

A **R v Secretary of State for Health ex p
Hammersmith and Fulham LBC, M and K**

Queen's Bench Division
Laws J

B 9 July 1997

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Local authorities have no power to make payments of cash under National Assistance Act 1948 s21 to service users.
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C **Facts**

As the result of the decisions by Collins J in *R v Hammersmith & Fulham LBC and Others ex p M and Others* (1997) 1 CCLR 69, and then by the Court of Appeal in *R v Westminster CC and Others ex p M, P, A and X* (1997) 1 CCLR 85, local authorities became liable to make arrangements to provide residential accommodation for

D large numbers of destitute asylum-seekers. On 5 March 1997 the House of Commons approved Special Grant Report (No 24) providing for reimbursement, up to £165.00 per week, of:

... expenditure lawfully incurred by an authority in providing accommodation under s21 ... For any asylum seeker unaccompanied by children who would not have been provided with that accommodation but for the judgment of the High Court...

However, in Circular LAC(97)6 the Secretary of State for Health stipulated that expenditure would not be regarded as lawfully incurred if it related to 'any provision of cash payments to individual asylum seekers'. The applicant local authority, in
F common with many other authorities, had recourse to bed-and-breakfast accommodation, and gave asylum-seekers cash to enable them to purchase meals, toiletries and other basic necessities themselves because that was the most convenient, most efficient and cheapest way of proceeding. There was evidence
G from the applicant asylum-seekers showing that cash payments enabled them to obtain reasonable, albeit very basic, provision of necessities, but that when a regime including some element of cash payment was replaced by one consisting exclusively of provision of things in kind, they suffered grave hardship.

Held:

- H 1 The expression 'make arrangements for providing' in National Assistance Act 1948 (NAA) s21 means in context that in consequence of such arrangements the beneficiaries should directly receive in kind the forms of provision contemplated by the statute and nothing else. The 'arrangements' made by the local authority are the practical measures by which the local authority fixes the means by which
I the provision is to be directly delivered. The making of cash payments, accompanied by whatever insistence that they be used only for the statutory purpose, is outside the statutory purpose.
- 2 A construction of an Act of Parliament which produces a nonsensical result is to be rejected if there is any reasonable possibility of finding an alternative
J meaning to the words. Further, a court may be impressed with this or that potential result of any given construction, depending upon its appreciation of the policy of the Act. It was impossible, however, to assume that Parliament in enacting or amending the NAA 1948 ever intended to alleviate the difficulties caused by inability to make cash payments to asylum-seekers. It is not possible
K to construe legislation simply so as to produce a more benevolent result.
- 3 One can find an express exclusion of cash payments elsewhere in the NAA 1948

and also in other community care statutes. Examination of such other provisions revealed, however, that they were enacted in a context in which cash payments were or might reasonably be contemplated and the exclusion of cash payments had the function of expressing clear limits as to the circumstances in which cash might be paid out. It could not, therefore, be inferred that no exclusion was involved for the purposes of NAA 1948 s21.

- 4 Local Government Act 1972 s111 did not authorise cash payments so as to facilitate arrangements with bed-and-breakfast hostels under NAA 1948 s26, since s26 was itself merely a function of NAA 1948 s21.

Cases referred to in judgment:

R v Westminster CC and Others ex p M, P, A and X (1997) 1 CCLR 85; *Times*, 19 February, CA.

Legislation/guidance referred to in judgment:

National Assistance Act 1948 ss21, 22, 24, 26 and 29 – Health Services and Public Health Act 1968 s45 – National Health Service Act 1977 Sch 9 para 2 – Children Act 1989 s17 – Asylum and Immigration Act 1996 ss9, 10 and 11 – Community Care (Direct Payments) Act 1996 – Local Government Act 1972 s111 – Local Government Finance Act 1988 s88B(5) – Special Grant Report (No 24) and LAC(97)6.

This case also reported at:

(1997) *Times*, 31 July, QBD.

Representation

Nigel Pleming QC and Steven Kovats (instructed by the solicitor for the Department of Health) appeared on behalf of the Secretary of State for Health.

Patrick Elias QC and Nigel Giffin (instructed by the Council Solicitor, Hammersmith and Fulham London Borough Council) appeared on behalf of Hammersmith and Fulham London Borough Council.

Stephen Knafler (instructed by Hammersmith and Fulham Community Law Centre and Hackney Law Centre) appeared on behalf of M and K.

Judgment

MR JUSTICE LAWS: These applications for judicial review concern the true construction of s21(1) of the National Assistance Act 1948. The applicants are the London Borough of Hammersmith and Fulham, and three individual asylum seekers. In *R v Westminster City Council & Ors ex parte M, P, A and X* (1997) 1 CCLR 85, in which judgment was delivered on 17th February 1997, the Court of Appeal held that certain asylum seekers could take advantage of the duty imposed upon local authorities by s21(1)(a) of the 1948 Act. They are those whose claims of asylum were not made at the port of entry upon arrival, but later. By force of the Asylum and Immigration Act 1996 and certain subordinate legislation such persons have no right to cash state benefits such as income support or housing benefit, nor any rights under the homeless persons legislation. Having no such rights, and (which no doubt is usually the case) lacking any resources of their own in this country, these persons would be destitute but for recourse to s21. The decision of the Court of Appeal made that recourse available to them. I am told that the House of Lords has granted provisional leave to appeal against the court's decision.

In order to explain the point arising for my determination upon these applications, it is convenient at once to set out the relevant part of s21, though I must in due course set out other provisions also contained in Part III of the 1948 Act.

A (1) Subject to and in accordance with the provisions of this Part of this Act, a local authority may with the approval of the Secretary of State, and to such extent as he may direct shall, make arrangements for providing –

B (a) residential accommodation for persons aged 18 or over who by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them; . . .

C (2) In making any such arrangements local authorities shall have regard to the welfare of all persons for whom accommodation is provided, and in particular to the need for providing accommodation of different descriptions suited to different descriptions of such persons as are mentioned in the last foregoing subsection.

D (4) Subject to the provisions of s26 of this Act accommodation provided by a local authority in the exercise of their functions under this section shall be provided in premises managed by the authority or, to such extent as may be determined in accordance with the arrangements under this section, in such premises managed by another local authority as may be agreed between the two authorities and on such terms, including the terms as to the reimbursement of expenditure incurred by the said other authority, as may be so agreed.

E (5) References in this Act to accommodation provided under this Part thereof shall be construed as references to accommodation provided in accordance with this and the five next following sections, and as including references to board and other services, amenities and requisites provided in connection with the accommodation except where in the opinion of the authority managing the premises their provision is unnecessary.

F (8) Nothing in this section shall authorise or require a local authority to make any provision authorised or required to be made (whether by that or by any other authority) by or under any enactment not contained in this Part of this Act, or authorised or required to be provided under the National Health Service Act 1977.

G As one might expect, the residential accommodation maintained by local authorities under s21 (and the private sector facilities the subject of arrangements made under s26, which I will set out shortly) are suitable for the kinds of persons traditionally thought of as needing help under the provisions of Part III of the 1948 Act. Thus Hammersmith & Fulham has six elderly persons' homes and two homes for people with mental health problems. Private sector institutions in use within the Borough for s21 purposes are generally residential care homes for the elderly or nursing homes. But facilities of these types are not at all suitable for the accommodation of the asylum seekers, whose needs and characteristics are quite different from those of the elderly or others who are looked after under s21 by reason of their mental or physical frailty. In consequence the authority has had recourse to the provision of bed and breakfast accommodation, and done so, on the evidence, on a considerable scale. But that provision does not secure to the asylum seekers 'board and other services, amenities and requisites' under s21(5), in particular meals other than breakfast and other necessary incidents of everyday life such as toiletries. Hammersmith & Fulham say that to provide such things in kind would entail very great inconvenience, inefficiency and expense. So instead they have made cash payments, requiring the asylum seekers to use the money for the purchase of necessary requisites. The practical difficulties faced by the council are well described in evidence filed on its behalf. In addition there is much evidence filed on behalf of the individual asylum seeker applicants to demonstrate grave hardships suffered by them unless cash payments are made.

K

Irrespective of these particular difficulties, the decision of the Court of Appeal generally imposed heavy financial burdens upon local authorities having to provide assistance to asylum seekers under s21. In consequence, on 5th March 1997 the House of Commons approved Special Grant Report (no 24) which the Secretary of State had laid pursuant to s88B(5) of the Local Government Finance Act 1988. It provided for Asylum Seekers Accommodation Special Grant to be paid to local authorities accommodating asylum seekers under s21, initially in or for the period from 5th August 1996 to 31st March 1997; I understand that it has been renewed for a further period, and is still at present current. Under this measure, grant is geared to the laying out by authorities of 'relevant expenditure' which (by Annex A to the Report) means 'expenditure lawfully incurred by an authority in connection with providing accommodation under s21 . . . for any asylum seeker unaccompanied by children who would not have been provided with that accommodation but for the judgment of the High Court . . .'. But in Circular LAC(97)6 para 15 the Secretary of State stipulated that:

Expenditure will not be regarded as relevant expenditure if it relates to:

....

(c) *any provision of cash payments to individual asylum seekers for which there is no provision in s21 of the National Assistance Act. Authorities should be aware that giving vouchers with a cash face value equates to giving cash. S21 however would allow for arrangements to be made with a provider (e.g. a supermarket chain) to enable asylum seekers to obtain by pre-arrangement food and other necessities not provided in their accommodation.*

The sole issue for my determination upon these applications is whether the construction of s21 offered in para 15(c) of the Circular is correct; that is whether the making of cash payments, as is done by Hammersmith & Fulham, is outwith the contemplation of the section. In order to determine that question, I must set out the remaining relevant provisions in Part III of the 1948 Act. Section 22 provides so far as material as follows :

(1) *Subject to section 26 of this Act, where a person is provided with accommodation under this Part of this Act the local authority providing the accommodation shall recover from him the amount of the payment which he is liable to make in accordance with the following provisions of this section.*

(2) *Subject to the following provisions of this section, the payment which a person is liable to make for any such accommodation shall be in accordance with a standard rate fixed for that accommodation by the authority managing the premises in which it is provided and that standard rate shall represent the full cost to the authority of providing that accommodation.*

(3) *Where a person for whom accommodation in premises managed by any local authority is provided, or proposed to be provided, under this Part of this Act satisfies the local authority that he is unable to pay therefor at the standard rate, the authority shall assess his ability to pay and accordingly determine at what lower rate he shall be liable to pay for the accommodation.*

(4) *In assessing for the purposes of the last foregoing subsection a person's ability to pay, a local authority shall assume that he will need for his personal requirements such sum per week as may be prescribed by the Minister, or such other sum as in special circumstances the authority may consider appropriate . . .*

Section 24(4):

Subject to and in accordance with the arrangements under section 21 of this Act,

- A *a local authority shall have power, as respects a person ordinarily resident in the area of another local authority, with the consent of that other authority to provide residential accommodation for him . . .*

Section 26:

- B *(1) . . . arrangements under section 21 of this Act may include arrangements made with a voluntary organisation or with any other person who is not a local authority where –*
C *(a) that organisation or person manages premises which provide for reward accommodation falling within subsection (1)(a) . . . of that section, and*
C *(b) the arrangements are for the provision of such accommodation in those premises . . .*

Section 29:

- D *(1) A local authority may, with the approval of the Secretary of State, and to such extent as he may direct in relation to persons ordinarily resident in the area of the local authority shall make arrangements for promoting the welfare of persons to whom this section applies, that is to say persons aged 18 or over who are blind, deaf or dumb or who suffer from mental disorder of any description, and other persons aged 18 or over who are substantially and permanently handicapped by illness, injury, or congenital deformity or such other disabilities as may be prescribed by the Minister.*

...

- F *(4) Without prejudice to the generality of the provisions of subsection (1) of this section, arrangements may be made thereunder –*
G *(a) for informing persons to whom arrangements under that subsection relate of the services available for them thereunder;*
G *(b) for giving such persons instructions in their own homes or elsewhere in methods of overcoming the effects of their disabilities;*
G *(c) for providing workshops where such persons may be engaged . . . in suitable work . . . ;*
H *(d) for providing persons to whom arrangements under subsection (1) of this section relate with suitable work . . . ;*
H *(e) for helping such persons in disposing of the produce of their work;*
H *(f) for providing such persons with recreational facilities in their own homes or elsewhere;*
H *(g) for compiling and maintaining classified registers of the persons to whom arrangements under subsection (1) of this section relate.*

...

- I *(6) Nothing in the foregoing provisions of this section shall authorise or require –*
I *(a) the payment of money to persons to whom this section applies, other than persons for whom work is provided under arrangements made by virtue of paragraph (c) or paragraph (d) of subsection (4) of this section . . .*

- J Other statutes were cited in the course of argument, and I should cite the following. Section 45 of the Health Services and Public Health Act 1968 empowers a local authority to make arrangements for promoting the welfare of old people. Subsection (4) provides:

- K *No arrangements under this section shall provide –*
K *(a) for the payment of money to old people in so far as the arrangements may*

provide for the remuneration of old people engaged in suitable work in accordance with the arrangements; A

(b) for making available any accommodation or services required to be provided under the National Health Service Act 1977.

The National Health Service Act 1977 Schedule 8 para 2 enables a local social services authority to make arrangements for the purposes of preventing illness and for the care and after-care of, broadly, ill persons. Sub-paragraph (2) provides: B

No arrangements under this paragraph shall provide for the payment of money to persons for whose benefit they are made except, in so far as they may provide for the remuneration of such persons engaged in suitable work in accordance with the arrangements, of such amounts as the local social services authority think fit in respect of their occasional personal expenses where it appears to that authority that no such payment would otherwise be made. C

Section 17(1) of the Children Act 1989 provides in part: D

It shall be the general duty of every local authority . . . –

(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. E

Section 17(6):

The services provided by a local authority in the exercise of functions conferred on them by this section may include giving assistance in kind or, in exceptional circumstances, in cash. F

The question which I must decide is purely one of the correct construction of s21, in particular the expression in subsection (1) 'make arrangements for providing'. I was pressed by Mr Knafler for the individual applicants to give decisive weight to the fact that, as his clients' very substantial evidence asserts, such asylum seekers as these will be in a much more parlous condition if cash payments are not made. He submitted in reply that the Secretary of State's construction of the statute meant that the least amount of care would be provided at the greatest expense. Mr Elias QC for Hammersmith & Fulham also submitted that I should take account of the real practical difficulties that arise if cash payments are not to be made. Mr Knafler referred to Section 286 in Bennion's *Statutory Interpretation*, page 602, as showing that the court should have in mind what is the more benevolent result when it embarks upon an exercise of statutory construction. Now, I well recognise that a construction which produces a *nonsensical* result is to be rejected if there is any reasonable possibility of finding an alternative meaning to the words. I recognise also that the court may be impressed with this or that potential result of any given construction, depending upon its appreciation of the policy of the Act. But in the present case, as it seems to me, I cannot assume that Parliament in 1948 (or upon the occasions when the National Assistance Act was amended, to which Mr Fleming QC for the Secretary of State drew my attention) intended to alleviate the difficulties to which in 1997 Mr Elias and Mr Knafler draw attention. I hope I may therefore be forgiven if I do not refer to any of the detail of what I may call the 'merits' evidence. It is to be noted that in *R v Westminster* the Master of the Rolls (who admittedly was of course considering whether s21 assisted the asylum seekers *at all*) said (transcript, p12B–C) K

A [(1997) 1 CCLR 85, at p90D–E]: ‘Their plight is indeed horrendous. However sympathy for their position cannot help in the interpretation of section 21 of the 1948 Act.’ Moreover, it is to be borne in mind that s21 plainly has application wider than the plight of these present asylum seekers.

B Mr Fleming drew attention not only to the provisions of the Asylum and Immigration Act 1996, depriving such persons of cash benefits from the state, but also to the Community Care (Direct Payments) Act 1996 and regulations made thereunder, which make provision for cash payments in certain circumstances in which it is clear that asylum seekers in the category with which I am concerned would not be entitled to receive them. He placed emphasis upon the distinction between those statutory provisions, and indeed the general statutes relating to social security which as a matter of basic legislative policy provide for cash benefits, and s21 which, he says, does not. Now, I think that Mr Elias was probably right to submit that these later statutes are of themselves no guide to the interpretation of s21 (he described Mr Fleming’s reliance upon them, slightly breathlessly perhaps, as a ‘constitutional outrage’). But it seems to me proper to suppose, given overall the statutory schemes for social security provision in this country as Act has succeeded Act over the years, that there is certainly no presumption, nor even any particular likelihood, that s21 was intended to contemplate cash payments. I must, I think, construe it purely according to its terms.

F Mr Elias submitted that the term ‘make arrangements for providing’ applies perfectly naturally to allow the authority to advance cash to a person, requiring him to use it to buy his food and other necessities. He said that this was no different from a situation in which the authority might send a council officer with cash to take the person in question to a shop where he might buy what he needed; and this, he said, would undoubtedly be unlawful within s21(1). Indeed, the council might ask a care worker or charity worker not in its employment to go along with the person in need to make the purchases he required. He pointed out that the Secretary of State accepts in para 15(c) of the Circular that an authority might make arrangements with a supermarket to enable asylum seekers to obtain food and so forth. He confronted one possible objection to this, namely that by providing cash the council lost any control over how it might be spent and would have no means of preventing its expenditure on items plainly not covered by s21(5), by pointing out, first, that since the people in question were in effect destitute, the likelihood of their using the money for anything other than the basic necessities was much reduced; and secondly, there was anyway nothing to stop an asylum seeker who was provided with food or other necessities from turning those into cash so that he might use it for other purposes.

I Mr Elias submitted also that where Parliament in relation to a benefit scheme intends to exclude the use of cash payments as a means of discharging its delegates’ statutory duty, it so provides in terms: s29(6) of the 1948 Act, s45(4) of the 1968 Act, Schedule 8 para 2(2) to the 1977 Act.

J Mr Knafler relied on the same provisions and submitted also that, as he said is shown by s17(1) and (6) of the Children Act 1989, the term ‘services’ (which of course appears in s21(5) is capable of including cash provision.

K Mr Elias advanced an alternative argument. It was that if the cash payments made by his clients were not permitted on the face of s21(1), then nevertheless they were made in order to facilitate the use by the authority of s26, which is the statutory basis upon which recourse was had to bed and breakfast accommodation in the private sector. The power so to ‘facilitate’ is said to be derived from s111(1) of the Local Government Act 1972:

Without prejudice to any powers exercisable apart from this section but subject to the provisions of this Act and any other enactment passed before or after this Act, a local authority shall have power to do anything (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions.

I deal first with the primary argument, that s21(1) on its terms allows cash payments to be made in the circumstances in which that is being done by Hammersmith & Fulham. I do not consider that the statute authorises or contemplates any such action. In my judgment, the expression 'make arrangements for providing' means in its context that the outcome of any such arrangements is that their beneficiaries should, in consequence of them, directly receive in kind the forms of provision contemplated by the statute, and nothing else. This construction marches, I think, with the ordinary sense of the words. Payment of money for persons to buy their own necessities leaves them to make the arrangements to get what they need. I consider that the use of the term 'arrangements' in ss21(1) and (4), 24(4) and 26(1) supports this conclusion. The premise of all of them is that the arrangements made by the authority should consist of practical measures whereby the authority fixes the means by which the provision is to be directly delivered. The making of cash payments, accompanied by whatever insistence that they be used only for the statutory purpose, contradicts this premise and, in my judgment, lies outside the statutory purpose. Some assistance is also to be derived from s22 which requires (subject to the section's detailed provisions) the payment of money by s21 beneficiaries. So far as Mr Elias submits that the provision of accommodation as such admittedly could not be effected by cash payments (because of s21(4) and 26(1)), but that the other provision contemplated by s21(5) may be so made, it is in my judgment important to notice that s21(5) defines 'accommodation' as including such other provision.

Nor am I impressed by the argument that since statute in other cases has excluded cash payments where such an exclusion is intended, it may be inferred that no such exclusion is involved in the purposes of s21. An examination of those other provisions shows that for reasons not applicable to s21 the contexts in which they appear either in fact contemplate the payment of money, or might reasonably be taken to do so; and the sections relied on by Mr Elias and Mr Knafler are there to express clear limits as to the the circumstances in which money may lawfully be paid. Nor, with respect to Mr Knafler, is any assistance to be derived from s17 of the Children Act.

Section 111(1) of the Act of 1972 cannot assist Mr Elias. If, as I have held, the payment of money lies outside the scope of s21(1), it cannot be said to facilitate the deployment of s26, which is itself a function of s21.

I have not found it necessary to travel through the earlier forms of s21, to which I was taken by Mr Pleming. They are of limited assistance; this case has turned simply on the ordinary meaning of the material words in s21(1), in the context in which Parliament has enacted them.

These applications are dismissed.