
GARDEN COURT
CHAMBERS

Care Act 2014 and other care and support services - recent developments

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S 23 (1) Care Act 2014: *A local authority may not meet needs under sections 18 to 20 by doing anything which it or another local authority is required to do under – (a) The Housing Act 1996, or…*

R (Campbell) v LB Ealing [2023] EWHC 10 (Admin), 9 January 2023; [2003] 26 CCLR 23

C who had a progressive condition and was partially sighted and suffered from OCD and depression, was assessed as having eligible needs under Care Act 2014. The LA's social services department funded temporary accommodation for him (B&B accommodation) under the Care Act 2014, after a different housing authority had treated its housing duty as discharged. C was registered on the LA's housing allocations scheme (Housing Act Part VI) with a Band B priority. C challenged the decision to terminate the funding for his temporary accommodation.

Judgment

- Applies principle in existing case-law that **a stand-alone need for accommodation is not a need for care and support** under Care Act 2014: *R(GS) v Camden; R(AR) v LB Hammersmith [18]*; *R (Aburas) v LB Southwark* (para 39)

(***R (Campbell) v Ealing*** continued)

- Applies principles from existing case-law that LAs **have a power to provide accommodation under Care Act 2014** in circumstances **where accommodation is required to effectively deliver care and support**: *R (SG) v LB Haringey & SSHD,* **but** that is **subject to s 23 of the Act** (para 50)
- **As to s 23**, approach in ***Idolo v Bromley*** applied: *"..where Housing Act duties are engaged (competing demands) are to be met within the housing priority allocation scheme* (para 43); s 23 ensures that that Care Act 2014 does not cut across the scheme of prioritization of applicants to the housing allocations scheme (para 56); in the circumstances of this case the LA had no power nor duty to fund the accommodation under Care Act 2014 **if s 23 applied** (para 54)
- C was a person the LA was required to provide with housing under Housing Act 1996: he was a **qualifying person under Housing Act 1996 Part VI**, and had been made offers (rejected by C as unsuitable); the fact that accommodation had not yet been provided under Part VI did not mean the LA was not required to do so and "***it may also be the case***" that he had rights under **Housing Act Part VII** (homelessness duties) also; s 23 was applicable (paras 56-8)
- However withdrawal of funding for C's accommodation meant there should now be a **further assessment of C's needs** to take into account the change in circumstances; the additional needs may include a need for enhanced assistance for information, advice and advocacy in attempts to find a Housing Act solution of C's accommodation needs (para 61)
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*(**R (Campbell) v Ealing** continued)*

Comment

- Follows and/or re-iterates pre-existing case-law on getting ordinary accommodation in the context of care and support duties under Care Act 2014
- Worth noting: the need to **re-assess needs for care and support when accommodation is to be lost**, and care and support may include advice and advocacy to get accommodation under Housing Act 1996 (para 61)
- Not a comprehensive examination of/ruling on when something is or is not something the LA is "*required to do under Housing Act 1996*" within the terms of s 23 of the Act 2014.

Care Act 2014/ s 95 Immigration and Asylum Act 1999 interplay (where accommodation-related needs)

R(SB & SBO) v LB Newham [2023] EWHC 2701 (Admin); [2024] 27 CCLR, 30 October 2023

Facts: C1 and C2 had outstanding claims for asylum which were being processed. C1 had a learning disability and other debilitating conditions. C2 was is mother and his full-time carer. The LA provided accommodation and financial support under s 19 Care Act 2014 whilst a community care assessment was being carried out. Its assessment identified eligible needs. The LA decided to terminate the accommodation saying that Cs could claim asylum support under s 95 IAA 1999; and that Cs did not need specialist accommodation. The LA also relied on s 23 Care Act 2014.

Judgment:

- LA should assess whether there were accommodation-related needs for care and support under Care Act 2014 "***without reference to the SSHD's residual powers***" under s 95 IAA 1999 (paras 103-4, 110-111)
- LA had not addressed the question whether C1 had accommodation-related needs for care and support (para 96); (having treated other factors as determinative)
- **S 23 not applicable**, as Cs had no recourse to Housing Act 1996 (due to immigration status)
- Decision to terminate the accommodation and support quashed: leaving LA to decide how to proceed whilst continuing support in the meantime under s 19 Care Act 2014.

Care Act 2014/s 95 Immigration and Asylum Act 1999 interplay (where accommodation-related needs)

R (TMX) v LB Croydon (1) SSHD (2) [2024] EWHC 129 (Admin), 26 January 2024

Facts

TMX was an asylum seeker who was accommodated by the Home Office under s 95 IAA 1999 with his wife and children in one bedroom accommodation. He had progressive multiple sclerosis causing loss of mobility and at time pain that was "*agonizing*". The bathroom was inaccessible to him, the room too small for his mobility equipment leaving him effectively bed bound. He required his wife's help with managing urination and defecation from his bed, without privacy. The room was poorly ventilated, and heat exacerbated his condition. There was no dispute that he had eligible needs under the Care Act 20214. The LA contended that the duty to provide suitable accommodation fell on the Secretary of State.

Judgment

- The **duty under s 95 IAA 1999 is residual**; where an asylum seeker's physical or mental condition was such that they had accommodation-related care needs, the **local authority** is responsible to meet those needs, not the Secretary of State under s 95 IAA 1999
- Croydon's failure to provide him with suitable accommodation breached his rights under both Articles 3 and 8 ECHR over a period of 7 months (paras 110-169).

Care Act 2014: Means tested charges: scope of Disability Related Expenditure (DRE)

RW v Royal Borough of Windsor and Maidenhead [2023] EWHC 1449, Dexter Dias KC (sitting as a Deputy High Court Judge), 7 June 2023; [2023] 26 CCLR 517

- C has autism, impacting on many aspects of his life including forming social relationships; received care package paid for by direct payments
- C attended the Step Together Group, part of his care package
- The cost of activities at the group was £15 per session (the activity costs)
- LAs how power to raise a means tested charge for care and support (Care Act 2014 ss 14 and 17). If expenditure by the person is deemed to be **Disability Related Expenditure (DRE)** it is viewed as necessary expenditure and does not form part of the person's income. DRE is defined in para 4 of Schedule 1 of the *Care and Support (Charging and Assessment of Resources) Regulations 2014*. There is guidance in Annex C of the Care and Support statutory guidance.
- The LA decided on the means tested charge to C for his care package without disregarding from his means the expenditure for the activity costs when attending the group, refusing to recognize that expenditure as DRE
- C challenged the decision not to treat the £15 activity costs as DRE

RW v Royal Borough of Windsor and Maidenhead continued

- D argued the activities were not disability related but "*chosen*", his disability need was for the staff, and that a cheaper option could have been chosen
- C argued the activities were inextricably linked to the group

Judgment

- An individual's care plan should be taken as the starting point for determining what constitutes DRE. C's needs were clear from the care plan: he needed support to develop and maintain personal relationships
- Whether expenditure was "*necessary*" for DRE purposes meant needed to allow the need to be met; it did not mean that the solution must be the *only* way to meet the need but it must be closely connected to the need and operate to meet or help alleviate it (para 51)
- When considering *whether costs are reasonably incurred*, one must weigh in the balance the value the claimant places on the group, the obvious negative impact it would have should he not attend the group activities and the difficulty for him in forming relationships in a new group: the defendant had not sufficiently evaluated these competing considerations (para 74)

RW v Royal Borough of Windsor and Maidenhead continued

- The activities were structured for disabled people to build social skills
- Support services for disabled person are not mere commodities
- The **statutory duty to promote well-being** and to take account of his wishes had not been taken into account and undue weight given to cost
- There had not been consideration of the impact on the person "*who needs the support of the community as part of the vindication of his rights under UN Convention to live independently and autonomously*" – referring directly to Article 3 – respect for individual autonomy and Article 19 on independent living
- *"The activities have helped him and this is an important step towards assisting him develop his ability to live independently. This is a critical life skill, a general principle recognise by the UN Convention (Art 3a)."*
- Decision quashed.

Care Act 2014 - Challenges to means tested charging decisions; Art 14

***R (SH) v Norfolk County Council* [2020] EWHC 3436 (Admin):**

The local authority had made a change to its adult social care charging policy as it applied to severely disabled people. It had previously used its discretion to set the Minimum Income Guarantee well above the minimum required in the statutory scheme and excluded the whole of PIP in calculation of income. It changed this – to charge the maximum permitted by the scheme.

The policy was challenged by a young woman with Down's Syndrome who because of her disability was unable to work and had no earned income.

The court held that the new policy unlawfully discriminated against her because it resulted in a **higher proportion of her income being taken in charges than was the case for those in receipt of care who were less disabled and not excluded from the workplace and able to earn an income.** The Court held that the discriminatory effect was unnecessary, irrational and disproportionate. (Summary taken from *YVR v Birmingham CC* paras 31-32)

(**The key provision**: The *Care and Support (Charging and Assessment of Resources) Regulations 2014* specify certain income that cannot be taken into account when calculating the means tested charge. This includes at reg 14 **earnings derived from employment.)**

Care Act 2014 – Challenges to means tested charging; Art 14

***R(YVR) (a protected party by his litigation friend YUL) v Birmingham CC* [2024] EWHC 701(Admin)**, 26 March 2024

Facts:

C is a person with high level of disability and unable to work and earn an income. The claim challenged the council's charging policy for Care Act services for unfairly discriminating against people whose disability prevents them from being able to work. Birmingham CC was in financial crisis, "*had effectively declared itself bankrupt, was looking to make £300m of cuts, and had been granted exceptional government permission to increase council tax by a total of 21% over the next two years*".

Birmingham had reviewed its charging policy after the ***Norfolk*** case ,but had not made any significant changes. The effect was that YVR was charged the maximum amount permissible under the statutory scheme.

The grounds of challenge by YVR were: Art 14 ECHR taken with Art 1 of Protocol 1, because the charging policy discriminates against those who are severely disabled and cannot work by reason of their disability, as compared to disabled people whoa re able to work; indirect discrimination and breach of PSED under Equality Act 2010.

R (YVR) v Birmingham CC – continued

Judgment

- The provision in the Regulations for the earnings disregard undoubtedly privileges earned income (para 67). It is people with earned income who are treated differently from everyone else receiving adult social care services (para 73).
- "*I proceed on the basis that it is (the claimant's) Thlimmenos challenge to the exercise of the Council's powers which is at the heart of this complaint*": whether the council failed to treat differently persons whose situations are significantly different; "*Looked at in that way, this is a challenge which essentially relies on identifying a problem in the statutory scheme, and a missed opportunity for the Council to address it. The problem in the statutory scheme is the failure to treat people who can work differently from people who, because of severe disability, cannot*" (see paras 75 – 77)
- The council's declared aim of getting itself back on track towards a balanced budget was a legitimate aim, much more fundamental than just saving money (para 85)
- Whether there was "a less intrusive measure" that could have been used is "***an entirely fact – sensitive evaluation***" – the evidence in this case is that the council has nowhere else to go (para 86)

R (YVR) v Birmingham CC – continued

- **On ordinary public law principles, the power to charge less to those excluded from the workforce has to be considered and kept under review; LAs need to think about their options** (para 87)
- Some LAs may have more choices about less intrusive measures than others but the court was satisfied **on the evidence of recent history before her** in the present case that Birmingham did not (para 88)
- The severity of the impact of the council's current "do nothing" strategy on the Claimant was not set out evidentially with any real clarity; it was his relative position that was being challenged in the proceedings not his absolute position (para 90)
- On the other side of the balance there was the immediate imperative of delivering the radical spending cuts, asset sales and service restrictions in a way that is as fair as possible to all of the council taxpayers and service users; The council's decision was that the Claimant's needs are safeguarded by the detailed statutory minima, and this could not be regarded as disproportionate to the point where the courts would be expected to intervene to force a different outcome (para 93)
- "***The council's situation was exceptional. Other local authorities, of course are in different circumstances***."

Care Act 2014: Judicial review challenge to lack of an appeals system

R (HL) v Secretary of State for Health and Social Care [2023] EWHC 866, Julian Knowles J, 18 April 2023, (2023) 26 CCLR 237

- Care Act 2014 s 72: power to make regs to set up an appeals system
- Government decided to do so (2016) but did not act, and then decided not to go ahead but to keep under review (December 2021)
- C has severe disabilities and a child with autism and challenging behaviour; her care package of 21 hrs pw was cut to 10.5 hrs pw
- C pursued complaint, contacted solicitors, chaser letters, promises of amended plan, promise of re-assessment – it took 18 months to secure an increase to 25 hrs per week
- C in permanent state of worry that review would result in reduction

R (HL) – challenge to lack of an appeals system - continued

- C challenged the decision not to implement the appeals process; C filed evidence of experiences of individuals seeking to challenge Care Act care packages: case-studies to demonstrate that existing mechanisms for resolving disputes are time-consuming, a revolving door system of re-assessments and review, and then, if flawed again, more correspondence and another promise of review
- Also, the existence of a complaints process prevents access to judicial review
- On introducing the Bill in 2014 the government had said the new clause demonstrated its recognition of the need for change and determination to ensure a clear, flexible and independent appeals system
- **Held**: no breach of duty to consult; no unconstitutional and unlawful denial of access to justice; no breach of Article 8 procedural rights – area of socio-economic choice; there is access to the court; no authority says any particular type of appeals system is required

EHRC report on challenging decisions in adult social care

Challenging adult social care decisions in England and Wales

– a report by the **Equality and Human Rights Commission**, February 2023

- statutory complaints processes lack a requirement for an independent decision-maker
- people find using statutory complaints processes complex, energy sapping and lengthy; fear of negative repercussions
- lack of access to skilled and knowledgeable advocates
- too few community care legal aid solicitors (only 3 in Wales)
- cases involve complex facts and histories that require many hours of exploratory work at the legal help rate and fixed fees for legal help rarely cover this.

Mental Health Act 1983 s 117 after-care: whose duty after 2nd period of detention

R (Worcestershire County Council) v Secretary of State for Health and Social Care [2023] UKSC 31; [2023] 1 WLR 2790; [2023] 26 CCLR 667, 10 August 2023

Facts

JG lived with schizoaffective disorder resistant to treatment. She lived in Worcestershire. She was detained under s 3 MHA 1983 in hospital in Worcester (the first detention). She was assessed as lacking capacity to decide on her residence. A best interests decision was made on her behalf on discharge to move to a residential care home in Swindon near her daughter, where she was placed by Worcestershire under s 117 MHA 1983. She was detained under s 3 again, in a hospital in Swindon (the 2nd detention). A dispute arose between Worcestershire and Swindon as to which of them was responsible for her s 117 after-care on discharge the 2nd detention.

Judgment

- **The key finding** was that the **s 117 after-care duty ceases upon the person concerned being detained under s 3 (or other provision specified in s 117(1))**, so that on discharge a **new duty** arises and then the question arises under s 117(3) - where was the person ordinarily resident before the second detention (para 54)

MHA 1983 s 117: *Worcestershire CC v SSHSC* (continued)

- **Key reasoning** (para 49): the duty ceases not only when the person is no longer in need of after-care services but also where the person ceases to be a person to whom the section applies e.g if the person were to die or be deported or imprisoned or detained under a relevant provision

- On the **meaning of ordinary residence**, see paras 56 – 57: "*voluntarily adopted*" ; "*settled purpose*"; "*The circumstances in which a person will not be regarded as ordinarily resident in a place because the person's presence there is involuntary are narrow and are limited to situations where the person is forcibly detained.*"
- As regards **a person who lacks capacity to make the decision**: "*the mental aspects of the test must be supplied by considering the state of mind of whoever has the power to make relevant decisions on behalf of the person concerned*" (para 56-57)
- Applying that approach: JG's residence in the area of Swindon was adopted voluntarily in the relevant sense, as it was the result of a choice made on her behalf to live there for settled purposes as part of the regular order of her life for the time being. Thus, **immediately before her second detention she was ordinarily resident in the area of Swindon** (para 58)

- S 117 MHA 1983 has **no deeming provision** for ordinary residence; the words must be given their ordinary meaning (paras 59,71,87).

Children Act 1989 care-leavers duties – right to education; NIAA 2002 Sch3

R (CVN) v Croydon LBC [2023] EWHC 464 (Admin), Dexter Dias KC, 28 February 2023; [2023] A.C.D. 57

- concerned a young person aged 21 who originally arrived as an unaccompanied child seeking asylum, whose claim was rejected
- **S 23(4) Children Act 1989**: a continuing function towards a "*former relevant (looked-after) child*" is the duty to give assistance to the extent that his welfare and education (or training) needs require it and by **s 24B(2)** this can be by paying for accommodation and/or living expenses
- **Sch 3 para 1 Nationality Immigration and Asylum Act 2002**: a person who would meet normal criteria to qualify for support is nevertheless be ineligible if he falls within one of the specified classes of ineligibility on grounds of immigration status. However **Sch 3 para 3** provides an exception to that ineligibility if the exercise of the power to provide assistance is necessary to prevent a breach of the person's Convention rights
- D made a significant error of law in failing to consider if its assistance power was exercisable to prevent a breach of Article 3 ECHR as connected to the claimant's educational needs (and associated breach of right to education under Art 2 of the First Protocol (A2P1)) (para 67)
- The judgment contains a useful analyses the right to education under A2P1

CVN v LB Croydon – continued

- On the right to education -

"*It is not an absolute right, it can be qualified or infringed. But if that were to happen,* ***the State would need to provide solid evidence and a sound basis to depart from what Lord Bingham termed "fair and non-discriminatory access"*** *to the system of state education (Ali at [24]). None of any substance has been put before the court. To give weight to this factor without the materials for proper analysis ahs all the hallmarks of capriciousness and arbitrary use of power.*" (para 86)

- C would cease to be able to engage in his education if destitute; D had not demonstrated that such interference was not disproportionate. On being asked to judge the matter afresh the judge concluded that the interference was disproportionate: it was necessary for accommodation and associated expenses to continue to be paid to avoid a disproportionate breach of (or interference with) the claimant's right to education and effective access to it (para 88).

Remedies in judicial review

Mandatory orders to enforce a statutory duty

R (Imam) v Croydon BC [2023] UKSC 45; [2023] 3 WLR 1178 – case under Housing Act 1996

The LA had accepted it owed a duty under Housing Act 1996 s 193(2) to secure that suitable accommodation was available for the occupation of Ms Imam, a wheelchair user, and her family, but for several years they had been housed in temporary accommodation that was not suitable for her needs. The LA resisted a mandatory order requiring it to comply with its duty on grounds of budgetary constraints.

Judgment of the UKSC

- "*When it is established that there has been a breach of statutory duty, it is not for a court to modify or moderate is substance by routinely declining to compel performance of it on the grounds of absence of sufficient resource*" (para 40)
- "*A court should proceed cautiously in exercising its discretion to refuse to make an order and should take care to ensure that it does so only when that course is clearly justified*" (para 43)
- UKSC set out principles relevant in that case to the court's consideration of the exercise of its discretion to grant a mandatory order to enforce a statutory duty (paras 66 – 70).

Remedies in judicial review

New power under **s 29A(1)(a) Senior Courts Act 1981** to make **suspended quashing orders**

R(ECPAT UK) v Kent CC, SSHD [2023] EWHC 2199 (Admin), 26 CCLR 615

- Example of the use of the new power in the context of a challenge concerning powers and duties to unaccompanied asylum seeking children
- The court may list a further hearing to monitor compliance with a suspended quashing order and to determine whether the suspension should be extended.

Upcoming

Covid-19 Inquiry

Modules to come on:

- Health
- the Social Care Sector

Reform of Civil Legal Aid: upcoming consultation

Asylum Accommodation – Updates in the Law

Raza Halim

28 March 2024

Contents

R (SA) v Secretary of State for the Home Department [2023] EWHC 1787 (Admin)

Facts:

The Claimant was an asylum-seeker, was heavily pregnant, had three young children, and was housed in hotel accommodation. The Claimant gave birth and remained in hotel accommodation albeit moved to a larger room. She challenged the failure to relocate the family to 'dispersal' accommodation pursuant to policy and the adequacy of accommodation for the purposes of the statutory scheme governing asylum accommodation pursuant to s.95 Immigration and Asylum Act 1999 ("the 1999 Act").

R (SA) v Secretary of State for the Home Department [2023] EWHC 1787 (Admin)

Significance:

1) The importance of time spent in the accommodation when assessing "adequacy" of accommodation.

2) Strategy

R (SA) v Secretary of State for the Home Department [2023] EWHC 1787 (Admin)

The importance of time spent in the accommodation when assessing "adequacy"

"**Passage of time**" (§§20 – 23)

This was described as the "decisive" feature by the Court – the "sheer passage of time" spent in hotel accommodation.

"20. I come to the feature of the case which - when put alongside the other features - becomes decisive. It is the sheer passage of time. This family has been in initial accommodation since March 2022 in Croydon. They are a family who lived for 7 months in the severely cramped first room. Even after commencing their claim for judicial review, they have lived for a further 8 months in the second room. ***This case is a paradigm case of what the case law recognises*** *(§10 above), that accommodation can have been legally adequate for a shorter timeframe but cannot satisfy the tests of legal adequacy in the longer term."* [emphasis supplied]

R (SA) v Secretary of State for the Home Department [2023] EWHC 1787 (Admin)

"20. … Both Counsel recognise the legal relevance of that consideration, in light of that case law. For her part, Ms Brown accepts that there could come a time at which the passage of time makes this accommodation fall below the standards of adequacy for the purposes of the statutory duty and requirement of reasonableness. She submits that this time has not yet arrived. For his part, ***Mr Gardner accepts that there could have been a time at which this accommodation achieved the legal standards of adequacy. He submits that the time has long since been passed at which those standards have been breached. I agree with Mr Gardner."***

[emphasis applied]

R (SA) v Secretary of State for the Home Department [2023] EWHC 1787 (Admin)

This follows the approach set out in authorities such as *R (A) v NASS* [[2004] 1 WLR 752, *R (NB) v SSHD* [2021] 4 WLR 92 and *R (MQ) v SSHD* [2023] EWHC 205 (Admin), that:

(i) Adequacy is informed by length of time (A §54, NB §149, MQ §127c)); and

(ii) Accommodation may be adequate only in the short-term (A §59, MQ §128), and not adequate on a long-term basis (NB §159), becoming unsuitable by reason of the passage of time (A §55).

(iii) It is necessary to look at the totality of accommodation (MQ §169), the conditions and how long they are being experienced (NB §172).

(iv) There may also be a change in circumstances or change in needs which mean accommodation is no longer adequate (A §59, NB §160).

(v) It is relevant to consider the prospective picture and the explanation given: the period during which the accommodation was or is "likely to be" occupied (A §54), the "uncertainty" (NB §149), whether the "stay was only to be a short one", and whether those affected were "reliably informed that this was the case, so that they had the comfort of knowing that their stay was finite" (NB §165).

Open Ended Uncertainty

23. … As I see it, this is an important point, at the heart of the lived experience of "temporary" accommodation in the "short term". To tell an adult, still less a child, to cope with and tolerate a situation because it is "temporary" and "short-term" begs a question of how long. It is difficult to process, or identify strategies for dealing with, a situation which is said to be temporary and short-term, but which is open-ended and ongoing. Open-endedness and uncertainty exacerbates agony and undermines coping. The implications are graphically encapsulated in the Claimant's witness statement evidence.

2. Strategy

- ***Interim relief?***
- ***Expedition?***
- ***Rolled up hearing?***

R (TMX) v London Borough of Croydon & Anor [2024] EWHC 129 (Admin)

Facts:

- The C was an asylum seeker who suffered from progressive multiple sclerosis and paraesthesia. He lived in on the 4th floor of an asylum hostel in an ensuite bedroom with his wife, who was his full-time carer, 14-year-old daughter and 10-year-old son. He was bed-bound, unable to use the bathroom for toileting and washing and so had to urinate in a bottle and defecate either on an incontinence pad in his bed or in the commode in the bedroom he shared with his wife and children which his wife would then empty. The broken lift prevented him from leaving the building.
- The LA provided some support under the Care Act 2014, knew that the accommodation was unsuitable but made a decision that he did not have accommodation-related needs for which it was responsible. That was because, on the LA's view, the SSHD should provide suitable accommodation under s.95 where the necessary care could be provided other than in a nursing or care home, and no accommodation-need arose under the Care Act.

R (TMX) v London Borough of Croydon & Anor [2024] EWHC 129 (Admin)

The Court held that the LA had a duty to provide the C with suitable accommodation. When undertaking its assessment as to whether an asylum seeker's needs under the Care Act 2014 included accommodation-related need, it was no answer that the SSHD was either currently providing or prospectively able to provide accommodation under s.95 and the LA should ignore that fact or prospect. That is because s.95 provides a safety net against destitution, a safeguard of last resort. Contrast that to the Care Act which:

"*is not intended as a safeguard of last resort. Rather, it is a regime under which individuals' needs are to be assessed in a broad and holistic way, and then met, in order to promote their wellbeing whilst respecting their personal autonomy to make choices and express preferences.*" [§77(6)]

Had the local authority, when assessing C's needs under the 2014 Act, correctly ignored the accommodation provided by the secretary of state under s.95, it would have concluded that he had an accommodation-related care need which it had a duty to meet. Therefore, it had breached its duty under the 2014 Act to C.

The Court thus held that at §77(7) that:

"In light of this understanding of the s.95 IAA 1999 on the one hand, and the Care Act on the other, it follows, as a matter of inexorable logic, that a local authority cannot determine that a person has no accommodation-related care need, on the basis that he does not need to be provided with accommodation as he is being – or will, or may at some future point in time, be – provided with accommodation by the Secretary of State under s.95. Mr Payne KC, for the Secretary of State, so argued with powerful simplicity: "You can't rely on something which is a last resort for deciding whether you are obliged to provide something which is not a last resort."

R (TMX) v London Borough of Croydon & Anor [2024] EWHC 129 (Admin)

The ratio can be seen in single place at §78, where the Court pithily sets out:

> *"…a local authority cannot properly rely on the Secretary of State providing accommodation for a person pursuant to the s.95 'residual safety net' as its basis for finding that that person does not have accommodation-related needs under the Care Act. As this case illustrates (involving, as it does, a severely disabled person whose very real need for suitable accommodation has remained unmet for many months), it is essential that there be clarity as to which public authority is legally responsible for providing suitable accommodation for such a person. Parliament cannot have intended to set up a perverse game of endurance between public authorities whereby they compete with one another as to how long they can bear it to leave a person such as the Claimant stuck in unsuitable accommodation, with responsibility falling on whichever authority 'breaks' first. The Council's argument would, if correct, give rise to a highly unattractive situation similar to that described by Knowles J in R (DMA and Ors) v Secretary of State for the Home Department [2020] EWHC 3416 (Admin) at [200] in a context in which legal responsibility properly lay with the Secretary of State:*
>
> > *"… If the Secretary of State through her officials anticipates that [other persons] will provide accommodation whilst [those other persons] look to the Secretary of State through her officials to do so, matters can quickly deteriorate to "who blinks first". The victim of that situation is an individual who already faces an imminent prospect of serious suffering … and who is prevented from addressing these needs in any other way."*

See also para 92:

> *In my judgment, the Council should have ignored any s.95 accommodation. Had the Council done so, it would have been bound to conclude that the Claimant had an accommodation-related care need which the Council had a duty to meet by providing him with suitable accommodation. It follows that the Council has breached its Care Act duty to the Claimant by failing to identify his accommodation-related care need and by failing to provide suitable accommodation for him.*

Breaches of Articles 3 and 8 ECHR

Breach of ECHR art.3:

In this case it was held that it was beyond doubt that "*the prolonged period over which the Claimant has been in the unsuitable accommodation has caused him pain, discomfort and indignity which he would not otherwise have suffered.*" [§111]

However, that in of itself is not enough to establish a breach of Article 3 by the LA. Rather, the Court applied a two-stage test:

(1) Whether the level of the Claimant's suffering or indignity, caused by his having been left in the unsuitable accommodation, has crossed the severity threshold for constituting 'degrading treatment' under Article 3; and

(2) if it did, whether the Council is responsible for 'treatment' of the Claimant which crossed the severity threshold.

R (TMX) v London Borough of Croydon & Anor [2024] EWHC 129 (Admin)

In deciding the first question, the Court looked at *R (Aburas) v Southwark LBC* [2019] EWHC 2754 (Admin).

"a public authority's refusal to provide accommodation may be found to have crossed the Article 3 threshold if it has given rise to "an imminent prospect of serious suffering caused or materially aggravated by [that] refusal

As to what what is meant by "*serious suffering"*, the Court looked at *Limbuela*, and reminded itself that the Article 3 threshold is a high one *per* Lord Bingham.

R (TMX) v London Borough of Croydon & Anor [2024] EWHC 129 (Admin)

The Court held that the C's circumstances meant that there was "*no doubt that the Council's prolonged failure to provide him with suitable accommodation, by causing his daily life to be so diminished, has given rise to "an imminent prospect of serious suffering caused or materially aggravated by [that] refusal"; indeed, it has actually caused and aggravated serious suffering.*" [§118]

The Court also held that "*the Claimant has also experienced mental suffering that is likely to have been caused or materially aggravated by the extreme limitations on his quality of life to which I have referred. The Council's own records, including the December 2022 Care Act needs assessment (see the quotations in paragraph 32 above), show that the Council was fully on notice that his unsuitable accommodation was producing those effects in him and that he had been prescribed medication for depression and anxiety.*" [§119]

R (TMX) v London Borough of Croydon & Anor [2024] EWHC 129 (Admin)

"Lord Bingham … was not suggesting (and the Council in the present case has not argued) that there can be no breach of Article 3 through leaving a severely disabled person in unsuitable accommodation, regardless of how detrimental this may be for him, provided he has food and shelter. … Rather, the focus is on treatment that either: (a) causes or exacerbates intense physical or mental suffering, or is liable to exacerbate such suffering; or (b) is 'degrading' in the sense that it diminishes, or fails to respect, the person's human dignity." [§122]

R (TMX) v London Borough of Croydon & Anor [2024] EWHC 129 (Admin)

When assessing whether Article 3 has been breached, the Court took a:

> *"holistic view of the totality of the detriment caused to [the C], including the extent to which his quality of life and dignity have been diminished over a prolonged period. His unsuitable accommodation has severely affected practically all his basic daily activities. It is at least arguable that the things he has been unable to do – such as going outdoors, getting out of bed and walking short distances, using the toilet, having a shower, and going into the bathroom to wash his face or brush his teeth – either are, or are close analogues to, "basic necessities of life" such as shelter. Further, his evidence that he finds having to toilet, and to receive intimate personal care, in a bedroom shared with his teenage daughter distressing and humiliating is unsurprising and is an example of the impact of his unsuitable accommodation in terms of his personal dignity. It is clear from his evidence that it causes him to feel ashamed and diminishes his sense of self-worth."* [123]

R (TMX) v London Borough of Croydon & Anor [2024] EWHC 129 (Admin)

In respect of the second limb of the Article 3 test – whether the LA was responsible for 'treatment' of the Claimant which was degrading, that was answered by the holding in relation to the first ground of claim: responsibility for providing the C with suitable accommodation lay with the LA under the Care Act. It did not matter that the Claimant's unsuitable accommodation was provided by the SSHD and not by the LA: that was because the public authority holding the statutory duty for providing suitable accommodation for the Claimant was the LA. [§127]

The Court also usefully held that will not be enough to avoid a finding of breach of Article 3 for LAs to argue that they had or have difficulties in finding suitable accommodation, at reasonable cost, for the Claimant or those like him who have complex disability-related accommodation needs. [§141]

Article 8 ECHR

The Court when deciding this question applied a three-stage test:

(1) Did the Claimant's remaining in unsuitable accommodation –

(a) interfere with his physical and psychological integrity to a high degree, thus reaching a level of severity comparable to that required for a breach of Article 3, and/or

(b) substantially prevent members of a family from sharing family life together?

(2) Was the Claimant's lack of suitable accommodation attributable to culpability on the part of the Council?

(3) Having regard to all the circumstances – including both -

(i) the extent of the Council's culpability for the failure to act, and

(ii) the severity of the consequences of that failure – am I satisfied that the Council has breached Article 8 (i.e. failed to show respect for the Claimant's private and/or family life in circumstances where its relevant conduct was not necessary and proportionate in pursuance of a legitimate aim)? [§156]

R (TMX) v London Borough of Croydon & Anor [2024] EWHC 129 (Admin)

The Court answered all three questions in the affirmative.

(1) the Claimant's remaining in unsuitable accommodation interfered with his physical and psychological integrity to a high degree comparable to the level crossing the severity threshold for breaching Article 3. [158] The various impacts of remaining in this accommodation "prevented him from: (a) pursuing any meaningful personal development, and (b) developing relationships with other human beings and the outside world save for his immediate family with whom he lives."

(2) This was not a case where the LA "ha[d] been anxiously seeking to provide suitable housing in fulfilment of its legal duties but been delayed in doing so by resource constraints. Rather, there ha[d] been prolonged failure on the part of the Council to acknowledge their responsibility for providing suitable accommodation for the Claimant under the Care Act; and it is that conduct which has led to the Claimant remaining in accommodation that was so unsuitable that it substantially deprived him of private life.". Again, it was no answer to culpability that the LA was unaware of its legal duty and/or that it may have genuinely and reasonably thought that the duty to accommodate the C lay with the SSHD [164] Nor was the LA's culpability mitigated by the fact that the C rejected an offer of suitable accommodation from the SSHD, or that the LA had a genuine and realistic expectation that the C was likely to be offered suitable accommodation by the SSHD within a reasonably short period of time.

(3) Taking a holistic view, the Court was satisfied that the LA had "*failed to show respect for the Claimant's Article 8 right and that the interference with that right was not necessary and proportionate in pursuance of a legitimate aim.*" [167]

R (SB) v London Borough Of Newham [2023] EWHC 2701 (Admin)

As in *TMX*, the Court held that it was no answer to an asylum seeker's accommodated related eligible needs for care and support, that s.95 accommodation was available. As in *TMX*, the Court in *SB* held that the

> *"128. … the CA 2014 imposes a distinct duty on the local authorities to meet eligible needs for care and support and these should be considered separately from and prior to the application of the last resort provisions under IAA 1999"*

> *"129. As set out above, the provisions have a different focus and the SSHD's duty under s.95 of the IAA 1999 is a recourse of last resort."*

For the same reasons, the Court rejected the LA's submission that that the Claimants had an alternative remedy which was to obtain accommodation from the SSHD, and that it was nothing to the point and did not provide a basis for refusing the claim for judicial review that the Claimants had not applied to the SSHD for support [§127]

R (NS) v Secretary of State for the Home Office [2023] EWHC 2675 (Admin)

A similar issue arose in a different context in this case – here the Claimant sought to mount a challenge to the legality of the SSHD's Guidance entitled "Asylum seekers with care needs" (Version 2, August 2018) ("the ASCN Guidance"). The argument was that the policy sets an unlawful requirement for a care needs assessment to be completed by a local authority before a person can access initial accommodation ("IA") from the SSHD pursuant to s.98 of the 1999 Act.

R (NS) v Secretary of State for the Home Office [2023] EWHC 2675 (Admin)

Permission was refused on the papers because it had become academic in the Claimant's case. The Claimant renewed the application for permission to the Court. The Court (Saini J) in obiter remarks (without hearing submissions from the SSHD because interlocutory directions had been made that the SSHD was not required to address the merits of that ground) considered that:

> *"there was force in the Claimant's argument on the merits. That is because the relevant part of the ASCN Guidance might be read to suggest that if the asylum seeker has care needs (that could lead a local authority to conclude that it should accommodate the asylum seeker) the caseworker should refuse to provide s.98 accommodation, pending the conclusion of the local authority's assessment. And it is said that this is vouched by the fact that this is how the caseworker acted in the Claimant's case: see [8] above. In my judgment, there appears to be force in Leading Counsel for the Claimant's submission that the SSHD's duty under s.98 of the 1999 Act is not suspended pending the completion of a local authority assessment, and therefore the relevant part of the Guidance appears to instruct caseworkers to approach applications on an unlawful basis."*

However, permission was refused because it was an academic point where the Claimant was no longer personally affected by the ASCN Guidance and had since been granted asylum.

R (DXK) v Secretary of State for the Home Department [2024] EWHC 579 (Admin)

This was a wide-ranging challenge to the lawfulness of the system of allocation of asylum accommodation provided by the SSHD under s 95 and s 4(2) of the 1999 Act as it relates to pregnant and new mother asylum-seekers and failed asylum-seekers ("PNMAS").

Six grounds were pleaded.

- The first was an "individual challenge" to the SSHD's failure to provide adequate asylum accommodation under s 4(2) which became academic during the lifetime of proceedings.
- Grounds 2-6 were challenges to the lawfulness of the system as it applies to PNMAS as a wider group. These fell under two headings:

Grounds 2-4 (the 'systemic grounds'):

- Ground 2: Systemic breaches of the SSHD's duties to provide 'adequate' accommodation to PNMAS under s 4(2) and s 95 of the 1999 Act and his duty to prioritise PNMAS for DA in accordance with his own policy, the Healthcare Needs and Pregnancy Dispersal Policy, v3.0 (1 February 2016) (the 'HNPD Policy').
- Grounds 3 and 4(a) (the 'HRA grounds'): Systemic breaches of Articles 3, 8 and 14 ECHR and s 6 of the Human Rights Act 1998 ('HRA').
- Ground 4(b): Indirect discrimination contrary to s 19 of the Equality Act 2010

Grounds 5-6 (the 'due regard grounds'):

- Ground 5: Breach of the SSHD's duty to have regard to children's welfare under s 55 of the Borders, Citizenship and Immigration Act 2009.
- Ground 6: Breach of the SSHD's duty to have due regard to equality considerations in the discharge of public functions (the public sector equality duty or 'PSED') in s 149 EA 2010.

"6. While the grounds are wide-ranging, the central allegation common to all of them is that the SSHD has unlawfully failed to collect and monitor relevant statistical data on the allocation of DA to PNMAS which is necessary to ensure the discharge of his duties to this vulnerable group. The Claimant places special emphasis upon the judgment of Knowles J in R (DMA) v. Secretary of State for the Home Department [2021] 1 WLR 2374 ('DMA') in which the SSHD's failure to collect and monitor statistical data in relation to the provision of asylum accommodation to disabled people was held to be unlawful, considered in detail at paragraph 43, below."

The Court decided not to entertain Grounds 2 – 4 because they were academic, or Grounds 3 – 4 because the C lacked standing to bring those claims under s.7 HRA 1998, but it did decide to entertain Grounds 5–6 (the 'due regard' grounds) as they did not depend on any finding of breach or anticipated breach of individual duties and were less fact-sensitive.

The Court held that the absence of statistical data monitoring on the provision of accommodation under the 1999 Act to PNMAS was a breach of the PSED 6 (§124)) because -

"*Without such information he cannot discharge - and is therefore in breach of - his continuing duty under s 149(1)(b) to have due regard to the need to advance equality of opportunity between PNMAS and their infants, who share the protected characteristics of pregnancy and maternity and age, and persons who do not share those characteristics.*" [§157].

R (DXK) v Secretary of State for the Home Department [2024] EWHC 579 (Admin)

However, there was no separate breach of s 55 BCIA (Ground 5) [§159]. A salient reminder of the principle was issued nonetheless, which practitioners would do well to have in mind when considering s.55 duties:

"167. As Chamberlain J observed in R. (Kent CC) v Secretary of State for the Home Department [2023] EWHC 3030 (Admin), [36], the s 55(1) duty 'is not breached simply because (in the view of the court) the relevant functions could have been exercised in a way which ***better*** *safeguards and promotes the welfare of children'; the question for the court is 'whether the Home Secretary made arrangements for ensuring that, when the functions were exercised, the persons exercising them* ***had regard to*** *the specified need.' In this case, the documents recording the SSHD's decision-making in relation to the provision of asylum support in the PES, the AASC contract, the HNPD Policy and the Vulnerability Log SOP shows that the relevant decision-makers thought that what they were doing was sufficient to safeguard and promote the welfare of children. There is, therefore, no evidence to support a breach of s. 55 BCIA."* [emphasis supplied]

Current and ongoing litigation:

1) Bibby Stockholm

2) Weathersfield

3) Manston IRC

Thank you

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Community Care Law Update (Adults)

Welfare benefits

Desmond Rutledge, Garden Court Chambers

Thursday 28 March 2024

Contents of Presentation

- New claims for benefit: delays and the National Insurance number requirement
- Pre-settled status and rights under the EU Charter
- Migration to Universal Credit for those in housing benefit
- Introduction of a harsher sanction regime

NEW CLAIMS AND PROOF OF IDENTITY

- As UC is paid monthly in arrears, 'advance payments' (AP) are available
- Extension of maximum repayment period for UC APs from 12 months to 24 months
- What about new claimants – eg. those moving from asylum support / community care to mainstream benefits?
- If DWP refuses to process claim, can they ask for a payment on account? [Social Security (Payments on Account of Benefit) Regulations 2013, SI 2013/383, reg 5 – Payment on account of benefit where there is no award of benefit]
- CPAG JR Project - Judicial review pre-action template letters: JR15: Failure to offer an advance to a newly recognised refugee

NEW CLAIMS AND PROOF OF IDENTITY

- New claimants granted leave to remain should receive a Biometric Residence Permit (BRP) with a National Insurance number (NINO) on the back of the card
- Where someone does not receive their BRP card to prove their identity, the DWP can accept the following documents as proof of identity:
    - ARC (Application Registration Card)
    - Home Office Decision Grant Letter
- SSWP's operational guidance / DWP staff guidance - **Refugees and Asylum Seekers (v13.0)**
- Otherwise see:
    - How to verify your identity for Universal Credit gov.uk
    - Universal Credit and homeless people: guide for supporting organisations gov.uk

NEW CLAIMS AND THE NINO REQUIREMENT

- For any claim for benefit, the individual must provide NINO or make an application to have one allocated to them (Social Security Administration Act 1992, ss 1(1A) and (1B)
- Question: Can benefit be award if an application for a NINO has been made?
- Answer: ‘no’.
- Upper Tribunal held that the information must be fully verified before the NINO can be allocated (*R (Bui) v Secretary of State for Work and Pensions* [2022] UKUT 189 (AAC)

NEW CLAIMS AND THE NINO REQUIREMENT – Cont.

Question: Can SSWP make an advance payment to claimants without a NINO?

- Answer: 'yes'
- Court of Appeal held such payments possible if the conditions for making a payment on account are satisfied (*R (Bui) v Secretary of State for Work and Pensions* [2023] EWCA Civ 566 at [79]).

OTHER CASES

- In *R (BK) v Secretary of State for Work and Pensions & Anor* [2023] EWHC 378 (KB) - failure to provide a NINO on a biometric residence permit to those granted leave under Destitute Domestic Violence Concession did not breach ECHR

Exemptions To Nino Requirement

1. Pension Credit: partner does not have to satisfy the NINO requirement (State Pension Credit Regulations 2002, SI 2002/1792, reg 1A)

2. Universal Credit: partner does not have to satisfy if a person subject to immigration control (UC Regulations 2013, SI 2013/376, reg 3(3), Advice to Decision Makers ADM Chapter A2: Claims, para A2153–54)

3. Child Benefit: can be awarded pending the allocation of a NI number (Social Security Administration Act 1992, s 13(1B)(b))

Pre-settled status and rights under the Charter

Case C-709/20 CG v The Department for Communities in Northern Ireland held:

- People with pre-settled status ('PSS') had a form of right to reside that brought them within the scope of the EU Charter

- Decision makers could only refuse UC to those with PSS if satisfied that -
  - Their fundamental rights were not placed at risk / would not prevent them living in dignity

Secretary of State for Work and Pensions v AT (Aire Centre and IMA intervening) [2022] UKUT 330 (AAC) held:

- *CG* applies to UC claims made after the end of the implementation period
- To meet the 'dignity test' the claimant needs to show they are currently without adequate resources to meet their basic needs (para 125).

SSWP v AT (AIRE Centre and IMA intervening) [2023] EWCA Civ 1307 held:

- The benchmark determining whether there is a breach of Article 1 is the approach taken by the CJEU in *CG* (para 113)
- Support 'in principle' does not count; what matters is the provision of actual support to the individual in need (at 118)
- The provision of accommodation will not be treated as sufficient if it is merely temporary (para 112)
- The Localism Act 2011 was not intended to be used to plug other support gaps (128(i))

FURTHER DEVELOPMENTS

- On 9 February 2024, the Government was refused permission to appeal against the Court of Appeal's judgment by the Supreme Court (UKSC 2023/0163 *Secretary of State for Work and Pensions (Appellant) v AT (AP)* (Respondent))

- According to CPAG, the DWP required to revisit 2,900 cases

AT and housing assistance

- Shelter brought at test case on behalf of a PSS denied homelessness assistance in Manchester County Court - *C v Oldham (*Case J05MA951)
- There were interventions by (i) Independent Monitoring Authority, (ii) The3Milliion, and (iii) AIRE Centre
- Concerns a third country national granted pre-settled status in November 2019 as a dependent family member
- Was heard on 8 and 9 February 2024 - judgment is reserved

MIGRATION TO UC

- August 2023: 5.2 million households were claiming UC, with 2.1 million households remaining on legacy benefits (Progress in implementing Universal Credit, National Audit Office, p 21).

- PHASE ONE: Tax credit only claimants selected for the managed migration during 2023.By the end of the 2023/24 tax year, most will have migrated to UC.

- PHASE TWO: Tax credit claimants who also claim any of the other legacy benefits selected during 2024. By the end of the 2024/25 tax year, most will have migrated to UC.

MIGRATION TO UC cont.

- PHASE THREE: People claiming other legacy benefits, but not ESA, will also be selected for the managed migration exercise during 2024. By the end of the 2024/25 tax year, most will have migrated to UC.

- PHASE FOUR: People claiming ESA only or ESA + another legacy benefit, will be selected for the managed migration exercise during 2028. By the end of the 2028/29 tax year, most will have migrated to UC.

The Migration Process

- DWP sends legacy benefit claimants a migration notice, advising them they need to apply for UC if they want to continue receiving financial support

- Claimants are given three months to apply, after which their legacy benefit will be stopped (and they will not have any transitional protection)

- DWP sends claimants reminders during this period and claimants can ask for more time to make a claim.

SHELTER'S Concerns

- On 27 March 2024, Shelter issued a briefing note which called for the DWP to pause migration of housing benefit-only claimants to UC to avoid increased risk of rent arrears and homelessness.

- Shelter warned that DWP pilots show that housing benefit-only claimants were more likely to miss the three-month deadline to claim UC following receipt of a migration notice than other cohorts.

- With an estimated 340,000 claimants due to be migrated from housing benefit only, or from a combination of housing benefit and other legacy benefits by the end of 2024, Shelter says that: -
    - "There is a serious risk that without appropriate support to claim before the three-month deadline, many people will face loss of housing benefit which could put them at risk of rent arrears and, ultimately, homelessness."

- For more information, see Briefing note: Managed migration to universal credit from shelter.org.uk

INTENSTIFYING SANCTIONS

- 16 November 2023, as part of the Autumn Statement, the Chancellor unveiled a ‘Back to Work Plan’ to “help people stay healthy, get off benefits and move into work”
- This included stricter benefit sanctions to be enforced by the DWP “for people who are able to work but refuse to engage with their Jobcentre or take on work offered to them
- Benefit claimants who “continue to refuse to engage with the Jobcentre” face having their claim closed
- The new sanctions will target those who have been on an open-ended sanction for more than six months (and are solely eligible for the standard allowance)

INTENSTIFYING SANCTIONS cont.

- It will review claims of those who have been on open-ended sanctions for more than eight weeks
- Interventions by work coaches will intensify the longer the claimant remains unemployed
- Those who have failed to find a job after six months, will be referred to Restart
- For those on Restart who are still unemployed after 12 months, the work coach will decide on:

INCREASING / INTENSTIFYING SANCTIONS

(i) further work search conditions or
(ii) impose employment pathways or
(iii) require them to accept time-limited placements or
(iv) require them to take part in some other intensive activity.

- If a claimant refuses to accept these new conditions, their universal credit claim will be closed

- The enhanced model for sanctions will be rolled out gradually from 2024.

THE END

Thank you

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