

Case No: CO/562/2014 & CO/564/2014

Neutral Citation Number: [2014] EWHC 3537 (Admin)

**IN THE HIGH COURT OF JUSTICE**

**QUEEN'S BENCH DIVISION**

**ADMINISTRATIVE COURT**

Manchester Civil Justice Centre  
1 Bridge Street West, Manchester  
M60 9DJ

Date: 28/10/2014

**Before :**

**MR JUSTICE LEWIS**

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**Between :**

<b>PAULINA MENSAH</b>	<b><u>Claimant</u></b>
<b>- and -</b>	
<b>SALFORD CITY COUNCIL</b>	<b><u>Defendant</u></b>

<b>ABIOLA BELLO</b>	<b><u>Claimant</u></b>
<b>-and-</b>	
<b>SALFORD CITY COUNCIL</b>	<b><u>Defendant</u></b>

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**Mr Ben McCormack** (instructed by **Platt Halpern Solicitors**) for the **Claimants in both cases**

**Mr Hilton Harrop-Griffiths** (instructed by **Manchester City Council** supplying legal services to **Salford City Council**) for the **Defendant in both cases**

Hearing date: 16<sup>th</sup> October 2014  
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**Judgment**

Mr Justice Lewis:  
INTRODUCTION

1. This is a claim for judicial review of the policy adopted by Salford City Council (“the Council”) for calculating the amount of financial assistance to be provided under section 17 of the Children Act 1989 (“the 1989 Act”) to meet the needs of children and their parents who are destitute as they had no accommodation and no means of providing for their living requirements, in circumstances where the parents are non-British nationals who, by reason of their immigration status, are not eligible to claim social security benefits or housing benefits.
2. The Council’s policy is to provide each family with accommodation and to pay the utility bills and council tax for the property. In addition, each family also receives a sum of money by way of financial assistance. The Council has a policy of calculating the basic amount of financial assistance to be provided by reference to the amount that the Secretary of State would provide to a failed asylum seeker and his or her dependants to enable them to purchase food and essential toiletries, pursuant to section 4 of the Immigration and Asylum Act 1999 (“the 1999 Act”). The policy has a degree of flexibility within it and the Council may provide assistance in excess of this level if it is needed.
3. The claimants contend that this approach to calculating the level of assistance is unlawful. They contended that it is not lawful to use a level of support calculated for one statutory purpose, the provision of subsistence for failed asylum seekers, for a different statutory purpose namely the performance of a duty intended to safeguard and promote the welfare of children in need, or that it is irrational to do so.

THE FACTUAL BACKGROUND

Ms Mensah

4. Ms Mensah is a national of Ghana. She came to the UK on 19 May 2010 on a visitor’s visa. She met and formed a relationship with a man and became pregnant by him. Ms Mensah gave birth to a child, Edwin, in March 2011. He is now 3 years old. The relationship between Ms Mensah and the father broke down. Ms Mensah first stayed with friends, and then the pastor of her church for a period of some five or six months. It was not feasible for Ms Mensah and Edwin to remain there after August 2013. Ms Mensah therefore approached the Council in July 2013 for assistance under section 17 of the 1989 Act.
5. The Council carried out an initial assessment of Edwin’s needs. The initial assessment noted that the main factor which prevented Ms Mensah from meeting Edwin’s needs arose from her immigration status. She was not entitled to have recourse to social security benefits or housing benefits and was potentially homeless.
6. The Council subsequently provided accommodation in the form of bed and breakfast accommodation. In April 2014, Ms Mensah was provided with a furnished, self-contained flat. The flat has two bedrooms, a sitting room, a kitchen and a bathroom. The furnishings include a cooker and a fridge. The Council pays

the rent of £189.50 a week (which includes utility bills). The Council also pays the council tax for the property. In addition, Ms Mensah receives £45 a week from the Council, and £25 a week from Edwin's father. The Council has also provided additional assistance from time to time by way of additional furniture, bedding, a microwave oven, and toys and clothing for Edwin as needed. Clothing was provided on 4 July 2014 and a sum of £79 was provided for clothing on 15 July 2104. It is proposed to provide additional winter clothing for Edwin when the weather becomes colder.

7. Edwin has also been identified as having significant delay in his physical development and his speech and language. He has been provided with support from a speech and language therapist, a community paediatrician and the audiology service. He attends a nursery, under an induction course, for two hours a day two days a week and the numbers of hours is to increase.
8. Ms Scragg, who is a family support worker, has had responsibility for Edwin's case since 10 April 2014. She visits Ms Mensah and Edwin approximately every three weeks. She explains that during each visit she is able to discuss with Ms Mensah the current levels of support provided and any needs for additional support that they may have. Ms Scragg sets out the support currently being provided to Ms Mensah in her two witness statements. At the end of her first statement, she concluded that:

“My view is that Ms Mensah is able to meet Edwin's needs with the support currently available to her. In the event that Edwin has any additional needs a request is made to senior management within Children's Services who will consider each request on its merits.”

9. Ms Mensah has also made two witness statements. The first concerned the situation when she was provided with bed and breakfast accommodation. The second, signed on 16 September 2014, was made after she and Edwin had moved to the flat. Ms Mensah explains that she has no complaint about her accommodation and that she is grateful for the accommodation. She explains that she is given £100 a month by Edwin's father and £90 a fortnight from the Council. Her total income is £68.04. Ms Mensah explains in detail that she has to pay £13.50 for a weekly bus pass and has to pay £1.15 a week to the National Health Service as she was charged for her maternity care. She has a mobile phone which costs £2.50 a week. That leaves her with £50.89 a week to spend on food and essential toiletries for both her and Edwin. She explains how she gives priority to ensuring that Edwin has sufficient healthy food and she herself eats what is available and drinks only water. She is not able to provide Edwin with the kind of activities usually enjoyed by children, such as swimming or days out, as she simply has no money to pay for them. She explains that their lives therefore are very limited, and she cannot give her son the opportunities that other children have and is concerned that this may have an impact on his development. She explains that life is very hard and, if there is any unexpected expenditure (such as, for example, a fee of £140 that she had to pay for a tribunal hearing in connection with her immigration status) that leaves her without money to buy sufficient food.

Ms Bello

10. Ms Bello is a national of Nigeria. She first came to the United Kingdom in about 2006. She formed a relationship with a British national. She returned to Nigeria but returned on a number of occasions to the UK to visit him. They had three children, one born on 22 September 2008, one on 24 April 2011 and the youngest born on 8 September 2012. The children are, therefore, 6, 3 and 2 years old. The relationship between Ms Bello and the father of the children broke down and they are no longer together. Ms Bello decided to come and settle permanently in the United Kingdom in July 2012 as she wished her three children, who are British nationals, to grow up in the United Kingdom.
11. In her witness statement, Ms Bello says that she initially lived with her sister who was working at a bank and could support and accommodate Ms Bello and the three children. Her sister was eventually relocated with her work and moved to a two-bedroom flat in Salford. The sister occupied one bedroom and Ms Bello and her children the other. In October 2013, however, the sister returned to Nigeria.
12. Ms Bello then approached the Council for assistance. The Council carried out an assessment of needs for each of the three children. At that stage, Ms Bello had not been given leave to remain in the United Kingdom under the Immigration Rules and was not entitled to claim social security benefits or housing benefits. The assessments note that there were no concerns over Ms Bello's care for her children. The assessments noted that the "risks are that the children will be destitute" without support from the Children's Services department of the Council and consequently that the Council would support Ms Bello financially and pay for bed and breakfast accommodation.
13. Initially, the family were provided with temporary bed and breakfast accommodation but were then provided with a first floor, two-bedroomed self-contained flat. The only flat that could be found was outside Salford as private landlords were unwilling to rent a property to a person such as Ms Bello who did not have leave to remain in the United Kingdom. The flat is opposite a bus stop from where a bus travels directly to the oldest child's school. The Council has been looking for alternative accommodation for the family closer to the school.
14. The flat has two bedrooms, a living room, a kitchen and a bathroom. It is furnished with beds, wardrobes, a sofa and armchair, a dining table and four chairs and a cooker and fridge/freezer. There are two double beds in one bedroom, and a single bed and bunk beds in the other. A washing machine was subsequently installed in the flat. Ms Bello brought some items with her such as bedding and utensils and the Council provided the additional bedding and crockery that the family needed. The Council also provided £50 for essential items when Ms Bello moved in. The rent for the flat is £189.50 a week and includes utilities. The rent and council tax is paid by the Council. The Council has provided second hand clothing for the family. The Council has also provided money for a school uniform for the oldest child. Ms Bello was initially provided with bus passes and £46.10 a week from 28 October until 20 January 2014. At that point, payments were increased to £51.10 per week together with bus passes. On 17 February 2014, payments to the family were increased to £140 a week but without bus passes.

15. Ms Scragg is also the family support worker with responsibility for Ms Bello's children's. She visits the children and Ms Bello approximately every two weeks. She explains that during each visit she is able to discuss with Ms Bello the current levels of support provided and any needs for additional support that the family may have. Ms Scragg sets out the support currently being provided to Ms Bello and the children, together with the additional support and payments that have been made over time, in her two witness statements. In her first statement, Ms Scragg expresses the view that "Ms Bello is able to meet each of the children's needs with the support currently available to her". She notes again that in the event that any of the children have additional needs, a request may be made to senior management and, if considered appropriate, additional funding can be provided.
16. Ms Bello has made two witness statements in connection with these proceedings. The second was made after Ms Bello was provided with the two-bedroomed flat. She considers that the flat is over-crowded for her and three children and is difficult to access with a pram. Ms Bello considers that the distance from the flat to her oldest child's school is a major problem as the bus journey can take up to one hour each way and she needs to take all three children. She says she spends up to four hours a day travelling. Ms Bello says that the other main problem is the limited financial support she receives of £140 a week. In her second statement, Ms Bello sets out the expenditure on bus travel, which leaves her £119.22 a month. Her mobile phone costs £8.76 a week leaving her with £110.46 for nappies and other essential toiletries and food for the family. After paying for nappies and toiletries, she says that she has £91.46 a week to spend on food for the family or £3.26 per person per day. She states that she is usually able to survive day to day but there are days when she does not eat because she can only afford enough food for the children but accepts that these days are few in number. She notes that she is unable to afford any unexpected expenses. She feels humiliated and powerless that she has to ask social services for every additional item that is needed or expense that is incurred. Ms Bello says that: "The truth is because the money they give me is not enough, it pays for food and every day essentials but no more."
17. Ms Bello applied in January 2013 to the Secretary of State for the Home Department for leave to remain in the United Kingdom under the Immigration Rules. On 15 April 2014, the Secretary of State granted Ms Bello leave to remain in the United Kingdom for a period of 30 months but subject to a condition that she had no recourse to public funds. That meant that she was not eligible to claim social security benefits or housing benefits. The Secretary of State has a policy whereby that condition may be removed in cases where the person is destitute or there are particularly compelling reasons relating to the welfare of children of a parent in receipt of a very low income. On the day of the hearing, counsel for the claimant informed the court that Ms Bello had been informed that the Secretary of State had decided to remove the condition.

#### *The Council's Policy*

18. By letters dated 6 February 2014 to solicitors for Ms Mensah and Ms Bello respectively, the Council explained that they were providing funding which was equivalent to the funding provided by the Home Office under section 4 of the 1999 Act. In Ms Mensah's case, that was the figure for a single adult and 1 child, amounting to £70 a week, but the Council would deduct the amount of £25 a week

to reflect the money provided by Edwin's father, together with suitable accommodation. In Ms Bello's case, that was a figure for 1 adult and 3 children, amounting to a payment of £140, together with suitable accommodation.

19. The Council's financial position and its policy in relation to the provision of assistance to families who are unable to claim social security benefits and housing benefits is explained in the witness statement of Mr Gordon, the interim head of service for child protection and children in need. He explains firstly that Salford has a population of approximately 230,000 and is ranked as the 15<sup>th</sup> most deprived local authority area nationally. The Children's Services department is responsible for a wide range of services, including child protection, adoption and fostering, services for looked after children, special educational needs and young people needing care. The Council has been required to make savings in its expenditure as a result of a reduction in funding from central government. This will amount to savings of £25 million in 2014/2015 and a further £30 million in 2015/2016. The Children's Services department are committed to achieving savings of £5,674,000 or 8.6% of its budget during the present financial year.
20. Against that background, the Council has a budget for meeting its duty under section 17 of the 1989 Act to safeguard and promote the welfare of children in its area who are in need. The budget for 2013/2014 was £107,000 although expenditure for that year was in fact £112,000. That budget is usually used to provide short-term support or one-off payments to families. Generally, the assistance is time-limited (12 weeks for child care costs and six weeks for other assistance) and subject to review and it must first be established that support is not available from other sources such as social security benefits or charitable organisations. However, the budget also has to be used to pay for those whose immigration status is such that they are not permitted to have recourse to public funds and where support may have to be provided for longer than six weeks. These payments are dealt with in paragraphs 8 and 9 of Mr Gordon's statement where he says this:

“8. This budget is used to pay for support for families who have no recourse to public funds (or NRPF, as it is sometimes put), in order to alleviate destitution and therefore avoid a breach of their human rights. They include families who are failed asylum-seekers, others with no right to reside or remain in the UK and who are awaiting immigration decisions from the Home Office and those, like Ms Bello, who have been granted leave but with a condition of no recourse to public funds. In Salford the cost of supporting such families has increased from £1191 in 2010/11 to a projected spend of £44,981 (on six families) in 2014/15.”

“9. Salford recognises that it may have to support such families for much longer than 6 weeks and because of the recent increase in numbers it has decided to review its provision for them. It considers that for administrative convenience and fairness there should be a base level rather than that its social workers should have to calculate in every case precisely how much assistance is needed- but with the flexibility for assistance in excess of this level if it is needed. Initially Salford decided, in February 2014, to pay subsistence at a rate equivalent to that paid by central government to failed asylum-seekers and their dependants. This position has since been confirmed by the council. I understand it is the level of assistance currently provided by the

majority of local authorities, including Manchester City Council, Salford's largest neighbour, and Birmingham City Council, which is the largest local authority in England and Wales."

21. In paragraph 10 and 11, Mr Gordon indicates that the Council considered the current rates of payments by the Home Office to different categories of persons, namely asylum seekers (who are provided with accommodation and assistance under section 95 of the 1999 Act to meet their essential living needs), and failed asylum seekers (who are provided with accommodation and assistance to meet provide food and toiletries under section 4 of the 1999 Act, which is the measure of assistance used by the Council in calculating its base level of support) and benefits. He says this:

"10. In coming to its decision Salford has considered the current rates of payments made by the Home Office to asylum-seekers and to failed asylum-seekers. It has also considered the level of payment made to families who are eligible for State benefits."

"11. It is of note that in the case of a single adult with one child the value of the assistance provided by Salford, on taking into account the amount paid for rent and utility bills, compares very favourably with the amount that the family would be entitled to if they were in receipt of State benefits. Salford currently pays rental of £189.50 per week, which includes payment of all utility bills and council tax; together with £70 per week subsistence, with an additional £5 per week for a child under 1 and £3 per week for a child aged 1 to 3. Therefore, in Ms Mensah's case she receives assistance to the value of £262.59 per week (including £25 a week from Edwin's father), whereas she would receive a total of £270.41, including housing benefit, if she were on State benefits. Ms. Bello receives assistance to the value of £335.50 per week and if she were on State benefits she would receive £355.76, including housing benefit. On asylum support rates they would receive £286.40 and £392.50 respectively."

22. At paragraph 12, Mr Gordon also confirms that its policy includes the following commitment:

"Further, Salford will maintain a clear commitment to making additional payments where there is an assessed need to do so."

23. Finally, at paragraph 13, Mr Gordon expresses his view as to the approach taken by the Council and says this:

"Salford is satisfied that its approach is a fair one, on taking into account its role in alleviating destitution in such cases and the other demands on its budget. It sets a reasonable benchmark and provides a clear baseline for the provision of subsistence that allows a timely decision to be take regarding provision of funding, together with the flexibility that allows additional funds to be made available to ensure that a child's needs are met."

## THE ISSUES

24. Cranston J. granted permission on two issues only, namely:

- (1) the principal issue, that is whether the Council's assessment of the needs of the claimants' children,

and the manner in which it would meet those needs, was irrational in that it sought to set as a guide to the level of financial support for subsistence payable by it under section 17 of the 1989 Act the sums payable to failed asylum- seekers and their dependants under section 4 of the 1999 Act;

- (2) a subsidiary issue, that is whether the Council had failed to recognise that the claimants had derived rights of residence when assessing the services to be provided under section 17 of the 1989 Act?

25. In considering those issues, it is necessary to consider:

- (1) the legal basis upon which the claimants are entitled to remain in the United Kingdom and the relationship between their immigration status and access to social security and housing benefits;
- (2) the arrangements by which the Secretary of State provides support for asylum seekers, and for failed asylum seekers and others;
- (3) the provisions of the 1989 Act under which local authorities may provide assistance for children in need and their families.

## THE LEGAL FRAMEWORK

### *Immigration Status and Eligibility for Benefits*

26. The first basis upon which the claimants may be entitled to remain in the United Kingdom is European Union law. The claimants' children, as British nationals, are citizens of the European Union by virtue of Article 20 of the Treaty on the Functioning of the European Union. The Court of Justice of the European Union has held that a third country national who is the primary carer of a child who is a citizen of the European Union must be accorded the right to reside in the Member State in question, and the right to work, if refusal of such rights would have the effect that the child would have to leave the territory of the European Union: see case C-34/09 *Ruiz Zambrano v Office national de l'emploi* [2012] Q.B. 265 at paras. 41 to 45.

27. That right is now provided for in domestic law by regulation 15A of the Immigration and Asylum (European Economic Area) Regulations 2006 ("the EEA Regulations"). The material provisions of that regulation provide that:

“(1) A person (“P”) who is not an exempt person and who satisfies the criteria in paragraph (2), (3), (4), (4A) or (5) of this regulation is entitled to a derivative right to reside in the United Kingdom for so long as P satisfies the relevant criteria.

.....



(4A) P satisfies the criteria in this paragraph if –

(a) P is the primary carer of a British citizen (“the relevant British citizen”);

(b) the relevant British citizen is residing in the United Kingdom;

(c) the relevant British citizen would be unable to reside in the UK or in another EEA State if P were required to leave.”

28. Whilst a primary carer has a derivative right to reside in the United Kingdom by virtue of the EEA Regulations, he or she is not eligible to claim social security benefits, child benefits, tax credits or housing benefits. That situation is brought about three sets of regulations amending the principal regulations under which such benefits are paid, namely the Social Security (Habitual Residence) (Amendment) Regulations 2012, the Allocation of Housing and Homelessness (Eligibility) (England) (Amendment) Regulations 2012, and the Child Benefit and Child Tax Credit (Miscellaneous) Regulations 2012 (“the Amending Regulations”). A challenge to the lawfulness of those Amending Regulations failed in *R (HC) v Secretary of State for Work and Pensions and others* [2013] EWHC 3874 (Admin.). Permission to appeal has been granted by the Court of Appeal.
29. The Council accepts that, at the material time, Ms Mensah and Ms Bello each had a derivative right to remain in the United Kingdom but that right does not confer eligibility upon them to claim social security or housing benefits.

*Leave to Remain under the Immigration Rules or Outside the Immigration Rules*

30. In addition, the claimants may be eligible for leave to remain under the provisions of the Immigration Rules (in particular, Appendix FM dealing with eligibility for parents to remain in the United Kingdom) or, alternatively, on the basis of an exercise of discretion outside the Immigration Rules (for example, on the basis that removal would involve a breach of Article 8 of the European Convention on Human Rights and the right to respect for family life).
31. Under present Home Office policy, leave to remain is normally given for a certain period of time and may be extended and may, ultimately, lead to the grant of indefinite leave to remain. Conditions may be attached to leave to remain including a condition that the person is not allowed to have recourse to public funds. Such a condition would prevent the person granted leave to remain claiming social security or housing benefits. The Secretary of State currently has a policy, described in section 12 of the Immigration Directorate Instructions on Family Migration, providing for the grant of leave to remain without the imposition of that condition where the applicant is destitute or there are particularly compelling reasons relating to the welfare of a child of a parent in receipt of a very low income. It appears that the Secretary of State is also prepared to entertain an application to remove the condition if the person concerned subsequently establishes that he or she is destitute.
32. Ms Bello applied for leave to remain in the United Kingdom. On 4 April 2014, she was granted discretionary leave to remain in the United Kingdom for 30

months on the basis that her removal would contravene her right to respect for family recognised by Article 8 ECHR. That leave was subject to a condition that she not have recourse to public funds. That leave would enable her to remain in the United Kingdom but would not enable her to claim social security and housing benefits. That is the reason why she continued to rely upon the provision of assistance by way of accommodation and financial support from the Council. Now that that condition has been, or is about to be removed, Ms Bello will be able to claim social security benefits and housing benefits assuming that she meets the other criteria for the grant of such benefits.

Central Government Support for Asylum Seekers and Failed Asylum Seekers

*Asylum-Seekers*

33. Section 95(1) and (3) of the 1999 Act provides that:

“(1) The Secretary of State may provide, or arrange for the provision of support for –

- (a) asylum-seekers, or
- (b) dependants of asylum seekers,

who appear to the Secretary of State to be destitute or to be likely to become destitute within which such period as may be prescribed.

.....

“(3) For the purposes of this section, a person is destitute if -

- (a) he does not have adequate accommodation or any means of obtaining it (whether or not his essential living needs are met); or
- (b) he has adequate accommodation or the means of obtaining it, but cannot meet his other essential living needs.”

34. Support may be provided by providing accommodation and the essential living needs of the supported person and any dependants: see section 96 of the 1999 Act. Section 95(12) and Schedule 8 to the 1999 Act provide for the Secretary of State to make regulations making further provision with respect to the powers conferred by section 95, including powers to prescribe the levels of support. The Secretary of State has made the Asylum Support Regulations 2000 (“the 2000 Regulations”). Regulation 10 provides as follows:

“10. – Kind and levels of support for essential living needs

- (1) This regulation applies where the Secretary of State has decided that asylum support should be provided in respect of the essential living needs of a person.
- (2) As a general rule, asylum support in respect of the essential living needs of that person may be expected to be provided weekly in the form of cash, equal to the amount shown in the second column of the following Table opposite the entry in the first column which for the time being describes that person.”

Table

Qualifying Couple	£72.52
Lone parent aged 18 or over	£43.94
Single person aged 25 or over (where the decision to grant support was made prior to 5 <sup>th</sup> October 2009 and the person reached age 25 prior to that date)	£42.62
Any other single person aged 18 or over	£36.62
Person aged at least 16 but under 18 (except a member of a qualifying couple)	£39.80
Person aged under 16	£52.96

35. There are additional payments for pregnant women and an additional £5 a week for a child until his or her first birthday and £3 a week until his or her third birthday: see regulation 10A of the 2000 Regulations.

*Failed Asylum-seekers*

36. Section 4 of the 1999 Act provides power to provide facilities for the accommodation for certain groups of persons. Section 4(1) deals with persons temporarily admitted to the United Kingdom or released from detention or granted bail. The material provision for present purposes is section 4(2) of the 1999 Act dealing with failed asylum-seekers. That provides that:

“(2) The Secretary of State may provide, or arrange for the provision of accommodation of a person if -

- a) he was (but is no longer) an asylum seeker, and
- b) his claim for asylum was rejected.”

37. Regulations made under section 4(5) of the 1999 Act provide that a failed-asylum seeker must satisfy certain conditions in order to be eligible for accommodation. These include a condition that the asylum-seeker “appears to the Secretary of State to be destitute”: see regulation 3 of the Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005 (“the 2005 Regulations”). “Destitute” is to be construed in accordance with section 95(3) of the 1999 Act: see regulation 2 of the 2005 Regulations.
38. In the case of both section 4 and 95 of the 1999 Act, destitution is an essential pre-condition for eligibility. The power in section 4 of the 1999 Act is, however, a power to provide for facilities for accommodation (not to provide accommodation and essential living needs as is the case in relation to section 95 and 96 of the 1999 Act). Any services provided under section 4 must be related to the accommodation, in that they must be intended to enable the individual to live in the accommodation. The facilities for accommodation that may be provided under

section 4 are, therefore, understood to comprise the accommodation itself, and also food and essential toiletries. They are not understood to include other aspects of essential living needs such as clothing. As such, the facilities provided to a failed asylum seeker will not include all of a failed asylum-seeker's essential living needs: see *R (MK) v Secretary of State for the Home Department* [2011] EWCA Civ 671 at paras. 14 to 17. The range of facilities provided under section 4(2) of the 1999 Act will, therefore be less than the facilities provided under section 95 of the 1999 Act which are intended to meet a destitute asylum-seeker's essential living needs.

39. Section 4(10) of the 1999 Act, however, enables the Secretary of State to make regulations for the provision of services or facilities of a specified kind in addition to the facilities provided under section 4(2). The Secretary of State has made the Immigration and Asylum Act (Provision of Services or Facilities) Regulations 2007 ("the 2007 Regulations"). These Regulations empower the Secretary of State to provide facilities for specified types of travel, telephone calls and letters, and vouchers for pregnant women and new mothers. Regulation 7 of the 2007 Regulations also provide for additional vouchers worth £5 a week for a child until his or her first birthday or £3 a week until his or her third birthday. Regulation 8 provides for the provision of weekly vouchers for clothing in the sum of £5 a week until a child achieves the age of 16. Regulation 9 deals with the provision of other facilities including, in exceptional circumstances, essential living needs.
40. The Secretary of State has not prescribed in regulations the basic amount of support to be provided under section 4(2) of the 1999 Act. The amount currently provided is in fact £35.39 a week and is provided by means of a payment card which can be used to purchase goods rather than a cash sum. The assumption in argument was that this amount was intended to meet the need for food and toiletries (but not clothing). The evidence before the court included internal Home Office guidance which indicates at section 2.3 that support is intended to meet "essential daily living needs". It does not state whether it is intended to cover food and toiletries only or whether it also includes clothing. The evidence, however, also included a copy of an extract from a government website. That indicates that a person who has been refused asylum will be provided with somewhere to live and "£35.39 a week per person on a payment card for food, clothing and toiletries." That appears to suggest that the sum is a combination of £30.39 a week for food and toiletries which may be provided under section 4(2) of the 1999 Act and the £5 voucher for clothing payable under regulation 8 of the 2007 Regulations. In addition, the website refers to the additional payments for pregnant women, new mothers and children under the age of 1 and 3 provided for by the 2007 Regulations. For present purposes, however, I proceed on the assumption made in argument (and which is the most favourable to the claimants) that the sum of £35.39 is intended to provide for food and toiletries (but not clothing).
41. On that basis, the important points to note are that the provision under section 95 is intended to meet the essential living needs of a destitute asylum-seeker in the sum of £43.94 for a lone parent and £52.96 for a child under 16 (with additional payments of £5 or £5 for a child under 1 or 3 years old respectively). The payment under section 4(2) is triggered by destitution but is payable only to meet food and

toiletries, not essential living needs, and is £35.39 per person (whether an adult or a child) with an additional £5 or £3 for a child under 1 or 3 years respectively.

42. Neither Ms Mensah nor Ms Bello have ever claimed asylum nor, consequently, have they have had such a claim refused. They have, therefore, never been eligible for support or assistance under either section 95 or section 4 of the 1999 Act. The only basis for them to seek assistance when they did was by means of seeking assistance for their children, and them, under the 1989 Act.

*Assistance under the 1989 Act*

43. The material provisions of section 17 of the 1989 Act provides as follows:

“17.— Provision of services for children in need, their families and others.”

“(1) It shall be the general duty of every local authority (in addition to the other duties imposed on them by this Part)—

(a) to safeguard and promote the welfare of children within their area who are in need; and

(b) so far as is consistent with that duty, to promote the upbringing of such children by their families,

by providing a range and level of services appropriate to those children's needs.”

“(2) For the purpose principally of facilitating the discharge of their general duty under this section, every local authority shall have the specific duties and powers set out in Part 1 of Schedule 2.”

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

.....

“(6) The services provided by a local authority in the exercise of functions conferred on them by this section may include providing accommodation and giving assistance in kind.”

“(7) Assistance may be unconditional or subject to conditions as to the repayment of the assistance or of its value (in whole or in part).”

“(8) Before giving any assistance or imposing any conditions, a local authority shall have regard to the means of the child concerned and of each of his parents.”

.....

“(10) 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;

(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.”

“(11) For the purposes of this Part, a child is disabled if he is blind, deaf or dumb or suffers from mental disorder of any kind or is substantially and permanently handicapped by illness, injury or congenital deformity or such other disability as may be prescribed; and in this Part—

“*development*” means physical, intellectual, emotional, social or behavioural development; and

“*health*” means physical or mental health.”

44. Section 11 of the Children Act 2004 also imposes a duty on the Council to make arrangements for ensuring that their functions are discharged having regard to the need to safeguard and promote the welfare of children

## DISCUSSION

### *The Principal Issue – The Lawfulness of the Council’s Policy on The Provision of Assistance*

45. The Council in the present case has assessed the needs of the children of each claimant. For present purposes, they are children in need as their mother, who is the sole carer, is unable to provide accommodation for them or to provide for their material needs such as food, toiletries and clothing. They are, therefore, destitute. The Council has, therefore, decided that the children, and their mothers, should be provided with accommodation in the form of a self-contained, furnished flat. The Council has, further, decided to provide assistance in the form of cash payments for the children and their mothers to enable them to acquire the basic means of subsistence. In fixing the basic amount considered appropriate to meet their subsistence needs, the Council has used the amount determined by the Secretary of State as appropriate in cases involving the provision of food and toiletries to failed asylum-seekers, but with flexibility to provide assistance in excess of this level if it is needed.
46. The claimants contend that such an approach is unlawful. They contend that such an approach is irrational, and involves using the power for a purpose not consistent with Part III of the 1989 Act. The purpose of the section 17 power is to promote and safeguard the welfare of children. The use of an amount calculated for a different statutory purpose – the minimum levels to be provided for a failed asylum-seeker – is, the claimants submit, not consistent with the purpose for which the section 17 power was conferred. Further, the services provided under section 4(2) of the 1999 Act are said not to be intended to provide for the essential

living needs of a failed-asylum seeker and it is therefore inappropriate or inapt to use that figure as a means of assessing the appropriate sum for subsistence levels for the claimants and their children. The claimants point to the difference between the payment under section 95 of the 1999 Act which are said to meet the essential living needs of asylum seekers and fix that at a sum of £43.94 for a lone parent and £52.96 for a child under 16 and contrast that with the payment under section 4(2) of the 1999 Act which are not intended to meet all essential living needs and are fixed at a sum of £35.39. Whilst not contending that the level of payment under section 95 of the 1999 Act would be a rational, lawful basis of support, the claimants do contend that the differences indicate that a sum based on the section 4(2) amount is unlawful. The claimants also contend that the payment under section 4 is intended to be a short-term payment for failed asylum-seekers who should be seeking to return to their countries of origin whereas the payments made under section 17 of the 1989 Act may continue for months or even years.

47. The starting point, in my judgment, is that the provision made by the Council is intended to address a particular set of needs arising from destitution. The authority has decided to provide accommodation so that destitute children, and their parents, will have a place in which to live. Furthermore, the Council has decided to provide payments to alleviate the destitution. The Council has done that by calculating a basic amount rather than leaving it to each individual social worker to calculate the appropriate figure in each case. Further assistance can be provided if necessary. In calculating that basic amount, the Council has considered the figures used by other public bodies to inform its determination of the basic figure needed to address the risk of destitution. In that regard, the Council has decided to use as a base figure the amount provided to failed asylum-seekers by central government who appear to be destitute.
48. In my judgment, that is, *prima facie*, a rational approach for the Council to take. It is for the local authority, not the courts, to determine what is the appropriate amount in cash that should be paid to alleviate destitution and meet the subsistence needs of a destitute family which includes children in need for whom the authority determines to provide assistance. The local authority has the expertise, and the awareness of the claims upon its resources, to make the necessary judgments. The function of the court is to review the lawfulness of the local authority's decision not to substitute its view for that of the local authority as to the appropriate level of assistance to be provided. The decision of the local authority may only be challenged if the authority breached one of the well-established principles of public law. See, in this regard, the observations of Popplewell J. in *R (Refugee Action) v Secretary of State for the Home Department* [2014] EWHC 1033 (Admin.) at para. 3 and of Mr Howell Q.C. sitting as a High Court Judge in *R (PO) v The London Borough of Newham* [2014] EWHC 2561 (Admin.) at para. 15.
49. First, there is 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.
50. Secondly, such an approach does not involve a failure to exercise the power conferred by section 17 of the 1989 Act to promote or safeguard the welfare of children. The Council has not confused the statutory purpose underlying the 1989

Act with the different purpose of providing facilities for the accommodation of failed asylum-seekers under section 4 of the 1999 Act. Rather, the Council is dealing with children who are in need because they face destitution. Given the pressures upon their budget, the Council has to assess the amount they consider appropriate to avoid the risk of destitution. In that respect, the Council has had regard to the amounts that other public bodies consider necessary, as a minimum, to avoid destitution. That is, in principle, a lawful approach.

51. The claimants rely upon the decision of the Divisional Court in *R (VC) v Newcastle City Council* [2012] P.T.S.R. 546 as support for their contention that calculating assistance by reference to the facilities provided for failed-asylum seekers under section 4 of the 1999 Act does involve a failure to use the power under section 17 for a proper purpose. That case involved a situation where the local authority contended that it was entitled to terminate the provision of assistance under 17 of the 1989 Act to destitute families comprised of a failed asylum-seeker and his dependants on the basis that such families would have access to support under section 4 of the 1999 Act. As part of its reasoning, the Divisional Court accepted at paragraph 87 of its judgment the description of the support provided under section 4 of the 1999 Act as:

“an austere regime, effectively of last resort, which is made available to failed asylum-seekers to provide a minimum level of humanitarian support”. Section 17, in contrast, is capable of providing a significantly more advantageous source of support, its purpose being to promote the welfare and best interests of the child”.

52. Against that background, the Divisional Court concluded that the local authority could not justify the refusal to make provision under section 17 of the 1989 Act to meet the assessed needs of children in need unless it was satisfied, first that the Secretary of State was able and willing to provide section 4 support and secondly, that the section 4 support would be likely to meet the child’s assessed needs (see paragraph 91 of the judgment). The Divisional Court considered that, given the significant difference between what is provided under section 4 and what is likely to have been assessed as required for the purposes of section 17, a local authority was unlikely to be able to satisfy the second requirement. Consequently, the Divisional Court concluded at paragraph 93 that a local authority is “very unlikely in the general run of cases to be able to justify non-intervention by reliance upon section 4”. In relation to the particular cases before it, the Divisional Court had first dealt with the case of JC who suffered from sickle cell problems and had been assessed as having complex needs (see paragraph 7 of the judgment). For other reasons, that claim could not proceed, and a different claimant, K, was substituted as a claimant and the court was provided with agreed evidence of K’s children’s’ needs although those needs are not referred to or identified in the judgment (see paragraph 10 of the judgment). In those circumstances, the court considered that it would be unlawful for the local authority to terminate the provision of the claimant’s section 17 support by reference to the potential availability of section 4 support (see paragraph 95, where the Divisional Court accepted proposition (ii) set out in paragraph 70).
53. The decision in *VC*, therefore, involved a refusal to provide assistance under section 17 of the 1989 Act on the basis that section 4 support was available. The



present case, however, involves a different problem. The Council is not declining to provide assistance under section 17 of the 1989 Act to meet the assessed needs of the children. Rather, so far as the needs arise from destitution, the Council is providing accommodation and a sum of money intended to alleviate the destitution. The basic amount is calculated by reference to the amount provided for food and toiletries. Additional assistance can be provided to address additional needs (such as, for example, the provision of clothing and school uniforms, all of which has in fact been provided in the present cases). Further, if the assessed needs are different from, and additional to destitution, the Council may decide to provide for those needs (as is the case, for example, in relation to the needs arising out of Edwin's developmental delays). The Council is not, therefore, refusing to provide support under section 17. It has used the figures used for section 4 support as the basis for calculating the basic level of financial assistance to be provided to destitute families under section 17. That will involve the application of figures derived in the context of an austere regime intended to provide a minimum level of humanitarian support for the determination of the basic amount of support provided to destitute children, and their families. But, it is ultimately a calculation made by the Council of the minimum amount that it should provide to meet the subsistence needs of destitute children and their families given other competing claims upon their finances. The Council is still seeking to provide support to safeguard and promote the welfare of children, albeit at a minimum or subsistence level (subject to the provision of additional support if needed).

54. Thirdly, the claimants contend that the section 4 support is not intended to provide for all essential living needs and that it is, therefore, inappropriate to use that figure as the baseline for the assistance to be provided by way of assistance under section 17 of the 1989 Act. The amount provided under section 4 is intended to provide at least for food and essential toiletries but not clothing. On the evidence, the Council provides, as a minimum, an amount of money on a weekly basis which it considers will provide food and toiletries. It provides additional assistance, including the provision of clothing, if such a need is identified. In the present two cases, the Council has provided clothing for Edwin and clothing and a school uniform for Ms Bello's children. The policy itself, and its operation in practice does provide the minimum level of subsistence considered necessary to meet the needs of the children and the claimants.
55. Fourthly, the claimants contend that the provision of such support is likely to continue for an extended time. The section 4 support is intended to be short-term pending the return of the failed-asylum to his country of origin and, further, that the level of support is "deliberately limited in order to minimise the incentive for economic migration through the asylum support system" (*R (VC) v Newcastle City Council* [2012] PTSR 546 at para. 74). The claimants submit that it is inappropriate, therefore for the Council to use that figure. Again, however, the Council has decided to provide accommodation, and sufficient financial assistance, and other assistance if needed, to avoid destitution. The use of figures from one regime, which is intended to provide a minimum level of humanitarian support for the purposes of calculating the basic amount needed to avoid destitution is lawful. The Council is entitled to fix the levels of assistance at that amount. The evidence is that the Council considers that the needs of the children are being adequately met. The level of subsistence provided for, although low and

although it may continue for some time, is considered by the Council to be sufficient to avoid destitution. Further, the Council does not intend the support it provides to continue longer than is necessary. In this regard, the Council points to the fact that it is open to single parents with British national children to apply for leave to remain. There is provision under current Home Office Policy for a condition providing that a person granted leave has no recourse to public funds to be removed (or not imposed when leave is granted) thereby enabling a person to have recourse to the greater assistance available by way of social security benefits and housing benefits. Ms Bello, in fact, has obtained leave to remain and has had the condition prohibiting recourse to public funds removed albeit that that took some time. In all the circumstances, the policy adopted by the Council is lawful.

56. Finally, the claimants contend that the information referred to in paragraph 11 of Mr Gordon's statement is wrong. In that paragraph, Mr Gordon notes his view that the amounts provided by the Council compares favourably with the amount which would be available if the families were in receipt of state benefits. The claimants rely on a witness statement from Ms Carol Laidlaw which uses different figures to perform the comparison. In reality, this is a difference of view, not an error of fact on law, in analysing the underlying figures. Mr Gordon makes his comparison on the basis that the rent that is currently being paid for each of the claimant's flats is £189.50. He takes the amount of money that the claimants would receive if they were in receipt of state benefits and deducts expenditure, including the actual rental amount of the flat. Ms Laidlaw takes the view that it would be reasonable to assume, for the reasons she gives, that the claimants would be able to obtain accommodation at a rent of £115.37 (rather than £189.50) and that housing benefit, which is limited to a maximum of £115.37 a week, would meet the entirety of the rent. That, in truth, is a difference of view in assessing the figures. There is nothing unlawful in the way that the Council considered the figures.
57. For all those reasons, the Council's policy of meeting the needs that arise from destitution by providing accommodation and a basic amount of money intended to provide a minimum level of subsistence, and other assistance if needed, to avoid destitution is lawful.

#### *The Subsidiary Issue – Did the Council fail to Recognise the Claimants' Derivative*

##### *Rights of Residence*

58. The subsidiary issue concerns the question of whether the Council proceeded on the erroneous basis that there was a statutory restriction on the provision of support to Ms Mensah and Ms Bello under section 17 of the Act.
59. As a matter of law, paragraph 1 of Schedule 3 to the Nationality, Immigration Act 2002 ("the 2002 Act") provides that a person to whom that paragraph applies shall not be eligible for support or assistance under a number of Acts, including section 17 of the 1989 Act. Paragraph 7 of that Schedule provides that paragraph 1 applies to a person if he is in the United Kingdom in breach of immigration laws within the meaning of section 50A of the British Nationality Act 1981. The material provision of that Act is 50A (4) (e) which provides that a person is in the United Kingdom in breach of immigration law if, but only if, the person is not entitled to

reside in the United Kingdom by virtue of any provision made under section 2(2) of the European Communities Act 1972 (“the ECA”). There is a further, more limited exception, in paragraph 3 of Schedule 3 to the 2002 Act which provides that paragraph 1 does not prevent the exercise of a power or the performance of a duty if, and to the extent necessary for the purpose of avoiding a breach of (a) a person’s Convention rights or (b) a person’s rights under the EU Treaties.

60. The short point made is that the Council did not recognise that the claimants had rights to reside under regulation 15A(4)A of the EEA Regulations (which are made under section 2(2) of the ECA). There was, therefore, no restriction on the claimants’ eligibility for assistance under section 17 of the 1989 Act. Rather, it is said that the Council proceeded on the basis that paragraph 1 of Schedule 3 applied to the claimants save for the limited exception provided by paragraph 3(a) of the Schedule which would permit the provision of support if, and only to the extent necessary for the purpose of avoiding a breach of a Convention right.
61. It is correct that, at the time of the assessment, the Council did not appreciate that the restriction in paragraph 1 did not apply to the claimants as they had rights to remain as the primary carer of a British national child under the EEA Regulations and so were not in the United Kingdom in breach of immigration laws. The Council, therefore, arranged for an assessment of each of the claimants to be carried out to assess what was necessary to avoid breaches of their Convention rights. However, the fact is that the Council has not fixed the level of support it provides under section 17 of the 1989 Act because it considers that, as a matter of law, it is restricted from providing a greater level of support. Rather the Council has decided to provide the accommodation and assistance that it does as it has decided, as a matter of policy, that children in need and their families who are destitute in the circumstances of these claimants should be provided with the level of support considered necessary to avoid the risk of destitution and thereby avoid any breach of their Convention rights. Consequently, any error as to the claimants’ immigration status did not materially affect the decision to provide support in the form and at the levels the Council had decided. This ground of challenge, therefore, does not invalidate either the Council’s policy or the individual decisions in the claimants’ cases.

## CONCLUSION

62. The Council’s policy of providing destitute children and their parents (who cannot, by reason of their immigration status, have recourse to public funds) with accommodation and a basic amount of financial assistance determined by reference to the provision made by the Secretary of State for the Home Department to failed asylum-seekers, with additional support if assessed as necessary, is lawful. The policy, and the decision in the case of each claimant, to provide assistance in that form was not materially affected by any error as to the entitlement of the claimants to a right to reside in the United Kingdom as a primary carer of a British national child pursuant to regulation 15A of the EEA Regulations. These claims for judicial review are therefore dismissed.