Neutral Citation Number: [2010] EWCA Civ 1101

Case No: C1/2010/0601

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Mr Justice Calvert-Smith
CO/12357/2009

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/10/2010

Before :

LORD JUSTICE JACOB
LORD JUSTICE LEVESON
and
LORD JUSTICE TOMLINSON

- -

Between :

The Queen on the Application of S.O.	**Appellant**
- and -	
London Borough of Barking and Dagenham	**Respondent**
- and -	
Secretary of State for the Home Department	**Interested Party**
- and -	
The Children's Society	**Intervener**

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- -

Richard Drabble QC and Tim Buley (instructed by **Fisher Meredith LLP**) for the **Appellant**
Ashley Underwood QC and Kelvin Rutledge (instructed by **LB Barking Legal Department**) for the **Respondent**
Elisabeth Laing QC and David Blundell (instructed by the **Treasury Solicitor**) for the **Interested Party**
Ian Wise QC and Stephen Broach (instructed by **The Children's Society**) for the **Intervener**

Hearing date : 21 July 2010

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Judgment

Lord Justice Tomlinson :

1. This appeal raises the question upon whom falls the financial burden of providing accommodation to an eighteen year old asylum seeker who is also a "former relevant child", to the extent that his welfare requires it, where the asylum seeker is not in education or training. Does it fall upon the local authority, pursuant to its duty under s.23C(4)(c) of the Children Act 1989, as amended, hereinafter "the Act", or does it fall upon the National Asylum Support Service hereinafter "NASS", and thus upon the Secretary of State, pursuant to her powers under the Immigration and Asylum Act 1999?

2. The context in which the court has been asked to determine this question is an appeal from a decision of Calvert-Smith J, who held that a local authority derives from s.23C(4)(c) no power to provide accommodation, whether to a former relevant child asylum seeker or to any other person. He did not therefore need to decide what was the inter-relationship between the power or duty of the local authority and the power of the Secretary of State. However the judge went on to indicate that had that latter question arisen, he would have held that the local authority was entitled to conclude that the former relevant child asylum seeker would be likely to receive assistance from the NASS, at least until the result of any application for such assistance was known, and thus that his welfare did not require the provision of accommodation by the local authority.

3. The decision of the judge has apparently been received in some quarters with consternation and surprise, not least because local authorities have, we were told, on many occasions accepted an obligation to provide accommodation to "former relevant children", i.e. those who were formerly in care but who have attained the age of eighteen, which is the class of persons with which s.23C(4)(c) of the Act is concerned. Concern for the interests of this vulnerable cohort prompted an application by The Children's Society to be joined as an intervener. So too, in due course, on 15 April 2010 the Secretary of State was similarly joined, albeit not at his behest. It is a measure of the impenetrable nature of the legislation with which the court is concerned that until a week before the hearing it was the position of the Secretary of State that the local authority indeed enjoyed no power under s.23C(4)(c) of the Act to provide accommodation to a former relevant child, and furthermore that the local authority was in the case of a former relevant child asylum seeker entitled to rely upon the availability of NASS accommodation. The Secretary of State appeared at the hearing and argued to precisely the contrary effect on both points. I do not say this by way of criticism. There is nothing wrong with second thoughts, and as it happens I have concluded that the second thoughts of the Secretary of State were correct. It does, however, demonstrate that the legislation is far from clear.

4. It will be apparent therefore that by the time the issue reached this court the concern was far removed from simply the interests of the nominal applicant, SO, to whom the local authority has in any event and to its credit at all times provided, and continues to provide, accommodation, a subsistence allowance of £51.85 per week for food and other essentials and travelling expenses of £118.30 per month to enable him to pursue a full-time course at Lambeth College.

5. The Appellant, SO, is a national of Eritrea. He arrived in the UK on 25 September 2007 and claimed asylum the next day. For the purposes of this appeal his date of

birth is assumed to be 6 July 1990 so that he is now twenty. The Respondent local authority assessed his age on 2 October 2007 as seventeen years old. It has at all times been the belief of the Secretary of State that the Appellant is, in fact, Hashim Mahmoud Hassan, an Eritrean born on 21 February 1987, who had applied for entry clearance as a visitor from Saudi Arabia. The Appellant's asylum claim was refused on 28 November 2007. His appeal against that refusal was allowed by IJ Oliver in a determination dated 10 March 2008. The Secretary of State applied for, and was granted, an order for reconsideration. On 11 June 2008 SIJ Southern decided that the determination of IJ Oliver contained an error of law.

6. There was then a second stage reconsideration hearing before IJ Charlton Brown. In a determination sent on 18 October 2008 he dismissed the Appellant's appeal, finding that he was "a witness without credibility": paragraph 7.1. At paragraph 7.11 he concluded that:-

> ". . . this Appellant is indeed Hashim Hassan, with a date of birth 21 February 1987, he was, as stated in interview, born in Jeddah, his parents lived there and whilst he apparently visited Eritrea in 1997, he has never been afraid to go to that country and the only reason he does not go because [sic] his family all reside in Saudi Arabia. He has his own valid Eritrean passport in the name of Hashim Hassan and apparently resident's documentation in relation to Saudi Arabia."

7. SIJ Batiste refused permission to appeal to the Court of Appeal on 5 November 2008. Scott Baker LJ refused permission on a renewed application on 19 January 2009, finding that IJ Charlton-Brown "was entitled to disbelieve his story as a witness "entirely without credibility"".

8. Under cover of letters dated 15 June and 17 July 2009 the Appellant's representatives made further representations which they asserted amounted to a fresh claim pursuant to paragraph 353 of the Immigration Rules. The Secretary of State decided that the further representations were not a fresh claim, communicating that decision by a letter dated 17 June 2010.

9. The Appellant was accommodated by the local authority as a child pursuant to its powers under s.20 of the Act from the time when he first claimed asylum until his alleged eighteenth birthday on 6 July 2008. Since that date the local authority has continued to accommodate him. Notwithstanding that the local authority has apparently been at all material times aware of the decision of IJ Charlton Brown, it has at no time sought to revisit its own assessment of the Appellant's age.

10. However, on 1 June 2009 the local authority sent a letter to the Appellant indicating its intention to terminate its support for him. Following correspondence between the local authority and the Appellant, the local authority formally terminated his support for the reasons given in a letter dated 9 October 2009. That letter was accompanied by a pathway plan and a Human Rights Assessment. The decision of 9 October 2009 was, we were told, taken in ignorance of the fact that as from a date in September 2009 the Appellant had registered at Lambeth College on a BTEC First Diploma course in electronics, notwithstanding that as a later pathway plan revealed that fact

had been vouchsafed to an officer of the Respondent local authority on 22 September 2009, and indeed the Respondent has been paying relevant travel expenses.

11. The local authority gave two reasons for its decision. First, that the further representations to the Secretary of State were manifestly unfounded; and, second, that in any event the Appellant was eligible for support from NASS, pursuant to s.4 of the Immigration and Asylum Act 1999. The question of the power of the local authority under s.23C of the Children Act 1989 was not raised.

12. The Appellant challenged the decision of 9 October 2009 in the present proceedings. Calvert Smith J dismissed the claim for judicial view on 3 March 2010: [2010] EWHC 634 (Admin). Before the judge the local authority raised the question whether s.23C(4)(c) gave to it a power to provide accommodation to a former relevant child. It contended, and the judge agreed, that it did not. However, the judge granted permission to appeal to this court.

13. The basis upon which this court has been asked to consider the issue which I have identified in paragraph 1 above is as follows. First, the court is invited to treat the appellant as still an asylum seeker. It is accepted that on the authority of the decision of the Divisional Court in *R(ZA)(Nigeria) v SSHD* [2010] EWHC 718 (Admin) he is in fact now a failed asylum seeker, but that decision is itself the subject of an appeal to the Court of Appeal, which has been heard and in respect of which judgment is awaited.[1] No argument was addressed to this court on that question. Second, the court is asked to assume that the Appellant is, as he claims, twenty years old and not, as has been determined by the Asylum and Immigration Tribunal, twenty-three years old. The significance of this is that the power under s.23C(4)(c), of whatever it consists, is available only in respect of former relevant children between the ages of eighteen and twenty-one, unless the former relevant child's pathway plan sets out a programme of education or training which extends beyond his twenty-first birthday. It is common ground that in the light of the decision of the Supreme Court in *R(A) v Croydon LBC: R(M) v Lambeth LBC* [2009] 1 WLR 2557, the determination of the Appellant's age by the AIT is not conclusive and in the event that the appeal is allowed the court is invited to remit the claim to the Administrative Court for it to determine the Appellant's age. Finally the court is asked to ignore the circumstance that, as it appears, the Appellant is receiving education or training as set out in his pathway plan. As appears hereafter the local authority in such circumstances has a power under s.23C(4)(b) to contribute to expenses incurred by the former relevant child in living near the place where he is receiving education or training. The Respondent local authority has undertaken that in the light of the court's judgment on this appeal it will give further consideration to whether it is obliged to make support available to the Appellant pursuant to this sub-section without prejudice, of course, to its position that the Appellant is in fact ineligible as a failed asylum seeker and to the position which it now wishes to adopt in relation to the Appellant's age.

14. It is with some misgivings that I turn to address on this basis the issues of principle which I have identified above. I do not view with equanimity the expenditure of public money on the resolution of questions which may, in the context in which they have arisen, prove academic. On the other hand four leading counsel with their

[1] Since this judgment was prepared the Court of Appeal has, as I understand it, dismissed this appeal. An application to the Supreme Court for permission to appeal awaits decision.

juniors appeared before us, having prepared to address those questions, which are obviously of wider significance than their application to this Appellant. We were persuaded that we should attempt to answer the examination questions which counsel set before us.

The first issue. Does a local authority enjoy a power to accommodate a former relevant child under s.23C(4)(c) of the Children Act 1989?

15. S.17(1) of the Act provides that it shall be the general duty of every local authority, in addition to the other duties imposed upon them, to safeguard and promote the welfare of children within their area who are in need. When enacted s.17(6) of the Act provided as follows:-

> "The services provided by a local authority in the exercise of functions conferred on them by this section may include giving assistance in kind or, in exceptional circumstances, in cash."

16. The operative words in s.17(6) as originally enacted have some legislative history. Thus s.1 of the Children and Young Persons Act 1963 provided:-

> "1. (1) It shall be the duty of every local authority to make available such advice, guidance and assistance as may promote the welfare of children by diminishing the need to receive children into or keep them in care under the Children Act 1948, the principal Act or the principal Scottish Act or to bring children before a juvenile court; and any provisions made by a local authority under this subsection may, if the local authority think fit, include provision for giving assistance in kind or, in exceptional circumstances in cash."

17. The Child Care Act 1980 was a consolidating statute. It re-enacted s.1 of the 1963 Act, again as s.1.

18. In *Attorney General ex rel. Tilley v Wandsworth LBC* [1981] 1 WLR 854 the Court of Appeal confirmed a decision at first instance to the effect that the power to provide assistance in s.1 of the 1963 Act included the power to provide or pay for accommodation.

19. In *R v Tower Hamlets LBC, ex parte Monaf* (1988) 20 HLR 529 the Court of Appeal held that the decision in *Tilley* was equally authority for the proposition that the word "assistance" in s.1 of the 1980 Act includes the provision of accommodation.

20. It was against this background that the same language was used in s.17(6) of the Children Act 1989.

21. In November 2000 the Children (Leaving Care) Act 2000 inserted into the Children Act 1989 what are generally referred to as the Leaving Care Provisions, including s.23C with which this appeal is principally concerned. In order to put the matter into context I set out the surrounding sections, so far as relevant:-

> **"23A. The responsible authority and relevant children**

(1) The responsible local authority shall have the functions set out in section 23B in respect of a relevant child.

(2) In subsection (1) "relevant child" means (subject to subsection (3)) a child who—

(a) is not being looked after by any local authority;

(b) was, before last ceasing to be looked after, an eligible child for the purposes of paragraph 19B of Schedule 2; and

(c) is aged sixteen or seventeen.

. . .

23B. Additional functions of the responsible authority in respect of relevant children

(1) It is the duty of each local authority to take reasonable steps to keep in touch with a relevant child for whom they are the responsible authority, whether he is within their area or not.

(2) It is the duty of each local authority to appoint a personal adviser for each relevant child (if they have not already done so under paragraph 19C of Schedule 2).

(3) It is the duty of each local authority, in relation to any relevant child who does not already have a pathway plan prepared for the purposes of paragraph 19B of Schedule 2:-

(a) to carry out an assessment of his needs with a view to determining what advice, assistance and support it would be appropriate for them to provide him under this Part; and

(b) to prepare a pathway plan for him.

. . .

(8) The responsible local authority shall safeguard and promote the child's welfare and, unless they are satisfied that his welfare does not require it, support him by:-

(a) maintaining him;

(b) providing him with or maintaining him in suitable accommodation; and

(c) providing support of such other descriptions as may be prescribed.

. . .

23C. Continuing functions in respect of former relevant children

(1) Each local authority shall have the duties provided for in this section towards:-

(a) a person who has been a relevant child for the purposes of section 23A (and would be one if he were under eighteen), and in relation to whom they were the last responsible authority; and

(b) a person who was being looked after by them when he attained the age of eighteen, and immediately before ceasing to be looked after was an eligible child,

and in this section such a person is referred to as a "former relevant child".

(2) It is the duty of the local authority to take reasonable steps:-

(a) to keep in touch with a former relevant child whether he is within their area or not; and

(b) if they lose touch with him, to re-establish contact.

(3) It is the duty of the local authority:-

(a) to continue the appointment of a personal adviser for a former relevant child; and

(b) to continue to keep his pathway plan under regular review.

(4) It is the duty of the local authority to give a former relevant child:-

(a) assistance of the kind referred to in section 24B(1), to the extent that his welfare requires it;

(b) assistance of the kind referred to in section 24B(2), to the extent that his welfare and his educational or training needs require it;

(c) other assistance, to the extent that his welfare requires it.

(5) The assistance given under subsection (4)(c) may be in kind or, in exceptional circumstances, in cash.

. . .

> (6) Subject to subsection (7), the duties set out in subsections (2), (3) and (4) subsist until the former relevant child reaches the age of twenty-one.
>
> (7) If the former relevant child's pathway plan sets out a programme of education or training which extends beyond his twenty-first birthday:-
>
> (a) the duty set out in subsection (4)(b) continues to subsist for so long as the former relevant child continues to pursue that programme; and
>
> (b) the duties set out in subsections (2) and (3) continue to subsist concurrently with that duty.

. . .

> **24B. Employment, education and training**
>
> (1) The relevant local authority may give assistance to any person who qualifies for advice and assistance by virtue of [section 24(1A) or] section 24(2)(a) by contributing to expenses incurred by him in living near the place where he is, or will be, employed or seeking employment.
>
> (2) The relevant local authority may give assistance to a person to whom subsection (3) applies by:-
>
> (a) contributing to expenses incurred by the person in question in living near the place where he is, or will be, receiving education or training; or
>
> (b) making a grant to enable him to meet expenses connected with his education or training.
>
> (3) This subsection applies to any person who:-
>
> (a) is under twenty-four; and
>
> (b) qualifies for advice and assistance by virtue of [section 24(1A) or] section 24(2)(a), or would have done so if he were under twenty-one."

22. In November 2001 in *R(A) v LB Lambeth* [2001] EWCA Civ 1624 the Court of Appeal held by a majority, Chadwick LJ and Sir Philip Otton, Laws LJ dissenting, that s.17 of the Act gave no power to the local authority to provide accommodation. Laws LJ, influenced by the decision of this court in *Tilley* and by the reference in s.17(6) to assistance in kind, thought that it was the better view that s.17 did confer a power to provide accommodation.

23. The decision of the Court of Appeal in *(A)* caused what Brooke LJ later described as "a considerable stir among those concerned with the needs of children whose families

(not only the intentionally homeless) have no home and do not qualify for assistance by a local authority housing department" – see *R(W) v Lambeth LBC* [2002] 2 All ER 901. As Brooke LJ also observed at paragraph 18 of his judgment:-

> "The effect of the decision in *A*'s case was debated in each House of Parliament as early as 12 and 21 November 2001. We have been shown s.12 of the Homelessness Act 2002 (which was enacted on 26 February 2002 and is not yet in force). This represents an early statutory attempt to ameliorate the difficulties caused by the majority judgments in *A*'s case. We have also been shown the terms of a suggested new clause in the Adoption and Children Bill, now currently before Parliament. A petition by the appellants in *A*'s case for leave to appeal from this court is now before the House of Lords."

24. In due course the Adoption and Children Act 2002 inserted into s.17(6) of the Children Act 1989 a specific reference to the provision of accommodation. S.17(6) thus now reads:-

> "The services provided by a local authority in the exercise of functions conferred on them by this section may include <u>providing accommodation and</u> giving assistance in kind or, in exceptional circumstances, in cash." (emphasis supplied)

25. However, before even the Adoption and Children Bill, to which Brooke LJ referred, had become law, the Court of Appeal in *R(W) v Lambeth LBC* decided that the insertion which it enacted was unnecessary. Had the Court of Appeal in *(A)* had drawn to its attention the complete statutory background it must, said Brooke LJ, inevitably have concluded that it was not the intention of Parliament that the power of the local authority should be so circumscribed. S.17(6) should have been construed as were its predecessors in *Tilley* and *Monaf*. This court in (*W)* concluded that *(A)* had been decided *per incuriam.*

26. It is in the light of this history that s.23C(4)(c) of the Act falls to be construed, bearing in mind that the "other assistance" to which reference is there made is further described in s.23C(5) in precisely the same language as used in s.17(6) of the Act as originally enacted and in its predecessor provisions in the 1963 and 1980 Acts. The judge expressed his conclusion on this point as follows:-

> "39. I accept the arguments of the defendant on the structure of the sections in particular. The point of the Leaving Care provisions is to help 18 to 20 year olds who were formerly in care to start to stand on their own two feet by providing a point of contact, an advisor, a pathway plan and assistance either in securing employment or in following a course of education or training and, therefore, if necessary, accommodation or alternatively accommodation in a community home by section 20(5). The provisions of section 23C(4)(a) and (b) and (5) and section 24B(1) and (2) suggest strongly that the provision of accommodation is to be limited to the circumstances there described."

27. Before us Mr Ashley Underwood QC for the Respondent sought to support that approach. He pointed out that s.24B creates remarkably specific and carefully delineated powers in relation to assistance with the expense of accommodation. Ss.23C(4)(a) and 23C(4)(b) convert those powers into duties so far as concerns former relevant children, and if s.23C(4)(c) encompasses the provision of accommodation, it is difficult to see why the two earlier sub-sections are necessary. Indeed, he submits that they are on that hypothesis redundant. S.23C(4) is, he submits, a sub-section dealing with employment, seeking employment and education and training. The expression "other assistance" should be construed in that context as referring to other assistance related to employment, or seeking employment, or education and training, but plainly not to the provision of accommodation, for which provision is already made in the preceding sub-sections to the extent intended as appropriate for this class of persons. Mr Underwood also pointed to the fact that there can be seen in the Act a gradation of provision. It begins with the general sections 20 duty for eligible children. The second stage is what he described as a "weaning off process" at age 16, as set out in ss.23A and 23B and, in particular in relation to accommodation, in s.23B(8), which I have set out above. Finally there is what Mr Underwood described as the second stage of the weaning off process, the provisions in s.23C dealing with former relevant children, at which stage the power and duty of the local authority with regard to the provision of accommodation is restricted to the employment, education and training context, noting importantly that employment includes seeking employment. It was his submission that outside these contexts the provision available to a former relevant child is the broad gamut of state rather than local authority benefits.

28. Mr Richard Drabble QC, Mr Ian Wise QC and Ms Elisabeth Laing QC made common cause, although their arguments differed. Whilst accepting that if s.23C(4)(c) includes the provision of accommodation, there is to some extent an overlap with the more narrowly defined powers under the two preceding sub-sections, that overlap was, Mr Wise submitted, intentional. S.23C(4)(c) is, he submits, a stopgap to provide a safety net in cases where other parts of the welfare state do not respond, young people leaving custody being an example in point. Ms Laing submitted that the legislative purpose of the Leaving Care Provisions is to enable a local authority to stand in the shoes of parents. She pointed out that the class of persons to whom s.24B applies is not the same as and is wider than that to which s.24C applies. She further pointed out that former relevant children are typically likely to leave school without qualifications and that it would be odd if duties in relation to this vulnerable class were to be restricted by reference to powers granted in respect of a wider class more likely to be in employment, or actively seeking employment or in education and training. Mr Drabble for his part accepted that "other assistance" available under s.23C(4)(c) must of necessity be of another kind than the assistance available under sub-sections (a) and (b). That assistance is, however, assistance with accommodation near a place of employment, or a place where the former relevant child will be employed, or at which he will seek employment or assistance with accommodation near a place where a former relevant child is or will be receiving education or training. A former relevant child who is neither employed or seeking employment, nor in education or training is in need or potentially in need of another kind of assistance. That is accommodation which is associated with none of those activities. He pointed out that the duty under sub-section (c) extends only to the extent that the welfare of the former relevant child requires, and accepts that the availability of

Housing Benefit may be relevant to the local authority's determination of what is, in the circumstances, required. He suggested however, as had Mr Wise, that sub-section (c) should be seen essentially as a safety net. Finally he submitted that if it had been the intention of Parliament that a local authority should have no power to provide accommodation to this cohort, other than in the limited circumstances prescribed in sub-sections (a) and (b), then it is odd indeed that the draftsman should have chosen to describe in sub-section (5) the assistance under sub-section (4)(c) in language which had already twice been judicially determined to encompass the provision of accommodation in the two earlier statutory contexts in which that language had been used.

29. Notwithstanding the assistance given to us by counsel in relation to the shape of this and associated legislation, I confess that I find it difficult to discern in the Leaving Care Provisions a clear parliamentary intention so far as concerns the power of a local authority to provide accommodation to former relevant children. It is however true to say that if s.23C(4)(c) encompasses the provision of accommodation, sub-sections (a) and (b) are not entirely redundant. Sub-section (a) enables a local authority to provide assistance with accommodation which is near to a place of employment or a place where employment will be sought, which might go beyond what the former relevant child's welfare alone might require. The same is true, *mutatis mutandis*, of sub-section (b), which also enables a local authority to take into account the former relevant child's educational or training needs, which again might go beyond what mere welfare might require. It follows that on the Appellant's construction there is a significant overlap between the powers granted by ss.23C(4)(a) and (b) and 23C(4)(c), but not complete redundancy.

30. The critical point, in my judgment, is the use by the draftsman in sub-section (c) of language which had already twice been construed by this court in a similar context as encompassing the provision of accommodation. I agree with Mr Drabble that it is in such circumstances in the highest degree unlikely that the draftsman would, in 2000, use the identical language in order to particularise the nature of "other assistance" if that assistance was not intended to extend to the provision of accommodation. Sub-section (c) must of course be construed in its immediate context, i.e. the Leaving Care Provisions, which context is by definition not the same as that in which the language had hitherto been used. Having examined that immediate context, and having rejected the argument based upon redundancy of language, I find that the context neither compels nor encourages the attribution of a meaning different from that hitherto given in a similar albeit not identical context. When I take into account also that in 2002 Parliament inserted into s.17(6) of the Act words intended to put its meaning beyond doubt, it is clear that now to construe s.23C(4)(c) of the same Act as not extending to the provision of accommodation would simply introduce an unacceptable element of inconsistency. Accordingly, in my view the judge erred in holding that the sub-section affords to a local authority no power to provide accommodation to a former relevant child.

The second issue. Can the council look to NASS support when considering whether a former relevant child's welfare requires that he be accommodated by it?

31. S.95 of the Immigration and Asylum Act 1999 gives to the Secretary of State power to provide support for asylum seekers in these terms:-

> "**95. Persons for whom support may be provided**
>
> (1) The Secretary of State may provide, or arrange for the provision of, support for:-
>
> a. Asylum-seekers, or
>
> b. Dependants of asylum-seekers
>
> who appear to the Secretary of State to be destitute or to be likely to become destitute within such period as may be prescribed.
>
> (2) In prescribed circumstances, a person who would otherwise fall within subsection (1) is excluded."

S.95(12) and Schedule 8 to the Immigration and Asylum Act 1999 give to the Secretary of State the power to make regulations concerning the manner in which it is to be determined for these purposes whether a person is destitute. The relevant regulations are The Asylum Support Regulations 2000, which by Regulation 6 provide:-

> "**6. Income and assets to be taken into account**
>
> (1) This regulation applies where it falls to the Secretary of State to determine for the purposes of section 95(1) of the Act whether:-
>
> a. A person applying for asylum support, or such an applicant and any dependants of his, or
>
> b. A supported person, or such a person and any dependants of his, is or are destitute or likely to become so within the period prescribed by regulation 7.
>
> (2) In this regulation "the principal" means the applicant for asylum support (where paragraph (1)(a) applies) or the supported person (where paragraph (1)(b) applies)."

32. The conundrum which arises is whether, when the local authority is considering whether it is under a duty to provide accommodation under s.23C(4)(c) to a former relevant child asylum seeker, it may take into account the possibility that support may be given by NASS, pursuant to s.95. A similar conundrum arises if an application for support by way of accommodation is first made by a former relevant child asylum seeker to NASS rather than to the local authority. Must the Secretary of State take into account the support which the local authority might reasonably be expected to give, pursuant to s.23C(4)(c)? Unless the circle can be squared, there is the opportunity for each body to decline to give support by reference to the possibility that the other would do so.

33. The same conundrum arises concerning the inter-relation of the powers and duties of a local authority under s.21 of the National Assistance Act 1948 to provide accommodation to the infirm destitute and the power of the Secretary of State to give support under s.95. It arose in *R(Westminster City Council) v NASS* [2002] 1 WLR 2956. The claimant was an infirm destitute asylum seeker. The local authority argued that she was entitled to support under s.95 of the 1999 Act, with the result that it should not have to support her under s.21 of the 1948 Act. NASS argued that only able-bodied asylum seekers were to be supported under s.95.

34. In *R v Hammersmith and Fulham LBC ex parte M* [1997] 30 HLR 10 this court decided that a local authority had an obligation under s.21 of the National Assistance Act 1948 to provide accommodation to healthy but destitute asylum seekers. This would have imposed a disproportionate burden on local authorities in whose area asylum seekers tend to congregate. In consequence the Immigration and Asylum Act 1999 introduced amendments to s.21, which had the effect of removing from a local authority the obligation to provide accommodation to asylum seekers whose need for care and attention arose solely from destitution or from the physical effects or anticipated physical effects of destitution. Thus s.21 henceforth read, so far as material:-

> "21 **Duty of local authorities to provide accommodation**
>
> (1)[Subject to and in accordance with the provisions of this Part of this Act, a local authority may with the approval of the Secretary of State, and to such extent as he may direct shall, make arrangements for providing]:-
>
> (a)residential accommodation for persons [aged eighteen or over] who by reason of age, [illness, disability] or any other circumstances are in need of care and attention which is not otherwise available to them;
>
> . . .
>
> (1A) A person to whom section 115 of the Immigration and Asylum Act 1999 (exclusion from benefits) applies may not be provided with residential accommodation under subsection (1)(a) if his need for care and attention has arisen solely:-
>
> (a) because he is destitute; or
>
> (b) because of the physical effects, or anticipated physical effects, of his being destitute.
>
> (1B) Subsections (3) and (5) to (8) of section 95 of the Immigration and Asylum Act 1999, and paragraph 2 of Schedule 8 to that Act, apply for the purposes of subsection (1A) as they apply for the purposes of that section, but for the references in subsections (5) and (7) of that section and in that paragraph to the Secretary of State substitute references to a local authority.]"

35. The question which arose in *Westminster* was whether this amendment had removed from the local authority responsibility for the infirm destitute as well as the able-bodied.

36. In the House of Lords Lord Hoffmann, after noting at paragraph 31 of his speech that the amendment said nothing about the infirm destitute, observed that the terms in which the 1948 Act had been amended were clear. He continued:-

> "32. The use of the word "solely" makes it clear that only the able bodied destitute are excluded from the powers and duties of section 21(1)(a). The infirm destitute remain within. Their need for care and attention arises because they are infirm as well as because they are destitute. They would need care and attention even if they were wealthy. They would not of course need accommodation, but that is not where section 21(1A) draws the line.
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> . . .
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> 35. It will be seen that while section 21(1A) removes only the able bodied destitute from the duty of the local social service departments, section 95(1) appears prima facie to give NASS power to accommodate all destitute asylum seekers, whether able bodied or infirm. It is this apparent overlap between the powers of NASS and the duties of the local authority which has given rise to this appeal.
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> . . .
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> 38. The ground upon which Stanley Burnton J and the Court of Appeal found for the Secretary of State was that although section 95(1) prima facie confers a power to accommodate all destitute asylum seekers, other provisions of Part VI of the 1999 Act and regulations made under it make it clear that the power is *residual* and cannot be exercised if the asylum seeker is entitled to accommodation under some other provision. In such a case, he or she is deemed not to be destitute. If Mrs Y-Ahmed had been able bodied destitute, she would have been excluded from section 21 and therefore qualified for accommodation under section 95(1). But as she was infirm destitute, her first port of call should be the local authority.
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> 39. The provisions relied upon by the Secretary of State are, first, section 95(12), which enacts Schedule 8, giving the Secretary of State power to "make regulations supplementing this section." Paragraph 1 of the Schedule says in general terms that the Secretary of State may make "such further provision with respect to the powers conferred on him by section 95 as he considers appropriate". More particularly, paragraph 2(1)(b) says that the regulations may provide that in connection with determining whether a person is destitute, the Secretary of State

> should take into account "support which is, … or might reasonably be expected to be, available to him or any dependant of his."
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> 40. The next step is to look at the regulations made under these powers, the Asylum Support Regulations 2000. Regulation 6(4) says that when it falls to the Secretary of State to determine for the purposes of section 95(1) whether a person applying for asylum support is destitute, he *must* take into account "any other support" which is available to him. As an infirm destitute asylum seeker, support was available to Mrs Y-Ahmed under section 21. Therefore she could not be deemed destitute for the purposes of section 95(1).
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> 41. My Lords, like Stanley Burnton J and the Court of Appeal, I find this argument compelling. The clear purpose of the 1999 Act was to take away an area of responsibility from the local authorities and give it to the Secretary of State. It did not intend to create overlapping responsibilities. Westminster complains that Parliament should have taken away the whole of the additional burden which fell upon local authorities as a result of the 1996 Act. It should not have confined itself to the able bodied destitute. But it seems to me inescapable that this is what the new section 21(1A) of the 1948 Act has done. As Simon Brown LJ said in the Court of Appeal ((2001) 4 CCLR 143, 151, para 29) what was the point of section 21(1A) if not to draw the line between the responsibilities of local authorities and those of the Secretary of State?"

37. It is this reasoning which Mr Drabble and Ms Laing submit must here apply by way of analogy. The important point is, they submit, that it has clearly been decided that the power under s.95 is residual and cannot be exercised if the asylum seeker is entitled to accommodation under some other provision. What has been determined for s.95 must equally be true of s.4, applicable to failed asylum seekers, for in *R(W) v Croydon LBC* [2007] 1 WLR 3168 Laws LJ, giving the judgment of this court, said, at paragraph 54:-

> "There is in the end nothing to show that the legislature intended to distribute responsibility for the support of failed asylum-seekers between central and local government in a radically different manner from the arrangements which their Lordships' decision in *Westminster* shows were made in relation to asylum-seekers."

38. Mr Underwood submitted before us, as Mr Rutledge had submitted to the judge, that the decisions in *Westminster* and *W* afford no analogy because so far as concerns the destitute asylum seeker the legislation had produced two mutually exclusive regimes. He pointed in particular to s.21(1B) of the 1948 Act and the fact that by reason thereof the local authority, when considering whether the need for accommodation has arisen solely by reason of destitution, must follow the guidance given in Regulation 6(3) of The Asylum Support Regulations 2000, as if references therein to

the Secretary of State are references to the local authority. Thus in considering whether an Applicant's need for accommodation has arisen solely by reason of destitution, the local authority must ignore any asylum support. This had the result in *Westminster*, as Simon Brown LJ noted in the Court of Appeal, (2001) 33 HLR 938 at page 946, paragraph 26, that the local authority would be bound to regard that applicant as destitute. Mr Underwood submitted that since Parliament in introducing the Leaving Care Provisions had not introduced a section similar to s.21(1B) of the National Assistance Act, it could be presumed that it had intended that the local authority could indeed have regard to the possibility of asylum support from NASS when considering for the purposes of s.23C(4)(c) whether an Applicant's welfare requires the provision of accommodation.

39. In my judgment this argument is misconceived, largely for the reasons succinctly advanced by Ms Laing. As Simon Brown LJ went on to point out in his judgment in *Westminster*, having decided as they were bound to do that the Applicant was destitute, the local authority had to go on to consider whether her need for care and attention arose solely because of her destitution. Plainly it did not, for she was chronically infirm, confined to a wheelchair and in need of regular hospital treatment. Thus the mutually exclusive regime introduced by s.21(1B), which is replicated for the purpose of certain other enactments in Rule 23 of The Asylum Support Regulations 2000, has a limited ambit, because Rule 6 of those Regulations which it makes applicable is concerned only with the question whether a person is destitute, not with the broader question whether his need for care and attention has arisen solely because of his destitution. On the critical question whether in considering its duties in relation to an infirm destitute person the local authority can have regard to the possibility of support from NASS, s.21(1B) sheds no light. Lord Hoffmann's reasons for regarding the powers of the Secretary of State under s.95 as in that respect residual have nothing whatever to do with the regime provided by s.21(1B) (or indeed Rule 23 of The Asylum Support Regulations) for the limited purpose of consideration by a local authority, or other prescribed body, whether a person is destitute.

40. That being the case, this court is, in my judgment, bound to conclude that since the powers under s.95 (and s.4) of the Immigration and Asylum Act 1999 are residual, and cannot be exercised if the asylum seeker (or failed asylum seeker) is entitled to accommodation under some other provision, a local authority is not entitled, when considering whether a former relevant child's welfare requires that he be accommodated by it, to take into account the possibility of support from NASS. It follows that in my judgment the judge erred on this point too. Whilst in no way disparaging the efforts of junior counsel who appeared below, and who contributed to the argument before this court, I would observe that on both points we have received more extensive assistance than did the judge.

41. I would therefore allow the appeal on both grounds advanced, answer the questions posed in the manner I have indicated, and, as the parties were agreed is the appropriate course, remit the claim to the Administrative Court for it to determine the Appellant's age.

Lord Justice Leveson :

42. I agree.

Lord Justice Jacob :

43. I also agree.