
GARDEN COURT
CHAMBERS

Accommodation and Support for Destitute Migrants: Case Law Update

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24 April 2024

Caselaw update for asylum support under Sections 95, 98 and 4 of the IAA 1999

Maaha Elahi, Garden Court Chambers

24 April 2024

Caselaw update

- ***R (HA) v SSHD* [2023] EWHC 1876 (Admin):** children under 3, delays in s95 and s98 decision and provision
- ***R (NS) v SSHD* [2023] EWHC 2675 (Admin):** location
- ***Re Dadzi's Application for Judicial Review* [2023] NIKB 113**: s95 or s4 support once ARE
- ***R (SA) v SSHD* [2023] EWHC 1787 (Admin):** Pregnancy and new mother asylum seekers (PNMAS)
- ***R (DXK) v SSHD* [2024] EWHC 579 (Admin):** PNMAS and statistical monitoring

R (HA) v SSHD [2023] EWHC 1876 (Admin)

Three issues considered:

1. Can payments for asylum-seekers with children under 3 (under reg 10A) be met by provision in kind (e.g. provision of food at a hotel);

2. Delays in the s95 decision and provision;

3. Is the practice of providing s98 accommodation only (and no financial support) unlawful?

C1 and C2: both had children under 3. Neither received any payments under reg 10A. D argued that this could be met by provision in kind. Court held that reg 10A required cash payments specified in that provision.

R (HA) v SSHD [2023] EWHC 1876 (Admin)

- C3 applied for s95 financial support only. A decision was not made until almost 7 months later. Pending this decision, she was not provided with any s98 support.

- C4 was at risk of eviction and applied for s95 support. A s95 decision was not made until nearly 11 weeks later and he was not made aware of this decision.

R (HA) v SSHD [2023] EWHC 1876 (Admin)

Decision delay

"Neither the 1999 Act nor the 2000 Regulations specifies the time within which section 95 applications are to be determined. **However, I am satisfied that there is an obligation to determine such claims promptly**" (§35).

"The obligation to take section 95 decisions promptly cannot be equated to a set period of time that applies in all cases. The circumstances of each application must be looked at on their own terms. However, absent particular cause, I am satisfied that what promptness requires for this purpose is that section 95 applications are decided by the Home Secretary within a short period following an applicant's first contact with Migrant Help. **In all cases the Home Secretary and those she has contracted with must act promptly; in most cases a decision ought to be taken within 10 days** (§37)."

R (HA) v SSHD [2023] EWHC 1876 (Admin)

Provision delay

"Neither the Act nor the Regulations prescribes the period within which section 95 support is to commence once a decision to provide that support has been made. However, given the nature of a section 95 decision, which is an acceptance that the applicant is, or is soon to be, destitute, **the necessary inference is that once a decision has been made steps towards making section 95 provision will start immediately and will be pursued efficiently**. Each case will therefore turn on its own facts" (§49).

R (HA) v SSHD [2023] EWHC 1876 (Admin)

Section 98 support

- SSHD's practice of providing s98 support by way of hotel accommodation, rather than payments, considered.
- Court stated that this can be overlooked where there is a prompt s95 decision.
- However, where significant time passes between s95 application and decision, failure to consider s98 support in the form of financial support is unlawful (§§42-44).

R (NS) v SSHD [2023] EWHC 2675 (Admin)

Location of accommodation

- C suffered from psychological distress and suicidal ideation and was heavily dependent on a support network of friends, the religious community at his local mosque, his youth worker and weekly counselling in London.

- Care needs assessment from local authority identified him as being at substantial risk of self-neglect, deteriorating mental health and self-harm, and that to mitigate those risks he needed to continue to engage with all of his current support network.

- Caseworker consulted a medical adviser and offered C accommodation in Swindon on a “no choice” basis, as suitable medical and support services existed in other UK cities.

R (NS) v SSHD [2023] EWHC 2675 (Admin)

Approach to assessing accommodation (§32):

i. Section 95 accommodation must appear to the SSHD to be adequate for the needs of the supported person.

ii. When provided with a local authority assessment, the caseworker is required as a minimum by public law to take it into account as a **mandatory relevant consideration.** Asylum accommodation provided under s.95 or s.98 should be suitable in view of the assessed needs.

R (NS) v SSHD [2023] EWHC 2675 (Admin)

Approach to assessing accommodation (§32):

iii. When assessing the adequacy or suitability of accommodation, the SSHD had a *Tameside* duty of inquiry. In the instant case, that meant asking whether the accommodation was suitable for the C's needs and required the caseworker to acquaint themselves with the care needs assessment and other evidence regarding needs.

iv. The caseworker was entitled to seek medical advice on the questions of adequacy or suitability but could not simply "rubber stamp" the adviser's view. The statutory duty could not be delegated.

Re Dadzi's Application for Judicial Review [2023] NIKB 113

Section 95 or section 4 support once ARE?

D's asylum claim was refused and he became ARE. He subsequently submitted further submissions.

SSHD issued a decision letter stating his s95 support and his eligibility for accommodation would cease. If he could not leave the UK, he may be entitled to short-term support under s4.

Court stated that the decision to withdrawn s95 support was lawful. S95 was intended to be withdrawn once asylum-seekers initial claim had been determined and they become ARE.

From that point, section 4 operated as a safeguard to avoid Art 3 breaches.

R (SA) v SSHD [2023] EWHC 1787 (Admin)

Pregnant and new mother asylum seekers

- C was heavily pregnant with 3 children and was housed in hotel accommodation. She gave birth and remained in hotel accommodation (albeit transferred to a larger room).

- Fordham J held the SSHD had breached her s95 duty to provide adequate accommodation.

R (SA) v SSHD [2023] EWHC 1787 (Admin)

Key features in the judgment:

1. **Passage of time (decisive feature):** in hotel accommodation for one year, 4 months. This breach exceeded what could be tolerable:

“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” (§23).

R (SA) v SSHD [2023] EWHC 1787 (Admin)

2. **Vulnerability**:

- Section 4, Asylum Seekers (Reception Conditions) Regulations 2005: where asylum seeker or family member is a vulnerable person, SSHD is required to take into account their special needs. Includes pregnant woman and lone parent with a minor child.

- Healthcare Needs and Pregnancy Dispersal Policy: generally constituted self-furnished flats and houses.

C fell squarely within the regulations and policy; the SSHD had unjustifiably departed from both.

R (SA) v SSHD [2023] EWHC 1787 (Admin)

3. **Facilities:**

- Access to laundry facilities limited to on a weekly basis; inadequate for the care of a new-born baby; and

- Cramped living conditions. The family eat, live and sleep in this small space. No shared spaces for eating, doing homework and playing.

R (DXK) v SSHD [2024] EWHC 579 (Admin)

Lack of statistical monitoring of pregnant and new mother asylum seekers

- Challenge of the system of allocation of asylum accommodation to PNMAS (under s95 and s4).

- Since March 2020, there had been significant delays in the provision to asylum-seekers and failed asylum-seekers of dispersal accommodation, which was longer-term and self-contained, resulting in people being inappropriately accommodated for long periods in initial accommodation, which was usually single rooms in hotels.

R (DXK) v SSHD [2024] EWHC 579 (Admin)

- DXK argued that the SSHD could not evidence his due regard to the PSED because he had no system of monitoring how many PNMAS received asylum support, the nature of their accommodation or how quickly they were allocated dispersal accommodation, and no way of making a comparison with other asylum seekers.

- Court held that to discharge his duty under s.149(1)(b) (to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it), SSHD had to have due regard to the need to take steps to meet the differing needs of PNMAS for dispersal and how to minimise or remove the particular disadvantages that delays in dispersal caused them, which could include treating PNMAS more favourably than other asylum seekers/failed asylum seekers

R (DXK) v SSHD [2024] EWHC 579 (Admin)

- With no statistical monitoring, he could not assess how vulnerable persons were affected by the delays after March 2020, whether he was discharging his duties towards them, or whether the HNPD Policy was operating as intended.

- There was no evidence that he had considered whether statistical data monitoring was necessary.

- Statistical data did not have to always be collected to discharge the PSED, but in some cases, such as this, hard statistical data was required.

- The EHRC guidance stated that equality evidence, including hard statistical data, was at "the root of effective compliance with the general equality duty". Statistical data was the 'key means by which to identify and correct failure and to inform change”

Asylum Matters “Surviving in Poverty”, December 2023

Thank you

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GARDEN COURT
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Accommodation for UASCs and age disputed persons

Georgie Rea

25 April 2023

ISSUES

1. Accommodation in hotels
   i. Risk of using of hotels for housing UASCs
   ii. National Transfer Scheme
   iii. *ECPAT UK v Kent County Council and Secretary of State For The Home Department [2023] EWHC 1953 (Admin)*

2. Local Authority support under s 20 Children Act 1989
   i. Age disputed children
   ii. Access to support as care leavers

3. Home Office 'care' under the Illegal Migration Act 2023

Hotels

- The Home Office's systemic failure in processing asylum claims has resulted in a growing number of asylum seekers in 'temporary' asylum accommodation.

- The Home Office estimates that "*about 51,000 destitute migrants are currently being accommodated in hotels*" and it is looking to reduce its estimated £6 million per day expenditure by using army camps and barges (24 May 2023).

- Refugee Council Report in 2021 (summary) Conditions in Hotels:
  - No capacity to cook familiar food or for children to engage in play.
  - Parents poor mental health has a greater impact on children in the close quarters of hotel living arrangements.
  - Children living in hotels experience high levels of social isolation and school placements can help them to establish lasting friendships.
  - Severe overcrowding with nowhere for children to complete their homework.
  - Link to delayed cognitive development and communication skills.

Report on the use of hotels for housing UASCs

Independent chief inspector of Borders and Immigration- October 2022

•The use of hotels did not constitute a permanent local authority placement but were provided on a 'short-term interim basis', and it fell to local authorities to provide services under Part III of the Children Act 1989.

•No agency or government department has statutory responsibility for these children. The Home Office has not assumed this statutory responsibility and is not operating as the 'corporate parent'.

•The local authorities of the areas where these hotels are located do not have statutory responsibility for these young people as they are not considered to be 'Looked After'.

•The young people are not provided with any kind of formal or informal education while living in the hotels. Social workers had identified a need for more educational input, such as English as a Second Language. Home Office staff acknowledged the importance of education but commented: "there's no way our provision can cater for that gap."

National Transfer Scheme Protocol for UASCs

National Transfer Scheme ("NTS"): transfers of UASC's into the care of a local authority across the UK.

- 2016: NTS formed the basis of a voluntary agreement made between local authorities in England to ensure a fairer, more equitable distribution of UASC's across local authorities.

- From 26 July 2021: the NTS operated on the basis of a national voluntary rota

- From 15 February 2022: all local authorities with children's services in the UK have been directed to participate in the NTS, commonly referred to as a 'mandated NTS'.

- Currently: operating under the powers set out under Section 72(3) of the Immigration Act 2016 providing for the SSHD to direct local authorities to comply with the scheme. All local authorities and Health and Social Care Trusts are subject to a direction under section 72(3) of the 2016 Act and are under a mandatory duty to comply with the NTS.

"We encourage local authorities with capacity to utilise placements for UASC who require them, including to support entry local authorities such as Kent County Council."

ECPAT UK v Kent County Council and SSHD [2023] EWHC 1953 (Admin)

Stephanie Harrison KC, Gráinne Mellon, Ollie Persey and Georgie Rea, of the Garden Court Chambers Public Law team, instructed by Bhatt Murphy for Brighton & Hove City Council.

- Ruling: HO placing unaccompanied asylum-seeking (UAS) children in hotels rather than into local authority care across the country, through the statutory NTS, was unlawful.

- The distribution of UAS children under NTS is supposed to be mandatory, but at no time during the unlawful use of hotels did the HO force reluctant local authorities to take children as quickly as the scheme requires.

- In future, the UK government will need to ensure that the NTS operates in a way that permanently eliminates the use of hotels to accommodate these children.

- Evidence revealed the HO had planned to open more hotels, with those commissioned receiving tax-payer funds while standing empty, following the July judgment that their use was unlawful.

ECPAT UK v Kent County Council and Secretary of State For The Home Department [2023] EWHC 1953 (Admin)

HO Evidence: 106 children being accommodated in hotels in Kent in September 2023, of which 83 were under 16 and the youngest child was 13 years old. The HO confirmed that since the 18 August, 2 children have gone missing.

Key issues with Hotel Accommodation:

1. No parental responsibility
2. Children not becoming looked after children
3. Trafficking or re-trafficking risk
4. Lack of access to education

Trafficking Considerations

Re-trafficking: The current state of play November 2021, Independent Anti-Slavery Commissioner

- Children not being correctly identified as victims in the first instance, going missing from care and being subjected to age disputes were identified as factors that could facilitate re-trafficking in a UK context.

The ADCS Guidance:

Page 7: Many trafficked children and young people go missing within 48 hours of becoming looked after.

Page 10: Other than in exceptional circumstances, children and young people will be looked after under Section 20 of the Children Act 1989 whilst the age assessment process continues.

Page 11: particular care must be given to planning accommodation for potential victims of trafficking who may be at risk of going missing very soon after discovery. Specialist placement should be considered for these children and young people.

Page 41: The following principles should guide decision making on placements for unaccompanied children and young people:
- Special consideration should be given to children and young people who may be trafficked; they may need additional support and monitoring in placement. That may include moving them out of the area in which they were exploited.
- Placement staff and foster carers should receive training on meeting the specific needs and vulnerabilities of unaccompanied and trafficked children.

Age Disputed Children: Legislative update

Age Assessment: Nationality and Borders Act 2022 Pt 4

Section 49. Interpretation of Part, etc.

Age Disputed Person

- An individual who requires leave to enter the UK.
- Who a Local Authority/ Public Authority/ Secretary of State has insufficient information to be sure of their age.

Comment

- New procedures will apply to all people who require leave, not just asylum seekers.
- No clarification on what 'sure' means in this context - sure of age or sure a person is/ is not a child.

Illegal Migration Act 2023

Section 4(5): For the purposes of this Act (other than sections 16 and 17) a person ("C") is an "unaccompanied child" if—

(a)C meets the four conditions in section 2,
(b)C is under the age of 18, and
(c)at the relevant time no individual (whether or not a parent of C) who was aged 18 or over had care of C.

Comment

- Definition of UASC in the immigration rules (352ZD) broader and aimed at child protection
  - Included children who lodged their claim under 18 (even if they are now 18), set in time at point of entry
  - *"Is separated from both parents and is not being cared for by an adult who in law or by custom has responsibility to do so"*
- New definition of an unaccompanied child aimed at exclusion of children
  - If they are cared for by relatives in the UK, they will not meet the definition
  - Takes them out of scope of protection

Section 57: sets out changes to age assessment processes, including removal of the right to appeal a decision, and allows the removal of a person while any judicial review challenge is ongoing. Courts and tribunals are told that they may only decide that the decision was wrong in law and not that it was wrong as a matter of fact.

Securing Accommodation: Local Authorities

Section 20 Children Act 1989

Section 20: Provision of accommodation for children: general.

(1)Every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation as a result of—
(a)there being no person who has parental responsibility for him;
(b)his being lost or having been abandoned; or
(c)the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care.

- Under s20 of the Children Act 1989, the local authority has a statutory responsibility to accommodate unaccompanied, asylum-seeking children (UASC).

- Where the child is accommodated for more than 24 hours, they become a 'looked after' child
  - the local authority where the child presents has a statutory duty to safeguard and promote the child's welfare in the same way as any other looked after child.
  - The UASC will be entitled to the same local authority provision as any other looked after child.
  - Assessment and care provisions for the child should commence immediately as for any looked after child, *irrespective* of whether an application (e.g. an asylum claim) has been submitted to the Home Office. (Statutory Guidance at [10])

Securing Accommodation

1. **The Statutory Guidance** for Local Authorities on Care of Unaccompanied Migrant Children and Child Victims of Modern Slavery, published in November 2017:

   "...that where the person's age is in doubt, they must be treated as a child unless, and until, a "case-law compliant age assessment" shows the person to be an adult."

2. Following ***R(S) v Croydon LBC* [2017]** EWHC 265, it is unlawful for a Local Authority not to treat an age disputed person as a child, pending the determination of their age assessment. The Local Authority may not depart from the Statutory Guidance unless they provide cogent reasons for doing so.

3. Compliance with the **Age Assessment Guidance** ("the ADCS Guidance") will be relevant to whether the reasons given are "cogent".

4. It is essential that advisors seek to secure section 20 accommodation as soon as possible where the child is approaching their 18th birthday (on the basis of their claimed age) to ensure they can become an **eligible child under Schedule 2, Paragraph 19B Children Act 1989.**

Presumption About Age (Trafficking Cases)

Modern Slavery Act 2015: *Section 51 "Presumption about age"*

(1)This section applies where—

(a) a public authority with functions under relevant arrangements has reasonable grounds to believe that a person may be a victim of human trafficking, and

(b) the authority is not certain of the person's age but has reasonable grounds to believe that the person may be under 18.

(2) Until an assessment of the person's age is carried out by a local authority or the person's age is otherwise determined, the public authority must assume for the purposes of its functions under relevant arrangements that the person is under 18.

ADCS, page 23: In accordance with the EU Directive on Trafficking in Human Beings and the Modern Slavery Act, 15 particular care should be given where there is any possibility that a child or young person has been trafficked, and in these cases the presenting child or young person should be presumed to be under 18 years of age.

The statutory guidance by the Department for Education for the care of unaccompanied and trafficked children states on p. 4, point 7: "*Note that, where the person's age is in doubt they must be treated as a child unless and until a full age assessment shows the person to be an adult.*"

Interim Relief: Mandatory section 20 Accommodation

A v Croydon LBC [2009] UKSC 8

[53]…the definition of "child" in section 105(1) applies to the Act as a whole, without qualification or exception. The question whether the child is "in need" is for the social worker to determine. But the question whether the person is or is not a child depends entirely upon the person's age, which is an objective fact. The scheme of the Act shows that it was not Parliament's intention to leave this matter to the judgment of the local authority.

R (the Application of BG) v Oxfordshire County Council [2014] EWHC 3187 (Admin)

[33] Parliament, as explained by the Supreme Court, has imposed in the present area a heightened duty on the reviewing court to evaluate objective facts for itself…once the court has reached the position at the permission stage filter that there is a properly arguable case which ought to proceed to a hearing, the court is squarely seized of a matter which falls within what can properly be described as a primary judgment of the court.

R(S) v Croydon LBC [2017]

- ***R(S) v Croydon LBC [2017] EWHC 265:*** Section 7 of the Local Authority Social Services Act 1970 applies to age assessments carried out by local authorities, with the result that, when conducting such an assessment, the local authority is obliged to follow and apply any relevant statutory guidance absent cogent reasons for not doing so (at [36]).

- If a local authority departs from this Statutory Guidance and refuse to treat the Claimant as a child, pending the determination of his age assessment, it must provide cogent reasons for doing so (at [38]).

- Confirmed the binding effect of the Statutory Guidance, 'Care for unaccompanied and trafficked children' issued in July 2014 required the defendant to accommodate the claimant pending an assessment of his age. The material passage from that guidance was: *"Note that, where the person's age is in doubt, they must be treated as a child unless, and until* ***a full age assessment*** *shows the person to be an adult."* (at [30]).

  - Note: New version of that guidance, issued in November 2017 which requires that, where the person's age is in doubt, they must be treated as a child *"unless, and until,* ***a case-law compliant age assessment*** *shows the person to be an adult" (Statutory Guidance 2017 at [8]).*

- The ADCS guidance is relevant to any consideration of whether a Local Authority has cogent reasons for departing from the statutory guidance (at [50])

Securing Accommodation: Care Leaver Support

The Statutory Guidance: Care Leaver Support

Local Authorities on Care of Unaccompanied Migrant Children and Child Victims of Modern Slavery, published in November 2017

11. The Care Planning, Placement and Case Review (England) Regulations 2010 set out local authorities' duties with regard to providing for looked after children and care leavers who are eligible children. The Care Leavers (England) Regulations 2010 likewise set out duties regarding care leavers who are relevant or former relevant children. These Regulations were amended in 2014 to require that those duties are fulfilled with particular regard to the child's circumstances and needs as an unaccompanied or trafficked child. The Regulations apply to all children, regardless of their immigration status, nationality or documentation.

94. If the care leaver's immigration status remains *unresolved*, pathway plans should consider the implications for them if their outstanding application or appeal is refused. Subject to a Human Rights Assessment by the local authority, the care leaver *may* then cease to be eligible for care leaver support under the restrictions on local authority support for adults without immigration status (in **Schedule 3 to 30 the Nationality, Immigration and Asylum Act 2002**).

- On 9 November 2021, NRPF published a new human rights assessment template and accompanying practice guidance to assist councils with the process of undertaking a human rights assessment when **Schedule 3 of the Nationality, Immigration and Asylum Act 2002** applies to an adult with care needs, family, or care leaver (age 18+) who is receiving or applying for social services' support.
- Although the Home Office provides local authorities with funding to support UASCs, the weekly amount significantly reduces once a child turns 18 and ends three months after a care leaver becomes 'Appeal Rights Exhausted'.

Support for Care Leavers

Category	Requirements	Entitlements
Eligible Child Schedule 2, Paragraph 19B CA 1989	• Aged 16 or 17 • Looked after by children's services for a period of 13 weeks since the age of 14 • Currently looked after	• A Personal Advisor • A Needs Assessment • A Pathway Plan • Receive all the care and support they normally receive until they leave care
Relevant Child Section 23A CA 1989 Section 23B CA 1989	• Aged 16 or 17 • Looked after by children's services for a period of 13 weeks since the age of 14 • Looked after for a period of time after their 16th birthday • No longer looked after	• A Personal Advisor • A Needs Assessment • A Pathway Plan • Accommodation and maintenance • financial support to meet education, training and employment needs
Former Relevant Child Section 23C CA 1989 Section 23CZA CA 1989 Section 23CA CA 1989	• Aged between 18 and 25 • Previously an eligible child and/or a relevant child	• A Personal Advisor • A Pathway Plan, kept under regular review • Assistance with employment, education and training • Assistance with accommodation • Help with living costs
Qualifying Care Leaver Section 24 CA 1989	• Aged between 16 and 25 • Looked after by children's services on, or after, their 16th birthday and no longer looked after • Spent less than 13 weeks in care since 14th birthday, i.e. do not fulfil criteria for eligible or relevant child	• Help with living expenses and if they are in higher education they may also help with securing vacation accommodation • advice and assistance from Children's Services, which may, be in cash

Securing Accommodation: Home Office Care

Scope of support for Unaccompanied Children - Pt 3 Illegal Migration Act 2023

Section 16: Accommodation and other support for unaccompanied migrant children

(1)The Secretary of State may provide, or arrange for the provision of, accommodation in England for unaccompanied children in England.

...

Section 17 Transfer of children from Secretary of State to local authority and vice versa

(4) The Secretary of State may decide that an unaccompanied child who is being provided with accommodation by a local authority in England is to cease being provided with that accommodation on a certain date (the transfer date).

(5) On making that decision, the Secretary of State must direct the local authority to cease providing the child with accommodation from the transfer date.

(6) The transfer date must be a date falling after the end of the period of five working days beginning with the day on which the local authority was given the direction.

(7) When a local authority ceases providing a child with accommodation in compliance with a direction under subsection (5), the Secretary of State must arrange for the child to reside in accommodation for unaccompanied migrant children from the transfer date.

Section 55 The Borders, Citizenship and Immigration Act 2009

Section 55 -Duty regarding the welfare of children

(1) The Secretary of State must make arrangements for ensuring that—
(a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and
(b) any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need.

(2) The functions referred to in subsection (1) are—

(a) any function of the Secretary of State in relation to immigration, asylum or nationality;
(b) any function conferred by or by virtue of the Immigration Acts on an immigration officer;
(c) any general customs function of the Secretary of State;
(d) any customs function conferred on a designated customs official.

Section 55 - *R(HZ) v Secretary of State for the Home Department* [2023] EWHC 660 (Admin) at [91]

The Section 55 duty, where it applies:

i) requires consideration of a child's specific circumstances, not merely consideration of "children" generally: ***Zoumbas v Secretary of State for the Home Department [2013] UKSC 74; [2013] 1 WLR 3690*** at [10];
the decision-maker should identify the principal needs of the children (broadly construed), both individually and collectively: ***Nzolameso v Westminster CC [2015] UKSC 22*** at [23] and [27];

ii) relates not merely to safeguarding the affected children but also to actively promoting their welfare: ***Nzolameso v Westminster*** at [27]; ***YR v Lambeth London Borough Council [2022] EWHC 2381*** at [46] and [82]; and

iii) imposes an enhanced duty to be properly informed and carefully to consider all relevant information. What precisely is required in each case is fact-sensitive and a matter of substance rather than form. In ***JO v Secretary of State for the Home Department [2014] UKUT 00517 (IAC)*** at [10] and [11].

Thank you

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GARDEN COURT
CHAMBERS

‘Accommodation-related needs’: navigating the interplay between Home Office and Local Authority support

Nadia O’Mara, Garden Court Chambers

24 April 2024

Overview

- Legal context:
  - CA 2014 and 'accommodation-related' needs for care and support.
  - Home Office powers/ duties to accommodate under the IAA 1999.
  - Interplay between the two statutory schemes.

- Recent cases and key takeaways:

  (i) *R (SB & SBO) v London Borough of Newham* [2023] EWHC 2701 (Admin); [2024] 27 CCLR, 20 October 2023.

  (ii) *R (TMX) v London Borough of Croydon (1) SSHD (2)* [2024] EWHC 129 (Admin).

- Tips and tricks when navigating the interplay between Home Office support and support provided under the Care Act 2014 by local authorities.

Care Act 2014 – overview of powers/ duties

- Care Act 2014 ('**CA 2014**') is the statutory scheme for the provision of social care to adults
- **S. 1** imposes a general duty 'in exercising a function' in relation to a person under Part 1, namely, to promote that person's wellbeing ('the **wellbeing principle**').
- **S. 1(2)** defines a person's wellbeing in terms of its relation to: (i) personal dignity, (ii) physical and mental health and emotional wellbeing, (iii) protection from abuse and neglect, (iv) control by the person over day-to-day life, (v) participation in work, education, training, recreation, (vi) social and and economic wellbeing, (vii) domestic, family and personal relationships, (viii) suitability of living accommodation, (ix) the individual's contribution to society.
- **S. 9** imposes a duty to undertake a 'needs assessment' where it appears to a LA that an adult may have needs for care and support. The LA must assess whether and to what extent a person has such needs.
- If the LA is satisfied that a person has such needs, it must under **s. 13(1)** determine whether any of those needs meet the eligibility criteria under the **Care and Support (Eligibility Criteria) Regulations 2015**.
- **Regulation 2(1)** provides that needs will be 'eligible' if (a) they arise from physical or mental impairment or illness; (b) cause the person to be unable to achieve two or more specified outcomes; and as a result (c) will have a significant impact on wellbeing.
- **Regulation 2(2)** lists ten 'specified outcomes' for the purposes of Reg2(1)(b).

Care Act 2014 – overview of powers/ duties (continued)

Regulation 2(2), The Care and Support (Eligibility Criteria) Regulations 2014

The specified outcomes are—

(a) managing and maintaining nutrition;
(b) maintaining personal hygiene;
(c) managing toilet needs;
(d) being appropriately clothed;
(e) being able to make use of the adult's home safely;
(f) maintaining a habitable home environment;
(g) developing and maintaining family or other personal relationships;
(h) accessing and engaging in work, training, education or volunteering;
(i) making use of necessary facilities or services in the local community including public transport, and recreational facilities or services; and
(j) carrying out any caring responsibilities the adult has for a child.

Care Act 2014 – overview of powers/ duties (continued)

- **S. 18(1)** provides that a local authority **must meet** the adult's needs for care and support which meet the eligibility criteria **if**, among other things, they are ordinarily resident in the local authority's area or present in its area but of no settled residence.
- **S. 24** requires the LA to prepare a 'care and support' plan. **S. 25** provides that the plan must set out the needs and how the LA is going to meet them. **S. 25(3)** requires the LA to involve the adult and (if relevant) their carer in preparing the plan. **S. 25(6)** requires the plan to be proportionate to needs. **S. 27** requires the plan to be kept under review.
- **S. 19** provides the local authority with a **power** to meet an adult's needs in circumstances where there is no established duty under **s. 18**. **S. 19(3)** provides a power to meet needs which appear to be urgent (irrespective of whether the person is ordinarily resident) without the LA having conducted a needs/ financial assessment/ made a determination under s. 13(1).
- **S. 8** gives examples of what may be provided to meet needs for care and support – these include accommodation *"in a care home or in premises of some other type"* (**s. 8(1)(a)**).
- **S. 23** contains an exception for the provision of housing – an LA may not meet needs under ss. 18-20 by doing anything which it is required to do under the Housing Act 1996.
- **S. 21** provides that a LA may not meet needs for care and support of an adult to whom **s. 115 IAA 1999** (exclusion from benefits) applies and whose needs for care and support have arisen **solely** (a) because the adult is destitute, or (b) because of the physical effects, or anticipated physical effects of being destitute (this is known as the 'destitution plus test').

‘Accommodation-related’ needs for care and support

When is a local authority required to provide accommodation under s. 18 CA 2014?

- The established position is that a need for accommodation by itself does not constitute a need for care and support, but that accommodation may nevertheless need to be provided, as a vehicle to deliver care and support, where that care and support is ‘accommodation-related’ (see, e.g., *R (SG) v Haringey LBC* [2015] EWHC Civ 2579 (Admin), §66 and *R (GS) v Camden LBC* [2016] EWHC 1762 (Admin)).

- This has been defined as support of a sort which is normally provided in the home or would be ‘effectively useless’ if the person had no home.

- ‘Accommodation-related needs’ are so defined to avoid undermining the statutory framework in the CA 2014 by allowing it to become a ‘back-door’ route to claims, circumventing the Housing Act scheme (‘queue jumping’ the homelessness queue) (*R (Aburas) v Southwark LBC* [2019] EWHC 2754 (Admin), §6(iii)).

- These decisions follow the approach previously adopted with respect to s. 21 National Assistance Act (NAA 1948), the predecessor to the CA 2014 – see, e.g., *R (L) v Westminster City Council* UKSC 27, [2013] 1 WLR 1445, per Lord Carnwath §48)

- Consensus in previous CA 2014 cases – the same approach under s. 21 is apt under CA 2014.

Home Office support under IAA 1999

- **S. 95(1) IAA 1999**: The SSHD has the power to provide, or arrange for the provision of, support for asylum-seekers and their dependants, who appear to the SSHD to be destitute or likely to become destitute within such period as may be prescribed.

- **Reg 5(1) Asylum Seekers (Reception Conditions) Regulations 2005, SI 2005/7** – turns the power under s. 95(1) into a **duty**.

- **S. 96(1) IAA 1999** – support may consist of accommodation, financial support to meet essential living needs or both.

- **S. 95(3) IAA 1999** – defines 'destitute' to mean that the person *"does not have adequate accommodation or <u>any means of obtaining it</u> (whether or not his other essential living needs are met)"* or *"has adequate accommodation or the means of obtaining it but cannot meet his other essential living needs"* .

- **Reg 6 Asylum Support Regulations 2000, SI 2000/704** governs the assessment of destitution, and materially provides:

> *"(3) The Secretary of State **must ignore** – (a) any asylum support, and (b) any support under section 98 of the Act … (4) **But he must take into account**- … (b) **any other support which is available to the principal** or any dependant of his, **or might reasonably be expected to be so available** in that period".*

The interplay between the CA 2014 and IAA 1999

Question: *Where an asylum seeker's physical or mental condition is such that they have accommodation-related care needs, who is responsible for providing accommodation for that person? Is it the local authority responsible under the CA 2014, or does responsibility lie with the Secretary of State under s. 95 IAA 1999?*

Background: In relation to the old regime (s. 21 NAA 1948), the Court of Appeal in *R v Hammersmith and Fulham LBC, ex p M* (1998) 30 HLR 10, held that destitute asylum seekers who were in need of care and attention by reason of poverty (among other things) should be supported under that provision.

IAA 1999: One of the main purposes of the 1999 Act was to reverse that decision. This was achieved by introducing s. 95 support coupled with amendments to the NAA 1948 *"to make clear that social services departments should not carry the burden of looking after healthy and able-bodied asylum-seekers"*.

- **S. 116 IAA 1999** amended s. 21 NAA 1948, inserting a new subsection (1A), prohibiting social services from providing accommodation to any person falling within the ambit of the 1999 Act, s. 115 whose need for care and attention arose 'solely' from destitution [that provision is mirrored by s. 21 CA 2014]
- **Key case:** *R (Westminster City Council) v NASS* [2022] UKHL 38, [2002] 1 WLR 2956 held that Part VI of the 1999 Act gave the SSHD residual powers to accommodate, and the effect of the amendment to the NAA was only to exclude the 'able-bodied destitute' from the responsibility of social services.
- **Key case:** The Supreme Court in *L* reinforced this – describing the IAA scheme as a "scheme of last resort" [9].

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 his 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.

** There is a very helpful summary of the case law on 'accommodation-related' needs at [52]-[55].*

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).

R (TMX) v LB Croydon [continued]

§78: *"… 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".*

§90: *"I do not doubt that the practical and financial challenges facing those local authorities are considerable. It is understandable that those authorities consider that responsibility for providing accommodation for such persons might more efficiently – and more fairly – be allocated to a national system that could more easily source suitable accommodation outside London and the South East, with the costs being met centrally. But similar arguments were made by the defendant … in NASS and were considered by Lord Hoffman"*

§91: *"…The Council's position taken in, and approach to, these proceedings have a distinct flavour of being part of a campaign of seeking to draw attention to a broader state of affairs which it believes is unfair to it … such change will have to be won in Parliament, it cannot be done in the courts"* (on this, note the Council's arguments about the Home Office *Asylum Seekers with Care Needs* guidance)

Takeaways for practice

Recent cases:

1. Put Claimants in a clear and strong position to argue that where 'accommodation-related' needs (whether for ordinary or specialist accommodation) are established, it is the local authority who holds the duty to accommodate, not the Home Office (the 1999 Act is residual).
2. Arguably expands the scope of what is an 'accommodation-related' need (cf earlier cases) – in *SB*, those needs were [78]:
   - *In respect of managing and maintaining nutrition, where the First Claimant is said to need support to build his confidence in using appliances in the kitchen and choosing healthy meals to prepare.*
   - *In respect of maintaining the home environment, where it is said that the First Claimant needs ongoing support to maintain a habitable home environment and explicitly envisages this support being provided by adult social care services.*

3. In *TMX*, Court gave short shrift to argument about specialist v non-specialist accommodation. Claimant had need for [25]: *"…at a minimum … a two-bedroom accommodation unit for himself, his wife and their children, with bathroom facilities (including a shower) that can be accessed by him using his walking frame or wheelchair".*

Takeaways for practice

Local authorities have an obligation to accommodate someone with 'accommodation-related' needs for care and support, but for this to apply, the local authority must:

1. Know about the person.
2. Assess them under the Care Act to establish that they have such needs.
3. Find them eligible for care and support under the Care Act.
4. Find that some of their needs are accommodation-related.

Challenges/ things to think about:

1. Ineffective Home Office guidance/ practice for making care needs assessment referrals/ role of providers.
2. LA 'practice' of accommodating only when a person requires specialist accommodation (applying misleading Home Office guidance).
3. LA reluctance to accept the duty to accommodate – following *SB* and *TMX*, arguments over what needs are or are not 'accommodation-related' – drill down on facts and evidence.
4. Choosing your opponent – Home Office as a defendant or an interested party (friend or foe)?
5. Should not be limited to IAA 1999 – no reason in principle why the same doesn't apply under para 9, Sch10 IA 2016
6. Clients in detention – release planning.

Thank you

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