Neutral Citation Number: [2016] EWCA Civ 707

Case No: C1/2014/4193

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE ADMINISTRATIVE COURT**
**Ms bobbie Cheema QC sitting as a Deputy Judge of the High Court**
**CO/13715/2012**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/07/2016

**Before:**

**LORD JUSTICE MOORE-BICK**
**(Vice President of the Court of Appeal, Civil Division)**
**SENIOR PRESIDENT OF TRIBUNALS**
and
**LORD JUSTICE VOS**

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**Between:**

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| **THE QUEEN**<br>**on the application of C, T, M and U** | **Appellant** |
| **- and -** | |
| **LONDON BOROUGH OF SOUTHWARK** | **Respondent** |
| **- and -** | |
| **CORAM CHILDREN'S LEGAL CENTRE** | **Intervener** |

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**Mr Richard Drabble QC and Mr Ranjiv Khubber** (instructed by **Shelter Legal Services**) for the **Appellants**
**Ms Fenella Morris QC and Ms Sian Davies** (instructed by **Southwark Legal Services**) for the **Respondent**
**Miss Shu Shin Luh** (instructed by **Coram Children's Legal Centre**) for the **Intervener**

Hearing date: 27 April 2016

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# Approved Judgment

**Senior President of Tribunals:**

1. This is an appeal against the order made by Ms Bobbie Cheema QC sitting as a Deputy Judge of the High Court on 28 November 2014 dismissing the appellants' claims for judicial review and damages. The claim challenged the lawfulness of the accommodation and the level of financial support provided to a family by a local authority. The decision of the Administrative Court is reported at [2014] EWHC 3983 (Admin).

2. The claim was made by C, who is the mother and litigation friend of T, M and U who are children aged between 12 and 6 years who, together with a baby, E, are dependent on her. The appellants are all Nigerian nationals who have been refused leave by the Secretary of State to remain in the United Kingdom on humanitarian grounds. C is an overstayer i.e. she remained in the UK after the expiry of her visa and in breach of immigration controls. The respondent is a local authority in England responsible for making a decision about the level of financial support to the family who have no right of recourse to public funds.

3. The grounds of appeal as originally settled were extravagant and we are very grateful to Mr Drabble QC and Mr Khubber, who did not appear below, for the careful manner in which they re-cast this appeal. I do not intend to deal with any of the grounds which were not pursued. Before us, the appeal was limited to three issues:

    i) Whether the respondent had an unlawful policy or practice of setting financial support to those seeking assistance under section 17 of the Children Act 1989 ['CA 1989'] at the level of child benefit in the circumstance that they otherwise had no right of recourse to public funds;

    ii) Whether after the decision of the Administrative Court in *R (PO & Ors) v Newham London Borough Council* [2014] EWHC 2561 (Admin) the respondent had an unlawful policy or practice of setting financial support to those seeking assistance under section 17 CA 1989 at the level of payments which would have been made to asylum seekers or failed asylum seekers by the Secretary of State under sections 4 and 95 of the Immigration and Asylum Act 1999 ['IAA 1999'] in the circumstance that they otherwise had no recourse to public funds;

    iii) Whether the respondent breached the appellants' article 8 ECHR rights because it provided them with financial support at a level less than that which it knew was necessary to prevent breach and, if so, are the appellants entitled to damages in respect of the breach?

4. There are two ancillary applications which we reserved until the conclusion of the argument in the appeal. The first is to adduce additional evidence concerning the relationship between child benefit rates and the respondent's assessment of 'the subsistence needs' of the children, and the second is to rely on an additional ground which became the second issue before us. We considered all the material relied upon in respect of these two applications *de bene esse* and we considered the additional ground of appeal as if leave had been granted. There was no opposition to the additional evidence being adduced. For the reasons which follow, I would have granted the applications but would dismiss this appeal.

5. There is no need to recite all of the more detailed facts around which the claim was based because they are set out in the judgment of the Administrative Court at [5] to [26]. A summary of the background is, however, helpful to an understanding of the issues in the appeal. The local authority undertook four full assessments of need and two financial support assessments. They provided accommodation throughout. They provided financial support in cash and in kind by the payment of utility bills and rent, regular financial support payments, school and activity transport costs and occasional payments for items such as winter and school clothing. The local authority have always admitted that they had regard to the levels of child benefit and IAA 1999 support that were payable but denied that they fettered their discretion or had an unlawful policy or practice of using those rates as a starting point for the decisions that they made.

6. The following summary of the support provided by the local authority is relevant:

   i) The family were self-supporting until the father left at which point, to avoid what was described by the local authority as 'the prospect of imminent destitution', C approached the local authority's children services department on 21 May 2012.

   ii) The first assessment of need for the purposes of section 17 CA 1989 was begun on that day. It concluded that the family's needs would be met by their return to Nigeria with accommodation being provided in the event that it was necessary pending return or any further application for leave to remain in the UK.

   iii) Consistent with the conclusion of the first assessment, the family were accommodated by the local authority when they faced eviction for non-payment of rent. After a night in bed and breakfast accommodation they moved to accommodation close to the children's school.

   iv) The local authority assessed the needs of the children for financial support on 17 July 2012 when the family's savings were at the point of being exhausted. C sought between £45.50 and £51.50 per week to cover the balance of a household budget that she had compiled having given credit for the value of vouchers that at the time she was receiving from Kids Company. The local authority provided £47.10 per week from 20 July 2012 together with bus passes for the cost of transport to school and for other activities for the children.

   v) A second assessment was requested by C on 4 September 2012. That assessment concluded with an offer by the local authority of more spacious accommodation which C rejected because it was further away from the children's school and her support network. A similar offer was made by the local authority in December 2012 which C also rejected for the same reason.

   vi) The claim for judicial review was issued on 19 December 2012. On 20 December the local authority offered the family a three bedroom property which C accepted and increased the financial support payments to £86.00 per week pending further assessment.

vii) A third assessment was completed on 21 January 2013. It included a finance assessment carried out on 9 January 2013. The local authority did not accept C's budget, not all of which was evidenced by receipts, with the consequence that financial support payments reverted to the previous sum of £47.10 per week, net of other financial support which continued.

viii) On 12 February 2013 the family moved to accommodation in Crystal Palace and by June 2013 the father had been released from prison and had moved back in with the family. E was born in October 2013.

ix) In February 2014 financial support payments were increased to £60.50 per week net of other support.

x) The fourth assessment which began on 20 February 2014 had regard to the new family circumstances. Financial support payments were increased to £80.70 per week, net of other support. The family were offered a move to Manchester which was refused.

xi) A fifth assessment was undertaken in May 2014 leading to an increase in the financial support payments to £140 per week net.

xii) In June 2014 the family agreed to move to the North West of England. They were temporarily accommodated in Catford before being accommodated in Rochdale on 1 September 2014.

xiii) A sixth assessment was completed on 6 November 2014. C's expenditure budget was accepted in its entirety. Financial support payments were increased to £216.92 per week. The assessment took account of increased travel costs and the cessation of the benefit of the Kids Company vouchers.

xiv) The family remain in a 3 bedroom furnished house in Rochdale where all utility bills are paid by the local authority and they are in receipt of both regular and occasional financial support which continues to be re-assessed.

7. Aside from the chronology of events that I have summarised which is not in issue in this appeal, the judge came to the following conclusions or value judgments which are not challenged:

i) The first needs assessment of the local authority was "a thorough and detailed piece of work". It concluded that the children were "happy and confident, well behaved" and that "there were no signs of neglect".

ii) The third assessment "followed the previous two being a detailed evidence based document".

iii) At the time of the fourth assessment "the children were thriving".

iv) The children were "well looked after".

v) The needs of the family were met and their altered circumstances over time were provided for.

vi) There is no evidence that the children or the family were discriminated against by the local authority because of their nationality or immigration status.

8. Although the grounds of appeal that have been discarded incorporated a number of novel and probably unsustainable propositions of law, the statutory scheme with which this court is concerned is not in any dispute. The judge dealt with it at [29] to [38]. The critical elements can be stated quite simply.

9. Section 17(10) CA 1989 provides as follows:

> For the purposes of this Part a child shall be taken to be in need if -
>
> (a) he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by a local authority under this Part;
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> (b) his health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services; or
>
> (c) he is disabled,
>
> and
>
> 'family' in relation to such a child includes any person who has parental responsibility for the child and any other person with whom he has been living."

10. By section 16B(1) CA 1989, Part III of the Act into which section 17 falls applies to local authorities in England. Section 17 imposes a general duty in the following terms:

> "17(1) It shall be the general duty of every local authority (in addition to other duties imposed on them by this Part) –
>
> (a) to safeguard and promote the welfare of children within their area who are in need; and
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> (b) so far as is consistent with that duty, to promote the upbringing of such children by their families,
>
> by providing a range and level of services appropriate to those children's needs.
>
> (2) For the purpose principally of facilitating the discharge of their general duty under this section, every local authority shall have the specific duties and powers set out in Part 1 of Schedule 2."

11. Part 1 of Schedule 2 includes a power to assess a child who appears to be in need, a power to take reasonable steps through the provision of services to prevent ill

treatment or neglect, a power to assist a person to obtain alternative accommodation to protect a child and powers that effectively enable a child to live with his family.

12. It is settled law that the section 17 scheme does not create a specific or mandatory duty owed to an individual child. It is a target duty which creates a discretion in a local authority to make a decision to meet an individual child's assessed need. The decision may be influenced by factors other than the individual child's welfare and may include the resources of the local authority, other provision that has been made for the child and the needs of other children (see, for example *R (G) v Barnet London Borough Council* [2003] UKHL 57, [2004] 2 AC 208 at [113] and [118]). Accordingly, although the adequacy of an assessment or the lawfulness of a decision may be the subject of a challenge to the exercise of a local authority's functions under section 17, it is not for the court to substitute its judgment for that of the local authority on the questions whether a child is in need and, if so, what that child's needs are, nor can the court dictate how the assessment is to be undertaken. Instead, the court should focus on the question whether the information gathered by a local authority is adequate for the purpose of performing the statutory duty i.e. whether the local authority can demonstrate that due regard has been had to the dimensions of a child's best interests for the purposes of section 17 CA 1989 in the context of the duty in section 11 Children Act 2004 to have regard to the need to safeguard and promote the welfare of children. It is perhaps helpful to examine that question in a little more detail.

13. Where a person has no right of recourse to public funds (i.e. the person is ineligible as a matter of law to have recourse to public funds or to the payment of sums under the Immigration and Act 1999 ['IAA 1999'] see, for example section 54 and schedule 3 to the Nationality, Immigration and Asylum Act 2002 ['NIAA 2002'] and paragraph 6 of the Immigration Rules), that person remains eligible to receive support from a local authority in the exercise of its powers under section 17 CA 1989. That is because, by paragraphs 2 and 3 of Schedule 3 NIAA 2002, there is an exception to the ineligibility of persons who are prohibited from being provided with mainstream housing and welfare benefits where the ineligible person is a child or the provision of section 17 support is necessary for the purpose of avoiding a breach of a person's Convention rights (see, for example: *R (M) v Islington London Borough Council* [2004] EWCA Civ 235, [2005] 1 WLR 884 at [18] to [19] per Buxton LJ). The local authority is, however, prohibited from providing accommodation or assistance for such a family pursuant to the Housing Act 1996 ['HA 1996'].

14. A local authority that provides support for children in need under the 1989 Act is acting under its powers as a children's services authority (a local social services authority with responsibility for children) not as a local social services authority performing functions relating to homelessness and its prevention, and not as a local housing authority. The limited nature of the local authority's power is important. The local authority appropriately remind this court of the statement of principle in this regard which is to be found in *R (Blackburn Smith) v London Borough of Lambeth* [2007] EWHC 767 (Admin) at [36] per Dobbs J:

> "…the defendant's powers [under section 17] were never intended to enable it to act as an alternative welfare agency in circumstances where Parliament had determined that the claimant should be excluded from mainstream benefits."

15. Accordingly, although in this case the local authority provided accommodation and financial support, it did so under section 17 CA 1989 and not as a consequence of any other statutory scheme. In so doing, the local authority was not required to have regard to guidance issued under another statutory scheme, for example the Homelessness Code of Guidance issued under section 182 HA 1996. That said, the overarching obligation imposed on local authorities in England (and their specified partner agencies) by section 11 CA 2004 is to "make arrangements for ensuring that – (a) their functions are discharged having regard to the need to safeguard and promote the welfare of children; and (b) any services provided by another person pursuant to arrangements made by the person or body in the discharge of their functions are provided having regard to that need." That overarching obligation casts the evidential net rather wide so that a decision based on an assessment undertaken for the purposes of section 17 CA 1989 should identify how the local authority has had regard to the need to safeguard and promote the welfare of children both individually (i.e. the subject children as regards the claim) and collectively: see, for example *Nzolameso v Westminster City Council* [2015] UKSC 22, [2015] PTSR 549 at [24] to [27] per Baroness Hale of Richmond DPSC.

16. The Secretary of State has issued guidance to local authorities in accordance with section 7 of the Local Authority and Social Services Act 1970 about assessments of need for the purposes of section 17 CA 1989. That guidance is to be followed save in exceptional circumstances (following the principle explained by Sedley J in *R v Islington London Borough Council ex p Rixon* [1996] EWHC 399 (Admin), [1997] 1 CCLR 119 at 123J-K that a local authority has liberty to deviate from the Secretary of State's guidance only on admissible grounds for good reason but without the freedom to take a substantially different course). The relevant guidance was originally to be found in *Framework for the Assessment of Children in Need and their Families*, TSO, 2000, and from 15 April 2013 is to be found in *Working Together to Safeguard Children*, DfE, March 2015. In simple terms, an assessment of the needs of a relevant child is to be undertaken so as to satisfy the three domains and 20 dimensions which the common assessment framework is designed to address. There is no longer a prescribed form of assessment but it remains the case that for an assessment to be lawful, it must be compliant with the guidance having regard to the *Rixon* principle: *R (AB and SB) v Nottingham City Council* (2001) 4 CCLR 295 per Richards J at [41] and [43]. For example, in accordance with the guidance, local authorities are required to publish a local protocol for their assessments and a threshold document which describes the criteria for referral for assessment.

17. There are no categories or sub-divisions of 'children in need' in the statutory scheme. That is hardly surprising given the enormous range of circumstances in which children present to the authorities with needs that may require assessment. That is why there is a generic assessment framework with identifiable factors that is the object of the central Government guidance that has been issued. A local authority can be expected to evidence that due regard has been had to the framework dimensions and that there has been a proper appreciation of the potential impact of the decisions that have been made on the best interests of the individual children. The decision maker would be expected to demonstrate that the impact on the individual child's welfare is proportionate given the other factors to which they are entitled to have regard, for example, the needs of other children and the resources of the local authority.

18. In this case it is now common ground that the local authority do not have a written policy in relation to the assessment of children of families who have no right of recourse to public funds. Without hearing detailed submissions on the question, I venture to suggest that to have a separate policy outside the published guidance for just one category of children in need (i.e. those who do not have a right of recourse to public funds) would in the nature of this statutory scheme be difficult given that each child's needs are to be individually assessed by reference to the framework.

19. That is a different question from the one addressed by Mr John Howell QC sitting as a Deputy Judge of the High Court in *R (PO & Ors) v Newham LBC* supra at [43] where he observed that:

> "It would be administratively absurd (if not impossible), and productive of unnecessary expense, if the amount required had to be assessed in each individual case without any guidance as to what is normally appropriate. Moreover, in practice, such an approach devoid of any general guidance would inevitably lead to unjustifiable and unfair differences in the amounts paid to different families in a similar position depending on the views of the individuals making or approving such assessments."

20. That is simply to re-state in practical terms the need for a rational and hence consistent approach to decision making. It permits of appropriately phrased internal guidance or cross-checking that is consistent with the Secretary of State's statutory guidance but does not suggest, let alone approve of a policy or practice of fixing financial support by reference to the support available under other statutory schemes and for other purposes. In this case the questions whether each of the children were in need and the nature and extent of that need were answered by repeated assessments the contents of which are not challenged. The issue that remains is whether the local authority fettered its discretion in an inappropriate way in relation to the decisions that it made.

21. Given that the legislative purpose of section 17 CA 1989 in the context of section 11 CA 2004 is different from that in sections 4 and 95 IAA 1999, it would be difficult for a local authority to demonstrate that it had paid due regard to the former by adopting a practice or internal guidance that described as its starting point either the child benefit rate or either of the IAA support rates. The starting point for a decision has to be an analysis of all appropriate evidential factors and any cross-checking that there may be must not constrain the decision maker's obligation to have regard to the impact on the individual child's welfare and the proportionality of the same.

22. There is no necessary link between section 17 CA 1989 payments and those made under any other statutory scheme; quite the contrary. The section 17 scheme involves an exercise of social work judgment based on the analysis of information derived from an assessment that is applicable to a heterogeneous group of those in need. That analysis is neither limited nor constrained by a comparison with the support that may be available to any other defined group, no matter how similar they may be to the section 17 child in need. In any event, the circumstances of those who qualify for section 17 support, those who have just arrived seeking asylum and those who have failed in their application to be granted asylum are sufficiently different that it is likely to be irrational to limit section 17 support to that provided for in a different statutory scheme.

23. In so far as it was submitted that destitution as defined by section 95 IAA 1999 i.e. an inability to meet essential living needs or inadequate accommodation, or by section 4 IAA 1999 i.e. destitution in the context of accommodation, is relevant to section 17 CA 1989, the difference between the purposes of the two statutory schemes must be borne in mind. The latter scheme is to be applied to those persons who would otherwise be ineligible for recourse to public funds in order to avoid a breach of their Convention rights. Furthermore, the section 17 scheme, unlike the IAA schemes, is not the subject of regulations that make provision for the support which is to be made available to the defined group for a specific purpose.

24. I have already observed that it is no longer asserted in this court that the local authority had an undisclosed policy to fix its financial support payments either at the child benefit rate or the central Government section 4 or section 95 IAA 1999 support rates. The judge found as a fact on evidence contained in witness statements that there was no such policy and there is no documentary material sufficient to lead to a conclusion that such a policy in fact existed. Such a conclusion would have necessitated a finding that the local authority had acted in bad faith in failing to disclose the policy, and was untenable on the basis of the evidence accepted by the judge. The submission is rather that the documents disclosed "clearly establish that the support rates in this case have been arrived at by the Respondent starting from a view that equivalent to child benefit and then section 4 rates was lawful" and that the local authority irrationally set rates at "a level significantly below that which national government regards as necessary to meet the 'essential living needs' of asylum seekers (s95 support) and/or to avert a breach of human rights for failed asylum seekers (s4 support)".

25. That amounts to an allegation that support rates were fixed by reference to those rates rather than their having been used for the purpose of cross-checking. The basis for that submission is limited to the observations of a social worker in records disclosed by the local authority *after* the hearing in November 2014. There was no mention of child benefit rates in the assessments themselves. The documents would have to be adduced as additional evidence with this court's permission if the contents were to be relied upon. Although there is no longer formal opposition to that course, the contents of all of the documents including the additional evidence, taken at their highest, are insufficient to establish a *prima facie* case on the facts of unlawful fixing of rates by the social worker. The judge held that the social worker had applied a 'bespoke approach' to the assessments that were undertaken, that the local authority had "sought to provide a detailed, case-sensitive assessment of the needs of the children" and that the "financial support was the amount actually needed by the first Claimant, taken from her rather than imposed on the basis of a notional average child's requirements". There is insufficient in the materials this court has seen to undermine those conclusions.

26. In so far as a submission was maintained that the section 17 support provided by the local authority fell short of an essential living need, for example as identified by Popplewell J in *R (Refugee Action) v Secretary of State for the Home Department* [2014] EWHC 1033 at [117], on the facts there is no conclusion in the court below which supports that submission. Furthermore, no conclusion which is relevant to that proposition has been established to be wrong.

27. In this case, the nature and extent of the financial support, accommodation and benefits in kind that were provided to or accessed by the family in this case were considerably greater than the discrete element of their financial support payments. In any event, the financial support provided exceeded child benefit rates and section 4 IAA 1999 support rates for most of the duration of the period in question. Furthermore, there were repeated assessments and consequential changes to the level of support provided. Given the quality of the bespoke assessments upon which the local authority's decisions were based and the nature and extent of those decisions as described above, there is no sufficient material upon which a court could have concluded that the financial support payments were made by reference to an irrational or inflexible rate. On the facts, the only support for that proposition was the coincidence described by the judge in these terms: "any correlation in the final sum allocated with child benefit rates is purely accidental". There is a difference of substance between an appropriate and lawful cross-check and an inflexible fixing of rates whether by the use of an extraneous and inappropriate rate as a starting point or an inflexible policy or practice.

28. If payments are made at a rate that is greater than the allegedly fixed rate then that would suggest that a *de facto* policy or practice of inflexible fixing did not exist, that a discretion was being exercised and in any event that the evidence of the rate of payment is inconsistent with a policy or a practice. Accordingly, I have come to the conclusion that the judge was right and that there was no practice or policy in this case which establishes a basis for the claim nor which is comparable to the process of set rates fixation which was criticised in *R (PO & Ors) v Newham LBC*.

29. Any submission that the local authority should have 'benchmarked' its support payments to the IAA 1999 support levels or indeed to any other fixed rate would be inconsistent with the appellant's primary submission. In any event, it would be likely to be an irrational fetter on the local authority's discretion if it were not done in the context of an appropriate evidential exercise. While every case turns on its particular facts, I note that the decision of Lewis J in *R (Mensah) v Salford City Council* [2015] EWHC 3537 (Admin), [2015] PTSR 157 recognised the different purposes of the statutory schemes and provided for flexibility of decision making based on evidential assessment. The internal guidance that survived challenge in that case set a basic or minimum payment by reference to section 4 IAA 1999 rates. That was held to be lawful given that the practice did not involve irrational fixation nor was it inflexible and the evidence was that the children's needs were met. I should not, however, be taken as endorsing *Mensah* insofar as Lewis J gave the impression in paragraphs 47-50 that the local authority's starting point should ever be amounts fixed under other statutory schemes.

30. For these reasons, I have come to the clear conclusion that there is no basis to challenge the local authority's decisions based upon a flawed policy or practice that the local authority inflexibly fixed its support payments. It did not base its decisions on such things. I am equally clear that it would have been inappropriate for the local authority to have benchmarked its payments under section 17 CA 1989 to any other statutory scheme including that applicable under the IAA 1999. Accordingly, I do not accept that there has been a breach of article 8 founding an entitlement to damages.

31. If I am wrong about the decisions of the local authority, I question whether article 8 imposes a positive obligation on the State in the factual circumstances complained of.

I accept that if a local authority fails to provide services in accordance with an assessment of need then it is arguable that an immediate and direct link is capable of being established between the measures requested and the appellant's private life. Even then, "regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation" (per Lord Brown in *R (McDonald) v Royal Borough of Kensington and Chelsea* [201] UKSC 33 at [15]).

32. Given that this court in *Anufrijeva v Southwark London Borough Council* [2003] EWCA Civ 1406, [2004] QB 1124 held that a factual situation that did not cross the necessary threshold of severity to engage article 3 would not give rise to a positive obligation to provide welfare support under article 8, unless welfare support was necessary to allow family life to continue, the decisions of this local authority were well within the margin of appreciation that the State enjoys.

**Lord Justice Vos:**

33. I agree. I also agree with the judgment of Moore-Bick LJ, which I have seen in draft.

**Lord Justice Moore-Bick VP:**

34. The circumstances giving rise to this appeal have been described by Ryder L.J., whose account I gratefully adopt.

35. The principal question we have to decide is whether the respondent, the London Borough of Southwark, acted unlawfully in determining the rate at which it provided financial support to the appellants, C and her children T, M and U. Mr. Richard Drabble Q.C., appearing on their behalf, submitted that it did, because it fixed the rate of support artificially by reference to, or at any rate having in mind, the amount payable in respect of child benefit or the support payable to asylum seekers or failed asylum seekers under sections 4 and 95 of the Immigration and Asylum Act 1999. That, he submitted, was unlawful, because the level of support required to comply with the local authority's duty under section 17 depended upon an assessment of the children's particular needs. Moreover, since neither of those benefits was set at a level that was intended to provide sufficient means to support a family with children, the local authority's conduct was irrational in the public law sense. It also involved a breach of the appellants' rights under article 8 of the European Convention on Human Rights.

36. Miss Fenella Morris Q.C. submitted that the local authority did assess the needs of the family on a regular basis, taking account of the support they received from time to time from other sources, and that it provided financial support at an appropriate level. Any regard that it had to the level of child benefit or asylum seeker's support was for the purposes of reassuring itself that the amount it was providing was not wholly out of line with the amount payable to those who were eligible for support from public funds.

37. The judge found that the local authority sought to provide detailed case-sensitive assessments of the needs of the children and that the package of support it provided (which included accommodation and other benefits) was sufficient to meet the children's needs.

38. As Ryder L.J. has explained, section 17(1) of the Children Act 1989 imposes on local authorities a duty of a general kind to safeguard and promote the welfare of children in need within its area by providing a range and level of services appropriate to their needs. In the case of this family that involved the provision of accommodation and adequate financial support to ensure that they had access to the essentials of life. It is a duty that must be discharged in accordance with the requirements of section 11(2) of the Children Act 2004, that is, having regard to the need to safeguard and promote the welfare of children. The amount of support, in whatever form it may take, will inevitably vary from case to case and will therefore have to be the subject of individual assessment.

39. On 21st May 2012 the children's mother, C, approached the local authority's children's department seeking assistance. An assessment of the family's needs was set in motion the same day and led to the conclusion that their immediate need was for accommodation. Subsequent assessments were undertaken at intervals, leading to the continued provision of accommodation as well as financial support to enable them to cover the costs of food and basic household items. Ryder L.J. has described those assessments and their outcomes. It is to be noted both that C put forward her own assessment of the family's need based on a 'shopping list', which in broad terms was accepted by the local authority, and that the judge's findings demonstrate that the needs of the family were in fact met and that the children were well looked after and thriving. Ultimately, however, the only question for us is whether the local authority arbitrarily fixed the rate of financial support it was willing to provide by reference to other statutory benefits instead of the assessed needs of the family.

40. I am not persuaded that it did. The financial and other support provided to the family was based on frequent assessments including on occasions C's own calculation of what was needed to provide a modest but adequate way of life. The judge's findings show that C was a very capable mother, who was able to provide well for her family in difficult circumstances, making good use of the assistance she received from a variety of sources. It was accepted that the social workers responsible for assessing the children's needs had an eye to the amounts payable by way of other benefits, but I am not persuaded that they treated them as in any sense a starting point or benchmark for determining the amount of support this family needed.

41. Mr Drabble submitted that it was not appropriate for the local authority to use other statutory benefits as even a cross-check, having undertaken the necessarily specific needs assessment. In my judgment, that submission cannot be sustained and is at odds with common-sense.

42. In view of the judge's findings to which I have referred I am also not persuaded that the level of support provided to the appellants was such as to amount to a breach of their rights under article 8 of the European Convention on Human Rights.

43. In *R (Mensah) v Salford City Council* [2015] EWHC 3537 (Admin) Lewis J. had to consider a similar question in relation to the determination by the local authority of the level of support that they provided under section 17 of the Children Act 1989. In that case the local authority had adopted a policy of basing its assessment of the amount that should be paid in cash (in addition to the provision of accommodation) on the amount payable to destitute failed asylum seekers under section 4 of the Immigration and Asylum Act 1999, subject to a degree of flexibility as necessary. The

applicants challenged the policy on the grounds that it was irrational. They argued that the purpose of section 4 of the Immigration and Asylum Act 1999 was quite different from that of section 17 of the Children Act 1989, so that the support available under that section could provide no guide to what might be necessary to meet the needs of the children in each individual case. Lewis J. dismissed the claim. He held that it was for the local authority rather than the court to determine the appropriate level of support and that the policy adopted by the council in that case was prima facie rational. There was, in his view, nothing inherently unlawful in one public body having regard to the level of subsistence payments fixed by another public body as being necessary to avoid or alleviate destitution. He also said that it was prima facie rational for the local authority to have used as a base figure the amount provided by central government to failed asylum seekers who appeared to be destitute.

44. Miss Luh, who appeared for the intervener submitted that *Mensah* had been wrongly decided. It is unnecessary for the purposes of this appeal to reach any final conclusion on that question. Much might depend on the approach that the local authority adopted in practice and whether the local authority's consideration of the base figure for failed asylum seekers effectively restricted its ability to make a proper assessment of the needs of the children in question. It does seem to me, however, that a level of support considered adequate simply to avoid destitution in the case of a failed asylum-seeker is unlikely to be sufficient to safeguard and promote the welfare of a child in need and by extension the essential needs of the parent on whom the child depends for care. Ultimately what matters is whether the assessment when completed adequately recognises the needs of the particular child.

45. I agree with Ryder L.J. that the two ancillary applications should be allowed for the reasons he gives. However, for the reasons I have given, which are essentially the same as those of Ryder L.J., I would dismiss the appeal.