CO/14630/2009

Neutral Citation Number: [2010] EWHC 1002 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 20th April 2010

B e f o r e:

M SUPPERSTONE QC
SITTING AS A DEPUTY HIGH COURT JUDGE

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Between:
THE QUEEN ON THE APPLICATION OF
(1) MORTEZA KIANA
(2) TONY MUSGROVE

Claimants

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

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Mr M Westgate QC and Mr R Khubber (instructed by Messrs Ben Hoare Bell LLP) appeared on behalf of the **Claimant**
Mr Ben Lask (hearing) and Ms Julie Anderson (judgment) (instructed by the Treasury Solicitor) appeared on behalf of the **Defendant**

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J U D G M E N T

1. THE DEPUTY: Introduction

The claimants challenge the decision of the Secretary of State for the Home Department ("the defendant") made on 16th November 2009 to offer the first claimant support in the form of accommodation and subsequently vouchers to purchase food and essential toiletries. The first claimant declined the offer because it would require him to live separately from his partner, the second claimant, and his young daughter.

2. This case raises an issue of general application as to the scope of assistance under section 4 of the Immigration and Asylum Act 1999 ("the 1999 Act"). Section 4(2) gives the defendant power to "provide or arrange for the provision of facilities for the accommodation of" failed asylum seekers.

3. The question is the nature of the support that the defendant may provide or arrange where an applicant has access or the means of access to accommodation but cannot meet his essential living needs. The context in which the question arises in the present proceedings is that of a "mixed household" where a section 4 applicant is living with a person who is entitled to work and to mainstream benefits, but their joint income, absent section 4 support, is such that they are still destitute. The second claimant is a British citizen, as is the daughter of the claimants.

4. On 20th January 2010, Stadlen J directed that this matter be listed for a "rolled up" hearing on an expedited basis. Two other cases raising the same issues have been set down to be heard on 23rd April 2010. The first claimant has in fact now being granted three years discretionary leave, which renders his application academic. However, given the importance of the legal issue to be considered, the parties have agreed that this matter should still proceed. The claimant's solicitor suggests the issue in this case "affects many hundreds, if not thousands, of section 4 applicants or potential applicants".

Factual background

5. The first claimant is a national of Iran. He arrived in the UK on 28th August 2007 and applied for asylum on the same day. On 7th January 2008, his application for asylum was refused. His appeal was dismissed on 7th March 2008. The first claimant's appeal rights became exhausted on 18th April 2008. Further representations were submitted by the first claimant's then solicitors on 5th November 2008. By letter dated 12th January 2010, he was informed that it had been decided that the decision of 7th January 2008, upheld by an immigration judge on 7th March 2008, should not be reversed and that the submissions did not amount to a fresh claim. Subsequently, on 12th March 2010, further representations were made on the first claimant's behalf in which it was submitted that his removal from the UK would constitute a disproportionate interference with his rights under Article 8 of the ECHR. By letter dated 13th April 2010, the first claimant was informed that he is to be granted three years discretionary leave. No reasons for the decision have as yet been given.

6. On 7th September 2007, the first claimant was granted support under section 95 of the 1999 Act. On 1st May 2008, he was notified that his section 95 support was to be

discontinued with effect from 15th May 2008 since he had exhausted his appeal rights in his asylum claim on 18th April 2008. On 5th October 2009, the first claimant applied for support under section 4 of the 1999 Act on the grounds that he was destitute and required support in order to avoid a breach of his rights under the ECHR. He stated:

> "As I am staying with my partner I require support in a mixed household with my partner who is [in] receipt of main stream benefit[s]."

7. On 17th October 2009, the application for support was refused on the grounds that it did not appear to the defendant that he was destitute. He appealed that decision and on 4th November 2009 the First-tier Tribunal, Asylum Support, allowed his appeal and decided that he was entitled to receive section 4 support. By letter dated 16th November 2009, the first claimant was informed that support would be provided to him in the form of separate accommodation on a no choice basis. The offer was made subject to conditions, one of which was:

> "You must reside at the accommodation provided to you and must not be absent without the permission of the Secretary of State from the accommodation for more than 7 consecutive days and nights or for more than a total of 14 days and nights in a 6-month period."

The offer of support was not taken up by the first claimant as it would require him to live separately from his partner and daughter, which he did not wish to do. On 23rd November 2009, a pre-action protocol letter was written to the defendant and the present claim for judicial review was filed on 2nd December 2009.

The legislative framework

8. Separate provision is made in the 1999 Act for support for asylum seekers and support for persons whose asylum applications have failed. By section 95(1) the defendant may provide or arrange for the provision of support for asylum seekers or dependants of asylum seekers who appear to the Secretary of State to be destitute or to be likely to become destitute within such period as may be prescribed. By section 95(3) a person is destitute if:

> "(a) he does not have adequate accommodation or any means of obtaining it (whether or not his other essential living needs are met); or
>
> (b) he has adequate accommodation or the means of obtaining it, but cannot meet his other essential living needs."

Section 95(4) states that:

> "If a person has dependants, subsection (3) is to be read as if the references to him were references to him and his dependants taken together."

9. Support under section 95 can be provided in the ways set out in section 96:

"(1) Support may be provided under section 95—

(a) by providing accommodation appearing to the Secretary of State to be adequate for the needs of the supported person and his dependants (if any);

(b) by providing what appear to the Secretary of State to be essential living needs of the supported person and his dependants (if any)...

(2) If the Secretary of State considers that the circumstances of a particular case are exceptional, he may provide support under section 95 in such other ways as he considers necessary to enable the supported person and his dependants (if any) to be supported."

10. The Asylum Support Regulations 2000 set out the circumstances in which support under section 95 will be provided. They are supplemented by the Asylum Seekers (Reception Conditions) Order 2005. Support under section 95 applies only for so long as the person is an asylum seeker and their application is pending, although an asylum seeker with dependant children living with them remains an asylum seeker so long as they continue to so reside and are under 18 and unless and until they are given leave to remain (section 95(5) and (6)). Section 4 governs the provision of support to failed asylum seekers. So far as is material, it states:

"4(2) The Secretary of State may provide, or arrange for the provision of, facilities for the accommodation of a person if -

(a) he was (but is no longer) an asylum seeker, and

(b) his claim for asylum was rejected.

...

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

(a) whether or not to provide accommodation, or arrange for the provision of accommodation, for a person under this section;

(b) whether or not to continue to provide accommodation, or arrange for the provision of accommodation, for a person under this section.

...

(6) The regulations may, in particular -

(a) provide for the continuation of the provision of accommodation for a person to be conditional upon his performance of or participation in community activities in accordance with arrangements made by the Secretary of State;

(b) provide for the continuation of the provision of accommodation to be subject to other conditions;

(c) provide for the provision of accommodation (or the continuation of the provision of accommodation) to be a matter for the Secretary of State's discretion to a specified extent or in a specified class of case.

...

(10) The Secretary of State may make regulations permitting a person who is provided with accommodation under this section to be supplied also with services or facilities of a specified kind.

(11) Regulations under subsection (10)-

(a) may, in particular, permit a person to be supplied with a voucher which may be exchanged for goods or services,

(b) may not permit a person to be supplied with money,

(c) may restrict the extent or value of services or facilities to be provided, and

(d) may confer a discretion."

11. The Immigration and Asylum (Provision of Accommodation to Failed Asylum Seekers) Regulations 2005 have been made under section 4(5) and the Immigration Asylum (Provision of Services or Facilities) Regulations 2007 have been made under section 4(10) and (11). By regulation 3 of the 2005 regulations, the criteria to be used to determine the matters referred to in paragraphs (a) and (b) of section 4(5) of the 1995 Act are that they appear to the Secretary of State to be "destitute" and one of the conditions in regulation 3(2) applies. These include paragraph (e):

> "(e) the provision of accommodation is necessary for the purpose of avoiding a breach of a person's Convention rights, within the meaning of the Human Rights Act 1998."

By regulation 6, the conditions that may be imposed on the continued receipt of support include residing at a particular address. In practice this is imposed as a standard condition.

12. The 2007 regulations allow for the provision of help with certain travel expenses, the cost of certain telephone calls and letters, clothing for children and some payments to pregnant women and young mothers and payments for essential living needs in some exceptional circumstances. Such assistance may be given to a supported person, defined as a person "who is being provided with accommodation under section 4 of the 1999 Act and who is destitute".

13. Section 103 of the 1999 Act provides for rights of appeal in relation to decisions under section 95 and section 4 in the following terms:

> "(1) If, on an application for support under section 95, the Secretary of State decides that the applicant does not qualify for support under that section, the applicant may appeal to [the First-tier Tribunal].
>
> (2) If the Secretary of State decides to stop providing support for a person under section 95 before that support would otherwise have come to an end, that person may appeal to [the First-tier Tribunal].
>
> (2A) If the Secretary of State decides not to provide accommodation for a person under section 4, or not to continue to provide accommodation for a person under section 4, the person may appeal to [the First-tier Tribunal.]"

Submissions

14. Mr Westgate QC for the claimants submits:

> (1) the defendant has misinterpreted the scope of his powers to provide assistance under section 4. First, he submits that, even if the defendant is correct that he cannot provide support for essential living needs unless he also arranges accommodation, he does not need to enter into the kind of highly structured and formal arrangements that he has put in place. Nothing stops him from entering into an arrangement with the second claimant such that the family can continue to reside together without the need to provide further separation accommodation. Second, and in any event, where an applicant already has access to accommodation but requires assistance with subsistence needs in order to make use of it, then the defendant may provide the necessary subsistance assistance even if he does not also provide or arrange for the provision of separate accommodation.
> (2) The defendant has acted unlawfully in failing to exercise his power to enter into the kind of arrangements the claimants propose. He has fettered his discretion because he will only provide accommodation through "target contracts" as explained in Mr Cairns' statement or on terms that contain analogous provisions. This position is also irrational and fails to take account of his duty under section 55 of the Borders Citizenship and Immigration Act 2009.
> (3) The decision to provide/offer separate accommodation to the first claimant away from the second claimant and their daughter (and then assistance for the first claimant's essential living needs) was in breach of their rights under Article 8 ECHR.
> (4) The decision was unjustifiably discriminatory against the family unit of the claimants and their daughter and therefore contrary to Article 14 ECHR.

15. During the course of these proceedings, it appeared that the claimants had put their case as to the section 4 support they were seeking in different ways. The claimants' submission as set out in their summary grounds of challenge was that the defendant's decision failed to appreciate that service provision under section 4 could have been made by way of funding the existing accommodation where the first claimant resides with the second claimant, followed by provision of vouchers. In the evidence filed on behalf of the claimants, it was said "it would be possible within the terms of section 4(2) for the Secretary of State to arrange with the second claimant for the first claimant to live in her rented flat with her and their child for a border lodging payment" (Mr Garlick's third witness statement, paragraph 7).

16. Finally, the claimant's skeleton argument at paragraph 4.1.4 says that "in the circumstances of the claimants' case nothing stops the defendant from making an arrangement with the second claimant, who controls access to the accommodation, authorising the first claimant to live with her. The arrangement can be formal or informal and need not involve the payment of any money. The effect would be that the defendant would have "arranged facilities for the first claimant's accommodation within the meaning of section 4".

17. Commenting on these different proposals, Mr Westgate observed that it matters not to the claimants whether the arrangements are with the second claimant or the second claimant's landlord and whether payment of money is made or not, so long as the claimants' objective for the two of them and their daughter being accommodated together is achieved.

18. Mr Lask, on behalf of the defendant, suggested that logically the order in which Mr Westgate put the two parts of his submissions as to the scope of section 4 should be reversed. I agree and I will consider these submissions in the order Mr Lask suggests.

19. As for the claimant's case that the defendant is able to exercise his power under section 4 by payment of vouchers to the first claimant, living in the house of the second claimant, without needing to also provide or arrange for the provision of accommodation itself, Mr Lask submits that this ignores both the language of section 4(2) and the wider statutory context. As for the claimants' argument that the phrase "arrange for the provision of accommodation" is to be interpreted as giving the defendant "the greatest possible freedom of action as to the range of arrangements he was empowered to make" (the claimants' skeleton, paragraph 4.1.3), Mr Lask submits that the claimants exaggerate the breadth of the phrase "arrange for the provision of". If the defendant decides not to provide accommodation directly but to arrange for provision of accommodation by third parties, he still has responsibility for the provision of accommodation. Mr Lask submits that in discharging that responsibility he is required to take some kind of positive steps to organise the accommodation and he must retain a degree of responsibility for the accommodation itself.

20. Mr Lask submits that the defendant did not fetter his discretion. He did not do so, first, because he does not accept that he had a power to provide voucher support only and therefore this ground falls away; second, because, whilst the defendant accepts it would have been open to him to enter into contractual arrangements with the second

claimant's existing landlord, the evidence shows that UKBA did consider whether it would be appropriate to do so in this case, having regard to Article 8 and the claimants' individual circumstances were fully taken into account.

21. On the Article 8 challenge, Mr Lask submits the limitation on section 4 support, as a result of which it is not open to him to exercise his power in the way the claimant proposed, does not give rise to any infringement of Article 8. In his submission, the impact on the claimants in this case is insufficiently severe to outweigh the considerations that justify the system of section 4 support established by Parliament. The limitations on section 4 support are necessary and proportionate. They pursue legitimate aims and strike a fair balance between the rights of the claimants and the wider interests of the community.

22. Finally, Mr Lask submits that neither claim for direct or indirect discrimination for the purposes of Article 14 is well-founded. The claimants argue that they are directly discriminated against in the enjoyment of their Article 8 rights as compared to a couple who are both subject to section 4 support, because the latter would ordinarily be accommodated together under section 4. Mr Lask submits that the situations of the claimants and their chosen comparators cannot on any view be regarded as analogous. The claimants' case on indirect discrimination relies on essentially the same criticisms of the limitations on section 4 support as are relied on in the context of Article 8. Mr Lask submits those limitations are necessary, legitimate and proportionate for the same reasons he relies on in support of his Article 8 arguments.

Discussion

Ground 1: the scope of the defendant's powers under section 4.2

Issue 1: "facilities for the accommodation of a person"

23. Section 4 is headed "accommodation". Section 4(2) confers on the defendant a power to provide or arrange for the provision of "facilities for the accommodation of a person". It is primarily a power to provide a person with somewhere to live. In R (AW (Kenya)) v Secretary of State for the Home Department [2006] EWHC 3147 (Admin), Sir Michael Harrison said at paragraph 28:

> "Section 4 is dealing with accommodation. Not only is that the heading of the section, but the provision of accommodation permeates through the various sub-sections of section 4. The words 'facilities for the accommodation of a person' obviously go wider than the accommodation itself, but the facilities must be linked to the accommodation. Clothing cannot possibly be linked to the accommodation."

24. However, Mr Westgate submits that that case was concerned with the reach of the term "facilities for the accommodation of a person". It did not deal with when those facilities are to be provided and in particular whether they had to be provided together with the accommodation. Mr Westgate submits that the power to provide facilities is a power to provide any of them and consequently the defendant is able to exercise his

power under section 4 by payment of vouchers to the first claimant living in the house of the second claimant without needing also to provide or arrange for the provision of the accommodation itself. He submits there is no requirement that facilities and accommodation be provided by the same person. As a matter of ordinary language, he submits, the section does not require the defendant to provide separate accommodation in order to exercise his power.

25. In my judgment, that submission overlooks the fact that section 4 is plainly dealing with accommodation. It can be contrasted with section 95, which confers an express power on the Secretary of State to provide forms of support other than accommodation, including essential living needs, on a stand-alone basis. There is no such power in section 4. I agree with Mr Lask that Parliament conferred on the defendant through section 95 a wider and more flexible power to support asylum seekers than the power in section 4.

26. Further support for this conclusion can be found in three other material provisions. First, where Parliament intended to incorporate elements of the system of support under section 95 into the section 4 regime, it did so by express reference. For example, section 4(4) provides that the terms "asylum seeker", "claim for asylum" and "dependant" have the same meaning in this section as in Part VI of the Act as defined in section 94. Second, section 103(2A) provides a right of appeal to the First-tier Tribunal if "the Secretary of State decides not to provide accommodation for a person under section 4 or not to continue to provide accommodation for a person under section 4". There is no express right of appeal against a refusal to provide subsistence only support which one would expect to find if section 4 conferred on the defendant a power to provide such support. Third, the 2007 regulations empower the defendant to provide a range of other facilities which are not linked to accommodation. Such facilities may only be provided to a "supported person"; that is a person who is being provided with accommodation under section 4 and who is destitute. This restriction gives effect to section 4(10).

Issue 2: "provide or arrange for the provision of"

27. Mr Westgate submits that section 4 contains very broad words and that they do not warrant the limitation imposed upon them by the defendant.

28. However, section 4(2) does require the defendant to "provide" or "arrange" for the provision of accommodation. I do not accept that, if the defendant merely obtained the second claimant's consent to the first claimant living with her, he could be said to have arranged for the provision of accommodation. He would merely have satisfied himself that accommodation was available to the first claimant before going on to provide the means to make use of the accommodation. This is not what section 4 requires.

29. In my view, having given the defendant responsibility for the provision of accommodation, Parliament must have intended the defendant to exercise that responsibility by taking positive steps to organise the accommodation and he must retain a degree of responsibility for the accommodation itself. In practice, this is likely

to involve the defendant entering into contractual relations with the accommodation provider.

30. Section 4(5) and 4(6) and regulations 3 to 6 of the 2005 regulations, made pursuant to those subsections, support this conclusion. The defendant has the power to withdraw the provision of accommodation where the supported person ceases to be eligible or where certain other conditions are not met. If the defendant did no more than approve an existing arrangement, it would be difficult for him to exercise any control over the continued provision of the accommodation.

31. Further, section 95(3) states that a person is destitute if "he does not have adequate accommodation". Parliament must have intended that accommodation provided under section 4(2) should be adequate. By requiring the defendant to retain a degree of responsibility for the provision of the accommodation, Parliament has enabled the defendant to ensure that the accommodation is and remains adequate. He can safeguard against the accommodation falling into disrepair or becoming dangerous.

32. The defendant considers section 4 support should generally be provided through target contracts to enable him to ensure that services are provided to defined standards. The defendant's policy is explained in the witness statement of Mr James Cairns, a senior procurement manager within the UK Border Agency. His evidence is that these contracts guarantee the health and safety of service users, ensure value for money and protect the reputation of the defendant (paragraph 40).

33. UKBA does recognise that there may be circumstances where some other alternative arrangement is appropriate (Cairns, paragraph 20). However, in their opinion an arrangement of the kind proposed by the claimants, if entered into informally, would lack the very important safeguards provided for in the target contracts.

34. The claimants are currently living in privately rented accommodation in Gateshead. The landlord for this property is not a party to any of the three target contracts into which UKBA has entered for the Northeast region, where the accommodation is located. For the reasons I have already summarised, UKBA consider it important to ensure that any existing landlord with whom they are proposing to contract for the provision of section 4 support is subject to a regime comparable to that contained in the target contracts. At paragraphs 51 to 60 of his witness statement, Mr Cairns explains why the process of negotiating and administering such a contract would itself cause UKBA to incur not insignificant costs. In addition, there is no guarantee that the existing landlord would be willing to enter into contractual arrangements with UKBA. If he was unwilling to do so, it would be difficult for the defendant to ensure that the first claimant could remain in the existing accommodation.

Ground 2: failure to lawfully exercise discretion/fettering of discretion

35. For the reasons I have already given, I do not accept that section 4 gives the defendant the power to provide voucher support only. That leaves for consideration Mr Westgate's submission that the defendant fettered his discretion because he would only provide accommodation through target contracts or analogous arrangements. Again,

for the reasons I have given, in my view section 4 does not give the defendant power to enter into any of the informal arrangements proposed on the claimant's behalf.

36. However, following the institution of these proceedings, UKBA did consider whether it would be appropriate for the defendant to enter into contractual arrangements with the second claimant's existing landlord, having regard to the claimant's particular circumstances. The evidence of Ms Bass, the Deputy Director of National Asylum Operations for Immigration Group within UKBA, is that the claimants' individual circumstances were taken into account (see paragraphs 46 to 68). Further, in accordance with their duties under section 55 of the 2009 Act, UKBA also considered the impact of the first claimant having to live in separate accommodation from the claimants' daughter (paragraphs 55, 56, 58 and 65 of the statement of Ms Bass deal with this issue).

Ground 3: Article 8

37. The claimants' case is that, by section 3 of the Human Rights Act 1998, section 4 must be interpreted in such a way as to secure compliance with Convention rights, so that, where support is necessary in order to avoid a breach of Article 8, then it must be provided. Mr Westgate submits that the defendant's policy of providing accommodation only through target contracts or analogous arrangements fails properly to take account of the interests of the first claimant and his family in remaining together and fails to weigh the hardship to them. He submits that there is a breach of Article 8 by the defendant refusing to support the first claimant in his current accommodation.

38. Mr Westgate submits that the restrictions imposed by the defendant in the manner in which he is prepared to provide section 4 support involve an interference with the negative aspect of Article 8. In support of that submission, he referred me to the Court of Appeal decision in R (Q) v Secretary of State for the Home Department [2004] QB 36, where at paragraph 64 Lord Phillips MR said that:

> "If the denial of support to an asylum seeker impacts sufficiently on the asylum seeker's private and family life, which extends to the individual's physical and mental integrity and autonomy ... the Secretary of State will be in breach of the negative obligation imposed by article 8, unless he can justify his conduct under Article 8(2)..."

39. The features of the present case Mr Westgate submits are relevant include the following. First, as a result of direct action by the defendant, the first claimant cannot work and has no access to other benefits. The limited support afforded by section 4 is by way of alleviation of the destitution that this regime would otherwise cause. Second, the first claimant has an existing family relationship that he cannot maintain and which the defendant's decision interferes with. Third, the claimant does not simply relate an offer of support that the claimant can accept or reject. If he accepts it, then he will be subject to a condition of residence. It therefore separately interferes with an aspect of his autonomy, being his right to determine his only residence. Fourth, in formal terms the first claimant has a choice whether to accept support on the terms offered by the defendant or to remain where he is but be destitute. However, this is not

a free choice. He is in the same position as the mother in R (J) v London Borough of Enfield [2002] HLR 38, who might reluctantly agree that her child be taken into care because no support had been provided for them both.

40. I do not accept that there has been an interference with the negative aspect of Article 8 in the present case. This is a case when an offer of welfare support has been made. In Q there was a denial of support combined with a prohibition on working (paragraphs 56 to 57 and 64). I agree with the observations of Richards J, as he then was, in R (Mvundi) v Secretary of State for the Home Department [2004] EWHC 2889 (Admin) at paragraph 42, that in that case, and in my view in the present case, one is concerned with the extent of the state's positive obligations to support. The situation cannot fairly be characterised as one of breach of the negative obligation not to interfere with the first claimant's family life. Further, it was not correct, in my view, to consider the present case as if the family is being separated. It is not like a case, for example, where a person is being deported. In the alternative, Mr Westgate submitted that this is a case where there are positive obligations on the state to enable family life to continue.

41. It is common ground that Article 8 does not in itself guarantee a right to be provided with accommodation or other forms of welfare assistance (see Chapman v United Kingdom [2001] 33 EHRR 399 and R (Carson) v Secretary of State for Work and Pensions [2003] 3 All ER 577 at paragraph 26). However, the decision of the Court of Appeal in Anufrijeva v London Borough of Southwark [2004] QB 1124 confirms that Article 8 is capable of imposing a positive obligation on the state to provide welfare assistance in special circumstances (paragraph 33). In order for it to do so, the failure to provide such support must have a sufficiently severe impact on the claimant's private and family life which cannot be justified under Article 8(2) (paragraph 36). When the welfare of children is at stake, Article 8 may require the provision of welfare support in a manner which enables family life to continue (paragraph 43).

42. In this connection, Lord Woolf CJ referred to two cases in which it had been held that Article 8 did impose a positive obligation to provide welfare support: R (Bernard v Enfield London Borough Council [2003] LGR 423 and R(J) v London Borough of Enfield [2002] HLR 38. In my judgment, both those cases are to be distinguished from the present case. In J the claimant was homeless and faced separation from her child. It was common ground that if this occurred Article 8(1) would be infringed. In the present case, there is no question of the claimant's daughter being separated from her mother. Further, in J there was no consideration of whether the interference with Article 8 could be justified under Article 8(2). It was common ground that it could not (see paragraph 48). In Bernard, family life was seriously inhibited by the hideous conditions prevailing in the claimant's home. On the facts of that case, the Court of Appeal considered it was open to Sullivan J to find that Article 8 was infringed. The living conditions resulting from the Council's failure to provide suitably adapted accommodation had made it "virtually impossible for the claimants to have any meaningful private or family life for the purpose of Article 8" (paragraph 34).

43. In my judgment, on the facts of the present case, which I shall consider in further detail below, the provision of accommodation offered to the first claimant pursuant to section 4 of the 1999 Act does not constitute an interference with the rights of either claimant

under Article 8(1). That being so, as in Mvundi, one does not reach the stage of considering justification under Article 8(2) (see paragraphs 42 and 43). If, however, I am wrong to conclude that there is not a positive obligation to provide the support for which the claimants contend, or if I am wrong in not characterising the situation as one of breach of a negative obligation, then in either case regard must be had to whether a fair balance was struck between the competing public and private interests involved: see Dixon v United Kingdom [2008] 46 EHRR 41 at paragraph 68 to 71. The critical question is whether, having regard to all the circumstances, the offer of support by the defendant would have a sufficiently severe impact on the claimant's family life which cannot be justified under Article 8(2).

44. The question of proportionality under Article 8(2) involves "striking a fair balance between the rights of the individual and the interests of the community, which is inherent in the whole of the Convention. The severity and consequences of the interference will call for careful assessment at this stage": R (Razgar) v Secretary of State for the Home Department [2004] 2 AC 368 per Lord Bingham at paragraph 20.

45. As for the impact, the defendant's evidence is that "every effort would have been made to allocate Mr Kiana accommodation that was geographically as close as possible to [the second claimant] and their daughter" (Bass, paragraphs 56 to 57). They would have sought to arrange for him to be accommodated within a reasonable walking distance of his partner's home.

46. The claimants' evidence is that there had been cases in which accommodation had been provided more than three miles away (Mr Garlick's third witness statement, paragraph 28). However, the claimant did not put to the test where the accommodation that he was to be offered would be. He rejected the offer because, wherever it was, it involved him leaving his existing accommodation. Further, Ms Bass explains at paragraphs 60 to 62 of her witness statement that, if the first claimant had accepted the offer of support, the impact of the decision would have been temporary. Mr Garlick suggests that in many cases section 4 support lasts many months or years (third witness statement, paragraph 29). However, the defendant says that many cases in the category in which the first claimant's case falls are concluded within six month of submission. In any event, his separation from his partner and their daughter would in fact have been for only approximately two months if he had accepted the offer made to him, because, when his further representations were refused on 17th January 2010, he was no longer eligible for section 4 support.

47. The second claimant spent a period of time in hospital in November 2009. At the time Ms Bass made her witness statement on 10th February 2010, the absence of independent medical evidence made it difficult to assess the seriousness of the second claimant's medical condition. There is now a short report of Dr Al-Rifai, dated 1st March 2010. He says that he saw her in clinic on 23rd December 2009 and is "still actively following her up in clinic", but it does not appear she has had any further admission to hospital which would have required the first claimant to care for his daughter in her absence. If such a situation had arisen, then it would have been open to the first claimant to seek permission from the defendant to be absent from his accommodation for longer than the maximum periods prescribed (Bass paragraph 67).

48. Whilst Konstantinov v The Netherlands [2007] ECHR 336 was a case concerning removal from the country in which the applicant was living, the factors referred to in the judgment as relevant when considering the extent of the state's obligations under Article 8 also in my view assist in assessing the severity of the impact of a decision on family life in the circumstances of the present case. One factor the court said should be taken into account is "the extent to which family life is effectively ruptured". On the facts I have outlined, family life in my view would not have been effectively ruptured if the section 4 offer had been accepted.

49. A further factor is "whether family life is created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of the family life within the host state would be precarious from the outset". From the time the claimants met, they would have been well aware that the first claimant's immigration status was precarious. His appeal rights were exhausted on 18th April 2008, a number of months before they started living together and commencing a sexual relationship.

50. As for justification, the claimant accepts that the defendant is entitled to operate a system of section 4 support that is less advantageous than ordinary benefits or asylum support under section 95 in order not to create an incentive to failed asylum seekers to remain. However, Mr Westgate submits that, when, as here, the defendant accepts a claim for section 4 support, the applicant cannot be required to leave the UK pending determination of his further claim or for some other reason. In that case, the only relevant question is how that support should be provided. The answer to that question, it is said, cannot be designed to encourage the applicant to leave the UK because that would be inconsistent with the basis on which support is provided.

51. In my view, this is to adopt too narrow an approach. It overlooks that section 4 support was established as an alternative to detention for those who have no legal right to remain in the UK but for whom there is a temporary barrier to removal (Bass, paragraph 6). Section 4 establishes a limited form of accommodation based support for failed asylum seekers. The support is deliberately limited in order to minimise the incentive for economic migration through the asylum support system (see R (Erdogan) v Secretary of State for the Home Department [2004] EWCA Civ, paragraphs 19 and 21) and the incentive of failed asylum seekers who have by definition been bound to have no right to remain in the UK to remain nonetheless.

52. Section 4 support is an aspect of the UK system of immigration controls and, as Moses LJ observed in LK (Serbia) v Secretary of State for the Home Department [2007] EWCA Civ 1554 at paragraph 8, "in normal circumstances interference with family life will be justified by the requirements of fair and consistent immigration control".

53. The claimant also accepts that the defendant was entitled to operate a target contract regime for the reasons given in Mr Cairns' statement (generally, see ground 1, issue 2 above). However, Mr Westgate submits that the consequence of the decision in the present case is that the first claimant and his family are left with a choice either to stay where they are but suffer destitution or to separate, which would involve a grave interference with their family life. By reason of the matters I have already considered

in the context of impact, for example geographical location, duration and the second claimant's medical condition, I do not accept that the offer would have led to a grave interference with family life.

54. The claimants suggest that their proposed arrangement will cost less than the provision of accommodation under the target contract. They accept that a public authority is not obliged to adopt the cheaper option where there are countervailing considerations (R(G) v Barnet London Borough Council [2004] 2 AC 208 paragraphs 45 to 47) but say there are no countervailing considerations in the present case.

55. In my view, there are. The claimants focus on the cost in the instant case. This ignores the wider resource implications of a system of support that encourages the incentives that this system is intended to minimise. It is the claimants' evidence that there may be many hundreds or even thousands of applicants affected by the defendant's present interpretation of section 4.

56. As stated, section 2 permits the defendant to enter into contractual arrangements with an applicant's existing landlord. The legislative scheme is accordingly sufficiently flexible to allow the defendant in appropriate circumstances to provide section 4 support in a manner that allows an applicant to remain in existing accommodation.

57. However, for the reasons given by Ms Bass (paragraphs 50 to 68) and Mr Cairns (paragraphs 58 to 60), having regard to all the circumstances and Article 8 considerations, the defendant did not consider that it would be appropriate in the present case to seek to enter into contractual arrangements with the claimants' existing landlord. The claimants do not challenge that conclusion.

58. In my judgment, having regard to all the circumstances, the offer of section 4 support that was made by the defendant would not have had a sufficiently severe impact on the claimants' family life, which cannot be justified under Article 8(2).

Ground 4: Article 14

59. The claimants' direct discrimination claim is that they are discriminated against in the enjoyment of their Article 8 rights as compared to a "couple who are both subject to section 4 support". However, in my view, the claimants and their chosen comparators are not in "analogous situations": see R (Carson) v Secretary of State for Work and Pensions [2006] 1 AC 173 per Lord Hoffmann at paragraphs 14 to 17 and per Lord Walker at paragraph 65. There is discrimination only if the cases are not sufficiently different to justify the difference in treatment (Lord Hoffmann at paragraph 14).

60. The claimants and their chosen comparators are in my view sufficiently different to justify difference in treatment. In the case of a couple in which both partners are eligible for section 4 support, both partners will be failed asylum seekers "or a dependant" and both partners will be destitute. In the claimants' case, the second claimant is a British citizen who is entitled to live and work in the UK and may access mainstream welfare benefits. The difference in treatment arises from the fact that section 4 support is confined to persons who are destitute, whereas the second claimant

is prevented from becoming destitute either through an ability to work or through access to an entirely different system of welfare support.

61. Mr Westgate suggests that the claimants are in a uniquely disadvantaged position compared to all other section 4 applicants and indeed those on mainstream benefits. This submission is not supported by the evidence. Further, it would appear to run counter to the claimants' suggestion that the issue in this case affects at least many hundreds of section 4 applicants or potential applicants.

62. The claimants' case on indirect discrimination is that the way in which section 4 support is operated has a disproportionately adverse affect on members of mixed households because they alone will be put to their election whether to separate or face destitution. Mr Westgate submits that this is unjustified for the reasons given under Article 8.

63. The claimants' case on indirect discrimination relies on essentially the same criticisms of the limitations on section 4 support as are relied on in the context of Article 8. For the reasons I have given when considering these matters in relation to Article 8, I am of the view that those limitations are necessary, legitimate and proportionate.

Conclusion

64. In my judgment, this application for judicial review passes the threshold for permission to be granted but, for the reasons I have given, this application must be dismissed.

65. MS ANDERSON: My Lord, there is no application for costs from the defendant.

66. THE DEPUTY: Thank you very much.

67. MR WESTGATE: My Lord, I am grateful to you for producing the judgment so quickly, in particular in advance of the hearing on Friday.

68. My Lord, I do have an application for permission to appeal. You observed at the outset of your judgment this is a matter that raises issues of some importance in relation to the scope of section 4, which is likely to affect a large number of families, or may well affect a large number of families.

69. As to the grounds of appeal, I suggest that your Lordship has dealt with the scope of Article 4 and has dismissed both the grounds that are put forward. If I can concentrate really on the second of those grounds, which is the provision of facilities, the Secretary of State's argument that it is implicit that it has certain responsibilities for the provision of accommodation to continue does create a large number of difficulties as to exactly what the boundaries of that are and it in a sense puts the Secretary of State in the position of being a housing authority of a kind, which the claimant will say is not necessary as part of the section 4 scheme, and your Lordship's judgment, the claimants would say, fails to give sufficient weight to the breadth of the language in section 4.

70. My Lord, as far as the Article 8 points are concerned, we are now repeating the submissions that I made in the course of my submissions. The main focus here would be that this is a case where one has to recognise the weight of the parliamentary policy,

which, as I put it in my submissions, I think, draws a line at the point where the interests of children are being adversely affected and that is something that needs to be put very heavily in the balance which the claimants would say is certainly a matter on which the Court of Appeal may take a different view.

71. My Lord, whatever your Lordship decides on the question of permission to appeal, I have some further submissions about the timing of any appeal and the transcript, but it might be helpful if your Lordship deals with permission to appeal first.

72. THE DEPUTY: Yes, certainly. Ms Anderson?

73. MS ANDERSON: My Lord, the Secretary of State's position is this. We think that this judgment has very clearly answered the issue and is determinative. However, if there is to be an appeal, it should be in this case rather than any further resources being expended in deciding another case in the first instance. So it is really a matter for my Lord.

74. THE DEPUTY: I think the appropriate course at this stage is to refuse permission and to leave it to the Court of Appeal to decide whether to grant permission.

75. MR WESTGATE: That then leads on, my Lord, to my points on timing. This is a case where, obviously formulating any application for permission to appeal, we would want to have the advantage of a transcript.

76. THE DEPUTY: Yes, of course.

77. MR WESTGATE: And would your Lordship extend the time for applying for permission to appeal until say 14 days after the transcript has been approved?

78. THE DEPUTY: Ms Anderson?

79. MS ANDERSON: I think that is very fair.

80. THE DEPUTY: What I will do is to repeat what I said on Thursday, that a transcript should be expedited. Second, I accede, Mr Westgate, to your request that time be extended until 14 days after the transcript.

81. MS ANDERSON: My Lord, I am very grateful. In that case the only remaining submission I have is for detailed assessment of the claimants' publicly funded costs.

82. THE DEPUTY: Yes, most certainly you can have that.

83. MR WESTGATE: Thank you.

84. THE DEPUTY: Mr Westgate, can I thank you and Mr Khubber very much for your detailed submissions and I also thank Mr Lask in his absence and thank you for attending today, Ms Anderson.

85. MR WESTGATE: Thank you.