to govern the community care assessment procedure so we will be looking back at those directions. In particular the Fair Access to Care Services, the FACS Guidance, which was updated relatively recently with new eligibility guidance will be going.

So turning to the right to a community care assessment, another piece of good news is that the Government is going to retain this fairly low threshold which people have to go through to access a community care assessment. At the moment the provision is that a person *may* be in need of community care services so that is a fairly low level. However, there is a slight change towards a more subjective test which is that when it appears to a local authority that the person may be in need of community care services so definitely litigation there. I suppose that we will have to argue that they are talking about a reasonable local authority. You know, as Ranjiv discussed at length, that there is then the exclusion for a person who falls within Schedule 3, subject to then being re-included. It is important to remember that the local authority does not necessarily have to be providing services again itself, it might be referring the case to another local authority.

In an interesting recent case, the kind of case you wish you had brought yourself, a prisoner with learning difficulties who was going to his parole board hearing was trying to get Islington to come and do a community care assessment to show that when he was released from prison, if he was released from prison, he would have somewhere to go and he would have a package of support. Islington were trying to refer it to another local authority where he had lived before he was in prison. He lost his case because there was no chance of him being released but the case does provide some quite useful guidance which indicates that people who are in prison or detention or psychiatric hospital, if there is a prospect of them being released then they can ask the local authority in the relevant area to come and assess them.

The other issue, of course, is carers' rights. At the moment there are lots of different pieces of guidance and legislation saying that a carer may have a right to an assessment and if a disabled person is refusing the services that you can perhaps provide the services via the carer. The carers lobby has been quite effective with the new Bill and there is going to be a clear duty to inform carers of their right to an assessment and to carry out an assessment and to provide them with a package to meet their eligible needs. Ranjiv did not have time, I think, to talk about this question about whether local authorities can refuse to carry out an assessment based on the person being possibly subject to Schedule 3. I think he would have said that that argument is not open to local authorities; that this person may be excluded and therefore we are not going to assess them at all. The reason being if you have got a disabled person or somebody with HIV or somebody with serious mental health needs;

in order to work out whether they need support to avoid a breach of their human rights, for example, you need to carry out a human rights assessment, you need to carry out that Schedule 3 assessment. You also need to look at the community care assessment to work out what the possible needs are. It is argued by local authorities that they do not have to such an assessment, certainly at the very least they are going to have to carry out an ECHR assessment which takes into account the community care needs.

Then the next question is which local authority should assess and, again, this is something which is in the new Bill. This is a positive development because it is being proposed that you should have the right to move to a different area so if you are living in Liverpool and you fancy moving to Bournemouth you should be able to move to Bournemouth, ask Bournemouth to assess you and until Bournemouth carry out the assessment, surprisingly perhaps, they are going to have to pay for the package of care which you had previously. I am not sure how that is going to work in practice if someone is in a care home and no doubt seaside local authorities are going to be complaining about it. But at the moment local authorities cannot refuse to assess because there is a dispute about who will provide services and the courts have really got fed up with these kinds of disputes. I also refer in the notes to the Ordinary Residence guidance but I will come back to that.

Something else which is often faced by practitioners is how long has the local authority got to do the assessment. So I have a client with paranoid schizophrenia at the moment; he has had an assessment by a psychiatric hospital, he has had an assessment by the GP, he has been assessed at home to see whether he should be sectioned, he has been to the community mental health team, social services have been round a couple of times; they still have not decided whether or not he is need of care and attention and they still have not completed the assessment. That is where Section 47(5) of the NHS and Community Care Act comes in; a local authority can provide a temporary service pending the conclusion of their assessment and that is your judicial review. Either they have got to complete the assessment within a reasonable time and make a decision under Section 21 or they need to provide emergency provision. Obviously that is probably not going to work if they are sleeping on the sofa, perhaps, of a relative but if the person is threatened with homelessness or is in completely unsuitable accommodation then, hopefully, it should work.

Lawful assessment process is something that is going to be covered in the new legislation, as I mentioned, by regulations. At the moment the assessment needs to take into account the directions, needs to take into account the care and wishes of the migrant and their carers and this is case law reference to take into account their psychological needs and their cultural and social support needs. For example, is they are Muslim they might want to be in certain types of accommodation.

Moving to paragraph 17 of the notes, what about eligibility criteria? These are what used to be called the FACS, Fair Access to Care Services criteria and now are revised eligibility criteria. It seems pretty astounding that local authorities are still refusing to give people Section 21 accommodation based on the fact that they do not meet the eligibility criteria. If you are a disabled person then you probably will have to have substantial or critical care needs to get community care services. The lower, low or moderate bands are probably not going to help you get anything very much. But if you are an asylum seeker or a migrant within Schedule 3 then it is not about the eligibility criteria; it is about whether you are in need of care and attention under Section 21 and as long ago as 2003 the Department of Health was explaining this so it is quite surprising that in the *Almeida* case that Ranjiv was talking about the same argument was being made in the last couple of months. Once again the Administrative Court made it clear that using those risk criteria was not appropriate for working out whether or not there is need for care and attention.

At paragraph 19 onwards, I am talking about the ordinary residence criteria and there are a few tips here for arguing about ordinary residence. I will not bore you with repeating the *Shah v Barnet LBC* test, which I am sure you are well aware of, but the idea that an asylum seeker might not acquire ordinary residence because they might have moved somewhere compulsorily, for example dispersed, etc. can work in this context. Against that, going back to the case of *Mani*, there was a finding that a period of 6 months in what was then NASS accommodation could amount to ordinary residence.

So we were all waiting for the House of Lords to give local authorities some guidance about what care and attention meant and it came in *M v Slough Borough Council*. It concerned a man with HIV but fairly asymptomatic HIV and he argued that he needed accommodation, not least so that he would have a fridge to keep his HIV medication in, which obviously he was not going to be able to have if he was street homeless. Unfortunately he lost his case, however the House of Lords guidance, on the face of it more restrictive than previously, was not as bad as we could have had and one important

point to remember is that they approved a lot of the previous cases, including the *NASS v Westminster* case and the *Mani* case, so if you are facing arguments about *M v Slough* that is something to bear in mind. They drew a clear distinction between medical needs and social services needs so if you are trying to argue that someone is in need of care and attention you need to try and find some social services type needs as opposed to more NHS type needs. I think a good way of looking at it, which was not part of Lady Hale's judgement, but is this the kind of help that a rich person might need? That would be something which brought you in need of care and attention. But really the central part of the judgement was this idea the person needed looking after, they needed something doing that they could not do for themselves, they might need watching over or, in the case of someone with mental health or mental disability needs, they may need protection from risks. However, after *M v Slough* there were a series of unhelpful cases so a seriously mentally ill client who was being looked after by his wife who was at the end of her tether, the need was being met by her so there was no need for care and attention, no Section 21 accommodation. In the next case, the *Shoaib v Newham LBC* the claimant had epilepsy and needed to be kept an eye on as a result of that and the social worker found that the claimant was able to look after himself and the court agreed.

There was then a case which went the other way, which was the case of *Zarzour v LB Hillingdon*, which concerned a young blind man who was just moving into new accommodation and needed help working his way around the accommodation and around the local area. Both the Administrative Court and the Court of Appeal decided that that was a need for care and attention, the need for certain help with dressing, matching his clothes up, with laundry, with being kept safe when he went outside that met the Section 21 test.

So then the most recent case is *SL v Westminster City Council*. Again, people had been waiting for a case about mental health. The Freedom from Torture was worried about torture survivors because the more restrictive approach to Section 21 was having an affect on them. In *SL* the client was not someone who just turned up at social services because he needed accommodation; he had been in psychiatric hospitals, he had a mental health social worker who was already having weekly meetings with him and was keeping an eye on him because he had been a suicide risk and he was being linked up to voluntary organisations and befriending groups. The Court of Appeal decided that that was a need for care and attention which was not otherwise available and they also looked at the question of could you provide that kind of support if you were not actually in accommodation? Westminster have been granted permission to appeal which is due to be heard on 28 and 29 January and they are arguing that you can have the care and attention without the accommodation; you can go to your social worker's office to meet them and to meet befriending organisations so perhaps rather worrying that the Supreme Court has granted permission to appeal. We have to wait and see whether they agree with Westminster.

Another interesting issue which is post *M v Slough* is the question of what happens if someone has a deteriorating condition or a need which goes up and down? I am now at paragraph 30. Some of the early cases were not very promising so in *N v Coventry City Council* this was somebody who was HIV positive and had been in hospital for TB and other HIV related illnesses. He was getting help from his cousin at times but did not always need that and social services decided that at the time of the assessment he could complete certain tasks unaided and therefore he was not in need of care and attention.

Nassery v London Borough of Brent was a case about mental health needs where the client had started off being quite seriously ill but by the time of the assessment he was a bit better and so he was unsuccessful.

In the case of *Almeida v Royal Borough of Kensington and Chelsea* you really wonder why somebody who has got 6 to 12 months life expectancy, HIV, Aids, hepatitis C and cancer has to go to the Administrative Court to get accommodation. He was Portuguese and had been evicted from his private rented accommodation and the council attacked him on all sides, found him excluded by Schedule 3 because he was an EEA national, but here I wanted to talk about his need for care and attention. So his need for care and attention fluctuated and having looked at the eligibility criteria the council found that he therefore did not qualify. Again, the court turned back to *M v Slough* but they reached a different conclusion. It was not that you had to be incapable of performing a particular task; it was about performing a task with difficulty. The things that he found difficult were things that had been talked about in *M v Slough*, domestic tasks like shopping and cleaning and I think this is the kind of key point, isn't it? It is not an unusual feature of long term illnesses that they fluctuate; that is what you would expect with serious illnesses and that does not necessarily take you outside the scope of Section 21(1) and they referred back to *Mani.* You remember that I said that in *M v Slough* they

approved the previous cases, that was a man who had one leg shorter than the other and he did not need help with household tasks all the time; he just needed it on certain days when he was in pain. The court found it was a question of fact for every case, whether or not there is a need for care and attention so faced with a fluctuating condition probably we are not going to have somebody as ill as Mr Almeida but I think the case does contain quite useful guidance, in particular this last bit at paragraph 35; the seriousness of his illness ongoing, debilitating symptoms, frequent periods of acute illness, hospitalisation and poor prognosis.

So quality of accommodation, just something as housing lawyers we may just overlook, is that at the moment you can argue about the type of accommodation that someone who is supported under community care provisions, migrant or other is given under the choice of accommodation directions. It is only works if the place your client wants to move to, or the type of place your client wants to move to, is not going to be any more expensive than the place the local authority has found for them. But these directions do provide that as long as it is of similar price you can choose what kind of accommodation you are in or which accommodation you are in and the local authority will have to come up with good reasons for refusing you.

At the end I just wanted to mention a couple of lawyers' points. Ranjiv started talking about the Reception Directive but he was running out of time so here I have just tried to clarify who it is going to apply to. It is, basically, someone who has a claim for asylum which has not yet been decided but it can also include someone who has made a fresh asylum claim. You may know about this *ZO (Somalia)* case which said that if you had been waiting 12 months after making a fresh claim then you are entitled to have permission for work and that case was decided based on the Reception Directive being part of UK law. So here I am just suggesting that we might want to think about using it in the context of housing and health is another area where it could be used and here are the groups that it is particularly aimed at. It talks about an adequate standard of living and taking account of special needs and I would say that it should be applied both in the Section 4 context, which is the obvious context, but also in the context of Section 21. Given that we have the Reception Directive, surely we can get in the EU Charter of Fundamental Rights, which I do not know if you have talked about but we are desperate to use and argue that there should be legal aid and other access to justice safeguards.

The last part should be fairly self-explanatory, still talking about the Directive through the Regulations but the fact that you might be able to make some kind of "due regard" argument to ensure that adequate accommodation is provided.

Chair: Are there any questions from the floor?

Nik Antoniades, Shelter: Could Ranjiv comment on this scenario: it is a *Clue* type situation where there is no application to the Secretary of State, for example for permission to remain outside the rules on Article 8 grounds because you cannot afford the fee, so should you not be asking social services to pay the fee to allow you in to the *Clue* type situation?

Ranjiv Khubber: That situation has arisen and there are two aspects to it. One is the aspect you have highlighted and the extent to which social services should assist in relation to the fee that is required to be paid in order to pursue the application but the other dimension, inevitably, is the legality of the Home Office requiring the fee. There have been challenges to that as regards the requirement for the fee in itself being unlawful; unlawful in a public law sense and unlawful in an Article 8 sense. There are cases which have been heard in the Administrative Court, I think there is a case by Miss Justice Black which is a very useful one. I think you are right to focus on social services as well to see if they can assist.

Wendy Pettifer, Hackney Law Centre: I wonder if people have come across the implementation of the Munro Agreement in Section 17 assessments whereby Hackney has tried to argue that they are in a pilot scheme which is financially supported by the Government whereby they do not have to comply with the time directions in the assessment framework for Section 17 assessments. I have heard that that is a Government proposal that is going to be rolled out nationally. I have challenged them on trying to opt out of the time requirements but they have just complied with them so we have not had anything that has gone any further than that.

Chair: Neither of the speakers seems to have heard of that. Although if Hackney give in perhaps it is just that they are not as keen to push that as they might suggest.

Jan Luba QC, Garden Court Chambers: Both speakers, for understandable reasons, have touched on the *D Almeida* decision and I wanted to go back, if I could, to the discussion of it at pages 10 and 11 of Ranjiv's very helpful paper. There are two striking features of Miss Justice Lang's decision. The first is the apparent assumption to herself of the question of whether the action proposed by the authority was proportionate or not and the departure, therefore, from a classis judicial review public law analysis. The second is, as you recount where you extract paragraph 141 of her judgement on page 11, the reversal of the burden of proof so it becomes necessary for the local authority in judicial review proceedings to prove that its action is proportionate. To the housing lawyer who has only just managed to convince the housing courts that any of this is arguable at all the idea that the judge assumes the decision making so you do not have to worry about the local authority's legality of its action and that the burden passes to the authority is quite striking. Am I misunderstanding or is the new battleground the granting of permission for judicial review, on the basis that once you have permission and there is a trial then the judge is looking at the question afresh and the burden of proof is passed to the defendant?

Ranjiv Khubber: In terms of the two parts that you refer to, it is clearly an ongoing issue of controversy about what the court is meant to be doing in a judicial review with a human rghts context. That has been bubbling around for ages now ever since *Daly* happened and what I thought was interesting is that the judge here goes much further than just simply anxious scrutiny, it is beyond super *Wednesbury*, it is just getting into it and saying, I have got to look at what I am doing as a public law court respecting the Human Rights Act. I thought what was interesting there is surely the focus should be what the essence of the issue? The essence of the issue for the High Court is whether the decision by the local authority is lawful. The decision of the local authority that is being impugned is the decision on paragraph 3. Paragraph 3 requires a consideration of the very question under ECHR so I think what the court is doing there is certainly taking a more muscular role than was ever envisaged under judicial review normally but I think something that is logical and inevitable because of the very fabric of the context.

The question that is being asked or being put forward to the court to engage in is under paragraph 3, will there be a breach? If that is the question, what can the court do? It cannot simply, I would say, recoil and go back into *Wednesbury* mode;it can certainly do more than that. Whether it can go into the heart of the question and decide the question is certainly a controversial one. There is some support for that through the growing jurisprudence and particularly I think that *Denbigh* is the case that Miss Justice Lang decides to say, as I have said when I was making my observations, look to substance not form. That is what Strasbourg says and I think that is what this judgement says; that is what I am taking inspiration from, I am looking for substance not form. What is happening here under paragraph 3? My view, including post decision evidence, is there is a breach. I think that is obviously going to be a question that will continue to rumble as regards legality but I think there is certainly a basis for it as being a legally permissible approach. It is certainly going to be interesting for future cases as regards the approach that will form the debate of the arguments post permission. I would say that in the light of this, I think in extreme cases there will not be many post permission trials but there are not going to be that many extreme cases, I would have thought. It is when you get into the much more careful and nuance cases that it is going to get very much more difficult. I think the point that you are raising is a good one because other judges may take the view that I can do super *Wednesbury* but I cannot do more than that. So I think it is an ongoing debate.

On the other aspect, the burden of proof, again that is an interesting point. That has been debated in the immigration context and what has happened, again I have not got the citation with me, I think it is paragraph 11, Court of Appeal, I cannot remember the year. It is a judgement where Lord Justice Sedley actually said that once you get into proportionality under Article 8(2) the burden shifts on the Secretary of State. Now that point was not taken on board in a lot of the judgements because in Article 8 cases in the immigration context the courts do not really want to get into a debate about the burden of proof; they just simply want to get into what is the answer on proportionality? But if you are looking for any kind of original basis for that approach there is certainly one in immigration.

Chair: I would now like to thank both our speakers and move on to the Information Exchange.

David Watkinson, Garden Court Chambers: This is on the issue of whether the proportionality approach applies at the point of enforcement of a possession order as well as at the time when the possession order was made. This issue was argued at a hearing last week in a case called *JL v Ministry of Defence* and judgement has been reserved, that is from 12 July last week. It may not go that far to dealing with the issue because the circumstances were unusual to an extent in that at the time when the actual possession order was made the court could not conduct a proportionality review

because it was prior to *Manchester City Council v Pinnock*. However, the Ministry of Defence argued that the logic of the claimant's position was that the claimant, or any person against whom a possession order was made, could claim entitlement to 2 proportionality reviews; once at the time when the possession order was made and once when it was sought to enforce. In addition to that and relating to what we have just been talking about, the judge also decided that she could consider whether it would be proportional now for the possession order to be enforced and that was conceded by the representative of the Ministry of Defence. That has some bearing on the facts of the case because there have been significant changes in the claimant's position since permission was granted, which was almost exactly a year ago, last July. So there is something to look out for.

Chair: Is that the case that started as *Defence Estates v L* a couple of years ago?

David Watkinson: That is the very one, yes.

Chair: The woman and her disabled children are still in occupation? The case where her partner (who was ex-services) left her?

David Watkinson: Correct.

John Gallagher, Shelter: This is an issue that has not gone anywhere near the courts but I thought it might be worth mentioning as it has featured in a couple of cases that we have had recently. It is a question of whether a minor, a child, can claim housing benefit and this issue may be familiar to many of you but I am afraid it was not to me. Both cases have involved housing association tenants who have been sent to prison for periods of two to three years leaving their children in the flat so in both cases the housing benefit claim has ceased immediately the mothers were sentenced and rent arrears had begun to build up. In both cases the children's grandmother is acting as their carer and in both cases the housing association has, predictably, reacted by bringing possession proceedings and in once case obtained an outright order so the children not only lost their mother to imprisonment but were also faced with losing their home as well. In some cases it should be a relatively straightforward matter for the grandmother to make a claim for housing benefit under Regulation 8 of the Housing Benefit Regulations on the basis that the tenant is not able to make the claim and it is reasonable to treat her as liable for the rent if the home is to be preserved. That could not happen in these cases because in one case the grandmother had no recourse to public funds and in the other she already had a housing benefit claim on her own flat which she had left temporarily. So we submitted a claim for housing benefit in the name of the eldest child who was aged 12 in one case and 14 in the other, although I do not think anything turns on the age.

Nowhere in the Housing Benefit Regulations does it actually say that you have to be an adult to claim housing benefit. We argued that it was reasonable to treat the child as liable for the rental payments because accommodation is a necessary and minors can be liable for necessaries. As expected, the initial reaction of the two councils was to throw up their hands in horror and say do not be ridiculous, we cannot accept a claim from a 12 year old. But after some persuasion they agreed to take it seriously. The way that housing benefit officers deal with life's uncertainties is to go on to a social networking site frequented by housing benefit officers and there they can be reassured by their colleagues that that is not such a daft idea after all and that it has been accepted in other cases. So the outcome is that housing benefit is now back in payment in both cases and most of the arrears have been cleared by back payments and the possession order is about, hopefully, to be set aside. So it is always worth thinking about the child making a housing benefit claim in this type of case where, for some reason, the carer is unable to do so.

Sue Willman: My colleague, Sasha Rosanski has asked me to mention an unsuccessful homelessness appeal called *Price v Southwark* in which she has been granted permission to appeal to the Court of Appeal. It is on the right to reside; it is one of the *Zambrano* cases so a Jamaican over-stayer with three kids, two are British, she is the primary carer, they are dependent on her because they do not have any contact with their fathers. The County Court looked closely at the actual homelessness legislation itself and decided that because she did not have any kind of Home Office residence permit that she did not have a right to reside. The Court of Appeal have granted permission to appeal focusing on Article 20 of the Treaty on the Functioning of the EU which is about the right to citizenship and the right to residents connected to the citizenship. She says in her notes, Desmond, that you have got a case called *Jabassi* which seems to be on a similar point. I do not know if you want to mention that or you have already mentioned that?

Desmond Rutledge, Garden Court Chambers: Yes and no. Social security has to go for an elaborate statutory appeal system which seems to take forever and they use any excuse to stay everything and let somebody else make key decisions and then they come on board. So they are currently staying everything and waiting for a Court of Appeal decision. But the one that I was running was a satellite legislation whereby because we actually had succeeded before a specialist first tier tribunal we then said can we be paid and challenged a decision to suspend payment and that went down like a lead balloon in the Administrative Court. But it is currently awaiting a Lord Justice or Lady Justice to consider.

David Watkinson, Garden Court Chambers: I am in fact awaiting judgement in a case concerning a child claimant for housing benefit from the Upper Tribunal. The hearing was on 1 March this year and it is a case called *Tallaat v Westminster City Council* and the child at the time of the claim was aged 4½. The reason why she was claiming housing benefit was because her mother was a person from abroad and not entitled and her father was in prison for a period of time which put him outside a housing benefit claim. Neither of those disqualifications continued to apply so in fact, again, it was a housing association and the landlord held off possession proceedings long enough for a housing benefit claim to be made by one or other of the parents so we are, in fact, now dealing with historic arrears. But that judgement on that issue making exactly the same point as John has outlined is pending because the Department of Works and Pensions submitted that they considered children who were competent and we are talking 13 to 16 year olds or thereabouts would be able to claim housing benefit, though something may come out of it yet.

Nik Antoniades, Shelter: This is just a request, really, for information from other members. I am becoming increasingly exercised about the plight 35 year olds or people under 35 who are only entitled to housing benefit equal to the single persons share. I would just like some help with brainstorming any possible remedies or solutions or ways of keeping people in their homes because I see an army of potential homeless people with no duty on the part of anybody to help them because they are fit and well, as it were, and not priority need. My email address is nik_antoniades@shelter.org.uk; any thoughts would be gratefully appreciated.

Chair: Are there any members of the Executive here who want to make reports or announcements?

David Watkinson, Garden Court Chambers: This is on housing law reform. Just to recap, when we were last here on 16 May I referred to Section 144 of the Legal Aid Act, the criminalisation of squatting. I said there was no date so far as I know for its coming into force; my information is it will come into force on 1 September of this year so from then on any person who is squatting in a building who knows or ought to know that they are a trespasser will be committing a criminal offence, no matter when they started.

Secondly, I said that the Queen's Speech did not contain anything about implementation proposals that had been consulted on last year for extending the mandatory grounds relating to anti-social behaviour and extending the discretionary ground. Well, on 22 May the Government announced that this legislation would be introduced in a Home Office Bill at some as yet undetermined time but that is clearly on the legislative agenda.

Next, I hope everybody has caught up with the new Allocation of Accommodation guidance for local housing authorities in England which was published by the Department of Communities and Local Government on 29 June 2012 and that gives guidance in particular in relation to the new allocation system under the Localism Act.

Then we have the most recent consultation paper, which is the Homelessness Suitability of Accommodation England Order 2012. The paper came out in May and the closing date is 5pm on 26 July so that is next week. You remember this was trailered at the end of last year. This is about discharge of the homelessness duty in the private sector and lays down what a local authority should form a view about when facilitating an offer in the private sector and it has to be said it is not at all bad, actually. The authority should be of the view that the accommodation is in a reasonable physical condition, that it must consider electrical equipment safety, fire safety precautions, carbon monoxide poisoning, that the landlord is a fit and proper person to act in the capacity of the landlord, that if it is a house in multiple occupation it is licensed under the Housing Act 2004, that it has a valid energy performance certificate, a gas safety record and the landlord has provided a written tenancy agreement which it proposes to use. We are asked for our comments on that if anything more should be included. The consultation paper also asks whether there should be a statutory instrument to do with the location of accommodation. It asks whether in principle we think that there should be, well no

prizes for guessing an HLPA answer on that, I would think, and if so what it should contain. If you have comments could you please send them to me at davidw@gclaw.co.uk.

Chair: Just two other short announcements on behalf of the Executive. Those of you who were here at the last meeting will remember that David Watkinson announced that he is standing down from chairing the law reform committee and this task is going to fall to me. I intend to put together a housing law reform committee. Anyone who would like to join the housing law reform committee, please come and see me afterwards.

The second point on behalf of the Executive is we have been approached by Sweet & Maxwell who publish among other things the Journal of Housing Law. At the conference this year they will be giving out information and flyers inviting HLPA members to have a half price subscription to the Journal of Housing Law for a year. They have also asked if we would like to guest edit an edition of the Journal which we have agreed to do. Anyone who is interested in writing something for the Journal of Housing Law, please let me or Giles Peaker, the HLPA Chair, know as we need to start putting together our writing team for it reasonably promptly.

The next HLPA meeting will be held on 19 September when we will have the homelessness update. Thank you very much for coming and thanks once again to our speakers.

OUTSIDE THE HOUSING ACTS: NO RECOURSE AND COMMUNITY CARE

Presented by Ranjiv Khubber (1 Pump Court Chambers) and

Sue Willman (Deighton Pierce Glynn solicitors)

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Exclusion from assistance, exemption from exclusion under ECHR/EU law and the division of responsibility between public authorities.

Introduction.

0.1. The purpose of this talk is to provide an analysis of key recent developments in an area which is subject to a complex interplay between a number of different areas of legislation, rapidly developing case law and extra statutory guidance.

S.54 /Schedule 3 Nationality Immigration and Asylum Act 2002 ("Sch 3 NIAA 2002").

The generally excluded classes.

1.1. Sch 3 NIAA 2002 (paras 4-7A) sets out a general exclusion from social welfare support for persons subject to immigration control, Refugees and EU nationals:

1.2. Who is excluded?

i. Person with Refugee Status abroad (para 4);

ii. Citizen of EEA state (para 5);

iii. Failed asylum seeker (para 6);

iv. Person unlawfully in UK (para 7);

v. Failed asylum seeker with family (para 7A).

1.3. In *R(AW) and others v Croydon LBC and others [2005] EWHC 2950 (Admin)* the Court held that a failed asylum seeker who was in the UK in breach of immigration laws under s.11 of the NIAA 2002 was by virtue of Sch 3 para 7 ineligible for support and assistance identified in Sch 1 para 1, subject to the exceptions in Sch 3 para 2-3. Parliament had clearly intended to distinguish between those who claimed asylum at the port of entry and those who claimed later, treating the former group more generously. There was a clear policy in the legislation to discourage such late applications and encourage prompt applications at the port of entry (see paras 27-29). As such a failed asylum seeker who claimed at port will be usually be granted temporary admission and therefore not be in the UK unlawfully (and therefore not fall within para 7), whereas a failed asylum seeker who did not claim at port will be in the UK unlawfully, needing to satisfy para 3 in order to be provided with welfare assistance under Sch 3 para 1.

Generally excluded social welfare provisions.

1.4. Sch 3 NIAA 2002 (para 1) sets out a general exclusion from a raft of social welfare provisions e.g. s.21 NAA 1948, s.17 etc CA 1989, s.2 LGA 2000, Part VI (asylum support) IAA 1999, s.4 support IAA 1999, s.188(3)/204(4) Housing Act 1996 (accommodation pending review or appeal) and s. 2 LGA 2000.

Exemptions from exclusion.

1.5. However, that general exclusion does not prevent provision of support to a British citizen or to a child or by virtue of certain regulations made pursuant to the section (Sch 3 para 2).

1.6. Further, there is an exemption from the general exclusion for persons falling within paras 4-7A by virtue of Sch 3 para 3:

"Paragraph 1 does not prevent the exercise of a power or the performance of a duty if, and to the extent that, its exercise or performance is necessary for the purpose of avoiding a breach of –

(a) a person's Convention rights, or

(b) a person's rights under Community Treaties".

1.7. In addition, and pursuant to Sch 3 para 9 NIAA 2002 and the *Withholding and Withdrawal of Support (Travel Assistance and Temporary Accommodation) Regulations 2002*, a local authority may be under a duty to provide temporary accommodation to a adult and child/ children who otherwise fall within para 7 (unlawfully in the UK) (per para 3(3) regs, see *R (M) v Islington LBC and SSHD [2004] EWCA Civ 235*). As stated in *M,* this can be for a considerably longer period than 10 days stated in the Home Office guidance issued in relation to these regulations.

Case law developments.

1.8. Recent case law has focussed on the nature and scope of the protection provided by para 3, the tension between the role of the SSHD/UKBA and local authorities in relation to issues that arise in relation to exclusion and the division of responsibility as between the SSHD in relation to support under s. 4 IAA 1999 and local authorities (particularly under s.17 CA 1989).

Clue v Birmingham CC and SSHD (Section 17 and Sch 3 NIAA 2002).

1.8. In *Clue v Birmingham CC* Charles J held that the local authority's decision to offer support to a Jamaican overstayer and her children by way of airfares to Jamaica was unlawful by failing to take into account the Home Office's policy on not removing children and their parents where they had resided in the UK for at least 7 years ("DP5/96"). Further the potential for divergence between decision makers on matters crucial to the question of whether a family's Art 8 ECHR rights were being breached

should be avoided or kept to a minimum. In order to achieve this it would be sensible to either join the Home Office to the existing proceedings or to obtain its view on the immigration issue (See paras 38-52).

1.9. The local authority appealed this decision to the Court of Appeal. The Court of Appeal gave some authoritative guidance on the scope of the use of Schedule 3 and the division of responsibility between local authorities and the Home Secretary; in short the Court has emphasised the limited way in which the local authority can adopt the approach taken in cases such as *Kimani* and *Grant* previously.

1.10. The court noted that the issues in the case before them concern a person who

i. is unlawfully present in the UK within the meaning of para 7 of Sch 3;
ii. is destitute and would (apart from Sch 3) be eligible for services of the kind listed in para 1 of Sch 3; and
iii. has made an application to the SSHD for leave to remain which expressly or impliedly raises grounds under the ECHR (para 53).

1.11. The Court dismissed Birmingham's appeal and reached the following conclusions:

i. *Previous case law distinguished;* In *Kimani* the case was concerned with family and not private life under Article 8 and in *Grant* there was no full consideration of Article 8 - further fact that the claimant was unlawfully present not legally relevant to the question whether the refusal of a local authority to provide assistance was impermissible on the grounds that it would breach their Convention rights (paras 41,49). The recent case law on Article 8 from the House of Lords did not however undermine the decisions *Kimani* and *Grant* (para 42[1]);
ii. *Relevance of practical impediment to return;* Where only potential impediment to leaving the UK for an illegal migrant practical in nature then open to a local authority to avoid breach of ECHR by arranging removal (para 56).
iii. *Relevance of legal impediment to return;* where potential impediment to return is legal (i.e. breach of ECHR) further consideration required (para 57);
iv. *Fundamental difference between social services functions of a local authority and the immigration functions of the SSHD;* reliance on *ex p 0* (para 60);

[1] This conclusion has to now be read in the light of the seminal guidance by the Supreme Court in *ZH (Tanzania) v SSHD [2011] UKSC 4[2011] 2 AC 166.*

v. *Sch 3 does not require local authorities to make an immigration decision that needs to be made by the SSHD* (paras 61, 65-68);

vi. *The correct task for local authorities when considering immigration issues under Sch 3;* save in hopeless or abusive cases, when considering ECHR obligations, local authorities not required or entitled to decide how SSHD will determine immigration application (para 63);

vii. *Relevance of immigration rules for local authorities;* local authorities should approach their task on the footing that if, by withholding assistance, they require a person to return to his country of origin, that person's application for leave to remain will be treated by the SSHD as withdrawn (para 65);

viii. *Financial situation of local authority irrelevant when considering Sch 3 and when 3 conditions satisfied* (per para 1.9 above, see para 72 judgment);

ix. *Where no outstanding immigration application;* different considerations do apply where the person does not have an outstanding application for leave to remain. In that situation, the local authority is entitled to have regard to the calls of others on its budget in deciding whether an interference with a person's Article 8 rights would be justified and proportionate within the meaning of Art 8(2) (para 73);

x. *Assessments unlawful;* In the present case the assessment was unlawful because it, amongst other reasons, had failed to appreciate that the claim made was not obviously hopeless or abusive (para 77);

xi. *Failure to appreciate importance of private life under Art 8 ECHR;* Yet further the assessment had failed to appreciate and give consideration to the fact that to require the claimant and her family to return to Jamaica would interfere with the family's right to *private* life or that they understood that the private life rights of the children who were born in the UK or came here at an early age were of particular weight (para 79);

xii. *Co-ordinated assessments by SSHD and local authorities?* The second issue in the case was: does rational and/ or proportionate decision-making require the SSHD and the local authority to make Convention assessments in a co-ordinated manner and at the same time? (para 83);

xiii. The Court noted that the facts of the current case exposed the problem that has been created for local authorities by delays on the part of the UKBA in dealing with applications for leave to remain by persons in the position of the Claimant and her family and further noted that the SSHD had set out 3 ways

in which the UKBA had been working to achieve increased co-operation and liason with local authorities (paras 83-85[2]);

Subsequent case law developments.

1.11. Issues now arise as to whether support by a local authority or the SSHD should be provided where a negative decision has been made on further representations and where the claimants i. are in the process of seeking advice to challenge such a decision by JR or ii. have issued a claim for JR challenging such a decision.

1.12. It is arguable that they should be protected under para 3 Schedule 3 NIAA 2002 via e.g. s.17 CA 1989. This is because such situations are not one where there has been no representations made (per *Clue* para 73). Further, where a person is entitled to seek legal advice against an adverse decision that can be seen to constitute a legal impediment as opposed to a merely practical one (per *Clue* para 57). Persons in such a position are entitled to seek access to legal advice as a fundamental right (e.g. see *Anufrijeva v SSHD [2003] UKHL 36* per Lord Bingham at para 26). Further, access to legal advice in relation to rights under the ECHR can be seen as analogous to rights protected under the Reception Directive[3] for asylum seekers - see Reception Directive Article 2(c) (definition of asylum seeker includes an application for asylum in respect of which a final decision has not yet been taken) and observations in *ZO (Somalia) v SSHD* per Lord Kerr at para 30 (referring to final decision meaning when all remedies have been pursued and determined). See further judgment of Stadlen J in *R (NS (Somalia) v FTT and SSHD [2009] EWHC 3819 Admin* (the FTT had erred in law when dismissing an appeal against a decision of the SSHD to cease to provide a failed asylum seeker with s.4 support by holding that the making of an application for JR of another decision of the SSHD (fresh claim refusal) was not of itself sufficient to satisfy the ECHR protection basis for s.4 support under the relevant Regulations (Reg 3(2)(e) *Immigration and Asylum (Provision of Accommodation to Failed Asylum Seekers) Regulations 2005*).

[2] See further paras 77-78 *MK and AH v SSHD [2012] EWHC 1896* in relation to Home Office procedure.
[3] *Council Directive (2003/9/EC) of 27 January 2003 laying down minimum standards for the reception of asylum seekers (the "Reception Directive").*

1.13. The recent case of *R (Almeida) v RBKC [2012] EWHC 1082 (Admin)* considered a number of issues in relation to provision of support by a local authority under Schedule 3 in the context of a European national without access to mainstream support.

1.14. This part of the talk is not looking at s.21 NAA 1948 analysis (Sue will be covering this in her session) but analysing the Court's approach to the ECHR exception for a EU national.

1.15. The Claimant was a Portuguese national who had lawfully entered the UK. He was terminally ill with severe AIDS and had a life expectancy of less than a year. He was highly susceptible to life-threatening infections and was also suffering from skin cancer. After becoming too ill to work and unable to pay for his own accommodation he sought assistance from the local authority under S.21 NAA 1948. After assessment the local authority concluded that he was not eligible for assistance under s.21 and further that refusal to provide such assistance would not breach his rights under Articles 3 and/or 8 ECHR (per para 3 Schedule 3 NIAA 2002) because it was reasonable to expect him to return to Portugal.

1.16. In terms of the key issues under Sch 3 the Court essentially held that the local authority's decision to refuse to provide assistance under s.21 NAA 1948 was incompatible with his rights under Article 3 and 8. See in particular paras 72-74, 83-85, 115-122,131, 138:

The Court's approach on JR to a local authority's assessment under the ECHR:

72. The Defendant submitted that, in deciding the human rights issue, the court's role was limited to determining "whether there is an error of law in the council's human rights assessment on traditional judicial review principles" (skeleton argument, paragraph 5). It was for the Defendant to decide, under paragraph 3 of Schedule 3 to the NIAA 2002, whether the making of s.21(1)(a) arrangements was "necessary for the purpose of avoiding a breach of a person's Convention rights". The Court did not have the information required to make this judgment, nor was it entitled to substitute its judgment for that of the Defendant. It followed from this analysis that the issue had to be decided on the basis of the evidence available to the Defendant at the date it made its human rights assessment, in October 2011, not 6 months later. The Defendant relied upon the authorities of M v Islington LBC [2004] EWCA Civ 235 and Clue v Birmingham CC [2010] EWCA Civ 460; however, these cases did not

provide much assistance on the role of the Court when considering alleged breaches of Convention rights.

73. I accept the Claimant's submission that the Defendant's analysis of the Court's role is too restrictive. As the Court is itself a public authority for the purposes of the Human Rights Act 1998, it is subject to the duty in s.6 not to act incompatibly with Convention rights. It must also ensure that other public authorities, such as the Defendant, do not act incompatibly with Convention rights. This is an essential part of the way in which the ECHR is enforced in domestic law. Lord Bingham said in Huang v. Secretary of State for the Home Department [2007] 1 AC 167, at [8]:

"In the Human Rights Act 1998 Parliament not only enabled but required the Convention rights set out in Schedule 1 to the Act .. to be given effect as a matter of domestic law in this country. It did so (section 2) by requiring courts or tribunals determining a question which had arisen in connection with a Convention right to take into account of any relevant Strasbourg jurisprudence, by requiring legislation, where possible, to be read compatibly with Convention rights (section 3) and, most importantly, by declaring it unlawful (section 6) for a public authority to act in a way incompatible with a Convention right. Thus immigration officers, the appellate immigration authority and the courts, as public authorities (section 6(3), act unlawfully if they do not (save in specified circumstances) act compatibly with a person's Convention right....The object is to ensure that public authorities should act to avert or rectify any violation of a Convention right, with the result that such results would be effectively protected at home, thus (it was hoped) obviating or reducing the need for recourse to Strasbourg."

83. Although the relevant court in Pinnock was the County Court, the Claimant submits that, by analogy, the Administrative Court must have a similar power as the sole court with power to review whether or not the Defendant's decision will result in a breach of the Claimant's Article 3 and Article 8 rights.

84. The Claimant particularly relies upon the confirmation by the Supreme Court that, as part of its review, the Court may consider facts which have arisen since the issue of proceedings. This develops the approach of Lord Bingham in Denbigh where he said, at [30], "The domestic court must now make a value judgment, an evaluation, by reference to the circumstances prevailing at the relevant time". It also accords with the approach taken by the ECtHR in D v UK (1997) 24 EHRR, at [50]: "the Court will assess the risk in the light of the material before it at the time of its consideration of the case, including the most recent information on his state of health".

85. In the light of these authorities, I cannot accede to the Defendant's submission that the role of the Court is limited to a review of the Defendant's decision in October 2011 on traditional judicial review grounds. I also accept the Claimant's submission that the Court is entitled to take into account evidence relating to the Claimant's current medical condition, post-dating the Defendant's decision of October 2011.

The Court’s approach to Article 3:

115. In this case, the Claimant is threatened with the loss of accommodation and support, not with removal. Although this distinguishes his case from N and D, the parties are agreed that the general principles in those cases are applicable here. In an Article 3 case, the focus is on the effect on the applicant of the move to another country, rather than the reason or justification for the move.

116. In my judgment, applying the test set out in N, the Claimant's case is 'exceptional' because he is at the end of his life. Based on the medical opinion, his life expectancy is very limited, and he could die at any time. He has advanced and untreatable HIV/AIDS, hepatitis C and cancer and he is being hospitalised on a monthly/bi-monthly basis.

117. Although Portugal is an EU country and signatory to the ECHR, with a health and welfare system, it is too late for this impoverished Claimant to access the immediate support which he needs on his return, because of his weakened physical condition; his vulnerable mental state; the absence of any friends or family in Portugal to assist him; and the 'cumbersome' and slow assessment procedures in Portugal (for exemption from health care charges, eligibility for financial benefits, and any type of accommodation). The Defendant's offer of financial support for 4 weeks is insufficient, as the evidence is that it will take much longer than that for him to obtain the accommodation and benefits he needs, and so there is, in my view, a real risk that the Claimant will end up sleeping rough on the streets. As M said; "[t]he effect of what would essentially be a forced return of a sick man ...would be to condemn this man to a very likely relapse, a hastened death, and a lonely end to what has been a brave struggle to live with dignity."

118. In my judgment, this case falls within the exceptional class described by Lady Hale in N v Secretary of State for the Home Department [2005] 2 AC 296, at [69]:

"...the test, in this sort of case, is whether the applicant's illness has reached such a critical stage (i.e. he is dying) that it would be inhuman treatment to deprive him of the care which he is currently receiving and send him home to an early death unless there is care available there to enable him to meet that fate with dignity."

119. Lord Hope explained the test applied by the ECtHR in D at [36]:

"What was it then that made the case exceptional? It is to be found, I think, in the references to D's "present medical condition" (para 50) and to that fact that he was terminally ill (para 51: "the advanced states of a terminal and incurable illness"; para 52 "a terminally ill man".....). It was the fact that he was already terminally ill while still present in the territory of the expelling state that made his case exceptional."

120. Lord Brown said of D at [94]:

"The critical question there was accordingly where and in what circumstances D should die rather than where he should live and be treated. D really did concern what was principally a negative obligation, not to deport D to an imminent, lonely and distressing end. Not so the more recent cases including the present one."

121. As stated in Macdonald: Immigration Law and Practice (8th ed., 2010), at 8.53, the conclusion of the House of Lords was that "[t]he breach of Article 3 in D's case did not lie in the denial of treatment which would ensure his long-term survival there (there wasn't any at the time), but on the

denial of the opportunity to die in dignity, in a caring environment. This was what was exceptional in D's case.."

122. In my judgment, the potential breach of Article 3 in the Claimant's case is, as in D's case, that it would be "inhuman treatment" to send him to an undignified and distressing end in Portugal, facing delay and difficulty in obtaining accommodation and benefits, and parted from his existing support network of friends and healthcare professionals.

The Court's approach to Article 8:

131. For the reasons set out in paragraphs 115 to 121 above, I consider it inevitable that the refusal to provide accommodation and support in the UK, thus forcing the Claimant to return to Portugal, will 'interfere' with the Claimant's physical and psychological integrity, within the meaning of Article 8.
132. However, such interference is in accordance with the law, as set out in Schedule 3 to the NIAA 2002.
133. The Defendant submits, and I accept, that it is exercising a legitimate aim, in the interests of "the economic well-being of the country" in seeking to minimise its expenditure on social services, and prioritising its scarce resources for the benefit of UK nationals.
134. In R. (Clue) v Birmingham City Council [2011] 1 W.L.R. 99, the Court of Appeal held, at [73], that, where there was no outstanding application for leave to remain, a local authority was entitled to have regard to the calls of others on its budget in deciding whether an interference would be justified and proportionate.
135. The issue is whether such interference is "necessary in a democratic society", that is to say, justified by a pressing social need, and, in particular, proportionate to the legitimate public end sought to be achieved.
136. The financial burden of supporting the Claimant is the justification for the interference with his private life. However, the Claimant has a limited life expectancy and so the cost to the public purse is not open-ended. The cost of supporting him in the UK has to be weighed against the costs which will be incurred if the Defendant pursues its preferred option of repatriation to Portugal.
137. The Defendant accepts that, if it decides to withdraws support in the UK, it must incur the expense of obtaining a passport and Portuguese ID card for the Claimant; translate his medical records; fund his travel; use its staff resources to assist him in making appointments with welfare authorities in Lisbon; and fund temporary accommodation and living expenses for up to 4 weeks, at the same rate as in the UK. His departure cannot be immediate and the Defendant will continue to pay the cost of supporting him in the UK until his passport and ID card are obtained. By then he may be hospitalised and too ill to travel.
138. In my judgment, the Claimant is justified in submitting that any potential saving to the public purse will be minimal and does not reasonably justify a decision which will have such severe consequences for the Claimant. The Claimant's terminal illness means that he faces an undignified

and distressing end in Portugal, struggling to find any accommodation and means of support, and parted from his existing support network of friends and healthcare professionals.

139. It is appropriate to weigh in the balance the fact that the Claimant entered the UK lawfully and has worked here (see JA (Ivory Coast) & Anor v Secretary of State for the Home Department [2009] EWCA Civ 1353, per Sedley LJ at [21],[22], distinguishing the claimants' cases from N v UK and D v UK, on the basis that they were lawful entrants). He has spent a significant time here and prior to becoming seriously ill he did not rely on public resources for his welfare.

140. In its decision letter, the Defendant relied upon the fact that the Claimant could maintain his private life relationships from Portugal e.g. by electronic means of communication. In its assessment, the social worker referred to the possibility that he would be able to develop new friendships through Narcotics Anonymous in Portugal. These are valid points, but they do not address the problem of depriving a very sick man of his support network, which currently provides him with practical day-to-day help, as well as emotional support.

141. In my judgment, for the reasons set out above, the Defendant has failed to discharge the burden of proving that its decision is "necessary in a democratic society", that is to say, justified by a pressing social need, and proportionate to its legitimate aim. I find, therefore, that the consequence of its decision (if implemented) will be a breach of Article 8.

1.17. Points that emerge from this judgment and that are likely to be relevant for future cases include:

i. The Court's clear rejection of a narrow *Wednesbury* approach contended by the Defendant to a JR challenge in relation to potential breaches of the ECHR (paras 72-73, 83-85).

ii. The Court's emphasis on the relatively high threshold in order to establish a breach of Article (per *N v UK etc*). However, the Court also emphasised that in an Article 3 case the focus is on the *effect* on the applicant of the move to another country, rather than the reason or justification for the move (para 115-116). On this aspect, and more generally on Article 3, the guidance in *Pretty v UK (2002) 35 EHRR 1 (33)* para 52 is particularly important;

iii. The fact that Article 3 breaches can occur even in relation to an EU national being returned to another Member State. However, what will be required here will be a particularly detailed comparative assessment of the availability of support/ relevant social infrastructure in the UK with the proposed state of return/expected departure (see paras 88-106);

iv. When looking at Article 8 there will be two potential aspects to consider where there is no family unit; private life in terms of social infra-structure and support in the UK (see para 127, also see *Clue v Birmingham CC*) and private life in terms of moral and physical integrity, relating to impact of removal /departure on health (per *Bensaid v UK (2001) 33 EHRR 205*);

v. When addressing the issue of proportionality (justification for not providing support) the expenses incurred by a local authority had to be compared to the impact of the denial of that cost (e.g. the extent of the consequences to the Claimant, severe or elsewhere on a spectrum (see paras 137-140). On the facts the position was stark but in other cases it may be more nuanced and indeed difficult to assess.

1.18. In *R (U) v Newham LBC [2012] EWHC 610 (Admin)* U was a British child who was dependent on her mother, a 3rd country national and U's sole carer. U applied for JR of a decision by Newham LBC to refuse to provide her with accommodation and financial support under s. 17 CA 1989. The case settled before any substantive hearing but the Court made the following declaration:

> "(i) The Claimant is a British citizen with EU rights. By virtue of the Claimant being entirely dependent on her mother, her mother has derivate rights to reside as the Claimant's primary carer under EU law as such a right of residence is necessary to render effective the Claimant's EU rights arising under article 20, TFEU.
> (ii) Local authorities when considering eligibility for support of a British child with a Third Country national parent under the Children Act 1989 must consider the nature of the family's composition and the dependency between the child and parent and the family's right to reside in the UK under EU law to determine the family's eligibility for mainstream support. This is not dependent on the Third Country national parent's domestic immigration status."

Section 17 CA 1989 v Section 4 IAA 1999.

2.1.1. The recent case of *R (VC and others) v Newcastle CC and SSHD [2011] EWHC 2673 (Admin)* has addressed perhaps the inevitable issue, in the light of previous case law, on the division of responsibility between local and central government obligations in

relation to the correct approach to the dividing line between the provision of support under s. 4 IAA 1999 and s. 17 CA 1989.

2.1.2. The case concerned two sets of claimants, the most relevant of which for the purposes of the legal question, was K.

2.1.3. The Claimant K had 2 children J and B. She had arrived in the UK 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 s. 95 IAA 1999 was then terminated. J was born on 29 January 2008. On 18 December 2007 the local authority had begun to provide support, and from 17 January 2008, accommodation, both under s. 17 CA 1989.

2.1.4. K submitted a "legacy" questionnaire to the SSHD 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. She was subsequently granted ILR.

2.1.5. B was born on 5 March 2010, with 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 s. 4 IAA 1999 support within 2 weeks her s. 17 CA 1989 support would cease. On 10 June 2010 K applied for s. 4 support. Her application was refused on 14 June 2010 and her appeal from that decision was dismissed on 30 June 2010. 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 s. 4 support and again threatening to terminate her s. 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 for JR. It was implicit that the local authority had assessed J (and possibly B) as being a child in need.

2.1.6. The Court granted the application for JR and reached the following conclusions:

i. The Court had to make comment on the unnecessarily convoluted nature of the paper chase required to resolve the legal issues (para 16);

ii. Under s. 17 there is a duty to assess, per *R(G) v Barnet LBC [2003] UKHL 57, [2004] 2 AC 208.* However although there is a duty to assess, there is not, as such, a duty to provide the assessed services (para 21);

iii. The Claimant's argument that there was in fact a duty pursuant to para 4.1 of the *Framework for the Assessment of Children in Need and their Families* would be rejected (paras 22- 26);

iv. In terms of the legal question under s. 17(10) as to who is a "child in need" the final words in ss. 17(10)(a) and (b) were important. The duties of a local authority did 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] the local authority" will fall within one or other of the statutory criteria (para 29);

v. It followed 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 3rd party, e.g. by a family member, by a charitable or other 3rd sector agency or by another statutory body (para 30-32);

vi. There was now substantial guidance as to how the assessment process was to be undertaken; firstly, the authorities, reflecting the requirements of the *Assessment Framework,* emphasised the need for the assessment to embody "a realistic plan of action". That was an important aspect of the duty to assess and indeed a critical factor in determining, whether the duty has been properly performed. Secondly, the assessment must address not only the child's immediate, current circumstances but also any imminent changes in those circumstances. Thirdly, where the assessment contemplated the provision of some of the relevant services from an outside agency 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 3rd party, then the authority must demonstrate that the 3rd party is actually able and willing (or if not willing can be compelled) to provide the relevant services (paras 34-36);

vii. When looking at the relevant statutory framework with regard to the relationship between a local authority's obligations and asylum support the effect of s. 122 IAA 1999 was to oust the local authority's powers under s. 17 of the CA 1989 where the SSHD is complying (or there are reasonable grounds for believing that, if asked, the SSHD would required to comply) with s. 95 IAA 1999. But it was important to note that there is no comparable provision in relation to s. 4. In other words, a local

authority is potentially in a weaker position in s. 4 cases (as here) than in a s.95 case (para 53);

viii. The Court reviewed and considered the key case law, thus far, on the division of responsibility between local authorities and central government for those subject to immigration control; *R (Westminster CC) v NASS [2002] UKHL 38, [2001] 1 WLR 2956, R(O) v Haringey LBC and SSHD [2004] EWCA Civ 535, R (AW) v Croydon and others [2005] EWHC 2950 (2006) 9 CCLR 252, [2007] EWCA Civ 266, R(SO) v Barking and Dagenham LBC [2010] EWCA Civ 1101, [2011] HLR 63* (paras 58-69);

ix. In the light of the key facts and case law the question raised for determination was 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 s. 95 IAA 1999 (para 70);

x. At the outset it was not in fact in issue in the present challenge that the children were "in need" as the local authority had assessed the children as having been in need and it was on that basis that they were provided with support under s. 17 (para 82);

xi. The local authority's contention that there was no public law basis for challenge was to be rejected in the light of the real question that had arisen; did the mere fact that support under s. 4 was (or could be) available mean that without more ado- without any elaborate process of re-assessment – it was open to the local authority to say that a child who was previously in need is now, *ipso facto,* no longer in need (para 84);

xii. There were a number of "key legislative indicators" which together pointed to the conclusion that in contrast to s. 17, s.4 was a residuary power and that the mere fact that support was, or may be available under s. 4, did not of itself exonerate a local authority from what would otherwise be its powers and duties under s.17 (para 86);

xiii. First, there is the contrast not merely between the level of support available under s.17 and s. 4 but also between the very different purposes of the two statutory schemes (para 87);

xiv. Second, there is the striking fact that, in contrast to the position under s. 95 IAA 1999 Parliament has not excluded families who are or may be eligible for support under s. 4 from local authority support under s.17 (para 88);

xv. 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 s.17 (para 89);

xvi. In the light of these indicators and in practical terms, whatever the theoretical possibilities, a local authority faced with a child who is assessed as being “in need” is, very unlikely in the general run of cases to be able to justify non-intervention by reliance on s. 4. Where support is actually provided under s. 17 can a local authority decide to discontinue such provision, on the basis that s. 4 support is or may be available? The answer must be the same (para 93);

xvii. In the circumstances of the present cases, and insofar as the evidence was considered, the local authority wholly failed to demonstrate that any support which might be available under s. 4 would be adequate to meet the assessed needs of any of the children. The claims therefore succeeded without any need to rely on the ECHR (para 95);

xviii. The other matters raised by the parties were not appropriate to address in the circumstances of this case; in particular the SSHD’s contention that the SSHD is entitled to refuse to provide s.4 support to a new applicant family on the basis that they are not “destitute”, being entitled to support from a local authority under s.17, involved questions of some nicety in relation to the decision in *O v Hackney* and *R (SO)* (para 96).

See in particular paras 91-93:

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."

Section 17 CA 1989, s.94(5),s.95, s.4 IAA 1999 and the Reception Directive.

2.2.1. The case of *R (X and others) v SSHD and Bolton CC (ref 1493/2012&4162/2012)*[4] raises further issues in relation to the division of responsibility for families who are overstayers and who have fresh claims which were outstanding, then refused and which resulted in a separate (but related) challenge to the SSHD's decision.

2.2.2. In this case the Claimants were Nigerian nationals consisting of a single mother and her 3 minor children. None of the children had lived in Nigeria, two were born in the UK and one had in fact spent a number of years in Italy. The Claimant had become an overstayer. She made a claim for asylum (she alleged she had been the victim of trafficking). No consideration was given to this application by the SSHD. However, and after this application was made, she was advised to withdraw that application and instead make an application under EU law on the basis of the status of her children (it was to be asserted that one of the children were EU nationals and she was their primary carer). That application was made and refused on the basis of lack of sufficient evidence re status of the children. There was no appeal against that

[4] Claimants' Solicitors Platt Halpern.

decision. The Claimant then made another application for asylum (on the same factual basis to that which would have previously been set out). The SSHD began to provide support under s.95 IAA 1999 in the light of that application for the Claimant and her children. However, in December 2011 the SSHD/ UKBA concluded that s.95 support had been given in error, would be terminated and the Claimants should seek support from the local authority if they remained in the UK.

2.2.3. As a result of facing imminent eviction from their property and after having had welfare assistance terminated the Claimants sought legal advice and requested support from the local authority under s.17 CA 1989. The local authority refused to provide support. The Claimants issued proceedings against the local authority and sought interim relief. The Court granted interim relief and made directions. In the meantime the SSHD rejected the "fresh claim" representations and the Claimant sought legal advice on that decision via separate immigration solicitors. Subsequently the SSHD was joined as a Defendant to these proceedings on the basis that outside of support under s.17 CA 1989, the Claimant was entitled to support from the SSHD/UKBA under either s.95 as an asylum seeker or s.94(5) as a failed asylum seeker with a child/ children in her household and /or by way of the direct effect of the 1st Claimant's rights as an asylum seeker, as defined under the Reception Directive. The Claimant also issued JR proceedings against the SSHD in relation to the decision to apply and /or refuse the asylum/ Article 8 submissions under the fresh claim rule.

2.2.4. On the support issue the SSHD contended that the Claimants were not entitled to support from it under either s94(5), s.95 or s.4. This was because, on the SSHD's interpretation of the relevant provisions, and particularly as a result of the 1st Claimant having withdrawn her previous claim for asylum, she was not a failed asylum seeker for the purposes of provision under s.4, she was not an asylum seeker for s.95 purposes because her fresh claim had been considered and refused and she could not rely on s.94(5) because by withdrawing her previous claim there had not been any "determination" by the SSHD of her original claim for asylum. The local authority contended that if any support should be provided to the Claimants it should be by the SSHD and not the local authority and as a result of the negative decision on her fresh claim, it was reasonable to expect her to leave the UK. However support would continue to be provided on an interim basis whilst the Claimant was litigating against the SSHD.

2.2.5. In terms of the immigration issues the Claimant contended that the fresh claim rule did not apply and even if it did the SSHD had erred under public law principles in concluding that the threshold had not been satisfied (relying in particular on the guidance in *ZH (Tanzania)* and *Tinizaray*)). In terms of the welfare issues the Claimant submitted (i). the SSHD had erred in her interpretation of s.94(5) IAA 1999 (ii). further an in any event, the Claimant was entitled to support from the SSHD pursuant to her rights under the Reception Directive as a result of her right to be pursue a fresh claim and all relevant legal remedies (including JR) in relation to that issue (i.e. she fell within the definition of an asylum seeker under the terms of the RD) (iii). alternatively, she was entitled to support from the local authority under s.17 CA 1989 as her situation fell into the territory of what had been decided in *Clue* and *VC*: prior to the decision on her representations they could not be classified as hopeless and after their rejection she was entitled to, and was pursuing, a legitimate legal challenge against that decision. Further, even if s.4(2) did not apply to the Claimant (on the basis that she could not be defined as a failed asylum seeker) the hierarchy of provision explained in *VC* (s.17 /s 4) was relevant because she was potentially entitled to support under s.4(1) (s.4 provision for those who have temporary admission).

2.2.6. The matter was due to be heard as a rolled up hearing but is now likely to settle in the light of the SSHD's decision to make a removal decision and grant the Claimants an in country right of appeal against any adverse decision and to also grant asylum support if an appeal is pursued against any such decision.

S4 recent developments.

2.3.1. An ongoing issue in relation to the provision of s.4 support has been general and systemic delay in consideration of an application for such support and service provision (once eligibility is accepted). This issue has particularly arisen where a failed asylum seeker submits representations alleging a fresh claim for asylum/echr protection.

2.3.2. In *R (MK and AH) v SSHD and Refugee Action [2012] EWHC 1896 Admin 10 July 2012* the Claimants and Intervener challenged the policy of the SSHD in relation to

provision of s.4 support where fresh claim representations had been made. The SSHD deliberate policy (or practice) was that the further submissions advanced by a failed asylum had to be considered before his application for s.4 support was considered, unless 15 working days elapsed and there was to be further justifiable delay in deciding on the further submissions.

2.3.3. Foskett J considered that the issue ultimately was whether an instruction of general application that sanctions a delay of 15 working days before it was necessary to consider the associated section 4 application risked, to a significant degree, breaching the Article 3 rights of individual applicants for s. 4 support (para 170). The Judge concluded that such a policy was unlawful because the blanket instruction did involve a significant risk that the Article 3 rights of a significant number of applicants for s. 4 support will be breached, referring to the guidance on the correct approach to policies and potential breaches of Article 3 in *R (Munjaz) Mersey Care NHS Trust [2005] UKHL 58, [2006] 2 AC 148* and the reasonable inference that could be drawn from the evidence provided in the case. See paras 152-156,182-186. The Judge further concluded that the Claimants were entitled to the protection given under the Reception Directive in relation to welfare support whilst their fresh claims were being considered (see paras 157-165).

2.3.4. It is perhaps interesting to also note that Foskett J draws a distinction between the difficulties faced by local authorities and the SSHD in adopting a quick filtering process/system in relation to the merits of a fresh claim (i.e. whether it is hopeless or not) in the light of the fact that a local authority is more reliant on the decision of a different public authority, the SSHD, whereas the SSHD is the decision maker on both matters (support /immigration) (see paras 166-169).

EU law: The impact of Zambrano/Dereci/Sanade.

3.1.1. Recent developments in the case law in relation to rights under EU law for 3rd country nationals with European citizen children are likely to have an impact on welfare issues arising from application to local authorities.

3.1.2. In *Ruiz Zambrano v Office national de l'emploi (ONEM) (C-34/09) [2011] 2 CMLR 46* the Applicants in the main proceedings were both Columbian nationals who had

sought refugee status in Belgium. Their applications were refused. The Belgian authorities however accepted that the Applicants should not be sent back to Columbia because of the civil war there. The Applicants subsequently had 2 children who acquired Belgian nationality under national law. The Applicants then applied to take up residence in Belgium pursuant to national legislation which permitted certain relatives of EU nationals, including ascendant relatives of dependent children, to be treated in the same way as EU nationals who intended to settle in Belgium. That application was refused on the grounds that they were attempting to legalise their own residence on the basis of the nationality acquired by their children under domestic law. The Applicant's brought proceedings against that decision and the referring court decided to stay proceedings and seek a preliminary ruling as to whether the provisions of the Treaty on Functioning of the European Union (TFEU) were to be interpreted as conferring on a 3rd country national/nationals such as the Applicants, a right of residence and exemption from the obligation to hold a work permit solely by virtue of his status as relative in the ascending line of dependant children who were EU nationals.

3.1.3. The key passages of *Zambrano v Office national de l'emploi C-34/09* are 42-45 judgment:

> *42 In those circumstances, Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union (see, to that effect, Rottmann, paragraph 42).*
>
> *43 A refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect.*
>
> *44 It must be assumed that such a refusal would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. Similarly, if a work permit were not granted to such a person, he would risk not having sufficient resources to provide for himself and his family, which would also result in the children, citizens of the Union, having to leave the territory of the Union. In those circumstances, those citizens of the Union would, as a result, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.*

45 Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen.

3.1.4. The key principles from *Zambrano* are therefore:

i. Union citizens can rely on art.20 TFEU without ever having exercised rights of free movement, hence they can rely on art.20 TFEU against the member state of which they are a national;

ii. Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union;

iii. A refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect, because it would force the citizen of the Union to leave the territory of the Union.

3.1.5. The subsequent CJEU case of *Dereci and others Case C -256/2011* considered the reach of the *Zambrano* principle. The applicant was a Turkish national who had entered Austria illegally. He married an Austrian national and submitted an application for residence permit under the national law then applicable. Under that law Turkish nationals who were family members of Austrian nationals enjoyed freedom of establishment and could submit an application for an initial establishment permit in Austria. D and his wife subsequently had 3 children who were also Austrian nationals and were still minors at the time of the proceedings. D's application for a residence permit was rejected on the ground that the EU citizens concerned (D's family) had not exercised their right to free movement. The referring Court decided to stay the proceedings and to seek a preliminary ruling from the CJEU, inter alia, as to i. whether EU law and, in particular, the provisions concerning citizenship of the EU, had to be interpreted as precluding a Member State from refusing to grant residence

within its territory to a 3rd country national in circumstances such as those in the instant case.

3.1.6. For the Court's judgment see in particular paras 66-69,71-72,74:

> *"66 It follows that the criterion relating to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of European Union citizen status refers to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole.*
>
> *67 That criterion is specific in character inasmuch as it relates to situations in which, although subordinate legislation on the right of residence of third country nationals is not applicable, a right of residence may not, exceptionally, be refused to a third country national, who is a family member of a Member State national, as the effectiveness of Union citizenship enjoyed by that national would otherwise be undermined.*
>
> *68 Consequently, the mere fact that it might appear desirable to a national of a Member State, for economic reasons or in order to keep his family together in the territory of the Union, for the members of his family who do not have the nationality of a Member State to be able to reside with him in the territory of the Union, is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted.*
>
> *69 That finding is, admittedly, without prejudice to the question whether, on the basis of other criteria, inter alia, by virtue of the right to the protection of family life, a right of residence cannot be refused. However, that question must be tackled in the framework of the provisions on the protection of fundamental rights which are applicable in each case.*
>
> *71 However, it must be borne in mind that the provisions of the Charter are, according to Article 51(1) thereof, addressed to the Member States only when they are implementing European Union law. Under Article 51(2), the Charter does not extend the field of application of European Union law beyond the powers of the Union, and it does not establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties. Accordingly, the Court is called upon to interpret, in the light of the Charter, the law of the European Union within the limits of the powers conferred on it (McB., paragraph 51, see also Joined Cases C-483/09 and C-1/10 Gueye and Salmerón Sánchez [2011] ECR I-0000, paragraph 69).*

72 Thus, in the present case, if the referring court considers, in the light of the circumstances of the disputes in the main proceedings, that the situation of the applicants in the main proceedings is covered by European Union law, it must examine whether the refusal of their right of residence undermines the right to respect for private and family life provided for in Article 7 of the Charter. On the other hand, if it takes the view that that situation is not covered by European Union law, it must undertake that examination in the light of Article 8(1) of the ECHR.

74 In the light of the foregoing observations the answer to the first question is that European Union law and, in particular, its provisions on citizenship of the Union, must be interpreted as meaning that it does not preclude a Member State from refusing to allow a third country national to reside on its territory, where that third country national wishes to reside with a member of his family who is a citizen of the Union residing in the Member State of which he has nationality, who has never exercised his right to freedom of movement, provided that such refusal does not lead, for the Union citizen concerned, to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a citizen of the Union, which is a matter for the referring court to verify."

3.1.7. In the case of *Sanade and others (British children – Zambrano- Dereci) [2012] UKUT 00048 (IAC)* the UT further considered the impact of decision in *Zambrano* in the light of the CJEU's review of its reach in *Dereci.* Sanade and others were cases involving deportation of 3rd country nationals who had family units (partner, children) which included British citizen children. The case was therefore concerned with the extent to which rights under Article 8 ECHR and under EU law could defeat a decision to deport by the SSHD. The Tribunal held, inter alia:

i. ZH (Tanzania) v SSHD [2011] UKSC 4 had considered in what circumstances it was permissible to remove or deport a non-citizen parent where the effect would be that a child who is a citizen of the United Kingdom would also have to leave. The fact the children are British was a strong pointer to the fact that their future lies in the United Kingdom.

ii. Ruiz Zambrano now makes it clear that where the child or indeed the remaining spouse is a British citizen and therefore a citizen of the European Union, as a matter of EU law it is not possible to require the family as a unit to relocate outside of the European Union or for the Secretary of State to submit that it would be reasonable for them to do so.

iii. Where in the context of Article 8 one parent ("the remaining parent") of a British citizen child is also a British citizen (or cannot be removed as a family member or in their own right), the removal of the other parent does not mean that either the child or the remaining parent will be required to leave, thereby infringing the Zambrano principle, see C-256/11 Murat Dereci. The critical question is whether the child is dependent on the parent being removed for the exercise of his Union right of residence and whether removal of that parent will deprive the child of the effective exercise of residence in the United Kingdom or elsewhere in the Union.

Contextual considerations.

Fresh claims.

4.1. Para 353 of the Immigration Rules provides

"When a human rights or asylum claim has been refused or withdrawn or treated as withdrawn under para 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:

(i)has not already been considered; and

(ii). taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection..."

4.2. Also it should be noted that para 353A of the Immigration Rules prevents the removal of an failed asylum seeker who has made further submissions which have not yet been considered.

4.3. The lead case on the correct approach to fresh claims remains *R (WM and AR) v SSHD [2006] EWCA Civ 1495* (see esp paras 7, 10). See also *R (AK Sri Lanka) v SSHD [2009] EWCA Civ 447* (paras 33-35) and *R (YH) v SSHD [2010] EWCA Civ 116* (para 10).

Article 8.

4.4. Practitioners will be aware of the seminal guidance given on the correct approach to the application of Article 8 where welfare implications for children are in issue in the Supreme Court judgment in *ZH (Tanzania) v SSHD [2011] UKSC 4* (see paras 23-26,30-33,38,39,45).

4.5. Subsequent cases of relevance in relation to best interests of children in an immigration context include *R (Tinizaray) v SSHD [2011] EWHC 1850 Admin* (importance of SSHD investigating and considering s55 BCIA 2009 issue by obtaining relevant evidence, see paras 13,25) and *R(BN) v SSHD [2011] EWHC 2367 Admin* (on the facts of the case irrational of SSHD not to have referred the matter to the Office of the Children's Champion before proceeding with removal action see paras 155,163, 178).

The new immigration rules.

4.6. The immigration rules have recently been amended (from 9 July 2012)[5] such that considerations under Article 8 (usually a ground of appeal outside of, and separate to, the rules) are now said to be fully incorporated in the rules. The attempt to integrate all considerations under Article 8 within the rules with a restrictive interpretation of the Article 8 jurisprudence from Strasbourg and the domestic Courts, is highly controversial and likely to generate further litigation in the near future.

Ranjiv Khubber

rkh@1pumpcourt.co.uk

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[5] http://www.ukba.homeoffice.gov.uk/sitecontent/documents/news/soi-fam-mig.pdf http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/statementsofchanges/2012/hc194.pdf?view=Binary

Housing adult migrants via Community Care

The Legal Framework

Statutes

1. Local authorities have responsibility for arranging 'community care services' under NHS & Community Care Act 1990 ('NHSCCA 1990'). It defines community care services and provides the legal framework for both *assessment* and the *provision* of such services. There are then specific statutes dealing with different areas of provision eg National Assistance Act (NAA) 1948. Section 7 of the Local Authority Social Services Act 1970 ('LASSA 1970') *requires* social services authorities to follow statutory guidance and directions issued by the Secretary of State for Health.

2. Under the NAA 1948 s21 local authorities have a duty to provide:
'*residential accommodation for persons who are aged 18 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'*. Under s21(1)(aa) in relation to nursing mothers, local authorities have a power and not a duty to provide accommodation; the power is not limited to those who are over the age of 18 years (see *R (G & D) v Leeds CC* [2008] EWHC).

Directions

3. The most relevant are:
Approvals and directions for arrangements from 1 April 1993 made under schedule 8 to the National Health Service Act 1977 and Sections 21 and 29 of the National Assistance Act 1948 (LAC (93)10)). The Community Care Assessment Directions 2004 govern the assessment procedure, including consulting and agreeing on the assessment. The *National Assistance Act 1948 (Choice of Accommodation) Directions 1992* are useful for challenging unsuitable accommodation (LAC (92)27).

Guidance

4. The previous Fair Access to Care Services (FACS) Guidance was replaced in February 2010 by *Prioritising need in the context of Putting People First: A whole system approach to eligibility for social care Guidance on Eligibility Criteria for Adult Social Care,* England 2010 ('updated Eligibility Guidance'). Updated statutory guidance on ordinary residence was issued on 15 April 2011: *Ordinary residence: guidance on the identification of the ordinary residence of people in need of community care services, England*. Such guidance should be followed by local

authorities although an authority has 'liberty to deviate from it where the local authority judges on admissible grounds that there is good reason to do so, but without freedom to take a substantially different course.' (*R v Islington LBC ex p Rixon* [(1998) 1 CCLR 119, 15 March 1996).

Right to a community care assessment?

5. The duty to carry out a community care assessment under s47 NHSCCA arises when a Local Authority is aware that **a person *may* be in need of community care services which it has a *power* to provide**. There is no direct 'person subject to immigration control' exclusion from the right to a community care assessment under s47. There may be an indirect exclusion where the local authority has no power to provide services e.g. to a failed migrant by virtue of Nationality, Immigration and Asylum Act (NIAA) 2002, Schedule 3 (see Ranjiv's notes and below).

6. The threshold test for assessment is low, and does not depend on whether the Local Authority would be likely to provide the relevant services (*R v Bristol City Council ex p Penfold* (1998) 1 CCLR 315).

7. In *R (NM) v London Borough of Islington & Ors* [2012] EWHC 414 (Admin) a prisoner with learning disabilities sought a community care assessment, to enable him to demonstrate he would have accommodation and support if he were to be released. NM relied observations of Stanley Burton J in *R (B) v Camden LBC* (2005) EWHC 1366 (Admin): 'In my judgment, the words "a person may be in need of such services" refer to a person who may be in need at the time, or who may be about to be in need'. Although the court dismissed NM's application, stating that his release was too conditional and speculative to fall within the narrow class of future provision covered by s47, it made clear that in a number of other situations, including release from prison or discharge from hospital, it may be sufficiently clear that a person is likely in the very near future to be present in the area of the local authority, and in such circumstances the obligation to assess under section 47 would arise before the person actually is in the community.

8. The trigger for an assessment is the 'appearance' of need so a request may be made by any person (or even UKBA) and it is not necessary for the migrant to co-operate in the process.

9. A carer who provides substantial amounts of care is entitled to participate in the community care assessment and should be informed of their rights to request an assessment of their own ability to provide care (Carers (Recognition and Services Act) 1995; *Carers and Disabled Children Act 2000*; Practice Guidance to the Carers and Disabled Children Act 2000; *Carers and Disabled Children Act 2000 and Carers (Equal Opportunities) Act 2004 combined policy guidance*, 18 August 2005).

Right to an assessment in Schedule 3 cases?

10. The duty to complete a s47 assessment and care plan only arises in relation to a person for whom a local authority **may** have the power to provide or arrange for the provision of community care services. So in cases where a local authority has no power to provide services due to NIAA 2002, Schedule 3, it has been argued that a more limited duty to assess arises, firstly to carry out an assessment of whether the applicant's immigration status brings them under one of the five excluded classes and secondly to conduct a human rights assessment to consider whether they are brought back in to entitlement to services and a full s47 assessment. If the second part of the assessment shows that a failure to exercise its powers will result in a breach of ECHR or EU Treaty rights, the authority will then have a duty to carry out a community care assessment and properly consider the relevant provision e.g. under NAA s21, LGA s2, and so on. This was confirmed in the case of *R (Sharef) v Coventry City Council* [2009] EWHC 2191 (Admin).

Which authority should assess?

11. A local authority may not refuse to assess or meet needs because there is a dispute about who will provide services; it must assess even if the applicant is not ordinarily resident in their area (see LAC(93)7 guidance). The 'authority of the moment', normally but not necessarily in the area where the migrant is living, should assess. The authority cannot refuse to assess because it considers that a person is not ordinarily resident in its area (*R v Berkshire County Council ex p P* (1998) 1 CCLR 141, QBD).

12. Under the 2011 Ordinary Residence guidance, before referring a matter to the Secretary of State, the local authorities must ensure they have taken all reasonable steps to resolve the dispute, including specified steps. If the dispute is not resolved after three or six months (the period of time is one of the matters subject to consultation), there would be a duty to refer it to the Secretary of State. An applicant

who is of no settled residence (such as a refused asylum-seeker), or in urgent need is not ordinarily resident so will be the responsibility of the authority to which they present, by virtue of NAA 1948 s24 (3).

Urgent accommodation pending the assessment/decision/ delays

13. The assessment should be carried out within a 'reasonable time'. In 2011, the local government ombudsman suggested 4-6 weeks from the dare of the original request (LGO (2011) Fact Sheet Complaints about councils that conduct community care assessments.

14. S.47(5) NHSCCA 1990 provides that a local authority may temporarily provide a service without carrying out a prior assessment of needs 'if, in the opinion of the authority, the condition of that person is such that he requires those services as a matter of urgency'. Where services are provided in an emergency, the duty to assess still remains and an assessment should be done as soon as reasonably practicable. Although it is a power rather than a duty to provide temporary urgent services, in obvious cases of urgent need the courts will order an authority to make provision pending an assessment, see *R (AA) v Lambeth LBC* (2002) 5 CCLR 36.

15. When a person has no settled residence or is of no fixed abode, the authority to which they present should accept responsibility. If there is urgent need the authority to which the person presents should assist on an emergency basis. The case may then be transferred to the authority where the person is ordinarily resident (NAA 1948 s24 and LAC(93) 7 & 10).

A lawful assessment process?

16. The assessment should involve the migrant and have regard to their wishes and preferences and those of their carer(s) see Community Care Assessment Directions 2004 and the circular (LAC (2004) 24. The assessment should address any psychological needs of the migrant (*R v Avon CC ex p M (1999) 2 CCLR 185).* It should take into account cultural attitudes and social support needs.

Assessment outcomes

Do eligibility criteria apply to asylum-seekers?

17. In the normal course of event, the FACS criteria/ revised eligibility criteria based on 'low, moderate, substantial or critical' needs would be the trigger for service provision. However s21 operates independently of these criteria. Once a need for care and attention is identified, then the local authority has a duty to consider the accommodation and support needs additionally, see e.g. DoH Practice Guidance on FACS, 'Implementation Questions And Answers' published on the DoH website in March 2003 explaining that the FACS criteria – which preceded the current criteria - are not applicable in such cases.

'*where destitute asylum seekers have assessed care needs for which councils may provide community care services, no matter whether these care need fall within or outside council's eligibility criteria, councils should accommodate such asylum seekers under section 21 of the 1948 Act. The services provided must be sufficient to address their needs, as they are cut off from all other means of support. This position was confirmed by the Law Lords judgment in the case of Westminster City Council v NASS in 2002'.*

18. Although the law appears clear, local authorities have continued to (unsuccessfully) refuse support on the basis that the client does not have substantial or critical needs, (see *R(N) v Lambeth LBC* [2006] EWHC 3427 (Admin*)).* The House of Lords in *M v Slough LBC* further confirms this approach is incorrect. And see the more recent decision in *R (De Almeida) v Royal Borough of Kensington and Chelsea* [2012] EWHC 1082 (Admin) where the court decided that the use of the FACS risk criteria was not appropriate for assessing whether a local authority owes a duty under to provide accommodation under s21.

The ordinary residence test- which authority pays?

19. In relation to s21 accommodation, the duty to accommodate covers both migrants who are ordinarily resident in the authority's area, and those simply living in its area when the need arises, as well as those (whether or not ordinarily resident anywhere) who are in urgent need (see NAA 1948 s 24(3), Approvals and Directions LAC (93) 10).

20. A person will be ordinarily resident is s/he can show a regular habitual mode of life in a particular place, the continuity of which has persisted despite any temporary absences *(Shah v Barnet LBC [1983] 2 AC 309*). Although there is no statutory definition of the terms 'ordinarily resident', there is guidance at LAC (93) 7. The 2011 Ordinary residence guidance provides:

37. A person from overseas who is not excluded from receiving services by virtue of one of these provisions should have their ordinary residence assessed in the usual way. A person's immigration status may be a factor to take into account in determining ordinary residence; for example it may be relevant to the consideration of the person's intentions (in accordance with the Shah case). However, the fact that a person is unlawfully resident in the UK does not of itself mean that they cannot acquire ordinary residence in a local authority's area for the purposes of section 24(1) of the 1948 Act.

37b.In ordinary residence determination OR 9 2010 (published on 20/01/2011), the Secretary of State considered that the person's immigration status was not relevant to the consideration of ordinary residence for these purposes.

21. *Al-Ameri v Kensington & Chelsea RLBC* [2004] UK HL 4 suggests in the homelessness context that migrants do not acquire ordinary residence where residence has not been voluntarily adopted, eg where housed by NASS. But see also Wilson J's approach to ordinary residence in the Administrative Court's decision in *Mani*, finding that a period of six months in NASS accommodation could amount to ordinary residence.

Not in need of care and attention v destitute plus

22. In *R (M) v Slough Borough Council [2008] UKHL 52 63,* the House of Lords reviewed the case law of the past decade and settled on what appears to be a more restrictive approach to the meaning of 'in need of care and attention' than the 'non-destitution' needs approach which had become the norm. In the lead judgment, Baroness Hale found that 'care and attention' must mean something more than 'accommodation'. In a key paragraph of the judgment she stated: '… *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.'.*

Care and attention "not otherwise available"

23. In *R (Mwanza) v Greenwich LBC and Bromley LBC* [2010] EWHC 1462 (Admin) a severely mentally ill client was provided with support from his wife who was assessed as being in danger of ceasing to cope. The assessment identified that this care and attention was currently otherwise available, through his wife, and the court agreed that whilst the wife was coping, the care and attention the Claimant needed was being provided by her, and therefore no s21 duty arose.

Does care and attention include a need for watching over/ monitoring?

24. In *R (Shoaib) v Newham LBC* [2009] EWHC (Admin), [2009] All ER (D) 198 (Jun), the Claimant was a refused asylum-seeker with epilepsy who was being accommodated by Newham under s21 NAA 1948. Support was later withdrawn following a review because the social worker decided the claimant did not need 'looking after'. The Court refused his application for judicial review. They found that the social worker had applied the correct test by considering whether the Claimant needed things to be done for him which he could/should not be able to do for himself. There was plenty of evidence to show that the claimant was able to look after himself. The social worker had acted rationally in deciding that s21 support was not required.

25. In *R (Zarzour) v LB Hillingdon* [[2009] EWCA Civ 1529 the Claimant was a Lebanese asylum seeker aged 36 who was blind. He has no settled accommodation and relied on various friends for accommodation and daily assistance. The assessor's summary was: 'I feel that Mr Zarzour will be unable to gain the independence he desires unless stable accommodation is found for him. If he continues to move around different temporary accommodation with his friends he will be at increased risk of falls due to the overcrowding and unfamiliar environment and will continue to be dependent on his friends for support. He is unable to access shopping or leave his home alone at present but is likely to be able to do this independently if he is settled somewhere.'

26. The Administrative Court judge rejected Hillingdon's conclusion and found that Z was entitled to s21 support. He determined that the assessment identified a number of needs including the need for tuition to find his way around, need for assistance with dressing, laundry, for help with shopping, for assistance to keep him safe when he goes out and assistance with providing food. The judge's decision was later upheld by the Court of Appeal.

Which mental health needs require care and attention

27. In *SL v Westminster City Council & Ors* [2011] EWCA Civ 954 the Claimant was a gay Iranian refused asylum-seeker with a diagnosis of depression and PTSD who had attempted suicide after his partner died in an Iranian jail. He was being supported by the CMHT at the time he sought s21 accommodation. He received weekly meetings with a social services care co-ordinator who monitored his condition and progress and had linked him to counseling groups and to a befriender.

28. The Court of Appeal allowed SL's appeal, deciding that his need for weekly meetings with his social worker, counseling and a befriender was sufficient to amount to a need for 'care and attention' and that, since such a need had arisen, there would be a duty to accommodate under NAA s21 if "care and attention is not 'otherwise available', unless it would be reasonably practicable and efficacious to supply it without the provision of accommodation".

Deteriorating condition/ future needs

29. The threshold for s.21(1)(a), is met "as soon as a person can be said to be in need of some care and attention, even to a relatively small degree" (Lord Neuberger in *M v Slough*) and considering current and prospective need.

30. *R(N) v Coventry City Council* [2008] EWHC 2786 (Admin) concerned a South African national who came to the UK in 2002 on a visitor's visa. He was HIV positive and in 2006 was admitted to hospital with TB, meningitis and syphilis. He had applied for based on Art 3 ECHR in June 2007; this application was refused and finally determined by August 2007. In 2007 Coventry carried out an assessment and decided although he was destitute he had no care needs, and therefore was ineligible for s21 support. By the time of the proceedings N's health had improved. His cousin helped him with basic household chores, but he was able to complete them unaided when necessary.

31. The Court found that in order to establish that there was a duty to provide N with support or assistance, N had to show that he was in need of care and attention, and that need had not arisen solely from his destitution. The local authority's assessment concluded that N was able to manage the activities of his daily life himself, despite his persisting symptoms. The fact that he had previously been assisted by his cousin did

not mean that he could not do them or that he needed to have them done by someone else.

32. In *R (Nassery) v London Borough of Brent* [2011] EWCA Civ 539 the council found that an Iranian asylum-seeker who needed monitoring due to his mental health needs was not in need of care an attention at the time of the assessment. In the Admin Court, the key question was whether he was seeking community care services or medical services. In the Court of Appeal, Lady Arden, referred to *M v Slough* where Lady Hale and Lord Neuberger had accepted that there could be a situation where it was clear that a person was in the early stages of what would be likely to develop into much more serious illness, and some flexibility was allowed provided that at all times there was indeed a need for care and attention. The same must apply to both physical and mental illness. However on the facts of N's case, at the time of his assessment, N's condition appeared to be under control. She accepted Brent's assessment that he had an appropriate level of insight and perception of when help was needed and the ability to act appropriately in seeking it.

33. In *R* (*De Almeida) v Royal Borough of Kensington and Chelsea* [2012] EWHC 1082 (Admin), RB K and C and C had refused to assess a terminally ill Portugese national with HIV who had a life expectancy of 6 -12 months and had been evicted from his private rented accommodation. Apart from finding him excluded by Schedule 3 as an EEA national, the council found he was not in need of care and attention because his ability to care for himself fluctuated. They also assessed him as only having low care needs according to the Fair Access to Care Services (FACS) risk criteria and decided he therefore did not have a need for care and attention, so no accommodation duty arose under NAA s21.

34. Again the court turned to *M v Slough* for guidance: "… it is not a pre-requisite of eligibility under s.21(1)(a) that the person is incapable of performing a domestic task himself. Lady Hale gave the example of "household tasks which an old person ….can only perform with great difficulty". In the Claimant's case, it was sufficient that, because of his fragile condition, he reasonably required support with domestic tasks, such as shopping, cleaning, cooking etc. In relation to the fluctuations, it said: "This is not an unusual feature of long-term illnesses, and LAC 93 (10) paragraph 2(5) expressly approved the provision of accommodation for the purpose of caring for those who are ill. A fluctuating need does not necessarily take a person outside the scope of s.21(1)(a). In *Mani* for example, the claimant needed help with household tasks "on days when he is in pain" (at [2]), i.e. not all the time".

35. The Court found it would be a question of fact in each case whether a person's condition was such that he should be treated as 'in need of care and attention' even though the extent of his need for care and assistance fluctuated from time to time. They contrasted the decision in *R (Nassery) v Brent LBC* where the Court of Appeal had upheld the Council's assessment that, despite the claimant's sporadic past episodes of mental disorder, he was not "in need of care and attention" at the time of its assessment. In De Almeida's case, the decisive factors were "the seriousness of his illnesses, his ongoing, debilitating physical symptoms, his frequent periods of acute illness requiring hospitalisation, and his very poor prognosis."

Quality of accommodation

S21 Accommodation

36. If a migrant client has a preference for particular s21 accommodation which is no more expensive than that proposed by the authority, consider the effect of the *National Assistance Act 1948 (Choice of Accommodation) Directions 1992* as amended (see *Goldsmith v Wandsworth LBC* [2004] EWCA Civ 1170). The September 2003 guidance states at paragraph 3.1 that where a council decides not to arrange a place for someone in their preferred accommodation it must have a clear and reasonable justification for that decision which relates to the criteria in the Directions.

37. The EU Directive laying down minimum standards for the reception of asylum seekers [2003/9/EC of 27 January 2003] 'the Reception Directive', is binding on the UK in relation to asylum applications made since 5 February 2005. In the context of the right to work after 12 months, the Supreme Court has suggested it applies to refused asylum-seekers who have made further representations which are not yet decided *ZO (Somalia) and Another) v Secretary of State for the Home Department* [2010] UKSC 36; [2010] WLR (D) 203. Its provisions include:

    The reception of groups with special needs should be specifically designed to meet those needs (Preamble); Family unity should be maintained (Article 8); *A standard of living adequate for asylum-seekers' health should be provided taking account of any special needs and including asylum-seekers in detention* (Article 13); *Where there has been an evaluation of a vulnerable asylum-seeker, this should be taken into account* (Article 17). (Vulnerable person is widely defined as including a child, a disabled person, an elderly person, a pregnant woman, a lone parent, or 'a person who has been subjected to torture, rape or other serious forms of psychological, physical or sexual violence').

38. If accommodation for asylum-seekers can engage EU law, then the *EU Charter of Fundamental Rights*, with its 'access to justice safeguards' may apply, see *NS v*

Secretary of State for the Home Department and Amnesty International, the AIRE Centre, United Nations High Commissioner for Refugees (UNHCR) and Equality and Human Rights Commission (EHRC) (third party interveners) C-411/10, 21 December 2011.

Accommodation under s4 Immigration and Asylum Act 1999

39. The duty under section 95(1) and s4 IAA 1999 is to provide accommodation adequate to the Claimant's needs assessed on an individual basis. Regulation 4 of the *Asylum Seekers (Reception Conditions) Regulations* 2005 requires that the UKBA take into account the special needs of the Claimant, who is a disabled person for the purposes of the Regulations. This duty is shored up by the general duties in section 20 of the Equality Act 2010 to provide reasonable adjustments and the section 149(A) 'due regard' duty in relation to the Claimant's disabilities. It appears these duties are regularly ignored, or arguments are made that disabled accessible accommodation is not available and cannot be provided. This does not appear to be lawful.

Sue Willman

www.deightonpierceglynn.co.uk

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