Case No: CO/2016/2005, CO/6016/2004
CO/3433/2004, CO/3110/2005

Neutral Citation Number: [2005] EWHC 2950 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday, 16th December 2005

Before :

MR JUSTICE LLOYD JONES

- -

Between :

THE QUEEN ON THE APPLICATION OF A W	**First Claimant**
- and -	
THE LONDON BOROUGH OF CROYDON	**First Defendant**
THE QUEEN ON THE APPLICATION OF A, D AND Y	**Second, Third & Fourth Claimants**
- and -	
THE LONDON BOROUGH OF HACKNEY	**Second Defendant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Interested Party**

- -

(Transcript of the Handed Down Judgment of
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- -

Mr Stephen Knafler (instructed by **Pierce Glyn**) for the **First Claimant**
Mr Stephen Knafler (instructed by **Hackney Law Centre**) for the **Second, Third & Fourth Claimants**
Ms Jennifer Richards (instructed by **London Borough of Croydon**) for the **First Defendant**
Mr Jonathan Cowen (instructed by **London Borough of Hackney**) for the **Second Defendant**
Miss Elisabeth Laing (instructed by **The Treasury Solicitor**) for the **Interested Party**

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Judgment

Mr Justice Lloyd Jones :

1. There are before the Court four applications for judicial review challenging decisions of local authorities in relation to the support of failed asylum-seekers.

2. AW claims to have arrived in the United Kingdom on 23 June 1998. She applied for asylum about a month after entering the United Kingdom. She is therefore in the United Kingdom in breach of the immigration laws within section 11 of the 2002 Act. Her claim for asylum was refused by the Secretary of State by letter dated 20 July 2001. The Secretary of State was not satisfied that she was Somali. On 20th November 2003 the Adjudicator dismissed her appeal disbelieving that she was from Somalia. After her appeals had been rejected AW made further representations to be treated as an asylum-seeker on 30 September 2004, 9 November 2004 and 4 February 2005. The Secretary of State has not yet made a decision on those representations. Her application for support under section 4 of the Immigration and Asylum Act 1999 Act ("the 1999 Act") was rejected by the Secretary of State on the ground that support was not necessary to avoid a breach of her human rights, because she was free to leave the United Kingdom or take steps to leave the United Kingdom. AW applied to the London Borough of Croydon ("Croydon") for assistance, in particular under section 21, National Assistance Act 1948 ("the 1948 Act"). Croydon maintains that AW is not eligible for support under the 1948 Act and that it therefore has no power to provide support.

3. D claims to have entered the United Kingdom on a lorry and to have claimed asylum immediately. Her immigration status is unclear. At an early stage in these proceedings it was conceded that she had failed to claim asylum on arrival and was not granted temporary admission before entry to the United Kingdom. However, it now appears likely, on the basis of the submissions on behalf of the Secretary of State, that she was granted temporary admission and therefore is not in the United Kingdom in breach of the immigration laws within section 11, Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). Although her asylum application initially succeeded, it was overturned on appeal on 19th July 2002. She made further representations on 19 April 2005. These further representations were rejected by the Secretary of State on 18 October 2005. She has not been served with any removal directions with which she has failed to comply. On 18th June 2005 D applied to the London Borough of Hackney ("Hackney") for an assessment of her need for residential accommodation for which she claims to be eligible under section 21 of the 1948 Act. Hackney maintains that she is not eligible for such assistance.

4. A did not make a claim for asylum until several days after his arrival in the United Kingdom. He is therefore in the United Kingdom in breach of the immigration laws within section 11 of the 2002 Act. His application for asylum failed. He made further representations in support of his claim for asylum on 17 September 2003, 27 November 2003, 20 January 2004, 7 May 2004 and 6 September 2004. The Secretary of State has not yet made a decision on those representations. A applied to Hackney for accommodation and support pursuant to section 21 of the 1948 Act. Hackney maintains that A is not eligible for such assistance.

5. Y claimed asylum two days after arriving in the United Kingdom. He is therefore in the United Kingdom in breach of the immigration laws within section 11 of the 2002 Act. His claim for asylum was refused. The number of enforced returns to Eritrea in 2005 has been limited due to practical obstacles. However voluntary return is possible if a person can obtain documents. The Secretary of State accepts that if Y were able to show that he is taking steps to leave the United Kingdom, for example by making an application for documents, or by applying for an Eritrean passport, he would be eligible for section 4 support until he were actually able to return. Y made further representations in support of his claim for asylum on 8 July 2005. By letter dated 6 October 2005 the Secretary of State rejected those representations on the grounds that they do not amount to a fresh claim. Y has been assessed as in need of care and attention within section 21 of the 1948 Act. However, Hackney has refused to assist Y pursuant to section 21of the 1948 Act on the ground that he is not eligible.

6. By a consent order made on 12th October 2005 these four applications for judicial review were listed for hearing "confined to the issue of whether the Claimant in each case is ineligible for support from the Defendant by reason of the provisions of Schedule 3 to the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") and any related issues in respect of Convention rights".

7. At the hearing before me it was agreed that I should deliver a preliminary ruling on the following three issues.

(1) Is a failed asylum-seeker who is in the United Kingdom in breach of the immigration laws within the meaning of section 11, Nationality, Immigration and Asylum Act 2002, excluded by paragraphs 1 and 7 of Schedule 3 of that Act from support or assistance?

(2) If in the case of a failed asylum-seeker who satisfies the criteria of section 21(1) and (1A), National Assistance Act 1948 the provision of support is necessary for the purpose of avoiding a breach of his Convention rights within the meaning of paragraph 3 of Schedule 3 to the Nationality, Immigration and Asylum Act 2002, is that provision to be made by a local authority pursuant to section 21 National Assistance Act 1948 or by the Secretary of State for the Home Department pursuant to section 4, Immigration and Asylum Act 1999?

(3) If the Article 3 threshold would otherwise be met, does the making of a purported fresh claim on UN Convention on Refugees/Article 3 ECHR grounds by a failed asylum-seeker always make it necessary for support to be provided in order to avoid a breach of Convention rights, pending a decision by the Secretary of State on the representations?

Issue 1

Is a failed asylum-seeker who is in the United Kingdom in breach of the immigration laws within the meaning of section 11, Nationality, Immigration and Asylum Act 2002, excluded by paragraphs 1 and 7 of Schedule 3 to that statute from support or assistance?

8. Schedule 3 to the 2002 Act, which is given effect by section 54, provides:-

> "1. (1) A person to whom this paragraph applies shall not be eligible for support or assistance under-
>
> (a) section 21 or 29 of the National Assistance Act 1948 (c. 29) (local authority: accommodation and welfare),
>
> …
>
> (l) a provision of the Immigration and Asylum Act 1999 (c. 33), or
>
> (m) a provision of this Act."

9. Paragraphs 4-7A of Schedule 3 set out the persons to whom paragraph 1 applies i.e. the classes of person who are ineligible.

> "4. (1) Paragraph 1 applies to a person if he-
>
> (a) has refugee status abroad, or
>
> (b) is the dependant of a person who is in the United Kingdom and who has refugee status abroad.
>
> (2) For the purposes of this paragraph a person has refugee status abroad if-
>
> (a) he does not have the nationality of an EEA State, and
>
> (b) the government of an EEA State other than the United Kingdom has determined that he is entitled to protection as a refugee under the Refugee Convention.
>
> 5. Paragraph 1 applies to a person if he-
>
> (a) has the nationality of an EEA State other than the United Kingdom, or
>
> (b) is the dependant of a person who has the nationality of an EEA State other than the United Kingdom
>
> 6. (1) Paragraph 1 applies to a person if-
>
> (a) he was (but is no longer) an asylum-seeker, and

(b) he fails to cooperate with removal directions issued in respect of him.

(2) Paragraph 1 also applies to a dependant of a person to whom that paragraph applies by virtue of sub-paragraph (1).

7. Paragraph 1 applies to a person if-

(a) he is in the United Kingdom in breach of the immigration laws within the meaning of section 11, and

(b) he is not an asylum-seeker.

7A. Paragraph 1 applies to a person if—

(a) he—

(i) is treated as an asylum-seeker for the purposes of Part VI of the Immigration and Asylum Act 1999 (c 33) (support) by virtue only of section 94(3A) (failed asylum-seeker with dependent child), or

(ii) is treated as an asylum-seeker for the purposes of Part 2 of this Act by virtue only of section 18(2),

(b) the Secretary of State has certified that in his opinion the person has failed without reasonable excuse to take reasonable steps—

(i) to leave the United Kingdom voluntarily, or

(ii) to place himself in a position in which he is able to leave the United Kingdom voluntarily,

(c) the person has received a copy of the Secretary of State's certificate, and

(d) the period of 14 days, beginning with the date on which the person receives the copy of the certificate, has elapsed.

(2) Paragraph 1 also applies to a dependant of a person to whom that paragraph applies by virtue of sub-paragraph (1).

(3) For the purpose of sub-paragraph (1)(d) if the Secretary of State sends a copy of a certificate by first class post to a person's last known address, the person shall be treated as receiving the copy on the second day after the day on which it was posted.

(4) The Secretary of State may by regulations vary the period specified in sub-paragraph (1)(d)."

10. Paragraph 17(1) of Schedule 3 defines an "asylum-seeker" as follows:-

"(1) In this Schedule—

"asylum-seeker" means a person—

(a) who is at least 18 years old,

(b) who has made a claim for asylum (within the meaning of section 18(3)), and

(c) whose claim has been recorded by the Secretary of State but not determined.

Paragraph 17(2) further provides:-

"For the purpose of the definition of "asylum-seeker" in sub-paragraph (1) a claim is determined if—

(a) the Secretary of State has notified the claimant of his decision,

(b) no appeal against the decision can be brought (disregarding the possibility of an appeal out of time with permission), and

(c) any appeal which has already been brought has been disposed of."

11. Section 11 of the 2002 Act, to which paragraph 7 of Schedule 3 refers, provides:-

"11. (1) This section applies for the construction of a reference to being in the United Kingdom "in breach of the immigration laws" in section 4(2) or (4) or 50(5) of, or Schedule 1 to, the British Nationality Act 1981 (c. 61).

(2) A person is in the United Kingdom in breach of the immigration laws if (and only if) he-

(a) is in the United Kingdom,

(b) does not have the right of abode in the United Kingdom within the meaning of section 2 of the Immigration Act 1971,

(c) does not have leave to enter or remain in the United Kingdom (whether or not he previously had leave),

(d) is not a qualified person within the meaning of the Immigration (European Economic Area) Regulations 2000 (S.I. 2000/2326) (person entitled to reside in United Kingdom without leave) (whether or not he was previously a qualified person),

(e) is not a family member of a qualified person within the meaning of those regulations (whether or not he was previously a family member of a qualified person),

(f) is not entitled to enter and remain in the United Kingdom by virtue of section 8(1) of the Immigration Act 1971 (crew) (whether or not he was previously entitled), and

(g) does not have the benefit of an exemption under section 8(2) to (4) of that Act (diplomats, soldiers and other special cases) (whether or not he previously had the benefit of an exemption).

(3) Section 11(1) of the Immigration Act 1971 (person deemed not to be in United Kingdom before disembarkation, while in controlled area or while under immigration control) shall apply for the purposes of this section as it applies for the purposes of that Act."

Section 11, Immigration Act 1971 ("the 1971 Act"), to which section 11(3) of the 2002 Act refers, provides:

"11(1) A person arriving in the United Kingdom by ship or aircraft shall for the purposes of this Act be deemed not to enter the United Kingdom unless and until he disembarks, and on disembarkation at a port shall further be deemed not to enter the United Kingdom so long as he remains in such area (if any) at the port as may be approved for this purpose by an immigration officer; and a person who has not otherwise entered the United Kingdom shall be deemed not to do so as long as he is detained, or temporarily admitted or released while liable to detention, under the powers conferred by Schedule 2 to this Act or by Part III of the Immigration and Asylum Act 1999 or section 62 of the Nationality, Immigration and Asylum Act 2002 or by section 68 of the Nationality, Immigration and Asylum Act 2002."

12. Paragraph 2 of Schedule 3 creates a number of exceptions to ineligibility. Further, paragraph 3 of Schedule 3 provides in relevant part:-

"Paragraph 1 does not prevent the exercise of a power or the performance of a duty if, and to the extent that, its exercise or performance is necessary for the purpose of avoiding a breach of –

(a) a person's Convention rights,…"

13. In each of the applications, with the possible exception of D's, the question has arisen as to the effect of Schedule 3 on the eligibility of a failed asylum-seeker to receive support or assistance.

14. Paragraph 6 of Schedule 3 deals expressly with the eligibility of a failed asylum-seeker. However, many failed asylum-seekers will also be persons who are in the United Kingdom in breach of the immigration laws within section 11 of the 2002 Act.

In their case, the question arises whether they are ineligible by virtue of paragraph 7 or whether they become ineligible only if the criteria in paragraph 6 are met. The Claimants maintain that paragraph 6 makes exclusive provision for failed asylum-seekers and that a failed asylum-seeker becomes ineligible only if he fails to co-operate with removal directions issued in respect of him under paragraph 6(1)(b), thereby fulfilling the criteria of paragraph 6. They maintain that it is irrelevant whether the individual concerned is also in the United Kingdom in breach of the immigration laws because paragraph 7 has no application to failed asylum seekers.

15. The Defendants and the Secretary of State maintain that in any given case it is necessary to consider whether the individual concerned falls within any of the categories of ineligibility. In particular, they contend that paragraph 6 does not make exclusive provision for failed asylum-seekers and that a failed asylum-seeker who is in the United Kingdom in breach of the immigration laws will be ineligible by virtue of paragraph 7.

16. Mr Knafler, on behalf of the Claimants, accepts that the words of paragraph 7 are wide enough and apt to include failed asylum-seekers who are in the United Kingdom in breach of the immigration laws. However, he advances a number of arguments in support of his contention that Parliament must have intended that the cases of failed asylum-seekers are to be addressed exclusively by reference to paragraph 6.

17. First, he relies on the maxim *generalibus speciala derogant*. As Bennion explains, where the literal meaning of a general enactment covers a situation for which a specific provision is made by some other enactment within the Act or instrument, it is presumed that the situation was intended to be dealt with by the specific provision. (Bennion, Statutory Interpretation, 4th Ed., (2002) pp. 51-53.) Mr Knafler argues that although, read literally, paragraph 7 of Schedule 3 also applies to failed asylum-seekers who are unlawfully in the United Kingdom, the presumption is that Parliament intended all failed asylum-seekers to be dealt with by paragraph 6 of Schedule 3 because that is a special provision that deals with the special case of failed asylum-seekers, as distinct from the broader, larger and heterogeneous group of persons unlawfully present in the United Kingdom. However, the application of this approach to Schedule 3 encounters a number of difficulties.

18. In this regard, it is necessary to bear in mind the distinction between those who claim asylum at the port of arrival in the United Kingdom and those who claim asylum only after having entered the United Kingdom. Miss Laing for the Secretary of State informed the court of the Secretary of State's practice in the former case. A person arriving in the United Kingdom who claims asylum at the port of arrival is normally temporarily admitted to the United Kingdom. Accordingly, for the purposes of section 11 and paragraph 7 of Schedule 3 of the 2002 Act, he is deemed not to have entered the United Kingdom, by virtue of section 11(1) of the 1971 Act. If the application for asylum is unsuccessful, temporary admission is not discontinued at that point nor is it discontinued when removal directions are set. If the person is detained pending removal, temporary admission ceases at that point. However, in other cases temporary admission continues until the time set for departure. If the person does not report for the set flight, temporary admission then ceases. Consequently, a person who claims asylum at the point of arrival in the United Kingdom, who is granted temporary admission and whose claim for asylum is later determined against him will not, at that point, without more, be in the United Kingdom in breach of the immigration laws

within the meaning of paragraph 7(a). By contrast, a person who has applied for asylum only after entering the United Kingdom is likely to be a person who is in the United Kingdom in breach of the immigration laws within the meaning of paragraph 7(a). For example, a person who has entered the United Kingdom unlawfully and has later applied for asylum will normally be given temporary release. He will be a person in the United Kingdom in breach of the immigration laws within the meaning of paragraph 7(a). In particular, he will not be entitled to invoke the deeming provision in section 11(1) of the 1971 Act because he has otherwise entered the United Kingdom.

19. To my mind, there is nothing in the scheme or language of Schedule 3 to support the view that paragraph 6 was intended to make exclusive provision for failed asylum seekers to the exclusion of other categories of ineligibility. On the contrary, there appears to be no good reason why a failed asylum seeker who is not ineligible by virtue of paragraph 6 may not be ineligible on another ground. Thus, for example, a failed asylum seeker may not be ineligible within paragraph 6 because he has not failed to cooperate with removal directions, but may nevertheless be ineligible within paragraph 4 because he has refugee status abroad.

20. The principle of interpretation represented by the maxim *generalibus speciala derogant* is usually applied in situations where there is a contradiction between two provisions resulting in a need to limit the scope of the more general provision in order to remove the contradiction. However, here a literal reading and application of paragraphs 6 and 7 do not lead to any such contradiction. When these provisions are considered against the background described above and the very different immigration status enjoyed by different persons following the determination of their applications for asylum, the cumulative application of paragraphs 6 and 7 leads to an entirely sensible result. A failed asylum-seeker who is not to be regarded as in the United Kingdom in breach of the immigration laws is not, without more, rendered ineligible following the determination of his claim for asylum. He is placed in a more advantageous position than a failed asylum-seeker who is present in breach of the immigration laws. For the reasons stated above, this would, in general, have the effect of distinguishing between those who claim asylum at their port of entry and those who claim it later and would result in the more generous treatment of the former. There are clear indications that this was an important policy behind the 2002 Act.

21. A further difficulty with the Claimants' case is that it is inconsistent with the wording of paragraph 7. The criteria of ineligibility in paragraph 7 require that the individual "is not an asylum-seeker" (paragraph 7(b)). If it had been the intention of Parliament that paragraph 7 should be read subject to paragraph 6 so that failed asylum-seekers were to be excluded from paragraph 7, the words should have read "… he is not and has not been an asylum-seeker". The Claimants' case requires one to read paragraph 7(b) in this way. In his oral submissions, Mr Knafler maintained that this was an inadvertent result of insufficiently careful drafting in a complex area and that Parliament did not intend the result which emerges from a literal reading of paragraph 7(b). However, in my view there is no justification for an interpretation which would require one to read in these additional words. On the contrary, there is evidence elsewhere in the statute that Parliament was able to distinguish between the current and earlier status of an individual when it wished to do so (See for example, paragraph 6(1) of Schedule 3).

22. Mr. Knafler seeks to demonstrate that every case of a failed asylum-seeker within paragraph 6 would necessarily also fall within paragraph 7 and that this would have been apparent to Parliament in enacting those provisions. If that were the case, he says, the whole of paragraph 6 would be unnecessary and that would lend support to the view that paragraph 6 was intended to make specific and exclusive provision for failed asylum-seekers. He contends that all failed asylum-seekers who fail to co-operate with the removal directions issued in respect of them are in the United Kingdom in breach of the immigration laws within paragraph 7(a). First he maintains that the Secretary of State terminates temporary admission when he makes removal directions. Secondly he says that even if the Secretary of State did not discontinue temporary admission, a failure to comply with the conditions of temporary admission destroys the statutory presumption under section 11(1) of the 1971 Act that a person with a port-granted temporary admission has not entered the United Kingdom.

23. The first submission is inconsistent with Miss Laing's explanation of the Secretary of State's practice, which I accept. So far as the second submission is concerned, ***Raja Waheed Akhtar v Governor of Pentonville Prison*** [1993] Imm A. R. 424, supports the view that a person who has been temporarily admitted to this country subject to conditions is not an illegal entrant so long as he obeys those conditions, but that a breach of the conditions would destroy the statutory presumption that he has not physically entered the United Kingdom and would render him an illegal entrant because he entered at a time when he had not received permission to do so. (See Sir Thomas Bingham MR at p. 431; Kennedy LJ at p. 430.) However, the conditions which may be imposed on temporary admission do not include a condition of compliance with removal directions. (See paragraph 21(2) of Schedule 2 to the 1971 Act.) Furthermore, it is not necessarily the case that any failure to co-operate with removal directions would be a breach of such conditions as may be imposed. A failure to co-operate with removal directions will not necessarily render the failed asylum-seeker a person in the United Kingdom in breach of the immigration laws within paragraph 7(a) of Schedule 3. For these reasons, I consider that paragraph 6 applies in circumstances where paragraph 7 does not apply. Furthermore, I consider that, in any event, it was the intention of Parliament, as a matter of policy, to distinguish between failed asylum-seekers who are in the United Kingdom in breach of the immigration laws within paragraph 7 of Schedule 3 and those who are not and to make more generous provision for the latter category.

24. The Claimants argue that certain consequences, which they say would flow from the reading of these provisions for which the Defendants and the Secretary of State contend, demonstrate that Parliament cannot have intended that failed asylum-seekers should fall within paragraph 7 of Schedule 3.

25. First, they point out that, on the Defendants' case in relation to Issue 1 and Issue 2, a failed asylum-seeker who satisfied the criteria for assistance under section 21 of the 1948 Act, would be left with only such provision pursuant to section 4(2) of the Immigration and Asylum Act 1999 ("the 1999 Act") as is necessary to prevent a breach of his Convention rights under the Human Rights Act 1998. In that regard, they refer to the basic nature of the section 4 regime. They point to the observations of Mance L.J. in the Court of Appeal in ***R (Westminster City Council) v National Asylum Support Service*** (2001) 4 CCLR 143 at paragraph 57, on the limited nature of the accommodation and provision for essential living needs that section 95 of the

1999 Act contemplates and contend that the section 4 regime is an *a fortiori* case. That case was, of course, decided before the introduction of legislation in the form of the 2002 Act, intended to limit eligibility for assistance, and is concerned with different statutory provisions. However, even if the Defendants are correct in their submissions on Issue 2, I consider that such a result could not alter the plain meaning of Schedule 3 of the 2002 Act.

26. The Claimants then point to various anomalies which could arise if paragraph 7 of Schedule 3 were read as applying to failed asylum-seekers. In particular they contend that a person who entered the United Kingdom lawfully and only subsequently applied for asylum could be placed in a less advantageous position, so far as eligibility for asylum support is concerned, than a person who claimed asylum at the port of entry only after a failed attempt to enter unlawfully and who was granted temporary release. However, it seems to me that any such anomalies would arise from the curious fiction employed in section 11 of the 1971 Act and the administrative practice of the Secretary of State, as opposed to the reading of paragraphs 6 and 7 of Schedule 3 for which the Defendants and the Secretary of State contend. In any event, I do not consider that any such anomalies could displace the clear meaning of those provisions.

27. Nor, in my judgment is it inconsistent with the reading of Schedule 3 for which the Defendants and the Secretary of State contend that, as Mr Knafler maintains, the majority of asylum-seekers apply for asylum after entering the United Kingdom. There is a clear policy in the legislation to discourage such late applications and to encourage prompt applications at the port of entry. In my view, Parliament in enacting Schedule 3 of the 2002 Act intended to distinguish between failed asylum-seekers who are in the United Kingdom in breach of the immigration laws within the special meaning identified in paragraph 7 of Schedule 3 and those who are not. As Lord Bingham pointed out in ***R v Secretary of State for the Home Department, ex parte (1) Adam, (2) Limbuela, (3) Tesema*** [2005] UKHL 66, 3rd November 2005, in relation to section 55(5)(a) of the 2002 Act:-

> "Provisions have been enacted with the object, first, of encouraging applicants to claim asylum very promptly. This is because it is thought that claims made promptly are more likely to be genuine, because such claims are easier to investigate, and because if claims are made promptly and are judged to be ill-founded, the return of the unsuccessful applicant to his country of origin is facilitated." (paragraph 2)

The results which would follow from the reading of paragraphs 6 and 7 of Schedule 3 for which the Defendants and the Secretary of State would contend are, to my mind, entirely consistent with the policy of Parliament. Furthermore, the Claimants' proposed reading of those provisions would, by failing to distinguish between those who claimed asylum at the port of entry and those who did not, undermine that policy.

28. Finally, in this regard, the Claimants point to the Guidance issued by the Secretary of State to assist local authorities and housing authorities to implement section 54 and Schedule 3 of the 2002 Act and the Withholding and Withdrawal of Support (Travel Assistance and Temporary Accommodation) Regulations 2002. Paragraph 2(5) of Schedule 3 provides:-

> "A local authority which is considering whether to give support or assistance to a person under a provision listed in paragraph 1(1) shall act in accordance with any relevant guidance issued by the Secretary of State under sub-paragraph (3)(a)."

Mr Knafler contends that this Guidance supports the view that the eligibility of failed asylum-seekers is to be determined by the application of paragraph 6 and not paragraph 7. In my view, the Guidance does not support this contention. It merely reflects the categories established by those paragraphs and does not cast any light one way or the other on this issue. In any event, while such Guidance is entitled to respect it simply represents the view of the Secretary of State (***R v Wandsworth LBC, ex parte Beckwith*** [1996] 1 WLR 60 per Lord Hoffmann at pp 64-5).

29. For these reasons, I have come to the conclusion that a failed asylum-seeker who is in the United Kingdom in breach of the immigration laws within the meaning of section 11 of the 2002 Act is, by virtue of paragraph 7 of Schedule 3, ineligible for the support or assistance identified in paragraph 1 of Schedule 3, subject to the exceptions in paragraphs 2 and 3 of Schedule 3.

Issue 2

If in the case of a failed asylum-seeker who satisfies the criteria of section 21(1) and (1A), National Assistance Act 1948 the provision of support is necessary for the purpose of avoiding a breach of his Convention rights within the meaning of paragraph 3 of Schedule 3 to the Nationality, Immigration and Asylum Act 2002, is that provision to be made by a local authority pursuant to section 21, National Assistance Act 1948 or by the Secretary of State for the Home Department pursuant to section 4, Immigration and Asylum Act 1999?

30. We are here concerned with the relationship of section 21 of the 1948 Act and section 4 of the 1999 Act.

31. Section 21 includes the following provisions:-

> "21(1) Subject to and in accordance with the provisions of this Part of this Act, a local authority may with the approval of the Secretary of State, and to such extent as he may direct shall, make arrangements for providing — "
>
> (a) residential accommodation for persons aged eighteen or over who by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them; and
>
> (aa) 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;

…

(1A) A person to whom section 115 of the Immigration and Asylum Act 1999 (exclusion from benefits) applies may not be provided with residential accommodation under subsection (1)(a) if his need for care and attention has arisen solely—

(a) because he is destitute; or

(b) because of physical effects, or anticipated physical effects, of his being destitute.

(1B) Subsections (3) and (5) to (8) of section 95 of the Immigration and Asylum Act 1999, and paragraph 2 of Schedule 8 to that Act, apply for the purposes of subsection (1A) as they apply for the purposes of that section, but for the references in subsections (5) and (7) of that section and in that paragraph to the Secretary of State substitute references to a local authority.

(3) In making any such arrangements a local authority shall have regard to the welfare of all persons for whom accommodation is provided, and in particular to the need for providing accommodation of different descriptions suited to different descriptions of such persons as are mentioned in the last foregoing subsection.

…

(a) References in this Act to accommodation provided under this Part thereof shall be construed as references to accommodation provided in accordance with this and the five next following sections, and as including references to board and other services, amenities and requisites provided in connection with the accommodation except where in the opinion of the authority managing the premises their provision is unnecessary.

…

(8) Nothing in this section shall authorise or require a local authority to make any provision authorised or required to be made (whether by that or by any other authority) by or under any enactment not contained in this Part of this Act [or authorised or required to be provided under the National Health Service Act 1977].

32. The Secretary of State has directed local authorities to make arrangements under section 21(1)(a) of the 1948 Act in relation to persons who are ordinarily resident in their area and other persons who are in urgent need thereof, to provide residential

accommodation for persons aged 18 or over who by reason of age, illness, disability or any other circumstance are in need of care and attention not otherwise available to them. (Secretary of State's Approval and Directions LAC (93) 10, Appendix 1, paragraph 2(1).) Accordingly, section 21(1) imposes a duty on local authorities.

33. Section 4 of the 1999 Act includes the following provisions:-

> "4(2) The Secretary of State may provide, or arrange for the provision of, facilities for the accommodation of a person if—
>
> (a) he was (but is no longer) an asylum-seeker, and
>
> (b) his claim for asylum was rejected.
>
> …..
>
> (4) The following expressions have the same meaning in this section as in Part VI of this Act (as defined in section 94)—
>
> (a) asylum-seeker,
>
> (b) claim for asylum, and
>
> (c) dependant.
>
> (5) The regulations may, in particular—
>
> (a) provide for the continuation of the provision of accommodation for a person to be conditional upon his performance of or participation in community activities in accordance with arrangements made by the Secretary of State;
>
> (b) provide for the continuation of the provision of accommodation to be subject to other conditions;
>
> (c) provide for the provision of accommodation (or the continuation of the provision of accommodation) to be a matter for the Secretary of State's discretion to a specified extent or in a specified class of case."

34. In circumstances where failed asylum-seekers are ineligible by virtue of Schedule 3 to the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") for support or assistance under the provisions set out in paragraph 1 to Schedule 3, paragraph 3 nevertheless provides that paragraph 1 does not prevent the exercise of a power or the performance of a duty if, and to the extent that, its exercise or performance is necessary for the purpose of avoiding a breach of a person's Convention rights. We are here concerned with the exercise of powers or the performance of such duties by virtue of paragraph 3.

35. It is well established and was common ground between the parties that if there are no legal or practical obstacles to prevent a failed asylum-seeker returning to his country of origin, the denial of support by the Secretary of State or a local authority would not constitute a breach of that person's Convention rights. He has the choice to return to his country of origin. Neither Article 3 nor Article 8 imposes a duty on the United Kingdom to provide support for a failed asylum-seeker when there is no impediment to his returning to his own country (***R (Kimani) v Lambeth LBC*** [2004] 1 WLR 272). However, in many cases there may be obstacles to such a return. In such cases section 4 of the 1999 Act empowers the Secretary of State to provide or to arrange for the provision of facilities for the accommodation of a failed asylum-seeker. This is commonly referred to as 'hard cases support'. The effect of paragraph 3 of Schedule 3 to the 2002 Act is to permit the exercise of the power under section 4 of the 1999 Act to the extent that it is necessary to avoid a breach of the individual's Convention rights. If the failed asylum-seeker also satisfies the personal criteria in section 21(1) and (1A) of the 1948 Act so that he is a person in need of care and attention within the meaning of those provisions, the question arises whether there is a duty on the local authority in his place of ordinary residence to provide such assistance as is necessary to prevent a breach of his Convention rights, or whether the local authority is entitled to decline to provide assistance on the ground that that is the responsibility of the Secretary of State under section 4 of the 199 Act.

36. In the present case the Secretary of State maintains that he is not under a duty to act under section 4(2) because it is the responsibility of the local authority in question under section 21, which creates a special regime for the infirm destitute. The local authorities on the other hand maintain that there can be no duty on them to act under section 21 because it is the responsibility of the Secretary of State under section 4(2) which creates a special regime for the provision of accommodation for failed asylum-seekers. In addition, the local authorities point to the wording of section 21(1) which refers to a need for care and attention "which is not otherwise available to them" and to section 21(8) which provides that nothing in section 21 shall authorise or require a local authority to make any provision authorised or required to be made by that or any other authority by or under any other enactment.

37. A similar question arose in ***R (Westminster City Council) v National Asylum Support Service*** [2002] 1 WLR 2956. There, the House of Lords was concerned with the position of a current asylum-seeker as opposed to a failed asylum-seeker and the competing statutory provisions of section 21 of the 1948 Act and section 95 of the 1999 Act which empowers the Secretary of State to provide or arrange for the provision of support for asylum-seekers. In that case, the House of Lords was able to resolve the question of the applicability and priority of those provisions by reference to the regulations supplementing section 95. The 1999 Act empowered the Secretary of State to make "such further provision with respect to the powers conferred on him by section 95 as he considers appropriate" and stated that the Regulations may provide that in connection with determining whether a person is destitute the Secretary of State should take account "of support which is, …or might reasonably be expected to be, available to him or any dependent of his". (Section 95(12); Schedule 8, paragraphs 1, 2(1)(b).) The Regulations made under these powers were the Asylum Support Regulations 2000 (2000 No. 704). Regulation 6(4) stated that when it fell to the Secretary of State to determine for the purposes of section 95(1) whether a person applying for asylum support is destitute, he must take into account "any other support" which is available to him. The Secretary of State submitted that as an infirm

destitute asylum-seeker the applicant was entitled to support under section 21 and therefore could not be deemed destitute for the purposes of section 95(1). This argument prevailed. Lord Hoffmann observed:-

> "My Lords, like Stanley Burnton J and the Court of Appeal, I find this argument compelling. The clear purpose of the 1999 Act was to take away an area of responsibility from the local authorities and give it to the Secretary of State. It did not intend to create overlapping responsibilities. Westminster complains that Parliament should have taken away the whole of the additional burden which fell on local authorities as a result of the 1996 Act. It should not have confined itself to the able-bodied destitute. But it seems to me inescapable that this is what the new section 21(1A) of the 1948 Act has done. As Simon Brown LJ said in the Court of Appeal 4 CCLR 143, 151 para 29, what was the point of section 21(1A) if not to draw the line between the responsibilities of local authorities and those of the Secretary of State?" (at paragraph 41)

38. In the light of ***Westminster*** it is appropriate to consider whether guidance can be obtained from the regulations relating to section 4(2) of the 1999 Act and section 21 of the 1948 Act. Both the local authorities on the one hand and the Claimants and the Secretary of State on the other claim that the Regulations in question cast light on the present issue. However, their different approaches lead to very different conclusions.

39. Sub-sections 4(2)-(4) were inserted in the 1999 Act by section 49(1) of the 2002 Act. Sub-sections 4(5)-(9) were inserted by the Asylum and Immigration (Treatment of Claimants etc) Act 2004, section 10(1)(6). Regulations have been made pursuant to section 4(5) of the 1999 Act: Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005 (2005 No. 930) ("the 2005 Regulations"). Regulation 3 provides:-

> "(1) Subject to regulations 4 and 6, the criteria to be used in determining the matters referred to in paragraphs (a) and (b) of section 4(5) of the 1999 Act in respect of a person falling within section 4(2) or (3) of that Act are—
>
> (a) that he appears to the Secretary of State to be destitute, and
>
> (b) that one or more of the conditions set out in paragraph (2) are satisfied in relation to him.
>
> (2) Those conditions are that-
>
> (a) he is taking all reasonable steps to leave the United Kingdom or place himself in a position in which he is able to leave the United Kingdom, which may include complying with attempts to obtain a travel document to facilitate his departure;

(b) he is unable to leave the United Kingdom by reason of a physical impediment to travel or for some other medical reason;

(c) he is unable to leave the United Kingdom because in the opinion of the Secretary of State there is currently no viable route of return available;

(d) he has made an application for judicial review of a decision in relation to his asylum claim—

(i) in England and Wales, and has been granted permission to proceed pursuant to Part 54 of the Civil Procedure Rules 1998,

…

(e) the provision of accommodation is necessary for the purpose of avoiding a breach of a person's Convention rights, within the meaning of the Human Rights Act 1998."

Regulation 2 includes the following definition:-

""destitute" is to be construed in accordance with s 95(3) of the 1999 Act."

Section 95(3) of the 1999 Act provides:-

"(3) For the purposes of this section, a person is destitute if—

(a) he does not have adequate accommodation or any means of obtaining it (whether or not his other essential living needs are met); or

(b) he has adequate accommodation or the means of obtaining it, but cannot meet his other essential living needs."

However, section 95 also includes the following provisions:-

"(5) In determining, for the purposes of this section, whether a person's accommodation is adequate, the Secretary of State—

(a) must have regard to such matters as may be prescribed for the purposes of this paragraph; but

(b) may not have regard to such matters as may be prescribed for the purposes of this paragraph or to any of the matters mentioned in subsection (6)."

and

"(7) In determining, for the purposes of this section, whether a person's other essential living needs are met, the Secretary of State—

(a) must have regard to such matters as may be prescribed for the purposes of this paragraph; but

(b) may not have regard to such matters as may be prescribed for the purposes of this paragraph."

The matters prescribed for the purposes of section 95(5) and (7) are to be found in the Asylum Support Regulations 2000 (2000 No. 704) ("the 2000 Regulations"). These were the Regulations considered by the House of Lords in the ***Westminster*** case.

"(1) This regulation applies where it falls to the Secretary of State to determine for the purposes of section 95(1) of the Act whether—

(a) a person applying for asylum support, or such an applicant and any dependants of his, or

(b) a supported person, or such a person and any dependants of his,

(c) is or are destitute or likely to become so within the period prescribed by regulation 7.

2) In this regulation "the principal" means the applicant for asylum support (where paragraph (1)(a) applies) or the supported person (where paragraph (1)(b) applies).

(3) The Secretary of State must ignore—

(a) any asylum support, and

(b) any support under section 98 of the Act,

(c) which the principal or any dependant of his is provided with or, where the question is whether destitution is likely within a particular period, might be provided with in that period.

(4) But he must take into account—

(a) any other income which the principal, or any dependant of his, has or might reasonably be expected to have in that period;

(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; and

(c) any assets mentioned in paragraph (5) (whether held in the United Kingdom or elsewhere) which are available to the principal or any dependant of his otherwise than by way of asylum support or support under section 98, or might reasonably be expected to be so available in that period.

"Asylum support" is defined in Regulation 2(1) as follows:-

"(1) In these Regulations—

"asylum support" means support provided under section 95 of the Act;

40. Miss Richards for the London Borough of Croydon, supported by Mr Cowen for the London Borough of Hackney, contends that Regulation 2 of the 2005 Act which defines "destitute" by reference only to section 95(3) of the 1999 Act deliberately excludes the application of sections 95(5) and (7) and thereby prevents the 2000 Regulations from applying to section 4(2) of the 1999 Act. She maintains that the definition in section 95(3) should apply in the case of section 4(2) without the qualifications made by sub-sections 95(5) and (7).

41. In regard to Regulation 6 of the 2000 Regulations, the local authorities maintain that the opening words of Regulation 6(1) limit the application of Regulation 6 to cases where the Secretary of State has to take the decision as to destitution pursuant to section 95(1) of the 1999 Act. Accordingly there is, they say, no obligation on the Secretary of State by virtue of Regulation 6(3) to ignore support under section 4(2) or by virtue of Regulation 6(4) to take account of "any other support" which is available to the individual concerned.

42. Furthermore, Miss Richards contends that Regulation 6 of the 2000 Regulations does apply to a local authority when taking a decision under section 21(1A) of the 1948 Act where the alternative is section 4(2) support. Regulation 23 includes the following provisions:-

"(3) Paragraphs (3) to (6) of regulation 6 apply as they apply in the case mentioned in paragraph (1) of that regulation, but as if references to the principal were references to the person whose destitution or otherwise is being determined and references to the Secretary of State were references to the authority or (as the case may be) Department.

> (4) The matters mentioned in paragraph (3) of regulation 8 (read with paragraphs (4) to (6) of that regulation) are prescribed for the purposes of subsection (5)(a) of section 95 of the Act, as applied for the purposes of any of the relevant enactments, as matters to which regard must be had in determining for the purposes of any of the relevant enactments whether a person's accommodation is adequate."

Miss Richards submits that regulation 6 applies to any section 21(1A) decision, whether or not the individual concerned is an asylum-seeker or a failed asylum-seeker. She contends that when one substitutes the local authority for the Secretary of State in Regulation 6, Regulation 6(3) requires the local authority to ignore asylum support. However, this is defined as limited to support under section 95. Accordingly, the local authority is not required to ignore support under section 4(2). Furthermore, she submits, under Regulation 6(4)(b), as modified, a local authority has to take account of support under section 4(2). On this basis she contends that the Regulations establish a hierarchy of responsibility which is the reverse of that established by the House of Lords in ***Westminster*** in relation to section 95 and section 21.

43. In approaching these submissions it is important to bear in mind, at the outset, that, despite regulation 23 of the 2000 Regulations, these competing statutory regimes are not precisely symmetrical. In particular, the concept of destitution performs a very different function in section 4 and section 21. In section 4, as in section 95 of the 1999 Act, destitution is an essential precondition to the availability of support. (In the case of section 4 this is the result of Regulation 3(1)(a) of the 2005 Regulations. In the case of section 95 this is the result of section 95(1) itself.) However, as Simon Brown L.J. demonstrated in the Court of Appeal in ***Westminster*** (***R. (Westminster City Council) v NASS*** [2001] EWCA Civ 512; (2001) 4 CCLR 143 at paragraphs 26, 27) the concept of destitution plays a very different role in section 21 of the 1948 Act. There, its only relevance is that it goes to the question posed by section 21(1A): whether an individual's need for care and attention arises solely because of his destitution or its actual or anticipated physical effects. In that context destitution has no direct relevance to whether there is a need for care and attention and is relevant only to whether, assuming there is such a need, meeting it is nevertheless barred by section 21(1A). As a result, the fact that Regulation 6 may apply to such a determination by a local authority in the context of section 21 does nothing to further the local authorities' case on the relationship of sections 21 and 4(2).

44. Miss Laing, for the Secretary of State, supported by Mr Knafler, for the Claimants, contends that the provision in Regulation 2 of the 2005 Regulations that "destitute" is to be construed in accordance with section 95(3) of the 1999 Act, requires one to have regard to the adequacy of accommodation under section 95(3)(a) and to whether a person's other essential living needs are met under section 95(3)(b) and that, in doing so, one has to take account of the qualified meanings given to those concepts by section 95(5) and (7) respectively. She argues that the draftsman of the 2005 Regulations, when referring to "destitution" intended to import not only section 95(3) but also section 95(5) and (7) and by that route to import the 2000 Regulations.

45. This seems to me to be entirely correct. Regulation 2 of the 2005 Regulations requires "destitute" to be construed in accordance with section 95(3). While it would be possible to apply section 95(3) in isolation, this would ignore the important

qualifications resulting from sub-sections 95(5) and (7) to the meaning of the concepts employed by section 95(3). The result would be the application of a concept of destitution very different from that actually established by section 95(3) and I am unable to accept that the draftsman in stating that "destitute" is to be construed in accordance with section 95(3) intended such a result. Rather, I consider that he intended to employ the same concept as operates in the case of section 95. Contrary to Miss Richards's submission, the words "for the purposes of this section" in sub-sections (5) and (7) are not inconsistent with this reading. The same words appear in sub-section (3) which, on any view, is required to be transposed so as to apply to section 4(2). Similarly, the opening words of Regulation 6(1) of the 2000 Regulations – "This Regulation applies where it falls to the Secretary of State to determine for the purposes of section 95(1) of the Act…" - must be read as referring to the new purpose required by the 2005 Regulations i.e. the purposes of section 4(2) of the Act. In the same way, sub-sections (5) and (7) and the 2000 Regulations are transposed so as to apply to section 4(2).

46. Turning to the 2000 Regulations as imported, Miss Laing accepts that there is a difference between the operation of the 2000 Regulations in their original application to section 95 and in their application to section 4(2). This flows, she says, from the definition of "asylum support" by Regulation 2(1) as support provided under section 95 of the Act. As a result, Miss Laing contends, under Regulation 6(3)(a) the Secretary of State is not required to ignore support under section 4(2) but under Regulation 6(4)(b) he is required to take account of "any other support".

47. In the course of argument I suggested that it might be possible to carry the process of transposition one step further and to read the reference to "asylum support" in Regulation 6(3) as a reference to support under section 4(2). That would seem to make more sense than excluding consideration of asylum support under section 95 which can have no application in the case of a failed asylum-seeker and would be consistent with an intention to apply the same concept of destitution as applies under section 95. If that were done, the relationship of section 4(2) and section 21 would be identical to that of section 25 and section 21 accepted by the House of Lords in ***Westminster***. Although that would be a bold step in the interpretation of Regulation 6, I consider that it is at least arguable. However, it is not necessary to decide the point. What matters for present purposes is that, in deciding whether a failed asylum-seeker is destitute as a precondition to his obtaining relief under section 4(2), the Secretary of State must take into account any other support which is available to him or which might reasonably be expected to be available to him. He must therefore take account of support under section 21 of the 1948 Act. If such support is available or might reasonably be expected to be available the applicant is not destitute and does not qualify for support under section 4(2) of the 1999 Act. As a result, therefore, the responsibilities under section 4(2) and section 21 do not overlap and the relationship of these two provisions, in this regard, closely resembles that of section 95 and section 21.

48. Even if it were the case that the 2005 Regulations import only section 95(3) of the 1999 Act in order to determine whether a person is destitute for the purposes of section 4(2), the Secretary of State would still be required to consider whether that person has adequate accommodation or any means of obtaining it. That would necessarily require consideration of any entitlement pursuant to section 21. If there

were such entitlement, the individual could not be considered destitute within Regulation 3(1)(a) of the 2005 Regulations and therefore would not be eligible for support under section 4(2).

49. This result accords with the statutory scheme. The very fact of the insertion of sub-section 21(1A) by the Immigration and Asylum Act 1999, section 116, demonstrates that local authorities were to continue to bear a responsibility for persons whose need for care and attention was not solely due to destitution or its effects. In this regard it should also be noted that sub-section 21(1A) applies to persons to whom section 115 of the 1999 Act applies i.e. persons subject to immigration control. It is significant that it does not distinguish between asylum-seekers and failed asylum-seekers. Furthermore, to my mind this result also accords with the different functions of section 4(2) and section 21.

50. We are of course concerned here with the application of those provisions in order to prevent a breach of Convention rights. Paragraph 3(a) of Schedule 3 to the 2002 Act creates an exception to the general rule of ineligibility for support as established by paragraph 1(1) in respect of the various statutory provisions there identified including section 21 of the 1948 Act and the provisions of the 1999 Act. Paragraph 1 does not prevent the exercise of a power or the performance of a duty if and to the extent that its exercise or performance is necessary for the purpose of avoiding a breach of a person's Convention rights. However it does not create any new or independent power or duty to act to prevent a breach of Convention rights. Rather, the authority concerned is permitted to exercise the powers or perform the duties it would otherwise have, only to that limited extent. The statutory limitations on powers and duties under the various provisions therefore remain of great importance. In certain circumstances the effect of paragraph 3 may be to convert a power into a duty. As Lord Bingham of Cornhill observed in ***R (Adam, Limbuela and Tesema) v Secretary of State for the Home Department*** [2005] UKHL 66 with regard to the Secretary of State's power under section 55(5)(a) of the 2002 Act:-

> "Thus 55(5)(a) authorised the Secretary of State to provide or arrange for the provision of support to a late applicant for asylum to the extent necessary for the purpose of avoiding a breach of that person's Convention rights. But the Secretary of State's freedom of action is closely confined. He may only exercise his power to provide or arrange support where it is necessary to do so to avoid a breach and to the extent necessary for that purpose. He may not exercise his power where it is not necessary to do so to avoid a breach or to an extent greater than necessary for that purpose. Where (and to the extent) that exercise of the power is necessary, the Secretary of State is subject to a duty, and has no choice, since it is unlawful for him under section 6 of the 1998 Act to act incompatibly with the Convention rights. Where (and to the extent) that exercise of the power is not necessary, the Secretary of State is subject to a statutory prohibition and again has no choice. Thus the Secretary of State (in practice, of course, officials acting on his behalf) must make a judgment of the situation of the individual applicant matched against what the Convention requires or

> proscribes, but he has, in the strict sense, no discretion." (at paragraph 5.)

Similarly, the effect of paragraph 3 of Schedule 3 is that if a breach of human rights would otherwise result, a public body with power to act must exercise that power in order to avoid such a breach. However the duty which arises can be no more than a duty to exercise a power in accordance with its terms.

51. Section 4(2) of the 1999 Act is intended to empower the Secretary of State to provide or arrange for the provision of accommodation to failed asylum-seekers. The regime which it establishes is acknowledged by all concerned to be one of hard cases support. The Secretary of State has expressly accepted in this case that the accommodation provided is very basic. It is, of course, his case that it is not suited to the needs of destitute failed asylum-seekers who would otherwise qualify for assistance under section 21(1A). Certainly, nothing in section 4 caters for care needs. Furthermore, in contrast to section 95 which applies to all asylum-seekers who appear to be or to be likely to become destitute, section 4 is not a blanket provision for all failed asylum-seekers. It is a target provision for those who meet the criteria in the 2005 Regulations. Reference has been made above to the conditions of eligibility under Regulation 3(2) of the 2005 Regulations. Persons who are granted accommodation pursuant to section 4(2) may be dispersed to other parts of the United Kingdom and may be required to perform community activities as a condition of the continued provision of the accommodation.

52. By contrast, a very different statutory function is performed by section 21 of the 1948 Act. Its purpose is to meet the needs of those who are in need of care and attention which is not otherwise available to them, by reason of age, illness, disability or any other circumstances. In the case of persons subject to immigration control section 21(1A) applies more restrictive criteria. Nevertheless, the purpose of section 21 remains to meet the needs of those who are assessed to be in such need. The purpose of section 21(1)(a) is not to provide accommodation for those who need accommodation *per se* but to provide accommodation for those who are in need of care and attention. The provision of accommodation is not an end in itself but the means by which care and attention can be provided. As Lady Justice Hale observed in ***Abdul Wahid v The Mayor and Burgesses of the London Borough of Tower Hamlets*** [2002] EWCA Civ. 287:

> "A duty to provide housing under s 21(1)(a) is premised on an unmet need for "care and attention" ("a condition precedent", as this Court put it in the ***Westminster*** case, at p. 93E). These words must be given their full weight. Their natural and ordinary meaning in this context is "looking after": this can obviously include feeding the starving, as with the destitute asylum seekers in the ***Westminster*** case. Ordinary housing is not in itself "care and attention". It is simply the means whereby the necessary care and attention can be made available if otherwise it would not."

53. Furthermore, section 21(2) requires a local authority, in making arrangements, to have regard to the welfare of all persons for whom the accommodation is provided and in particular to the need for providing accommodation of different descriptions suited to

different descriptions of persons. Section 21(5) gives a wide meaning to "accommodation" as including board and other services, amenities and requisites provided in connection with the accommodation. Moreover, section 21(7) authorises a local authority to provide for the conveyance of persons to and from the accommodation provided and to provide in the premises in which accommodation is provided such other services as appear to the authority to be required. These provisions demonstrate the nature of the regime created by section 21.

54. The particular purpose of section 21 is highly relevant when one comes to consider the effect of section 21(8). There will be situations in which provision for meeting the needs of an individual for care and attention is authorised by another statute in addition to section 21 of the 1948 Act. An example is provided by the decision of the Court of Appeal in ***R v Richmond LBC, ex parte Watson*** [2001] QB 370 (this point was not the subject of the appeal to the House of Lords). There, section 117, Mental Health Act 1983 imposed a duty on the health authority to provide after-care services to the applicant. It was accepted that such after-care services could include residential accommodation which was specifically designed to care for the needs of persons in the position of the applicant. In those circumstances the effect of section 21(8) was that there was no power to provide residential accommodation under section 21(1) (see the judgment of Otton L.J. at pp. 379, 381).

55. However, the position would be very different if the other statute does not make provision for meeting the individual's needs for care and attention. A number of cases demonstrate that the fact that the section 21(1) duty could be discharged by the provision of ordinary housing without the provision of ordinary ancillary services, i.e. accommodation which could otherwise have been provided under legislation specifically addressed to the provision of accommodation, did not disengage the duty of the local authority under section 21. In ***R v Bristol City Council, ex part Penfold*** (1998) 1 CCLR 315 Scott Baker J. stated at p. 327A-B:-

> "In my judgment while section 21(1)(a) is not a basic safety net for everybody, it can in appropriate circumstances extend to the provision of "normal" accommodation. "Normal" housing can be provided by this subsection when it is the answer to a need which would otherwise have to be met by other community care services."

(See also ***R (Batantu) v Islington LBC***, Henriques J. (2001) 4 CCLR 445 at paragraph 33.) Similarly, in ***Khana v The Mayor and Burgesses of Southwark LBC*** (2001) 4 CCLR 267, C.A., Mance L.J. referred to the passage from the judgment in ***Penfold*** cited above and continued:-

> "However, I agree with Henriques J. in ***Ex parte Batantu*** that these permissive words are not to be understood as introducing a rigid hurdle or pre-condition to be overcome by any applicant or indeed local authority seeking to rely on the section. Section 21(1)(a) requires simply that a person is in need of care and attention which is not otherwise available to him or her. If accommodation will meet that need, the local authority may meet it in that way, without having to show that it could have been met in any other way."

56. In the same way, where a person is assessed as in need of care and attention under sections 21(1) and (1A), there is a duty on the local authority to exercise its powers or perform its duties to the extent necessary to avoid a breach of Convention rights. It is not open to a local authority to refuse to provide support which it would otherwise be required to provide, on the ground that accommodation could be provided by the Secretary of State under section 4 which would prevent a breach of Convention rights. Section 4 of the 1999 Act is intended to perform a different function: the provision of accommodation to able-bodied former asylum-seekers who satisfy the criteria.

57. The local authorities contend that many failed asylum-seekers who have satisfied the requirements of section 21(1) and (1A) do not require residential accommodation equipped with special features appropriate for those with severe disabilities. That is undoubtedly the case. However, that is a result of the standard enacted by Parliament in section 21(1) and (1A). That standard is not particularly high and as a result the qualifying group includes a large variety of vulnerable individuals with differing degrees of illness or disability. The function of section 21 is to meet the needs of those who are assessed as in need of care and attention in a wide range of situations. What matters for present purposes is not the character or the quality of the accommodation which may be provided under section 4 or section 21 respectively, but the function which that provision is intended to perform.

58. In their submissions for the local authorities Mr Cowen and Miss Richards made great play of the practical difficulties which they said would be experienced by local authorities if they were required to make decisions as to the immigration status of applications for support under section 21, matters in respect of which, it is said, local authorities possess no expertise. However, it is clear that local authorities often have to decide such questions, for example in applying paragraph 7 of Schedule 3 to the 2002 Act. Furthermore, Miss Laing has explained that there exists a Unit within the Home Office to assist local authorities in relation to such issues.

59. Finally, it is necessary to refer to a further authority on which the defendant local authorities relied. ***R. (Bakhada) v London Borough of Islington and the Secretary of State for the Home Department*** [2003] EWHC 3328 (Admin), 12th December 2003, is an unreported judgment of Stanley Burnton J on an application for interim relief. The applicant was a failed asylum-seeker who suffered from mental illness. Apart from the provisions of paragraph 3 of Schedule 3, he would have been ineligible for assistance under section 21. There was an issue as to whether there had been a proper assessment. In refusing permission to bring proceedings for judicial review, the judge considered it was not necessary to determine whether Article 3 was engaged; Islington could not be in breach of Article 3 because accommodation was available under section 4(2) from the Secretary of State. On the face of it, this decision lends some support for the scheme of priorities which the Defendant local authorities contend. However, the decision has to be approached with some caution for a number of reasons. First, it was decided before the 2005 Regulations came into force on 31st March 2005. Secondly, the competing priorities of section 21 and section 4(2) do not appear to have been fully argued at this interlocutory hearing. Indeed, although the Secretary of State was represented at the hearing, it is not clear what position he took on this issue. Thirdly, there had been an indication from the Home Office that it would reconsider its earlier decision to refuse accommodation under section 4(2) if the applicant needed accommodation while travel arrangements

were made. In all the circumstances, this decision does not cause me to alter the view to which I have come.

60. For all these reasons I consider that if in the case of a failed asylum-seeker who satisfies the criteria of section 21(1) and (1A) of the 1948 Act the provision of support is necessary for the purpose of avoiding a breach of that person's Convention rights, that provision is to be made by the local authority pursuant to section 21 of the National Assistance Act 1948.

Question 3

If the Article 3 threshold would otherwise be met, does the making of a purported fresh claim on UN Convention on Refugees/Article 3 ECHR grounds by a failed asylum-seeker always make it necessary for support to be provided in order to avoid a breach of Convention rights, pending a decision by the Secretary of State on the representations?

61. In two of the cases currently before the court (A and AW) the Applicant, following the determination of his or her claim for asylum, has made further representations to the Secretary of State and the Secretary of State has not yet taken a decision as to whether these amount to fresh claims within Rule 353 of the Immigration Rules.

62. Section 94(1) of the 1999 Act defines "asylum-seeker" as follows:-

> ""asylum-seeker" means a person who is not under 18 and has made a claim for asylum which has been recorded by the Secretary of State but which has not been determeined;"

and defines "claim for asylum" as follows:-

> ""claim for asylum" means a claim that it would be contrary to the United Kingdom's obligations under the Refugee Convention or under Article 3 of the Human Rights Convention, for the claimant to be removed from, or required to leave, the United Kingdom;"

63. In ***R (Nigatu) v Secretary of State for the Home Department*** [2004] EWHC 1806 Collins J. addressed the questions whether, and if so when, a purported fresh claim for asylum may have the effect of rendering the applicant an asylum-seeker once again. Relying closely on the reasoning of Sir Thomas Bingham M.R. in ***R v Secretary of State for the Home Department, ex parte Onibiyo*** [1996] QB 768, Collins J. considered that there exists an important distinction between the situation where an initial claim for asylum is made and that where attempts are made to prevent removal following rejection of a claim and the exhaustion of all the appeal processes in respect of that claim. He considered that in the latter case the Secretary of State is entitled to consider whether the representations made can properly be said to amount to a fresh claim so as to make the individual an asylum-seeker. On this basis, he concluded that it is necessary for the Secretary of State to decide the initial question as to whether it should be regarded as a claim for asylum before any right to deport within section 95 of the 1999 Act could arise.

64. If a fresh claim is accepted and recorded as such by the Secretary of State under Rule 353 of the Immigration Rules, the failed asylum-seeker making that claim becomes an asylum-seeker once again. This was common ground in the present proceedings which are concerned, rather, with the interim position between the making of further representations and the decision of the Secretary of State.

65. The Claimants maintain that where a failed asylum-seeker has made further representations to the Secretary of State, only the Secretary of State can take a decision on the status of those representations and that it follows that, pending such a decision by the Secretary of State, where the Article 3 threshold would otherwise be met it is always necessary for support to be provided in order to prevent a breach of Convention rights. In particular, the Claimants maintain that it is never open to a local authority which would otherwise be under a duty to provide support on Convention grounds to decline to do so on the basis of any inadequacy in a purported fresh claim.

66. The Defendants accept that it is only the Secretary of State who can take a decision as to whether further representations constitute a fresh claim for the purpose of the immigration status of the applicant. Nevertheless, they maintain that local authorities, in taking decisions as to whether it is necessary for them to provide support in order to prevent a breach of the applicant's Convention rights, are entitled to take account of all relevant facts including the purported fresh claim. They maintain that there are circumstances, for example where the representations merely state that the adjudicator was wrong to reject the applicant's claim or where they merely repeat verbatim the original grounds, where it would be open to the local authorities to conclude that the withholding of support would not result in the breach of the applicant's Convention rights. The Defendants therefore maintain that whether or not the making of a purported further claim by a failed asylum-seeker entitles him to support in order to prevent a breach of Convention rights will depend upon the facts of each individual case and, in particular, on an assessment of the further representations.

67. Miss Laing on behalf of the Secretary of State distinguished between two broad categories of further representations. The first comprises those which manifestly are not fresh claims, either because they merely repeat material already advanced and on which an adverse decision has already been reached, or because they are on their face not claims at all. The second comprises those which on their face may, or may not, be fresh claims because the answer to that question will depend on further investigation. The Secretary of State accepts that in the second category of case where the case does not fall within section 21 of the 1948 Act, support by him may be necessary in order to avoid a breach of Convention rights. In particular, the Secretary of State accepts that a fresh claim may be a barrier to removal until a decision has been made under Rule 353 of the Immigration Rules because of his obligations under the Refugee Convention not to refoule a refugee or someone who may be a refugee. Accordingly the Secretary of State submits, that in the circumstances set out in Issue 3, it will not always be necessary to provide support. The necessity for such provision will depend on whether the purported fresh claim looks like a fresh claim and is neither repetition of points previously made nor manifestly not an asylum claim at all. These submissions on behalf of the Secretary of State are adopted by the Defendants.

68. The present issue, was, in fact, touched on by Collins J. in certain passages in ***Nigatu***. There, Collins J. was clearly very conscious of the risk that if an individual is to be

deprived of support pending a determination on his purported fresh claim he may be subjected to altogether illegitimate pressure and forced to give up what may be a genuine fresh claim in the face of destitution. He considered that the safeguard lay in section 4 of the 1999 Act which meant that so long as the individual is remaining in the United Kingdom there is power in the Secretary of State to provide at least for his accommodation. Nevertheless, the judge accepted that there is another side of the coin and that the procedures are open to abuse. He had been referred by counsel to one case in which there had been no fewer than seven purported fresh applications; each time one was rejected, another was put forward before removal could take place. The judge observed:-

> "One can see that in that sort of situation and where, for example, the alleged fresh claim contained nothing that was essentially new, and only arose some time after support had been removed and when removal was due to take place, it may well be that the Secretary of State could properly refuse any further support."

He then stated that it was obvious that if someone had remained in the country after his support had been removed the Secretary of State might well properly reach the conclusion that he did not need any further support either because he should not be regarded as destitute or because section 4 would not come to his aid. He concluded:-

> "Those are all matters that would have to be taken into account when considering the circumstances of any individual case. But I am satisfied that the making of what is asserted to be a fresh claim does not automatically trigger the right to continuing support as an asylum seeker. That only arises when the Secretary of State decides, obviously as soon as possible, that it can be properly regarded as a fresh claim, whether or not, as I said, in the end it succeeds." (paragraphs 25-26)

69. I respectfully agree. It seems to me that pending a decision by the Secretary of State on whether the further representations constitute a fresh claim, the Secretary of State will not be bound in every case to provide support under section 4 where the other requirements of that section are met. In my view it will be open to him, or to NASS, to decline to do so, for example on the grounds that the further representations are manifestly unfounded, or merely repeat the previous grounds or do not disclose any claim for asylum at all. In his remarks in ***Nigatu*** Collins J. was addressing the provision of support under section 4 of the 1999 Act. Nevertheless, to my mind, his observations provide considerable assistance to the Defendants in their submission in the present case. A public body required to decide whether the provision of support is necessary for the purpose of avoiding a breach of Convention rights will not in every case be required to treat further submissions as a sufficient basis for the provision of support pending a decision by the Secretary of State that they do not constitute a fresh claim.

70. The present practice of the Secretary of State reflects this approach. Policy Bulletin 71 published on 31 March 2005 is intended to provide guidance to NASS staff, accommodation providers, one-stop services and applicants' representatives on the

criteria that a failed asylum-seeker must meet to qualify for support under section 4 of the 1999 Act and the conditions under which this support shall be provided. Paragraph 5.3(v) provides:

> "5.3 If the NASS caseworker is satisfied that a person applying for support under section 4 is destitute, they must then determine whether the person meets one or more of the conditions set out in 3.1(i)-(v) above. In making this determination, the NASS caseworker shall consider any supporting evidence submitted by the applicant. The NASS caseworker shall be satisfied that a person meets a relevant condition if the following evidence is available
>
> …
>
> (v) necessary to avoid a breach of the person's Convention rights: the NASS caseworker shall take decisions on a case-by-case basis as to whether an application meets this criterion. In each case the caseworker must decide whether it is reasonable to expect the person to leave the UK, and if it is not, whether it is necessary to provide support under section 4 to avoid a breach of the person's Convention rights. It would not be reasonable to expect a person to leave the United Kingdom in the following circumstances. (These are examples and are not intended to be an exhaustive list.)
>
> - The person has submitted to the Secretary of State further representations which seek a fresh claim for asylum and these have not yet been considered. Support under section 4 shall be provided in such cases unless it is clear to the NASS caseworker that the further representations simply rehearse previously considered material or contain no detail whatsoever. …"

71. In this regard my attention has been drawn to a recent decision of an Asylum Support Adjudicator in ***Wamba v Secretary of State for the Home Department*** ASA/05/04/9178. The appellant appealed against a decision of the Secretary of State refusing his application for support under section 4 of the 1999 Act on the ground that he did not satisfy one or more of the conditions in Regulation 3(2) of the 2005 Regulations. The decision had in fact been taken by a NASS caseworker, under delegated powers. The decision stated that in refusing the application it had been noted that the further representations made by the failed asylum-seeker did not constitute a significant material change of circumstances or significant new evidence which directly related to his claim, but, rather, a critique of the original decision. The Adjudicator held that the decision of the NASS caseworker to refuse to provide

support under section 4 on the basis of a preliminary assessment that the fresh claim application would not satisfy the requirements of paragraph 353 of the Immigration Rules was ultra vires. The Adjudicator considered that decisions under the Immigration Rules involving applications for leave to enter or remain in the United Kingdom could not be made by NASS caseworkers. On this basis she concluded that the decision to refuse support under section 4 was ultra vires. As an alternative basis of her decision, she referred to Policy Bulletin 71 which, in her view, if it conferred authority on NASS caseworkers to refuse section 4 support where the further representations "simply rehearsed previously considered material or contained no detail whatsoever", did not do so in circumstances where the extensive evidence submitted did not in the view the caseworker constitute "a significant material change of circumstances or significant new evidence which directly relates to the appellant's claim".

72. The Defendants and the Secretary of State have submitted in these proceedings that ***Wamba*** is incorrectly decided. With respect to the learned Adjudicator, I accept that submission. It is undoubtedly the case that the decision as to whether the further representations constitute a fresh claim under Rule 353, Immigration Rules, for the purpose of determining the Applicant's immigration status, is a decision to be taken by the Secretary of State or his lawful delegate. Clearly it could not be taken by NASS, a local authority or any other public body. However, it is clear from paragraph 9 of the decision that the NASS caseworker was not purporting to take any decision under the Immigration Rules. Rather, he was making an assessment, for the purposes of section 4 support only, of whether the claim could be regarded as a fresh claim or whether, manifestly, it could not. To my mind, it is not necessarily ultra vires for a NASS caseworker to make any sort of evaluation of a purported fresh claim. Similarly, I am not prepared to conclude that there are no circumstances in which it would be open to a local authority, in determining whether it was necessary to provide support, for example under section 21 of the 1948 Act for the purpose of avoiding a breach of Convention rights, to conclude on the basis of a purported fresh claim that no such necessity arose because of the contents of the further representations.

73. Mr Knafler for the Claimants placed particular reliance on the statement by Simon Brown L.J. in ***R v Wandsworth LBC, ex parte O*** [2000] 1 WLR 2539 at pp. 2552-3 that a local authority has no business with an applicant's immigration status save only for the purpose of learning why care and attention is not otherwise available to him, as section 21(1) requires, and for reporting such applications to the immigration authorities if they conclude that the Home Office is unaware of the applicant's unlawful presence. That was a case where the local authority refused section 21 support on the basis that the applicant was in the United Kingdom unlawfully and the observations of Simon Brown LJ were made in that context. However, since that decision, Parliament has enacted the 2002 Act and local authorities are now required not to provide support to a failed asylum-seeker who is in the United Kingdom in breach of the immigration laws save where and to the extent that this would lead to a breach of that person's Convention rights. The guidance issued by the Home Office to local authorities and housing authorities in relation to Schedule 3 to the 2002 Act makes clear that the position has changed dramatically since the decision in ***O*** and the local authorities now are required to take decisions relating to the immigration status of individuals as a matter of course.

74. It seems to me that in considering whether the provision of support to failed asylum-seekers is necessary in order to prevent a breach of Convention rights it will be necessary for the public body concerned to have regard to all relevant circumstances including, where appropriate, the matters which are alleged to constitute a fresh claim for asylum. In many cases – possibly the great majority – it may well be inappropriate for a public body to embark on any consideration of the purported fresh grounds. However, there may well be cases in which the purported fresh grounds are manifestly nothing of the sort and where it would be appropriate for the public body to take account of that fact in arriving at its decision in relation to asylum support.

75. I accept the submission of the Defendants and the Secretary of State that it is necessary to proceed on a case-by-case basis. Each case will turn on its own facts and it will be necessary to examine the facts of each case with care. The Defendants have indicated that following this preliminary judgment they will have to reconsider their positions in relation to each of the cases. The parties have expressed the hope that it will be possible to resolve outstanding matters by agreement. Should this not be possible in relation to the issue of the further representations made by A and AW it will be necessary to consider in detail the purported fresh claims in each case. This is not a matter which has yet been addressed in argument.

76. I should add that, contrary to the submission of the Claimants, I do not consider that this conclusion is inconsistent with the principles expounded by the Court of Appeal in ***Onibiyo*** or that it in any way diminishes the protection afforded to failed asylum-seekers who wish to make a further claim for asylum. It is only in the clearest cases that it will be appropriate for the public body concerned to refuse relief on the basis of the manifest inadequacy of the purported fresh grounds. In addition, where appropriate the individual will have recourse to judicial review in order to challenge such a decision. Moreover, the alternative contended for by the Claimants would lead to a situation in which failed asylum-seekers could secure assistance for prolonged periods on the basis of purported fresh claims which were manifestly nothing of the sort.

77. In these circumstances I conclude that if the Article 3 threshold would otherwise be met, the making of a purported fresh claim on Refugee Convention/Article 3 ECHR grounds by a failed asylum-seeker does not always make it necessary for support to be provided in order to avoid a breach of Convention rights, pending a decision by the Secretary of State on the representations.