Neutral Citation Number: [2011] EWCA Civ 954

Case No: C1/2010/2818

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
MR JUSTICE BURNETT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/08/2011

Before :

LORD JUSTICE LAWS
LORD JUSTICE RICHARDS
and
LORD JUSTICE RIMER

- -

Between :

SL	**Appellant**
- and -	
Westminster City Council	**Respondent**
The Medical Foundation	**Interveners**
Mind	**(in writing)**

- -
- -

Mr Stephen Knafler QC and Mr Jonathan Auburn (instructed by **Pierce Glynn**) for the **Appellant**
Mr H Harrop-Griffiths (instructed by **Creighton & Partner**) for the **Respondent**

Hearing dates : 8 June 2011

- -

Approved Judgment

Lord Justice Laws:

INTRODUCTION

1. This is an appeal, brought with permission granted by Tomlinson LJ on 4 February 2011, against the judgment of Burnett J given at a rolled-up hearing in the Administrative Court on 15 November 2010 ([2010] EWHC Admin 3182) when he granted the appellant permission to seek judicial review but dismissed the claim. The case requires the court to re-visit the proper interpretation and scope of s.21(1)(a) of the National Assistance Act 1948 ("the 1948 Act"), by force of which the appellant submits that the Westminster City Council ("the council") owed him a duty to provide residential accommodation. Leave to intervene in the proceedings on paper only was granted by Arden LJ to the organisations Mind and The Medical Foundation for the Care of Victims of Torture, and the court is grateful for their written materials.

2. The appellant is an Iranian national who at the time of the hearing below was a failed asylum-seeker. However in March 2011 he was granted indefinite leave to remain (exceptionally, outside the Immigration Rules) by the United Kingdom Border Agency, and has since then been eligible for a range of State benefits including local authority housing support. The grant of indefinite leave generated an exchange of correspondence and submissions on the question whether the proceedings should now be regarded as moot. However, as Tomlinson LJ said when granting permission to appeal, "whilst superficially a decision on the particular facts, I accept that the decision raises broader questions of principle". We think it right to entertain and resolve the appeal notwithstanding the grant of indefinite leave to the appellant.

THE STATUTORY PROVISIONS

3. It is convenient to set out or describe the relevant statutory materials before looking at the facts and the decision under challenge. S.21(1)(a) provides:

> "Subject to and in accordance with the provisions of this Part of this Act, a local authority may with the approval of the Secretary of State, and to such extent as he may direct shall, make arrangements for providing –
>
> > (a) residential accommodation for persons aged eighteen or over who by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them."

It is important to note, as the judge did, that the application of s.21(1)(a) is limited by two further provisions. First, s.21(8) of the 1948 Act has the effect of excluding care and attention which is provided by the National Health Service from the ambit of s.21(1)(a). Secondly, s.21(1A) of the 1948 Act, inserted by s.116 of the Immigration and Asylum Act 1999, provides:

> "A person to whom section s.115 of the Immigration and Asylum Act 1999 (exclusion from benefits) applies may not be

> provided with residential accommodation under subsection (1)(a) if his need for care and attention has arisen solely –
>
> (a) because he is destitute; or
>
> (b) because of the physical effects or anticipated physical effects of his being destitute."

The effect, broadly, is to exclude from s.21(1)(a) a series of categories of foreign nationals including those who have exhausted their immigration appeal rights and have no lawful basis on which to remain in the United Kingdom.

4. I should also set out s.29(1) of the 1948 Act:

> "A local authority may, with the approval of the Secretary of State, and to such extent as he may direct in relation to persons ordinarily resident in the area of the local authority shall make arrangements for promoting the welfare of persons to whom this section applies, that is to say persons aged eighteen or over who are blind, deaf or dumb or who suffer from mental disorder of any description, and other persons aged eighteen or over who are substantially and permanently handicapped by illness, injury, or congenital deformity or such other disabilities as may be prescribed by the Minister."

S.29(4) sets out a non-exhaustive list of the kind of arrangements that may be made under s.29(1). The second item there specified is "[arrangements] for giving such persons instruction in their own homes or elsewhere in methods of overcoming the effects of their disabilities".

BACKGROUND

5. The appellant was born on 21 September 1990. He arrived in the United Kingdom in 2006. His asylum claim, based on his fear of persecution in Iran on account of his sexual orientation as a gay man, was refused in January 2007. He became homeless in October 2009. In December 2009, apparently after learning of the death of his partner in an Iranian prison, he attempted to kill himself. He was admitted as an in-patient to the St Charles Hospital Mental Health Unit. He was at length discharged on 27 April 2010, diagnosed as suffering from depression and post traumatic stress disorder.

6. A number of reports and assessments were made in relation to the appellant to which I will have to make some further reference. There was an occupational therapist's report of 19 March 2010, an adult mental health assessment of 6 April 2010 carried out by Mr Adam Wyman, a social worker employed by the council who was the appellant's care co-ordinator, a care plan of 27 April 2010 compiled by the Central and NW London NHS Foundation Trust and a later review of 2 November 2010 by a consultant psychiatrist, Dr Maria Clarke. Since his discharge certain assistance has been provided to the appellant by or through the council, and it will be necessary to look at some of the documents in order to decide how that assistance ought to be characterised for the purpose of s.21(1)(a). The appellant has been accommodated at

the council's expense pending the resolution of these proceedings, pursuant to an interim order made by Saunders J on 16 April 2010 when the judicial review application was lodged; although the National Asylum Support Service ("NASS"), an arm of the Home Office, recognised for its part a duty to provide the appellant with accommodation.

THE COUNCIL'S DECISION

7. The decision under challenge in the proceedings was communicated in a letter dated 14 April 2010 from the council's solicitors. It was essentially based on Mr Wyman's assessment. The council's position was summarised by the judge at paragraph 8 of his judgment as follows:

> "Mr Wyman's assessment noted that the claimant had been supported by the Abbey Road Community Mental Health Team prior to his admission to hospital. It also noted that such support would be needed after his discharge. He concluded that the claimant did not need 'looking after' [this is a phrase found in the learning, to which I will refer in due course]. On the contrary, his view and the view of Dr Maria Clarke... was that the claimant should not only be encouraged to live independently but that any other arrangement would be to his detriment. National Health Service support would be provided, but the limit of the input from the Council would be social worker support. That support would be provided through weekly meetings with Mr Wyman at Abbey Road."

The judge for his part was very clear that "[t]he assistance provided by the local authority, even if it is properly described as care and attention, is limited to social worker input provided by Mr Wyman when the claimant visits him at the Abbey Road Centre. The balance of the claimant's needs identified in the original assessment... are all being met by the NHS" (paragraph 17). In legal terms the Council's decision was to the effect that the appellant was not in need of care and attention within the meaning of s.21(1)(a) of the 1948 Act, and in consequence they owed him no duty under the subsection to provide residential accommodation. That conclusion was challenged as being wrong in law given the facts of the case. The judge rejected it and the challenge is repeated on this appeal.

ESSENTIAL FACTS: THE SERVICES PROVIDED

8. Mr Knafler QC for the appellant was content to fashion his argument by reference to the assistance actually being furnished to the appellant by or on behalf of, or perhaps at the instigation of, the council. He says that once the nature of that assistance is properly understood, its only proper legal characterisation is as care and attention within the meaning of s.21(1)(a). The issue in the case is therefore akin to that which arose in *R (Zarzour) v LB of Hillingdon* [2009] EWCA Civ 1529 in which I said (paragraph 13):

> "[T]he real question here is whether the council's own findings... compel a conclusion that the claimant was in need of care and attention within the meaning of section 21(1)(a) or, to

> put it in conventional public law terms, whether that conclusion was one which, on the facts, no reasonable council could reach."

The precise nature of the services provided to the appellant by or for the council was the subject of some little controversy at the Bar. The principal element seems clearly to consist in regular weekly meetings between the appellant and Mr Wyman, referred to by the judge. But there is a good deal more detail in the evidence, and I should describe some of it.

9. At the end of the occupational therapist's report of 19 March 2010 a number of recommendations are set out. The second bullet point reads:

> "Support from care co-ordinator [that is Mr Wyman] or outreach support workers to link [SL] with local support groups (ie refugee and asylum seekers' groups, gay and lesbian community groups) to help with expanding his social support network."

In his first witness statement Mr Wyman comments on the substance of the occupational therapist's report as follows (paragraph 16):

> "In summary her report concluded that SL is independent in all self care needs, ie personal hygiene, toileting, cooking, budgeting. He has no cognitive or motor difficulties and is sociable and able to form positive relationships. During my assessment I assessed SL's needs as not significantly different from those described in this report."

10. The care plan prepared on 27 April 2010 (when SL was discharged from the hospital) has three parallel columns, the first of which is headed "Needs Assessed", the second "Identified Needs and Issues (from Assessment) and Objectives and Desired Outcomes" and the third "Services to be provided and by who [*sic*]". Under the first column heading, "Mental Health", column 2 has this (among other things):

> "[SL] continuing to experience symptoms of depression and anxiety, sleeplessness and repetitive nightmares. Mood remains labile and SL can be subject to bouts of hopelessness and feelings of self-harm".

Alongside this column 3 has:

> "SW [sc. social worker – Mr Wyman] to provide community support and liaison of care. Initially weekly visits following discharge by Crisis Team.
>
> SW to contact counselling groups and request they reinstate contact and support."

Later in the document, where column 1 has "Social Network and Support", column 3 reads:

> "There may be some mileage in contacting groups associated with the exiled Iranian community in London, or groups from within the gay community who [SL] may find he can draw some additional support from."

Then on the last page of the document three "risk factors" are identified: "increased compulsion to self-harm, increasing depression, danger of becoming overwhelmed by daily struggle to contain and to cope". Below that, under "Action to be Taken", this appears:

> "Has access to SW through direct line telephone number and will receive community SW support initially at least 1x week.
>
> SW to arrange for counselling groups to reinstate contact via offering regular appmts with regard to counselling."

11. The references in these extracts to "counselling groups", as I understand it, connote two counselling organisations working specifically with gay men and women which had earlier made contact with SL while he was in hospital. They are mentioned in the occupational therapist's report and in Mr Wyman's assessment; he also refers to them at paragraph 15 of his first witness statement.

12. Since late August 2010 SL has also had regular meetings with a "befriender" found for him by the Westminster Befriender Service at Mr Wyman's request. The latest information (Mr Wyman's second statement, paragraph 9) is that the befriender sees SL once a week and takes him "to activities he enjoys".

13. Looking at the factual material in the round, the support furnished by the council may be summarised much as Mr Knafler summarised it: at his weekly meetings with the appellant the care co-ordinator Mr Wyman offers advice and encouragement, and generally monitors the appellant's condition and progress. He has also been instrumental in arranging contact (or the renewal of contact) with the counselling groups to which I have referred, and the appellant's "befriender".

14. The appellant also receives medical attention including prescribed medicines. The details are shortly stated in Dr Clarke's review of 2 November 2010, an assessment described by the judge (paragraph 9 of his judgment) as "very neatly [encapsulating] the nature of the support both needed and provided to" the appellant. However as I have stated, s.21(8) of the 1948 Act excludes care and attention which is provided by the National Health Service from the ambit of s.21(1)(a).

TWO QUESTIONS

15. There is now much authority on the construction and application of s.21(1)(a) of the 1948 Act. It includes two decisions of their Lordships' House, *Westminster CC v NASS* [2002] 1 WLR 2956, [2002] UKHL 38 and *M v Slough BC* [2008] 1 WLR 1808, [2008] UKHL 52. The subsection poses two questions of interpretation both of which are elusive. The first is, what is meant by "care and attention"? The Act does not define the phrase. The second is, what is the nexus between the care and attention of which the claimant is putatively in need and the provision of accommodation? The expression "care and attention which is not otherwise available" is not clear-cut. In *M*

v Slough BC Lord Neuberger explained (paragraphs 47 – 52) that the subordinate clause "which is not otherwise available" qualifies the phrase "care and attention" rather than the noun "accommodation" appearing earlier in the subsection. But broader questions remain. Must it be shown that the necessary care and attention cannot be given without the provision of residential accommodation? Or should the expression be construed as meaning that the provision of accommodation is reasonably required in order for care to be furnished in a way that fully meets the claimant's needs? That is Mr Knafler's submission (skeleton argument paragraph 33), supported by the interveners. Or are there other possible meanings?

16. A major feature of the learning on s.21(1)(a) has been an extended debate as to the location of the boundary between the respective statutory responsibilities of local authorities and NASS to provide accommodation for destitute asylum seekers: a debate described by Baroness Hale at paragraph 28 of *M v Slough BC* as "an inverted and unseemly turf war between local and national government", citing J A Sweeney, *The Human Rights of Failed Asylum Seekers in the United Kingdom* [2008] PL 277, 285. NASS has been dissolved and replaced, but I will continue to refer to it for convenience. The divide between these responsibilities is given by s.21(1A) of the 1948 Act which I have cited earlier. The relevant responsibility of NASS (in fact a power rather than a duty) is provided for by s.95 of the Immigration and Asylum Act 1999, which I need not set out. In *Westminster CC v NASS* Lord Hoffmann drew a distinction between "the able bodied destitute" and the "infirm destitute" as representing, after something of a paper-chase, the border between the two responsibilities. One may compare *W v Croydon, A v Hackney* [2007] 1 WLR 3168, [2007] EWCA Civ 266, which however concerned the allocation of responsibility as between central and local government not for asylum seekers but for *failed* asylum seekers, as regards whom the central government responsibility arises (after a yet more elaborate paper chase) from s.4 of the 1999 Act. I will have to return to the turf war.

17. In the *NASS* case the candidate for care and attention, Mrs Y-Ahmed, was an asylum seeker who suffered from cancer and needed accommodation of two rooms near to St Mary's Hospital in Paddington with wheelchair access and room for a carer to look after her physical needs. There are three features of the case to which it is convenient to refer at this stage, though I shall have to return to it in greater detail. First, it is clear that NASS' power to provide accommodation "is *residual* and cannot be exercised if the asylum seeker is entitled to accommodation under some other provision [sc. such as s.21(1)(a)]" (*per* Lord Hoffmann at paragraph 38: cf Lord Slynn of Hadley at paragraph 17; see also *Zarzour*, paragraph 18). Thus in the present appeal the potential availability of NASS accommodation is nothing to the point; the council's decision under s.21(1)(a) had to be made on the assumption that there was no such recourse. Secondly, there is no suggestion that in order to constitute care and attention for the purpose of s.21(1)(a), the support provided by the local authority has to attain any particular level of intensity. At paragraph 29 Lord Hoffmann merely refers to "some infirmity which required the social services to provide them with care and attention". Thirdly, there is likewise no suggestion of a particularly tight nexus between the care and attention furnished and the accommodation provided. At paragraph 26 Lord Hoffmann merely says:

> "[N]ormally, a person needing care and attention which could be provided in his own home, or in a home provided by a local authority under the housing legislation, is not entitled to accommodation under section 21. That is why the use of the section had previously been for the most part limited to the provision of accommodation in specialist institutions like homes for the aged, in which the necessary care and attention could be provided more conveniently than in separate dwellings."

I shall return to the nexus between the care and attention furnished and the accommodation provided, which for reasons I will give is in my view problematic.

18. I should emphasise that the second and third of these points were not directly in issue in *NASS.* However they reflect the two elusive questions of interpretation which I identified at paragraph 15, both of which are at the core of the present case. Generally, of course, the wider the concept of care and attention, and the looser the nexus between the care and attention needed and the provision of accommodation, the more onerous will be the duty of local authorities under s.21(1)(a).

MEANING OF "CARE AND ATTENTION"

19. I turn to the first of these two questions of interpretation, to which their Lordships' decision in *M v Slough BC* is particularly germane. In that case the respondent (who was subject to immigration control) was HIV positive. However his only needs, other than for a home and subsistence, were for medication prescribed by his doctor and a refrigerator in which to keep it. The Court of Appeal had held that his case fell within s.21(1)(a). The local authority appealed. Baroness Hale said this at paragraphs 31 – 34:

> "31. Mr Howell [for the appellant authority] adopts the three conditions which I suggested in *R (Wahid) v Tower Hamlets London Borough Council* [2002] EWCA Civ 287, [2003] HLR 2, para 30, and Lord Hoffmann found helpful [in the *NASS* case] at para 26:
>
> > 'first, the person must be in need of care and attention; secondly, the need must arise by reason of age, illness, disability or "other circumstances" and, thirdly, the care and attention which is needed must not be available otherwise than by the provision of accommodation under section 21'.
>
> Mr Howell argues that there must be some meaningful content in the need for care and attention. He was at first disposed to argue that it must mean care and attention to physical needs, such as feeding, washing, toileting and the like, and not simply shopping, cooking, laundry and other home help type services. But he accepted that it had also to cater for people who did not need personal care of this sort but did need to be watched over to make sure that they did not do harm to themselves or others by what they did or failed to do. The essence, he argued, was

that the person needed someone else to look after him because there were things that he could not do for himself. [The respondent] does not need care and attention of this sort. He is perfectly capable of looking after himself. He needs his medication, but that is supplied by the National Health Service and under section 21(8) the local authority is not allowed to provide him with anything which is authorised or required to be provided under the National Health Service Act 2006. Medical treatment has always been provided for separately in the National Health Service legislation. The need for a fridge in which to keep his medication cannot be described as a need for care and attention.

32. My Lords, a test as strict as that proposed by Mr Howell might not even include Mrs Y-Ahmed, let alone Mrs O and Mr Bhikha [the references are to earlier cases: Mrs Y-Ahmed was as I have indicated the claimant for care and attention in *NASS*]. It might not include a great many people who have been accommodated in old people's homes over the years since 1948. Our ideas of when people need to be in residential care have changed a good deal since then. Much of the care which used to be provided in a residential setting can now be provided at home. Furthermore, section 26(1A) requires that if arrangements are made under section 21(1)(a) for accommodation 'together with nursing or personal care' for people who are or have been ill, people who have or have had a mental disorder, people who are disabled or infirm, or people who are or have been dependent on alcohol or drugs, then in effect the home must be registered under the Care Standards Act 2000. Thus accommodation may be arranged under section 21(1)(a) without including either nursing or personal care. So the 'care and attention' which is needed under section 21(1)(a) is a wider concept than 'nursing or personal care'. Section 21 accommodation may be provided for the purpose of preventing illness as well as caring for those who are ill.

33. But 'care and attention' must mean something more than 'accommodation'. Section 21(1)(a) is not a general power to provide housing. That is dealt with by other legislation entirely, with its own criteria for eligibility. If a simple need for housing, with or without the means of subsistence, were within section 21(1)(a), there would have been no need for the original section 21(1)(b). Furthermore, every homeless person who did not qualify for housing under the Housing Act 1996 would be able to turn to the local social services authority instead. That was definitely not what Parliament intended in 1977. This view is consistent with *Ex parte M*, in which Lord Woolf emphasised, at p 20, that asylum seekers were not entitled merely because they lacked money or accommodation. I remain of the view which I expressed in *Wahid* ([2002] EWCA Civ 287, [2003]

> HLR 2), at para 32, that the natural and ordinary meaning of the words 'care and attention' in this context is 'looking after'. Looking after means doing something for the person being cared for which he cannot or should not be expected to do for himself: it might be household tasks which an old person can no longer perform or can only perform with great difficulty; it might be protection from risks which a mentally disabled person cannot perceive; it might be personal care, such as feeding, washing or toileting. This is not an exhaustive list. The provision of medical care is expressly excluded. Viewed in this light, I think it likely that all three of Mrs Y-Ahmed, Mrs O and Mr Bhikha needed some care and attention (as did Mr Wahid but in his case it was available to him in his own home, over-crowded though it was). This definition draws a reasonable line between the 'able bodied' and the 'infirm'.
>
> 34. This construction is consistent with all the authorities, including *R (Mani) v Lambeth London Borough Council* [2003] EWCA Civ 836, [2004] BLGR 35. That case was argued on the assumption that the claimant did have a need for care and attention, but not a need which required the provision of residential accommodation. Mr Mani had one leg which was half the length of the other. He had difficulty walking and when in pain he could not undertake basic tasks such as bed-making, vacuum cleaning and shopping. He did need some looking after, going beyond the mere provision of a home and the wherewithal to survive."

20. The local authority's appeal in *M v Slough BC* succeeded on the facts: the respondent was not in need of care and attention within the meaning of s.21(1)(a). Lord Neuberger said this at paragraph 60:

> "...M is not 'in need of care and attention' simply because he is without accommodation. However, in addition to being without accommodation, he is HIV-positive (and may have AIDS), he consequently must take medication which is provided to him by the NHS, he requires the use of a refrigerator in which to keep the medication; and he needs access to a medical practitioner four or five times a year. However, his illness does not otherwise affect him, and he can look after himself. The absence of somewhere to live, coupled with the requirement for medication, refrigerator use and access to a doctor, even taken together, cannot, in my view, be said to amount to a need for care and attention, as a matter of ordinary language. M simply does not need looking after."

21. As I understand it Lady Hale's approach to the expression "care and attention" within the meaning of s.21(1)(a) has, with respect, commanded general acceptance. It is worth noting, moreover (to recall the second point I ventured to draw from the *NASS* case) that the facts in the other cases referred to by Lady Hale at paragraph 33 – I will not set them out, but would refer in particular to paragraphs 8, 24 and 33 in *Wahid* –

suggest that the level of support provided by the local authority by way of care and attention does not have to attain any particular level of intensity. So does Lord Neuberger's observation in *M v Slough BC* at paragraph 65:

> "… [S]ection 21(1)(a) only applies to a person who is in present need of care and attention, albeit that a local authority may act under the section once satisfied that there is such a need, even if it is currently not very pressing, especially where the situation appears likely to deteriorate."

CARE AND ATTENTION: APPLICATION TO THIS CASE

22. In these circumstances I would hold that on the proved or admitted facts the appellant is, and at all material times was, in need of care and attention within s.21(1)(a), subject however to the second question of interpretation (the meaning of "not otherwise available"). That was not the judge's view. At paragraph 31 of his judgment he said:

> "On analysis, Mr Wyman's input was expected to be limited to a weekly meeting with the claimant to provide social work support. Important though that no doubt is, and has been, to the claimant's continued well being, my conclusion is that it does not amount to care and attention for the purposes of section 21(1)(a) of the 1948 Act. To suggest that the claimant needs 'looking after' would stretch the meaning of those words beyond their proper limit. In my judgment, it would be more accurate to say that the support that the claimant needs amounts to keeping an eye on him. That is a rather different matter. It imports the notion that whilst keeping an eye on him, if circumstances change, different or further interventions might become necessary. It is not, however, in my view, care and attention. On this basis also, the claimant fails to establish that he came within the criteria found in section 21(1)(a)."

The judge has, I think, understated the nature of the support provided by the council through Mr Wyman. As Mr Knafler submitted, Mr Wyman is doing something for the appellant which he cannot do for himself: he is monitoring his mental state so as to avoid if possible a relapse or deterioration. He is doing it, no doubt, principally through their weekly meetings; but also by means of the arrangements for contact (or the renewal of contact) with the two counselling groups, and with the "befriender". It is to be noted that care and attention within the subsection is not limited to acts done by the local authority's employees or agents. And I have already made it clear that the subsection does not envisage any particular intensity of support in order to constitute care and attention.

23. I acknowledge that the question is to some extent a matter of impression; and also that the appellant must show that the council's determination was not open to a reasonable decision-maker (as I indicated at paragraph 13 of *Zarzour*: see paragraph 8 above). But in my judgment that test is met. The support provided by the council to the appellant qualifies as care and attention.

MEANING OF "NOT OTHERWISE AVAILABLE"

24. I turn to the second question of interpretation. What is meant by the expression "care and attention... which is not otherwise available"? As I have foreshadowed, to my mind this is altogether more problematic. Some of the learning, with great respect, does little more than repeat the words of the statute; and I have found much of it – I am sure the fault is mine – convoluted and sometimes difficult to unravel. The turf war between central and local government has perhaps focussed attention more on the policy of the material provisions than on the statutory language.

25. The turf war's genesis is to be found in s.21(1A) of the 1948 Act. I think it helpful to start with a decision of this court which pre-dated the enactment of that subsection, and indeed may be said to have prompted it. In R v City of Westminster and others ex p M, P, A and X [*Ex p. M* (1998) 30 HLR 10] the claimants were destitute asylum seekers. They were not in need of care and attention, but because they were destitute, without accommodation or subsistence, they soon would be in need of care and attention unless something was done about it. This court held that they were entitled to accommodation pursuant to s.21(1)(a).

26. As Lord Hoffmann stated in *NASS* at paragraph 28, the decision in *Ex p. M* caused "consternation". This is how Lord Slynn of Hadley put it in the same case:

> "12. If this applied across the board to all asylum seekers, it meant that local authorities in particular areas to which asylum seekers regularly went, would have to bear the cost of a large number of asylum seekers whereas the large majority of local authorities would have no or little liability.
>
> 13. This on the face of it imposed a heavy burden on a few local authorities for what should have been a national problem. The Government accepted that the burden, or some of it, should be taken over nationally..."

27. And so s.21(1A) was inserted into s.21 of the 1948 Act by s.116 of the Asylum and Immigration Act 1999. What has happened since is that the cases seem to have proceeded on the basis that all destitute persons are liable to be accommodated under s.21(1)(a) unless they are able bodied. Only the "able bodied" destitute are excluded by s.21(1A). There is, so to speak, no undistributed middle between the two subsections. Thus Lord Slynn said in *NASS*:

> "17... [T]he only limitation of a local authority's liability to provide accommodation is where the need is 'solely' due to destitution or its effects."

And Lord Hoffmann at paragraph 32:

> "The use of the word 'solely' makes it clear that only the able bodied destitute are excluded from the powers and duties of section 21(1)(a). The infirm destitute remain within. Their need for care and attention arises because they are infirm as well as because they are destitute. They would need care and attention

> even if they were wealthy. They would not of course need accommodation, but that is not where section 21(1A) draws the line."

28. In this court in *NASS* Simon Brown LJ as he then was said this:

> "42. Looking back, I have little doubt that our thinking (or certainly my thinking) on asylum-seekers was this: Those who without support would deteriorate essentially through destitution would be entitled to s.95 support irrespective of whether they were particularly vulnerable through age, ill health or disablement. Those, however, whose need for care and attention would exist even if in funds would still be entitled to community care under the 1948 Act.
>
> 43. The difficulty with this approach, however, a difficulty not I think appreciated by anyone when we decided *ex parte O*, is that it involves looking at s.21(1A) differently depending upon whether the 'person subject to immigration control' who is seeking support is or is not an asylum-seeker. If not an asylum-seeker then clearly the 1948 Act is indeed 'the last refuge of the destitute' and, as *ex parte O* decided, s.21(1A) should exclude from relief only the young and fit. If, however, the applicant is an asylum-seeker, then national assistance is no longer their last refuge: s.95 has replaced it."

Also in this court in *NASS* Mance LJ as he then was said:

> "63. I am therefore left in no doubt that the overall scheme was that NASS should take responsibility only for asylum seekers falling within s.21(1A), and that persons (whether asylum seekers or not) needing care and attention for other reasons would continue to be dealt with under s.21(1)(a) of the 1948 Act.
>
> …
>
> 65… Simon Brown LJ has drawn attention to the potential implications of this strict or limited interpretation of the scope of s.21(1A) on the balance of responsibility between NASS and local authorities in relation to asylum seekers. Our decision today indicates a mutually exclusive analysis of the roles of s.21(1)(a) of the 1948 Act and s.95 of the 1999 Act, which one would expect to apply whether or not the person seeking support was an asylum seeker. The relationship between and the working of the two sections will presumably be kept under review, and can if necessary be fine-tuned by legislation, regulation or, within limits, by pragmatic accommodation between the parties involved."

29. I may turn next to R v Wandsworth LBC ex p O [*Ex p. O* [2000] 1 WLR 2539] in this court. This case was decided shortly after s.21(1A) had been inserted into the Act of 1948. It was concerned with two destitute overstayers (not asylum seekers). One had severe psychiatric problems; the other had recurring cancer of the duodenum which required continuous medical treatment. The critical question was whether the insertion of subs.(1A) into s.2 had made them ineligible for accommodation under that section. This court held that it did not. Simon Brown LJ stated at 2548 (accepting the appellants' submission):

> "[I]f an applicant's need for care and attention is to any material extent made more acute by some circumstance other than the mere lack of accommodation and funds, then, despite being subject to immigration control, he qualifies for assistance. Other relevant circumstances include, of course, age, illness and disability, all of which are expressly mentioned in section 21(1) itself. If, for example, an immigrant, as well as being destitute, is old, ill or disabled, he is likely to be more vulnerable and less well able to survive than if he were merely destitute."

30. *NASS* and *Ex p. O* were extensively referred to in R (Mani) v Lambeth LBC [*Mani* [2004] LGR 35, [2002] EWCA Civ 836], which as I have shown was itself referred to by Lady Hale in *M v Slough BC* at paragraph 34. As her summary indicates, the case was directly concerned with the relationship between care and attention and accommodation. Wilson J as he then was, giving judgment at first instance in *Mani*, had formulated the question in the case in words repeated by Simon Brown LJ at the outset of his judgment in this court: "[d]oes a local authority have a duty to provide residential accommodation for a destitute asylum seeker who suffers a disability which, of itself, gives rise to a need for care and attention which falls short of calling for the provision of residential accommodation?" Mr Mani's right leg was about half the length of his left. Simon Brown LJ noted (paragraph 2) that on days when he was in pain he could not undertake basic tasks such as bed-making and hovering, needed help in carrying heavy shopping. He also had a history of mental health difficulties.

31. Lord Brown cited paragraphs 42 and 43 of his judgment in this court in *NASS*, which I have set out. At length he returned to the council's argument in the case before him, which was (paragraph 16) "in a nutshell, that s21(1)(a) applies, not to all those who need care and attention, but solely and exclusively to those who need care and attention of a kind which is only available to them through the provision of residential accommodation... [T]he care and attention referred to means care and attention of a kind calling for the provision of residential accommodation". But this argument, he held, could not stand with the authorities he had discussed. He concluded (paragraph 21):

> "... [T]he test now applicable equally to asylum seekers as to non asylum seekers is that laid down in *Ex parte O* and it must remain so unless and until the House of Lords decides otherwise or Parliament in some way adjusts the balance of responsibility between NASS and local authorities..."

Judge LJ as he then was and Nelson J agreed. The council's appeal was dismissed.

32. In *NASS* in the House of Lords Lord Hoffmann had said this:

> "50. Your Lordships are not however concerned to decide whether the test laid down by the Court of Appeal in *R v Wandsworth London Borough Council, Ex p O* [2000] 1 WLR 2539 (and applied by Wilson J in *Mani's* case, The Times, 8 May 2002) for determining whether the need for care and attention has arisen 'solely because he is destitute' was correct. It would not be right to express any view on this point because it affects the rights of everyone subject to immigration control, whether an asylum seeker or not, and they were not represented before your Lordships."

33. I should also refer again to *Zarzour*, in which the claimant was a Lebanese asylum seeker who was entirely blind. At first instance Mr Timothy Brennan QC, sitting as a deputy High Court judge, allowed his claim for judicial review of the local authority's refusal to accommodate him pursuant to s.21(1)(a). At paragraph 20 of his judgment he said:

> "I accept that there is some force in Hillingdon's contention that not all of the Claimant's identified needs are accommodation-specific - an example might be his need for assistance in using public transport to get to his English class - but those I have just mentioned are not in this category. Meeting the needs I have identified is dependent on him having stable accommodation."

This court dismissed the local authority's appeal. At paragraph 16 of my judgment I said:

> "It is clear on the council's own approach to the case that the claimant needed help finding his way around his accommodation, at least until he had learnt the geography, help also in ensuring that his clothes matched and were put on properly, help with shopping and help with laundry, help with housework such as vacuuming. Not all of these needs, as the deputy judge accepted (paragraph 20), are, so to speak, accommodation-specific, but some undoubtedly are."

And I proceeded to cite paragraph 20 of Mr Brennan's judgment.

34. *Zarzour* thus indicates a need to find at least some nexus between care and attention on the one hand and the provision of accommodation on the other. However in the same case I also stated (paragraph 18):

> "It is… important to note that it has been accepted in [*Mani*], approved by Lady Hale at paragraph 34 of [*M v Slough BC*], and in [*NASS*] that the need of care and attention spoken of in section 21 was not such as necessarily to call for the provision of residential accommodation notwithstanding the fact that such provision is made by the statute the principal medium for

> meeting the need, and notwithstanding the further fact that, as other parts of Part III of the 1948 show, section 21 typically entails a move into local authority accommodation."

35. It is clear, post-*Mani*, that the approach taken in this court in *Ex p. O* remains the law. Nothing in *M v Slough BC* suggests otherwise: see, in addition to paragraph 34 in Lady Hale's opinion, Lord Brown at paragraphs 40 and 42 and Lord Neuberger at paragraphs 63 and 64. For convenience I repeat the test in *Ex p O*:

> "[I]f an applicant's need for care and attention is to any material extent made more acute by some circumstance other than the mere lack of accommodation and funds, then, despite being subject to immigration control, he qualifies for assistance [sc. under s.21(1)(a)]."

Lord Brown added this at 2548:

> "The word 'solely' in the new section [sc. s.21(1A)] is a strong one and its purpose there seems to me evident. Assistance under the 1948 Act is, it need hardly be emphasised, the last refuge for the destitute. If there are to be immigrant beggars on our streets, then let them at least not be old, ill or disabled."

36. This test reflects, indeed exemplifies, the division of destitute asylum seekers into two mutually exclusive classes, able bodied and infirm. All members of the first class are covered by s.21(1A), and all members of the second by s.21(1)(a); there is no third class, no undistributed middle. And if all asylum seekers who are destitute and infirm are entitled to the benefit of s.21(1)(a), so are all other persons who are destitute and infirm.

37. The difficulty with this approach is that read literally it includes within the embrace of s.21(1)(a) an infirm and destitute person even though there is no nexus between his destitution and his infirmity. But this gives no weight to the third condition for the subsection's application stated by Lord Hoffmann in *NASS* at paragraph 26 and quoted by Lady Hale in *M v Slough BC* at paragraph 31: "the care and attention which is needed must not be available otherwise than by the provision of accommodation under section 21" – indeed it gives no weight to the words of the statute – "not otherwise available" – which that condition replicates.

38. However some force must be given to those words. The undistributed middle cannot be quite what it seems. Now, a nexus between a claimant's destitution and his infirmity may mean different things. At paragraph 15 I suggested two possible ways in which the expression "care and attention which is not otherwise available" might be understood. First, it might mean that the necessary care and attention unequivocally requires the provision of residential accommodation. Secondly, it might mean that the provision of accommodation is reasonably required in order for care to be furnished in a way that fully meets the claimant's needs. As I stated, Mr Knafler, supported by the interveners, urges the latter approach. A third possibility, though perhaps little more than a variant of the second, would be that care and attention is not "otherwise available" unless it would be reasonably practicable and efficacious to supply it without the provision of accommodation.

39. In my judgment this third sense of "not otherwise available" most closely reconciles the statutory condition which those words exemplify with the exhaustive division of destitute asylum seekers between the infirm and the able bodied – the undistributed middle. As I have shown, this court in *Mani* rejected the local authority's submission that care and attention in s.21(1)(a) means "care and attention of a kind calling for the provision of residential accommodation". I take that submission in effect to mirror the first of the three meanings I have identified. As Lord Brown indicated in *Mani*, it cannot stand with the other authorities, not least *Ex p. O.* But the second meaning, favoured by Mr Knafler and the interveners, is in my judgment too far distant from the statutory language. The subsection's terms do not suggest a legislative policy by which accommodation is to be provided in order to maximise the effects of care and attention. However the third meaning, that care and attention is not otherwise available unless it would be reasonably practicable and efficacious to supply it without the provision of accommodation, can in my judgment live with existing authority. Indeed it is, I think, an implicit assumption made in the course of the learning's evolution.

40. In reaching this conclusion I have of course considered the written material put in by the interveners. While their work and their expertise plainly command respect, I will not travel into the detail of what they have to say. Insofar as it promotes the second meaning of "not otherwise available" which I have discussed, I have concluded that the statutory language is not open to such a construction. I apprehend, however, that their concerns are at any rate partly met by the construction which I have adopted.

41. I should say, however, that I am troubled by this conclusion as to the proper interpretation of s.21(1)(a). The natural and ordinary meaning of the statutory words seems to me to be closer to that advanced but rejected in *Ex p. Mani* – "care and attention of a kind calling for the provision of residential accommodation", so that the need for care and attention is "accommodation-related" (*Mani* paragraph 16): the first of the three meanings I have identified. But the learning, so much of whose focus has been on the "inverted and unseemly turf war between local and national government", has barred such a construction.

42. Mr Harrop-Griffiths made certain further submissions concerned respectively with s.26 of the 1948 Act, s.2 of the Chronically Sick and Disabled Persons Act 1970, and Part VII of the Housing Act 1996. But none of them has a critical bearing on the conclusion I have reached, and I mean Mr Harrop-Griffiths no disrespect if I do not set them out.

"NOT OTHERWISE AVAILABLE": APPLICATION TO THIS CASE

43. After citing paragraph 26 of Lord Hoffmann's opinion in *NASS* (thus including the third condition there described), the learned judge below (paragraph 15) posed the question, which he described as "straightforward", whether the care and attention supplied (assuming that is what it was) was "available otherwise than by the provision of accommodation". His answer is at paragraph 17 of his judgment:

> "It seems to me that, on the basis of the evidence before me concerning the assessment carried out in April of this year, the answer to the question that I have formulated is self-evidently 'yes'. The assistance provided by the local authority, even if it

> is properly described as care and attention, is limited to social worker input provided by Mr Wyman when the claimant visits him at the Abbey Road Centre. The balance of the claimant's needs identified in the original assessment, and indeed confirmed in the recent review of Dr Clarke, are all being met by the NHS. As it happens, those too are being met at the Abbey Road Centre."

44. I have already indicated my view that the judge has understated the nature of the support provided to the appellant. Mr Wyman monitors his mental state so as to avoid if possible a relapse or deterioration: principally through their weekly meetings, but also by means of the arrangements for contact with the two counselling groups and the "befriender". On the view of the law which I favour the question is whether it would be reasonably practicable and efficacious, for the purpose in hand, to supply these services without the provision of accommodation; and in asking the question the assumption has to be made that the appellant is destitute (because the potential availability of NASS accommodation has to be ignored). Approaching the matter thus, the question admits of only one sensible answer. Given the evidence of the appellant's condition which was before the council it would, as Mr Knafler submitted (skeleton argument paragraph 30), be absurd to provide a programme of assistance and support through a care co-ordinator "without also providing the obviously necessary basis of stable accommodation".

45. I should add that I have considered whether the services being provided should properly be regarded as falling within s.29(1) and (4) of the 1948 Act, which I have cited earlier. But given the construction of s.21(1)(a) which I have explained, and the approach to the facts which I have just set out, that would in my judgment be an erroneous conclusion.

46. I would allow the appeal.

Lord Justice Richards:

47. I agree.

Lord Justice Rimer:

48. I also agree.