*883 R (M) v Islington London Borough Council

Positive/Neutral Judicial Consideration

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Court of Appeal

Waller , Buxton and Maurice Kay L.J.J.

2004 Jan 26, 27; April 2

Local government—Homeless persons—Children in need—Immigrant having child holding British nationality—Provision of housing pending determination of mother's application for indefinite leave to remain—Local authority assessing child's needs as best served by offering air tickets to return to country of mother's origin—Local authority offering short—term accommodation pending removal—Whether decisions lawful—Whether infringing right to family life— Children Act 1989 (c 41), s. 17 — Human Rights Act 1998 (c 42), Sch. 1, Pt I, art 8 — Nationality, Immigration and Asylum Act 2002 (c 41), Sch. 3, paras 1(1)(g), 7—Withholding and Withdrawal of Support (Travel Assistance and Temporary Accommodation) Regulations 2002 (SI 2002/3078), reg 3

The claimant, a national of Guyana, entered the United Kingdom on a visitor's visa in 1998 and stayed beyond its expiry date. In 1999 she married a man with indefinite leave to remain in the United Kingdom and had a child who was a British citizen. The claimant's husband subsequently left and she presented as destitute to the local authority's social services department. At that stage the claimant was the subject of immigration proceedings and her appeal against a refusal of indefinite leave to remain was pending. The local authority assessed the child's needs pursuant to its duty under section 17 of the Children Act 1989 [1] , under which services might also be provided for the child's family if provided with a view to safeguarding or promoting the child's welfare. However, under paragraphs 1(1)(g) and 7 of Schedule 3 to the Nationality, Immigration and Asylum Act 2002 [2] , a person who was in the United Kingdom in breach of the immigration laws and who was not an asylum seeker was not eligible for support or assistance under section 17 of the 1989 Act. Regulation 3 of the Withholding and Withdrawal of Support (Travel Assistance and Temporary Accommodation) Regulations 2002 [3] empowered a local authority to arrange travel and provide accommodation for certain persons to whom paragraph 1 of Schedule 3 to the 2002 Act applied. The 2002 Regulations provided that a local authority had to have regard to guidance issued by the Secretary of State for the Home Department in making travel and accommodation arrangements. The guidance stated that it was preferable for persons returning to countries which were not EEA member states that accommodation should not continue for more than ten days from the date the family first presented for support or assistance. The local authority in compliance with those provisions decided to offer the claimant and her child one-way tickets to Guyana and to provide accommodation for 21 days pending the claimant's removal. The claimant sought judicial review of the decision. The judge criticised the assessment procedure for failing to consider the rights of the all the parties to respect for private and family life under article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms , as scheduled to the Human Rights Act 1998. He further held that it would not be lawful for the defendant local authority to offer accommodation to a person in the claimant's

position for any more than a short period pending removal. He therefore allowed the *884 claim, quashed the decision to offer tickets and ordered the local authority to reconsider its decision.

On the claimant's appeal-

Held, allowing the appeal, (1) that under Schedule 3 to the Nationality, Immigration and Asylum Act 2002 and regulation 3(3) of the 2002 Regulations a local authority's power was limited to the provision of accommodation to a person like the claimant who was an immigrant unlawfully in the United Kingdom with a dependent child; but that, since the claimant was the subject of ongoing immigration proceedings and her dependent child had British nationality, the power had to be exercised in the light of their rights and those of the father to respect for family life under article 8 of the Convention (post, paras 34, 46-47, 53, 60, 81).

(2) That (Buxton LJ dissenting), while Home Office guidance indicated the temporary duration for which accommodation could be supplied to the claimant under Schedule 3 to the 2002 Act, where the Home Office had not made travel arrangements for an immigrant unlawfully in the United Kingdom it was open to a local authority to supply accommodation for a period longer than the ten days set out in the guidance; that such accommodation could be provided whilst an immigrant awaited removal directions; that since the claimant had an immigration appeal pending which would be treated as abandoned if she left the country, she was entitled to such accommodation; and that, accordingly, there would be a declaration that the local authority had the power under Schedule 3 to the 2002 Act to provide accommodation to the claimant for as long as she was not in breach of any removal directions (post, paras 57, 59, 78-79, 81).

Decision of Wilson J [2003] EWHC 1388 (Admin); [2003] 2 FLR 903 reversed .

The following cases are referred to in the judgments:

Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223; [1947] 2 All ER 680, CA
De Falco v Crawley Borough Council [1980] QB 460; [1980] 2 WLR 664; [1980] 1 All ER 913, CA
Laker Airways Ltd v Department of Trade [1977] QB 643; [1977] 2 WLR 234; [1977] 2 All ER 182, CA
Lobe v Minister for Justice, Equality and Law Reform [2003] IESC 3, Ir Supreme Court
Marckx v Belgium (1979) 2 EHRR 330
Poku v United Kingdom (1996) 22 EHRR CD 94
R v Hammersmith and Fulham London Borough Council, Ex p D [1999] LGR 575
R v Wandsworth London Borough Council, Ex p O [2000] 1 WLR 2539; [2000] 4 All ER 590, CA
R (G) v Barnet London Borough Council [2001] EWCA Civ 540; [2002] LGR 34, CA ; [2003] UKHL 57; [2004] 2 AC 208; [2003] 3 WLR 1194; [2004] 1 All ER 97, HL(E)
R (Mahmood) v Secretary of State for the Home Department [2001] 1 WLR 840, CA
Samaroo v Secretary of State for the Home Department [2001] EWCA Civ 1139; [2001] UKHRR 1150, CA

The following additional cases were cited in argument:

Abdulaziz, Cabales and Balkandali v United Kingdom (1985) 7 EHRR 471
Chief Adjudication Officer v Foster [1992] QB 31; [1991] 3 WLR 473; [1991] 3 All ER 846, CA ; [1993] AC 754; [1993] 2 WLR 292; [1993] 1 All ER 705, HL(E)
Ciliz v The Netherlands [2000] 2 FLR 469
H (A Minor) (Adoption: Non-patrial), In re [1997] 1 WLR 791; [1996] 4 All ER 600, CA
Inquiry under the Company Securities (Insider Dealing) Act 1985, In re An [1988] AC 660; [1988] 2 WLR 33; [1988] 1 All ER 203, CA and HL(E) *885
Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997; [1968] 2 WLR 924; [1968] 1 All ER 694, HL(E)
R v Brent London Borough Council, Ex p Awua [1996] AC 55; [1995] 3 WLR 215; [1995] 3 All ER 493, HL(E)
R v Islington London Borough Council, Ex p Rixon (1998) 1 CCLR 119

R v Secretary of State for Social Security, Ex p Joint Council for the Welfare of Immigrants [1997] 1 WLR 275; [1996] 4 All ER 385, CA
R v Wandsworth London Borough Council, Ex p Beckwith [1996] 1 WLR 60; [1996] 1 All ER 129, HL(E)
R (Ali) v Birmingham City Council [2002] EWHC 1511 (Admin); [2003] LGR 238; 5 CCLR 355
R (Anufrijeva) v Secretary of State for the Home Department [2003] UKHL 36; [2004] 1 AC 604; [2003] 3 WLR 252; [2003] 3 All ER 827, HL(E)
R (J) v Enfield London Borough Council [2002] EWHC 432 (Admin); [2002] LGR 390
R (Kimani) v Lambeth London Borough Council [2003] EWCA Civ 1150; [2004] 1 WLR 272, CA
R (Q) v Secretary of State for the Home Department [2003] EWCA Civ 364; [2004] QB 36; [2003] 3 WLR 365; [2003] 2 All ER 905, CA
R (W) v Lambeth London Borough Council [2002] EWCA Civ 613; [2002] 2 All ER 901; [2002] LGR 351, CA
Secretary of State for the Home Department v Bambast (unreported) 8 June 1999, IAT
Sen v The Netherlands (2001) 36 EHRR 81

APPEAL from Wilson J

By a claim form dated 27 January 2003 and amended 11 March 2003, the claimant, M , sought judicial review of a decision made on 20 January 2003 upon an assessment by the defendant local authority, Islington London Borough Council, of her needs and those of her child under section 17 of the Children Act 1989 . The relief sought was an order quashing the decision; a mandatory order requiring the local authority lawfully to assess the needs of the claimant and her child under section 17 of the 1989 Act and an interim order to provide suitable accommodation and reasonable maintenance. The grounds were, inter alia, that the local authority failed to complete an assessment under the Children Act 1989 or failed to make an assessment in substantial compliance with guidance issued under section 7 of the Local Authority Social Services Act 1970 .

By order dated 5 June 2003 Wilson J, sitting in the Administrative Court, refused the application.

By notice of appeal dated 13 August 2003, and with permission of Sedley LJ granted on 29 August 2003, the claimant appealed on the grounds that the judge erred in deciding that Schedule 3 to the Nationality, Immigration and Asylum Act 2002 and regulation 3 of the Withholding and Withdrawal of Support (Travel Assistance and Temporary Accommodation) Regulations 2002 did not permit a local authority to provide accommodation to persons unlawfully in the United Kingdom until such time as they failed to comply with removal directions and /or did not permit a local authority to provide accommodation to persons unlawfully in the United Kingdom for longer than a very short period of ten days or so, with the result that after a very short period it was lawful for a local authority to exercise functions under section 17 of the 1989 Act so as to offer travel to the home country against the wishes of persons from abroad, in lieu of ****886*** accommodation, under the 1989 Act and the 2002 Regulations. The claimant sought a declaration that Schedule 3 to the 2002 Act and regulation 3 of the 2002 Regulations permitted and required a local authority to provide accommodation to persons unlawfully in the United Kingdom with dependent children where the family was destitute and had no other recourse until such time as they failed to comply with removal directions, so that until such time it was not lawful for a local authority to exercise functions under section 17 of the Children Act 1989 so as to offer travel to the home country against the wishes of persons from abroad, in lieu of accommodation under the 1989 Act or the 2002 Regulations.

The facts are stated in the judgment of Buxton LJ.

Stephen Knafler for M.

Bryan McGuire for the local authority.

Kristina Stern for the Secretary of State as interested party.

Cur. adv. vult.

2 April. The following judgments were handed down. BUXTON LJ

The facts and issues

1. The claimant, Mrs M, is a national of Guyana. She came to the United Kingdom in 1998 on a visitor's visa, staying here after that visa expired. It is accepted that both at the time of the hearing before the judge and at the time of the present hearing she was and is unlawfully in this country. She is, however, the subject of current immigration proceedings. An appeal against the Secretary of State's refusal of her application for indefinite leave to remain was rejected by an adjudicator on 23 September 2003. She has however been granted permission by the Immigration Appeal Tribunal to appeal against that decision; we understand that the appeal is to be heard on 23 June 2004.

2. That application on Mrs M's part is largely based on her family circumstances. In November 1999 Mrs M married Mr M, a native of Antigua with indefinite leave to remain in this country, and set up home with him in his council flat in the area of the respondent, Islington London Borough Council ("Islington"). On 17 October 2001 a daughter ("the child") was born. By the operation of section 1(1)(b), read with section 50(2) , of the British Nationality Act 1981 the child is a British citizen. She was not only born in the United Kingdom, but born there in lawful wedlock to a father who has indefinite leave to remain here.

3. Unfortunately, the marriage did not prosper, and in about August 2002 Mr M left the claimant. The tenancy of the flat was transferred to Mrs M, but she is unable to pay the rent, and has no means of subsistence for herself or the child apart from the provision that Islington has, very properly, made pending the outcome of the present proceedings. As to the husband, we were told from the bar that arrangements have been made for contact between him and the child, arrangements that Mr M has in the main fulfilled.

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4. Again very properly, the situation of Mrs M and the child attracted the concern of Islington's social services department, which embarked upon an assessment of the child's needs under the provisions of the Children Act 1989. On the basis of that assessment Islington concluded that the needs of the child could be met by providing Mrs M and the child with tickets to enable Mrs M to return to her family in Guyana. That step was not, in itself, outside Islington's proper powers under the Children Act: see *R v Hammersmith and Fulham London Borough Council, Ex p D [1999] LGR 575* , per Kay J. However, it then came to be accepted that, as set out above, Mrs M was unlawfully in the United Kingdom. That was thought by Islington to impact on its Children Act obligations towards the child, by the operation of Schedule 3 to the Nationality, Immigration and Asylum Act 2002 and the Withholding and Withdrawal of Support (Travel Assistance and Temporary Accommodation) Regulations 2002. I shall have to return to these provisions in much more detail later in the judgment. On the basis of its understanding of them, Islington sent a long and detailed letter to the claimant's solicitors on 27 March 2003, the salient points of which were as follows. Islington maintained its earlier decision

> "to offer [Mrs M] and [the child] one way plane tickets to Guyana because [the child's] welfare would be best safeguarded and promoted by being cared for in Guyana where she has a grandmother, aunt, uncle and cousins, and therefore a greater prospect of family support than she has in the UK."

If Mrs M none the less remained in the UK in order to pursue her immigration proceedings,

> "circumstances could very well arise whereby mother and child might be separated in breach of article 8 if [Mrs M] remained in this country pursuing your application to remain here without any means of supporting your child. Without deciding what the authority would do in circumstances which have not arisen, there would be a real prospect that the authority would reach a decision that the child had to be taken into care as a means of addressing its [sc the child's] needs."

None the less, Islington had

> "not made any decision as to what would happen in the event that the offer was refused even after having been found by the court to have been lawfully made. This is not a case where a decision has been made, still less a threat made, to take [the child] into care. In the event that [Mrs M] [refuses] to accept the offer made even following court proceedings, the Islington would continue to assess what is in the best interests of [the child] in the light of developing circumstances."

5. Mrs M has throughout adamantly opposed any return to Guyana either for herself or for the child. In these proceedings she seeks an order quashing the decision to offer tickets to Guyana contained in Islington's letter of 20 January 2003; and directions that Islington should further assess the needs of Mrs M and the child under section 17 of the Children Act 1989 , and pending the completion of that assessment provide Mrs M with accommodation and maintenance. ***888** *The legislation*

6. The inquiry starts with Islington's powers and duties under section 17 of the Children Act 1989. The most immediately relevant provisions are in subsections (1) to (3):

> "(1) It shall be the general duty of every local authority (in addition to the other duties imposed on them by this Part)-(a) to safeguard and promote the welfare of children within their area who are in need; and, (b) so far as is consistent with that duty, to promote the upbringing of such children by their families, by providing a range and level of services appropriate to those children's needs.
>
> "(2) For the purpose principally of facilitating the discharge of their general duty under this section, every local authority shall have the specific duties and powers set out in Part 1 of Schedule 2.
>
> "(3) 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."

There is no dispute that the child in the present case is "in need".

7. The local authority's position has however been severely affected by, and these proceedings address, Schedule 3 to the 2002 Act. That is entitled "Withholding and withdrawal of support", and by paragraph 1(1) provides that "A person to whom this paragraph applies shall not be eligible for support or assistance under" and there are then set out a very large number of statutory provisions that otherwise provide health, welfare and housing benefits. Importantly for present purposes there is included, under paragraph 1(1)(g): " section 17, 23C, 24A or 24B of the Children Act 1989 (welfare and other powers which can be exercised in relation to adults)."

8. Schedule 3 then goes on to indicate various exceptions to the blanket exclusion of rights under the listed statutes. The exceptions relevant to our case are to be found in paragraphs 2 and 3:

> "2(1) Paragraph 1 does not prevent the provision of support or assistance-(a) to a British citizen, or (b) to a child ...
>
> "3. 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 ..."

9. Schedule 3 then goes on to set out the four classes of persons who are by paragraph 1, and subject to the above exceptions, rendered ineligible for the statutory benefits that Schedule 3 addresses, and then makes further provision for the limited amount of assistance that local authorities are permitted to give to persons falling within those categories. Those provisions are important in the determination of this appeal, and need to be set out in full:

> " *First class of ineligible person: refugee status abroad*
>
> "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.
> ***889**
> "(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 [see Convention and Protocol relating to the Status of Refugees (1951) (Cmd 9171) and (1967) (Cmnd 3906)].

"Second class of ineligible person: citizen of other EEA state

"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.

"Third class of ineligible person: failed asylum seeker

"6(1) Paragraph 1 applies to a person if-(a) he was (but is no longer) an asylum seeker, and (b) he fails to co-operate 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).

"Fourth class of ineligible person: person unlawfully in United Kingdom

"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.

"Travel assistance

"8. The Secretary of State may make regulations providing for arrangements to be made enabling a person to whom paragraph 1 applies by virtue of paragraph 4 or 5 to leave the United Kingdom.

"Temporary accommodation

"9(1) The Secretary of State may make regulations providing for arrangements to be made for the accommodation of a person to whom paragraph 1 applies pending the implementation of arrangements made by virtue of paragraph 8.

"(2) Arrangements for a person by virtue of this paragraph-(a) may be made only if the person has with him a dependent child, and (b) may include arrangements for a dependent child.

"10(1) The Secretary of State may make regulations providing for arrangements to be made for the accommodation of a person if-(a) paragraph 1 applies to him by virtue of paragraph 7, and (b) he has not failed to co-operate with removal directions issues in respect of him.

"(2) Arrangements for a person by virtue of this paragraph-(a) may be made only if the person has with him a dependent child, and (b) may include arrangements for a dependent child."

10. The regulation-making power has been exercised by the Secretary of State by the 2002 Regulations. The relevant parts of the Regulations read as follows:

> "Power for local authorities to arrange travel and provide accommodation
>
> "3(1) A local authority may make arrangements ('travel arrangements') enabling a person with refugee status abroad or who is an EEA national to leave the United Kingdom to travel to the relevant EEA state.
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>
> "(2) A local authority may make arrangements for the accommodation of a person in respect of whom travel arrangements have been or are to be made pending the implementation of those arrangements.
>
> "(3) A local authority may make arrangements for the accommodation of a person unlawfully in the United Kingdom who has not failed to co-operate with removal directions issued in respect of him.
>
> "(4) Arrangements for a person by virtue of paragraph (2) or (3)-(a) may be made only if the person has with him a dependent child, and (b) may include arrangements for that child

"Requirements relating to travel and accommodation arrangements

"4(1) Travel arrangements and arrangements for accommodation must be made so as to secure implementation of those arrangements at the lowest practicable cost to the local authority.

"(2) Subject to the requirements in paragraph (1), travel arrangements made in respect of a person must be made so that the person leaves the United Kingdom as soon as practicable.

"(3) Travel arrangements and arrangements for accommodation may not include cash payments to a person in respect of whom arrangements are made and must be made in such a way as to prevent the obtaining of services or benefits other than those specified in the arrangements.

"(4) A local authority must have regard to guidance issued by the Secretary of State in making travel arrangements and arrangements for accommodation."

The proceedings before Wilson J

11. It was assumed on all sides before Wilson J, and he accepted, that the issue was to be determined by the construction, or at least the application, of the 2002 Regulations. Mrs M's contention was that the 2002 Regulations made it unlawful for Islington to perform its section 17 duty by offering tickets for a return to Guyana. Islington had the power under the 2002 Regulations, which in this case it should exercise, to accommodate Mrs M and the child until the outcome of Mrs M's immigration proceedings was known. Wilson J [2003] 2 FLR 903, para 45, rejected that contention. He held that if Islington properly concluded that it would safeguard and promote the welfare of the child to return with Mrs M to Guyana, it would not be unlawful for Islington "at least to offer tickets for travel": which latter, the judge concluded, was all that Islington had so far done. He was fortified in

that view by his conclusion, at para 36, that it would not be lawful under the 2002 Regulations for a local authority to offer a person in the fourth class, a person unlawfully in the United Kingdom, not travel but accommodation for any more than a short period pending removal, such as the 21 days that Islington had originally offered to Mrs M.

12. The judge however went on to criticise Islington's procedure in coming to the decision that an offer of travel would meet Islington's obligations. He drew attention to paragraph 3 of Schedule 3, set out above, which permitted the exercise of a section 17 power if such was necessary to avoid a breach of a person's Convention rights. In the judge's view, the assessment conducted by Islington had not given attention to the mutual rights of the child and of Mr M for family contact with each other; and had ***891** inadequately investigated the actual prospects for the child's welfare were she to be returned to Guyana. He therefore concluded, at para 59:

> "For each of those two reasons Islington's assessment was flawed. Its decision to offer tickets under section 17 must be quashed and Islington must reconsider what decision to make about any exercise of its powers for the benefit of the child, including in relation to the claimant, under that section."

13. Mrs M does not of course quarrel with that conclusion so far as it goes; but by this appeal she contends that the judge should have gone considerably further. As the argument in the appeal developed, it became clear that the parties were principally concerned to have guidance as to how Islington should perform the reconsideration ordered by Wilson J. The precise terms of the relief sought may not therefore be of central importance. However, after discussion with Mr Knafler, for Mrs M, I think that the substance of Mrs M's case can be expressed in terms of a declaration that Schedule 3 to the 2002 Act and the 2002 Regulations permit local authorities to provide accommodation to persons unlawfully in the United Kingdom who have dependent children, and require that power to be performed when the family is destitute and has no other recourse. As a result, it was not open to Islington, and until failure to comply with removal directions is not open to Islington, to offer tickets to the home country against the wishes of Mrs M.

14. This issue, and the statutory background against which it is ventilated, has given rise to a series of problems, going some way beyond the case as it appeared before the judge, and all of which have been explored before us with considerable force and subtlety. I have concluded that the judge was correct in remitting the case to Islington. However, that conclusion has to be reached through a detailed examination of the statutory provisions with which those working in this difficult field now have to wrestle, which in my view impose a scheme somewhat different from that which was debated before the judge. And that examination involves the resolution of a number of essentially preliminary points that I will address first. These are: the ambit of paragraph 1(1)(g) of Schedule 3 to the 2002 Act; the respective roles of the Secretary of State and of the local authority; and position of the child as a British citizen.

The ambit of paragraph 1(1)(g) of Schedule 3

15. It was assumed without question before the judge, and the judge accepted, that the issue for him was as set out in para 1 of his judgment: "What powers do local authorities now have to provide accommodation for an adult who, not being an asylum seeker, is unlawfully present in the United Kingdom and who is caring for a child?"

16. I was initially concerned, and still am concerned, by this formulation. The local authority only becomes involved, at least in the terms of this case, because it is confronted by a *child* in need. It is accepted in the circumstances of this case that its powers, either original or as modified by Schedule 3 and the Regulations, can only be exercised in the context of the interests of the child. When the judge ordered Islington to reconsider its decision, at least in relation to conditions in Guyana, he did so because Islington had not sufficiently considered whether to live there would ***892** safeguard and promote the child's welfare. Save as it impacted upon the welfare of the child, the welfare of the mother would be an irrelevant and unlawful consideration for Islington to take into account. Paragraph 1(1)(g) of Schedule 3 addresses those cases where, under Children Act 1989 provisions, support or assistance "can" be provided to an adult: either in his capacity as such, as a person formerly in care, under sections 23C, 24A and 24B; or as part of the provision of services to the child's family or a member of it under section 17(3) , though always in such case with a view to safeguarding and promoting the child's welfare. But why should it be assumed in a case such as the present, where as a matter of fact the child cannot be accommodated without accommodating the mother, that the

disqualification of the mother from any assistance under the Children Act 1989 must by the same token deprive the child of the assistance to which she is entitled under section 17?

17. In our case, Mrs M is not eligible for support or assistance under welfare powers that can be exercised in relation to adults under section 17 of the Children Act 1989 because she is a person in the fourth class, unlawfully in the United Kingdom. That proposition says nothing, as a matter of law, about the provision of support or assistance to the child. However, it is contended that if the local authority performs its duty by accommodating the child, it will thereby unavoidably break its duty under paragraph 1 of Schedule 3 to the 2002 Act of withholding accommodation from the mother: because in practice, bearing in mind the local authority's duty under section 17(1)(b) of the 1989 Act to promote the upbringing of children by their families, the child's accommodation will be with her mother. That would seem on its face to be inconsistent with paragraph 2(1)(a) and (b) of Schedule 3 to the 2002 Act. Paragraph 1 does not prevent the provision of support or assistance to a British citizen or to a child. But in our case, that is exactly what paragraph 1 appears to do. The daughter's status as a British citizen, with a right to remain in this country, is completely ignored. Her status as a child does reappear in the equation under the accommodation provisions of paragraph 10 of Schedule 3 to the 2002 Act and regulation 3(3) of the 2002 Regulations . That, however, is not in her own right, but as the dependent child upon whom the mother's rights in turn depend. And she serves that function not because she is a child *in need* , owed duties under the Children Act 1989, but because she is dependent on the person who (unlike herself) is unlawfully in the United Kingdom: in just the same way, but only in the same way, as for instance the presence of a dependent child would activate the provisions of paragraphs 9 and 10 of Schedule 3 in the case of a person rendered ineligible by paragraph 1(1)(a) of Schedule 3 for the provision of accommodation in case of illness under section 21 of the National Assistance Act 1948 .

18. The approach adopted by the judge, and by all counsel before him, therefore produces some surprising results. In particular, although the point of departure is the needs of the child, the duty of the local authority to provide for those needs depends on whether the child happens to live in a household headed by a person falling into one of the ineligible categories in Schedule 3. And the protection of British citizens from the removal of services under Schedule 3 depends, in the case of a child in need, not on whether that child is a British citizen, but on whether the head of the household in which the child lives is a British citizen. I have, however, been ****893*** persuaded by the submissions of Mr McGuire (which it is fair to say were not strenuously opposed by Mr Knafler) that that is indeed what this legislation provides.

19. That is essentially because the reality will often or usually be that services to protect the child will be provided, as in the present case, by providing services to the child's family or at least to the child's custodial parent. That is what is envisaged by section 17(1)(b), read with section 17(3), of the Children Act 1989 . Paragraph 1(1)(g) of Schedule 3 to the 2002 Act must, therefore, be read at least in part as addressing that case; and thus as providing that where a Children Act 1989 power is exercised through assistance to an adult, the power, even though it is a power to assist the child, is taken away if the adult in question falls within one of the ineligible classes. I say nothing as to the policy that that provision implements. I do however accept that the provision indeed operates in the way that lies behind the judge's formulation, as set out in para 14 above.

The role of the Secretary of State and of the local authority

20. Immigration policy is the concern of the Secretary of State. Welfare provision is in the main the concern of the local authorities. That not only reflects the constitutional roles of the two parties, but also the relative skills that they have at their disposal, as Hale LJ expounded in her seminal judgment in *R v Wandsworth London Borough Council, Ex p O [2000] 1 WLR 2359* , 2557c-e.

21. Schedule 3 is an instrument of the Secretary of State's immigration control policy. That is made plain in evidence before the court from the director of the international policy directorate, immigration and nationality directorate, of the Home Office. However, the machinery adopted to implement that policy to some extent disturbs the constitutional balance referred to in para 20 above. In the first and second "ineligible" classes under Schedule 3 (persons with refugee status in an EEA state or EEA nationals) the local authority by regulation 3(1) of the 2002 Regulations "may" make "travel arrangements" for that person's return to the relevant EEA state. Whether in such circumstances the local authority is obliged to make such arrangements remains obscure. The implication must however be that local authorities are expected to act to further the national policy referred to by the Director. By contrast, the third ineligible class, failed asylum seekers, remains the responsibility of the Secretary of State. The extent of the local authority's powers and obligations towards the fourth class, persons unlawfully in the United Kingdom, is the subject of this appeal.

22. The construction of Schedule 3 to the 2002 Act and, in particular, of the 2002 Regulations therefore has to be undertaken against the background of the scheme that the legislation promotes. It is also necessary to remember that although part of the scheme envisages the local authority providing persons affected by Schedule 3 with the means to leave the United Kingdom, immigration control as such remains in the hands of the Secretary of State. Decisions as to immigration status are therefore for the Secretary of State and not for the local authority. ***894**

British citizenship

23. As a British citizen the child enjoys, by section 2(1)(a) of the Immigration Act 1971 , the right of abode in the United Kingdom. By section 1(1) of that same Act:

> "All those who are in this Act expressed to have the right of abode in the United Kingdom shall be free to live in, and to come and go into and from, the United Kingdom without let or hindrance ..."

That proud statement seems plainly to say, and subject to further discussion below, that immigration controls simply do not apply to a British citizen, and he cannot be expelled against his will.

24. We were however told on behalf of the Secretary of State that he has power to remove from the United Kingdom the custodial parent of a British citizen, even though the practical result of that step would be the forcible removal of the British citizen from her country of citizenship. The only controlling factor so far as the British citizen was concerned was whether that step would infringe her rights under article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The child's citizenship would be a factor to be put into that balance. Two comments are necessary. First, it is established Convention jurisprudence that article 8 (nor any other article of the Convention) does not create a direct right to enter or remain in any particular country: see for instance *Poku v United Kingdom (1996) 22 EHRR CD 94* , 97, cited with approval by Lord Phillips of Worth Matravers MR in *R (Mahmood) v Secretary of State for the Home Department [2001] 1 WLR 840* , 858-859, para 47. It is therefore difficult to see how the child's right of abode could play an independent role in any article 8 assessment. Second if (as Islington concluded in the present case) family life can be reproduced in the country of removal, then it is difficult to see how the case could fall under article 8 at all: because, as made clear in the *Mahmood case [2001] 1 WLR 840* , 861, para 55(3), article 8 creates no right to enjoy family life in one country rather than another.

25. The issue of the child's British citizenship, which I find one of some considerable difficulty, was not confronted in the proceedings below, so we unfortunately do not have the benefit of the judge's view upon it. Nor does it seem to be addressed in any English authority. Ms Stern showed us the judgment of this court in *Samaroo v Secretary of State for the Home Department [2001] UKHRR 1150* , para 4, where the court mentioned, apparently with approval, the Secretary of State's inclusion within the "compassionate circumstances" pointing against the deportation of Mr Samaroo, a convicted drug dealer, "the existence of [his son] and his age [nine years], including the fact that he is a British citizen with his own independent right to live here and his relationship to his father". In that case, however, the article 8 rights under consideration were those of the father, not those of the son; and there was no suggestion that, unlike in our case, the inevitable effect of the expulsion of the father would be the expulsion of the son in his company.

26. This issue was, however, addressed in the Supreme Court of the Irish Republic in *Lobe v Minister for Justice, Equality and Law Reform [2003] IESC 3* where, similarly to our case, non-national parents of an infant child born in Ireland claimed the right to remain in Ireland with their child as an Irish citizen. In the majority judgment Keane CJ held, at para 17, that the ***895** child did not have an unqualified right to reside in the state. Rather, the right of a citizen was to choose whether or not to reside in the state. Infants were incapable of exercising that or any choice, so the right "may reasonably be regarded as a right which does not vest in them until they reach an age at which they are capable of exercising it": para 35. In the meantime, any decision on the part of the child had to be taken by its parents, who simply were unable to acquire for themselves a right to remain indefinitely in the state by purporting to make that choice on behalf of their infant child: para 40. In reaching that conclusion Keane CJ was strongly influenced by United States authority, that similarly regarded the right of a US citizen as being to reside where he chose: so the right did not attach to a minor who was fortuitously born in the USA through the choice of his parents, not of himself, to reside there.

27. If that authority can be applied in our case, then the status of the child as a British citizen becomes effectively irrelevant. I would wish to approach that proposition with caution. It would appear that the courts in Ireland and the USA regarded the effect of citizenship with some reserve because that status was acquired by the simple fact of being born in the country. That is certainly the case under section 6 of the Irish Nationality and Citizenship Act 1956 , cited by Keane CJ, at para 28. The child in our case has however acquired citizenship not simply by birth, but by a deliberate parliamentary decision expressed in the British Nationality Act 1981. The child is a British citizen because she was not only born here, but born to a parent falling into a carefully limited class: see para 2 above. That careful conferment of citizenship is to be contrasted with the somewhat adventitious acquisition of citizenship of the Irish Republic that troubled the court in *Lobe's* case. Second, there does not appear to be in the law of either the Irish Republic or the United States the strong and general statement of freedom to live in the United Kingdom that is to be found in section 1(1) of the Immigration Act 1971 : see para 21 above. It is not immediately obvious that that right should be construed simply as a right to choose, not available to a person until he reaches years of discretion.

28. In my view, therefore, the implications of the child's British citizenship need further exploration. The immigration status of Mrs M is a matter for the Secretary of State. In the current proceedings referred to in para 1 above the implications of the child's citizenship do not seem to have been addressed, a matter to which Mrs M's advisers may wish to give attention before the case is heard by the Immigration Appeal Tribunal. However, the issue also impacts on how Islington should perform whatever functions are conferred on it.

29. Even if we accept as valid for the United Kingdom the analysis of citizenship in terms of a right to choose that was adopted in *Lobe's* case, I am very doubtful whether it is open to a local authority, which has no powers of immigration control, effectively to force upon a British citizen a decision not to assert the right given her by section 2(1)(a) of the Immigration Act. That in my view was the effect of Islington's letter of 21 March 2003, summarised in para 4 above, carefully worded though it was. The offer was of tickets. Although no decision had been made as to what would be done if the offer were refused, the reference to the "real prospect" of the child being taken into care if the mother remained in the UK to pursue her immigration claim; and the prospect of no other support being available for the mother herself; ****896*** could only in the eyes of Mrs M point strongly in the direction of accepting the offer.

30. In the event, and for reasons that I shall shortly demonstrate, I have reached the conclusion that such power as Islington may have to offer tickets is, as the judge held, severely circumscribed by the rights of various parties under the Convention. But if it were to be concluded that the power could be exercised without infringing those rights, then I do not think that it would be open to Islington to exercise it in a way that encourages or in practice enforces the expulsion of the child before the effect of her citizenship on the child's immigration status has been decided by the proper authority for that purpose, the Immigration Appeal Tribunal.

The powers and obligations of Islington

31. On this aspect of the case I have the misfortune to differ in an important respect from the view of Waller and Maurice Kay LJJ, whose judgments I have had the benefit of reading in draft. The remission of the case to Islington must therefore take place in the terms that they have determined. I would however venture to continue to set out my own view of how the case should be resolved, and in the course of doing so to indicate why I cannot adopt the disposal of it that appeals to Waller and Maurice Kay LJJ.

32. It will be convenient if I first summarise my own conclusions. (i) Islington only has powers under the Children Act 1989 if the application to Mrs M's case of Schedule 3 to the 2002 Act is excluded by paragraph 3 thereof, avoidance of a breach of a person's convention rights. (ii) If Schedule 3 does apply to Mrs M's case, it operates as a complete code, separate from the Children Act 1989. (iii) Under the code, there is no power to make travel arrangements in respect of a person in the fourth class of ineligible persons. (iv) In the case of such a person, the only power is to provide accommodation, for a very limited period. (v) But in the present case, serious consideration must be given to whether the operation of Schedule 3 is excluded by the need to avoid a breach of the convention rights of all of the child, Mrs M and Mr M. (vi) That consideration involves an assessment by Islington of what Children Act 1989 powers, if any, are necessary to be exercised to avoid such a breach. Guidance is given as to the factors that Islington may think should be taken into account. I will first indicate what will be the position if Islington concludes that Schedule 3 to the 2002 Act does apply to this case. I then consider the issues arising in relation to the Convention.

The local authority's powers under the 2002 Regulations

33. For the reasons already explained, the local authority only has power under the 2002 Regulations to make "travel arrangements" in respect of the first and second ineligible classes: see regulation 3(1). Where such arrangements have been or are to be made there is a further power to provide accommodation, pending travel: regulation 3(2).

34. A good deal of confusion has been caused in this case by Islington's decision to continue its earlier, Children Act 1989, offer of tickets: see para 4 above. On the construction of Schedule 3 to the 2002 Act and the 2002 Regulations for which Islington contends, and which as indicated in para ***897*** 20 above I accept, Islington no longer had power to offer tickets *under the Children Act 1989* , because Mrs M was ineligible for support or assistance under the Children Act 1989. Islington's powers were strictly limited to what was allowed to it under Schedule 3 and the Regulations, in substitution for Children Act 1989 support, by reason of Mrs M having a dependent child. Those powers do not include the making of travel arrangements in the case of a person unlawfully in the United Kingdom. And there is a very good reason for that, in that a local authority is not qualified to determine contentious matters relating to immigration: see the observations of Hale LJ cited in para 20 above.

35. In the case of Mrs M, therefore, Islington's power is limited to that in regulation 3(3) of the 2002 Regulations. Provided, as in this case, there is a dependent child, "A local authority may make arrangements for the accommodation of a person unlawfully in the United Kingdom who has not failed to co-operate with removal directions in respect of him". Wilson J however held [2003] 2 FLR 903, para 36, that that apparently general power was severely circumscribed by guidance issued by the Secretary of State: Nationality, Immigration and Asylum Act 2002 section 54 and Schedule 3 and the Withholding and Withdrawal of Support (Travel Assistance and Temporary Accommodation) Regulations 2002. Guidance to Local Authorities and Housing Authorities. I respectfully agree in broad terms with the view that the judge took of the meaning and implications of that guidance. Waller and Maurice Kay LJJ do not. I must first therefore explain my own opinion, and then indicate how this difference affects the outcome of the appeal.

The Secretary of State's guidance

36. Regulation 4(4) of the 2002 Regulations provides: "A local authority must have regard to guidance issued by the Secretary of State in making travel arrangements and arrangements for accommodation." The Secretary of State issued such guidance in December 2002. As Wilson J pointed out, one of the problems in understanding the guidance is that it seeks to apply the same regime and criteria to the two different cases identified in paras 32-33 above; and that even though local authorities are expressly reminded in para 27 of the guidance:

> "No arrangements may be made in respect of failed asylum seekers and those unlawfully present in the UK-responsibility for making travel arrangements for these groups of person rests with the Home Office Immigration and Nationality Directorate."

Put shortly, the guidance requires all offers of accommodation to be for a short period, no more than ten days from the time at which the family first presented for assistance. On the basis of that guidance, the judge found that the 21 days offered by Islington was the very limit of what could lawfully be done.

37. The difficulty of the approach in the guidance is that it takes as the paradigm case the offering of accommodation as an adjunct to the making of travel arrangements. In that case, control over when the subjects should leave is in the hands of the local authority that is making the travel arrangements. It is therefore understandable that, even if only to encourage promptitude in the making and enforcing of those arrangements, the local ***898*** authority should be limited in the length of time for which it can accommodate pending departure. But where, as under regulation 3(3), the local authority (contrary to Islington's offer in our case) has no power to make travel arrangements, the date of departure of the person who has not yet failed to co-operate with removal directions is not within the control of the local authority, and may well be, as in our case, distant and uncertain.

38. In those circumstances, I have to say that it makes no sense to limit the local authority, irrespective of the needs of the individuals concerned, to a very short period of accommodation. The present case demonstrates that to the full. Islington made its decision on 27 March 2003, offering 21 days' accommodation "to provide you with the opportunity to make travel arrangements". For the reasons set out in para 30 above, the lawfulness of that step in the present case must be in serious question. Nor had removal directions then been issued by the Secretary of State, nor could their issue be contemplated before the

termination of the appeal process. Mrs M's appeal against refusal of indefinite leave to remain had then already stood unheard for 13 months, and was not resolved until September 2003. An appeal against that decision, brought with the permission of the Immigration Appeal Tribunal, is not to be heard until June 2004. Mrs M and the child will therefore be in the United Kingdom for at the very least 15 months after Islington's decision. To offer accommodation, but only for the first three weeks of that period, cannot be an appropriate response to the condition of Mrs M and of the child.

39. That, however, is what the guidance plainly requires. It re-emphasises that it indeed addresses non-EEA cases, that is, ineligibility class four cases where removal directions have not been disobeyed, by making a distinction between them and EEA cases in its para 32. We were taken to various authorities limiting the effect of "guidance" and of an obligation "to have regard to". Thus Roskill LJ in *Laker Airways Ltd v Department of Trade [1977] QB 643* , 714c said that "guidance is assistance in reaching a decision proffered to him who has to make that decision, but that guidance does not compel any particular decision"; Lord Denning MR in *De Falco v Crawley Borough Council [1980] QB 460* , 478a said that "The council, of course, had to have regard to the code: see section 12 of the statute: but, having done so, they could depart from it if they thought fit". Those observations however related to latitude to depart from guidance when it did not fit the obvious statutory needs of a particular case. They do not give the local authority a licence, and much less impose on it a duty, to depart from a general policy set out in the guidance just because it appears, as this policy appears, to be unreasonable.

40. Nor, I have to say with regret, can I agree with Maurice Kay LJ's view that the reference in the guidance to a limit on the period of accommodation being "preferable" entitles the local authority to decide that it should not apply in a case such as that of Mrs M. Although the implications of so doing do not seem to have been properly thought out, there is no doubt that, for the reasons given at the beginning of para 39 above, persons in the same class as Mrs M are intended to be covered by the guidance. She may be different from some others in that class, in that she is engaged in active appeal proceedings; but in all category four cases there is likely to be uncertainty about removal arrangements, extending over a substantially longer period than the ten days from the date the family first ***899*** presented for support that is the criterion laid down by para 32 of the guidance. Any limited licence to depart from guidance in a special case, and any cautious expression of the guidance in terms of that period of ten days being preferable, cannot therefore be used to supply a much longer period effectively to the whole class of non-EEA cases.

41. Nor can it be said that the guidance is plainly inconsistent with the statutory powers. The regulation-making power is referred to in Schedule 3 to the 2002 Act under the heading of "temporary" accommodation. I would not regard that fact, if it stood on its own, as particularly compelling, either as an aid to construction or as determining what is meant by "temporary". But it can at least be used to demonstrate that the author of the guidance did not plainly depart from his statutory powers. And, indeed, this point goes further, because Schedule 3 and the 2002 Regulations, with which the guidance has to be construed, are all about the witholding and withdrawal of support. It would be odd if category four cases, having been removed from Children Act 1989 support by Schedule 3, were then reinstated into a substantial period of support by the guidance.

42. Nor is it possible to revert to Islington's obligations under section 17 of the Children Act 1989 . The whole point of Schedule 3 to the 2002 Act is to substitute the Schedule 3 obligations, limited as they are, for the original Children Act 1989 duties. And that is why no assistance can be gained from *R v Wandsworth London Borough Council, Ex p O [2000] 1 WLR 2539* , where an exceptionally strong constitution of this court held that the use, or rather the withholding, of welfare provision could not be used to implement immigration policy without clear statutory authority. That authority has now been provided by Parliament in the Nationality, Immigration and Asylum Act 2002.

43. It is for these reasons also that, with regret, I cannot adopt the approach of Waller LJ, that the guidance permits the provision of accommodation for a period until travel arrangements are made by the Home Office. I would venture in that regard to mention two further considerations. First, para 2 of the guidance indicates that the object is to provide to category four cases "similar" accommodation to that envisaged in EEA cases. It would be odd if later in the guidance a completely different regime were provided for category four. Second, I revert to the specific starting-point, the date of presentation for support, that is given for all cases in para 32 of the guidance: see also para 40 above. It is very unlikely that there is none the less intended to be a different and unstated starting point, whatever date upon which removal directions are finally made, in category four cases.

The effect of my understanding of the guidance

44. The guidance, if it does indeed treat all three ineligible cases together, makes clear that the very limited, in effect non-existent, accommodation that is all that Islington can offer is intended, as in the EEA cases, to encourage or force Mrs M to leave the UK; even though, paradoxically, in her case Islington has no power to make travel arrangements. It is therefore necessary

to consider whether that will lead to a breach of Convention rights; because, if it will, paragraph 3 of Schedule 3 to the 2002 Act requires reversion to the original Children Act 1989 powers. ***900** *Breach of a person's Convention rights*

45. I entirely accept Ms Stern's submission, countering an ill-considered suggestion on my own part, that "a" person in paragraph 3 of Schedule 3 to the 2002 Act means any person, and not that person. So even though the disqualification from Children Act 1989 assistance turns on the status of Mrs M and not on that of the child (see para19 above), the lifting of that disqualification can address the position of the child, or indeed of her father.

46. Wilson J [2003] 2 FLR 903, paras 49-59, gave cogent reasons why the convention rights, at least under article 8, of all of the child, Mrs M and Mr M are in issue in this case. All of those rights would be likely to be seriously affected if all that Islington could do were to exercise its powers under the 2002 Regulations, with the effects summarised in para 40 above. First, Mrs M is adamant that she will not leave the United Kingdom. Absent removal directions, she cannot be forced to do so; and since, as we have seen, Islington cannot fund her travel arrangements under Schedule 3 it is difficult to see how a destitute woman could leave, let alone find her way back to Guyana, even if she wanted to do so. Islington made it clear in its letter of 21 March 2003 that that would raise "a real prospect" of the child being taken into care. I for my part would find it difficult not to see an offer of tickets with an alternative of no accommodation (made not for social reasons but in an attempt to enforce immigration control other than by the issuing of removal directions) as an unjustifiable interference with the article 8 rights both of Mrs M and of the child. Second, as the judge pointed out, whilst Mrs M and the child may be able to maintain family life in Guyana, if the object of removing them there succeeds, there has to be substantial certainty on that point before removal can confidently be said not to raise issues under article 8. Third, it would be quite unreasonable to expect Mr M, settled in the United Kingdom and separated from Mrs M, to follow her to Guyana. Depending on the strength of the bond between Mr M and the child, the article 8 rights of both of them would be threatened by the prospect of the child's removal to Guyana.

47. While this would be in the first instance a matter for Islington, it might have found it difficult not to conclude that, on any view of Mrs M's possible reaction, the limitation of its powers to those under the 2002 Regulations will involve interference with the parties' Convention rights. I should also make plain that, in assessing any future decision that Islington might have made, the criterion would not simply be that of *Wednesbury* unreasonableness: see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223* . The test of necessity under paragraph 3 of Schedule 3 to the 2002 Act imposes a condition precedent to the exercise of a statutory function, under the (restored) Children Act 1989 powers. That test must be applied according to objective criteria, which the court retains the power to review.

Islington's powers under the Children Act 1989

48. On the assumption that action constrained by Schedule 3 is seen as infringing convention rights, Islington would become again free to, and would be obliged to, exercise its powers under the Children Act 1989. That was what the judge saw Islington as doing in the offer of tickets that it had made to Mrs M.
***901**

49. Islington would have to bear three considerations in mind before it could lawfully discharge its Children Act 1989 duty by an offer of tickets rather than by providing support, including accommodation, in the United Kingdom. First, it would have to be confident that the child will cease to be "in need" if removed to Guyana. Wilson J, who has unrivalled experience in these matters, pointed to the detailed and circumstantial enquiry needed in this case, none of which appears to have taken place. Second, the various parties' convention rights must be respected in any action taken under the Children Act 1989, just as they are relevant to putative action under the 2002 Regulations. The considerations set out in para 46 above remain directly in point. Here again, because what is in issue is the state's positive obligation under article 8 of the Convention to protect family life (see for instance *Marckx v Belgium (1979) 2 EHRR 330* , 342, para 31), Islington would have to act in the light of that obligation, and not simply reach a decision that is not *Wednesbury* unreasonable. Third, Islington would have to bear in mind the implications of seeking to remove a British citizen from the United Kingdom, as indicated in para 30 above.

Powers and duties

50. It will be recalled (see para 13 above) that counsel for Mrs M argued that there was a general power to provide accommodation under Schedule 3 to the 2002 Act, and that in the circumstances of Mrs M's case there was a duty on Islington to exercise that power. I have found that the power under Schedule 3 is far more circumscribed: see para 38 above. And, even if that were not the case, there is simply no justification for translating whatever power is conferred by Schedule 3 into a duty.

For that to be the case, Schedule 3 would at least have to impose obligations as to the general welfare of the subject. That is the last thing that it does.

51. By contrast, Islington does have a general duty under the Children Act 1989 to provide for children in need, such as the child in this case. It must exercise those powers with that end in mind, as well as with regard to its duties under the Convention.

Disposal

52. Wilson J concluded that Islington's decision, whether taken under Children Act 1989 powers or under Schedule 3 to the 2002 Act, had to be reconsidered in the light of Convention obligations. I have reached the same conclusion by a slightly different route. If the decision were my own I would allow the appeal only to the extent of varying the judge's order to provide that the case must be reconsidered by Islington in the light of the guidance given in paras 46-49 above. In that process, the criticism of the consideration of the case so far that is set out in paras 47-58 of the judge's judgment would have to be borne very carefully in mind. However, since that conclusion is based upon a view of Islington's powers and duties that is not that of the majority of the court, the appeal must be determined according to the order proposed by my Lords.

MAURICE KAY L.J.

53. I agree with what Buxton LJ has said about the import of the Convention for the Protection of Human Rights and Fundamental Freedoms ***902*** in the circumstances of this case. However, I take a different view of the power of Islington to provide accommodation pursuant to regulation 3(3) of the 2002 Regulations.

54. The legislative sequence is as follows. By section 54 of and Schedule 3, paragraph 1(1)(g) to the Nationality, Immigration and Asylum Act 2002 eligibility for support or assistance under section 17 of the Children Act 1989 is withdrawn. Nevertheless, the subsequent provisions of Schedule 3 provide for exceptions. I adopt the reasoning of Buxton LJ in relation to the exceptions set out in paragraphs 2 and 3. Paragraph 7 provides that paragraph 1 applies to a person-that is, renders him ineligible-if he is in the United Kingdom in breach of the immigration laws and he is not an asylum seeker. It therefore applies to M. However, it is not the end of the story. By paragraph 10 the Secretary of State is empowered to make regulations providing for arrangements to be made for the accommodation of a person to whom paragraph 7 applies if he has not failed to comply with removal directions issued in respect of him, provided that he has with him a dependent child, in which case the arrangements may include arrangements for that child. Thus, the position of M is precisely one of those contemplated by the regulation empowerment.

55. Regulation 3(1) and (2) do not apply to M as they relate only to persons with refugee status abroad and EEA nationals. The crucial provision is therefore regulation 3(3) which provides that a local authority "may make arrangements for the accommodation of a person unlawfully in the United Kingdom who has not failed to cooperate with removal directions issued in respect of him" provided that (regulation 3(4)) he has with him a dependent child. If the 2002 Regulations stopped there, it would be beyond dispute that Islington would have the power to provide accommodation in M's case. However, regulation 4 goes on to provide:

> "(1) ... arrangements for accommodation must be made so as to secure implementation of those arrangements at the lowest practicable cost to the local authority."
>
> "(4) A local authority must have regard to guidance issued by the Secretary of State in making ... arrangements for accommodation."

I do not consider that the regulation 4(1) imposes a temporal restriction. It simply requires economy in the context of whatever the appropriate duration may be.

56. It is the published guidance which persuaded Wilson J and Buxton LJ to conclude that Islington has no power to make arrangements for accommodation for more than two or three weeks. I therefore explain why I disagree with that conclusion.

57. Although paragraph 10 of Schedule 3 to the 2002 Act (the power to make regulations) and the title of the 2002 Regulations themselves refer to temporary accommodation, I do not think that that points to an unduly short period. It is common knowledge that the categorisation of something as "temporary" in the context of immigration law is not synonymous with duration of extreme brevity. It means no more than "lacking permanence". Some insight into the purpose of this power to provide temporary accommodation can be obtained from the introduction to the guidance, which states that local authorities will be able to provide such accommodation to those unlawfully in the United Kingdom "whilst they **903* await removal directions from the Immigration Service". Again it is common knowledge, and was in 2002, that there are many circumstances in which that wait may last for months or even years. The case of M is an obvious example. She is pursuing an appeal against the refusal to grant her indefinite leave to remain. Her case is not obviously hopeless or abusive. The Secretary of State did not certify it so as to curtail her appeal rights and the Immigration Appeal Tribunal has given her leave to appeal, thereby accepting that her appeal has a real prospect of success. Whilst her appeal is pending, she must remain in this country because the appeal would be treated as abandoned if she left the country: section 104 of the 2002 Act. In all these circumstances, there is no question of the Secretary of State issuing removal directions unless and until the appeal process has been exhausted and has ended in failure.

58. The part of the guidance which has a part to play in these circumstances is under the heading of the grant of "temporary short-term accommodation". It is a fact that neither the 2002 Act nor the 2002 Regulations use the expression "short-term". The crucial paragraph is para 32:

> "For those persons returning to EEA member states, it is preferable if accommodation does not continue for a period of more that a further five days from the date the family first presented for support or assistance to the local authority. For those returning to other countries, it is preferable if accommodation does not continue for a period of more than a further ten days from the date the family first presented for support or assistance to the local authority."

Wilson J and Buxton LJ have concluded that, because of para 32, Islington has no power to provide accommodation for more than two or three weeks, even though, in the words of Buxton LJ, at para 38 above, "it makes no sense to limit the local authority, irrespective of the needs of the individual concerned, to a very short period of accommodation".

59. In these proceedings, there is no challenge to the lawfulness of the guidance. We have to approach it on the basis that, to comply with regulation 4(4), Islington must "have regard" to it. In my judgment, it would be consistent with the authorities referred to in para 39 of Buxton LJ's judgment for Islington to conclude that, notwithstanding that it is "preferable" to limit the provision of accommodation to the sort of period referred to in para 32, it would be inappropriate to do so in the circumstances of this case. If the wait is likely to be measured in months, there would be no point in a provision which exists for the benefit of children being limited to a period of days. I base this conclusion on the fact that para 32 is expressed in the language of preference and must be considered in the context of the stated purpose of providing accommodation "whilst they await removal directions". I also agree with Waller LJ, whose judgment I have seen in draft, that the words "For those returning to other countries" in para 32 of the guidance provide further support for this conclusion.

60. I emphasise that, on this analysis, Islington has a statutory power rather than a duty to provide accommodation. I accept that there can be circumstances in which any proper consideration of the exercise of a power can only result in a positive conclusion but I stop short of saying that this is necessarily such a case. It is a matter for Islington to consider in the course of **904* the reconsideration which is to take place. For my part, I would hesitate before granting a declaration of the width suggested by Mr Knafler.

WALLER LJ

61. I have read in draft the judgments of Buxton and Maurice Kay LJJ. There is a point on which they disagree. That point is the very point on which Sedley LJ gave permission to appeal, and is of general importance to local authorities who have to consider how they should react to persons in the position of Mrs M, of whom there may be many. She is a mother with a child who without assistance would be destitute; she is also unlawfully present in the United Kingdom but exercising her rights of appeal challenging that unlawfulness, a process which for reasons not within her control is taking a very substantial period. If

Islington had been free to exercise their powers under section 17 and other sections of the Children Act 1989 they would, as indeed they first did, have offered tickets to Mrs M to enable her to fly to Guyana. The subtext of such an offer would have been that if she did not accept the offer, consideration would have been given to taking her child into care. The Court of Appeal in *R (G) v Barnet London Borough Council [2002] LGR 34* upheld as lawful the decision of the local authority in that case to provide tickets for a child and its parent to return together abroad, in circumstances where the local authority had concluded that the provision of such tickets did "safeguard and promote the child's welfare".

62. What was intended to be the effect of the bringing into force of Schedule 3 to the 2002 Act on persons such as Mrs M and her child? That Schedule had its effect by virtue of section 54 . As Wilson J points out section 54 describes Schedule 3 in these terms "which makes provision for support to be withheld or withdrawn in certain circumstances". Schedule 3 applied to four categories of adult persons who were not British citizens (paragraph 2(1)(a) and (b)), and provided that such persons should not be eligible for support or assistance under, among other provisions, section 17 of the Children Act: paragraph 1(g).

63. Mrs M was not a British citizen or a child and falls by virtue of paragraph 7 within the fourth category of ineligible persons being a "person unlawfully in the United Kingdom", and, as Buxton LJ has concluded, it is clear that the starting point for consideration of the effect of the remainder of Schedule 3 is that Islington's powers under section 17, and in particular the powers under section 17(3) which might have been exercised in favour of Mrs M for the child's benefit, were withdrawn.

64. But as paragraph 2(1)(c) makes clear, paragraph 1 does not prevent the provision of support or assistance "under or by virtue of regulations made under paragraph 8, 9, or 10 ". Furthermore, paragraph 3 makes clear 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."

65. Paragraphs 8 and 9 empower the making of regulations relating to the first two categories of ineligible persons (EEA classes). It is regulation 10 which is critical so far as considering the position of Mrs M is concerned. It empowers the making of regulations ***905**

> "providing for arrangements to be made for the accommodation of a person if ... paragraph 1 applies to him by virtue of paragraph 7, and ... he has not failed to co-operate with removal directions issued in respect of him."

66. Mrs M was and is of course both a person ineligible by virtue of paragraph 7 and has not failed to co-operate with removal directions. There is nothing in paragraph 10 which gives any indication as to the duration for which the regulations should provide for accommodation to be provided, save that non-compliance with "removal directions" places a long stop on the power to arrange accommodation.

67. Paragraph 11 of Schedule 3 sets out that for which the regulations may provide, and that includes, at (e), that they may "require a local authority or another person to have regard to guidance issued by the Secretary of State in making arrangements".

68. Pursuant to his powers under paragraphs 8, 9, 10 and other provisions irrelevant for present purposes, the Secretary of State made the Withholding and Withdrawal of Support (Travel Assistance and Temporary Accommodation) Regulations 2002. Regulation 3 dealt first with the EEA classes of ineligible persons empowering a local authority to make travel arrangements for such persons and the making of arrangements for accommodation in respect of whom travel arrangements "have been or are to be made pending implementation of those arrangements": regulation 3(1) and (2). Regulation 3 dealt second with persons

unlawfully in the United Kingdom, empowering a local authority to make arrangements for the "accommodation of a person unlawfully in the United Kingdom who has not failed to co-operate with removal directions issued in respect of him": regulation 3(3). Arrangements could only be made for accommodation in either case if the person had with them a "dependent child": regulation 3(4). In regulation 3 there was no indication as to the speed with which travel arrangements had to be made or the duration of any accommodation.

69. Regulation 4 dealt with "Requirements relating to travel and accommodation arrangements". Regulation 4(1) provided that both travel and accommodation must be at lowest practicable cost; regulation 4(2) provided for travel arrangements having to be made (subject to cost) "so that the person leaves the United Kingdom as soon as practicable"; regulation 4(3) forbade cash payments in lieu of travel or accommodation arrangements, and required the making of arrangements in such a way as to "prevent the obtaining of services or benefits other than those specified in the arrangements"; and regulation 4(4) provided that "A local authority must have regard to guidance issued by the Secretary of State".

70. Thus, as regards EEA classes for whom travel arrangements had to be made, some indication of duration was given by regulation 4 in combination with regulation 3(2), in that the arrangements had to be made so that those persons left as soon as practicable and the power to provide accommodation was a power "pending the implementation of those arrangements", and that was the limit of the local authority's power.

71. As regards persons unlawfully present with a child, i e persons such as Mrs M, the 2002 Regulations provided no indication as to duration unless it is by reference to "removal directions". So far as travel arrangements were concerned, the local authority was not given power to make them; it would ***906*** be a matter for the Home Office to make such arrangements, as the guidance to which I am about to turn makes clear.

72. It is in the above context that the guidance to which the local authority "must have regard" has to be considered. The key provisions seem to me to be:

> "27. The Withholding and Withdrawal of Support (Travel Assistance and Temporary Accommodation) Regulations 2002 ... give limited powers to local authorities to make arrangements for: (a) nationals of other EEA member states; and (b) those with refugee status in another EEA member state to travel back to that member state. No arrangements may be made in respect of failed asylum seekers and those unlawfully present in the UK-responsibility for making travel arrangements for these groups of person rests with the Home Office Immigration and Nationality Directorate.
>
> "28. Additionally, local authorities are also granted a power under the 2002 Regulations to grant temporary short-term accommodation to some classes of person listed in Schedule 3 pending departure from the United Kingdom. The powers to grant temporary accommodation are limited to the following classes of person who have with them a dependent child: (a) nationals of EEA states other than the UK; (b) those with refugee status in another EEA member state; and (c) those unlawfully present in the UK."
>
> "31. Accommodation is purely a temporary measure to allow a person with dependent children to be accommodated pending departure from the UK. Local authorities should have regard to the desirability of ensuring that the overall cost of accommodation and the return journey is as cost-effective as possible.
>
> "32. For those persons returning to EEA member states, it is preferable if accommodation does not continue for a period of more than a further five days from the date the family first presented for support or assistance to the local authority. For those returning to other countries, it is preferable if accommodation does not continue for a period of more than a further ten days from the date the family first presented for support or assistance to the local authority.
>
> "33. In the event of failure to travel, should the person have an acceptable reason and be able to provide acceptable proof, further accommodation could, in principle, be provided. New travel arrangements should ideally be made at the first possible opportunity and it is preferable if accommodation does

not continue for a period of a further five days (returns to EEA member states) or ten days (for those returning to non-EEA states).

"34. Where an individual fails to travel and they do not provide an acceptable reason or cannot provide acceptable proof, further accommodation should not be provided to them as set out in the 2002 Regulations. Offers of care may be made to any children under section 20 of the Children Act 1989. But further accommodation, or any other form of support as defined in paragraph 1(1) of Schedule 3 [to] the Nationality, Immigration and Asylum Act 2002 should not be provided to the adults.

"35. In respect of individual(s) here unlawfully, the Home Office Immigration and Nationality Directorate will inform local authorities ***907*** should the individual refuse to co-operate with removal directions. In such an event, all accommodation must be immediately terminated as set out in the 2002 Regulations. Offers of care may be made to any children under section 20 of the Children Act 1989 . Again, it follows from the 2002 Regulations that no further accommodation, or any other form of support as defined in paragraph 1(1) of Schedule 3 [to] the Nationality, Immigration and Asylum Act 2002 should be provided to the adults."

73. Para 32 clearly does provide guidance as to the duration of the provision of accommodation. Para 35 emphasises that the relevance of being in breach of removal directions is that there is simply no power to provide accommodation once a person is in breach. But what precisely is the guidance? Is it that in all circumstances the local authority should consider about ten days as the limit or could there be circumstances where much longer would be appropriate? The answer is by no means obvious.

74. The second sentence of para 32 provides: "For those returning to other countries, it is preferable if accommodation does not continue for a period of more than a further ten days from the date when the family first presented for support ..." Is that a guide that ten days should be about the limit to all persons unlawfully present including those in Mrs M's position, or do the opening words leave room for arguing that, if no travel arrangements have either been made or are in the process of being made by the Home Office, then there is greater flexibility? The words "For those returning to other countries" seems to contemplate a decision already taken that the persons should return, and possibly in the context a situation in which travelling arrangements were either about to be made or already made. Why, it could be said, ten days in this context and five days in the EEA classes' context, other than to give a little more time for travel arrangements to be made by the Home Office as compared with the travel arrangements that the local authority could make themselves?

75. On the other hand, where section 17 powers are being withdrawn, it would at first sight seem strange to grant a power to provide accommodation almost as extensive, and strange to place limits on the power as per regulation 4(3).

76. I considered paras 37-50 under the heading "Travel arrangements" to see whether any assistance could be gained from those paragraphs. But as I read paras 37-50, they apply only to persons and situations where travel arrangements have been made by the local authority, i e the EEA classes. At times the language is general and could be applied literally to a person for whom travel arrangements have been made by the Home Office, i e those unlawfully present. But starting as the paragraphs do with para 37, which clearly applies only to EEA classes, the intention must be that the other paragraphs apply only to EEA classes.

77. If paras 36-50 had applied to those unlawfully present, that would have lent considerable support to a possible interpretation of para 32 of the guidance that ten days was a time, contemplating that the Home Office would be making travel arrangements, inapposite if the Home Office had no intention of doing so.

78. I have not found it easy to know precisely what the guidance had in mind. But: (a) it seems to me that the thrust of the guidance and the power being given to the local authority is consistently linked with there being ***908*** travel arrangements; (b) the wording "for those returning to other countries" seems to show a link even in the cases of those unlawfully present, and even though the travel arrangements must be made by the Home Office; and (c) the result in a case such as Mrs M, of placing a limit of ten days or some short duration where no travel arrangements have been made, leads to an unsatisfactory result (see further below). I have therefore concluded that the guidance provides the indication of the duration for which accommodation can be supplied under Schedule 3, but where travel arrangements have not been made by the Home Office, it is open to Islington to provide accommodation for a period longer than ten days pending arrangements being made by the Home Office.

79. I find support for the above view in considering what would be the result of there being a limit of about ten days in the case of Mrs M. The offer of accommodation of such limited duration would clearly lead to a breach of "a person's Convention rights" as Buxton LJ has pointed out. In posing the question which I did at the outset, what was intended to be the position in relation to persons in the position of Mrs M, it must have been foreseen that, having withdrawn section 17 powers with one hand, if about ten days was the limit for the duration of any accommodation, the likelihood was that the powers would be handed back with the other, but subject to a constraint. What Islington would then have to determine is what power or duty they could perform under section 17 to prevent the breach of convention rights; their freedom to go back to section 17 is only to the extent that the exercise of the power under section 17 "is necessary" for the purpose of avoiding a breach. If that means all that could be supplied was accommodation, then it is of no practical consequence whether the guidance is construed in the way I have suggested or has the more limited construction favoured by the judge and Buxton LJ. If the regaining of section 17 powers provides the local authority with the option of providing air tickets, then the result (I suggest) is somewhat bizarre. Was it really contemplated by Schedule 3 to the 2002 Act and by the 2002 Regulations that, despite local authorities not having the power to make travel arrangements for those unlawfully within the United Kingdom, and being placed under the constraints as to the making of cash payments or the provision of any other benefits (regulation 4(3)), the result of confining the duration of the accommodation would be to give local authorities the powers to make travel arrangements, and provide other benefits? The answer appears to be that if to provide air tickets would safeguard and promote the welfare of the child, and promote the upbringing of such child by its family, and if to do so was necessary to prevent a breach of the Convention in relation to Mrs M, the child or the father, it would be an option available, if the guidance is construed as limiting the duration of accommodation to ten days. That seems to place on local authorities responsibilities in relation to immigration where the guidance would suggest that they were still with the Home Office. That, it seems to me, would be an unsatisfactory result, and supports the construction of the guidance which I have advocated.

80. If I were wrong about the proper construction of the guidance, then I would agree with Buxton LJ's conclusions and his guidance to Islington.

81. The above, however, being my view and that of Maurice Kay LJ, this appeal should (I would suggest, and subject to the submissions of counsel) be disposed of by allowing the appeal and making a declaration that Islington ***909*** have the power to provide accommodation under Schedule 3 to M pending her being in breach of removal instructions. That does not impose a duty, simply reflecting the ambit of Islington's powers. However, it is right to add that in exercising those powers Islington will have to be aware of their Convention obligations. That, in real terms, may leave them little choice but to offer accommodation. But that question can only be answered finally once Islington have reviewed the matter in the light of our judgments.

Appeal allowed.

Representation

Solicitors: Pierce Glynn ; Borough Solicitor, Islington ; Treasury Solicitor .

(A M S)

Footnotes

1 Children Act 1989, s. 17: see post, para 6.
2 Nationality, Immigration and Asylum Act 2002, Sch. 3, para 1(1)(g): see post, para 7.Para 7: see post, para 9.
3 Withholding and Withdrawal of Support (Travel Assistance and Temporary Accommodation) Regulations 2002, reg 3: see post, para 10.