HOUSE OF LORDS SESSION 2007–08

[2008] UKHL 52

on appeal from: [2006]EWCA Civ 655

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

R (on the application of M) (FC) (Respondent) *v* Slough Borough Council (Appellants)

Appellate Committee

Lord Bingham of Cornhill
Lord Scott of Foscote
Baroness Hale of Richmond
Lord Brown of Eaton-under-Heywood
Lord Neuberger of Abbotsbury

Counsel

Appellants:
John Howell QC
Kelvin Rutledge

(Instructed by Slough Borough Council)

Respondent:
David Pannick QC
Stephen Knafler

(Instructed by Hackney Community Law Centre)

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LORD BINGHAM OF CORNHILL

My Lords,

1. I have had the benefit of reading in draft the opinion of my noble and learned friend Baroness Hale of Richmond. I am in complete agreement with it, and would, for the reasons which she gives, allow the Council's appeal.

LORD SCOTT OF FOSCOTE

My Lords,

2. I have had the advantage of reading in draft the opinion of my noble and learned friend Baroness Hale of Richmond and, for the reasons she gives, with which I am in full agreement, I too would allow this appeal.

BARONESS HALE OF RICHMOND

My Lords,

3. The issue before us is whether a local social services authority is obliged, under section 21(1)(a) of the National Assistance Act 1948, to arrange (and pay for) residential accommodation for a person subject to immigration control who is HIV positive but whose only needs, other than for a home and subsistence, are for medication prescribed by his doctor and a refrigerator in which to keep it. The answer to that issue turns on the meaning of the words "in need of care and attention which is not otherwise available to [him]" in section 21(1)(a). But there is also an issue as to whether, if he does need care and attention, that need arises solely because of his destitution, in which case section 21(1A) provides that the local authority is not obliged to accommodate him. If the local authority is not so obliged, it is common ground that, in this particular case, his needs for housing and subsistence will be met by the National Asylum and Support Service (NASS).

The facts and these proceedings

4. M is 42 years old, a citizen of Zimbabwe, where his wife and children still live. He arrived here as a visitor in 2001 and was given six months leave to enter. He has remained here without leave ever since that leave expired in May 2002. In November 2002 he was diagnosed HIV positive. In 2003, he applied to the local authority for an assessment of his needs. The local authority concluded that he needed medication, which had to be kept in refrigerated conditions, and to see a doctor once every three months. The National Health Service provided the medical checks and the medication. Otherwise his illness did not affect him and he was able to look after himself. His only other need was for accommodation if he did not have it. Accordingly, the local authority took the view that he was not currently owed any duty under section 21(1)(a) of the 1948 Act because he had no current need for care and attention; and that if later such a duty might arise, it would be excluded by section 21(1A) because the need would arise solely from his destitution.

5. M's proceedings to challenge the local authority's decision have been going on since December 2003. The authority was ordered to provide him with accommodation in January 2004, and in April 2004, Mr Justice Collins granted his application for judicial review: [2004] EWHC 1109 (Admin), [2004] LGR 657. In his view, the fact that medication and regular medical attention were required was sufficient to show a need for care and attention. That need arose from a combination of destitution and illness and not solely from destitution. The Court Appeal dismissed the local authority's appeal in May 2006: [2006]

EWCA Civ 655, [2007] LGR 225. Care and attention could extend to the provision of shelter, warmth, food and other basic necessities. If the need was made "more acute" by some other circumstance than mere lack of accommodation and funds, it did not arise "solely" from destitution and the local authority was responsible. The local authority now appeals to this House.

6. In the meantime, the Secretary of State and the immigration appellate authorities have been seized of M's claim that his rights under article 3 of the European Convention on Human Rights would be infringed if he were to be returned to Zimbabwe. We understand that those proceedings are still continuing and for that reason the respondent would be entitled to NASS accommodation and support if the local authority is not obliged to accommodate him under section 21(1)(a).

Section 21(1)(a) and the other responsibilities of local social services authorities

7. It is fair to say that, until 1996, it would not have occurred to anyone that section 21(1)(a) might cover this sort of case. There was no need for it to do so. And it was not designed to do so. As originally enacted, section 21(1) imposed a duty on every county and county borough council to provide two kinds of accommodation: "(a) residential accommodation for persons who by reason of age, infirmity or any other circumstances are in need of care and attention which is not otherwise available to them;" and "(b) temporary accommodation for persons who are in urgent need thereof . . . " Paragraph (a) was principally used to provide old people's homes, while paragraph (b) was used to house those homeless people who qualified for help. The post-World War II welfare state never purported to provide housing, as opposed to the means of obtaining it, for all. Accommodation could be provided in premises managed by the local authority, or by another local authority (s 21(4)), or by a voluntary organisation (s 26(1)), and, after 1968, in privately run care homes (Health Services and Public Health Act 1968, s 44). Local authorities were and remain also required to provide a range of welfare services for disabled people under section 29 of the 1948 Act and for old people under section 45 of the Health Services and Public Health Act 1968.

8. Under the Local Authority Social Services Act 1970, these local authority welfare services for the old, the disabled and the homeless were combined with their child care services into generic social services

departments. Following the Local Government Act 1972, there was power to provide all of these services with ministerial approval and the duty to do so to such extent as he might direct: ministerial approvals and directions under section 21 and 29 of the 1948 Act were first given in Department of Health and Social Services Circular No LAC 13/74 and under section 45 of the 1968 Act in DHSS Circular No 19/71.

9. Separately from these welfare services, local health authorities used to provide a variety of health services, such as midwifery, health visiting and district nursing, under Part III of the National Health Service Act 1946. These included, in section 22, the duty to make arrangements for the care of expectant and nursing mothers and children under five; in section 28, the provision of services for the prevention of illness, the care of people suffering from illness or "mental defectiveness", or the after-care of such persons; and in section 29, the power to provide domestic help for certain households. Section 28 was replaced and expanded by section 12 of the Health Services and Public Health Act 1968, which made it clear that there was power to provide residential accommodation for this purpose. This power was used to provide homes for mentally ill and mentally handicapped people. These services were also transferred to the new social services departments in 1970, except to the extent that it was proper for them to remain part of the National Health Service (1970 Act, ss 2(1)(a), (3), (4), and Schedule 1). The relevant ministerial approval and directions were first given in Department of Health and Social Security Circulars Nos LAC 19/74 and LAC (74)28. LAC 19/74 specifically approved the provision of residential accommodation for people who were or had been suffering from mental disorder. All three were later consolidated in the National Health Service Act 1977, Schedule 8, and again in the National Health Service Act 2006, Schedule 20. The other functions of local health authorities were transferred to the National Health Service under the National Health Service Reorganisation Act 1973.

10. In 1974, therefore, local social services authorities had power to provide residential accommodation for people needing care and attention and temporary accommodation for people in urgent need, both under section 21 of the 1948 Act; and for expectant and nursing mothers and young children under section 22 of the 1946 Act; they shared with the health service the power to provide residential accommodation for the prevention, care and after care of illness, and were specifically required to take this responsibility for people with mental disorders. And they were required to provide a range of welfare services for disabled people, under section 29 of the 1948 Act as expanded by the Chronically

Sick and Disabled Persons Act 1970, for old people, under section 45 of the 1968 Act, and home help services under section 29 of the 1946 Act.

11. The next step was to remove their responsibility for providing temporary accommodation for homeless people. A joint circular from the Department of the Environment (Circular 18/74) the Department of Health and Social Security (Circular 4/74) and Welsh Office (Circular 34/74) signalled that henceforth the responsibility for housing the homeless should be undertaken as a housing rather than a social services function. This was followed by the Housing (Homeless Persons) Act 1977 which repealed section 21(1)(b) of the 1948 Act and imposed specific statutory duties upon local housing authorities. In areas where there were two tiers of local government, these were the district rather than the county councils. As before, the 1977 Act duties (now contained in the Housing Act 1996) were targeted at particular classes of homeless people and did not require a home to be provided for everyone who might need one.

12. Another major upheaval came with the National Health Service and Community Care Act 1990. The main object was to try and achieve a professional assessment of what the people in these various client groups really needed, rather than to allow them to enter residential homes for which the social security scheme would have to foot the bill. Hence local social services authorities should have the task of "ensuring that the needs of individuals within the specified groups are identified, packages of care are devised and services co-ordinated" (Sir R. Griffiths, *Community Care: Agenda for Action: A Report to the Secretary of State for Social Services*, 1988, page vii, para 24*)*. Local authorities retained all their previous responsibilities; but all their powers to provide or arrange residential accommodation for the various adult client groups were brought together in an amended version of section 21(1) of the 1948 Act:

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

> (aa) residential accommodation for expectant and nursing mothers who are in need of care and attention which is not otherwise available to them."

13. It will be seen that the insertion of "illness, disability" into section 21(1)(a) imported the residential component of the services for the care of the sick from paragraph 2 of what was then schedule 8 to the National Health Service Act 1977; and the insertion of section 21(1)(aa) did the same for pregnant and nursing mothers from paragraph 1 of the same schedule. The purpose was to bring them all within the same assessment and charging regime. New approvals and directions covering sections 21(1) and 29 of the 1948 Act and paragraphs 1 and 2 of Schedule 8 to the National Health Service Act 1977 (now Schedule 20 to the 2006 Act) were given in Department of Health Circular LAC(93)10, which is still current. As with the previous Circulars, this imposed a duty to make arrangements under section 21(1)(a) for people ordinarily resident in the area and for other people in urgent need thereof and a power to do so for people with no settled residence or who lived in the area of another local authority (Appendix 1, para 2(1)). A mysterious paragraph (para 2(2)) also directs them to make arrangements under section 21(1)(a) "to provide temporary accommodation for persons who are in urgent need thereof in circumstances where the need for that accommodation could not reasonably have been foreseen". This repeats word for word the repealed provision in section 21(1)(b). It may simply have been a slip, repeating paragraph 3(b) of Circular No LAC 13/74. Or it may have been retained so as to impose a temporary obligation where the need arose in unforeseen circumstances. But it could not impose any obligation going beyond that provided for in section 21(1)(a) and so it must be confined to people "in need of care and attention which is not otherwise available to them".

14. Unlike the services provided by the National Health Service, section 21(1)(a) accommodation has never been free. It was a point of pride in 1948 that people going into local authority old people's homes were not going into the poor house. They were expected to pay what they could, up to the full cost if they could afford it. The criterion for eligibility was the reason why such accommodation was needed rather than the need for accommodation as such. As Lord Hoffmann observed in *R (Westminster City Council) v National Asylum Support Service* [2002] 1 WLR 2956, para 32, *("NASS")* the obligation under section 21(1)(a) was owed to the wealthy as well as the poor.

15. Thus it has always been assumed that the words "which is not otherwise available to them" govern the words "care and attention" and not the words "residential accommodation" in both section 21(1)(a) and (aa). A person may have a roof over her head but still be in need of care and attention which is not available to her in that home and therefore qualify for residential accommodation under section 21(1)(a) or (aa). Old people who had homes of their own were and are regularly accommodated in old people's homes under this provision when no longer able to cope in their own homes.

16. The alternative construction, that the words "which is not otherwise available to them" govern the words "residential accommodation", is grammatically attractive. But not only would it defeat the main purpose of the section, which is to make special provision for those with special needs; it would be contrary to the construction which has twice been adopted in this House, in *Steane v Chief Adjudication Officer* [1996] 1 WLR 1195, 1202, and *Chief Adjudication Officer v Quinn* [1996] 1 WLR 1184, 1194; and to the understanding of Parliament when it enacted section 21(2A), which begins: "In determining for the purposes of paragraph (a) or (aa) of subsection (1) of this section whether care and attention are otherwise available to a person . . ." This time Parliament got the grammar right and the meaning is plain.

17. Section 21(1)(a) did not feature in the law reports at all until after the 1990 Act came into force. A handful of cases were triggered by the decisions of local social services authorities either to transfer their own old people's homes to voluntary organisations or the private sector or to close them down altogether: see *R v Wandsworth London Borough Council, Ex parte Beckwith* [1996] 1 WLR 60; and *Quinn* and *Steane* above.

The impact of immigration control

18. As Lord Hoffmann also observed in the *NASS* case, at paras 19-20, "there was a time when the welfare state did not look at your passport or ask why you were here. . . As immigration became a political issue, this changed". A brief account of the progressive withdrawal of social security benefits from immigrants and asylum seekers may be found in my judgment in *R v Wandsworth London Borough Council, Ex parte O; R v Leicester City Council, Ex parte Bhikha* [2000] 1 WLR 2539, 2555 ("*Ex parte O*"). With the total

withdrawal of all benefits from some claimants, the trickle of cases about section 21(1)(a) soon became a flood.

19. As is well known, the Social Security (Persons from Abroad) Miscellaneous Amendment Regulations 1996 (1996 SI No 30) purported to remove the entitlement to social security benefits of asylum seekers who failed to claim asylum at the point of entry. In *R v Secretary of State for Social Security, Ex parte Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275, the Court of Appeal declared that it was not possible to make such a momentous change, reducing such people to utter destitution, by delegated legislation. Parliament responded by passing the Asylum and Immigration Act 1996, validating the 1996 social security regulations and the associated denial of public housing assistance under Part III of the Housing Act 1985 by the Housing Accommodation and Homelessness (Persons Subject to Immigration Control) Order 1996 (1996 SI No 1982), thus also reversing the effect of *R v Royal Borough of Kensington and Chelsea, Ex parte Kihara and others*, unreported, 25 June 1996.

20. With all other avenues of support and housing denied to them, asylum seekers turned to section 21(1)(a) of the National Assistance Act 1948. In *R v Hammersmith and Fulham London Borough Council, Ex parte M* (1997) 30 HLR 10 (*"Ex parte M"*), the Court of Appeal held that they could do so. The Court rejected the argument that the words "any other circumstances" had to be construed *ejusdem generis* with "age, illness, disability" and held that they could cover people whose need for care and attention had arisen from having to sleep rough and go without food. Equally, however, the Court rejected the idea that "section 21(1)(a) is a safety net provision on which anyone who is short of money and/or short of accommodation can rely". The crucial passage is this, at p 20:

> "What [asylum seekers] are entitled to claim (and this is the result of the 1996 Act) is that they can as a result of their predicament after they arrive in this country reach a state where they qualify under the subsection because of the effect upon them of the problems under which they are labouring. In addition to the lack of food and accommodation is to be added their inability to speak the language, their ignorance of this country and the fact that they have been subject to the stress of coming to this country in circumstances which at least involve their contending to be refugees. Inevitably the combined effect of these factors with the passage of time will produce one or more of the conditions

> specifically referred to in section 21(1)(a). It is for the authority to decide whether they qualify."

21. Thus far, the decision is uncontroversial. The need for care and attention is a condition precedent to entitlement under section 21(1)(a). A mere need for housing and financial support is not a need for care and attention. But its consequences, especially when combined with other factors making the claimant more vulnerable, may eventually lead to such a need. When it does so, section 21(1)(a) applies. However, the Court went on to say, at p 21, that "the authorities can anticipate the deterioration which would otherwise take place in the asylum seekers' condition by providing assistance under the section. They do not need to wait until the health of the asylum seeker has been damaged." This is the only part of the decision with which Mr John Howell QC, who appears for the local authority in this case, takes issue.

22. The result of the decision was a general perception that local social services authorities had become responsible for the housing and support of those asylum seekers who were denied the help of the social security and housing authorities because of the 1996 Act. In 1998, the Government published a White Paper, *Fairer, Faster and Firmer – A Modern Approach to Immigration and Asylum*, Cm 4018. It commented at para 8.14:

> "The Court of Appeal judgment relating to the 1948 Act meant that, without warning or preparation, local authority social services departments were presented with a burden which is quite inappropriate, which has become increasingly intolerable and which is unsustainable in the long term, especially in London, where the pressure on accommodation and disruption to other services has been particularly acute."

The white paper proposed the setting up of a national asylum support scheme, separate from the welfare schemes available to people with an established right to live here, and specifically intended as a safety net of last resort for people with nowhere else to turn. It was recognised that the scheme might be used to promote specific policy objectives, including the deterrent effect of making the claimants' situation "less eligible" (to use a 19th century poor law concept). Thus, in para 8.17:

> "In considering what form support arrangements for asylum seekers should take, the Government believes that they should satisfy the following objectives:
>
> - To ensure that genuine asylum seekers cannot be left destitute, while containing costs through incentives to asylum seekers to look first to their own means or those of their communities for support;
> - To provide for asylum seekers separately from the main benefits system;
> - To minimise the incentive to economic migration, particularly by minimising cash payments to asylum seekers."

Meanwhile, at para 8.23:

> "The 1948 Act will be amended to make clear that social services departments should not carry the burden of looking after healthy and able bodied asylum seekers. This role will fall to the new national support machinery."

23. The new system of asylum support was set up under Part VI of the Immigration and Asylum Act 1999. This allowed the Secretary of State to provide support for asylum seekers. (The Act also contains a power to provide accommodation facilities for some others, including failed asylum seekers, in section 4). But section 115 excluded any "person subject to immigration control", unless falling within an excepted category, from all social security cash benefits. It is possible, therefore, that some people may be excluded from social security benefits but not qualify for any asylum support. It must, however, be remembered that the Secretary of State is not permitted to subject anyone to inhuman or degrading treatment as a result of the package of restrictions and deprivations affecting him: *R (Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66; [2006] 1 AC 396.

24. Section 116 of the 1999 Act added two new subsections to section 21 of the 1948 Act. Section 21(1A) reads as follows:

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

(a) because he is destitute; or
(b) because of the physical effects, or anticipated physical effects, of his being destitute."

Subsection 21(1B) incorporated the definition of destitution, together with its ancillary provisions, from section 95(3) of the 1999 Act:

"For the purposes of this section, a person is destitute if –

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

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

Our lives would have been a great deal easier if section 21(1A) had simply provided that local social services authorities were under no obligation at all to "persons subject to immigration control". It did not do that, no doubt because it was accepted that people with particular health or care needs should have still access to the National Health Service and social services. So the question was where to draw the line between those for whom the social services were responsible and those for whom they were not, for some of whom the asylum support service might be responsible and for some of whom there might be no-one responsible at all.

25. The issue came before the Court of Appeal in *R v Wandsworth London Borough Council, Ex parte O, R v Leicester City Council, Ex parte Bhikha* [2000] 1 WLR 2539. The applicants were not asylum seekers but over-stayers who had stayed here long after they should have returned to their home countries. When they approached their local authorities for assistance under section 21(1)(a), neither was entitled either to social security benefits or to asylum support (Mrs O was later granted Exceptional Leave to Remain and therefore became entitled to benefits). But both had quite serious health problems. The local authorities refused to assess their needs, initially on the ground that their presence here was unlawful. The Court of Appeal held that they were not entitled to refuse assistance on this ground. But the case also raised the issue of whether they were excluded from section 21(1)(a) by the new section 21(1A).

26. The local authorities argued that "it is only if an applicant would still need assistance even without being destitute that he is entitled to it". The applicants argued that "if an applicant's need for care and attention is to any material extent made more acute by some circumstance other than the mere lack of accommodation and funds, then . . . he qualifies". Lord Justice Simon Brown, at p 2548, unhesitatingly preferred the latter: "The word 'solely' in the new section is a strong one and its purpose there seems to me evident. . . . If there are to be immigrant beggars on our streets, then let them at least not be old, ill or disabled". I said, at p 2557, "Parliament might have gone even further in denying such services completely, but chose to limit that denial to those whose need arose 'solely' from destitution. This must leave it open to those whose need arises also from other cause to seek such assistance. . . . It makes no sense for the old, the sick or the disabled to be eligible for hospital and other health services but not for the community care services they need." Lord Justice Kay agreed with us both.

27. This decision proved more problematic than we had expected. We had assumed that the new national asylum support scheme would provide for destitute asylum seekers even if they were especially vulnerable, if the care and attention they needed could be provided for them in the accommodation provided by the new scheme. This would leave only those asylum seekers with the sort of care needs which could only be met in specialised accommodation, and people like Mrs O and Mr Bhikha who fell outside the asylum scheme altogether, to be catered for under section 21(1)(a). But this was wrong. The Secretary of State was determined that the national scheme would indeed be a last resort. The regulations required him, in deciding whether an asylum seeker was destitute, to take into account any other support which was available to the asylum seeker: Asylum Support Regulations 2000, reg 6(4)(b). So if support was available under section 21(1)(a), it would not be available under the national scheme.

28. This led to what has been called an "inverted and unseemly turf war between local and national government" (J A Sweeney, "The Human Rights of Failed Asylum Seekers in the United Kingdom" [2008] PL 277, 285), culminating in the decision of this House in *R (Westminster City Council) v National Asylum Support Service* [2002] 1 WLR 2956. Mrs Y-Ahmed was an asylum seeker who suffered from spinal cancer. She and her daughter were assessed as needing self contained accommodation of at least two rooms near the hospital where she had been treated, accessible by wheel-chair and to community care services. She needed care and attention, but it could have been provided in her own accommodation if she had had any. It was only because of

the lack of her own accommodation that the care and attention she needed was "not otherwise available to [her]" without the provision of accommodation under section 21(1)(a).

29. The House held, consistently with *Ex parte M*, that this brought her within section 21(1)(a). *Ex parte M* was not challenged and Lord Hoffmann observed that "I do not think it would be open to [counsel] to do so, because the whole of Part VI of the 1999 Act proceeds on the assumption that it is correct" (para 43). The House also held that she was not excluded by section 21(1A). Lord Hoffmann, at para 29 drew, a distinction between "the able-bodied destitute" and "the infirm destitute". He thought that the existence of the latter class "may have escaped notice" in the aftermath of *Ex parte M* (para 29). Nevertheless, as he explained, at para 32,

> "The use of the word 'solely' makes it clear that only the able bodied destitute are excluded from the powers and duties of section 21(1)(a). The infirm destitute remain within. Their need for care and attention arises because they are infirm as well as because they are destitute. They would need care and attention even if they were wealthy. They would not of course need accommodation, but that is not where section 21(1A) draws the line."

The House declined to express a view on whether the exact test adopted by Lord Justice Simon Brown in *Ex parte O* was correct, because it also affected people who were not entitled to asylum support. The case had been argued throughout on the basis that Mrs Y-Ahmed had a need for care and attention which had not arisen solely because she was destitute but also (and largely) because she was ill.

This case

30. My Lords, it might appear that this case too is part of the "inverted and unseemly turf war" between central and local government, but although the Secretary of State intervened on a different issue in the Court of Appeal, he has not intervened on the issues before us. The main issue is the precise meaning of the words "in need of care and attention which is not otherwise available to them". It may well be that those who drafted section 21(1)(a) in 1948 assumed that it only applied to people who needed extra care and attention which could not be provided in their own homes. They undoubtedly drew a distinction between the

ordinary homeless, who were catered for under what was then section 21(1)(b), and those with special needs, who fell within section 21(1)(a). Be that as it may, we are required, by the *NASS* case, to accept that people who need care and attention which could be provided in their own homes, if they had them, can fall within section 21(1)(a). But that does not answer the question in this case.

31. Mr Howell adopts the three conditions which I suggested in *R (Wahid) v Tower Hamlets London Borough Council* [2002] EWCA Civ 287, [2003] HLR 13, para 30, and Lord Hoffmann found helpful in the *NASS* case at para 26:

> "first, the person must be in need of care and attention; secondly, the need must arise by reason of age, illness, disability or 'other circumstances' and, thirdly, the care and attention which is needed must not be available otherwise than by the provision of accommodation under section 21".

Mr Howell argues that there must be some meaningful content in the need for care and attention. He was at first disposed to argue that it must mean care and attention to physical needs, such as feeding, washing, toileting and the like, and not simply shopping, cooking, laundry and other home help type services. But he accepted that it had also to cater for people who did not need personal care of this sort but did need to be watched over to make sure that they did not do harm to themselves or others by what they did or failed to do. The essence, he argued, was that the person needed someone else to look after him because there were things that he could not do for himself. The respondent does not need care and attention of this sort. He is perfectly capable of looking after himself. He needs his medication, but that is supplied by the National Health Service and under section 21(8) the local authority is not allowed to provide him with anything which is authorised or required to be provided under the National Health Service Act 2006. Medical treatment has always been provided for separately in the National Health Service legislation. The need for a fridge in which to keep his medication cannot be described as a need for care and attention.

32. My Lords, a test as strict as that proposed by Mr Howell might not even include Mrs Y-Ahmed, let alone Mrs O and Mr Bhikha. It might not include a great many people who have been accommodated in old people's homes over the years since 1948. Our ideas of when people need to be in residential care have changed a good deal since then. Much of the care which used to be provided in a residential setting can now be

provided at home. Furthermore, section 26(1A) requires that if arrangements are made under section 21(1)(a) for accommodation "together with nursing or personal care" for people who are or have been ill, people who have or have had a mental disorder, people who are disabled or infirm, or people who are or have been dependent on alcohol or drugs, then in effect the home must be registered under the Care Standards Act 2000. Thus accommodation may be arranged under section 21(1)(a) without including either nursing or personal care. So the "care and attention" which is needed under section 21(1)(a) is a wider concept than "nursing or personal care". Section 21 accommodation may be provided for the purpose of preventing illness as well as caring for those who are ill.

33. But "care and attention" must mean something more than "accommodation". Section 21(1)(a) is not a general power to provide housing. That is dealt with by other legislation entirely, with its own criteria for eligibility. If a simple need for housing, with or without the means of subsistence, were within section 21(1)(a), there would have been no need for the original section 21(1)(b). Furthermore, every homeless person who did not qualify for housing under the Housing Act 1996 would be able to turn to the local social services authority instead. That was definitely not what Parliament intended in 1977. This view is consistent with *Ex parte M*, in which Lord Woolf emphasised, at p 20, that asylum seekers were not entitled merely because they lacked money or accommodation. I remain of the view which I expressed in *Wahid*, at para 32, that the natural and ordinary meaning of the words "care and attention" in this context is "looking after". Looking after means doing something for the person being cared for which he cannot or should not be expected to do for himself: it might be household tasks which an old person can no longer perform or can only perform with great difficulty; it might be protection from risks which a mentally disabled person cannot perceive; it might be personal care, such as feeding, washing or toileting. This is not an exhaustive list. The provision of medical care is expressly excluded. Viewed in this light, I think it likely that all three of Mrs Y-Ahmed, Mrs O and Mr Bhikha needed some care and attention (as did Mr Wahid but in his case it was available to him in his own home, over-crowded though it was). This definition draws a reasonable line between the "able bodied" and the "infirm".

34. This construction is consistent with all the authorities, including *R (Mani) v Lambeth London Borough Council* [2003] EWCA Civ 836, [2004] LGR 35. That case was argued on the assumption that the claimant did have a need for care and attention, but not a need which required the provision of residential accommodation. Mr Mani had one

leg which was half the length of the other. He had difficulty walking and when in pain he could not undertake basic tasks such as bed-making, vacuum cleaning and shopping. He did need some looking after, going beyond the mere provision of a home and the wherewithal to survive.

35. The only passage which might cast any doubt upon this approach is Lord Woolf's statement in *Ex parte M*, that the authorities could "anticipate the deterioration which would otherwise take place" and intervene before a person's health had been damaged. He did not, however, say that they could intervene before there was a need for care. There has to be some sensible flexibility here. Section 21(1)(a) requires that the person "*are* in need of care and attention" so that the primary focus must be on present rather than future needs. But if there is a present need for some sort of care, then obviously the authorities must be empowered to intervene before it becomes a great deal worse. Section 21(1A) reflects this by referring to the anticipated physical effects of destitution. It was possible to meet the present needs that Mrs Y-Ahmed already had, for without that she would have needed a great deal more. It would be possible to meet the need for care of an HIV positive person who is beginning to get sick before he becomes a great deal worse. But there must still be a need for some care and attention for section 21(1)(a) to apply at all.

36. Although the respondent is HIV positive, his medical needs are being catered for by the National Health Service. So even if they did amount to a "need for care and attention" within the meaning of section 21(1)(a) he would not qualify. But for the reasons given above, I do not think that they do amount to such a need. There may of course come a time when they do, but people with the virus can now live normal lives for many years and we must hope that the respondent is able to do so. As he does not fall within section 21(1)(a) it is unnecessary to decide whether he would be excluded by section 21(1A). Unless and until one knows what care and attention a claimant needs, one cannot sensibly ask whether his need for it arises solely from destitution or its actual or anticipated effects.

37. For these reasons, and in agreement with the additional reasons of my noble and learned friends, Lord Brown of Eaton-under–Heywood and Lord Neuberger of Abbotsbury, I would allow this appeal and set aside the order quashing the local authority's decision.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

38. I have had the advantage of reading in draft the opinion of my noble and learned friend Baroness Hale of Richmond and I am in full agreement with it. Since, however, I was myself closely involved with this area of the law for many years in the Court of Appeal, I wish to add a few paragraphs of my own which I hope may further clarify and not cloud the position now arrived at. In doing so I gratefully adopt my Lady's exposition of the relevant facts, and legislation.

39. As Lady Hale has explained, the ultimate question arising in all these cases is: who ultimately is responsible for meeting the housing and subsistence needs of destitute people subject to immigration control (mostly but not exclusively asylum-seekers)? Is it local authorities under section 21(1)(a) of the National Assistance Act 1948 or is it central government in the form of NASS, now under section 95 of the Immigration and Asylum Act 1999 (or otherwise pursuant to the state's obligation not to breach article 3 of the European Convention on Human Rights—see *R (Limbuela) v Secretary of State for the Home Department* [2006] 1 AC 396)?

40. Part of the answer was provided by the House in *R (Westminster City Council) v National Asylum Support Service* [2002] 1 WLR 2956: NASS is responsible for the "able-bodied destitute"; local authorities for the "infirm destitute". Given, however, that the asylum-seeker there, Mrs Y-Ahmed, was agreed by all to be an "infirm destitute" with "a need for care and attention which has not arisen solely because she is destitute but also (and largely) because she is ill", it was unnecessary for the House to consider in depth either (i) what constitutes a need for care and attention within the meaning of section 21(1)(a) or (ii) whether any such need has arisen "solely… because he is destitute" (or because of the actual or anticipated physical effects of destitution) so as to fall within section 21 (1A). I turn, therefore, to these two questions.

(i) What constitutes a need for care and attention such as (subject to section 21(1A)) to entitle a person to section 21 residential accommodation?

I agree with Lady Hale's analysis. A person must need looking after beyond merely the provision of a home and the wherewithal to survive —beyond, therefore, the needs able to be met by NASS for suitable

accommodation and subsistence. The looking after required does not have to be for either nursing or personal care. It must, however, be of such a character as would be required even were the person wealthy. It is immaterial that this care and attention could be provided in the person's own home if he had one (as he would have if he were wealthy). All that is required is that the care and attention needed must not be available to him otherwise than by the provision of section 21 accommodation. In the case of someone subject to immigration control who is destitute, inevitably only the provisions of section 21 accommodation will enable his need for care and attention to be met. But that does not exclude him under section 21(1A): that provision only excludes those whose need for care and attention (not whose need for accommodation) has arisen solely because of destitution. As Lord Hoffmann said in *NASS* para 32):

> "The use of the word 'solely' makes it clear that only the able-bodied destitute are excluded from the powers and duties of section 21(1)(a). The infirm destitute remain within. Their need for care and attention arises because they are infirm as well as because they are destitute. They would need care and attention even if they were wealthy. They would not of course need accommodation, but that is not where section 21(1A) draws the line."

As Lady Hale explains, the respondent (unlike the two claimants in *R v Wandsworth London Borough Council Ex parte O*; *R v Leicester City Council Ex parte Bhikha* [2000] 1 WLR 2539 ("*Ex parte O*"), Mrs Y-Ahmed in *NASS*, and Mr Mani in the later case of *R (Mani) v Lambeth London Borough Council* [2004] LGR 35) fails at this initial hurdle: M needs no looking after beyond medical care which is provided by the NHS and thus excluded from consideration by section 21(8).

(ii) Should the person's need for care and attention be regarded as having arisen "solely because he is destitute"?

This question only arises once it is established that the person has a need to be looked after—a need beyond merely the provision of a home and the means of survival. If a person reaches that state purely as a result of sleeping rough and going without food, as envisaged in *R v Hammersmith and Fulham London Borough Council, Ex parte M* (1997) 30 HLR 10 ("*Ex parte M*") at p.19, then clearly the need for care and attention will have arisen solely from destitution. If, however, that state of need has been accelerated by some pre-existing disability or infirmity—not of itself sufficient to give rise to a need for care and attention but such as to cause a faster deterioration to that state and

perhaps to make the need once it arises that much more acute—then for my part, consistently with the views I expressed in the earlier cases, I would not regard such a person as excluded under section 21(1A).

41. Given, however, that the real dispute in the vast majority of cases is, as stated, between local authorities and NASS, and given too the House's decision in *Limbuela*, it seems to me unlikely that in practice this point will now arise. Surely the question to be asked is rather whose responsibility it is to provide accommodation and subsistence to destitute asylum-seekers *before* any such deterioration occurs and by reference, therefore, only to whatever particular disability or infirmity the person already suffers. Only if they already need section 21 care and attention is the local authority responsible; otherwise the responsibility falls on central government.

The Court of Appeal's decision

42. It would be wrong to reverse the Court of Appeal's decision here without recognising my own part in their mistaken approach. Paragraph 15 of the judgment (of Maurice Kay LJ, concurred in by Ward LJ and Sir Peter Gibson) accepted the respondent's argument that it was implicit in *Ex parte M* that "'care and attention' . . .could extend to the provision of shelter, warmth, food and other basic necessities". In support of this view paragraph 19 of the judgment cited a passage from my own judgment in the Court of Appeal in *Ex parte Mani*: ". . . [A]s is apparent from [*Ex parte M*], all destitute asylum-seekers, unless they are explicitly excluded by section 21(1A), would be entitled to accommodation under section 21 . . ." That this was indeed my opinion of the matter was implicit also in my judgment in *Ex parte O* and in my view (expressed in my judgments in the Court of Appeal both in the *NASS* case, [2001] EWCA Civ 512, para 44, and in *Ex parte Mani*, para 21) that a blind asylum-seeker would fall to be supported by the local authority rather than by NASS. Perhaps, moreover, I was not alone at that time in taking this view. Lady Hale, besides agreeing with my judgment in *Ex parte O*, said in *R (Wahid) v Tower Hamlets London Borough Council* [2003] HLR 13, para 32: that the words "care and attention" in section 21 (1)(a) "must be given their full weight. Their natural and ordinary meaning in this context is 'looking after': this can obviously include feeding the starving, as with the destitute asylum-seekers in [*Ex parte M*]".

43. I am now persuaded, however, that it would not be right to regard all destitute asylum-seekers as in imminent need of care and attention. I had originally based this view on the final passage at p.21 of the report of *Ex parte M* (quoted by Lady Hale at para 21) combined with section 21(1A)'s reference to the "anticipated physical effects" of destitution. Now, however, I respectfully agree with Lady Hale's analysis, not least at para 35 of her opinion.

44. For these reasons, which substantially mirror those more fully given by Lady Hale, I too would accordingly allow this appeal.

LORD NEUBERGER OF ABBOTSBURY

My Lords,

45. This appeal, brought by Slough Borough Council, raises two issues of interpretation of section 21(1)(a) of the National Assistance Act 1948, and, at least contingently, an issue of interpretation of section 21(1A) of that Act.

46. I have had the benefit of reading in draft the opinions of my noble and learned friends, Baroness Hale of Richmond and Lord Brown of Eaton-under-Heywood. Lady Hale has explained the facts giving rise to this appeal, and has also provided an authoritative history of the directly and indirectly relevant legislation, and I gratefully adopt what she says.

47. The principal issue which arises in relation to section 21(1)(a) is the meaning of the expression "are in need of care and attention". However, it is first appropriate to consider another issue which arose during the course of argument. That issue concerns the identification of the expression referred to by the closing words of section 21(1)(a), "which is not otherwise available to them". Do they refer, as appears to have always been assumed in previous cases on section 2, to "care and attention" (see e.g. *Steane v Chief Adjudication Officer* [1996] 1 WLR 1195, 1202), or do they refer, as was suggested as a possibility during the hearing, to "accommodation"?

48. On a purely syntactical analysis, there is something to be said for each of the two interpretations. The word "which" normally refers back to the noun or set of nouns immediately preceding it (i.e. "care and attention"), but it can be read, if the context so indicates, as referring back to an earlier noun (i.e. "accommodation") or set of nouns. On the other hand, the singular verb "is" suggests that the word "which" normally refers to a single noun (i.e. "accommodation"), but it would not be a misuse of language to regard some combination of nouns (such as care and attention) as a singular concept.

49. Decisions on questions of interpretation, whether of a contract or a statute, are often influenced by the impression conveyed by the words concerned to the particular reader. There can therefore be a danger of *post hoc* rationalisation when it comes to justifying a particular interpretation. This is such a case. It is therefore only right to acknowledge that the impression conveyed to me when I first read the section was that the closing words of section 21(1)(a) referred to "care and attention", and I remain of the view that that is the more natural reading. (Having said that, it not infrequently happens that a more detailed and careful linguistic and contextual analysis convinces one that a departure from the primary impression is appropriate - although it is at least equally likely to confirm, or at least not to undermine, that impression.)

50. On closer analysis, it seems to me that the reading which the words seem to bear as a matter of impression appears to comply somewhat better with the purpose of section 21(1). In this connection, it is pertinent to mention that it is common ground that "residential accommodation" extends not merely to premises to live in, but also to the care and attention of which the person concerned has need. That seems clear from section 21(5), which states that references to accommodation provided under Part III of the 1948 Act are to be construed as extending to "board and other services, amenities and requisites provided in connection with the accommodation except where in the opinion of the authority managing the premises their provision is unnecessary". As Hale LJ said in *R (Wahid) v Tower Hamlets London Borough Council* [2002] EWCA Civ 287; [2003] HLR 13 para 32, residential accommodation "is simply the means whereby the necessary care and attention can be made available if otherwise it will not…."

51. In the light of that meaning of "residential accommodation", it seems to me that, on either interpretation, section 21(1) is engaged where a person is without the care and attention which he needs.

However, if the closing words of section 21(1)(a) refer to "residential accommodation", then section 21 would also be engaged where such a person has all the care and attention that he needs, but is without accommodation. That would have rendered otiose section 21(1)(b), which was repealed by the Housing (Homeless Persons) Act 1977. Section 21(1)(b) empowered, and, subject to the Secretary of State's directions, required, a local authority to provide "temporary accommodation for persons who are in urgent need thereof".

52. Quite apart from this, the closing words of section 21(1)(a) have been consistently treated as referring to "care and attention" rather than "accommodation". There is some, albeit pretty limited, force in the point that, if the legislature had been unhappy about this, there would have been ample opportunities to amend section 21(1)(a) accordingly. As already mentioned, there have been many amendments made to section 21(1) since 1948. Perhaps more significantly, section 21(2A), which was added by the Community Care (Residential Accommodation) Act 1998, opens with the words "In determining … whether care and attention are otherwise available to a person….". Accordingly, it appears clear that, in 1998, the legislature amended section 21 on the assumption that the traditional interpretation of section 21(1)(a) was correct (and, in contrast with the original drafting, it used the plural "are" rather than the singular "is").

53. I turn, then, to the second, and principal, question raised in relation to section 21(1)(a), namely the meaning of "are in need of care and attention", and, in particular, whether on the facts of the present case, M was "in need of care and attention".

54. As a matter of ordinary language, while reformulation of a statutory expression can be dangerous, "are in need of" means much the same as "currently require". "Need" is a more flexible word than it might first appear. "In need of" plainly means more than merely "want", but it falls far short of "cannot survive without". Particularly bearing in mind the multifarious circumstances in which section 21(1)(a) might be invoked, I do not think it would be sensible or helpful to indulge in further generalised exegesis. In the great majority of cases, I would have thought that the words should not present a problem.

55. As for the word "are", it seems to me that, unless the contextual imperative to the contrary is very powerful indeed, the use of the present tense excludes the future, let alone the future conditional. It would seem

wrong to extend a duty owed to a person who satisfies a statutory requirement to a person who currently does not satisfy the requirement simply because he will or may do so in the future. I should add that, as a matter of practicality, humanity and common sense, this cannot mean that a local authority is required to wait to act under section 21 until a person becomes seriously in need, however close and inevitable that serious need may be, and however much the authority reasonably wants to assist at once. The section must contemplate that a local authority can act, where it reasonably considers it right to do so, as soon as a person can be said to be in need of some care and attention, even to a relatively small degree.

56. As for "care and attention", while again it is right to caution against the risks of reformulating the statutory language, it appears to me that Hale LJ was right to say that "in this context", the expression means "looking after" and that "ordinary housing is not in itself 'care and attention'" – see *Wahid* [2002] EWCA Civ 287; [2003] HLR 13, para 32. I do not consider that "care and attention" can extend to accommodation, food or money alone (or, indeed, together) without more. As a matter of ordinary language, "care and attention" does not, of itself, involve the mere provision of physical things, even things as important as a roof over one's head, cash, or sustenance. Of course, if a person has no home or money, or, even more, if he has no access to food, he may soon become in need of care and attention, but, as already explained, that is beside the point.

57. Quite apart from the language of section 21(1)(a), I think it is unlikely that the legislature would have intended the section to apply to a person simply because he had no home. It would mean that the section imposed a power and potential obligation on a local authority to house all the homeless. In the first place, this would have rendered redundant section 21(1)(b), discussed above. People falling within section 21(1)(b) would be within section 21(1)(a) if it applied to someone who had no home. The notion that homelessness could, of itself, bring someone within section 21(1)(a) would also be inconsistent with the 1977 Act (which replaced section 21(1)(b)), and with Parts VI and VII of the Housing Act 1996 (which replaced the 1977 Act).

58. It would also be surprising if there was a potential obligation to provide "residential accommodation" to a person solely because he has no money. Further, as explained by Lady Hale, Part II of the 1948 Act provided for financial help for the poor or destitute in the form of national assistance, replaced by supplementary benefit under the

Ministry of Social Security Act 1966, which was in turn replaced by income support under what is now the Social Security Contributions and Benefits Act 1992.

59. So far as food is concerned, imposing an obligation on government to feed the starving, or to ensure that they have access to food, would be eminently proper. Hence, no doubt, the existence of provisions such as those in Part II of the 1948 Act. However, if all someone needs is food, it does not appear to me to be particularly rational to require him to be housed. Of course, it would almost certainly be different if a person is starving because he suffers from physical or mental disability: in such a case, he may well need care and attention because of his disability; partly, indeed, because it will often no doubt be the case that it is the disability which causes him to starve.

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

61. The conclusion that M's medical condition and consequent requirements do not serve to bring him within the ambit of section 21(1) is strongly reinforced by the duty imposed two years before the 1948 Act, by the National Health Service Act 1946, now re-enacted (with modifications) in section 3(1) of the National Health Service Act 2006. Section 3(1) of the 2006 Act requires the Secretary of State for Health to provide "to such extent as he considers necessary to meet all reasonable requirements", *inter alia*, (a) "hospital accommodation", (b) "other accommodation … ", (c) "medical [and] nursing… services", (e) "such other services or facilities for … the care of persons suffering from illness … as he considers are appropriate as part of the health service", and (f) "such other services or facilities as are required for the … treatment of illness". In this connection, "illness" includes mental disorder, and any injury or disability requiring medical treatment or nursing – see section 275 of the 2006 Act.

62. The “sharp distinction” between “treatment” and “care” in the 1946 Act was discussed by Denning LJ in *Minister of Health v Royal Midland Counties Home for Incurables* [1954] Ch 530, 547. This distinction has been adopted in two subsequent decisions of the Court of Appeal, *White v Chief Adjudication Officer* (1993) R(IS) 18/94; 17 BMLR 68 and *Botchett v Chief Adjudication Officer* (1996) R(IS) 10/96; 32 BMLR 153, where the issue arose because the amount payable to a claimant depends on whether he receives “treatment” in a hospital, or “care” in a residential or nursing care home. In this case, M, with his HIV-infection, and possible AIDS, clearly needs treatment (albeit not in a hospital), but he does not need care (or, indeed, attention), although I accept, of course, that the time may come when, as a result of his medical condition, he does so.

63. In the instant case, Maurice Kay LJ said that he found this line of argument “logical”, but nonetheless felt constrained to hold that M was within section 21(1)(a), in the light of previous decisions and observations of the Court of Appeal– see [2007] LGR 225, para 15. He considered that authority established that “care and attention” in that section “could extend to the provision of shelter, warmth, food and other basic necessities”. He rested this view on the reasoning in *R v Hammersmith and Fulham London Borough Council ex p M, P, A and X* (1997) 30 HLR 10, and on dicta in *R v Wandsworth London Borough Council ex p O* [2000] LGR 591, 600 and *R (Mani) v Lambeth London Borough Council* [2003] EWCA Civ 836, [2004] LGR 35, paras 18 to 21.

64. I am not convinced that the reasoning of Lord Woolf MR in *Ex p M* (1997) 30 HLR 10 required such a conclusion, but I do not find the reasoning on this point entirely clear, in that there are aspects of the analysis on p. 19 which are somewhat hard to reconcile with observations on the following page. *Ex p O* [2000] LGR 591 and *Mani* [2004] LGR 35 were not ultimately concerned with the meaning of “care and attention”, although Maurice Kay LJ’s reliance on the dicta he cited from those cases is hard to quarrel with. I have read what Lady Hale and Lord Brown say about those dicta. I agree with them, and it would not be profitable for me to say any more on the topic, save that the dicta were readily comprehensible given that they were made before this House had established the principle decided in *R (Limbuela) v Secretary of State for the Home Department* [2006] 1 AC 396.

65. Another part of the reasoning of *M, P, A and X* (1997) 30 HLR 10, however, does merit further consideration. At (1997) 30 HLR 20, Lord

Woolf stated that people who are without accommodation or money "can as a result of their predicament … reach a state where they qualify under the subsection because of the effect upon them of the problems under which they are labouring." That is unexceptionable; as was said on the previous page, sleeping rough and going without food "can bring about illness and disability which can result in [a need for] care and attention". However, the observations at (1997) 30 HLR 20 to 21, that homeless asylum-seekers will "inevitably" come to need care and attention and that local authorities can act under section 21(1) before a person has a need for care and attention are more problematic. They apparently mean, and have been taken to mean, that local authorities have to act under section 21(1)(a), at least in relation to some people, before they actually need care and attention (see e.g. per Collins J at first instance in this case, [2004] LGR 657, paras 10 to 20.) In my view, this is not correct. As already explained, section 21(1)(a) only apply to a person who is in present need of care and attention, albeit that a local authority may act under the section once satisfied that there is such a need, even if it is currently not very pressing, especially where the situation appears likely to deteriorate.

66. So far, other than agreeing with the description of "looking after", I have been more concerned with identifying what is not, rather than what is, "care and attention" within the meaning of section 21(1)(a). In that connection, while it is strictly unnecessary to address that issue further, it is right to say that I agree with Lady Hale's observations at paras 31 to 33 of her opinion.

67. As M is unable to rely on section 21(1)(a), it must follow that this appeal must be allowed. It also follows that it is unnecessary, indeed that it would be somewhat difficult, to decide whether, if he was within the scope of section 21(1)(a), he would nonetheless be excluded from the ambit of section 21(1) by the provisions of section 21(1A).

68. For these reasons, in addition to the reasons given by Lady Hale with which I fully agree, I would allow this appeal.