

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

BY EMAIL: davestamp@asirt.org.uk

TO: Dave Stamp at ASIRT

16th June, 2008

Dear Dave,

Thank you for your query to Liberty's voluntary sector advice service. Please accept my apologies for the delay in replying to you.

I understand that you are working with an increasingly large number of women with no recourse to public funds who are either pregnant or have young children. You are finding it difficult to access appropriate accommodation and subsistence support for these women from local authority social services teams, with the result that these vulnerable families are left in destitution. You ask whether there is anyway that the Human Rights Act could be used to as an appropriate lever to ensure support for this group.

I have outlined below the position on entitlement to welfare benefits and community care services for people with no recourse to public funds, and incorporated advice on where human rights arguments will be relevant which I hope you will find useful. I have not set out any details on the domestic violence concession in the Immigration Rules which enables spouses to apply for indefinite leave to remain despite their marriage no longer subsisting. Please let me know if you need information about this.

Public Funds

As you know, there are many categories of applicants who have to show that they can adequately maintain and accommodate themselves in the UK without recourse to public funds. Public funds are defined in the immigration rules and includes Income Support, Income-Based Job Seekers Allowance, Housing Benefit, Council Tax Benefit, Child Benefit, Disability Living Allowance and Attendance Allowance to name but a few. The Immigration and Asylum Act 1999 further excludes many categories of applicant, defined as those 'subject to immigration control' from entitlement to benefits (Section 115). As a result, many people are left without any form of support and so turn to the social services departments of local authorities for community care support.

Community Care and the Immigration and Asylum Act 1999

Section 21 of the National Assistance Act 1948 (“NAA 1948”) places a duty on the local authority to provide residential accommodation to persons aged 18 or over and ordinarily resident in the area 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. The main purpose of section 21 of the NAA 1948 is the provision of residential support, although other support such as food, laundry and personal hygiene facilities may be provided as part of a package with the accommodation.

Section 116 of the Immigration and Asylum Act 1999 (“IAA 1999”) inserted a new subsection (1A) into Section 21 of the NAA 1948 which provides that people ‘subject to immigration control’ may not be provided with residential accommodation under section 21 if their need for care and attention has arisen *solely* because they are destitute or because of the physical effects, or anticipated physical effects of being destitute.

Therefore, any person subject to immigration control whose needs do not solely arise from their destitution or the physical effects of the destitution may receive care and attention under Section 21 of the NAA 1948. This is referred to as ‘destitution plus’. Persons subject to immigration control are defined in Subsection 9 of section 115:

“(9) “A person subject to immigration control” means a person who is not a national of an EEA State and who—

- (a) requires leave to enter or remain in the United Kingdom but does not have it;
- (b) has leave to enter or remain in the United Kingdom which is subject to a condition that he does not have recourse to public funds;
- (c) has leave to enter or remain in the United Kingdom given as a result of a maintenance undertaking; or
- (d) has leave to enter or remain in the United Kingdom only as a result of paragraph 17 of Schedule 4.”

In O v Wandsworth London Borough and Bikha v Leicester City Council (2000) the Court of Appeal considered the meaning of the term ‘solely’ in relation to the determination of whether a person’s needs arise from their destitution. It decided that in order to satisfy the test, it is not necessary that the person’s needs arise completely independently of their destitution. Therefore, they do not have to show that, even if they were not destitute, they would still qualify for assistance. It was enough if the applicant could show that their needs were materially more acute by reasons other than lack of resources, such as age, illness or disability.

In R (Khan) v Oxfordshire CC (2004) it was decided that domestic violence was what had led to the destitution but the need for care and attention arose solely from destitution. The court considered that in some cases, in addition to causing destitution, domestic violence could make the need for care and attention more acute. When faced with such a case, careful consideration should be given to establish

whether there are any additional circumstances which create a section 21 need. Examples might include physical or mental injuries created by the domestic violence.

Destitution plus may also arise through mental health difficulties. In R (PB) v Haringey LBC (2006) the court considered that where the applicant's depression arose from factors other than just destitution, it could not be said that destitution and its physical effects were the sole cause.

It should be noted that under s 21(1)(aa) of the NAA 1948 expectant and nursing mothers are not to be exempted from the provision of services to meet 'eligible needs' regardless of whether they are subject to immigration control and regardless of whether their needs are solely caused by destitution. Accordingly, expectant or nursing women who require residential accommodation and do not otherwise have support available to them, are entitled to receive this (for such time as they are nursing) under section 21(1)(aa) of the NAA 1948.

Nationality, Immigration and Asylum Act 2002

Even if an applicant is 'destitute plus' Section 54 and Schedule 3 of the Nationality, Immigration and Asylum Act 2002 (NIAA 2002) prohibits local authorities from providing community care services in general to:

1. individuals with refugee status in other EEA countries;
2. nationals of other EEA countries;
3. failed asylum seekers who have not co-operated with removal directions and their dependents;
4. individuals who are unlawfully in the UK and who are not asylum seekers;
and
5. failed asylum seekers with dependant children who fail, without reasonable excuse, to leave the UK voluntarily or to put themselves in a position to do so.

The community care services excluded by Schedule 3 includes Sections 21 and 29 of the NAA 1948, Section 17 of the Children Act 1989 ("CA 1989") and Section 2 of the Local Government Act 2000 ("LGA 2000"). The terms of Section 21 of the NAA 1948 has been set out above. Section 29 of the NAA 1948 requires local authorities to make arrangements to promote the welfare of people within the local area who are blind, deaf or dumb, who suffer from mental disorder of any description, and other persons who are substantially and permanently handicapped by illness, congenital deformity or disability.

Section 17(1) of the CA 1989 places a general duty on social services authorities to safeguard and promote the welfare of children 'in need' and to promote the upbringing of such children by their families. In meeting this duty, social services are empowered to provide a wide range of services appropriate to those children's needs. Subsection 3 of Section 17 provides

"Any service provided by an authority in the exercise of functions conferred on them by this section may be provided for the family of a particular child in need or for any member of his family, if it is provided with a view to safeguarding or promoting the child's welfare."

A child is to be taken to be ‘in need’ if:

- “(a) he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by a local authority under this Part;*
- (b) his health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services; or*
- (c) he is disabled,”* (section 17(10) of the Children Act 1989)

Section 2 of the LGA 2000 provides a wide power for local authorities to improve the economic, social and environmental welfare of a local area provided it is not specifically prohibited elsewhere in legislation. Section 2 empowers a local authority to give financial assistance and provide accommodation to any person in the local area.

There are two important exceptions to note to the prohibition in Schedule 3 of the NIAA 2002. The first is the human rights exception set out in paragraph 3 of Schedule 3. This exception means that the excluded support referred to above must still be provided if it is necessary to do so in order to avoid a breach of the applicant’s human rights. This is discussed more fully below.

In addition to the human rights exception, the NIAA 2002 made way for regulations to allow local authorities to provide support to certain of the classes excluded from support by schedule 3. So for those in the UK unlawfully (who are not asylum seekers), some support can be provided but, importantly, there is no duty to do so. The relevant regulations are the Withholding and Withdrawal of Support (Travel Assistance and Temporary Accommodation) Regulations 2002. Accommodation can be provided to this class of persons if they have a dependant child, but no cash can be provided. In R (on the application of M) v Islington LBC (2004), the Court of Appeal decided that the Withholding regulations (see further below) gave local authorities the power to provide support during the whole period that an applicant is waiting for the immigration authorities to set removal directions, including the period taken for appeals.

A further point to note is that the exclusions under Schedule 3 do not prevent the provision of support or assistance to either a British citizen or a child.

Human Rights Exception

The Human Rights Act 1998 (“HRA”) incorporates the European Convention on Human Rights (“the Convention”) into domestic law. Section 6 of the HRA makes it unlawful for public authorities to act in a way that is incompatible with the rights incorporated from the Convention.

Article 3: Prohibition on Torture

There have been a number of cases where individuals have argued that the denial of support would constitute a breach of their human rights. R (Adam, Limbuela and Tesema) v SSHD (2005) was a decision of the House of Lords which concerned asylum seekers who were found not to have claimed asylum 'as soon as reasonably practicable' after their arrival in the UK as required by Section 55 of the NIAA 2002. Section 55 denies support to asylum seekers who fail to claim asylum as soon as reasonably practicable on arrival and contains a human rights exception in the same terms as the exception contained in paragraph 3 of Schedule 3. The issue was whether it was necessary to provide support for them for the purpose of avoiding a breach of their human rights.

The House of Lords held that an asylum seeker would be at risk of suffering degrading treatment contrary to Article 3 of the European Convention if he, with 'no alternative sources of support, unable to support himself, is, by the deliberate action of the state, denied shelter, food or the most basic necessities of life'. While the court felt unable to formulate a simple test applicable in all cases, the court considered that the potential breach of Article 3 would require that a person be supported if the person was "*...obliged to sleep in the street, save perhaps for a short and foreseeably finite period, or was seriously hungry, or unable to satisfy the most basic requirements of hygiene.*"

Article 3 is an absolute prohibition against torture, inhuman or degrading treatment or punishment and if the effect of what the public authority is doing is to breach the prohibition, it has no option but to do something to prevent the breach, in this case – provide support. The fact that an act of a positive nature was required to prevent the treatment from attaining the minimum level of severity which engages the prohibition against degrading treatment in Article 3 did not alter the essential nature of the right.

The current position is therefore that, an asylum seeker receiving a section 55 refusal of support must show that he or a dependent is facing an imminent prospect of serious suffering caused or materially aggravated by denial of shelter, food, or the most basic necessities of life and that a failure to support will result in a breach of their rights under Article 3. Lord Bingham explained that many factors would affect that judgment, including "*...age, gender, mental and physical health and condition, any facilities or sources of support available to the applicant, the weather and time of year and the period for which the Applicant has already suffered or is likely to continue to suffer privation.*" This reasoning on Article 3 will I think be equally relevant to the human rights exception contained in Schedule 3.

Article 8: Right to Respect for Private and Family Life

Where the applicant is able, in principle, to return to their country of origin, local authorities may be able to avoid a breach of the applicant's human rights other than by providing support. In some cases, the courts have upheld decisions to provide a plane ticket in order to help the applicant return to their country of origin. In R (Kimani) v Lambeth London Borough Council (2003): the Court of Appeal found that "*[a] State owes no duty under the Convention to provide support to foreign nationals*

who are permitted to enter their territory but who are in a position freely to return home.”

Although such course of action may not raise issues under Article 3, it is likely to engage Article 8 where the denial of support to the parent of a child would result in the separation of that family.

Article 8 guarantees the right to respect for private and family life, home and correspondence. The relationship between parent and child is protected by the family life element of Article 8. What you should note though is that Article 8 is a qualified right which means that, unlike with Article 3, it can be interfered with in certain circumstances, if such interference is in accordance with the law, is in pursuit of a legitimate aim and is ‘necessary in a democratic society’. This latter requirement means that any interference must be proportionate and necessary.

As mentioned, Schedule 3 of the NIAA 2002 does not prevent services being provided for children and so support can be offered under Section 17 of the CA 1989. Section 17 of the CA 1989 imposes a general duty on authorities to safeguard the welfare of children in need and so far as consistent with that, to promote the upbringing of such children by their families. It is specifically provided that any service provided under the section *may* be provided for the family as a whole (section 17(3) CA 1989). Accordingly, where a child is entitled to receive support by virtue of the CA 1989, but the parent or parents with custody of the child are not, this raises the question of whether the parent should also receive accommodation support in order to prevent a violation of Article 8.

In the 2004 case of R (on the application of “O”) v The London Borough of Haringey and another (2004) the Court of Appeal commented:

“The terms of section 17 are wide enough for the needs of any children of a destitute asylum seeker to be brought within its scope, and arguably to impose an obligation on the authority to support them as a family.”

Section 17 confers a *discretion* upon the local authority to provide for the family in the interests of the child, which can include the provision of fares and assistance to the family for travel to another country if this is in the child’s interests *G v Barnet* [2001] EWCA Civ 540; [2001] 2 FLR 877, and *A v Lambeth* [2001] EWCA Civ 1624). Conversely, accommodation may be provided to the parent and the child on the basis that it is in the child’s best interests to remain in the UK with the parent.

Whilst the conditions in the home country are not directly relevant to the assessment of the child’s needs under the CA 1989, it is relevant to the assessment of how best to meet the child’s needs (*R (on the application of Ali and others) v Birmingham City Council* [2002] EWHC 1511). In the same judgement Moses J went on to say:

“That is not to say that the Council could not be in any circumstances in breach of art 8(1). There may be circumstances where a mother refuses to take up an offer of funding a return and refuses to live separately from the children, where the Council is compelled to invoke its powers under s 31 [of the CA 1989 entitling the State to take the children into care]. If matters

reached such a head, which they did not in this case, it is possible to envisage a breach of art 8(1) even before s 31 proceedings started. As Mr Sales suggested, that is the proper way to approach the decision of Elias J in R (J) v London Borough of Enfield and Secretary of State for Health [2002] EWHC Admin 432. In that case Elias J recorded that the taking of a child away from her mother and putting him into care against the wishes of a mother would amount to an infringement of art 8(1) and pointed out, at para 48, that even if the mother only consents reluctantly because it is the only way to protect the child that would not be true consent. Accordingly, art 8(1) was engaged.”

In R (on the application of G) v Barnet London Borough Council (2003) the House of Lords considered whether the council’s policy of offering accommodation to a child in need under the CA 1989 could be limited to the child only, to the exclusion of the parents. The Lords noted that the difficulty faced by councils with a duty under the CA 1989 is that the cost of accommodating a parent with their child in temporary accommodation is often less than accommodating a child with a foster carer, but taking this course with some homeless families would result in the council having to provide for the housing needs of families with dependent children where the parents are intentionally homeless or ineligible for housing assistance. The Lords commented that providing accommodation for these families is not the function of a local social services authority. The function of a social services authority under the CA 1989 is to provide accommodation for homeless children, not homeless families. Families with dependent children should not be allowed to jump the housing queue.

The claimants contended in this case that it was not lawful for a local authority to offer to accommodate a child alone in the hope or expectation that the parent would refuse to be separated from the child and thereby accept the offer of a plane ticket home. In G's case the child was 14 months old at the time of the initial decision. The mother adamantly refused to return to the Netherlands. The council decided to end the arrangements whereby G lived with her young child in bed and breakfast accommodation. The council offered instead to accommodate the child with foster parents, even though this would have been more expensive than the existing arrangements.

The House of Lords considered the Article 8 issues raised by the claim and decided that where the child's immediate need is for accommodation with his parent – a most basic need- it was difficult to see how the local authority can be said to have fulfilled its duty under section 17(1) of the CA 1989 by accommodating the child alone in such circumstances. The interference with family life through the separation of parent and child was not proportionate in that case, particularly considering the young age of the child.

“It cannot be reasonable in this type of case to give greater weight to the wider financial repercussions than to the adverse consequences to the individual child in the particular case. Parliament cannot have intended that the latitude afforded to local authorities by section 17(1) should embrace such a highly unsatisfactory result regarding the accommodation needs of a child in need.”

In making an argument that the local authority should exercise its discretion under section 17 and provide accommodation to the family of the child, any likely separation of parent and child if the support was not provided and the interference with Article 8 that would result will be relevant.

Conclusion

Where a person with no alternative source of support is left without food or shelter by the deliberate action of the State, the House of Lords has found that such a person would be at risk of suffering degrading treatment contrary to Article 3 of the Convention. If a person with no recourse to public funds falls within one of the five categories set out in Schedule 3 of the NIAA 2002, they will also be ineligible for community care support *unless* they are able to show that such support must be provided in order to avoid a breach of their human rights. In such a situation, Schedule 3 of the NIAA does not prevent the exercise of a power or the performance of a duty to the extent that it is necessary in order to avoid a breach.

As mentioned, children are excluded from the prohibition in Schedule 3 but this does not mean that services provided under Section 17 of the Children Act 1989 will necessarily be provided to the parent of the child. Where they are not, this may result in the parent and child being separated which will constitute an interference with Article 8. In such a case, social services will have to show why such a measure was necessary and proportionate in the circumstances.

If they do not fall within Schedule 3 of the NIAA 2002, but are subject to immigration control as per Section 115 of the IAA, then they cannot access welfare benefits (contributory ones) and are not entitled to section 21 support *unless* they are able to show that they are 'destitute plus'. As discussed, this requires an applicant to show that they have needs for care and attention which do not arise solely because they are destitute or solely from the physical effects of destitution.

You may be aware that Rights of Women (<http://www.rightsofwomen.org.uk/>) and Southall Black Sisters (<http://www.southallblacksisters.org.uk/contact.html>) (amongst others) have been running a campaign to abolish the no recourse to public funds rule so that women subject to such a condition are not left destitute. I understand that Vernon Coaker MP, Parliamentary Undersecretary for Crime Reduction has stated recently that the government recognises the problems with the no recourse rule and that it intends to introduce a scheme to enable the payment of money retrospectively to organisations that support certain women who are subject to this rule. I would recommend that you get in touch with the organisations involved to see how the campaign is progressing and whether they are able to offer any further advice or information to you. Southall Black Sisters have a campaign pack on this issue on their website at: <http://www.southallblacksisters.org.uk/campaigns.html#nrcampaign>

Feedback

I would be very grateful if you could spare a few moments to complete and return the attached feedback form to me. You can either complete it electronically by underlining your chosen answers or you can print out the form, complete and post it to VAS, Liberty, 21 Tabard Street, London SE1 4LA. Liberty is very grateful for any

feedback received from our service users. All feedback we receive will be analysed and referred to for the purposes of developing and improving the service. Thank you in advance for taking the time to complete the form.

I hope the information contained in this letter is of assistance. Please do contact me if you have any questions or if I can be of any further help.

Yours sincerely,

Shamle Begum
Advice and Information Officer
LIBERTY