Neutral Citation Number: [2019] EWHC 2754 (Admin)

Case No: CO/562/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/10/2019

Before:

MICHAEL FORDHAM QC

- -

Between:

R (SHEHAB ABURAS)	**Claimant**
- and -	
LONDON BOROUGH OF SOUTHWARK	**Defendant**

- -
- -

NABILA MALLICK (instructed by **Instalaw Solicitors**) for the **Claimant**
CATHERINE ROWLANDS (instructed by **London Borough of Southwark**) for the **Defendant**

Hearing dates: 18 September 2019

- -

Judgment Approved by the court for handing down

Michael Fordham QC:

Introduction:

1. This claim for judicial review is found on that part of the legal map where there is an intersection between (i) local authority functions of assessing and meeting adult needs for care and support under Part I of the Care Act 2014 (CA14) and (ii) human rights arguments invoking the Convention rights in Article 3 (protection from inhuman and degrading treatment) and Article 8 (right to respect for private and family life) of Schedule 1 to the Human Rights Act 1998 (HRA98). The claimant (Mr Aburas) was represented by Ms Mallick and the defendant (Southwark) by Ms Rowlands.

    i) The essence of Ms Mallick's argument was that, linked to but wider than being destitute and in need of accommodation and subsistence, Mr Aburas has a 'looked-after need' of support by a social worker to access food and medication, which support requires for its effective delivery the provision of accommodation, refusing which supported accommodation has consequences so serious as to breach Mr Aburas's Convention rights.

    ii) The essence of Ms Rowlands' defence of the claim was that, even if (which is not accepted) Mr Aburas is destitute and in need of accommodation and subsistence, it is to the Home Secretary through Asylum Support that he must look for human rights-compatible action, Southwark having lawfully discharged its statutory 'looked-after needs' functions under CA14 read with HRA98.

2. These were the key factual features on which the argument proceeded:

    i) Mr Aburas is aged 58. He is an apparently stateless Palestinian who came to the United Kingdom from Kuwait, arriving in 1996. He has mental health issues and has been diagnosed with bi-polar disorder and depression. He is a failed asylum-seeker without regular immigration status. He is a person in the category 'no recourse to public funds'. He is a 'person subject to immigration control' for the purposes of CA14 section 21. He is present in the United Kingdom as a 'person in breach of immigration control' for the purposes of Schedule 3 paragraphs 1 and 7(1)(a) to the Nationality Immigration and Asylum Act 2002 (NIAA02). He faces barriers to a proposed removal to Kuwait.

    ii) Southwark's acceptance that Mr Aburas is a person facing barriers to removal has the consequences that removal is not the human rights solution; nor is it the human rights problem. As to the human rights solution, Mr Aburas's needs for care and support cannot be said to be met by his going to Kuwait and being looked-after there. In some cases that can be an answer to human rights arguments: see *R (AR) v London Borough of Hammersmith and Fulham* [2018] EWHC 3453 (Admin) at §42. As to the human rights problem, no issues as to the human rights-compatibility of the act and implications of removal from the United Kingdom arise for consideration, as they do in some cases. These consequences explain why various human rights topics relating to the human rights implications of removal appeared in Southwark's Assessment document and why they were filled in as 'not-applicable'.

iii) Mr Peter Bondzie is a social worker employed by Southwark who has dealt with Mr Aburas's case. Mr Bondzie issued a *No Recourse to Public Funds Adults Assessment* on 14 January 2019, which Mr Bondzie then revised on 4 February 2019, within which a Manager review was added by Mr Jermine Nuby on 6 February 2019. It was common ground that the original assessment, the revisions and the review together and as a whole constitute the relevant CA14 section 9 needs assessment (the Assessment). The Assessment was a negative one: Southwark decided that there were no relevant needs for care and support and that no action was needed.

iv) Mr Brian Dikoff is the Legal Organiser at the non-governmental organisation Migrants Organise (MO). It was Mr Dikoff who had referred Mr Aburas's case to Southwark. MO works primarily with vulnerable migrants and refugees, typically those with ongoing mental health issues. Mr Aburas had been referred to MO in June 2018, as a person without regular immigration status and who was homeless. Initially, MO had referred Mr Aburas to homelessness charities and charities who could arrange private hosting (short-term stays in spare bedrooms), to the Waterloo Multi-Ethnic Counselling Service, to a GP, and to its own weekly counselling sessions. Such were the concerns about Mr Aburas by the autumn of 2018 that Mr Dikoff became involved and made a referral to Southwark's Adult Social Care Team, requesting a CA14 assessment of care and support needs.

v) Central to MO's concerns about Mr Aburas's need for a proper assessment as to care and support in relation to 'looked-after needs' were issues regarding Mr Aburas's vulnerability, physical and mental health conditions, a lack of insight and uncomplaining nature, problems with not taking medication linked to a lack of support, not eating and not being able to take medication on an empty stomach. What MO has consistently said is Mr Aburas is someone needing care and support, which care and support would for effective delivery require accommodation. I read and heard submissions on the evidence before the Court relating to these and other concerns about Mr Aburas and his well-being.

vi) So it was that Southwark received a reasoned written referral from MO on 9 November 2018. Mr Bondzie then conducted a two-hour meeting with Mr Aburas on 14 January 2019, which meeting was also attended by Mr Dikoff who followed up the same day with an email containing matters he wished to bring to Mr Bondzie's attention. On 24 January 2019 Mr Dikoff provided detailed written representations. It was on receipt of those representations that the Assessment included the revisions dated 4 February 2019. For transparency, the Assessment was written up in a way which showed what text had been added by those revisions.

vii) The Assessment recorded and was reasoned on the basis that Mr Aburas is *"a current asylum seeker"*. That would have meant that the Home Secretary has the function through Asylum Support of providing appropriate accommodation and subsistence support in accordance with IAA99 section 95, including a duty to do so in order to secure compatibility with Convention rights to protect against destitution. The position for Mr Aburas, as explained by Ms Mallick in her skeleton argument, accepted by Ms Rowlands in post-hearing submissions, is that Mr Aburas is a failed-asylum seeker. That would mean that the Home

Secretary had the statutory function through Asylum Support of providing appropriate accommodation and subsistence support in accordance with IAA99 section 4 (which Ms Mallick's post-hearing submissions told me has been replaced by equivalent provision under Immigration Act 2016 Schedule 10 paragraph 9), including a duty to do so in order to secure compatibility with Convention rights to protect against destitution. Nobody submitted that the difference between current and failed asylum-seeker was material in this case and, ultimately, it was accepted that Mr Aburas is a failed asylum-seeker. It was common ground that Mr Aburas has in the past been accommodated by the Home Office under section 4 of IAA99. It was also accepted that, in principle, he would stand to be so accommodated again if he approached the Home Office and if he met the relevant test as to accommodation and subsistence support were met.

viii) Southwark considered that the availability of human rights-compatible protection in relation to destitution from the Home Office provided the answer in this case, so far as accommodation and subsistence is concerned. The Assessment said this:

> ***"The council believes that Mr Aburas is able to make representation to Asylum Support for support with accommodation and subsistence … This would meet his current needs around accommodation and subsistence."***

Ms Mallick accepted that this would be the legally legitimate answer, if this case were solely about accommodation and subsistence needs and about protection from destitution. Her case is that none of this is an answer if this case is more than that, because Mr Aburas (a) has a 'looked-after need' for social worker support (b) whose effective delivery requires accommodation (c) the denial of which has such serious consequences as to breach his Convention rights.

ix) The Assessment addressed Mr Aburas's current situation, background and health issues. It set out functional assessments, by reference to headings reflecting the criteria for 'eligible needs' under the legislative scheme. It then addressed risks, as to homelessness, mental health issues and malnutrition. A 'human rights' section, concerned with the question of immigration removal and its human rights implications, recorded that there were barriers to return. There was an eligibility determination by reference to wellbeing criteria, followed by a summary of well-being. The outcome was that there was no relevant 'looked-after need', the Assessment concluding as follows:

> ***"The council does not believe that Mr Aburas has eligible needs under its duties of the Care Act 2014 nor non-eligible needs that require the Council to use its powers under the Care Act 2014."***

I will need to explain below the lexicon of *"eligible needs"* which trigger a CA14 duty, and *"non-eligible needs"* which trigger a CA14 power.

4. Ms Mallick challenges the Assessment on grounds of incompatibility with Convention rights, it being agreed that this is the sole issue for which permission for judicial review was granted and the sole issue for me to decide. The case therefore proceeded on the footing that, leaving aside compatibility with Convention rights, the Assessment was a valid and lawful CA14 needs assessment applying the CA14 criteria. The case also proceeded on the basis, in circumstances where the Home Secretary was not a party to these proceedings and no refusal by Asylum Support is before the Court, I am not deciding whether Asylum Support would owe Mr Aburas a duty to provide accommodation and subsistence on grounds of destitution. There may well be such a duty, especially as winter approaches.

The Legal Framework

5. I turn to the statutory scheme as it affects Southwark's functions. I can describe it by asking and answering some key questions. First, what are relevant needs for the purposes of CA14? The answer is that they are 'looked-after needs'. CA14 is a statutory scheme for the assessing and meeting *"needs for care and support"*. These are in the nature of needs to be 'looked-after'. That idea was well-recognised in relation to predecessor legislation concerning needs for *"care and attention"* and the parties were agreed that the case-law makes clear that the same idea underpins CA14. It was Lady Hale who explained the 'looked-after needs' point in *R (M) v Slough Borough Council* [2008] UKHL 52 [2008] 1 WLR 1808 at §33:

> ***"… the natural and ordinary meaning of the words 'care and attention' in this context is 'looking after'. Looking after means doing something for the person being cared for which he cannot or should not be expected to do for himself: it might be household tasks which an old person can no longer perform or can only perform with great difficulty; it might be protection from risks which a mentally disabled person cannot perceive; it might be personal care, such as feeding, washing or toileting. This is not an exhaustive list. "***

6. Secondly, what is the relationship between CA14 and duties to provide accommodation? The answer is that the need for accommodation is not itself a 'looked-after need', but the provision of accommodation may be called for under CA14 so as to secure effective care and support for a 'looked-after need'. In other words, accommodation may be assessed to be the necessary and appropriate conduit for the practical and effective delivery of care and support for the relevant 'looked-after needs'. It is important to look at accommodation needs through that prism, for the purpose of the CA14 statutory functions. To elaborate on this:

    i) Parliament made clear (CA14 section 8(1)) that 'looked-after needs' may come to be met by the provision by the local authority of accommodation in a care home, or accommodation of some other type. Parliament also recognised (CA14 section 21) that 'looked-after needs' could, in principle, arise out of destitution or the effects of destitution. It is well-established that the need for accommodation is not a *"need for care and support"* for the purposes of CA14: see *R (GS) v Camden London Borough Council* [2016] EWHC 1762 (Admin) [2017] PTSR 140 at §29; *R (AR) v London Borough of Hammersmith*

and Fulham [2018] EWHC 3453 (Admin) at §18. Nor is the need for subsistence: see *AR* at §19.

ii) Counsel were agreed as to when it is, in essence, that accommodation comes to be appropriately provided pursuant to CA14. They agreed that this is so where the person has a 'looked-after need' of care and support whose effective delivery requires accommodation. Ms Mallick described that situation, where accommodation is required to deliver effective care and support for a 'looked-after need', as 'accommodation-plus'. In that language the 'plus' constitutes specific action addressing the 'looked-after need' for care and support, and the 'accommodation' is required for its effective delivery. That language is not in my judgment inapt, provided that it is remembered that the 'plus' is what matters in leading to the 'accommodation'. The 'plus' is not an incidental extra; it is a necessary prism.

iii) This analysis was accepted and this is how the case was argued before me. It follows that what CA14 is not concerned to do is to deal, in any other or more general way, with accommodation or with accommodation needs. To take a practical example from the cases cited to me, I mention *R (Bernard) v Enfield London Borough Council* [2002] EWHC 2282 (Admin) [2003] HLR 27, decided on equivalent predecessor legislation. In that case the care needs were those of Mrs Bernard, a person with severe disabilities. Addressing those needs gave rise to a statutory duty (under the equivalent legislation) to provide suitably-adapted accommodation (see §10), whose denial was a breach of Mrs Bernard's Convention rights (at §33).

iv) Maintaining a disciplined focus on 'looked-after needs' makes sense. There is a distinct statutory scheme for the principled and orderly approach to local authority housing, including local authority duties owed to those who are homeless. That distinct scheme is to be found in the Housing Act 1996 (HA96), and there are boundaries between the statutory schemes (see too CA14 section 23). It would undermine the integrity of a coherent statutory framework if CA14 became a 'back-door' route to claims based on accommodation needs, circumventing the scheme of HA96 and jumping the homelessness queue. As Lady Hale said of the predecessor legislation in the *M (Slough)* case at §33, the local authority function of addressing 'looked-after needs' for care and support:

> ***"… is not a general power to provide housing. That is dealt with by other legislation entirely, with its own criteria for eligibility … [Otherwise,] every homeless person who did not qualify for housing under the Housing Act 1996 would be able to turn to the local social services authority instead. That was definitely not what Parliament intended …"***

7. Thirdly, what are *"eligible needs"* and *"non-eligible needs"*, to which the Assessment referred? The answer is that *"eligible needs"* are statutorily-prescribed and trigger a CA14 statutory duty, while *"non-eligible needs"* are a residual category which trigger a CA14 statutory power. The difference between these two categories of need engages an important structural point about CA14, highly relevant in securing Convention rights so far as 'looked-after needs' are concerned. Parliament made dual

provision as to the care and support needs of a person who is *"ordinarily resident in the authority's area or present in its area but of no settled residence"*. In such a case Parliament has imposed a statutory duty under CA14 section 18(1) and it has conferred a statutory power under CA14 section 19(2). The statutory duty (s.18(1)) is a duty to meet an adult's eligible care and support needs (*"needs for care and support which meet the eligibility criteria"*); the statutory power (s.19(1)) is a power to meet non-eligible care and support needs (*"needs for care and support"*) being those not covered by the statutory duty but appropriately met by the local authority. It is 'eligible' care and support needs, triggering the section 18 duty, which are the subject of particular prescribed criteria. 'Non-eligible' care and support needs are the subject of a broad power, which brings flexibility and discretion.

8. The key provisions of CA14 were described in this way in *AR* at §§7-9:

> ***"Section 9 of the Care Act 2014 provides that, where it appears to a local authority that an adult may have needs for care and support, the authority must assess whether the adult does have such needs and, if so, what they are. If the authority is satisfied on the basis of a needs assessment that an adult has such needs it must, under section 13(1) , determine whether any of those needs meet the eligibility criteria in accordance with the Care and Support (Eligibility Criteria) Regulations 2015 . "***
>
> ***Regulation 2 of the 2015 Regulations provides that an adult's needs meet the eligibility criteria if: (a) they arise from or are related to a physical or mental impairment or illness; (b) as a result of their needs the adult is unable to achieve two or more of the specified outcomes; and (c) as a consequence there is, or is likely to be, a significant impact on the adult's well-being. The outcomes are:***
>
> ***(a) managing and maintaining nutrition;***
>
> ***(b) maintaining personal hygiene;***
>
> ***(c) managing toilet needs;***
>
> ***(d) being appropriately clothed;***
>
> ***(e) being able to make use of the adult's home safely;***
>
> ***(f) maintaining a habitable home environment;***
>
> ***(g) developing and maintaining family or other personal relationships;***
>
> ***(h) accessing and engaging in work, training, education or volunteering;***

> ***(i) making use of necessary facilities or services in the local community including public transport, and recreational facilities or services; and***
>
> ***(j) carrying out any caring responsibilities the adult has for a child.***
>
> ***Section 18(1) of the Act provides that an authority must meet the adult's needs for care and support which meet the eligibility criteria if, amongst other things, they are ordinarily resident in the authority's area or are present in its area but of no settled residence. If the authority is not required to meet needs under section 18(1), section 19(1) provides that it may meet such an adult's needs for care and support.***

9. The essentials as to how CA14 is structured can I think be encapsulated as follows:

   i) There is a first stage at which the local authority must ask itself whether the adult *"may have needs for care and support"* (section 9(1)), regardless of the authority's view of the level of those needs or the adult's financial means (section 9(3)). Where that threshold test is satisfied, the needs assessment duty is triggered.

   ii) At the assessment stage the authority is must assess whether, and if so what, needs the adult has (section 9(1)), arriving at a determination on (a) whether the adult has needs for support and if so (b) whether they are eligible needs for support (section 13(1). Detailed provisions apply to the assessment and how it is approached. They include the duty to assess: (i) how any care and support needs impact on nine statutorily-specified 'well-being' matters (section 9(4)(a) and section 1(2)); and (ii) whether and how provision of care and support could contribute to the adult's desired day-to-day living outcomes (section 9(4)(b) and (c)).

   iii) The question whether needs for care and support are *"eligible"* needs for care and support is answered by applying eligibility criteria specified in regulations made by the Secretary of State (section 13(7)(8) and section 125). The eligibility criteria are set out in the Care and Support (Eligibility Criteria) Regulations 2015, under which eligible care and support needs are those (a) from physical or mental impairment or illness (b) which render unachievable two or more of ten statutory-specified outcomes (c) producing a significant well-being impact.

   iv) There is then a stage regarding the meeting of needs. As I have explained, a determination that there are *"eligible"* care and support needs triggers a statutory duty to meet those needs (CA14 section 18(1)); a determination that there are *"non-eligible"* care and support needs triggers the statutory power to meet those needs (CA14 section 19(1)).

10. Fourthly, how do human rights arguments relating to 'looked-after needs' fit with the structure of CA14? The answer is that Convention rights which relate to 'looked-after needs', if not met through the section 18 duty and *"eligible needs"*, must be secured

through the exercise of the section 19 power. In my judgment, the correct analysis is as follows.

i) In principle, there could be a case with the following features: (1) the individual has a 'looked-after need' for care and support; (2) applying the prescribed statutory criteria under the primary and secondary legislation there is no 'eligible' need attracting a section 18(1) duty; (3) the denial of care and support in respect of the 'looked-after need' would, nevertheless, be incompatible with a Convention right. This could be, for example, where the needs do not relate to a prescribed specified outcome (regulation 2(2)), or where they leave the person seriously unable to achieve one but not two of those outcomes (regulation 2(1)(b)). Whether, based on Convention rights, there was a human rights duty to provide for the 'looked-after need' would depend on applying the relevant standards found in the human rights case-law.

ii) If such a case arose, the answer is supplied by section 19 of CA14, which confers a statutory power to provide for a 'non-eligible need'. The local authority could not in such a case refuse to exercise that statutory power, because it would thereby be breaching the statutory duty imposed on it as a public authority under HRA98 section 6. Put another way, section 19 is read as imposing a duty in such a case in order to secure a Convention rights-compatible interpretation of CA14, in accordance with HRA98 section 3.

iii) This analysis of the inter-relationship between what Parliament said in CA14 and HRA98 has a number of virtues. In the first place, in retaining the necessary focus on 'looked-after needs', it respects the clear design of CA14, while securing that Convention rights which arise in respect of 'looked-after needs' are complied with in the application of CA14. It avoids HRA98 subverting the clear boundaries of the relevant statutory schemes. For example, it leaves the HRA98-compliant operation of homelessness decision-making to the discharge of HA98 functions. For another example, it leaves the HRA98-compliant operation of destitution and subsistence decision-making in the case of failed asylum-seekers to the Home Secretary, as pursuant to IAA99 section 4.

iv) Secondly, it is supported by what Parliament did in making the provision in Schedule 3 paragraph 3 to NIAA02. That provision speaks, in the context of a series of statutes which include CA14, of human rights compatibility being secured through either the exercise of a statutory duty or *"the exercise of a power"*. The relevant *"power"* under CA14 is section 19.

v) Thirdly, a person who is in the United Kingdom in breach of immigration control can rely on Schedule 3 paragraph 3 to invoke Convention rights in the context of 'looked-after needs'. That achieves parity, so far as Convention rights are concerned, with the position of any United Kingdom national or person with regularised immigration status. Everyone can invoke Convention rights in the context of CA14.

vi) Finally, this approach also means that the legislative criteria for 'eligible' needs (section 18) retain their ordinary meaning and application. If respect for

Convention rights requires action, beyond that ordinary meaning and application of eligibility criteria, this is achieved through section 19.

11. Fifthly, how does CA14 deal with those who, like Mr Aburas, have irregular immigration status? The answer is that, leaving aside destitution-based situations because those are for the Home Secretary and Asylum Support, compatibility with Convention rights in relation to 'looked-after needs' is secured by an exception to an immigration exclusion. In its essentials, the position is as follows.

    i) In the case of a 'person subject to immigration control' whose needs have arisen *solely* from destitution or *solely* from the actual or anticipated physical effects of destitution the authority is statutorily prohibited from performing its statutory duty to meet eligible care and support needs, and from performing its statutory duty to meet non-eligible care and support needs (CA14 section 21). The legislation includes no express Convention rights proviso for this situation. That indicates that Parliament proceeded on the basis that the Home Secretary's functions, such as those which for which provision was made in IAA99 sections 4 and 95, would cater for Convention rights in these destitution-based cases.

    ii) A 'person present in breach of immigration control' is barred on grounds of statutory ineligibility from receiving any support or assistance under Part I of CA14 (NIAA02 Schedule 3 paragraphs 1(1)(n) and 7), as is a failed asylum-seeker (paragraph 6). However, here there is an express human rights proviso. Schedule 3 paragraph 3 (to which I have referred above) operates so that the bar is disapplied in any case where the performance of a statutory duty or the exercise of a statutory power is necessary to avoid a Convention rights breach. This is the statutory human-rights compliant route relied on by Ms Mallick in this case as being applicable to Mr Aburas as a 'person present in breach of immigration control', albeit that he is a failed asylum-seeker.

12. Sixthly, what are the relevant standards to be applied under the human rights case-law? The answer is that, at least in a case such as the present, the *Limbuela* case can be looked to for appropriate guidance, remembering always the discipline of the 'looked-after needs' prism. Based on the passages from case-law on which both Counsel relied, I put to them this as a possible encapsulation of the relevant threshold: is there an imminent prospect of serious suffering caused or materially aggravated by the refusal? Counsel accepted that this question suitably encapsulated the relevant threshold. I agree, but with some observations as to the question which is being asked.

    i) Ms Mallick and Ms Rowlands agreed that the relevant standards were to be found encapsulated in a passage in the judgment of Deputy High Court Judge Peter Marquand in *R (GS) v Camden London Borough Council* [2016] EWHC 1762 (Admin) [2017] PTSR 140 at §§64-70. From that passage I have extracted the following:

> ***"… In Limbuela's case [2006] 1 AC 396, paras 7–8, Lord Bingham of Cornhill reviewed the principles of article 3 … "Treatment is inhuman or degrading if, to a seriously detrimental extent, it denies the most basic needs of any human being. As in all article 3 cases, the treatment, to be***

> ***proscribed, must achieve a minimum standard of severity, and … in a context such as this, not involving the deliberate infliction of pain or suffering, the threshold is a high one. A general public duty to house the homeless or provide for the destitute cannot be spelled out of article 3. But I have no doubt that the threshold may be crossed if [an individual] with no means and no alternative sources of support, unable to support himself, is, by the deliberate action of the state, denied shelter, food or the most basic necessities of life… When does the … duty … arise? The answer must in my opinion be: when it appears on a fair and objective assessment of all relevant facts and circumstances that an individual applicant faces an imminent prospect of serious suffering caused or materially aggravated by denial of shelter, food or the most basic necessities of life. Many factors may affect that judgment, including age, gender, mental and physical health and condition, any facilities or sources of support available to the applicant, the weather and time of year and the period for which the applicant has already suffered or is likely to continue to suffer privation."***
>
> ***Baroness Hale of Richmond, at para 78, included the following when considering the degree of suffering prohibited by article 3: "It might be possible to endure rooflessness for some time without degradation if one had enough to eat and somewhere to wash oneself and one's clothing. It might be possible to endure cashlessness for some time if one had a roof and basic meals and hygiene facilities provided. But to have to endure the indefinite prospect of both, unless one is in a place where it is both possible and legal to live off the land, is in today's society both inhuman and degrading."***
>
> ***In Anufrijeva's case [2004] QB 1124, para 43, which concerned allegations that there was a failure to take positive action to avoid breaches of article 8 rights by denying benefits to the claimants, the Court of Appeal (Lord Woolf CJ, Lord Phillips of Worth Matravers MR and Auld LJ) stated: "We find it hard to conceive, however, of a situation in which the predicament of an individual will be such that article 8 requires him to be provided with welfare support, where his predicament is not sufficiently severe to engage article 3. Article 8 may more readily be engaged where a family unit is involved. Where the welfare of children is at stake, article 8 may require the provision of welfare support in a manner which enables family life to continue …"***

ii) Counsel invited me to follow this same guidance, and I am content to do so. I do so having in mind that *GS* was a case which, although it arose out of a CA14 needs assessment was treated as being an accommodation-need case which did not fall within CA14 (§49), and was ultimately decided under the

Localism Act 2011 (§§61, 75, 78). Ms Mallick accepts that she cannot advance an accommodation-need argument. Hers is a 'looked-after needs' argument, giving rise to an 'accommodation-plus' outcome based on Convention rights. *Limbuela* was concerned with destitution and Asylum Support. *Anufrijeva* was discussing housing needs. As I explain below, *AR* (which applied *Limbuela* at §§35-41) was an accommodation-need case where the Judge dealt with human rights in the alternative, having decided that such needs did not fall to be met under CA14 or the 2011 Act. So, care is needed in relation to what is said in all of these cases.

iii) Having said that, I agree that authoritative guidance as to the relevant level of severity of the implications for the individual can be discerned from the passages citing *Limbuela* and *Anufrijeva*. No alternative line of authority was cited to me and no alternative formulation of relevant standards was contended for. The observations in *Limbuela* can, in my judgment, aptly inform the 'looked-after needs' context, if that context is borne in mind. It can be asked, of the relevant 'looked-after need', whether the claimant is an individual "*with no means and no alternative sources of support, unable to support himself [and] … denied … the most basic necessities of life"*. It can be asked, of the relevant 'looked-after need' whether "*it appears on a fair and objective assessment of all relevant facts and circumstances that [he] faces an imminent prospect of serious suffering caused or materially aggravated by [the] denial"*; whether that denial is of "*the most basic necessities of life"*; and remembering always that "*[m]any factors may affect that judgment, including age, gender, mental and physical health and condition, any facilities or sources of support available to the applicant, the weather and time of year and the period for which the applicant has already suffered or is likely to continue to suffer privation."* For the reasons explained in *Anufrijeva*, Article 8 does not materially add to the analysis in the present case, unlike *Bernard* where it and not Article 3 held the day, and Ms Mallick rightly did not press any submission to the contrary. So, all of this is relevant and helpful, as is this encapsulation: is there an imminent prospect of serious suffering caused or materially aggravated by the refusal to provide accommodation so as to secure the support of a social worker?

13. There is one final point to address so far as human rights compatibility is concerned. Ms Mallick submitted that the Court should assess the question of compatibility with Convention rights objectively for itself, and that it was appropriate – notwithstanding Southwark's objections – to take into account evidence relating to Mr Aburas's circumstances post-dating the decision, as recognised in this way by the Judge (UTJ Markus QC, sitting as a Deputy High Court Judge) in *AR* at §33:

> ***"I am satisfied that the role of the Court is to assess for itself whether the claimant's Convention rights require the provision of accommodation. In the light of the decision of Lang J in R (de Almeida) v Royal London Borough of Kensington and Chelsea [2012] EWHC 1082 (Admin) at §85, it is clear that I am not limited to a review of the defendant's decision in May 2018 and I may take into account evidence relating to the claimant's circumstances post-dating that***

> ***decision. Further it is for the claimant to prove any breach of Convention rights, but for the defendant to justify any interference: GS at §70."***

As the Judge in *GS* said at §70:

> ***"The burden of proving any breach of Convention rights rests on the claimant … and the defendant has to justify any interference with article 8… I should … consider all of the evidence before me and not just the material that was available to the decision-maker…"***

Ms Rowlands objected to the updating evidence, but I did not discern in her submissions any objection of principle to the legal approach in *AR* or *GS*, and I decline to depart from them. I am satisfied that there was no unfairness in the timing of the evidence, and that allowing it to be adduced is necessary and appropriate in the interests of justice. I allow the application to rely on it.

Analysis of the legal merits:

14. The evidence in this case raises concerns which go to the question of homelessness, destitution and subsistence. But these do not constitute the 'looked-after need' focus of the claim against Southwark. They are matters for the Home Secretary, and for Asylum Support. So far as they are concerned, in my judgment Southwark correctly identified the legally appropriate response in the Assessment: *"the best course of action is to apply for Asylum Support"*.

15. The 'looked-after needs' identified on Mr Aburas's behalf by Ms Mallick were the need of social worker support in order to take medication (and in order to access food, in turn to be able to take medication), and the need of accommodation so that this social worker support could effectively be provided.

16. Reading the evidence before the Court carefully and as a whole, this is not a case which crosses the threshold for the refusal or social worker support. These are my findings on the evidence. The evidence does not establish that Mr Aburas needs the support of a social worker to prompt him to take his medication, or to prompt him to eat so as to take his medication. The evidence does not establish, moreover, that Mr Aburas needs accommodation in order to have the support of a social worker. Nor does the evidence establish that missing taking the medication gives rise to serious suffering. Overall, the evidence does not establish that there is an imminent prospect of serious suffering caused or materially aggravated by the refusal to provide supported accommodation.

17. There is evidence of concerns in these regards, as well as other concerns. Lukas Kudic-Gloster, a friend of Mr Aburas, tells me in his witness statement that Mr Aburas "*need[s] help to access medical treatment"* as a result of which (together with other concerns) *"I think that he needs accommodation with the social services support"*. In a witness statement from a friend Ms Sara El Sheekh dated 30 July 2019 I am told: *"[Mr Aburas] requires someone to help him access medical care and mental health workers. He will not do this himself, he needs pushing to do it. He will also not eat unless he is pushed into doing so…"* She concludes: *"[He] would benefit*

from being in one place where he can have the support of a social worker checking up on him, to ensure that he is meeting his care needs, attending the doctor to access treatment, medication etc". Mr Dikoff's witness statement describes Mr Aburas as failing to take his medication and attributing this to his homelessness and, when he has not accessed food, because he cannot take the medication on an empty stomach. Mr Dikoff tells me *"In this case, [Mr Aburas] required a floating social worker or social worker to drop in on him to check that he was accessing his medication and necessary medical assistance, etc"*. I do not doubt the genuineness of all of these concerns, nor the views expressed. But they could not, in my judgment, suffice even if they stood alone, which they do not.

18. Mr Bondzie is the registered social worker who carried out the Assessment. He also acted as the social worker support during a period of time when Mr Aburas was in 'supported accommodation' in accordance with an order for interim relief at an earlier stage in these proceedings. His witness statement evidence dated 5 March 2019 told the Court: *"I do not consider that Mr Aburas has any care needs for the purpose of the Care Act, or that there is any reason why Mr Aburas requires the provision of 'supported accommodation'"*. His witness statement evidence dated 10 May 2019 repeated the same assessment. It is evident that no formal support was given in relation to the taking of medication. It is also evident that Mr Bondzie's professional opinion is that none is needed. There is no reason for me to doubt the good faith of that view, and good reason for me to accord it substantial weight.

19. Ms Mallick makes the point that Mr Bondzie is the decision-maker whose assessment is being impugned in these proceedings. I have asked myself whether there is any material whose nature, viewed objectively, gives a convincing basis for rejecting Mr Bondzie's views? I have found none. For me to conclude that there is so pressing a need for social worker support, with a need for accommodation so as to secure that social worker support, that the denial of these is to cause or materially aggravate an imminent prospect of serious suffering would be for me as a Judge to substitute a conclusion for that of Mr Bondzie, without the support of any professional judgment to contradict him, and without the backing of clear objective evidence supporting a view in relation to the relevant threshold. The evidence is not of that nature.

20. In the report by Mr Aburas's GP Dr Wilkins dated 4 October 2018 I find: *"Due to his homelessness he is not currently receiving support from a local mental health team and he remains at significant risk of deterioration of his mental state"*; *"In view of the mental and physical health problems it is my opinion that Mr Aburas would be particularly vulnerable to the effects of homeless and less able to care for himself compared to the average homeless person. He would certainly benefit from emergency accommodation"*. In the letter dated 20 February 2019 by psychiatrist Dr Sara Alsaraf, I am told: *"[Mr Aburas] remains vulnerable to further deterioration of his mental and physical health if he is not rehoused"*.

21. In my judgment, the highest it can be put is that these materials would support the view that Mr Aburas may be facing circumstances of destitution and need of support and subsistence, depending on what other support is available to him, and especially with the onset of winter. These are matters for the Home Secretary and Asylum Support, as Southwark has consistently pointed out. What the evidence does not support is the conclusion that there is a 'looked-after need' for social worker support, requiring the provision of accommodation, the refusal of which is a breach of Mr

Aburas's Convention rights. On an objective assessment, the evidence does not establish that there is an imminent prospect of serious suffering caused or materially aggravated by the refusal to provide accommodation so as to secure the support of a social worker. The evidence does not establish that the claimant has a need of social worker support – nor of accommodation to deliver that support – so as to take his medication, nor access and consume food so as to be able to do take his medication. Nor does it establish that the refusal of social worker support (with accommodation) does, in these ways, deny him a basic necessity of life. The Article 3 claim fails. For the reasons explained in *Anufrijeva*, Article 8 does not materially add to the analysis in the present case (unlike *Bernard* where it and not Article 3 held the day) and Ms Mallick rightly did not press any submission to the contrary.

Other Matters:

22. A number of other points arose in the course of argument. There are three topics which, in my judgment, call for brief comment. First, questions arose as to whether Southwark had recognised correctly the way in which human rights arguments can arise in the context of a CA14 needs assessment. Ms Mallick pointed out that the sole topics in Southwark's 'human rights' section in the Assessment (where moreover there was a stray reference to the Children Act 1989) were topics concerned with barriers to and implications of removal from the United Kingdom which, since there are barriers to removal in this case, were filled out as 'not applicable'. It was also noted at the hearing that Mr Bondzie's witness statement treated human rights arguments as only capable of arising where there is an *"eligible"* need. He said this: *"A human rights assessment is only carried out if a person has been assessed as having eligible care and support needs but [is] excluded from receiving care and support on account of their immigration status"*. For the reason I have given, there is in principle room for Convention rights to arise beyond the scope of *"eligible"* needs, in situations covered by the CA14 section 19 power. This does not appear to have been appreciated by Southwark, or in the design of the Assessment form. However, this is not a point which goes anywhere in the present case. Human rights review requires the Court to focus on the substance of whether the public authority's action has breached the Convention right. So far as Southwark's reasoning is concerned, the Assessment did address *"non-eligible"* needs and determined that no need arose for care and support under section 19.

23. Secondly, Ms Mallick invoked as an alternative to CA14 section 19, for the Convention rights-compatible action in addressing Mr Aburas's 'looked-after needs', section 1 of the Localism Act 2011. She relied on *GS*, where a duty was held to arise under section 1 of the 2011 Act. Ms Rowlands responded that *GS* is a case which was wrongly decided, as was recognised in *AR* at §29. In my judgment, the correct position is as follows:

    i) In a case where there is said to be a 'looked-after need', as was squarely the focus of this case, section 1 of the 2011 Act is not needed. The power under CA14 section 19, read and applied compatibly with HRA98, provides the solution. That solution extends to the provision of accommodation, where delivery of the care and support for the 'looked after need' requires accommodation.

ii) If there is no 'looked-after need', but if the need is for accommodation, then the provisions of CA14 cannot apply at all, for there is no *"need for care and support"*: *GS* at §29 and *AR* at §18. That is not this case, for Ms Mallick is not contending for a need for accommodation. She expressly accepted that this was not open to her. She is contending for a 'looked-after need'. As I read *GS*, the Judge there treated the need as being for accommodation alone (§49), which he held was required to be provided under section 1 of the 2011 Act (§78). As I read *AR*, the Judge there concluded that the 2011 Act could not be invoked in respect of accommodation needs (§§29, 43), having regard in particular to HA96 section 185 and relevant case-law. The Judge in *AR* went on to explain why there was in any event – *"even if"* the 2011 Act had been available to meet an accommodation need – no breach of Convention rights in refusing accommodation (§§31, 41). I was not shown any convincing reason why the analysis in *AR* at §29 was wrong, in doubting *GS*. If this case had been put forward as an accommodation need case, invoking the 2011 Act, I would have followed *AR* and rejected such a claim.

iii) I am conscious that the 2011 Act is one statute within a long list of provisions included within NIAA02 Schedule 3 paragraph 3, which can be relevant to secure Convention compatible action in the case of a person excluded under Schedule 3 paragraph 7. That can be seen to raise the question in what circumstances could the 2011 Act perform that human rights compliance function. It is not necessary or appropriate for me to resolve this point. I am not saying that the 2011 Act never has a role to play in securing Convention rights. Whether and when it has such a role will fall to be analysed as and when an appropriate case arises. It would, in my judgment, be a case concerning neither a need for accommodation, nor a 'looked-after need', but something else. As I have explained, this case was squarely one about a 'looked-after need' and falls to be analysed under CA14 read with HRA98.

24. Thirdly, it has not been necessary for me to grapple with the position applicable where a destitute person subject to immigration control (CA14 section 21) is neither (a) an asylum-seeker (covered by NAA99 section 95) nor (b) a failed asylum-seeker (covered by NAA99 section 4). Ms Rowlands suggested that this would be a matter for arrangements made by the Home Secretary, including as to stateless persons. Ms Mallick's position was that the responsibility would be that of the local authority. I gave the parties an opportunity to file brief further written submissions with the purpose that they could if they wished supply an answer to this question, which I had raised with them at the hearing. I am satisfied that I need not decide anything relating to this point. In the event, I received written submissions on a series of topics. I read and considered those submissions. I remained quite satisfied that the arguments that mattered in this case were those squarely ventilated at the oral hearing, and would not have granted permission after that hearing to extend the essential scope of the case on either side, had such permission been sought which rightly it was not.

Conclusion:

25. For the reasons explained above, I am satisfied that Southwark did not act unlawfully in this case and the claim for judicial review will be dismissed. In short, Southwark were right that it is for the Home Secretary and Asylum Support to address his needs if satisfied that he presents to them as a destitute failed asylum-seeker in need of

accommodation and subsistence. He may well meet that test to receive that help and nothing I have said in this judgment is a finding or indication to the contrary.