



Neutral Citation Number: [2019] EWHC 130 (Admin)

Case No: CO/3436/2018

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 1 February 2019

**Before :**

**David Casement QC**

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**Between :**

**The Queen on the application of**  
**(1) JA**  
**(2) GA**  
**(3) EF**  
**(by their mother/aunt and litigation friend**  
**AA)**

**Claimants**

**- and -**

**THE LONDON BOROUGH OF BEXLEY**

**Defendant**

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**KHATIJA HAFESJI** (instructed by **Youth Legal and Resource Centre**) for the **Claimants**  
**CATHERINE ROWLANDS** (instructed by **Legal Services, The London Borough of Bexley**)  
for the **Defendant**

Hearing dates: 15 and 16 January 2019  
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**Approved Judgment**

## **David Casement QC sitting as a Deputy High Court Judge:**

### **Introduction**

1. By way of amended claim form issued 3 September 2018 the Claimants challenge the decision of the Defendant that AA is not destitute, and therefore the Claimants are not children in need of accommodation and support pursuant to section 17 of the Children Act 1989. The decision was made by way of a Children and Family Assessment dated 12 June 2018 (“the assessment”). The assessment relies in part upon the findings of a fraud investigation carried out by the Defendant in 2017.
2. As set out in the Detailed Grounds for Defending the Defendant contends that AA is concealing her resources and is far from destitute. In addition the local authority is of the view that AA and her family can and should return to Nigeria. The Defendant asserts that there have been ongoing investigations into the family’s means and “they apparently live a lifestyle well beyond that which could be financed by the amounts given to them as subsistence by the local authority.”
3. In summary, the Claimants contend that the D’s decision is unlawful for the following reasons:
  - i) the decision is based on material errors of fact;
  - ii) the Defendant failed to make sufficient enquiries and its decision is procedurally unfair;
  - iii) the Defendant’s decision is based on a failure to take account of relevant and material considerations. The Defendant also took account of irrelevant matters; and
  - iv) further or alternatively, the Defendant’s decision was irrational, in that on the facts of this case this was not a decision open to the local authority to take.
4. Initially these proceedings were commenced by JA through AA as litigation friend. Pursuant to an application GA and EF were added as Claimants. Permission on all grounds was granted on 27 September 2018 by Elizabeth Cooke sitting as a Deputy High Court Judge who also granted the Claimants interim relief pending the final determination of these proceedings.
5. The Claimants are represented by Khatija Hafesji of counsel and the Defendant was represented by Catherine Rowlands of counsel.

### **Background**

6. The Claimants are three children. AA is the litigation friend and full time carer of the three Claimants. She is the mother of JA and GA presently aged 11 and 7 respectively whereas EF is the niece of AA and the cousin of JA and GA and is aged 13. JA has a learning disability as a result of which the London Borough of

Greenwich provides her with the necessary support. JA has a number of medical conditions including epilepsy, macrocephaly, hydrocephalus and also suffers from seizures.

7. AA is a 39 year-old national of Nigeria who by reason of now being in the United Kingdom without leave to remain has no recourse to public funds. As someone with no leave to remain in the United Kingdom and who has exhausted her appeal rights she is disentitled to claim benefits and accommodation for homeless persons provided under Part VII of the Housing Act 1996, pursuant to Schedule 1 of the Nationality, Immigration and Asylum Act 2002.
8. AA has another child SA. He returned to Nigeria in October 2016 where he attends a boarding school and is supported by his father referred to herein as MTA.
9. AA became the full time carer of EF when her mother, AA's sister, left the UK in January 2013 and returned to Nigeria. It is contended by AA that her sister has mental health problems and cannot provide care for EF in Nigeria. EF was the subject of sexual abuse which was the subject of proceedings in the Crown Court. She is in receipt of support to help her to deal with her ordeal. I am told that EF has a current outstanding appeal against the refusal of her current application for leave to remain.
10. AA arrived in the United Kingdom on a Student Visa on 31 July 2009 and was granted further Leave to Remain as a Tier 1 Post Study Work Migrant until 21 July 2013. She was joined by her husband MTA and two children, SA and JA, in 2010. GA was born in the UK in late 2010. According to AA in late 2011 MTA left the family home after the breakdown of their relationship although they did not get divorced until November 2017 with a decree absolute being granted in February 2018. After applying for Leave to Remain Outside the Rules on Compassionate Grounds on 10 July 2013 AA continued to work maintaining she was under the impression that she was entitled to work until she had exhausted her appeal rights. Her earnings were approximately £1200 to £1700 per month with which she was able to support herself and the children as well as to pay rent. On or around August 2015 she was informed that she was not able to lawfully work in the United Kingdom at which point she left her job and approached the Defendant for assistance on the basis that she was unable to provide accommodation and subsistence to her children.
11. The Defendant provided AA with accommodation and support under section 17 Children Act 1989 until September 2017 at which time the Defendant commenced a new Section 17 assessment of the children's needs. On 1 October 2017 subsistence payments ceased although the assessment had not been completed. That assessment was completed on 13 November 2017. A financial review was not undertaken at that point and it was determined that accommodation would continue to be provided pending that review of finances. The Defendant concluded that the Claimants were not destitute and that subsistence would cease.
12. That 2017 assessment was overtaken by a further assessment. On 22 March 2018 AA was interviewed by the Defendant as a part of a fraud investigation into the financial assistance she was claiming since 2015. An assessment was commenced on 12 April 2018 and was concluded on 12 June 2018. The assessment set out and adopted the fraud investigation conclusions in finding that the Claimants were not destitute and were not children in need.

13. It is the 2018 assessment including the findings of the fraud investigation upon which the Defendant relies that comprise the Decision which is the subject of challenge in these proceedings.

### **Legal Framework**

14. Section 17 (1) Children Act 1989 provides:

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

- (a) to safeguard and promote the welfare of children within their local 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.”

15. The general duty under section 17(1) together with paragraph 1 of Schedule 2 of the 1989 imposes a duty upon local authorities to assess the needs of putative children in need: R(G) v LB Barnet [2004] 2 AC 208 at [32].

16. Section 17(10) of the 1989 Act provides:

“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 service; or
- (c) he is disabled.”

17. Section 17(11) of the 1989 Act provides definitions in respect of “development” and “health.” A child without accommodation is a child in need within the meaning of section 17(10): R(G) v Barnet [2004] 2AC 208 [19].

18. Paragraph 1 of Schedule 3 of the Nationality, Immigration and Asylum Act 2002 provided that persons specified in paragraph 7 of that Schedule are not eligible for a range of benefits, including support or assistance under section 17 of the Children Act 1989. Paragraph 2(1)(b) provides that the exclusion in paragraph 1 does not prevent the provision or support or assistance to a child. Further paragraph 3 provides that the exclusion in paragraph 1 does not prevent the exercise of a power or performance of a duty if and to the extent that its purpose is necessary for the purpose of avoiding a breach of the person’s Convention rights.

19. The consequence is that a local authority has power to provide services under section 17 to a child even though that child lacks immigration status but it can only provide services to the child and their carer together as a family if and to the extent that the failure to do so would breach the Convention rights of either the child or their carer: R(MN) v London Borough of Hackney [2013] EWHC 1205 at [19]. The Convention rights that are likely to be engaged are Articles 3 and 8.
20. Section 21 of the Immigration Act 2014 concerns “Persons disqualified by immigration status or with limited right to rent” and provides that a person is disqualified as a result of their immigration status from occupying premises under a residential tenancy agreement if they are not a UK national and do not have a right to rent. Pursuant to section 22 of the 2014 Act a landlord faces criminal conviction if they authorise an adult to occupy premises under a residential tenancy agreement if that adult is disqualified as a result of their immigration status. Section 39 of the Immigration Act 2016 also creates a criminal offence for landlords in renting property to an adult whom they know or have reasonable cause to believe is disqualified from renting as a result of their immigration status.
21. The relevant principles are helpfully set out in R(OK and others) v London Borough of Barking and Dagenham [2017] EWHC (Admin) 2092. The threshold of enquiring whether the child of a family in need acquires particular significance because that determination triggers powers which will come close to duties to make basic provision if in the absence of such provision the consequence is destitution. It is a matter for the judgment and discretion of the local authority whether or not a child “is in need” and appropriate respect should be given to the judgment of local authorities who carry out the exercise on a regular basis in circumstances where financial resources are limited. If the decision is within the range of reasonable decisions open to the authority it is not for the Court to substitute its own decision.
22. One factor that is clearly relevant is if it appears that a family has been able to support themselves for a period of time without recourse to public funds the question arises as to how they were able to support themselves during that period and why are they unable to continue to provide for themselves. If the applicant does not provide a satisfactory explanation in respect of sources of support that have been provided in the past but are said to have dried up that may justify an adverse inference. Likewise if there is a lack of co-operation from an applicant for assistance then adverse inferences may properly be drawn.
23. Where the decision being made is one that has a profound impact in relation to vulnerable persons it is necessary to give close scrutiny to the decision. A higher level of intensity of review is justified: R (S and J) v London Borough of Haringey [2016] EWHC 2692 [53-54].

## **The Decision**

24. In the 2018 assessment the conclusions of the fraud investigation were set out as follows:

“(1) AA has failed to provide timely evidence of the destitution claimed.

(2) non essential household and non-household payments (bank statement evidence seen) made by AA on a regular basis despite claim to Local Authority that she is destitute.

(3) Home office records confirm that AA has been the sponsor of her husband travel visa’s [sic] to the UK on a number of occasions however she claims to be destitute and is living in temporary accommodation provided by the Local Authority since 2015 to date.

(4) [AA’s husband, MTA] and AA continue to be married. The Local Authority has not seen any evidence that their relationship has broken down and therefore suggest that they continue to maintain contact and have an amicable relationship.

(5) The Local Authority has seen financial evidence which details financial transactions sent to AA by MTA, husband.

(6) MTA visa application declaration: (Evidence seen by Local Authority)

(7) MTA declares that he works fulltime as a qualified accountant with income from property and shares.

(8) MTA also declares a monthly income accrued through his employment in Nigeria

(9) MTA reports to provide £1,196.75 (580,000 Nira) financial support to family and dependents on a monthly basis. MA declares he has family living in the UK.

(10) MTA visa declaration states that AA is his wife and that he has dependents GA,JA and S.

(11) MTA travels frequently in and out of Nigeria as stated by Home Office travel visa records

(12) AA informs the Local Authority that MTA is responsible for the financial payment of S’s boarding school payments in Nigeria. AA has not provided the Local Authority with confirmation of how and who paid for S’s travel from the UK in 2016 to Nigeria.”

25. The assessment findings included:

“This Child and Family reassessment determines that the Local Authority is not satisfied that AA is destitute and are satisfied that GA, JA and EF needs are being met by AA.”

The “family cannot be considered destitute on the grounds of clear evidence that mother has access to some financial and undisclosed support including that received from her husband [MTA]. Bexley fraud investigation and Home Office information provided detailed evidence against further support for family in view of destitution and s17 support.”

“it is my view that MTA has clear means of supporting his family in the UK should they choose to remain living in the UK aside of which the Voluntary Returns Service remain an option which AA might wish to consider in re-uniting with her husband in Nigeria.”

“the LA have found no evidence to corroborate mother’s claim to ‘selling sex’ for money” and that “should mother have made an adult decision to sell sex for money, she has also consciously made the decision not expose her children to any risks that this lifestyle might present.”

26. The decision was communicated to AA on 18 June and 28 days notice to quit her accommodation was given by the provider on 5 July 2018. The Claimants have not vacated the property as they contend they would be street homeless if they did so. AA faces a daily rental charge of £65 per night by continuing to remain.

### **Claimants’ Submissions**

27. The Claimants submit that the Defendant has taken into account matters that should not have been taken into account and failed to take into account matters that should have been taken into account. By way of example the Defendant has taken into account in the decision that AA owns computers, IPADs and a TV whereas, apart from the fact there is evidence of only one computer and one IPAD, these were acquired before the Claimants claimed to be destitute. They were acquired by AA whilst she was working. AA was not asked during interviews when these were acquired but has been able to identify by reference to evidence available to the Defendant that they were acquired before she presented herself as destitute.
28. The payment of £50 per month for a Sky subscription cannot be regarded as evidence of a lavish lifestyle or evidence that AA has access to other funds which she is not declaring to the Defendant.
29. The assertion that AA is still married to MTA is clearly erroneous and that AA has an ongoing amicable relationship with him such that he is supporting her and the children or would support them financially is not based upon any real evidence and is mere speculation. There is no evidence that he has made any significant contribution to support AA or the children for years other than a few very small payments.
30. The contention that AA and the children would have their needs met if they returned to Nigeria is not based upon any evidence but pure speculation. The Defendant had

not enquired of AA what provision there would be in Nigeria if she and the Claimants were to return and therefore had no opportunity to address this prior to the decision.

31. That AA may be able to find accommodation privately and her income from prostitution are factors that should not have been taken into account. In respect of accommodation there is no evidential basis or proper inference to be drawn from evidence that AA could be accommodated by family and friends. She would have to find accommodation for herself and three children. Likewise the suggestion that she might lease premises is not a factor that should have been taken into account given the legislative restrictions on doing so. Likewise AA's resort to prostitution during the period when she received no support from the Defendant whereby she earned a very small amount of money per month should be taken as evidence of destitution rather than evidence that she has an alternative source of income such that she is not destitute.
32. The analysis of expenditure versus means is clear that AA does not have a lavish lifestyle. Whether all of the money that she received from the Defendant was put to best use is a subjective matter. By way of example AA acquired a mobile phone which costs £10 per month for the use of EF on the basis that even as a twelve year old she required it for her safety. Some carers may agree or disagree but it cannot be regarded as evidence of hidden income or a lavish lifestyle. The question is whether AA is destitute and unable to provide for the Claimants. The evidence available to the Defendant do not show that her expenditure exceeded her declared means.
33. As a general theme in respect of the assessment the Defendant did not give AA a reasonable opportunity to address certain concerns if they had such and which led to the decision and did not carry out reasonable enquiries of its own to ascertain the correct position. One example which occupied some time during submissions is that the Defendant concluded that AA acted a sponsor for MTA to enter the UK in 2014 and 2015, a time when they are said to have been estranged and to have had no real contact. Whilst evidence was adduced of MTA's visa applications identifying AA as a sponsor there was no request made by the Defendant of the Home Office for the form suggested to have been filled in by her as sponsor. In fact the Defendant through its counsel confirmed to the court that the sponsorship forms had only been requested of the Home Office a few days before the hearing. Understandably no response from the Home Office had yet been received.

### **Defendant's Submissions**

34. The Defendant's case is that AA is lying about her ability to have access to other funds which may include any one or more of eight potential sources namely: contributions from friends and church, family, loans, Disability Living Allowance in respect of JA, prostitution, EF's mother, dressmaking and from MTA the father of JA and GA.
35. The Defendant does not have to prove that AA is receiving funds from any of these sources or is likely to receive money from these sources. The Defendant is entitled to conclude that the information provided by AA in interview and during the investigations were not full and frank and that it is not satisfied she is destitute.



36. During the hearing Ms Rowlands on behalf of the Defendant went to various parts of the interviews to highlight particular points where the information being provided by AA was not consistent with other accounts which she had given or was just plainly incredible. Whilst information has been provided subsequent to the interview in respect of her marriage status AA did not provide her certificates of decree nisi or absolute prior to the decision although it was accepted during the hearing she was not asked for the documents. Likewise AA did not proffer information about when the TV, IPAD and computer were acquired during interview although it was accepted she was not asked. Those, say the Defendant, are examples of an applicant not co-operating with the Defendant and the Defendant is entitled to draw adverse inferences from such lack of co-operation.
37. On several occasions AA told the Defendant in interview that she did not know the answer to certain questions including when was the last time her children saw MTA, where did MTA live when he visited the UK from Nigeria and why she placed a photograph of her and her husband on Facebook in 2013 if, as she claimed it was a 2010 photograph and they had separated in 2011. She said she was unable to state in interview the purpose of loans she took out in or about 2010 amounting to approximately £30,000. These are matters which mostly predate by a considerable period the claim that AA is destitute but which the Defendant contends are relevant to AA's credibility.

## **Findings**

38. AA had a visible means of income prior to presenting herself as destitute. Her employment slips were made available to the Defendant. She was self sufficient and cared for herself from 2008 and from 2010 when joined by her children and then husband, who returned to Nigeria in 2011. She is the fulltime carer of JA and GA as well as EF, the latter since 2014. She was also the fulltime carer of SA prior to his return to Nigeria in October 2016. JA has special educational needs and EF is in receipt of therapy services dealing with the effects of sexual abuse. The Claimants are clearly vulnerable if AA is destitute.
39. AA does not have recourse to public funds as a result of her immigration status. Absent permission being granted by the Secretary of State for the Home Office she is not permitted to rent a property and it would be a criminal offence for a landlord to rent a property to AA by reason of section 22 of the Immigration Act 2014. During the course of the investigation no real consideration appears to have been given by the Defendant as to what AA would do if she was not provided with accommodation. It was suggested in submissions that she could live with family "as she has done before" and there was evidence to this effect before the Defendant at the time of the decision. In fact the evidence before the court and which was available to the Defendant was that the only time AA lived with relatives was when she first came to the UK in 2008 and without her children. She now has three children to care for. The situation in 2008 is very different from a friend or relative providing accommodation for four people including three children but that appears not to have been considered by the Defendant.

40. It is difficult to see how any proper assessment can be said to have been made without addressing the accommodation needs of the three children and their carer including the issues arising by reason of section 21. That is quite apart from the need for financial assistance.
41. During the hearing I was referred to the case of R (Michael Stewart) v Birmingham City Council [2018] EWHC 61 and in particular paragraph 52 which refers to the “Permission to rent criteria” and the Home Office response in that case which stated “a person with an outstanding appeal which cannot be pursued from abroad will normally be granted permission to rent.” In the present case AA has no such application pending. EF on the other hand does have such an application. However the outcome of such an application is uncertain. In any event the Defendant does not appear to have addressed the issue in the decision. That in itself is a failure to take into account a matter which ought to have been taken into account in arriving at the decision.
42. The assessment has adopted the findings of the fraud investigation in 2017. The Defendant has clearly taken into account matters which should not have been taken into account alternatively has based the decision on errors of fact which might have been avoided if those supposed facts had been put to AA before reaching the decision. The Defendant has relied upon items of expenditure as indications of a lavish lifestyle without enquiring as to when the items were acquired and the sources of money involved. AA’s employment history prior to presenting herself as destitute in 2015 is clearly documented and was declared to the authority. To the extent that a television, a computer and an IPAD are evidence of unnecessary expenditure in the context of a carer and three young children it is relevant to ascertain the date when they were acquired. If they were acquired during the period when AA claimed to be destitute that fact together with the costs and the source of the funds are clearly relevant. However if they were acquired prior to that period of alleged destitution and during a period when the means of income is clear that is not a factor that ought to have been taken into account unless the suggestion is that they should be sold to provide funds to avoid destitution. That is not suggested by the Defendant. The significance of the date when these items were acquired was not taken into account by the Defendant and it ought to have been.
43. The Defendant urged in submissions that the decision be looked at in the round so as to see the overall picture of the potential eight sources of income as identified by the Defendant set out above and AA’s failure to address each of those fully so as to satisfy the Defendant that she is destitute. In taking each of the possible sources of income in turn the Defendant was unable to identify any evidence or legitimate basis for inference to support the decision that AA has or would have access to funds and support such that AA and the Claimants would not be destitute. It amounted to pure speculation. Reliance was made upon inconsistencies or gaps in the accounts given by AA in interview but those inconsistencies were such as not to provide a reasonable basis to infer that she was not destitute.
44. Several examples of that were the subject of detailed submissions during the hearing. The degree of contact between AA, JA and GA with MTA appeared to be reflected in different ways in the interview of AA compared to comments made by JA and GA. AA insisted she had no contact whereas JA is recorded as having said AA “Skypes” MTA at times or on one occasion recorded as “all the time” and lets her speak to

MTA. The records are not consistent in recording exactly what was said. No dates were identified. It is a matter for the Defendant to exercise its judgment as to the extent of any contact between AA and MTA but the Court must scrutinise closely the inference that is drawn. There was no evidential basis to conclude that MTA had any ongoing relationship with AA or had provided any financial payments to AA other than a few very modest payments during a period of several years. When contacted by the Defendant MTA made it clear in an email that he did not want to have anything to do with AA. It is not reasonable to infer that merely because MTA has declared on his visa applications what his income is and that he has dependants in the UK that he has or would make payments to support AA and the Claimants. Something more than mere suspicion or feel is required on the part of the Defendant before drawing that inference given the potentially serious consequences for the Claimants.

45. The assessment identified a sewing machine at AA's home. It was described in the assessment as "large" or "industrial." AA was asked questions about whether she was carrying on work as a dressmaker for reward. The Defendant noted that in 2015 prior to presenting as destitute AA received into her account some significant sums referring to clothes or clothing. The Defendant was entitled to infer that these monies obtained in exchange for goods or services whether that was for sewing, dressmaking or otherwise. However AA presented herself as destitute after she was informed it was illegal for her to do any paid work. That led her to give up her employment. Whilst relevant to credibility generally the payments that were received prior to the claim of destitution cannot show that she is not destitute after that claim is made. It was not a factor which ought to have been taken into account to show AA now has recourse to other sources of income or support.
46. One of the assertions of alternative sources of income was that JA was in receipt of Disability Living Allowance. The Defendant made an enquiry of Greenwich to confirm that was the case but the email exchange shows that no response was provided for that. AA denied there was any such allowance being paid.
47. Upon close scrutiny the findings that AA has recourse to other sources of funds is not properly based upon any of the evidence upon which the Defendant relied in reaching the decision. It was a decision which no reasonable authority could have reached on the evidence available.

## **Conclusions**

48. The decision was flawed in that the Defendant took into account matters which it ought not to have taken into account and failed to take into account matters which it should have taken into account. Given the evidence and materials before the Defendant at the time of the decision or which reasonably could have been available to the Defendant if appropriate enquiries had been made, the decision to find that AA was not destitute and that the Claimants were not children in need was *Wednesbury* unreasonable.
49. In these circumstances the Claimants' grounds are made out and the Claimants' application for judicial review is granted. The decision is therefore quashed.

50. It is open to the Defendant to conduct a further section 17 assessment taking into account the further evidence that has been filed in these proceedings and any other relevant matters. AA is under an obligation to comply fully with the reasonable requests of the Defendant to enable that section 17 assessment to be carried out including visiting the Claimants' home.
51. The parties shall liaise and seek to agree the appropriate form of order taking into account the interim relief that is in place. If consequential matters are agreed a draft order may be submitted for approval. If those matters cannot be agreed the parties shall lodge submissions in writing within 7 days of the handing down of this judgment.