

Neutral Citation Number: [2009] EWHC 1398 (Admin)

CO/2761/2009

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2

Friday, 1st May 2009

B E F O R E:
TIMOTHY BRENNAN QC
(Sitting as a Deputy High Court Judge)

THE QUEEN ON THE APPLICATION OF MAYMOUN ZARZOUR
(CLAIMANT)

-v-

LONDON BOROUGH OF HILLINGDON
(DEFENDANT)

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MR T BULEY (instructed by Fisher Meredith LLP) appeared on behalf of the CLAIMANT
MR K RUTLEDGE (instructed by Legal Services Department, London Borough of
Hillingdon) appeared on behalf of the DEFENDANT

J U D G M E N T

1. THE JUDGE: There is before the Court an application for permission to apply for judicial review. By order of HHJ Jarman QC, sitting as a judge of the High Court, on refusing interim relief, that application was rolled up with an urgent hearing of the substantive application. After detailed written and oral submissions it is clear that the application is arguable and I grant permission to apply.
2. The Claimant, Maymoun Zarzour, arrived in the UK from Lebanon in March 2008 and claimed asylum; his appeal against rejection of that claim remains outstanding. It is his contention that he is in need of 'care and attention' in the sense in which those words are used in the National Assistance Act 1948, section 21(1)(a), and that the London Borough of Hillingdon ("Hillingdon") therefore has a power under that provision to provide him with accommodation. In these proceedings he challenges Hillingdon's refusal to do so.
3. Hillingdon's refusal is based on its conclusion that, on the view which it takes of the Claimant's circumstances, it has no such statutory power. It is, however, common ground that if it has the power at all, the power must be exercised in the Claimant's favour. This is the effect of a general direction given by the Secretary of State in Department of Health Circular No LAC (93)10.
4. It is also common ground that, if Hillingdon lacks the relevant statutory power to accommodate the Claimant, the duty to do so is likely to fall upon central government in the shape of the National Asylum Support Service ("NASS"), which is a division of the Home Office. The statutory underpinning for that is to be found in Part VI of the Immigration and Asylum Act 1999 and in regulations made under section 95(12) and Schedule 8 thereof. As decided by the House of Lords in R (Westminster City Council) v National Asylum Support Service [2002] 1 WLR 2956, [2002] UKHL 38, by reference in particular to Regulation 6(4) of the Asylum Support Regulations 2000, the support which is available from NASS is of a residual nature. If the Claimant can get support from Hillingdon, it is from Hillingdon it must come, rather than from NASS.
5. The Claimant has not brought NASS before the court, either as a defendant or as an interested party. Whatever the practical outcome of this case may be for his dealings with NASS, the only issue before me is the lawfulness of Hillingdon's refusal to provide him with accommodation under section 21(1)(a) of the National Assistance Act 1948.
6. The Claimant is 36 years old and is totally blind in consequence of an accident in his childhood. He has no settled accommodation and has been moving from place to place. At present he is accommodated temporarily in a studio flat with two friends. It is probably more accurate to describe his current status as that of a tolerated occupant of their accommodation, rather than as their guest. Nobody suggests that he can reasonably stay there much longer.
7. At present he receives assistance in day-to-day matters from friends, Mr Mohamed Kerkoud and Mr Said Fawaz. Their evidence satisfies me that provision of this level of support for the Claimant is very time-consuming and stressful for each of them. It cannot be assumed that it will continue.

8. Hillingdon social workers carried out an assessment of the Claimant's position on 11 February 2009, the result of which is recorded in a written report of that date. The report includes the following observations, mixing (naturally enough) fact with opinion:

"Mr Zarzour is independent of personal care but he needs guidance with being told what clothes match or if he has put things on incorrectly. He is dependent on friends to take him shopping and to escort him to college five times a week ... He also needs assistance with laundry. [He] has been staying with friends since he moved to the UK but as his friends live in temporary accommodation he has moved three times in 11 months ... His main option involves staying with two friends in a studio flat [this is where he now is] but he is worried about this as there is very little space and he is prone to falls. He wishes to remain in Hillingdon as he has a good support network in the area.

[He] is in need of stable accommodation in order that he can maximise his independence in familiar surroundings. He is able to undertake all activities of daily living once he has 'memorised' an area and feels stable there. Once he is settled in an area and has permanent housing he is able to live independently. In Lebanon he was able to get his own shopping and use a memorized transport route to get to work. His incidence of falls is also greatly reduced in a familiar environment with adequate space.

...

[He] has fallen several times in the previous six months within unfamiliar environments... [He] can prepare his own meals using a microwave. [His] friends help with housework ... but he is able to undertake some tasks, such as washing up. His friends assist him with laundry as he is unable to get to the laundrette independently. His friends take him shopping or get items he needs for him. He is unable to go out unaccompanied as he is currently living on a busy main road so he is at risk of accidents or falls."

The assessor's overall summary is this:

"I feel that Mr Zarzour will be unable to gain the independence he desires unless stable accommodation is found for him. If he continues to move around different temporary accommodation with his friends he will be at increased risk of falls due to the overcrowding and unfamiliar environment and will continue to be dependent on his friends for support. He is unable to access shopping or leave his home alone at present but is likely to be able to do this independently if he is settled somewhere."

9. In a decision letter of 17 March 2009, which was addressed to the Claimant's solicitors and contains the effective decision under challenge, Hillingdon said this:

"Your client is a mobile person who can dress, wash and toilet independently. He is able to manage his own finances and is able to

travel after learning a route ... [Y]our client is able to live independently in a new environment after initial training and support. Your client does not need 24 hour residential care or a full time carer. He needs help with laundry and shopping along with practical assistance and support if he moves to a new environment. The Local Authority is willing to provide support and assistance to your client pursuant to s 29 of the National Assistance Act 1948 (NAA) and s 2(1) of the Chronically Sick and Disabled Persons Act 1970 (CSDPA) to assist him if he moves to new accommodation. S.29 NAA ... allows the local authority to provide advice and assistance in their own homes [sic] or elsewhere. S 2(1) CSDPA supplements s 29 and allows for practical assistance in the home."

After a reference to equipment and adaptations, the letter continued:

"Support and training could be given to assist him to learn a new area if he shifts house to allow him to travel independently in the local area. Assistance can be given to him allow to [sic] become independent at home and travelling around the home, including exits, moving from room to room and around each room. As you state once he is familiar with his environment he will be able to meet his care needs.

The Council provide a meal delivery service. Your client is able to use a telephone or order these. They can either be delivered hot daily or frozen to allow your client to have freedom to eat when he wants.

...

Your client therefore does not have a need to be looked after. His needs can be met by other social services provision under s 29 NAA and s 2(1) CSPDA while residing in NASS accommodation."

10. The National Assistance Act 1948 section 21(1)(a) reads as follows:

"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..."

11. In R (M) v Slough Borough Council [2008] 1 WLR 1808, [2008] UKHL 52 the House of Lords considered the scope of section 21(1)(a) of the National Assistance Act 1948 in the context of persons who were subject to immigration control. The Claimant in that case was HIV-positive; his need for assistance (other than accommodation) was limited to medical attention (a need which is excluded from consideration by section 21(8)) and to the availability of a refrigerator for storage of medication. Their

Lordships held that these needs did not qualify as needs for 'care and attention' for the purposes of section 21(1)(a).

12. After consideration of the statutory history and context of section 21(1)(a), and the authorities including the Westminster case, Baroness Hale of Richmond said this:

"My Lords, it might appear that this case too is part of the 'inverted and unseemly turf war' between central and local government, but although the Secretary of State intervened on a different issue in the Court of Appeal, he has not intervened on the issues before us. The main issue is the precise meaning of the words 'in need of care and attention which is not otherwise available to them'. It may well be that those who drafted section 21(1)(a) in 1948 assumed that it only applied to people who needed extra care and attention which could not be provided in their own homes. They undoubtedly drew a distinction between the ordinary homeless, who were catered for under what was then section 21(1)(b), and those with special needs, who fell within section 21(1)(a). Be that as it may, we are required, by the NASS case, to accept that people who need care and attention which could be provided in their own homes, if they had them, can fall within section 21(1)(a). But that does not answer the question in this case."

Her Ladyship continued, after discussing the submissions of counsel in that case:

"33. But 'care and attention' must mean something more than 'accommodation'. Section 21(1)(a) is not a general power to provide housing. That is dealt with by other legislation entirely, with its own criteria for eligibility. If a simple need for housing, with or without the means of subsistence, were within section 21(1)(a), there would have been no need for the original section 21(1)(b). Furthermore, every homeless person who did not qualify for housing under the Housing Act 1996 would be able to turn to the local social services authority instead. That was definitely not what Parliament intended in 1977. This view is consistent with *Ex parte M*, in which Lord Woolf emphasised, at p 20, that asylum seekers were not entitled merely because they lacked money or accommodation. I remain of the view which I expressed in *Wahid*, at para 32, that the natural and ordinary meaning of the words 'care and attention' in this context is 'looking after'. Looking after means doing something for the person being cared for which he cannot or should not be expected to do for himself: it might be household tasks which an old person can no longer perform or can only perform with great difficulty; it might be protection from risks which a mentally disabled person cannot perceive; it might be personal care, such as feeding, washing or toileting. This is not an exhaustive list. The provision of medical care is expressly excluded. Viewed in this light, I think it likely that all three of Mrs Y-Ahmed, Mrs O and Mr Bhikha needed some care and attention (as did Mr Wahid but in his case it was available to him in his own home, over-crowded though it was). This definition draws a reasonable line

between the 'able bodied' and the 'infirm'.

34. This construction is consistent with all the authorities, including *R (Mani) v Lambeth London Borough Council* [2003] EWCA Civ 836, [2004] LGR 35. That case was argued on the assumption that the claimant did have a need for care and attention, but not a need which required the provision of residential accommodation. Mr Mani had one leg which was half the length of the other. He had difficulty walking and when in pain he could not undertake basic tasks such as bed-making, vacuum cleaning and shopping. He did need some looking after, going beyond the mere provision of a home and the wherewithal to survive.

35. The only passage which might cast any doubt upon this approach is Lord Woolf's statement in *Ex parte M*, that the authorities could 'anticipate the deterioration which would otherwise take place' and intervene before a person's health had been damaged. He did not, however, say that they could intervene before there was a need for care. There has to be some sensible flexibility here. Section 21(1)(a) requires that the person 'are in need of care and attention' so that the primary focus must be on present rather than future needs. But if there is a present need for some sort of care, then obviously the authorities must be empowered to intervene before it becomes a great deal worse. Section 21(1A) reflects this by referring to the anticipated physical effects of destitution. It was possible to meet the present needs that Mrs Y-Ahmed already had, for without that she would have needed a great deal more. It would be possible to meet the need for care of an HIV positive person who is beginning to get sick before he becomes a great deal worse. But there must still be a need for some care and attention for section 21(1)(a) to apply at all."

13. Lord Bingham of Cornill, Lord Scott of Foscote and Lord Brown of Eaton-under-Heywood expressly agreed with Baroness Hale.

14. At paragraph 40, Lord Brown of Eaton-under-Heywood said this:

"... A person must need looking after beyond merely the provision of a home and the wherewithal to survive — beyond, therefore, the needs able to be met by NASS for suitable accommodation and subsistence. The looking after required does not have to be for either nursing or personal care. It must, however, be of such a character as would be required even were the person wealthy. It is immaterial that this care and attention could be provided in the person's own home if he had one (as he would have if he were wealthy). All that is required is that the care and attention needed must not be available to him otherwise than by the provision of section 21 accommodation. In the case of someone subject to immigration control who is destitute, inevitably only the provisions of section 21 accommodation will enable his need for care and attention to be met."

15. Finally, on the point of timing touched on by Baroness Hale at paragraph 35, Lord Neuberger of Abbotsbury said this:

"54. As a matter of ordinary language, while reformulation of a statutory expression can be dangerous, 'are in need of' means much the same as 'currently require'. 'Need' is a more flexible word than it might first appear. 'In need of' plainly means more than merely 'want', but it falls far short of 'cannot survive without'. Particularly bearing in mind the multifarious circumstances in which section 21(1)(a) might be invoked, I do not think it would be sensible or helpful to indulge in further generalised exegesis. In the great majority of cases, I would have thought that the words should not present a problem.

55. As for the word 'are', it seems to me that, unless the contextual imperative to the contrary is very powerful indeed, the use of the present tense excludes the future, let alone the future conditional. It would seem wrong to extend a duty owed to a person who satisfies a statutory requirement to a person who currently does not satisfy the requirement simply because he will or may do so in the future. I should add that, as a matter of practicality, humanity and common sense, this cannot mean that a local authority is required to wait to act under section 21 until a person becomes seriously in need, however close and inevitable that serious need may be, and however much the authority reasonably wants to assist at once. The section must contemplate that a local authority can act, where it reasonably considers it right to do so, as soon as a person can be said to be in need of some care and attention, even to a relatively small degree."

16. The relevant principles which emerge from the Slough case are that the applicant for accommodation must be in need of some care and attention, in the sense of being 'looked after'. A need for accommodation by itself is certainly not enough for him to qualify under section 21(1)(a). If he is an able bodied asylum seeker, it is to NASS that he will have to turn. But the need for care and attention does not have to be one for nursing, or personal care; nor does it have to be a need for the '24 hour residential care or a full time carer' referred to in Hillingdon's letter. The need for care and attention can extend to a need for someone to assist with, or to perform, tasks which the applicant cannot or should not have to cope with on his own.
17. As to timing, a present need is enough. The question is whether the applicant needs the care and attention at present, even to a relatively small degree. That his position may improve in the future if provided with accommodation and care and attention is, in my judgment, not a relevant consideration, save, just possibly, in a factually different case where the improvement is likely to be practically immediate. The question is what the applicant needs now by way of care and attention, not what he might be likely to need in the future, after everything has settled down.
18. Applying those principles to the Claimant's case, in my judgment he has established that he is in need of care and attention and that this care and attention cannot practicably be provided to him without stable accommodation. I highlight shortly the

main factors which emerge from the undisputed evidence, indeed from Hillingdon's own assessment of his situation:

- He needs tuition in finding his way around his accommodation and its surrounding area;
- If he does not have stable accommodation (and he has already moved three times in 11 months) his need for such tuition will be constantly refreshed;
- He cannot dress or deal with his own laundry without assistance; while possibly falling short of 'personal care' in the sense in which those words might be used by a social worker or a nurse, his need for such assistance is undoubtedly a need for 'care and attention';
- He needs help with his shopping;
- He cannot go out on his own; he needs assistance to keep him safe;
- His ability to feed himself - at any rate with an adequately varied diet - is severely circumscribed, to such an extent that Hillingdon is already willing (albeit under other statutory powers and without providing accommodation) to bring him hot or frozen meals on a continuing basis.

19. It is Hillingdon's submission that a relevant need for the purposes of section 21(1)(a) is a need either to be looked after physically or a need to be watched over to prevent harm to oneself or others. Hillingdon relies on paragraph 33 of Baroness Hale's speech in Slough as support for this proposition. Such needs are certainly capable of falling within section 21(1)(a), but Baroness Hale's description of the relevant needs is not so limited as Hillingdon submits. On the contrary, Her Ladyship expressly stated that her categorisation of what could fall within section 21(1)(a) "is not an exhaustive list".
20. I accept that there is some force in Hillingdon's contention that not all of the Claimant's identified needs are accommodation-specific - an example might be his need for assistance in using public transport to get to his English class - but those I have just mentioned are not in this category. Meeting the needs I have identified is dependent on him having stable accommodation. Once he has it, it is likely that his needs for care and attention in and in connection with that accommodation, initially quite significant, will diminish in significance and his ability to care for himself will be enhanced. But the statutory question is to be answered by reference to his current needs, not by reference to his likely future needs if his current needs are met.
21. I reject Hillingdon's submission that the current provision of assistance for the Claimant by Mr Kerkoud and Mr Fawaz means that care and attention for him is "otherwise available". Mr Kerkoud and Mr Fawaz have understandably not abandoned their friend without help; but this does not mean that Hillingdon's statutory duty is to be assessed by reference to an assumption that they will continue indefinitely to assist him in circumstances which are stressful for them and restrictive of their own time and freedom.

22. Hillingdon also submits that its willingness to provide assistance to the Claimant under section 29 of the National Assistance Act 1948 and section 2(1) of the Chronically Sick and Disabled Persons Act 1970 is not something which can be used to underpin a conclusion that it should be providing accommodation under section 21(1)(a). Hillingdon has identified that the Claimant has needs which it can and should meet. Hillingdon is obviously correct to say that its willingness to exercise one statutory power in the claimant's favour does not necessarily lead to the conclusion that it must exercise a different power in his favour. However, it would be unrealistic to proceed on the basis that a modern local authority feels able to expend its limited funds on providing services (for example, prepared meals) to the Claimant if it did not consider he had a need for them. Once the need for care and attention is identified as it has been in this case, the question has to be answered: where is it to be provided? The answer is that the Claimant cannot receive what he needs by way of care and attention without accommodation.
23. Accordingly, in my judgment the Claimant is entitled to accommodation to be provided by Hillingdon under section 21(1)(a) of the National Assistance Act 1948 and this application for judicial review therefore succeeds. I will hear submissions from counsel as to the appropriate form of order.