Neutral Citation Number: [2007] EWCA Civ 1351

Case No: C1/2007/1941

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
(Mr Justice Newman)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/12/2007

Before :

LORD JUSTICE SEDLEY
LORD JUSTICE MAURICE KAY
and
LORD JUSTICE RIMER

- -

THE QUEEN ON THE APPLICATION OF :

(1) RASIM PAJAZITI	**Appellants**
(2) HYLKIJE PAJAZITI	
- and -	
LONDON BOROUGH OF LEWISHAM	**Respondent**

- -
- -

Mr Richard Drabble QC and Mr Ranjiv Khubber (instructed by **Cambridge House Law Centre**) for the **Appellants**
Mr Bryan McGuire and Ms Sian Davies (instructed by **London Borough of Lewisham**) for the **Respondent**

Hearing date: 29 October 2007

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Judgment

Lord Justice Rimer :

Introduction

1. This is an appeal against an order dated 31 July 2007 by which Newman J refused the application of the claimants, Rasim and Hylkije Pajaziti, for judicial review of the decision of the respondent local authority, the London Borough of Lewisham ("Lewisham"), to refuse to provide them with accommodation and assistance under section 21 of the National Assistance Act 1948. The relief sought below was, and now on this appeal is, for a mandatory order requiring Lewisham to provide the claimants with such accommodation and assistance. The issues involve a close consideration of the relevant legislation, which I will set out straight away.

The legislation

2. The relevant material is in Part III, headed "Local Authority Services", of the National Assistance Act 1948, as amended. Section 21 is in a sub-part headed "Provision of Accommodation" and provides, 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 or any other circumstances are in need of care and attention which is not otherwise available to them; and …
>
> (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. …
>
> (8) Nothing in this section shall authorise or require a local authority to make any provision authorised or required to be made (whether by that or by any other authority) by or under any enactment not contained in this Part of this Act or authorised or required to be provided under the National Health Service Act 1977."

3. Section 21(1)(a) imposes a duty upon local authorities only to the extent that the Secretary of State may direct; and by Department of Health Circular No. LAC (93) 10 the Secretary of State gave a general direction imposing a duty upon local authorities to make arrangements under that sub-section in relation to persons ordinarily resident in their area and others in urgent need. Hale LJ explained in *Wahid v. Tower Hamlets London Borough Council* [2002] EWCA *Civ 287*; (2002) 5 CCLR 247, at paragraph 30, that a local authority's duty under section 21(1)(a) only falls to be discharged if

three conditions are satisfied: (i) the person must be in need of care and attention; (ii) the need must arise by reason of "age, illness, disability or any other circumstances"; and (iii) the care and attention that is needed must not be available otherwise than by the provision of accommodation under section 21(1)(a). There must, therefore, be a need for care and attention that can only be met by the provision of such accommodation. Section 21(1)(a) is a provision of last resort, a point underlined by section 21(8), which shows, for example, that a right to homelessness assistance under Part 7 of the Housing Act 1996 would exclude recourse to it.

4. The genesis of section 21(1A) requires explanation and it was lucidly provided by Lord Hoffmann in his speech in *Regina (Westminster City Council) v. National Asylum Support Service* [2002] UKHL 38; [2002] 1 WLR 2956, upon which I have gratefully drawn. Lord Hoffmann explained how the Asylum and Immigration Act 1996 removed from asylum seekers who did not claim asylum at the port or airport of entry the right to claim income support or housing under the homelessness legislation. That led to claims being made under section 21(1)(a) by destitute asylum seekers who had been so excluded from the normal social security system. The duty of local authorities to provide accommodation under that subsection for such claimants was established by the decision of this court in *R v. Hammersmith and Fulham London Borough Council, Ex p M* (1997) 30 HLR 10.

5. Lord Hoffmann explained that the consequence of the 1996 Act was to bring two classes of asylum seeker within the grasp of assistance under section 21(1)(a), whereas but for that Act neither would have been. The first class, illustrated by *Ex p. M,* included what he called "the able bodied destitute" who qualified for the provision of accommodation solely because they were destitute. The second class included what Lord Hoffmann called "the infirm destitute", that is asylum seekers with some infirmity requiring the provision of care and attention, but who would not, but for the 1996 Act, have needed accommodation to be provided under section 21(1)(a) because it was available in other ways, for example the homelessness legislation.

6. The decision in *Ex parte M* carried with it the potential for a heavy cost burden upon local authorities resulting from claims by asylum seekers. With a view to reducing that burden, section 116 of the Immigration and Asylum Act 1999 introduced the new section 21(1A) to the 1948 Act. Lord Hoffmann explained, however, that its use of the word "solely" made it clear that only the able bodied destitute were excluded from the powers and duties of section 21(1)(a). As he said, "[t]he infirm destitute remain within. Their need for care and attention arises because they are infirm as well as because they are destitute."

7. The exclusion of the able bodied destitute from the opportunity of assistance under section 21(1)(a) did not, however, result in their being left out in the cold. Section 95(1), within Part VI ("Support for Asylum Seekers") of the 1999 Act, empowered the Secretary of State to provide, or arrange for the provision of, support for asylum seekers or their dependants who appear to the Secretary of State to be destitute or to be likely to become destitute within any prescribed period. Section 95(3) defined "destitute" as follows:

> "For the purposes of this section, a person is destitute if –

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

8. That new power became exercised through the National Asylum Support Service ("NASS"). The effect, therefore, was to shift to the national purse the burden of provision for those within the reach of section 95. Lord Hoffmann pointed out, however, that although section 21(1A) appeared to remove only the able bodied destitute from the opportunity of local protection under section 21(1)(a), the language of section 95(1) appeared on its face to extend NASS's duties to both the able bodied and infirm destitute.

9. The *Westminster* case concerned an infirm destitute asylum seeker. Westminster City Council had housed her but considered that NASS should pay for the accommodation pursuant to its powers under section 95 of the 1999 Act. NASS disagreed and asserted that it was Westminster's responsibility, under section 21(1)(a) of the 1948 Act. That issue was decided at all levels, including the House of Lords, in favour of NASS. The reasoning was that NASS's powers under the 1999 Act and regulations were residual powers, which could only be exercised if the asylum seeker was not entitled to accommodation under some other provision. In the *Westminster* case the asylum seeker, being an infirm destitute, was entitled to be housed by the local authority under section 21(1)(a), and so her case was excluded from NASS's regime. Had she been able bodied, she would have been excluded from section 21(1)(a) and would have qualified for accommodation under section 95(1).

10. The *Westminster* case therefore raised an issue as to which of the local authority and NASS was responsible for the provision of accommodation for the applicant. The present case raises a like issue.

The facts

11. I take these basically, but with some supplements, from the judge's judgment, his findings not being the subject of challenge. Mr and Mrs Pajaziti are from Kosovo. They arrived in the United Kingdom on 3 November 1997. Mr Pajaziti applied for asylum. His claim was refused on 28 January 1998 on the basis that he had already claimed asylum in Germany. He sought judicial review of this decision, a protracted proceeding that continued until at least the end of 2000.

12. Mr and Mrs Pajaziti and their family (which by February 1999 comprised three children of whom the eldest was six) were originally supported by Lewisham under the Asylum Support (Interim Provisions) Regulations 1999. Mr Pajaziti applied for support from NASS on 2 July 2004, but his application was refused on 15 September 2004 as he was still eligible for support under the Interim Support Scheme. On 11 November 2004 he applied for indefinite leave to remain under the Family ILR Exercise. That application was refused on 21 March 2006. On 7 September 2006 he asked for a reconsideration of his application, a request that still remains outstanding. On 30 April 2006 he had also made what purported to be a fresh human rights claim under Article 8 of the Convention for the Protection of Human Rights and

Fundamental Freedoms, which was said to supplement an earlier claim he had made under Article 6 by a letter of 3 May 2005. Neither claim has yet been determined.

13. In 2005 the Secretary of State set up the Interim Scheme Project ("the ISP") to replace the Interim Support Scheme, which came to an end in the summer of 2006. The aim of the ISP was to transfer the responsibility for supporting eligible asylum seekers from local authorities to NASS. On 4 April 2006, following the introduction of the ISP, Mr Pajaziti made a renewed application for support to NASS. He submitted medical evidence about the conditions of his wife and son. The advice of a medical adviser on that was that they could readily be treated outside London and so the family could be dispersed. NASS accepted the application for support and made travel bookings for the dispersal of Mr Pajaziti and his family to Nottingham, Bristol, Barnet and Birmingham on five days between 6 June 2006 and 19 April 2007. Mr Pajaziti failed to travel on any of those days. On 18 April 2007 NASS wrote to Mr Pajaziti informing him that his application for accommodation in London on medical grounds had been considered and refused. The grounds were that the NASS medical adviser had advised that proximity to London was not necessary on medical grounds and that all necessary medical treatment would be available in the dispersal area. As Mr Pajaziti refused to accept NASS's conditions of the provision of support (namely, that he and his family travel to a dispersal area), NASS has declined to provide him with any support. Mr Pajaziti has not sought to challenge NASS's decision in this respect.

14. In the meantime Mr Pajaziti had applied to Lewisham for assistance under section 21 of the 1948 Act. He wanted to stay in London because that is where the children's schools were and where the family has established social connections. Lewisham carried out assessments of Mr and Mrs Pajaziti and decided that neither was eligible for support under section 21. Lewisham summarised the position in a letter of 15 November 2006 as follows:

> "The assessment of your client Hylkije Pajaziti showed her as not requiring any care services at all and managing her own needs. She identified any difficulties she does have by way of minor reactive ailments, such as headaches, as being attributable to the possibility of dispersal … Similarly, Mr Rassim Pajaziti has some minor medical needs which could be well managed in any part of the United Kingdom. Other than these, he did not display any difficulties save reactive minor ailments about his immigration status."

15. The appellants accept that section 115 of the 1999 Act applies to them so that, if the facts bring them within the exclusionary provisions of section 21(1A) of the 1948 Act, they cannot be entitled to the provision of residential accommodation under section 21(1)(a). Their case before the judge and on this appeal is, however, that they qualified for assistance under section 21(1)(a) and were not excluded by section 21(1A) because they satisfied the so-called "destitute plus" test which has been explained in the case law to which I shall come. Suffice it to say, however, that they made and make no criticism of Lewisham's conclusion at this stage in the story that they had no community care needs and that the "destitute plus" test had not been fulfilled; and the judge described Lewisham's conclusion to that effect as unimpeachable.

16. The appellants assert, however, that the picture changed materially with the provision to Lewisham on 20 April 2007 of the reports on each of them made 10 days earlier by

Dr Stuart Turner, a consultant psychiatrist. The judge summarised Dr Turner's conclusions in relation to each of Mr and Mrs Pajaziti. As for Mrs Pajaziti, he concluded that she was suffering from a major depressive episode. His opinion was that her psychiatric problems were associated with a period of detention she had undergone in 2004 and that some further deterioration was associated with a later second period of detention. Further factors had also contributed "increasing concern about her immigration status, threats of re-housing out of London, financial concerns and concerns about the welfare of her children and husband." In answer to a question as to whether all treatment needs would be met by social services and the NHS, he responded that "[Mrs Pajaziti] should be able to receive psychiatric treatment and counselling through the National Health Service. Of course given the opinion that I have already expressed, the most powerful intervention, if it were available, would be to offer her permanent settlement in London." As for Mr Pajaziti, Dr Turner's report was in substantially the same terms, namely that the consequences flowing from the two periods of detention and concerns for his family had given rise to a major depressive episode. Treatment would also be available through the NHS, but again "… the most powerful intervention (if it were available) would be to offer settlement in London." As Dr Turner did not there (as he had with Mrs Pajaziti) include the word "permanent", the judge ignored its inclusion in relation to Mrs Pajaziti.

Lewisham's decision letter

17. This was dated 25 April 2007 and was made in the light of Dr Turner's reports. Lewisham pointed out that it had carried out an assessment of the appellants in May 2006, with a negative conclusion; and a further assessment on 13 September 2006, with a like conclusion. The appellants had advanced their latest representations on 20 April 2007 and Lewisham's view was that it was the fact that the family was facing imminent dispersal that had prompted them. Heavy reliance was now being placed on Dr Turner's reports. Lewisham then set out section 21 and referred to four decided cases, all of which are also referred to in this judgment. They concluded that:

> "2. … the authority will not provide a service where the provision of that service is otherwise available. Secondly section 21(8) contains important words of qualification. Those needs for primary health care which are met by the Primary Healthcare Services must be excluded from consideration.
>
> 3. Lewisham … notes the services which can be provided by the NHS. It notes that those services are otherwise available. It also notes that where primary health care needs can be met by primary health services, section 21(8) forbids the provision of that support to an applicant.
>
> 4. We have therefore looked with care to see whether once the provision of primary health care services is taken into account there still remains an unmet need for care and attention, and whether you are caught by section 21(1A). Is any need for care and attention made materially more acute by some circumstances other than a need for accommodation and funds.
>
> 5. Prior to the receipt of these reports [Dr Turner's], the position was clear beyond any doubt. Their needs were solely for primary health care services and these could be met anywhere. Thus for example the August assessment included reference to the view of Dr Das that Rassim was suffering from mild to moderate

> medical conditions which can be reasonably controlled by medication. Likewise a good deal of the factual information set out in those reports was already known to Lewisham. For instance, Rassim's view is that he needs stability, wishes to remain in Lewisham and permanently in the UK is clearly noted in his core assessment.
>
> 6. The key question is therefore whether the evidence of Stuart Turner causes us to reconsider that assessed view.
>
> 7. Having read his reports with care we remain of the view that once one has set to one side the services provided by the NHS, you are not destitute plus. You do not have a need for care and attention made materially more acute by some circumstances other than a need for accommodation and funds.
>
> 8. As we read the reports of Stuart Turner, he is not saying that the provision of primary health care services will be ineffective. Rather, we read him as saying that ideally accommodation would be provided in London. This would be "*the most powerful intervention*". That is not the same thing as saying that the primary health care services cannot address the need.
>
> In those circumstances we stand by our assessments that no service can be provided under section 21 of the 1948 Act."

The judge's reasoning

18. The judge's reasons for his conclusion that Lewisham had made no error of law in their decision were summarised as follows:

> "37. In my judgment, the outcome of the assessment which a local authority is obliged to make when considering the case of an asylum seeker suffering from a medical condition and in need of medical attention will depend upon, at least, some of the following considerations:
>
> (1) whether the need for medical treatment exists solely by reason of a lack of accommodation and funds;
>
> (2) where a need exists for medical treatment other than by reason of the mere lack of accommodation and funds, whether the care and attention needed is 'otherwise available';
>
> (3) whether, even if medical treatment is provided, the asylum seeker's medical condition is of such a character as to make the need for care and attention materially more acute (see, for example, Collins J's conclusion in *R (on the application of M) v. Slough Borough Council* [2004] EWHC 1109 (Admin) which concerned an HIV positive applicant).
>
> 38. In my judgment, properly analysed, this was the approach taken by [Lewisham]. Prior to Dr Turner's reports, it refused support because it concluded that the need for medical attention existed solely by reason of destitution. Further, that the need for medical attention was in connection with minor ailments for which treatment was readily available. It follows that the conclusion was that the need, such as it was, had not made the position materially more acute.

> 39. Dr Turner's reports did not suggest that the condition of the Claimants would not be met by the availability of effective and adequate treatment. [Lewisham], therefore, concluded that the need would be met by services 'otherwise available', namely under the NHS. This conclusion was open to [Lewisham] on the material it had to consider and the suggestion that inadequate regard was paid to Dr Turner's comment on the 'most powerful intervention' is plainly wrong.
>
> 40. [Lewisham] concluded that although the opinion of Dr Turner was that the primary healthcare services, if provided in London, would be 'the most powerful intervention', that did not show that the need for care and attention was materially more acute because of the consequences of it being provided outside London.
>
> 41 For the reasons I have set out above, I am satisfied that no error of law has been made out and that it has not been demonstrated, on the evidence provided to [Lewisham], that it reached an assessment which was not available to it on the evidence. …"

The issue

19. The appeal was advertised in the papers as raising a novel question of law. For my part, I have not been able to identify what that is said to be. Section 21(1), as amended, is not an easy section, but at the level of this court the applicable principles appear clear. The question raised by the appeal is whether Lewisham's rejection of the application for accommodation for assistance was, in the light of these principles and the evidence then before them, including the psychiatric reports of Dr Turner, irrational.

20. A convenient starting point is the decision of this court in *Ex parte M* (1997) 3 HLR 10, to which I have earlier referred. That was the decision in which it was held that four destitute asylum seekers (who were statutorily excluded from state benefits such as public housing assistance under the Part III of the Housing Act 1985 and social security benefits such as income support and housing benefit, although not from the right to receive treatment under the NHS) were nevertheless entitled, by way of assistance of last resort, to the provision by a local authority of "care and attention", and thus also of "residential accommodation", under section 21(1)(a). The question arose because the exclusionary provisions of the Asylum and Immigration Act 1996 did not extend to section 21(1)(a). The issue was whether the circumstances of the applicants were ones to which that sub-section could apply. The applicants were destitute but able bodied, subject to the qualification that one was diabetic and needing insulin, arrangements for the supply of this having been made through the NHS.

21. The argument against the application of section 21(1)(a) to the cases of the four applicants was that section 21 was not capable of applying to persons whose needs were really for money or the freedom to work, and to have a roof over their heads. It was not its function to provide accommodation alone to those who needed it, but only to provide accommodation for those who required care and attention. The provision of accommodation was not in itself an end of the sub-section: it was merely the means whereby the required care and attention could be provided. The applicants, it was said, did not need care and attention. They simply needed food and accommodation.

22. The court rejected that approach. It acknowledged that an asylum seeker who was old, ill or disabled could certainly rely on the section. The effect of the decision was that able bodied asylum seekers, who found themselves visited with the problems of, amongst others, a lack of food and accommodation, can also reach a state where they would qualify under the subsection because of the effects upon them of their problems. They will at that point need care and attention by way of shelter, warmth and food, and the provision of residential accommodation to them will enable that need to be met. In this context, I would refer again to the decision of this court in *Wahid v. Tower Hamlets London Borough Council* [2002] EWCA Civ 287; (2002) 5 CCLR 239 in which, at paragraph 31, Hale LJ pointed out that whilst there were indications in the 1948 Act that the kind of accommodation originally envisaged was in a residential home or hostel, the language of section 21 was of an "always speaking" nature and "residential accommodation" can mean ordinary housing without the provision of any ancillary services.

23. The decision in *Ex parte M* led, as I have said, to the introduction into section 21(1)(a) of the exclusionary provisions of section 21(1A), which leads conveniently to the decision of this court in *Regina v. Wandsworth London Borough Council, Ex parte O* [2000] 1 WLR 2539. By then, destitute asylum seekers covered by the exclusionary provisions were provided for separately under Part VI of Immigration and Asylum Act 1999. The appeals in that case concerned two applicants subject in principle to the exclusionary provisions of section 21(1A). The importance of the decision is the focus provided by the judgment of Simon Brown LJ (with which Hale and Kay L.JJ agreed, the former adding a substantive judgment of her own) on the interpretation of the limits of the effect of section 21(1A). Simon Brown LJ said, at page 2548:

> "Section 21(1A) necessarily predicates that there will now be immigrants with an urgent need for basic subsistence who are not to be provided for anywhere in the welfare system. Parliament has clearly so enacted and so it must be. The excluded cases are, of course, those where the need arises solely from destitution as defined. In what circumstances, then, is it said that destitution is the sole cause of need. … [The judge then set out the submission of the local authorities on this point and continued as follows]
>
> The applicants contend for an altogether different approach. They submit that if an applicant's need for care and attention is to any material extent made more acute by some circumstance other than the mere lack of accommodation and funds, then, despite being subject to immigration control, he qualifies for assistance. Other relevant circumstances include, of course, age, illness and disability, all of which are expressly mentioned in section 21(1) itself. If, for example, an immigrant, as well as being destitute, is old, ill or disabled, he is likely to be yet more vulnerable and less well able to survive than if he were merely destitute.
>
> Given that both contended for constructions are tenable, I have not the least hesitation in preferring the latter. The word 'solely' in the new section is a strong one and its purpose there seems to me evident. Assistance under the Act of 1948 is, it needs hardly be emphasised, the last refuge for the destitute. If there are to be immigrant beggars on our streets, then let them at least not be old, ill or disabled."

24. A valuable authority of this court which considered the then state of the law is *R on the application of M v. Slough Borough Council* [2006] EWCA Civ 655; (2006) 9 CCLR 438 ("the *Slough* case"). The case concerned a citizen of Zimbabwe who had been diagnosed as HIV-positive and may have been suffering from AIDS. He fell to be treated as an asylum-seeker for relevant purposes. He asked the Council to assess him with a view to the provision of accommodation under section 21. The Council did so and concluded he did not qualify. It found that he was coping without assistance from social services and did not require assistance to maintain his health. Any risk to his health was being managed by his adherence to medication and three-monthly checks. He simply needed accommodation and support. He had accommodation at the moment (it was provided by his cousin but was for only a limited period) and any problems arising from its loss would merely be the physical effects of destitution. In short, M was excluded by section 21(1A). M sought judicial review of the Council's decision and Collins J upheld his claim, holding the case to be a section 21(1)(a) one. He held that M's need for care and attention was going to be the greater because of his condition and it could not therefore be said that the need arose solely because of the destitution or because of its physical effects. He concluded that M, as someone who was chronically ill, was properly regarded as in need of care and attention, and was so not solely because he was destitute.

25. The Council challenged that decision in this court. The primary argument was that a person in need of medical treatment or services, a matter for the NHS, was not, without more, in need of care and attention for the purposes of section 21(1)(a). Maurice Kay LJ, in a judgment with which Sir Peter Gibson and Ward LJ agreed, rejected that argument, holding it to have been foreclosed by *Ex parte M*, supra, in which it was "implicit … that 'care and attention' … could extend to the provision of shelter, warmth, food and other basic necessities." Maurice Kay LJ further held that, in approaching M's case as a "destitute plus" one within the sense of the guidance provided in *Ex parte O*, supra, Collins J had correctly directed himself that the case fell outside the exclusionary provisions of section 21(1A) and that M qualified for assistance under section 21(1)(a).

26. Turning to the present case, the submission of Mr Richard Drabble QC, leading Mr Ranjiv Khubber, for the appellants was as follows. The *Westminster* case shows that Lewisham could not embark upon its consideration of the appellants' case by having regard to the accommodation offered by NASS, because NASS support is only available if section 21 support is not. Lewisham therefore had to approach the task of considering the appellants' claim to qualify under section 21(1)(a) on the hypothesis that, absent intervention by Lewisham, the appellants were homeless and on the streets. The psychiatric reports showed that both appellants were suffering from severe depressive episodes, which had not been caused simply by their destitution but rather because of their traumatic undergoing of two periods of detention which had had a serious effect upon them. Mr Drabble acknowledged that out-patient counselling for their psychiatric condition is available under the NHS. But he said this is no more a conclusive answer to their claimed need for care and attention under section 21 than it was in the *Slough* case. In the light of the psychiatric evidence, the applicable principle is that explained by Simon Brown LJ in *Ex parte O.* The appellants are ill and are consequently more vulnerable and less well able to survive on the streets than if they were merely destitute. Approaching their case on the hypothesis that they are left to cope with their illness on the streets (albeit with the

benefit of counselling for it under the NHS), Mr Drabble submitted that it is obvious that, adapting Simon Brown LJ's words, their need for care and attention in the nature of shelter and warmth will, to a material extent, be made more acute than it would be if they were both fit and their need arose merely from the lack of accommodation and funds.

27. Mr Bryan McGuire, who appeared with Ms Sian Davies for Lewisham, did not question that Lewisham had to approach the issue on the hypothesis that the appellants are notionally on the streets. It was no part of his argument that Lewisham could or should take account of NASS's offers of accommodation outside London. His submission, however, was that the correct approach for Lewisham to adopt in considering a case such as the present was to start not with section 21(1A), which is merely an exclusionary provision, but with section 21(1)(a) itself, which is the provision under which any applicant must qualify if he is to be entitled to assistance. If the applicant does so qualify then, in the case of applicants who are in principle capable of falling within the exclusionary provisions of section 21(1A), it is necessary to go on to consider whether, on the facts, those provisions exclude them from the benefit of section 21 assistance. I agree with that approach to the section.

28. So approaching it, Mr McGuire submitted that the key question for Lewisham in the assessment exercise was whether the appellants have any care and attention needs that are not available to them otherwise than under section 21(1)(a). Their psychiatric condition does give rise to a need for care and attention, but that is capable of being met by the provision of counselling and therapy by the NHS, as Lewisham recognised. Mr McGuire accepted that that does not by itself mean that the appellants have no other need for care and attention for which relief is not available otherwise than under section 21, the critical further such need in this case being for care and attention in the nature of shelter and warmth in residential accommodation. If the appellants were not in principle within the exclusionary provisions of section 21(1A), then it may be that Mr McGuire would accept that they would on that ground qualify for assistance under section 21. But as they are within them, the critical question for Lewisham was whether their need for such further care and attention had arisen *solely* because of one or both of the factors mentioned in section 21(1A)(a) and (b). If the answer was that it had, then Lewisham was entitled to refuse the claimed assistance. Lewisham was only required to provide it if, on the facts, the appellants' need for the further head of care and attention could be said to any material extent to have been made more acute by some circumstance other than the mere lack of accommodation and funds – the relevant circumstance in this case being their need to cope with life on the streets whilst suffering from their depressive psychiatric disorder.

29. Mr McGuire's submission was that the answer to this question was a matter of assessment by Lewisham. He pointed out that, in paragraph 4 of the conclusions in the decision letter, Lewisham had asked itself the right question and that in paragraph 7 it had answered that question. That answer was based on a consideration of the material gathered in the assessment process, and it was not for the court now to substitute a different answer. The answer to such a question will necessarily vary according to the facts of the case. Mr McGuire submitted, for example, that the type of case in which a local authority could find that the applicant was not "destitute plus" was one in which his only complaint (other than a lack of accommodation and funds) was that he was suffering from a minor infection from which he had obtained antibiotic medication. In

other, more extreme cases – of which the *Slough* case was an example – the authority might well be bound to find that the applicant was "destitute plus" despite the availability of treatment elsewhere for his medical condition.

30. I record that the Secretary of State for the Home Department was originally joined in these proceedings as an interested party, but was discharged as such on 6 June 2007. The Secretary of State made written representations as to the position, which were before the judge, and she has repeated them to this court for the purposes of the appeal. Her position is (a) that if Lewisham's decision is lawful, she is responsible for supporting the Pajaziti family under Part VI of the 1999 Act; but (b) if that decision is unlawful, Lewisham is responsible for supporting either claimant who has an assessed need for care and attention under section 21, and the Secretary of State is responsible for supporting either claimant who does not and also the claimants' children.

Discussion

31. Despite the cogency of Mr McGuire's submissions, I was not persuaded by them. I do not question the way in which Mr McGuire submitted, in the light of *Ex parte O*, that a local authority should approach the making of a decision in what is said to be a "destitute plus" case. Where I have particular difficulty with his submission is that, whilst I agree that Lewisham asked itself the right question in paragraph 4 of the decision letter, I consider that the inference is either that Lewisham misunderstood its true sense, or that it in fact answered a different question.

32. I accept that Lewisham directed itself to the most relevant decided authorities, including in particular the key passage in *Ex parte O*. I record also the suggestion made in argument that the reference in paragraph 5 of the conclusions to the fact that "primary health care services … *could be met anywhere*" (italics supplied) may suggest that Lewisham was proceeding on the fallacious basis that alternative accommodation from NASS was available to the appellants outside London and had overlooked that it had to assume that the appellants were notionally on the streets. I have to say that I regard the italicised words as odd and I simply do not understand their relevance in the context. But, with some hesitation, I would not be prepared to conclude that Lewisham was in fact approaching the task on such an erroneous basis.

33. Even so, and whilst in paragraph 4 Lewisham ostensibly asked itself the right question, the problem with the answer to it in paragraph 7 is that it is there wholly unreasoned. But I interpret paragraph 8 as providing Lewisham's essential explanation, namely that it is because the NHS treatment available to the appellants whilst resident on the streets will be effective. If so, it appears to me that Lewisham has missed the key point of the guidance in *Ex parte O*. Its decision letter proceeds on the erroneous basis that at all stages the appellants' care and attention needs have been *solely* for medical services (see in that context paragraph 5 of the letter), including now for NHS services in respect of their psychiatric disorders. The appellants have of course had, and still have, such needs. But they also have had, and still have, a separate and additional need for the care and attention that is required by all who are condemned to a life on the streets, being care and attention in the shape of shelter and warmth capable of being provided by the type of residential accommodation (including ordinary housing) available under section 21. Were they not ill, section 21(1A) would exclude them from the right to section 21 assistance in order to meet this need. But as they *are* ill, the crucial question is whether their need for this

separate head of care and attention is made the more acute by the depressive disorder from which they are both suffering and the fact that, absent any section 21 assistance, they will have to cope with that disorder on the streets, albeit with the benefit of NHS counselling. For reasons given, I consider that Lewisham has simply not answered that question. It follows that its decision was materially flawed.

34. What of the judge's reasons for refusing the appellants' challenge to Lewisham's decision? I have earlier set out his conclusions in paragraphs 37 to 41 of his judgment. In defence of the judge, I sense that the argument before him took a rather different line from that taken before us. But I am respectfully of the view that his upholding of Lewisham's decision was unsound.

35. As for the judge's approach in paragraph 37, I regard that as reflecting the same error as was committed by Lewisham. It focuses only, or at any rate primarily, on a consideration of the need for care and attention in the nature of medical services. I would respectfully disagree with his analysis in paragraph 38, at any rate if this is a reference to paragraph 5 of the decision letter. Paragraph 5 does *not* show that Lewisham had "concluded that the need for medical attention existed solely by reason of destitution." Lewisham made no such finding. All that it there said was, wrongly, that the appellants' "needs were solely for primary health care services ….". It had ignored their need for shelter and warmth. It may be that the conclusion that the judge then attributes to Lewisham is one to which it would have been entitled to come, but it is not one to be found in paragraph 5.

36. The crucial paragraphs in the judgment are paragraphs 39 and 40. Paragraph 39 summarises Lewisham's conclusion that the appellants' psychiatric disorder could be effectively treated under the NHS. Paragraph 40 appears, with respect, to misstate what Dr Turner had been saying as to "the most powerful intervention". He had not said that NHS treatment in London rather than elsewhere would provide that "intervention". What he had said was that permanent housing in London would do so. As for the judge's final observation in paragraph 40, that appears to be wrong on three counts. First, Lewisham was not (as I read the decision letter) making a comparison between the relative effects on the appellants of NHS treatment outside and inside London. Secondly, the judge's focus on the notion that any NHS treatment was going to be provided outside London suggests that he was proceeding on the erroneous assumption that NASS was going to house the appellants outside London, which was not the relevant hypothesis. Thirdly, I regard it as also apparent that in that paragraph the judge was focusing on the wrong head of "care and attention". He was there asking himself whether the need for *psychiatric* care and attention was made materially more acute because it was to be provided outside London. The relevant question was whether the appellants' need for section 21 care and attention by way of the provision of residential accommodation was made materially more acute by reason of their psychiatric disorder. In my judgment the judge's reasons for upholding Lewisham's decision were, with respect, collectively unsound.

37. Having so concluded, the question arises as to what order this court should now make. Mr Drabble's submission was that Lewisham's decision was irrational because it is obvious, he submitted, that the answer to the *Ex parte O* question in the present case can only be yes. He pressed not just for an order quashing Lewisham's decision but for a mandatory order requiring Lewisham to provide accommodation and assistance under section 21.

38. For my part, whilst I have much sympathy for that submission, I consider that for this court to make the requested mandatory order would be to take a step too far. The problem in this case is, in my judgment, not that Lewisham has asked itself the right question and arrived at an irrational answer. It is that it has failed to address itself to the right question at all. If the only possible answer to that question is that for which Mr Drabble contended, then I would agree with him that this court should now make a mandatory order; and I admit to a strong temptation to agree with Mr Drabble as to the right answer to the question. But, as Pill LJ pointed out in paragraph 23 of his judgment in the *Wahid* case, it is not for the court to make the assessment of needs under section 21: it is for local authority to do so.

39. I would therefore allow the appellants' appeal, set aside the judge's order, quash the decision made by the decision letter and remit the matter to Lewisham for reconsideration.

Lord Justice Maurice Kay

40. I agree.

Lord Justice Sedley

41. I agree without reservation with the reasons given by Lord Justice Rimer for allowing this appeal and quashing the decision. Like him, I have hesitated about the consequent disposal of the case. There is much, it seems to me, to be said for the contention that on the materials before the decision-maker, only a decision in the appellants' favour was lawfully possible. But given the eventual view of both other members of the court that remission is the proper course, I concur. It is to be hoped that the decision now reached will not generate more litigation.