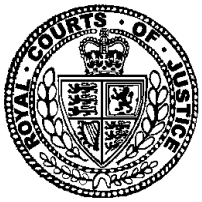

Neutral Citation Number: [2024] EWHC 129 (Admin)

Case No: AC-2023-LON-002522

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Friday, 26th January 2024

Before:
ALAN BATES
(sitting as a Deputy Judge of the High Court)

- -

Between:

THE KING (on the application of TMX)

Claimant

- and –

(1) LONDON BOROUGH OF CROYDON

(2) SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendants

- -

Gráinne Mellon and Nadia O'Mara (instructed by TV Edwards LLP) for the **Claimant**.
Lindsay Johnson (instructed by Croydon Council Legal Services) for the **First Defendant**.
Alan Payne KC and Sian Reeves (instructed by the Government Legal Department) for the **Second Defendant**.

- -

Hearing date: 8 November 2023
Confidential draft judgment circulated: 22 January 2024
Judgment Released: 26 January 2024

- -

Approved Judgment

This judgment was handed down remotely at 2:00 p.m. on 26 January 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives. I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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ALAN BATES

ALAN BATES:

Introduction

1. This judicial review claim raises two main questions.

2. The first question concerns the interplay between the obligations of a local authority under the Care Act 2014 (the "Care Act"), and the obligations of the Secretary of State for the Home Department (the "Secretary of State") under s.95 of the Immigration and Asylum Act 1999 ('IAA 1999').

3. The Care Act places on local authorities a duty to provide care and support to adults with social care needs, for meeting those needs. Asylum seekers are not generally excluded from being persons to whom Care Act duties are owed if they have relevant care needs. A person's needs for care and support may, depending on the circumstances, include what are known as "accommodation-related needs", i.e. care needs that can only be met in an effective manner if the adult is provided with accommodation in which he or she can receive the care he requires and so that the provision of care would not be useless. Where an adult has been assessed as having accommodation-related needs, the local authority's Care Act duties may require that it provide accommodation for the adult if he or she otherwise has no entitlement to occupy, or to be provided with, suitable accommodation (such as an entitlement to be housed by the local authority under Part 7 of the Housing Act 1996).

4. Under s.95 of the IAA 1999 read with other legislation, the Secretary of State has a duty to provide accommodation and other basic support to asylum seekers (and their dependants) who would otherwise be "destitute".

5. The question raised by the Claimant's first ground of claim ("Ground 1") is essentially this:- *Where an asylum seeker's physical or mental condition is such that they have accommodation-related care needs, who is responsible for providing accommodation for that person? Is the local authority responsible under the Care Act, or does responsibility lie with the Secretary of State under s.95 IAA 1999?*

6. In the facts of the present case, the local authority (the First Defendant, "the Council") accepts that the Claimant has care needs that it must meet. The Council has been providing him with some care and support, such as daily visits from a care assistant. But the Council denies that the Claimant has accommodation-related needs. That is because the Council takes the position that, in circumstances where the care required by the Claimant can be provided to him other than in a nursing or care home, the Secretary of State is responsible for providing suitable accommodation for him under

s.95 of the IAA 1999. On that basis, the Council contends that the Claimant's needs under the Care Act do not include any need for accommodation, since he is entitled to continue being accommodated by the Secretary of State.

7. Both the Claimant and the Secretary of State (who has been joined to these proceedings as the Second Defendant) disagree. Their cases are that the Secretary of State's duty under s.95 to provide accommodation for asylum seekers and their dependants is "residual", i.e. that such a duty arises only where an asylum seeker is "destitute" in the sense that he does not have an entitlement to accommodation under any other legal regime. That being so, the local authority is, they say, required to assess whether the Claimant has accommodation-related care needs *ignoring the Secretary of State's s.95 duty to provide accommodation on a "residual" basis*. In circumstances where, ignoring s.95, the Claimant has no other entitlement to accommodation, and his care needs are such that they can be met only if he is provided with accommodation, he has accommodation-related care needs that it is the Council's responsibility to meet. Accordingly, responsibility for providing suitable accommodation for the Claimant rests with the Council and not with the Secretary of State.

8. At the conclusion of the substantive hearing of this judicial review claim, I announced that I would give judgment for the Claimant, against the Council, on Ground 1, for reasons I would set out within my judgment on the claim as a whole, to be handed down at a later date. The reasons why I took that unusual course are explained at paragraphs 170 - 171 below.

9. The second main question raised by this claim is whether the Council has, by leaving the Claimant in his unsuitable current accommodation (a room in an asylum hostel provided by the Secretary of State under s.95 IAA 1999), breached the Claimant's Convention rights under the Human Rights Act 1998 ("HRA"). The specific Convention rights that the Claimant contends have been breached by the Council are those mirroring Article 3 and Article 8 of the European Convention of Human Rights ("ECHR").

The facts

10. The facts I now set out pertain to the Claimant's situation as at the time of the substantive hearing on 8 November 2023.

11. The Claimant is a 50-year-old asylum seeker whose asylum claim remains outstanding. He suffers from progressive multiple sclerosis ("MS") and functional neurological disorder. He also suffers from paraesthesia, which causes severe and varied pain, such that he sometimes shouts out in extreme pain, including during the night. His witness

evidence, which I accept, describes severe tingling, burning on his skin, muscle spasms, and a level of pain which is sometimes "*agonising*".

12. He has been accommodated by the Secretary of State in one ensuite bedroom in an asylum hostel facility in the Croydon area. That is a bedroom he shares with his wife and their two children (a 14-year-old girl and a 10-year-old boy). Its dimensions are approximately 5 meters x 3.5 metres.

13. The Claimant has been living in that hostel since 26 June 2022, when he was first accommodated there following his successful application to the Secretary of State for support under s.95 IAA 1999. Only a few weeks later, in mid-July 2022, he was admitted to hospital, where medics caring for him diagnosed his MS as having worsened and entered a progressive phase, meaning that his level of physical impairment had increased and would go on increasing without remission.

14. The bedroom in which the family live contains the Claimant's hospital bed, a single bed for his wife, and bunk beds for the children. The room also contains the Claimant's disability-related equipment, including his walking frame. The Claimant requires use of a 'Sara-Stedy' portable hoist but there is insufficient space in the room to store it. The Claimant is physically capable of mobilising for around 1 metre using his walking frame, but the lack of available space within the overcrowded room is such that there is no real scope for him to move around in it. He also has a standard wheelchair but there is no space for him to use it within the room. It is kept outside the room in a common area to which other residents have access. He has therefore been effectively bedbound.

15. The fact that the Claimant's MS is progressive means that his physical condition has worsened over the period for which he has been living in the hostel. He has recently had to start using a catheter for urinating. For much of the period during which he has been living in the hostel, however, he did not have a catheter and could have been assisted to go to the toilet to urinate, had he been in accommodation served by a bathroom he was able to access. But the ensuite bathroom attached to the bedroom in which the family live is too small to be accessed either by a wheelchair or by a walking frame, meaning that he cannot access it on his own. He had therefore been managing his bodily functions by way of urinating in a bottle, and defecating either on a pad in his bed, or in a commode in the bedroom shared with his wife and children, which his wife then removed/emptied. As his hands were shaking too much for him to hold the urine bottle, his wife had to hold the bottle in place whilst he urinated into it. This could take quite a long time, as one of the consequences of his MS was that he had difficulty in expelling a steady stream of urine.

16. The fact that he now has a catheter does not, of course, avoid the need for him to defecate – something he has no choice but to do on a pad or in a commode, given that he cannot access the bathroom. His catheter bag needs to be removed whilst he is in the family's shared bedroom, and then emptied and 'flushed out'. Nursing visits take place for changing his catheter; an uncomfortable intimate procedure that takes place whilst he is in his bed in the family bedroom.

17. The shower in the ensuite bathroom is a small step-in shower which he cannot use. It is therefore not possible for him to take a shower or bath in his accommodation.

18. A physiotherapist was once able to lift his walking frame up and put it into the bathroom (at an angle), enabling him to stand up in the bathroom using his walking frame. But she found that it was then impossible to close the bathroom door, meaning that the Claimant would still have no privacy from his children at times when they are in the shared bedroom.

19. The room is poorly ventilated. The windows can only open a few centimetres. During the summer months, the Claimant finds the room incredibly hot, which exacerbates his MS symptoms. The family do not have their own kitchen or facilities for washing clothes. Meals and laundry services are provided for hostel residents on a centralised basis.

20. The Claimant is totally reliant on his wife, who is his main carer, for all his basic daily activities. Caring for the Claimant is more than a full-time job for her. The Claimant has severe weakness in both hands and relies on care provided for him by his wife throughout the day and during the night. He cannot toilet, wash, dress, brush his teeth, access the meals provided within the hostel facility, or change his bed linen, without assistance. His wife brings him food and water (which he consumes in bed), empties and flushes his catheter bag around seven times a day, dresses him, helps him brush his teeth, and removes his faeces either by emptying the commode or by removing and replacing the incontinence pads in his bed.

21. A particular cause of distress to him is the extent to which, because of the limitations of the accommodation, his physical challenges impact on the experiences of the children. As the family all live in one room, he has no privacy from the children, meaning that they are exposed to seeing their father having his most intimate care needs being met either by their mother or by external carers. Prior to his being provided with a catheter, the Claimant tried not to drink liquids in the afternoons and evenings so as to minimise his need to urinate during the hours when the children were awake and in the room after school hours. The children's sleep is disturbed, and they are caused

anxiety, during the nights by hearing their father shout out in pain when he experiences severe muscle spasms.

22. As already noted, the Claimant has a wheelchair, which is kept in a common area, available for him to use. But it has rarely been possible for him to leave the building, since the building is, for practical purposes, not wheelchair accessible. The family's room is on the fourth floor of the building. There is a small lift into which his wheelchair can just about fit, which can be used to descend from the fourth floor. That lift is usually in working order, but it can only take him part of the way he needs to travel in order to exit from the building to street level. That is because, after using that lift, he then needs to use a fold-down platform lift to descend a seven-stair staircase within the building in order to move from the ground floor of the building to street level. That platform lift, as the Council has acknowledged, has been mostly out-of-order, and therefore not available for use, throughout the period over which the Claimant has been living in the hostel.

23. The Claimant therefore cannot leave the accommodation building, or return to his room after having done so, unless he can find four physically strong people (such as other residents of the hostel) who are able and willing to, together, carry him down or up those stairs in his wheelchair. On occasion, he has also had to be either carried, or 'bounced', up or down that staircase by ambulance service personnel, such as when they brought him home after a hospital stay. I have seen a photograph of those stairs. They are steep and narrow, with walls on both sides. I find it hard to imagine how four people could somehow carry the Claimant up or down those stairs in a wheelchair in such a confined space. The photograph leaves me in no doubt that carrying the Claimant up or down those stairs would be a difficult and treacherous operation carrying significant risks of injury both to the Claimant and to the people carrying him. I can well understand why the members of staff at the hostel are reluctant to assist with this. I do not know what, if any, plan the managers of the hostel have had in place for assisting the Claimant to exit the building in the event of a fire. As a result of these circumstances, even though his physical condition was not such as to make it impossible for him to go out into the community using a wheelchair, he has been unable to do so.

24. In summary, the Claimant has, for many months: (a) been confined to the accommodation building and, indeed, to his bed; (b) not been able to go to the bathroom for toileting and washing, having instead to carry out his bodily functions in the family bedroom shared with his children, relying on his wife to assist him in doing so; and (c) not been able to have a shower, except during times when he has been in hospital as an in-patient. Those extreme limitations to his quality of life have not been caused by his

physical health conditions *per se*. Rather, they have been caused by the manifestly unsuitable accommodation that has been the only accommodation available to him and his family; in particular, by its having only one bedroom, by the bathroom being too small for him to be able to access it with either his walking frame or his wheelchair, by the fact that he cannot use the shower, and by the fact that (given the non-working lift) the accommodation building is not wheelchair accessible.

25. In my judgment, there can be no doubt at all that the Claimant's accommodation is unsuitable for him, given his health conditions, physical challenges and associated care needs. What he needs, as a minimum, is a two-bedroom accommodation unit for himself, his wife and their children, with bathroom facilities (including a shower) that can be accessed by him using his walking frame or wheelchair. Such accommodation would enable his children to sleep separately from him, so that they are not woken and worried by his shouting out in pain during the night. It would also enable him to receive intimate personal care from his wife and external carers out of the sight of his children (who, as I have already noted, include a 14-year-old girl).

26. It would not, in my judgment, be reasonable or appropriate to expect the Claimant to live separately from his wife and their children, in circumstances where the Claimant is heavily reliant on his wife as his carer. The Claimant is resistant to receiving intimate care from strangers. That fact is a benefit to the Council, since his care needs requiring to be met by the Council would be very much greater were it not for the wife's unremunerated labours of love in providing round-the-clock care and supervision for the Claimant. In my judgment, the practical reality is that, if the Claimant were forced to move to accommodation separate from his family, he would be unable to care for himself and would have to be moved to a care home. I note that, even on the Council's case, it (rather than the Secretary of State) would be responsible for funding the provision of a residential care home placement if that was the form of accommodation required by the Claimant. The costs to the Council of funding such care would likely be far greater than the costs of providing the Claimant and his family with suitable accommodation.

27. Prior to receiving the Council's skeleton argument for the substantive hearing, it had reasonably been understood by the Claimant's legal representatives to be common ground amongst the parties that the Claimant's current accommodation was unsuitable for him, i.e. that his accommodation did not enable his care needs to be met. The Claimant's lawyers had therefore understood that the principal dispute to be resolved in these proceedings was a dispute between the Council and the Secretary of State as to which of them was responsible for remedying the practical situation by providing the Claimant with suitable accommodation, this being something that he currently lacked.

But the skeleton argument filed on behalf of the Council, dated 6 November 2023, surprisingly asserted, at paragraph 39, that the Claimant's "*needs can be met in his current accommodation*". That asserted factual position was said to be supported by paragraph 57 of the witness statement of Viviane Nicoue, the Team Manager of the Council's Immigration Asylum Support Service 'No Recourse to Public Funds' ("NRPF") Team, dated 27 October 2023.

28. In my judgment, that is not, in fact, what Ms Nicoue's witness statement is saying. Her witness statement – which (inappropriately, in my judgment) is a document consisting largely of argumentation and submissions, rather than factual evidence – sets out the Council's case that the Claimant has no accommodation-related care needs *because the provision of suitable accommodation for him is the responsibility of the Secretary of State*. She is not saying that the Claimant's care needs can be properly met in his current accommodation.

29. Moreover, if Ms Nicoue were making such a statement of asserted fact in her witness statement, this would give rise to judicial concern as the propriety of her having signed that statement (which is verified by a statement of truth). Either she would have asserted a fact she did not genuinely believe to be true, or her belief would have been irrational. There is no evidence on which she could rationally have founded such a belief. The Council's own social workers who have assessed the Claimant's care needs, and the occupational therapists who have seen the Claimant, have all been unanimously of the view that his accommodation is unsuitable. No one from the Council who has inspected the Claimant's living conditions and assessed his care needs has been in any doubt that his current accommodation is unsuitable and does not enable his care needs to be met. The only reason why the Council did not, in response to the findings of its relevant officers, take urgent steps for providing suitable accommodation to the Claimant was the Council's legal position that responsibility to do this lay with the Secretary of State under s.95 IAA 1999. To be sure I had not missed something, I asked the Council's Counsel to seek, during the lunch adjournment, to find any documents in the bundle or elsewhere which supported the Council's assertion that the Claimant's current accommodation is suitable for him. The position after lunch was that he was unable to show me any such document.

30. The Home Office, for its part, has sought to offer the Claimant what might fairly be described as *less unsuitable* accommodation, notwithstanding that the stock of asylum accommodation to which it has access has limited capacity for providing for asylum seekers who, like the Claimant, are severely disabled and have substantial care needs. The Home Office at one time offered him alternative accommodation in Clacton-on-Sea with his family, but that offer was then withdrawn, for reasons unknown to him.

The Claimant was subsequently offered Home Office accommodation in the East Dulwich area of London. That accommodation would have been in the form of a one-bedroom unit with an ensuite disabled access bathroom, but it was to have been provided on the basis that it would be occupied by him alone, i.e. without his family. He declined that offer as it would have separated him from his wife and their children. As already noted, his wife is his main carer and he is dependent on her for meeting all his basic daily needs.

31. The Claimant's lack of suitable accommodation is a situation that has persisted for some considerable time, albeit his physical condition has deteriorated over time. By mid-October 2022, when the Claimant was discharged from hospital after having been an in-patient there, the medics treating him were already expressing concerns about the unsuitability of the Claimant's accommodation. I note that this was more than a year before the date of this substantive hearing.

32. The Council have known of the Claimant's lack of suitable accommodation for almost the whole of that time. In November 2022, the Claimant was referred to the Council for an assessment of his needs under the Care Act. On 12 December 2022, a Care Act needs assessment was completed by the Council's NRPF team. This followed a visit made, by someone from the Council, to the Claimant in his room on 21 November 2022. The assessment concluded that the Claimant was eligible for Care Act support; indeed, it found that he was unable to meet <u>any</u> of the outcomes in the Care and Support (Eligibility Criteria) Regulations 2015 (regulation 2(2)(a) - (j)). In my judgment, it is clear from that assessment that the Council knew and recognised that the Claimant's accommodation was wholly unsuitable for him. The assessment included the following observations regarding the Claimant:

> "[He] will need suitable accommodation because according to the Occupational therapist who completed a home visit, the property is not suitable for a person who needs a wheelchair and is bed bound.
>
> Although there is space to move Sara Stedy in the room, other belongings or furniture would need to be moved first. Secondly there is no free space to place the Sara Stedy when not being used.
>
> Having suitable accommodation will ensure his family needs are met with wife and two children. Having suitable accommodation which is wheels chair [sic] friendly will support [him] with his independence as he will be able to go out in the community when need arises.

[He] stated that he feels depressed, stressed and anxious and has since been prescribed duloxetine …. If not supported with finding suitable accommodation, this will have negative impact to his emotional and physical wellbeing."

"[He] stated that he is unable to stand up without assistant of two people due to progressive MS, he currently has use of a wheelchair and zimmer frame but will need two people with him for support. Also, the current accommodation is not meeting these needs. Therefore, there is an urgency for this family to be moved to a better suitable accommodation that can meet the needs of this gentleman."

"[He] is a full-time wheelchair user. He cannot transfer to and from the bed/ without the support of two people, also to the toilet or shower. He does not have access to the shower in his room due to mobility issues. … [He] reported not having a shower since he was discharged due to unsuitable accommodation and progressive MS …."

"[He] stated he needs support with his toileting needs as he cannot go to the toilet without support. Also, the current accommodation is not suitable for him, he has no equipment to support him, so he is bed bound …."

"The accommodation is not suitable for [him]. There is a ramp entrance outside, so it is wheelchair friendly, and there is a lift in the building. However, there are seven steps to gain access to it. There is a wheelchair lift; this has been out of service for years, as reported by [him] and the hospital OT who completed a home visit. The building is unsuitable for someone reliant on a wheelchair."

"… [H]is wheelchair is too large to fit in the hostel lift. He had shared that four people were required to carry him to the top floor, where the family room was allocated in the hostel. There are concerns regarding health and safety should a fire occur …. Client will find it impossible to evacuate himself, so this is a concern that needs to be addressed urgently."

"Current accommodation posing a physical barrier to achieve some of the identified outcomes therefore a suitable accommodation is inevitable to promote [his] wellbeing under the Care Act's principle …."

33. As to what needed to change for the Claimant in order for his care needs to be met, the needs assessment referred to "*Suitable accommodation[,] wheelchair friendly[,] preferably one with disability access, work tops easily accessible by a wheelchair user to promote general health and wellbeing and independence*".

34. The needs assessment did not, however, identify the provision of suitable accommodation as being a responsibility of the Council under the Care Act. Instead, the assessment stated:

"[He] will need suitable accommodation as suitable accommodation as current is not meeting his needs. Who will do it? Home Office."

35. Following that needs assessment, the Claimant was provided with one hour of personal care daily. (There are inconsistencies in the documents I have seen as to whether such care was provided 7 days a week or only on weekdays, but that does not matter for present purposes.) This was subsequently increased to 2 hours, from February 2023. But the Council did not take any action towards itself providing the Claimant with suitable accommodation.

36. On 17 July 2023, the Claimant's solicitors wrote to the Council setting out concerns regarding the needs assessment and the accommodation, requesting *inter alia* a re-assessment under s.9 of the Care Act and that the Claimant be suitably accommodated under s.19(3) pending that re-assessment.

37. On 19 July 2023, the Council responded stating that the family were known to the NRPF team and that the Claimant was receiving a care package including daily care visits. It acknowledged that his wife was his main carer. The letter further stated, however, that an asylum seeker is entitled to be provided with accommodation by a local authority only "*if their assessment shows that the person needs the sort of residential care that [local authority] adult services are required to provide*". The Council therefore considered that it would be obliged to provide accommodation for the Claimant only if "*it was a residential or care home where his family would not be included*". In support of its position, the Council made reference to the Home Office guidance document, "*Asylum Seekers with Care Needs*".

38. On 26 July 2023, the Council emailed to the Claimant's solicitors a copy of a review of the care plan for the Claimant which had been carried out in May 2023. Within that email, the Council acknowledged that neither the original December 2022 assessment, nor the May 2023 review, had been provided to the Claimant. The May 2023 review largely echoed the content of the December 2022 assessment, again noting that the Claimant continued to have a need for suitable accommodation. But the Council still did not offer to provide the Claimant with such accommodation.

39. On 31 July 2023, the Claimant's solicitors sent the Council a judicial review pre-action protocol letter ("PAP letter"), challenging the lawfulness of the assessment under s.9 of the Care Act, and alleging failure to meet the Claimant's needs for care and accommodation under s.18 or s.19(3) of the Care Act and/or in breach of his rights under Articles 3, 8 and 14 ECHR.

40. On 14 August 2023, the Council responded to the PAP letter and enclosed a carer's assessment dated 8 August 2023 and a needs assessment dated 10 August 2023. Both of those assessments recognised that the Claimant's accommodation was unsuitable and inaccessible, but repeated the Council's position that the provision of suitable accommodation was the responsibility of the Home Office. In that, and in subsequent, pre-action correspondence, the Council asserted that the Claimant did not require "*specialist accommodation*" and that it followed that the duty to provide him with suitable accommodation remained with the Home Office under s.95 of the IAA 1999.

41. The judicial review claim was issued on 31 August 2023, together with an application for interim relief. The Council filed its Summary Grounds of Defence on 2 October 2023. On 12 October 2023, Bright J heard the application for interim relief. He granted permission to apply for judicial review, joined the Secretary of State to the proceedings as Second Defendant, refused to grant interim relief in advance of the substantive hearing, and directed an expedited substantive hearing.

Ground 1

42. As explained above in the 'Introduction' section, Ground 1 raises the question as to who is responsible for providing the Claimant with suitable accommodation in circumstances where he has care needs that can only be met if he has suitable accommodation. It is common ground that he is entitled to be provided with suitable accommodation. What is not agreed is whether the responsibility for providing it lies with the local authority under the Care Act, or with the Secretary of State under s.95 of the IAA 1999. By Ground 1, the Claimant contends that the Council, in refusing to accept that he has accommodation-related needs engaging the Council's duty under the Care Act, has misdirected itself in law and is breaching its duties under the Care Act to provide care and support for him.

Relevant legislation: local authorities' duties under the Care Act

43. The Care Act is the statutory scheme for the provision of social care to adults in England. It "*provides for a sequential approach to the provision of social care and support to individuals in need*" (*R (BG) v Suffolk County Council* [2022] EWCA Civ 1047 at [65]). A succinct guide to the structure of the Care Act, the sequential approach local authorities should take for identifying and then meeting needs for care and support under it, and the circumstances in which it may require that a person be provided with accommodation, was provided by Michael Fordham QC (as he then was), sitting as a Deputy High Court Judge, in *R (Aburas) v Southwark LBC* [2019] EWHC 2754 (Admin) at [5]-[9]. Entitlements to care and support under the Care Act are, in principle,

applicable to adults generally, regardless of their immigration status. It does not exclude adults whose immigration status is such that they are in the category of persons who have 'no recourse to public funds' and are accordingly excluded from rights to most forms of social welfare assistance, such as homelessness assistance under Part 7 of the Housing Act 1996 and welfare benefits such as Universal Credit and Child Benefit.

44. S.1 imposes on local authorities a general duty "*in exercising a function*" in relation to a person under the first part of the Care Act, to promote a person's wellbeing. This is known as the 'wellbeing principle'.

45. S.1(2) defines a person's wellbeing in terms of: its relation to any of personal dignity (including treatment of the individual with respect), physical and mental health and emotional wellbeing, protection from abuse and neglect, control by the individual over day-to-day life (including over care and support, or support provided to the individual and the way in which it is provided), participation in work, education, training or recreation, social and economic wellbeing, domestic, family and personal relationships, suitability of living accommodation, and the individual's contribution to society.

46. S.9 imposes a duty on a local authority to undertake a "needs assessment" where it appears to a local authority that an adult may have needs for care and support. In that circumstance, the authority must assess whether the adult has such needs and, if so, what they are.

47. Pursuant to s.13(1), if the authority is satisfied, based on a needs assessment, that an adult has such needs, it must determine whether any of those needs meet the eligibility criteria identified in the Care and Support (Eligibility Criteria) Regulations 2015 (the "2015 Regulations").

48. Regulation 2 of the 2015 Regulations provides that needs will be 'eligible' if they arise from, or are related to, physical or mental impairment or illness, cause the person to be unable to achieve two or more specified outcomes and, as a result, will have a significant impact on wellbeing. The specified outcomes are listed in Regulation 2(2) and include: (i) managing and maintaining nutrition, (ii) maintaining personal hygiene, (iii) maintaining a habitable home environment, (iv) accessing and engaging in work, training, education or volunteering, and (v) making use of necessary facilities or services in the local community, including public transport and recreational facilities or services (and others).

49. S.18(1) of the Care Act provides that, where a local authority determines that an adult's needs for care and support meet the eligibility criteria, it is under a duty to meet those

needs if the adult is ordinarily resident in the authority's area or is present in the area but of no settled residence.

50. S.19 creates a power to provide care and support. S.19(1) provides that a local authority, having carried out a needs assessment, *may* meet an adult's needs for care and support when it is not required to meet those needs under s.18, and the adult is ordinarily resident in the authority's area or present in its area but of no settled residence. In particular, under s.19(3) a local authority may meet an adult's needs for care and support which appear to it to be urgent (regardless of whether the adult is ordinarily resident in its area) without the authority having conducted a needs or financial assessment or having made a determination under s.13(1).

51. S.8 provides a non-exhaustive list of what may be provided to meet needs for care and support. This includes accommodation "*in a care home or in premises of some other type*" (s. 8(1)(a)). Examples of how the local authority may meet a person's needs are provided in s.8(2) and include providing a service, arranging for a person to provide a service, and making direct payments.

52. Local authorities are afforded a broad discretion in deciding how to meet needs under ss. 18 to 20 of the Care Act. But it is clear from s.8(1)(a) that *any type* of accommodation may be provided for meeting a person's care and support needs. The types of accommodation that a local authority may have a duty or a power to provide are not restricted to the provision of residential or specialist accommodation. As stated in *R (SB & Anor) v London Borough of Newham* [2023] EWHC 2107 (Admin) ("***SB***"), *per* Mr Dan Kolinsky KC sitting as a Deputy High Court Judge, at [116]:

> "It is … clear from the established caselaw that the accommodation need does not have to be met in specialist institutions or be of a specialised nature. The guidance given by Lord Carnwath in paragraph 48 of [*R (L) v Westminster City Council* [2013] UKSC 27] makes this explicit: "*it has at least to be the care and attention normally provided in the home (whether ordinary or specialised) or will be effectively useless if the claimant had no home*".

53. The circumstances in which the care and support to be provided by a local authority pursuant to s.18 of the Care Act may include accommodation have been considered by the High Court on several previous occasions. The settled position is that, whilst a need for accommodation by itself does not constitute a need for care and support, accommodation may nevertheless need to be provided where the care and support the adult requires is "accommodation-related", i.e. of a sort which is normally provided in the home or would be effectively useless if the claimant had no home. This makes sense, since: (a) the Care Act is concerned with meeting care needs of adults who have such

needs, and not with meeting all housing and other needs of adults who have care needs; but (b) some people with care needs cannot be provided with, or cannot benefit from, the personal care or other care and support provisions the local authority is obliged to provide to them if they do not have suitable accommodation.

54. A helpful summary of the relevant caselaw is set out in the *SB* judgment, at [52]-[53]:

> "[52] … The key decisions under the [Care Act] are as follows:
>
> a. In *R (SG) v Haringey London Borough Council* [2015] EWHC Civ 2579 (Admin), at para 66, John Bowers QC, sitting as Deputy High Court Judge summarised the applicable approach as follows:-
>
> i. The services provided by the council must be accommodation-related for accommodation to potentially be a duty.
>
> ii. In most cases the matter is best left to the good judgment and common sense of the authority.
>
> iii. Accommodation-related care and attention means care and attention of a sort which is normally provided in the home or will be effectively useless if the claimant has no home.
>
> b. The correctness of the approach in SG was endorsed in *R (GS) v Camden LBC* [2016] EWHC 1762 (Admin) paras 25-29 by Peter Marquand sitting as a Deputy High Court Judge who concluded that a need for care and assistance did not include a need for accommodation alone ….
>
> c. In *R (Aburas) v Southwark LBC* [2019] EWHC 2754 (Admin) Michael Fordham QC (as he then was) sitting as a Deputy High Court Judge explained at para 6:-
>
> i. the need for accommodation is not itself a 'looked after need' but the provision of accommodation may be called for under CA 2014 so as to secure effective care and support for a looked after need.
>
> ii. It was agreed between Counsel in that case that accommodation becomes appropriately provided pursuant to CA 2014 "when the person has a 'looked after need' of care and support whose effective delivery requires accommodation".
>
> iii. The importance for a "disciplined focus on looked after needs" to avoid undermining the integrity of the statutory framework in the CA 2014 by allowing it to become a backdoor route to claims based on accommodation needs circumventing the Housing Act scheme and jumping the homelessness queue.
>
> [53] These decisions followed the approach previously adopted at the highest level in respect of the provision of residential accommodation by social services under s.21 [of the NAA 1948], the predecessor to the [Care Act]. In *R (L) v*

Westminster City Council [2013] UKSC 27, [2013] 1 WLR 1445, the Supreme Court rejected the proposition that the duty to accommodate arose where the care and attention required was monitoring of an adult with mental health difficulties. It could be carried out anywhere and was, the Supreme Court found, in no way related to the provision of accommodation. In paragraph 48 of the judgment of the Supreme Court, Lord Carnwath JSC (with whom the other Supreme Court Justices agreed) commented on the approach under s. 21 NAA 1948 as follows:

> "The need has to be for care and attention which is not available otherwise through the provision of such accommodation. As any such guidance given on this point in this judgment is strictly obiter, it would be unwise to elaborate, but the care and attention obviously has to be accommodation-related. This means that it has at least to be care and attention of a sort which is normally provided in the home (whether ordinary or specialised) or will be effectively useless if the claimant has no home" (emphasis added)."

55. S.23 of the Care Act contains specific provision (headed "*Exception for the provision of housing etc.*") prohibiting local authorities from meeting needs under sections 18 to 20 "*by doing anything which it or another local authority is required to do under— (a) the Housing Act 1996, or (b) any other enactment specified in regulations.*" Notably, neither that section, nor any other section of the Care Act, makes equivalent provision in respect of things that *the Secretary of State* is required to do, whether under s.95 of the IAA 1999 or any other legislation. The principal practical function of s.23 of the Care Act is to make clear that, where a local authority has a duty to provide suitable housing to an adult under the Housing Act 1996 (for example, where the adult is homeless and is assessed as being in 'priority need'), it must carry out that duty, notwithstanding that the adult also has care needs under the Care Act. But s.23 does not in any way limit the circumstances in which the Care Act requires a local authority to meet accommodation-related care needs of adults, such as asylum seekers and other persons subject to immigration control, who have no entitlements under other legislation to be provided with accommodation by a local authority.

56. Insofar as there is a restriction on local authorities meeting the care needs (including any accommodation-related care needs) of an adult who is subject to immigration control, such restriction arises by operation of s.21(1) of the Care Act, which provides:

> "A local authority may not meet the needs for care and support of an adult to whom section 115 of the Immigration and Asylum Act 1999 … (exclusion from benefits) applies and whose needs for care and support have arisen solely—
>
> (a) because the adult is destitute, or
>
> (b) because of the physical effects, or anticipated physical effects, of being destitute."

(Emphasis supplied.)

57. That provision is largely a replication of a provision in the predecessor legislation to the Care Act, namely s.21(1A) of the National Assistance Act 1948 ("NAA 1948"). That subsection of the NAA 1948 was inserted by the IAA 1999 and provided that:

> "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 effects, of his being destitute."

58. S.78 of the Care Act provides that local authorities must act under the general guidance of the Secretary of State in exercising their functions under Part 1 of the Care Act. The relevant statutory guidance is the *Care and Support statutory guidance* published by the Department of Health and Social Care (last updated on 5 October 2023).

Relevant legislation: the Secretary of State's duties under the IAA 1999

59. Under s. 95(1) IAA 1999, the Secretary of State has the power to provide, or arrange for the provision of, support for asylum seekers and their dependents, who appear to him to be destitute or likely to become destitute within such period as may be prescribed.

60. This power is converted into a duty by regulation 5(1) of the Asylum Seekers (Reception Conditions) Regulations 2005, S.I. 2005/7. The support provided may consist of accommodation, financial support to meet essential living needs, or both: s.96(1) of the IAA 1999.

61. "Destitute" means that the person "*does not have adequate accommodation or any means of obtaining it (whether or not his other essential living needs are met) or has adequate accommodation or the means of obtaining it but cannot meet his other essential living needs*" (s.95(3) IAA 1999). Where the applicant has dependants, references to the applicant include references to the dependants also: s.95(4) IAA 1999.

62. The assessment of destitution is governed by reg.6 of the Asylum Support Regulations 2000, SI 2000/704, which provides, as relevant:

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

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

(b) a supported person, or such a person and any dependants of his, is or are destitute or likely to become so within the period prescribed by regulation 7…….

…

(3) The Secretary of State must ignore–

(a) any asylum support, and

(b) any support under section 98 of the Act, which the principal or any dependant of his is provided with or, where the question is whether destitution is likely within a particular period, might be provided with in that period.

(4) But he must take into account– … (b) any other support which is available to the principal or any dependant of his, or might reasonably be expected to be so available in that period."

The parties' submissions

63. The Claimant's case is essentially a simple one. It is that: (a) as is common ground, the Claimant's needs for care and support are such that they can be met only if he has suitable accommodation; (b) the Secretary of State's power to provide accommodation and other support under s.95 of the IAA 1999 is intended to be 'residual', i.e. it arises only in the cases of people who would otherwise be "*destitute*" due to their having no other entitlements to housing, welfare benefits, etc.; and accordingly, (c) any accommodation available to the Claimant under s.95 must be ignored when assessing whether he has accommodation-related care needs that the Council has a duty to meet.

64. That is a case that could equally be made even if the Claimant were already living in entirely suitable accommodation provided by the Secretary of State under s.95. The Claimant's case on Ground 1 does not, therefore, depend on establishing that his current accommodation is unsuitable. The Claimant also contends in the alternative, however, that he has an accommodation-related care need (i.e. a need, which is currently unmet, for suitable accommodation in order to be able to receive and benefit from the care he requires) in circumstances where his current s.95 accommodation is, in fact, unsuitable for him.

65. The Claimant contends that his case is plainly right as it has effectively already been ruled upon and upheld in multiple judgments of the higher courts, including the House of Lords. In that regard, his Counsel (Ms Mellon assisted by Ms O'Mara) relied particularly on *R (Westminster City Council) v National Asylum Support Service* [2002] UKHL 38, [2002] 1 WLR 2956 ("*NASS*") in which the House of Lords considered the interplay between, on the one hand, s.95(1) of the IAA 1999, and on the other hand,

s.21(1A) of the NAA 1948. The wording of s.21(1A) was similar to the wording now set out in s.21(1) of the Care Act in that it barred the provision, under the NAA 1948, of accommodation to a person whose "*need for care and attention has arisen solely … because he is destitute*" (emphasis added).

66. In *NASS*, Lord Hoffmann, in his opinion (with which at least two of the other four members of the committee agreed, and in which there was unanimity as to the result), stated:

> "[32] The use of the word "solely" [in s.21(1A) NAA 1948] makes it clear that only the able bodied destitute are excluded from the powers and duties of section 21(1)(a) [of that Act]. 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."
>
> "[38] The ground upon which [the courts below had] found for the Secretary of State was that although section 95(1) *prima facie* confers a power to accommodate all destitute asylum seekers, other provisions of Part VI of the [IAA 1999] and regulations made under it make it clear that the power is residual and cannot be exercised if the asylum seeker is entitled to accommodation under some other provision. In such a case, he or she is deemed not to be destitute. If [the claimant] had been able bodied destitute, she would have been excluded from section 21 and therefore qualified for accommodation under section 95(1). But as she was infirm destitute, her first port of call should be the local authority.
>
> [39] The provisions relied upon by the Secretary of State are, first, section 95(12), which enacts Schedule 8, giving the Secretary of State power to "*make regulations supplementing this section*". Paragraph 1 of the Schedule says in general terms that the Secretary of State may make "*such further provision with respect to the powers conferred on him by section 95 as he considers appropriate*". More particularly, paragraph 2(1)(b) says that the regulations may provide that in connection with determining whether a person is destitute, the Secretary of State should take into account "*support which is, … or might reasonably be expected to be, available to him or any dependant of his*".
>
> [40] The next step is to look at the regulations made under these powers, the Asylum Support Regulations 2000. Regulation 6(4) says that when it falls to the Secretary of State to determine for the purposes of section 95(1) whether a person applying for asylum support is destitute, he must take into account "*any other support*" which is available to him. As an infirm destitute asylum seeker, support was available to [the claimant] under section 21. Therefore she could not be deemed destitute for the purposes of section 95(1).
>
> [41] My Lords, like [the courts below], I find this argument compelling. The clear purpose of the [IAA 1999] was to take away an area of responsibility from the local authorities and give it to the Secretary of State. It did not intend to create

> overlapping responsibilities. [The local authority defendant] complains that Parliament should have taken away the whole of the additional burden which fell upon local authorities as a result of the [Housing Act 1996]. It should not have confined itself to the able bodied destitute. But it seems to me inescapable that this is what the new section 21(1A) of the [NAA 1948] has done. As Simon Brown LJ said in the Court of Appeal …, what was the point of section 21(1A) if not to draw the line between the responsibilities of local authorities and those of the Secretary of State?"

67. There is, in my judgment, some justification for the complaints of the Claimant's Counsel that the Council's case has, for much of the course of these proceedings, been expressed in a way that was unclear and puzzling. The Council's Summary Grounds of Defence ran to 71 paragraphs but, in my judgment, it contained no clear explanation as to why, on the Council's case, the legal question at the heart of Ground 1 had not effectively already been determined as a matter of binding House of Lords authority by way of *NASS*.

68. Despite this, the Council indicated at the interim relief application before Bright J that it would not be filing Detailed Grounds and would instead continue to rely on its Summary Grounds. That was an election the Council was entitled to make (CPR Practice Direction 54A, paragraph 9.1(1)). Bright J therefore sought to remedy the lack of clarity by setting a timetable for the Claimant to put questions to the Council about its case, and for the Council then to serve answers to those questions.

69. Within its answers served on 24 October 2023, the Council stated as follows:

> "[15] It is accepted that, under the predecessor legislation to the Care Act 2014, the House of Lords determined in *NASS* that all destitute asylum-seekers with care needs are the responsibility of the local social services authority in whose area they are resident.
>
> [16] If and insofar as the Claimant seeks to rely on *NASS* in these proceedings, the [Council] will argue (accepting that this court is bound by the decision) that the decision is no longer good law. As that is not the Claimant's case – insofar as the Claimant's case is understood – then it cannot be further elaborated upon."

Notably, the Council chose not to explain its basis for asserting that *NASS* was "*no longer good law*".

70. At the substantive hearing before me, the Council's case (as argued by its Counsel, Mr Johnson) was essentially that it had been open to the Council, in the facts of this case, to conclude that the Claimant's care needs did not include accommodation-related needs. That was because, although the Claimant's identified care and support needs were such that he needed to be in accommodation in order to receive that care, he

already had such accommodation and, therefore, had no need of being *provided with* accommodation by the Council in order to receive care. He was already being accommodated by the Secretary of State under s.95 of the IAA 1999, and that accommodation was suitable for him, since the care and support he required could be provided to him whilst he was living there. Moreover, even if that accommodation was not in fact suitable, he still did not have an accommodation-related care need, as the Home Office had been actively seeking to find more suitable accommodation in which to place him. Any doubt on that point was dispelled by the fact that the Claimant had chosen to turn down an offer of alternative Home Office accommodation. That accommodation would have provided him with an ensuite bathroom he could access in his wheelchair and in which his care needs could undoubtedly have been met, albeit it did not suit his preference to live with his wife and children. Accordingly, his needs could be met in ordinary accommodation of the kind that the Secretary of State is able to provide for asylum seekers under s.95 and it followed that he had no need of being provided with accommodation by the Council.

71. In the Council's submissions, that argument was not precluded by the House of Lords' interpretation of s.21(1A) of the NAA 1948 in *NASS*. In the present case, the issue was not whether the Council had a duty to meet the Claimant's needs for care and support. The Council had accepted he had such needs and that it was the Council's responsibility to meet them, and it had in fact been meeting them. But in circumstances where the Claimant had been assessed by the Council as not having accommodation-related needs, the question as to who was responsible for meeting those (non-existent) needs simply did not arise. The Council also contended, however, effectively as an alternative case, that I should distinguish *NASS* on the basis that the legislation the House of Lords was interpreting was materially different from the Care Act's provisions.

72. In support of its arguments, the Council also relied on text contained within a Home Office document entitled "*Asylum Seekers with Care Needs*" (version 2, dated 3 August 2018) (the "ASCN Guidance") stating (on p.8):

> "Local authorities (LA) are generally only expected to provide accommodation to asylum seekers if their assessment shows that the person needs the sort of residential care that LA adult services are required to provide. An asylum seeker who has care needs which can be appropriately addressed in asylum support accommodation, and is otherwise eligible, should be accommodated by the Home Office following a care assessment.
>
> **To note:** If a local authority assesses that a supported person's needs cannot be met without residential care they must arrange accommodation and care to meet the assessed needs. This is so that even when the person is residing in Home Office accommodation at the time of the assessment."

73. The Secretary of State's case aligned with the Claimant's case. The Secretary of State's provision of accommodation and other support under s.95 of the IAA 1999 was 'residual', being available to prevent a person being left destitute in circumstances where they had no other entitlements to accommodation or support. Any availability of such accommodation to the Claimant was, therefore, not a proper basis on which the Council could conclude that he did not have any accommodation-related need.

74. The Secretary of State's Counsel appearing at the hearing (Mr Payne KC) argued that it was irrelevant that the Council's position might appear consistent with certain statements in the ASCN Guidance. That document was guidance provided by the Home Office *for its own staff* and was not addressed to local authorities. The interplay between the Care Act and s.95 of the IAA 1999 was a matter on which the correct legal position was clear as a result of various authorities, including – but not only – *NASS*.

Analysis

75. As already explained, this is a case in which it is common ground that the Claimant has needs for care and support under the Care Act, and that the Council is responsible for meeting those needs. It is also common ground that the kinds of care and support he needs are such as require him to have accommodation, and that such accommodation must be suitable having regard to his needs. What is in dispute is whether the Council is right that the Claimant's care needs nevertheless do not include an accommodation-related care need (i.e. a need requiring the provision of accommodation for him), given that: (a) he in fact has accommodation provided for him by the Secretary of State under s.95 of the IAA 1999; and (b) based on the content of the ASCN Guidance, it appears that the Secretary of State's policy would lead him to provide suitable accommodation for the Claimant, at least in circumstances where the Council does not do so.

76. I am in no doubt that the position contended for by the Claimant and by the Secretary of State is right and that the Council does have a duty to provide the Claimant with suitable accommodation. In my judgment, it was not lawfully open to the Council to take account of any accommodation being provided to the Claimant, or which might at some future time be offered to him, by the Secretary of State pursuant to s.95. In other words, the Council should, when assessing whether the Claimant's needs for care and support included accommodation-related need, have ignored any current or potential provision of accommodation for him under s.95.

77. That is a conclusion I would have reached even if there were no relevant case-law to assist me, since I would have considered myself led to it by reading the relevant legislation. In that regard:

(1) It is plain from the wording of s.95 of the IAA 1999 that the provision of accommodation or other support under s.95(1) is intended to be a 'residual' safety net, i.e. the safety net of *last resort*. It is effectively the lowest-positioned of all the various social welfare safety nets the state provides. It is intended to catch only those people who have been unable to benefit from any other safety net, doing so just before they reach the 'destitution' bottom of the pit of homelessness and penury. The Claimant and the Secretary of State are therefore right to describe entitlement to accommodation and support under s.95 as being "*residual*".

(2) The residual nature of the support available under s.95 is apparent from the definition of 'destitution' in s.95(3). A person will only come within the concept of being "*destitute*", by reason of lack of accommodation, if he "*does not have adequate accommodation or any means of obtaining it*". It follows that a person who has a right to accommodation that is at least "*adequate*" under other legislation, such as the Care Act, has no right to be accommodated under s.95, and that is so even if that right is not already being met in relation to him.

(3) The purpose of the IAA 1999 was essentially to restrict – and, largely, to exclude – asylum seekers and other persons subject to immigration control from being able to access the social welfare benefits and housing assistance schemes available for the general population. It is in that context that the Secretary of State needed to be able to provide a very basic subsistence level of support (including accommodation, as well as food and money) so that such persons would not be destitute. Against this background, it is unlikely that Parliament could have intended s.95 accommodation to be the means of effectively satisfying, and thus removing, a person's need for accommodation required for him to be able to receive and benefit from care, provided only that he does not require accommodation in a residential care home or other specialist care setting. To put the point another way: since s.95 was needed for safeguarding people who would otherwise be destitute because of their ineligibility for other forms of state welfare provision, it would make little sense for s.95 to be the basis for accommodating a person whose care needs are such that, if he was without suitable accommodation, a local authority would be responsible for meeting his need for such accommodation.

(4) The 'last resort' nature of s.95 accommodation support is also reinforced by its subsections (5) and (6), which bar the Secretary of State from having regard to certain matters when deciding whether a person has "*adequate accommodation*" (a term which I note conveys a less generous sense than any concept of 'suitable accommodation' and is likely to have been deliberately chosen for precisely that reason). The matters to which the Secretary of State is barred from having regard

are: "*(a) the fact that the person concerned has no enforceable right to occupy the accommodation; (b) the fact that he shares the accommodation, or any part of the accommodation, with one or more other persons; (c) the fact that the accommodation is temporary; [and] (d) the location of the accommodation.*" Those are all matters that one would expect a local authority to consider when assessing, under the Care Act, whether a person with care needs has an (unmet) accommodation-related need, and when providing accommodation so as to meet that need.

(5) Further reinforcement of the residual nature of s.95 is provided by the terms of secondary legislation made thereunder, *viz*. the Asylum Support Regulations 2000. The Regulations provide, in reg.6(4), that the Secretary of State "*must take into account … any other support which is available to the [person or his dependants], or might reasonably be expected to be so available in that period*". That regulation puts it beyond doubt that, where a person would, if they lacked suitable accommodation, have a right to have their need for such accommodation met by a local authority, that person is not "*destitute*" within the meaning of the accommodation-related limb of the definition of that term in s.95(3). The Secretary of State has no power under s.95(1) to provide accommodation to a person who would not be destitute absent such provision.

(6) No provisions similar to the above-discussed provisions of s.95 IAA 1999 and the Asylum Support Regulations 2000 appear in the Care Act. That is not surprising, given that the Care Act (unlike s.95 IAA 1999) is *not* intended as a safeguard of last resort. Rather, it is a regime under which individuals' needs are to be assessed in a broad and holistic way, and then met, in order to promote their wellbeing whilst respecting their personal autonomy to make choices and express preferences.

(7) In light of this understanding of the s.95 IAA 1999 on the one hand, and the Care Act on the other, it follows, as a matter of inexorable logic, that a local authority cannot determine that a person has no accommodation-related care need, on the basis that he does not need to be provided with accommodation as he is being – or will, or may at some future point in time, be – provided with accommodation by the Secretary of State under s.95. Mr Payne KC, for the Secretary of State, so argued with powerful simplicity: "*You can't rely on something which is a last resort for deciding whether you are obliged to provide something which is not a last resort.*"

78. In my judgment, even if and insofar as the Secretary of State's *de facto* policy or practice is to seek to provide suitable accommodation for asylum seekers with care needs who have not been housed by a local authority, it is not open to the Council to

decide, in reliance on that policy or practice, that the Claimant does not have accommodation-related needs. Given my above analysis of the legislative provisions, a local authority cannot properly rely on the Secretary of State providing accommodation for a person pursuant to the s.95 'residual safety net' as its basis for finding that that person does not have accommodation-related needs under the Care Act. As this case illustrates (involving, as it does, a severely disabled person whose very real need for suitable accommodation has remained unmet for many months), it is essential that there be clarity as to which public authority is legally responsible for providing suitable accommodation for such a person. Parliament cannot have intended to set up a perverse game of endurance between public authorities whereby they compete with one another as to how long they can bear it to leave a person such as the Claimant stuck in unsuitable accommodation, with responsibility falling on whichever authority 'breaks' first. The Council's argument would, if correct, give rise to a highly unattractive situation similar to that described by Knowles J in *R (DMA and Ors) v Secretary of State for the Home Department* [2020] EWHC 3416 (Admin) at [200] in a context in which legal responsibility properly lay with the Secretary of State:

> "… If the Secretary of State through her officials anticipates that [other persons] will provide accommodation whilst [those other persons] look to the Secretary of State through her officials to do so, matters can quickly deteriorate to "who blinks first". The victim of that situation is an individual who already faces an imminent prospect of serious suffering … and who is prevented from addressing these needs in any other way."

79. I would, as noted above, have reached these conclusions based on the legislation alone, even if there were no relevant case-law. But there *is* relevant case-law. In my judgment, the principles to be derived from that case-law provide strong support for those same conclusions.

80. In particular, the reasoning in *NASS* supports a conclusion that the Claimant's accommodation requirements cannot be the responsibility of the Secretary of State in circumstances where, under the Care Act, the Council is the authority legally responsible for meeting his need for accommodation if and insofar as that need is not being met. As Lord Slynn stated at [17]:

> "… [T]he only limitation of a local authority's liability to provide accommodation is where the need is "solely" due to destitution or its effects. Section 95 can therefore not be relied on to give a separate right against the Secretary of State where there is destitution plus disability. Even if that were a possible construction the Secretary of State, under section 95, must take into account, by virtue of regulation 6(4) of the Asylum Support Regulations 2000 …: "*any other support which is available to the principal or any dependant of his, or*

might reasonably be expected to be so available in that period." Accordingly, the Secretary of State, even under section 95, would be obliged to have regard to the liability of the local authority under section 21 of the 1948 Act as amended for any asylum seeker whose need for care and attention had not arisen solely because of his destitution."

81. As stated by Lord Hoffmann in his at [38]-[40], quoted above within paragraph 66, a significant element of the committee's reasoning was that "*the power [in s.95(1)] is residual and cannot be exercised if the asylum seeker is entitled to accommodation under some other provision*". Lord Hoffmann also placed reliance on reg.6 of the Asylum Support Regulations 2000 for supporting a conclusion that, since "*an infirm destitute asylum seeker*" could access support under s.21 of the NAA 1948, "*she could not be deemed destitute for the purposes of section 95(1)*".

82. Mr Johnson, for the Council, is right to observe that there are differences between the provisions of the NAA 1948 and the provisions of the Care Act. In *R (BG) v Suffolk County Council* [2022] EWCA Civ 1047, the Court noted, at [70], that the Care Act places greater emphasis on the autonomy of the individual in the provision of "*care and support*" (as compared with the provisions of the NAA 1948 relating to the provision of "*care and attention*"). But the differences between the two Acts are not, in my judgment, significant for present purposes. The consensus in previous cases under the Care Act has been that the case-law in respect of s.21 of the NAA 1948 remains apt when considering similar issues under the Care Act. I see no reason why the principles identified in *NASS* regarding the interplay between s.95 of the IAA 1999 and the NAA 1948 are not likewise applicable to the interplay between s.95 and the Care Act. I have not seen any document or other material that suggests that the legislative changes made in 2014 by way of the Care Act were intended to change the interplay between the Home Office's and local authorities' respective responsibilities. As Ms Mellon submitted by way of a rhetorical question, "*Why would it have changed it, given that s.18 [of the Care Act] was intended to broaden, and thereby simplify, the scope of local authorities' responsibilities in terms of what care needs might be covered?*"

83. My conclusions are also consistent with the judgment of Tomlinson LJ (with whom Jacob and Leveson LJJ agreed) in *R (O) v Barking and Dagenham London Borough Council (The Children's Society intervening)* [2011] 1 WLR 1283. In that case, the claimant was an asylum seeker who had, whilst a child, been in the care of the defendant local authority. The local authority had terminated its provision of accommodation and other support for him as a "former relevant child" for the purposes of s.23C of the Children Act 1989 (the "Children Act"), noting that his asylum claim had now been refused and that he was eligible for support from the National Asylum Support Service

("NASS") under s.4(2) of the IAA 1999. The Court of Appeal held (at [31] *et seq.*) that the local authority, when taking decisions about the provision to the claimant of support under the Children Act, had been wrong to take account of the possibility of the claimant receiving support from NASS. That was because the power of the Secretary of State to provide support under s.4 of the IAA 1999 was "residual" and could not be exercised for the benefit of a person entitled to accommodation under some other statutory provision.

84. The punchline of the judgment is at [40], where Tomlinson LJ, after considering Lord Hoffmann's reasoning in *NASS*, stated that he found himself:

> "… bound to conclude that since the powers under section 95 (and section 4) of the Immigration and Asylum Act 1999 are residual, and cannot be exercised if the asylum seeker (or failed asylum seeker) is entitled to accommodation under some other provision, a local authority is not entitled, when considering whether a former relevant child's welfare requires that he be accommodated by it, to take into account the possibility of support from NASS."

85. That statement of the law was endorsed (*obiter*) by Lord Carnwath in *R (L) v Westminster City Council* [2013] UKSC 27 at [9]:

> "… [T]he national [asylum support] scheme is designed to be a scheme of last resort. The regulations require the Secretary of State, in deciding whether an asylum seeker is destitute, to take into account any other support available to the asylum seeker, including support available under section 21 of the 1948 Act: Asylum Support Regulations 2000 …, regulation 6(4)(b); …. Conversely, the local authority, in answering the questions raised by that provision, must disregard the support which might hypothetically be available under the national scheme: see e.g. *R (O) v Barking and Dagenham London Borough Council (The Children's Society intervening)* [2011] 1 WLR, para 40."

86. Consistent with this is Mr Kolinsky KC's judgment in *SB* (*supra*, paragraph 52), in which he stated, at [103]:

> "… [T]he role of the local authority under the [Care Act] is to address the issue of whether there are eligible needs for care and support which are accommodation related. It should do so focussing on the Claimant's wellbeing, individual circumstances and eligible needs for care and support without reference to the [Secretary of State's] residual powers."

87. The Council's case gains no real assistance from its reliance on the text contained in the Home Office's ASCN Guidance (see paragraph 72 above). For the reasons I have already explained, the allocation of responsibilities for providing care and support – including, where relevant, accommodation – as between local authorities and the

Secretary of State has been determined by legislation, as a matter of law. The Secretary of State has no power under s.95(1) IAA 1999 to provide accommodation for an asylum seeker who would be entitled to be provided with suitable accommodation by a local authority if and insofar as he lacked such accommodation. That is the law, with the consequence that, insofar as the Claimant has not been provided with suitable accommodation, responsibility for that state of affairs lies squarely with the Council. That being so, the content of the ASCN Guidance is, for present purposes, of no relevance to my task of determining whether the Council has a duty to provide suitable accommodation for the Claimant, and whether the Council has been breaching that duty. The text within that document might be legally wrong; and it anyway has, legally, no impact on the allocation of responsibilities, which has been determined by statutes.

88. In any event, as the Secretary of State submitted, that document is not, in fact, guidance provided by the Home Office to local authorities. Rather, it is a Home Office publication directed to its own officials. That much is made clear from text running through it 'like a stick of rock': every page of the document carries the following words, "*Published for Home Office staff*", in bold typeface. The guidance that *is* relevant to the Council's performance of its duties under the Care Act is an entirely separate document: the statutory Care Act guidance published by the Secretary of State for Health and Social Care (see paragraph 58 above).

89. Nor is the Council's case assisted by its submissions, made largely by way of the witness statement of Ms Nicoue (see paragraphs 27 - 28 above), describing the difficulties experienced, and high costs incurred, by local authorities in trying to provide suitable accommodation and other support for disabled asylum seekers and other persons categorised as having 'no recourse to public funds'. The burden falls disproportionately on the Council and other local authorities whose geographical areas happen to include an asylum seekers' hostel such as the one where the Claimant and his family live. To illustrate the level of that burden, Ms Nicoue estimated that, if the Council were found to be responsible for providing the Claimant and his family with the package of accommodation, care and support they require, the cost to the Council of doing so would be around £115,000 a year. Mr Johnson submitted that, if I were to find that local authorities, rather than the Secretary of State, were responsible for providing accommodation for asylum seekers who had care needs and also required to be in accommodation in order for those needs to be met effectively, then this "*could tip [the Council] over the edge in terms of its financing*".

90. I do not doubt that the practical and financial challenges facing those local authorities are considerable. It is understandable that those authorities consider that responsibility for providing accommodation for such persons might more efficiently – and more fairly

– be allocated to a national system that could more easily source suitable accommodation outside London and the South-East, with the costs being met centrally. But similar arguments were made by the defendant local authority in *NASS* and were considered by Lord Hoffmann at [45]-[49]. Those concerns were "*not without substance*" but this could not, of course, prevent the courts deciding cases in accordance with the legislation.

91. More than once during his oral submissions, Mr Johnson, for the Council, told me, "*Now your Lordship may say that the law's the law …*", whilst making a submission to the effect that I should, for various reasons, come to some other conclusion. Given that this is a court of law, it should come as no surprise to the Council that I am unpersuaded by those submissions. Relatedly, I note that some of the paragraphs of Ms Nicoue's witness statement appeared to have been taken directly from a report of the 'NRPF Network', a vehicle for collaboration between local authorities dealing with people in the 'no recourse to public funds' category. Various publications of the NRPF Network were exhibited to her witness statement. The Council's positions taken in, and approach to, these proceedings have a distinct flavour of being part of a campaign of seeking to draw attention to a broader state of affairs which it believes is unfair to it. With respect to the Council, I can do nothing to assist, as it is not properly open to me to adopt unrealistic interpretations of legislation or to ignore case-law that is binding on me. If the Council and the NRPF Network are to achieve change, then such change will have to be won in Parliament; it cannot be done in the courts.

92. Having reached the conclusions of law which I have done, I turn to applying them to the facts of this case. It follows from those conclusions that the Council's assessments of the Claimant's care needs were legally flawed. That is because those assessments, when considering whether he had accommodation-related care needs, took into account accommodation that was, or might be, provided to him by the Secretary of State under s.95 IAA 1999. In my judgment, the Council should have ignored any s.95 accommodation. Had the Council done so, it would have been bound to conclude that the Claimant had an accommodation-related care need which the Council had a duty to meet by providing him with suitable accommodation. It follows that the Council has breached its Care Act duty to the Claimant by failing to identify his accommodation-related care need and by failing to provide suitable accommodation for him.

93. Even if I had not concluded, as a matter of law, that the Council should have ignored any s.95 accommodation, I would still have gone on to find – effectively upholding the Claimant's 'alternative case' (see paragraph 64 above) – that the Council breached its Care Act duty to the Claimant. That is because, even if the Council was right to have taken into account the Claimant's s.95 accommodation, the Council should still have

concluded that he had an accommodation-related care need. His existing s.95 accommodation had, since at least the time when he was discharged from hospital in October 2022, been glaringly unsuitable for him. It has been a barrier to him receiving care and causes significant detriment to his wellbeing.

94. Nor could any different conclusion realistically have been reached by the Council based on there being a realistic prospect of the Home Office soon providing suitable accommodation for the Claimant under s.95, pursuant to its policy or practice indicated by way of the ASCN Guidance. As explained at paragraphs 26 and 30 above, insofar as the Home Office had been holding out any offer of alternative accommodation to the Claimant, it was an offer, said to be made to him on a 'no choice' basis, which would have required him to cease living with his wife, who is his main carer and on whom he is dependent for meeting all his basic daily needs. It requires little imagination to realise that accepting that offer would have put the Claimant into an even worse living situation than he was already in. Ironically, the practical consequence of this could well have been to swiftly render him in need of a residential care home placement; something which the Council accepts would be the responsibility of a local authority to provide for him under the Care Act (albeit that the responsible local authority might, by that stage, have been a different London borough).

Ground 2

95. By Ground 2, the Claimant submits that the Council has breached the Care Act by failing to recognise his need for financial support and by failing to provide such support.

96. The Claimant's evidence is that the financial support he has been receiving under s.95 IAA 1999 for his family has been around £32 a week, equating to £8 per person and that this was insufficient to cover the basic needs of himself and his family, given the added expenditures they face because of his severe disabilities. I was told at the hearing that the weekly payment may have recently increased to £36. Whatever the precise amount, it is, by any standards, a very small amount of money for any family in this country to live on, even if they are also receiving meals and a laundry service in hostel accommodation. But it is even more difficult for a severely disabled person, who is likely to incur certain expenses for meeting needs relating to his disability, to meet his own and his family's needs with such a sum.

97. The Claimant's solicitors drew the Council's attention to his alleged need for financial support in their letter dated 17 July 2023, stating that "*the family needs to spend money on essential disability-related items for their father*" and requesting that *"urgent financial support is provided to [the Claimant] to meet any essential disability-related*

needs, such as extra laundry and toiletries". This request was reiterated in the PAP letter of 31 July 2023. By the time of the Care Act assessment review of 10 August 2023, therefore, the request for financial assistance had clearly been raised with the Council. But the Council has not provided any financial assistance to him.

98. The Claimant contends that the Council either: (a) has taken a decision that he has no need of financial support – in which case, the decision is irrational; or (b) the Council has not considered, in its Care Act assessments, whether the Claimant needed any financial support, and the failure to consider that matter was irrational.

99. The Council's case in response is essentially three-fold. First, the Council says that the Claimant's desired outcomes he was supported to identify (the assessment process being patient-focused) did not include any of the matters for which he now seeks financial support. Secondly, the Council says that the Claimant did not raise any financial needs in his discussions with the Council's personnel in the context of the review of needs in July 2023 or the review in August 2023. Thirdly, the Council observes that his hostel accommodation already provides the family with both meals and a laundry service, and so any asserted financial need should be seen in that context.

Analysis

100. It is proportionate to deal with this Ground relatively briefly, given its limited practical significance for the Claimant (as explained further below). It took up only a small part of the overall time spent on oral argument at the hearing.

101. I am satisfied that the Claimant has, through his solicitors, drawn the Council's attention to his financial circumstances, including that, in consequence of the physical challenges he faces, he has some necessary expenses which a non-disabled person would not have. In my judgment, the Claimant is right that the Council should have considered the question of financial needs as part of its assessment and reviews of his care needs. The lawfulness of the assessment and reviews is vitiated by that failing.

102. I am not, however, persuaded that, had the Claimant's financial needs been considered (as they should have been), the only conclusion that could rationally have been reached was that he did have such needs and that he should be provided with amounts greater than those that have been being provided to him by the Secretary of State. Local authorities have a broad discretion as to how to meet needs: *R (McDonald) v Kensington & Chelsea RLBC* [2011] UKSC 33. In circumstances, for example, where a person's needs are being met partly by his being provided with accommodation that includes the provision of meals and a laundry service at no charge to him, his financial needs *might*, depending on all the circumstances, be very modest.

103. It does not seem to me to be proportionate for the Court now to try to model what a proper consideration of the question of his financial needs would have looked like in terms of the range of potential rational outcomes. Any such modelling would anyway be artificial in circumstances where I have found, under Ground 1, both: (a) that the Home Office hostel accommodation in which the Claimant and his family lived, and which provided them with meals and a laundry service, was unsuitable for him, having regard to his care needs; and (b) that the Council should have ignored all forms of Home Office assistance that might be available to the Claimant under s.95 IAA 1999.

104. Stepping back to view the broad canvas of this claim, Ground 2 adds little which is of real practical significance and goes beyond the questions determined under Ground 1. The Council's position has been that the meeting of the general needs of the Claimant and his family – such as their needs for accommodation, food, laundry services and money – is the Secretary of State's responsibility under s.95. That position, which I have found to be legally wrong, has dominated the way in which the Council have assessed the Claimant's needs. Had the Council accepted, as it should have done, that the provision of suitable accommodation for the Claimant and his family was its responsibility, then it is likely that he would have been provided with accommodation in a flat which did not come with any meals. In those circumstances, the Council would surely have accepted that the Claimant had financial needs. Further, in circumstances where the Claimant has been living in his current accommodation which is so unsuitable for him, both his and the Council's focus in their discussions with one another for identifying his needs for Care Act purposes has understandably been on his need for suitable accommodation and how *that* need might be met, rather than on any question relating to financial support.

105. Further, I was assured by Mr Johnson, on behalf of the Council, that, if the outcome of the hearing was that the Claimant had to be provided with accommodation by the Council, then the Claimant's move to that accommodation would be a material change in his circumstances triggering the making of a fresh assessment of his needs under the Care Act. The Claimant's financial needs would be considered as part of that new assessment. That would happen regardless of whether or not I granted any relief under Ground 2.

106. I have already stated above, in this judgment that will be published, that the Council should, when assessing and reviewing the Claimant's needs under the Care Act, have considered the question of financial need, but did not do so. This Ground succeeds to that extent. In all the circumstances, however, I do not think it necessary or proportionate to grant any relief under this Ground. On that basis, Ground 2 is dismissed.

Ground 3

107. By Ground 3, the Claimant alleges that the Council has, by failing to provide suitable accommodation for him, breached his Convention Rights under the HRA, specifically his rights mirroring ECHR Article 3 ('degrading treatment') and/or Article 8 ('respect for private and family life'). A more legally precise way of putting the Claimant's case, however, would be that the Council breached his Convention rights by failing to provide him with accommodation that was at least '*less unsuitable*' for him, i.e. accommodation that was not *so* unsuitable as to lead to the relevant 'severity threshold' for establishing a breach of Article 3 or 8 being crossed. A breach by the Council of its duties to the Claimant under the Care Act would not be itself sufficient to justify a finding that the conditions of life to which he has been exposed have been *so* grim as to breach his fundamental rights.

108. I will consider each of the two Articles separately for the purposes of determining whether the right for which that Article provides has been violated in the Claimant's case and, if so, whether the Council is responsible for that violation. I do so because: (a) each of those Articles sets out a distinct right, each protecting its own underlying fundamental human values; and (b) the case-law identifies distinct principles, in respect of each of those Articles, for determining whether the right has been violated.

109. The burden of proving any breach of Convention rights rests on the Claimant.

Article 3

110. It is well established (as illustrated by the authorities discussed further below) that Article 3 ECHR generates positive obligations for contracting States to protect individuals within their jurisdiction from suffering 'degrading treatment'. Likewise, under the HRA, the s.6 duty of public authorities to avoid acting incompatibly with individuals' Convention rights, when read with Article 3, may be breached by a public authority that has failed to carry out its duties and functions under domestic law competently and diligently, with the result that an individual has suffered, or been placed at imminent risk of suffering, 'degrading treatment' that he would not otherwise have experienced.

111. In the present case, there can be no doubt that the prolonged period over which the Claimant has been in the unsuitable accommodation has caused him pain, discomfort and indignity which he would not otherwise have suffered. But this is not by itself enough to establish a breach of Article 3 by the Council. Rather, I need to consider:

first, whether the level of the Claimant's suffering or indignity, caused by his having been left in the unsuitable accommodation, has crossed the severity threshold for constituting 'degrading treatment' under Article 3; and

secondly, if it did, whether the Council is responsible for 'treatment' of the Claimant which crossed the severity threshold.

112. For answering the first question, I need to identify the legal principles for establishing whether the suffering or indignity experienced by an individual, and against which he claims he should have been protected by a public authority, has crossed the severity threshold for constituting 'degrading treatment' under Article 3. Helpfully, those principles were identified in the judgment of Michael Fordham QC in *Aburas* (*supra*, paragraph 43), at [12]-[13]. That was a case relating to a local authority's refusal to provide accommodation and other assistance under the Care Act to a failed asylum seeker suffering from bipolar disorder and depression. Mr Fordham QC reviewed the relevant case-law and explained that a public authority's refusal to provide accommodation may be found to have crossed the Article 3 threshold if it has given rise to "*an imminent prospect of serious suffering caused or materially aggravated by [that] refusal*".

113. As to what is meant by "*serious suffering*", guidance may be derived from the authorities to which Mr Fordham QC's judgment referred. Of those authorities, the greatest source of assistance was provided by way of *R (Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66, which concerned the Secretary of State's refusal to provide support to asylum seekers who had not claimed asylum at the first opportunity for doing so. In that case, Lord Bingham of Cornhill said this:

> "[6] … [The legislation] prohibits the Secretary of State from providing or arranging for the provision of accommodation and even the barest necessities of life for such an applicant. But the applicant may not work to earn the wherewithal to support himself …. …
>
> [7] May such treatment be inhuman or degrading? [The legislation] assumes that it may, and that assumption is plainly correct. In *Pretty v United Kingdom* (2002) 35 EHRR 1, the European Court was addressing a case far removed on its facts from the present, but it took the opportunity in para 52 of its judgment (which Lord Hope has quoted, and which I need not repeat) to describe the general nature of treatment falling, otherwise than as torture or punishment, within article 3. … Treatment is inhuman or degrading if, to a seriously detrimental extent, it denies the most basic needs of any human being. As in all article 3 cases, the treatment, to be proscribed, must achieve a minimum standard of severity, and I would accept that in a context such as this, not involving the deliberate infliction of pain or suffering, the threshold is a high one. A general public duty to house the

> homeless or provide for the destitute cannot be spelled out of article 3. But I have no doubt that the threshold may be crossed if a late applicant with no means and no alternative sources of support, unable to support himself, is, by the deliberate action of the state, denied shelter, food or the most basic necessities of life. …
>
> [8] When does the Secretary of State's duty [to provide asylum support, so as to avoid breaching article 3,] arise? The answer must in my opinion be: when it appears on a fair and objective assessment of all relevant facts and circumstances that an individual applicant faces an imminent prospect of serious suffering caused or materially aggravated by denial of shelter, food or the most basic necessities of life. …"

114. In *Aburas,* Mr Fordham QC stated as follows, after considering *Limbuela*:

> "The observations in *Limbuela* can, in my judgment, aptly inform the 'looked-after needs' context, if that context is borne in mind. It can be asked, of the relevant 'looked-after need', whether the claimant is an individual "*with no means and no alternative sources of support, unable to support himself [and] … denied … the most basic necessities of life*". It can be asked, of the relevant 'looked-after need' whether "*it appears on a fair and objective assessment of all relevant facts and circumstances that [he] faces an imminent prospect of serious suffering caused or materially aggravated by [the] denial*"; whether that denial is of "*the most basic necessities of life*"; and remembering always that "*[m]any factors may affect that judgment, including age, gender, mental and physical health and condition, any facilities or sources of support available to the applicant, the weather and time of year and the period for which the applicant has already suffered or is likely to continue to suffer privation.*"

115. In applying these principles to the facts of the present case, I remind myself that the severity threshold that must be crossed in order for the treatment of the Claimant to breach Article 3 is, as Lord Bingham observed, "*a high one*". I also bear in mind that, over the past 23 years for which the HRA has been in force, judicial findings that a public authority has breached Article 3 by failing to provide welfare services to an individual have been infrequent. It is, therefore, right that I approach the Claimant's complaint under Article 3 with appropriate caution. A finding of a violation of Article 3 is, by its very nature, a serious and significant finding which should not lightly be made. On the other hand, the Court cannot shy from its duty to examine the suffering and other detriments caused to this individual Claimant from his having been left in the unsuitable accommodation. If a claimant has been caused actual suffering to a degree that can fairly be described as 'degrading treatment', then the Court must so find.

116. In view of the facts I have already found regarding the Claimant's living situation (see paragraphs 10 - 41 above.), it is plain that he has, for many months, been living a pitiable existence. The root cause of his difficulties has, of course, been his progressive

MS, not his lack of suitable accommodation. Nevertheless, it is also clear to me that his day-to-day existence has been considerably more unpleasant than it would have been, had he been provided with suitable accommodation.

117. As his witness statements explain, he has effectively been bed-bound: his bed is where he eats his meals, receives personal care, and toilets (save where he uses a commode next to his bed). Further, he is unable to go outside the building. He therefore spends practically his entire existence confined to his bed in a bedroom shared with his family; he is unable to toilet or wash in the bathroom; and he has no opportunity to go outdoors or do any activities in the community. All these extreme limitations on his quality of life are not attributable to his medical condition *per se*; rather, they are attributable to his unsuitable accommodation, which I am satisfied was a 'but for' cause of those limitations.

118. I have no doubt that the Council's prolonged failure to provide him with suitable accommodation, by causing his daily life to be so diminished, has given rise to "*an imminent prospect of serious suffering caused or materially aggravated by [that] refusal*"; indeed, it has actually caused and aggravated serious suffering. This can be illustrated by the following facts relating to the actual impacts, and risks of further impacts, from his having been rendered bed-bound:

(1) A file note made by a Council official following a discussion she had with the Claimant on 13 February 2023 stated that he was "*bedbound*", had "*not been out[doors] since his discharge from the hospital [in] October … last year*", and was "*developing pressure sores*". His being bed-bound has therefore led to his experiencing pain and suffering that he would not otherwise have experienced.

(2) The October 2022 hospital discharge summary recorded that he was also at risk of suffering deep vein thrombosis.

(3) His medical notes record a discussion between the Claimant and a medical professional in May 2023 relating to an incident in which the Claimant had experienced chest pains and thought he was having a heart attack. The medical professional explained that the medics who assisted him on that occasion has not found that he was experiencing a heart attack. Rather, what he experienced was musculoskeletal in nature and attributable to "*prolonged bed rest, reduced activity, stiffness and reduced time spent sitting/standing.*"

119. In my judgment, the Claimant has also experienced mental suffering that is likely to have been caused or materially aggravated by the extreme limitations on his quality of life to which I have referred. The Council's own records, including the December 2022 Care Act needs assessment (see the quotations in paragraph 32 above), show that the

Council was fully on notice that his unsuitable accommodation was producing those effects in him and that he had been prescribed medication for depression and anxiety.

120. Having made those findings, I have asked myself whether any of the principles identified in *Limbuela* and *Aburas* indicate I should not find the Article 3 severity threshold to have been crossed in these circumstances. In doing so, I bear in mind the reference in *Limbuela* to the imminent prospect of serious suffering arising from denial of "*the most basic necessities of life*". Has the Claimant been denied those necessities?

121. The Claimant has at all material times had access to food, shelter, and a little money – all provided by the Home Office. In my judgment, however, *Limbuela* is not, if properly read, suggesting that a breach of Article 3 can be found *only if* the individual in question has been denied access to food, shelter or other necessities for survival. Lord Bingham's focus on "*basic necessities*" was unsurprising in the context of a case about whether Article 3 required that such necessities be provided for able-bodied asylum seekers who would otherwise be destitute. He was not suggesting (and the Council in the present case has not argued) that there can be no breach of Article 3 through leaving a severely disabled person in unsuitable accommodation, regardless of how detrimental this may be for him, provided he has food and shelter.

122. I draw support for that conclusion from the fact that Lord Bingham expressly referred to the judgment of the European Court of Human Rights in *Pretty v United Kingdom* (2002) 35 EHRR 1. Specifically, he referred to paragraph 52 of that judgment, which states:

> "As regards the types of "treatment" which fall within the scope of Article 3 …, the Court's case-law refers to "ill-treatment" that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering …. Where treatment humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of Article 3 …. The suffering which flows from naturally occurring illness, physical or mental, may be covered by Article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible."

Notably, nothing in that paragraph refers to a denial of "*basic necessities*". Rather, the focus is on treatment that either: (a) causes or exacerbates intense physical or mental suffering, or is liable to exacerbate such suffering; or (b) is 'degrading' in the sense that it diminishes, or fails to respect, the person's human dignity.

123. In my judgment, in assessing whether Article 3 has been breached in the Claimant's case, it is appropriate that I take a holistic view of the totality of the detriment caused to him, including the extent to which his quality of life and dignity have been diminished over a prolonged period. His unsuitable accommodation has severely affected practically all his basic daily activities. It is at least arguable that the things he has been unable to do – such as going outdoors, getting out of bed and walking short distances, using the toilet, having a shower, and going into the bathroom to wash his face or brush his teeth – either are, or are close analogues to, "*basic necessities of life*" such as shelter. Further, his evidence that he finds having to toilet, and to receive intimate personal care, in a bedroom shared with his teenage daughter distressing and humiliating is unsurprising and is an example of the impact of his unsuitable accommodation in terms of his personal dignity. It is clear from his evidence that it causes him to feel ashamed and diminishes his sense of self-worth.

124. I do not accept the argument advanced by Mr Johnson, for the Council, to the effect that the Claimant was effectively the author of his own misfortune in terms of his lack of 'less unsuitable' accommodation, by reason of his having turned down an offer of alternative Home Office asylum accommodation located in a different local authority area. As explained above at paragraphs 26, 30 and 94, that offer was wholly unrealistic for meeting his care needs, as he would have been separated from his wife, who is his main carer and on whom he is heavily dependent.

125. I therefore conclude that the level of the Claimant's suffering or indignity, caused by his having been left in the unsuitable accommodation, has crossed the Article 3 severity threshold for constituting 'degrading treatment'.

126. Having so concluded, I move on to considering the second question, namely, whether the Council is responsible for 'treatment' of the Claimant which was degrading. That question has, in part, already been answered by my conclusions under Ground 1. Responsibility for providing the Claimant with suitable accommodation lay with the Council under the Care Act. The Council knew of the Claimant's unacceptable accommodation situation and its impacts on him, but nevertheless left him to remain in that accommodation for a prolonged period whilst the Council denied its responsibility. Therefore, if the Claimant, by reason of his having remained in that accommodation, suffered treatment crossing the Article 3 threshold, then the Council must be the public authority responsible for that treatment.

127. That conclusion is not undermined by the fact that the Claimant's unsuitable accommodation was provided by the Secretary of State and not by the Council. The public authority holding the statutory duty for providing suitable accommodation for

the Claimant was the Council. This should have been recognised by the Council at least by the time when it completed its care needs assessment of the Claimant in December 2022. Indeed, the Secretary of State was, by that time, arguably already doing more than he had a statutory power to do, given that it had become clear that the Claimant had an entitlement under the Care Act to be provided with accommodation and was, therefore, no longer "destitute" within the meaning of s.95 of the IAA 1999.

128. I need also to deal, however, with a further issue that was argued before me which relates to whether the Council is responsible for 'treatment' of the Claimant which was degrading. That issue relates to the Council's 'intent' and raises these questions: (1) In order for the Council to be found to have breached Article 3, is it necessary that the Council *intended* to subject the Claimant to living conditions crossing the Article 3 severity threshold? If so, (2) did the Council have the requisite intent during the period over which the Claimant has been left in his unsuitable accommodation?

129. As to the first of those questions, I note that the phrase 'degrading treatment' is suggestive of a positive decision or choice by someone to 'treat' an individual, or a group or a category of individuals, in a certain way, whether by way of an act or an omission (such as denying him the "*basic necessities of life*", as discussed above). The phrase is also suggestive of that positive decision or choice being made by someone having a degree of knowledge and/or intent with respect to the potential, likely or inevitable impacts of that act or omission in exposing the individual to degrading experiences or living conditions.

130. The relevance of 'intent' to a court's assessment of whether a public authority has breached Article 3 was considered in *R (Bernard) v Enfield London Borough Council* [2002] EWHC 2282 (Admin). That case concerned a local authority's prolonged failure to re-house a severely disabled woman and her family, leaving them in accommodation that was so unsuitable as to render their living conditions "*deplorable*". Sullivan J did not, however, find the local authority's failure to have constituted a breach of Article 3 (though, as discussed further below, he did find a breach of Article 8). As part of his reasoning for not finding a breach of Article 3, Sullivan J explained:

> "[28] … Although not conclusive, the fact that there was no intention to humiliate or debase the claimants is a most important consideration. The cases concerned with prisoners' rights … must be treated with great caution outside the prison gates. A prisoner is in a uniquely vulnerable position: detained against his will, he is literally at the mercy of the prison authorities. It is understandable that the protection afforded by Article 3 should be rigorously applied in such circumstances, even if there is no intention to humiliate or debase. The regime under which a prisoner lives will have been ordained by the prison authorities.

> Thus, whatever the authority's purpose may have been in imposing a particular regime, there will have been a deliberate decision to subject the prisoner against his will to that particular regime.
>
> [29] The present case is very different, not merely because the second claimant was living (in admittedly deplorable conditions) in her own home, surrounded by her family but also because those living conditions were not deliberately inflicted upon her by the defendant. The defendant failed to act on the September 2000 assessments but there is nothing to suggest that the defendant's breach of statutory duty was any more than that: a failure to act. The claimants' case appears to have fallen into an administrative void between the defendant's Social Services and Housing Departments. Thus, the claimants' suffering was due to the defendant's corporate neglect and not to a positive decision by the defendant that they should be subjected to such conditions."

131. Ms Mellon, on behalf of the Claimant, submitted that, in the present case, I should make my assessment, for Article 3 purposes, of the failure to accommodate the Claimant attaching lesser significance to the extent to which the Council acted with 'intent' than the above-quoted words of Sullivan J might suggest I should. In support of that submission, she argued that the Strasbourg case-law on Article 3 had moved on since Sullivan J's judgment in 2002 and now made clear that 'intent' was not a requirement. This should, Ms Mellon submitted, "*reduce the importance*" placed on 'intent'. As an example of the modern Strasbourg case-law, she relied on *MSS v Belgium and Greece* (App. No. 30696/09), (2011) 53 E.H.R.R. 2, in which the Strasbourg Court's judgment stated, at [220]:

> "Treatment is considered to be "degrading" when it humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance. It may suffice that the victim is humiliated in his or her own eyes, even if not in the eyes of others. Lastly, although the question whether the purpose of the treatment was to humiliate or debase the victim is a factor to be taken into account, the absence of any such purpose cannot conclusively rule out a finding of violation of art.3."

132. In my judgment, however, *MSS* does not assist Ms Mellon's argument. One reason why that is so is that, whilst the Strasbourg Court's above-quoted text states that a violation of Article 3 can be found even if humiliation or debasement of the individual was not "*the purpose of the treatment*", *purpose* is not the same thing as *intent*. *MSS* says nothing about whether a violation can be found in circumstances where the State authorities either: (a) did not know that their act or omission would, or would be likely to, result in an individual being exposed to the horrendous living conditions alleged to have crossed the Article 3 severity threshold; or (b) were seeking to improve the

individual's living conditions but failed to achieve that result within a reasonable timescale due to negligent sloth or administrative ineptitude.

133. Another reason why *MSS* does not assist Ms Mellon's argument relates to the inappropriateness of her inviting me to draw assistance from recent Strasbourg authority. It would not, in my judgment, be properly open to me to directly follow a development in the Strasbourg case-law which represented a departure from principles, or even guidance, established in the case-law of our own jurisdiction interpreting and applying a HRA Convention right.

134. In the early years of the HRA's life, the House of Lords (and, subsequently, the UK Supreme Court) developed the domestic case-law on the interpretation and application of the Convention rights in Schedule 1 to the HRA closely tracking the existing case-law of the Strasbourg Court: see *R (Ullah) v Special Adjudicator* [2004] UKHL 26, *per* Lord Bingham at [20]. That approach of 'reading across' from the Strasbourg case-law was consistent with the famous objective behind the HRA of "bringing rights home" and ensured that our courts were not sketching out the content of the Convention rights starting with a 'blank canvas'.

135. As time has gone on, however, the courts of the United Kingdom's three jurisdictions have increasingly developed our own 'home-grown' interpretations of the Convention rights; rights which are, after all, *domestic law rights* in the context of the HRA. (For a review of the key judgments illustrating this development, see chapter 2 of the report of the Independent Human Rights Act Review, published in December 2021.) This approach, whereby UK courts, after having effectively adopted an established body of law developed over many years in Strasbourg, have then been developing the content of the Convention rights incrementally over time, is consistent with our common law tradition and is also consistent with "bringing [the] rights home". Accordingly, in circumstances where the application of a Convention right in a particular broad context (such as the application of Article 3 to refusals or failures by public authorities to provide accommodation) has already been the subject of multiple judgments in the courts of this jurisdiction, it is unlikely to be helpful or appropriate for a first instance judge to consider any Strasbourg judgments (save, perhaps, for a Strasbourg judgment that has been expressly followed in a judgment of a court of precedent in this jurisdiction and to which reference may be made as an aid to understanding of the legal principles established in the domestic judgment).

136. In any event, Ms Mellon does not need to persuade me that the significance of 'intent' should be downgraded. That is because I am anyway satisfied that the Claimant was left in his unsuitable accommodation, and was thereby subjected to conditions of daily living which crossed the Article 3 severity threshold, in circumstances where the

Council *did* have the requisite intent, in the relevant circumstances, for constituting a breach of Article 3 by the Council.

137. I am not, of course, making any finding that the Council *wanted* the Claimant to continue living in the unsuitable accommodation. They did not. But the Council did have actual knowledge of the unsuitability of the Claimant's accommodation and the terrible impacts that remaining in such accommodation was having, and/or was very likely to have, on him. In my judgment, the Council also knew that, if it did not provide alternative accommodation for him, he was very likely to remain, for a significant period, in unsuitable accommodation that was very likely to produce the same, or similar, impacts. The Council also probably knew – and, in any event, should have known – that it was responsible, under the Care Act, for ensuring that the Claimant was provided with suitable accommodation. (In support of all these findings, I refer to the points I discuss further below, at paragraphs 163 - 166, when considering the Council's 'culpability' for the purposes of my assessment of its conduct under Article 8.)

138. In my judgment, the Council made an intentional choice to leave the Claimant, for a substantial period, living in unsuitable accommodation in circumstances where it knew very well that this would lead to his conditions of daily living continuing to be severely impaired. Subjection of the Claimant to those conditions was a virtually certain consequence of the Council's refusal to provide accommodation for him. In that sense, the Council *intended* to subject the Claimant to those conditions; conditions which I have found were sufficiently bad that they crossed the Article 3 severity threshold.

139. In this respect, an analogy may be drawn with the facts relevant to 'intent' which were considered in *Limbuela*. The House of Lords found that the withdrawal of asylum support from a category of asylum seekers was an intentional act and constituted the intentional infliction on those individuals of living conditions crossing the Article 3 severity threshold. That was because, since asylum seekers were not permitted to work, it was obvious that many would have no other sources of income or accommodation; and, therefore, "*the policy's necessary consequence [was] that some asylum seekers [would] be reduced to street penury*" (*per* Lord Brown at [101]; see also Lord Hope at [56] and Lord Bingham at [6]).

140. This is a conclusion I would reach even if, by straining to construct a version of the facts which was unduly generous to the Council, I proceeded on the basis that the Council simply did not understand the law and genuinely thought that, on the existing relevant authorities, legal responsibility for providing the Claimant with suitable accommodation lay with the Secretary of State under s.95 of the IAA 1999. In my judgment, ignorance of the law cannot be a defence open to a public authority in response to a claim that it breached Article 3. Were that not so, then the outcome in

Limbuela might have been that the Secretary of State could never be found to have acted unlawfully in refusing to exercise his residual power under s.55(5) of the Nationality, Immigration and Asylum Act 2002 to provide asylum support in order to avoid a breach of Article 3, provided that he had a genuine belief that Article 3 would not be being breached and that therefore his residual power did not arise. Further, given that Article 3 exists to protect individuals from degrading treatment for which the State is responsible, it cannot be right that the public authority that was, in the circumstances, legally responsible for fulfilling the State's obligations to the individual could escape being found to have breached that Convention right by relying on negligent ignorance of its legal obligations.

141. I also reject any suggestion by the Council that the difficulties in finding, at reasonable cost to the authority, suitable accommodation for people who, like the Claimant, have complex disability-related accommodation needs, should lead me to refrain from finding a breach of Article 3 in this case. As Knowles J observed in *R (DMA and Ors) v Secretary of State for the Home Department* [2020] EWHC 3416 (Admin) at [193]-[195], when an individual is at imminent risk of being subjected to living conditions that would cross the Article 3 severity threshold, "*[b]est efforts within the affordability constraints that [the public authority] has applied*" will not be enough to avoid a finding of breach of Article 3. In any event, given that the Council denied, for many months, that it was the authority responsible for providing suitable accommodation for the Claimant, and therefore took no steps towards providing such accommodation for him, there is no reason why I should assume, in the Council's favour, that it would not have been able to find suitable accommodation for him earlier, had it not taken that legally erroneous position.

142. Taking all the above-discussed matters into account, I am satisfied that the Claimant's Article 3 right has been breached, and that the public authority responsible for the breach is the Council.

143. In assessing the duration of that breach, I have borne in mind the following matters (thinking it right to do so, given that the burden of establishing a breach of Article 3 lies with the Claimant):

(1) Although the Claimant was referred to the Council under the Care Act in November 2022 (and the Council already had some knowledge of the Claimant's circumstances for some months prior to that), the Council may not have been fully aware of his accommodation-related needs until the first half of December 2022, during which period the Care Act needs assessment was completed.

(2) Even if the Council had accepted within that assessment that it had a duty to provide suitable accommodation for the Claimant, it might still reasonably have taken the Council – even if acting with a due sense of urgency – some time to source such accommodation for him and then to move him into it.

(3) Moreover, as the *duration* for which a person has been denied suitable accommodation is relevant to assessing whether the Article 3 threshold has been crossed, it may be that I would not have concluded that the threshold had been crossed if the Council had left him to remain in the unsuitable hostel accommodation only for a relatively short period of time.

144. After allowing for all these matters, I am satisfied that the Council was breaching the Claimant's Article 3 right by no later than 1 April 2023. By no later than that date, the Council should have provided him with accommodation that was at least 'less unsuitable' so that he was not exposed to severe detriment crossing the Article 3 threshold. In so finding, I rely on the Council's recognition within its Care Act needs assessment as to the "*urgency*" of re-housing the Claimant and his family (see paragraph 32 above).

145. As at the date of the substantive hearing, 8 November 2023, the Council had still not provided any accommodation for the Claimant, who was therefore still being accommodated by the Secretary of State in the hostel. Accordingly, the duration of the Council's breach of Article 3 was at least 7 months.

Article 8

146. The fact that I have found a breach of Article 3 does not obviate the need for me to go on to consider separately whether the Council also breached Article 8. A failure by a public authority to provide a person with accommodation may be found to infringe Article 3 but not Article 8, or *vice versa*.

147. True it is that: (a) Article 8 is a qualified right in the sense that it permits interference with the right it protects where such interference is in accordance with the law and necessary in a democratic society for pursuing one of the legitimate public policy objectives specified in paragraph 2 of that Article; whereas (b) Article 3, in contrast, is not subject to such qualification. It may, therefore, be tempting to assume that, in the context of public authorities' refusals to provide accommodation or other forms of welfare support, the function of Article 8 is essentially to catch situations where the circumstances of the individual are not quite serious enough for the Article 3 severity threshold to be crossed.

148. Such an understanding of those Articles would, however, be wrong. Article 8 is not simply 'Article 3 minus', whose *raison d'être* is to catch cases with less egregious circumstances. Rather, Article 8 protects two main aspects of fundamental human interests and values: (1) 'private life', i.e. "*the physical and psychological integrity of a person*", including "*a right to personal development, and the right to establish and develop relationships with other human beings and the outside world*" (*Pretty v United Kingdom* (2002) 35 EHRR 1, at [61]); and (2) 'family life', which may be infringed where "*members of a family are prevented from sharing family life together*" (*Anufrijeva v Southwark LBC* [2003] EWCA Civ 1406, at [12]). There is distinct Strasbourg and domestic case-law providing guidance, *in respect of each of those Articles*, as to the tests to be applied for identifying a breach of *that Article*.

149. Of the two Articles, Article 3 is the one that more obviously gives rise to positive obligations for public authorities, since it provides that "*No one shall be subjected to … degrading treatment …*" (whether by public or private actors), thereby specifying a substantive result to be achieved by the Contracting State. Article 8, in contrast, provides a right "*to respect for his private and family life*", thus requiring that public authorities refrain from interfering in matters of private or family life save where such interference is proportionate for pursuing a legitimate aim. Article 8 can, however, give rise to positive obligations on the part of public authorities. In *Anufrijeva* at [30]-[31], Lord Woolf CJ, giving the judgment of the Court, relied on the following passage from the Strasbourg Court's judgment in *Marzari v Italy* (Application no. 36448/97), (1999) 28 EHRR CD 175:

> "… [A]lthough Article 8 does not guarantee the right to have one's housing problem solved by the authorities, a refusal of the authorities to provide assistance in this respect to an individual suffering from a severe disease might in certain circumstances raise an issue under Article 8 … because of the impact of such refusal on the private life of the individual. The Court recalls in this respect that, while the essential object of Article 8 is to protect the individual against arbitrary interference by public authorities, this provision does not merely compel the State to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in effective respect for private life. A State has obligations of this type where there is a direct and immediate link between the measures sought by an applicant and the latter's private life …"

150. The Court of Appeal in *Anufrijeva*, following that authority, acknowledged that Article 8 could give rise to positive obligations to provide accommodation in some circumstances. But the Court of Appeal also stated, at [43], that it was "*hard to conceive … of a situation in which the predicament of an individual will be such that article 8*

requires him to be provided with welfare support, where his predicament is not sufficiently severe to engage article 3." The Court added that:

> "Article 8 may be more readily engaged where a family unit is involved. Where the welfare of children is at stake, article 8 may require the provision of welfare support in a manner which enables family life to continue."

151. In *R (McDonagh) v London Borough of Enfield* [2018] EWHC 1287 (Admin), Nigel Poole QC (as he then was), sitting as a Deputy High Court Judge, stated, at [68]:

> "I accept that the article 8 right to a private life includes a person's right to physical and psychological integrity which might be infringed if they are unable, for example, to access a toilet or washing facilities at home for a prolonged period or, potentially, if their private and family life is grossly undermined by having to look after a family member because they do not have such access."

152. Even where a claimant's circumstances are such as to engage Article 8, a breach of Article 8 by a public authority will not be found to have occurred unless certain additional elements are also proved. In particular, the Court of Appeal in *Anufrijeva* made clear (at [46]) that, in order for a public authority's failure to fulfil a positive obligation to provide social welfare support to be found to contravene Article 8, "*there must be some ground for criticising the failure to act. There must be an element of culpability.*"

153. As to what may suffice to constitute the requisite "*culpability*", the Court of Appeal in *Anufrieva* noted, at [45], that:

> "*Where the domestic law of a state imposes positive obligations in relation to the provision of welfare support, breach of those positive obligations of domestic law may suffice to provide the element of culpability necessary to establish a breach of article 8, provided that the impact on private or family life is sufficiently serious and was foreseeable*" (emphasis added).

154. The significance of the word "may" in that extract is illustrated by *R (Idolo) v London Borough of Bromley* [2020] EWHC 860 (Admin). In that case, Rowena Collins Rice (as she then was), sitting as a Deputy High Court Judge, found that delay in providing appropriate housing for a disabled person was unlikely to itself be sufficient to demonstrate that the authority displayed either culpability or lack of respect for fundamental rights. She stated:

> "[72] … Even if, taking the cumulative impact on Mr Idolo into account and taking a broad-brush approach, it could be argued that it raised a *prima facie* case of breach of statutory or more general public law duties – I do not find a basis in

the authorities for simply inferring lack of respect for fundamental rights, or culpability, from the fact of delay. More is needed.

[73] I do not have a basis for finding this additional element of lack of respect or culpability on the facts of this case. On the contrary, the narrative before me is one in which the correspondence, the conduct of the council officers involved, and the co-operation between the departments have the appearance of demonstrating a degree of empathy, attentiveness to Mr Idolo's plight, respect for his needs and acknowledgment of the council's duty to help him. That does not take away from the delay in doing so. But nor does it colour the delay with culpability. …"

155. Further, even in a case where there has been *some* culpability by the public authority, this may not suffice to justify a finding of breach of Article 8. That is because, when a court is considering whether there has been a breach of that Article:

> "*it is necessary to have regard both to the extent of the culpability of the failure to act and to the severity of the consequence. Clearly, where one is considering whether there has been a lack of respect for article 8 rights, the more glaring the deficiency in the behaviour of the public authority, the easier it will be to establish the necessary want of respect [for private or family life]*" (*Anufrieva,* at [48]).

156. Drawing together the principles I derive from these authorities, I ask myself the following questions:

(1) Did the Claimant's remaining in unsuitable accommodation- (a) interfere with his physical and psychological integrity to a high degree, thus reaching a level of severity comparable to that required for a breach of Article 3, and/or (b) substantially prevent members of a family from sharing family life together?

(2) Was the Claimant's lack of suitable accommodation attributable to culpability on the part of the Council?

(3) Having regard to all the circumstances – including both (i) the extent of the Council's culpability for the failure to act, and (ii) the severity of the consequences of that failure – am I satisfied that the Council has breached Article 8 (i.e. failed to show respect for the Claimant's private and/or family life in circumstances where its relevant conduct was not necessary and proportionate in pursuance of a legitimate aim)?

157. Having given careful thought to all three questions, I answer them all in the affirmative.

158. As to the <u>first of those questions</u>: I am satisfied that the Claimant's remaining in unsuitable accommodation interfered with his physical and psychological integrity to a

high degree comparable to the level crossing the severity threshold for breaching Article 3. In that regard, I note I have already found, above, that the Claimant's unsuitable accommodation breached his Article 3 right. I have so found essentially because his remaining in that accommodation has been a 'but for' cause of various impacts on him which are intimately connected with the concept of 'private life' for the purposes of Article 8. Those impacts have, in my judgment, substantially prevented him from: (a) pursuing any meaningful personal development, and (b) developing relationships with other human beings and the outside world save for his immediate family with whom he lives.

159. In that regard, I rely on the fact that he has, for many months, effectively been bed-bound and has not been able to access the bathroom for carrying out basic daily personal functions, such as toileting and washing, which most people would wish to carry out in privacy. He has not been able to shower. He has not been able to go outside the building where he lives so as to engage with the community and to exercise personal autonomy. Taken together, his living circumstances, attributable to his unsuitable accommodation, have very seriously curtailed his ability to enjoy any real quality of life and have substantially deprived him of private life.

160. I am fortified in my conclusion that I should answer the first question in the affirmative, by the extent to which the impacts on him of his unsuitable accommodation also impact upon his family life. Clearly there are significant negative impacts on his family life from living in circumstances where: (a) his toileting and other personal care take place in sight of the children; and (b) he is excluded from accompanying his wife and children in doing any activities outside the building. I would not, however, have regarded the impacts on his family life as being *themselves* sufficient to engage Article 8. That is because, whilst the Claimant's unsuitable accommodation caused him to be unable to participate in some family activities, they did not, in my judgement, substantially prevent him from sharing family life together. He has, at all material times, been living with his wife, who is clearly a great source of support for him, and their children.

161. In seeking to resist a conclusion that the detrimental impacts on the Claimant arising from his living conditions were sufficiently great as to be capable of constituting a breach of Article 8, Mr Johnson, for the Council, contended that they were not as bad as those in *Bernard* (*supra*, paragraph 130) – the case in which Sullivan J found that a long delay in providing suitable accommodation for a family did constitute a breach of Article 8. Ms Mellon, for the Claimant, took the diametrically opposite position that the facts of this case were analogous to those in *Bernard*, and arguably were worse. In my judgment, there is very little to be gained from carrying out forensic deconstructions of the facts of previous cases that either were, or were not, found to constitute breaches of

Article 8, with a view to showing that those facts either are, or are not, comparable with those of an instant case. Every case turns on its facts unique to that case. An assessment of whether the facts support a finding that a public authority defendant has failed to show respect for private or family life is to be judged, not just by reference to the circumstances of the claimants and the specific impacts on them, but rather by considering the totality of the factual circumstances in the round.

162. In any event, I do not see how a submission to the effect that the Claimant's circumstances might, in certain specific respects, have been a little less awful than those of the family in the *Bernard* case could assist the Council, given that Sullivan J found (at [31]) that, on the facts before him, "*the case under Article 8 [was] not finely balanced*". Thus, the facts of *Bernard* cannot be treated as establishing a threshold standard, on the basis that Sullivan J regarded the facts of that case as 'only just crossing the line' for being capable of constituting a breach of Article 8.

163. Turning, then, to the second question: I am satisfied that the Claimant remaining in unsuitable accommodation for the prolonged period that he has is attributable to significant culpability on the Council's part. This is not a case in which a local authority has been anxiously seeking to provide suitable housing in fulfilment of its legal duties but been delayed in doing so by resource constraints. Rather, there has been prolonged failure on the part of the Council to acknowledge their responsibility for providing suitable accommodation for the Claimant under the Care Act; and it is that conduct which has led to the Claimant remaining in accommodation that was so unsuitable that it substantially deprived him of private life.

164. In my judgment, very little mitigation of the Council's culpability can be found on the basis that it was unaware of its legal duty and/or that it may have genuinely and reasonably thought that the duty to accommodate the Claimant lay with the Secretary of State. Having regard to the case-law discussed above when considering Ground 1, I am in no doubt that the Council should have been (and may well have been) advised by its lawyers that its asserted position that it did not have a duty to provide suitable accommodation for the Claimant was contrary to law, or at least that it was unlikely to succeed.

165. The Council's conduct in relation to this matter has, in my judgment, prioritised keeping pressure on the Home Office to re-house the Claimant, in view of his desperate circumstances, notwithstanding its duty under s.1 of the Care Act to exercise its functions in a way that promotes his well-being. Further, as referenced above at paragraph 91, the Council's conduct of these proceedings has carried a flavour of seeking to further an agenda of drawing attention to what the Council perceives to be

the ‘unfair’ burden falling on certain local authorities. In the meantime, the Claimant has remained in his unsuitable accommodation, contrary to the Council’s Care Act duty to him. There were practical options open to the Council for pursuing its interests and concerns – including through court proceedings, if desired – without doing so at the cost to the Claimant and his family of their being left in their thoroughly unsuitable accommodation. The Council could, for example, have provided the Claimant with suitable accommodation on an interim basis, or could have itself brought proceedings against the Secretary of State seeking a declaration.

166. Nor do I find the Council’s culpability to be mitigated on the basis either that the Claimant rejected an offer of suitable accommodation from the Home Office, or that the Council had a genuine and realistic expectation that the Claimant was likely to be offered suitable accommodation by the Home Office within a reasonably short period of time. My reasons are as set out above at paragraph 124 read with paragraphs 26, 30 and 94.

167. I now turn to the third question. Looking at the whole picture – including, in particular, the Claimant’s circumstances, the impacts on him of being accommodated in the unsuitable accommodation for a prolonged period, and the extent of the Council’s culpability for this – I am satisfied that the Council has failed to show respect for the Claimant’s Article 8 right and that the interference with that right was not necessary and proportionate in pursuance of a legitimate aim. It follows that the Council has breached Article 8.

168. I find the duration of that breach to have been 7 months, for the same reasons I have given above at paragraphs 143 - 145.

Conclusion on Ground 3

169. For the reasons set out above, the Claimant succeeds in establishing that the Council breached his rights under each of Article 3 and Article 8, for a period of 7 months. I will grant a declaration to that effect. (As there is no claim for damages before me, it is not necessary for me to determine whether any damages should be awarded to the Claimant.)

Reasons for granting interim relief at the conclusion of the substantive hearing

170. It is, as a general rule, appropriate for the Court to announce the outcome of a hearing only when delivering, at the same time, its reasoned judgment setting out the reasons for that outcome. In the present case, however, I took the exceptional course of announcing my conclusion on Ground 1 at the end of the substantive hearing.

171. I thought it right to do so in view of the Claimant's urgent need for suitable accommodation. When Bright J refused to grant the Claimant an interim injunction requiring that the Council provide suitable accommodation for him (see paragraph 41 above), he directed an expedited substantive hearing and that the issue of interim relief be considered at the conclusion of that hearing. He also directed that the Council and the Secretary of State should bring to that hearing information as to available properties in which the Claimant could be suitably re-housed. In these circumstances, it was appropriate that I indicate which of the two Defendants I had identified as being responsible for providing suitable accommodation for him, so that I could then make an interim order for that Defendant to provide such accommodation without further delay. That is what I did, making that order against the Council.

Conclusions

172. For the reasons I have given, the claim for judicial review succeeds.