The Queen (on the application of 'N') v The Secretary of State for the Home Department;
The Queen (on the application of 'M') v The Secretary of State for the Home Department

BEFORE : THE LORD CHIEF JUSTICE OF ENGLAND AND WALES, THE MASTER OF THE ROLLS and **LORD JUSTICE AULD** CA ON APPEAL FROM QBD, The Hon Mr Justice Newman, Silber & Richards; 16th October 2003.

The Lord Chief Justice: This is the judgment of the Court

THE SIGNIFICANCE OF THESE APPEALS

1. This judgment relates to three appeals. They have been heard together because they provide this court with its first opportunity to consider in detail the power of the courts to award damages under the Human Rights Act 1998 ("HRA"). They raise a number of common issues of importance.

2. The three appeals have the following features in common. Each involves a claimant or claimants who came to this country to seek asylum. This common feature does not bear critically on the issues that we have to resolve. Each claimant complains of a failure by the defendants to comply with a public law duty imposed by statute under which they contend they were entitled to receive benefits or advantages. Each complains that this failure was attributable to maladministration. Each claims that the maladministration and its consequences constituted a breach of the claimant's rights under Article 8 of the European Convention on Human Rights ("the Convention"). Each claims to be entitled to damages under the HRA in respect of the breach in question.

3. None of these appeals involves an allegation that action was taken by either of these defendants which infringed Article 8. Each alleges that there was a failure by the relevant defendant to take the positive action that was necessary to ensure that the respective claimant's rights under Article 8 were respected.

4. The common issues of principle raised by these appeals are as follows:
   i. What is the nature of Article 8 rights?
   ii. When does a duty arise under Article 8 to take positive action?
   iii. In what circumstances does maladministration constitute breach of Article 8?
   iv. When should damages be awarded?
   v. On what basis should damages be assessed?
   vi. What procedures should be followed to ensure that the costs of obtaining relief are proportionate to that relief?

THE CLAIMS

5. We propose to consider the issues of principle before applying these to the individual appeals. In order to place the discussion in context it may, however, be helpful to give a short summary of the claims advanced in each case.

6. **Ala Anufrijeva**: The claimants are members of a family who claim that their local authority failed to respect their private and family life, contrary to Article 8. The basis of the claim is that the local authority failed to discharge their duty, under section 21 of the National Assistance Act 1948, to provide them with accommodation that met the special needs of one member of the family, with the result that the quality of family life was drastically impaired.

7. **N:** The claimant, an asylum seeker, arrived in this country from Libya on 1 February 2000. He was granted refugee status on 3 May 2002. He complains of maladministration in the handling of his asylum application which caused much of this delay, of receiving inadequate financial support during much of this period and of psychiatric injury caused by the stress of his experience. He contends that these matters infringed his Article 8 rights.

8. **M:** The claimant is an asylum seeker from Angola. His right to remain as a refugee was recognised in January 2001. He then applied for permission for his family, whom he had left behind, to be admitted to the country so that he could be reunited with them. The family were not given permission to enter until the end of November 2002. The claimant contends that much of this delay was attributable to maladministration and that it infringed his right to respect for family life under Article 8.

THE NATURE OF ARTICLE 8 RIGHTS

9. Article 8 of the Convention provides:

"Article 8 - Right to Respect for Private and Family Life"

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms of others."

10. In ***London Borough of Harrow v Qazi*** [2003] UKHL 43 Lord Bingham observed at paragraph 8 that the Convention was an attempt to identify the rights and freedoms most central to the enjoyment of human life in civil society and to give those rights and freedoms an appropriate measure of protection. Article 3 of the Convention provides protection against inhuman and degrading treatment. What is the nature of the right to respect for private and family life, the home and correspondence afforded by Article 8? In essence it is the right to live one's personal life without unjustified interference; the right to one's personal integrity. In ***Bensaid v United Kingdom*** (2001) 33 EHRR 10 the claimant contended that his Article 8 rights would be infringed if he were expelled from this country because of the likely effect that this would have on his mental health. At paragraph 46 the ECtHR had this to say about Article 8:

"Not every act or measure which adversely affects moral or physical integrity will interfere with the right to respect to private life guaranteed by Article 8. However, the Court's case-law does not exclude that treatment which does not reach the severity of Article 3 treatment may nonetheless breach Article 8 in its private life aspect where there are sufficiently adverse effects on physical and moral integrity."

11. In ***Pretty v UK*** (2002) 35 EHRR 1 the issue was whether Article 8 required that the claimant should be permitted to enlist the aid of her husband to commit suicide when immobilised in the final stages of motor neurone disease. At paragraph 61 the ECtHR made the following comment about the ambit of Article 8:

"As the Court has had previous occasion to remark, the concept of "private life" is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of the person. It can sometimes embrace aspects of an individual's physical and social identity. Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8. Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world. Though no previous case has established any such right to self determination as being contained in Article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees."

12. The reference to the right to develop relationships with other human beings demonstrates the link between the right to private life and the right to family life. If members of a family are prevented from sharing family life together, Article 8(1) is likely to be infringed.

13. In *M* the claim is for delay in providing the permission that would enable the sharing of family life to take place. In *Anufrijeva* the claim is for failure to provide the claimants with the facilities that would enable them to enjoy a satisfactory quality of family life. In *N* there is a claim for subjecting the claimant to stress resulting in psychiatric injury and also for failing to provide the support necessary to achieve a basic quality of personal life. In each case it is possible to understand the basis upon which the claim is contended to fall within the ambit of Article 8. Each case involves an allegation that the defendant was at fault in failing to take positive action, which would have averted the adverse consequences of which complaint is made.

WHEN DOES A DUTY ARISE UNDER ARTICLE 8 TO TAKE POSITIVE ACTION?

14. We now turn to the issue as to when Article 8 can impose an obligation on the State to take positive action to secure enjoyment of the rights that Article 8(1) requires should be respected. The jurisprudence of the ECtHR provides some limited assistance with this question.

15. In ***Abdulaziz and others v United Kingdom*** **(**1985) 7 EHRR 471 the applicants, who were permanently settled in the United Kingdom, alleged that their right to respect for family life was infringed because their husbands were not permitted to come to live with them in this country. The ECtHR observed, at paragraph 67:

"The Court recalls that, although the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent in an effective 'respect' for family life.

However, especially as far as these obligations are concerned, the notion of 'respect' is not clear cut: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case. Accordingly, this is an area in which the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals. In particular, in the area now under consideration, the extent of a State's obligation to admit in its territory relatives of settled immigrants will vary according to the particular circumstances of the persons involved. Moreover, the Court cannot ignore that the present case is concerned not only with family life but also with immigration and that, as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory."

16. Where the ECtHR identifies a positive obligation on a State in the context of Article 8 it often has two aspects: (1) to require the introduction of a legislative or administrative scheme to protect the right to respect for private and family life: and (2) to require the scheme to be operated competently so as to achieve its aim. It is in relation to the latter aspect that maladministration can amount to a breach of Article 8, a matter that we shall consider when we come to address the next issue. Thus in ***Glaser v United Kingdom*** (2001) 33 EHRR I at paragraph 63 the ECtHR stated:
"The essential object of Article 8 is to protect individuals against arbitrary interference by public authorities. There may however be positive obligations inherent in an effective "respect" for family life. These obligations may involve the adoption of measures designed to secure respect for family life even in the sphere of relations between individuals, including both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals' rights and the implementation, where appropriate, of specific steps. In both the negative and positive contexts, regard must be had to the fair balance which has to be struck between the competing interests of the individual and the community, including other concerned third parties, and the state's margin of appreciation."

17. The ECtHR has recognised a wide variety of situations in which States are under a positive obligation to introduce systems to preserve respect for family life – see the list identified by *Clayton and Tomlinson –The Law of Human Rights* paragraph 13.118. In particular, the ECtHR has recognised the possibility that a State might be under an obligation to admit relatives of settled immigrants in order to develop family life – ***Gul v Switzerland*** (1996) 22 EHRR 93. Such an obligation was recently established by the ECtHR in ***Sen v Netherlands*** (2003) 36 EHRR 7.

18. There are other fields in which the ECtHR has ruled that States are under an obligation to put in place a system which ensures that Article 8 rights are respected. Thus Article 8 can require a system that gives official recognition to a change of gender upon gender reassignment by a transsexual – see ***Bellinger (FC) v Bellinger*** (2003) UKHL 21. In ***Lopez Ostra v Spain*** (1994) 20 EHRR 277 the ECtHR held that a duty existed to take reasonable and appropriate measures to prevent severe environmental pollution from having an adverse effect on the private and family life of a family living in the vicinity.

19. This last case demonstrates that a deterioration in the quality of life can result in infringement of Article 8 and this is particularly true where it impacts upon the claimant's home – see ***Marcic v Thames Water Utilities Ltd,*** [2002] QB 929. There is, however, a difference between protecting the quality of life that a claimant enjoys in his existing home and providing him with a home where he can enjoy a particular quality of life. The ECtHR has always drawn back from imposing on States the obligation to provide a home, or indeed any other form of financial support. In ***Chapman v United Kingdom*** (2001) 33 EHRR 18 the claimant complained that she had been refused planning permission to live in a caravan on her own land. In rejecting her claim the ECtHR made this observation, which echoed earlier jurisprudence:
"It is important to recall that Article 8 does not in terms give a right to be provided with a home. Nor does any of the jurisprudence acknowledge such a right. While it is clearly desirable that every human being has a place where he or she can live in dignity and which he or she can call home, there are unfortunately in the Contracting States many persons who have no home. Whether the State provides funds to enable everyone to have a home is a matter for political not judicial decision."

20. *Clayton and Tomlinson* comment, at paragraph 13.120, that the positive obligations on the state to respect family life will rarely go so far as to require financial or other practical support. Thus in ***Andersson and Kullman v Sweden*** (1986) 46 DR 251 the Commission held inadmissible an application that Sweden had infringed Article 8 by failing to provide a mother with financial assistance that would have allowed her to

stay at home to look after her children, rather than placing them in a crèche and going out to work. The Commission observed:

"The Convention does not as such guarantee the right to public assistance either in the form of financial support to maintain a certain standard of living or in the form of supplying day home care places. Nor does the right under Article 8 of the Convention to respect for family life extend so far as to impose on States a general obligation to provide for financial assistance to individuals in order to enable one of two parents to stay at home to take care of children".

21. Whether Article 8 imposed a duty on the defendant to provide support to the claimant is an issue in both the *Anufrijeva* and the *N* appeal. It is thus necessary to give further consideration to this question as a matter of principle.

Mr Clayton's submissions

22. Mr Clayton QC appeared for the claimants in both *Anufrijeva* and *N*. In opening his submissions he appeared to be contending that the statutory scheme under which welfare support is provided to refugees and asylum seekers is the manner in which this country has chosen to discharge its positive obligations under the Convention and that maladministration, which constitutes breach of duty under public law that the scheme establishes and which denies to a claimant the support that he would otherwise be entitled to receive, infringes to that extent his Convention rights. In reply he accepted, however, that not every breach of statutory duty would infringe the Convention. The consequences of the breach had to be serious before the Convention would be infringed. In support of his submissions Mr Clayton relied upon the decision of Sullivan J in ***R (Bernard) v Enfield London Borough Council*** [2002] EWHC 2282 Admin: [2003] HLR 27, a decision that we shall consider in due course.

Mr Sales' submissions

23. Mr Sales appeared for the defendant in *N*. He was concerned to rebut the suggestion that a breach of duty in administering this country's statutory scheme of social security would automatically infringe Article 8. He submitted that the welfare system provides benefits which go far beyond any positive action required by the Convention. If failure to provide the benefits at all would not infringe the Convention, how could maladministration in the provision of those benefits do so? In support of his submission Mr Sales relied upon the recent decision of the Court of Appeal in ***R (Carson and Reynolds) v Secretary of State for Work and Pensions*** [2003] EWCA Civ 797.

24. We accept Mr Sales' submission on this point. Indeed, as we have noted, its correctness was accepted by Mr Clayton in reply. This leaves unanswered the question of whether the Convention requires this country to provide welfare support in order positively to ensure that those within our borders can enjoy some minimum standard of private and family life, and, if so, what standard has to be achieved. Mr Sales did not assert that there was no such obligation. What he did assert was that the Convention, and the Strasbourg jurisprudence, required all States to adhere to a single uniform standard when giving effect to Article 8 obligations. If a State chose to be more generous to its citizens than this, that did not have the effect of establishing a higher standard with which the State had to comply.

25. Strasbourg provides little guidance in this area, for we are not aware of any case where the ECtHR has held a State in breach of the Convention for failure to provide housing to a certain standard, or for failure to provide welfare support. In these circumstances, Mr Sales' uniform minimum standards are not readily identified. The dearth of authority is evidenced by the fact that counsel on each side attached importance to two recent decisions, which seem to us of only peripheral significance.

26. In ***Botta v Italy*** (1998) 26 EHRR 241 the claimant was physically disabled. Italian law required bathing establishments to be equipped with facilities enabling the disabled to gain access to the beach and sea. The claimant complained that his Article 8 rights were infringed because, in breach of Italian law, there were no facilities to enable him to get to the sea when he went on holiday. At paragraph 35 the ECtHR held that Article 8 was not applicable for the following reason:

"The right asserted by Botta, namely the right to gain access to the beach and the sea at a place distant from his normal place of residence during his holidays, concerns interpersonal relations of such broad and indeterminate scope that there can be no conceivable direct link between the measures the State was urged to take in order to make good the omissions of the private bathing establishments and the applicant's private life."

27. The ECtHR followed ***Botta*** in ***Zehnalova and Zehnal v Czech Republic*** (14 May 2002) where the applicants were husband and wife and the wife was physically handicapped. They complained that their Article 8 rights were infringed because, in breach of Czech law, the authorities had failed to install facilities that would enable her to gain access to public buildings. The claim failed. The Court observed at p.15:
"The Court is of the opinion that Article 8 of the Convention cannot apply as a general rule and whenever the everyday life of the female applicant is concerned, but only in exceptional cases where a lack of access to public buildings and those open to the public would prevent the female applicant from leading her life so that her right to personal development and her right to make and maintain relations with other human beings and the outside world are in question (see the Pretty v. United Kingdom judgment, No. 2346/02, §61, 29 April 2002). In a case like that, a positive obligation for the state could be established to ensure access to the buildings mentioned. Now, in the case in point, the rights invoked are too wide and indeterminate, as the applicants have failed to be specific about the alleged obstacles and to give convincing proof of an attack on their private lives. According to the Court, the female applicant has not managed to demonstrate the special link between the inaccessibility of the institutions mentioned and the particular needs concerned with her private life".

28. Mr Clayton relied on these decisions as indicating that, where breach of public law impinges directly on the private life of a claimant, Article 8 will be infringed. Mr Sales relied upon them as demonstrating that breach of a public law that is directed to addressing the problems of the disabled will not, automatically, infringe Article 8. It does not seem to us that these decisions carry the debate much further, save that they do suggest, by way of hypothetical observation, that there are some circumstances in which a public authority will be required to devote resources to making it possible for individuals to enjoy the rights that are entitled to respect under Article 8.

29. As long ago as 1982, in an article on 'The Protection of Privacy, Family Life and Other Rights under Article 8 of the European Convention on Human Rights' (1982) 2 YEL 191 at 199 Mr Peter Duffy wrote, in relation to the positive obligations inherent in Article 8:
"The case law has only just begun to grapple with this issue. In general, one would expect a somewhat cautious approach from the Commission and the Court. It seems nevertheless very probable that some welfare benefits come within the scope of Article 8 and possible that minimum welfare provision may now constitute a positive obligation inherent in the effective respect for private and family life by the States."

30. It is noteworthy that, so far as we are aware, the Strasbourg Court has not yet given a decision that a State has infringed Article 3 as a result of failure to provide welfare support, let alone that Article 8 has been infringed in such circumstances. The Court has, however, recognised the possibility of such an infringement. In ***Marzari v Italy*** (1999) 28 EHRR CD175 the applicant suffered from a rare disease that, at times, constrained him to use a wheelchair. He complained that his Article 8 rights had been infringed in that he had been evicted and that the alternative accommodation offered to him was not suitable, having regard to his special needs. The Court observed at p.179:
"The Court must first examine whether the applicant's rights under Article 8 were violated on account of the decision of the authorities to evict him despite his medical condition. It further has to examine whether the applicant's rights were violated on account of the authorities' alleged failure to provide him with adequate accommodation. The Court considers that, although Article 8 does not guarantee the right to have one's housing problem solved by the authorities, a refusal of the authorities to provide assistance in this respect to an individual suffering from a severe disease might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such refusal on the private life of the individual. The Court recalls in this respect that, while the essential object of Article 8 is to protect the individual against arbitrary interference by public authorities, this provision does not merely compel the state to abstain from such interference: in addition, to this negative undertaking, there may be positive obligations inherent in effective respect for private life. A State has obligations of this type where there is a direct and immediate link between the measures sought by the applicant and the latter's private life."

31. The Court went on to hold that it was not for it to review the decisions taken by the local authorities as to the adequacy of the accommodation offered to the applicant, observing that they had offered to carry out further works to make the accommodation suitable. In these circumstances the Court held that the local authorities could be considered to have 'discharged their positive obligations in respect of the applicant's right to respect for private life'.

32. In ***O'Rourke v United Kingdom*** Applcn No 39022/97 26th June 2001, the applicant, who was in poor health, complained of infringement of his Article 3 and 8 rights in that he was not provided with suitable accommodation after his discharge from prison. The Court referred to ***Marzari*** and observed that "any positive obligation to house the homeless must be limited". Insofar as there was any obligation to house the applicant the Court considered that this was discharged by advice given to the applicant to attend a night shelter and efforts that were made to find suitable temporary or permanent occupation.

33. Thus, while Strasbourg has recognised the possibility that Article 8 may oblige a State to provide positive welfare support, such as housing, in special circumstances, it has equally made it plain that neither Article 3 nor Article 8 imposes such a requirement as a matter of course. It is not possible to deduce from the Strasbourg jurisprudence any specific criteria for the imposition of such a positive duty.

34. If this is an area of the law where Strasbourg jurisprudence affords little positive guidance, both our domestic legislation and our own jurisprudence provide some assistance. Our complex, and frequently changing, scheme of provision of social security benefits distinguishes between different classes of those who are within our borders. Those who have an established right to live here, including those whose refugee status has been accepted, enjoy more generous rights to support than those who are seeking asylum, but whose claims have yet to be determined. And there is a statutory prohibition on providing any support to asylum seekers where the Secretary of State is not satisfied that they applied for asylum as soon as reasonably practicable after arrival in the United Kingdom. This prohibition is, however, subject to the exercise by the Secretary of State of a power 'to the extent necessary for the purpose of avoiding a breach of a person's Convention rights' – see section 55 of the Nationality, Immigration and Asylum Act 2002 and its legislative history as set out in paragraphs 6-12 of the judgment of this court in ***R (on the application of Q) v Secretary of State for the Home Department*** [2003] EWCA Civ 364; [2003] HRLR 21. Thus the statute itself appears to recognise the possibility that the Secretary of State will be required to exercise his power to provide support in order to comply with the Convention.

35. In ***Q*** there was discussion in argument as to whether, and in what circumstances, the Convention would impose an obligation to provide support to an asylum seeker and as to whether any such obligation was a positive obligation, or was an aspect of a negative obligation imposed by Article 3 not to subject asylum seekers to inhuman or degrading treatment. The Attorney General, for the Secretary of State argued that failure to provide support could never constitute 'treatment' but accepted that, in extreme circumstances, Article 3 could impose a positive obligation on the State to provide support for an asylum seeker. He gave by way of example the predicament of a heavily pregnant woman. The Court held that the regime imposed on asylum seekers constituted 'treatment'. Thus it did not have to decide whether, as a matter of general principle, the State is under a positive obligation to provide support insofar as is necessary to prevent persons within this country reaching that condition of degradation which, if resulting from treatment, would infringe Article 3. Addressing this point in the present case, we consider that the Attorney General's concession in ***Q*** was properly made. There is a stage at which the dictates of humanity require the State to intervene to prevent any person within its territory suffering dire consequences as a result of deprivation of sustenance. If support is necessary to prevent a person in this country reaching the point of Article 3 degradation, then that support should be provided. We refer to paragraphs 59 and 60 of the judgment in ***Q*** in relation to the degree of deprivation necessary to establish infringement of Article 3.

36. Is there a positive obligation to provide support that is needed to enjoy Article 8 rights? In ***Q*** this Court had this to say about the effect of the treatment of asylum seekers on their Article 8 rights:
"Article 8 provides that "everyone has a right to respect for his private and family life, his home and his correspondence". Similar considerations apply in relation to this right to those that we have discussed under Article 3. If the denial of support to an asylum seeker impacts sufficiently on the asylum seeker's private and family life, which extends to the individual's physical and mental integrity and autonomy - see ***X and Y v Netherlands*** *(1985) 8 E.H.R.R 235, the Secretary of State will be in breach of the negative obligation imposed by Article 8, unless he can justify his conduct under Article 8(2) - as to which there was little debate before us. Certainly Article 8 without more does not entitle the applicant to a roof over his head- see* ***Marzari v Italy*** *[1999] 28 E.H.R.R. CD 175. On the facts of this case, we find it easier to envisage the risk of infringement of Article 3 rights than of Article 8 rights."*

37. While it is possible to identify a degree of degradation which demands welfare support, it is much more difficult to identify some other basic standard of private and family life which Article 8 requires the State to maintain by the provision of support. In principle, if such a basic standard exists, it seems to us that it must require intervention by the State, whether the claimant is an asylum seeker who has not sought asylum promptly on entering the country or a citizen entitled to all the benefits of our system of social security. We turn to consider how judges in this jurisdiction have addressed the problem.

38. In ***Morris v London Borough of Newham*** [2002] EWHC 1262 Admin the claimant complained that the defendant authority had failed to provide her and her family with suitable accommodation pursuant to its duty under section 193 of the Housing Act 1996. Breach of duty was conceded. The relief sought by the claimant included damages for breach of Article 8 of the Convention. After considering the jurisprudence, Jackson J concluded that:
"Absent special circumstances which interfere with private or family life, a homeless person cannot rely upon Article 8 of the European Convention on Human Rights in conjunction with Part 7 of the Housing Act 1996 in order to found a damages claim for failure to provide accommodation".

He held that although the defendant's breach of duty had compelled the claimant and her family to live in *"grossly overcrowded and unsatisfactory accommodation"* for a period of 29 weeks, this did not infringe Article 8.

39. We next return to the decision of Sullivan J in the case of *Bernard*. The claimants were husband and wife. They had six children. The wife was severely disabled and confined to a wheelchair. The defendant Council provided the family with a small house but in breach, as they ultimately accepted, of section 21(1) (a) of the National Assistance Act, failed to provide the family with accommodation suited to her disability. The consequences to the quality of life of the family, and the mother in particular, were severe. The wife was doubly incontinent and, because there was no wheelchair access to the lavatory, she was constantly soiling herself. Living conditions were so cramped that she had no privacy. She was unable to play any part in looking after her children. Breach of duty was conceded. The claimants sought damages for breaches of Articles 3 and 8 of the Convention.

40. So far as Article 3 was concerned, no issue was raised as to there being a positive duty to provide accommodation that would not subject the claimants to conditions that constituted inhuman or degrading treatment. The only issue was whether the degree of severity of the claimants' predicament reached the Article 3 threshold. With some hesitation, Sullivan J concluded that it did not. He held, however, that there was a clear breach of Article 8:
"I accept the defendant's submission that not every breach of duty under section 21 of the 1948 Act will result in a breach of Article 8. Respect for private and family life does not require the State to provide every one of its citizens with a house: see the decision of Jackson J. in ***Morris v LB Newham*** *[2002] EWHC Admin 262 at [59]-[62]. However, those entitled to care under Section 21 are a particularly vulnerable group. Positive measures have to be taken (by way of community care facilities) to enable them to enjoy, so far as possible, a normal private and family life. In* ***Morris,*** *Jackson J. was concerned with an unlawful failure to provide accommodation under Part VIII of the Housing Act 1996, but the same approach is equally applicable to provide suitably adapted accommodation under the 1948 Act. Whether the breach of statutory duty has also resulted in an infringement of the claimants' Article 8 rights will depend upon all the circumstances of the case. Just what was the effect of the breach, in practical terms, on the claimants' family and private life?*

Following the assessments in September 2000 the defendant was under an obligation not merely to refrain from unwarranted interference in the claimants' family life, but also to take positive steps, including the provision of suitably adapted accommodation, to enable the claimants and their children to lead as normal a family life as possible, bearing in mind the second claimant's severe disabilities. Suitably adapted accommodation would not merely have facilitated the normal incidents of family life, for example the second claimant would have been able to move around her home to some extent and would have been able to play some part, with the second claimant, in looking after their children. It would also have secured her physical and psychological integrity. She would no longer have been housebound, confined to a shower chair for most of the day, lacking privacy in the most undignified of circumstances, but would have been able to operate as part of her family and as a person in her own right, rather than being a burden, wholly dependent upon the rest of her family. In short, it would have restored her dignity as a human being.

The Council's failure to act on the September 2000 assessments showed a singular lack of respect for the claimant's private and family life. It condemned the claimants to living conditions which made it virtually impossible for them to have any meaningful private or family life for the purposes of Article 8. Accordingly, I have no doubt that the defendant was not merely in breach of its statutory duty under the 1948 Act. Its failure to act on the September 2000 assessments over a period of 20 months was also incompatible with the claimants' rights under Article 8 of the Convention."

41. We turn now to the statements of principle in the decisions with which we are concerned. In *Anufrijeva* Newman J reviewed both the Strasbourg and the domestic jurisprudence and summarised his conclusions as follows:

"(1) Although the Strasbourg Court has stated on many occasions that there may be positive obligations inherent in an effective 'respect' for family and private life, the cases have differed. In only two cases have the facts had a marked similarity with the present claim. In both cases, the claims failed (See Botta and Marzari).

(2) The Court only last year in Chapman (after Marzari) adhered to the principle that '… Article 8 does not in terms give a right to be provided with a home.' Adding: 'Nor does any of the jurisprudence of the Court acknowledge such a right. Whilst it is clearly desirable that every human being has a place where he or she can live in … and which he or she can call a home, there are unfortunately in the Contracting States many persons who have no home. Whether the State provides funds to enable everyone to have a home is a matter for political not judicial decision'. (para 99)

(3) There may be cases where the circumstances impact upon the private or family life (for example Botta, Guerra and Ostra Lopez), and the principle upheld in Chapman will have little or no bearing. Where the circumstances relied upon are said to impact on family and private life by reason of a failure to act in connection with the provision of a home, the issues are more complex.

(4) The common feature of Chapman and Marzari is that in both cases the Court identified a particular group of people as qualifying for the protection to be afforded by the extended reach of Article 8. In Marzari, '… a refusal of the authorities to provide assistance in this respect to an individual suffering from a severe disease …' and in Chapman, '… the vulnerable position of gypsies as a minority means that some special consideration should be given to their needs.… To this extent there is thus a positive obligation imposed on the Contracting States by virtue of Article 8 to facilitate the gypsy way of life.'

(5) Since the Strasbourg jurisprudence is premised upon the basis that legislation in the sphere of housing and social welfare is in the 'political sphere' and further that it is primarily the responsibility of national authorities to interpret and apply domestic law, caution is called for on the part of this Court when considering the proper approach to adopt in a case where the extended reach of Article 8 is an issue. One might say, particularly where one consequence will be that where an infringement of the Convention is found, damages will be available where Parliament has decided that a breach of duty under the legislation should not give rise to damages. (O'Rourke)

(6) The positive obligation to which Article 8 may give rise in connection with the provision of a home comprises a duty to act so as to respect home, family and private life, it does not give rise to a requirement to act so as to produce a particular result in connection with it. Article 8 guarantees respect not a particular result.

(7) It will be rare for an error of judgment, inefficiency or maladministration occurring in the purported performance of a statutory duty, having application to the class or category of concept 'private and family life … home…', to give rise to an infringement of Article 8.

(8) For action taken pursuant to statutory powers having such application to constitute an infringement of Article 8, it is likely that the act or acts of the public authority will have so far departed from the performance of the public authority's statutory duty as to amount to a denial or contradiction of the duty to act.

*(9) It is likely that the circumstances of the infringement will be confined to flagrant and deliberate failure to act in the face of obvious and gross circumstances affecting the Article 8 rights of an individual. (I take the decision of Sullivan J in **Bernard v London Borough of Enfield** [2002] EWHC 2282 Admin. to be an example.)"*

42. We shall have to examine the approach of Silber J in *N* in some detail when we come to consider the merits of the individual cases. For present purposes it is enough to note that he was content to apply the tests advanced in ***Bernard*** and in *Anufrijeva*, adverting to the possibility that the test of Newman J in the latter might be too

narrow. *M* was not concerned with the provision of support and has nothing to contribute to the present discussion.

Conclusions

43. Neither Mr Sales nor Mr Swirsky, who appeared for the defendant in *Anufrijeva* challenged the decision of Sullivan J in ***Bernard***, either in principle or on the facts. Our conclusion is that Sullivan J was correct to accept that Article 8 is capable of imposing on a State a positive obligation to provide support. 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. Thus, in ***J v The London Borough of Enfield*** [2002] EWHC Admin 735, where the claimant was homeless and faced separation from her child, it was common ground that, if this occurred, Article 8(1) would be infringed. Family life was seriously inhibited by the hideous conditions prevailing in the claimants' home in *Bernard* and we consider that it was open to Sullivan J to find that Article 8 was infringed on the facts of that case.

IN WHAT CIRCUMSTANCES DOES MALADMINISTRATION CONSTITUTE BREACH OF ARTICLE 8?

44. We consider this question in relation to the particular type of maladministration that has taken place in each of the three appeals before us – the failure, in breach of duty, to provide the claimant with some benefit or advantage to which the claimant was entitled under public law. Such failure may have come to an end before the trial. If not, it is likely to be brought to an end as a consequence of a finding of breach of duty made at the trial, so that what is likely to be in issue is the consequences of delay.

45. In so far as Article 8 imposes positive obligations, these are not absolute. Before inaction can amount to a lack of respect for private and family life, there must be some ground for criticising the failure to act. There must be an element of culpability. At the very least there must be knowledge that the claimant's private and family life were at risk - see the approach of the ECtHR to the positive obligation in relation to Article 2 in ***Osman v United Kingdom*** (1998) 29 EHRR 245 and the discussion of Silber J in *N* at paragraphs 126 to 148. Where the domestic law of a State imposes positive obligations in relation to the provision of welfare support, breach of those positive obligations of domestic law may suffice to provide the element of culpability necessary to establish a breach of Article 8, provided that the impact on private or family life is sufficiently serious and was foreseeable.

46. Where the complaint is that there has been culpable delay in the administrative processes necessary to determine and to give effect to an Article 8 right, the approach of both the Strasbourg Court and the Commission has been not to find an infringement of Article 8 unless substantial prejudice has been caused to the applicant. In cases involving custody of children, procedural delay has been held to amount to a breach of Article 8 because of the prejudice such delay can have on the ultimate decision – thus in ***H v United Kingdom*** (1987) 10 EHRR 95 the Court held Article 8 infringed by delay in the conduct of access and adoption proceedings because the proceedings "lay within an area in which procedural delay may lead to a *de facto* determination of the matter in issue", which was precisely what had occurred. The ECtHR had adopted similar reasoning in ***W v United Kingdom*** (1987) 10 EHRR 29. In contrast, in ***Askar v United Kingdom*** (application no. 26373/95) the Commission held inadmissible a complaint of substantial delay in granting permission for the family of a refugee to join him in this country, observing:

"The Commission recalls that delay in proceedings concerning matters of "family life" may raise issues under Article 8 of the Convention. In the case of H. v. the United Kingdom, the Court found a violation of Article 8 in respect of proceedings concerning the mother's access to her child which lasted two years and seven months. However, the Court had regard in reaching that conclusion that the proceedings concerned a fundamental element of family life (whether a mother would be able to see her child again) and that they had a quality of irreversibility, lying within an area in which delay might lead to a de facto determination of the matter, whereas an effective respect for the mother's family life required that the question be determined solely in the light of all relevant considerations and not by mere effluxion of time."

H, W and a third case were then cited. The Commission continued:

"The Commission finds that the present case is not comparable. The subject-matter of the proceedings concerns the granting of permission to enter the United Kingdom for members of the applicant's family, whom the applicant had not

seen for at least six years and with some of whom the nature of his ties has not been specified beyond the fact that, pursuant to Somali tradition, the applicant has on the death of his father become head of the extended family group. Further, it is not apparent that the delay in the proceedings has any prejudicial effect on their eventual determination or that the effect of the passage of time is such as to prevent the proper and fair examination of the merits of the case."

47. We consider that there is sound sense in this approach at Strasbourg, particularly in cases where what is in issue is the grant of some form of welfare support. The Strasbourg Court has rightly emphasised the need to have regard to resources when considering the obligations imposed on a State by Article 8. The demands on resources would be significantly increased if States were to be faced with claims for breaches of Article 8 simply on the ground of administrative delays. Maladministration of the type that we are considering will only infringe Article 8 where the consequence is serious.

48. Newman J suggested in *Anufrijeva* that it is likely that the acts of a public authority will have to have so far departed from the performance of its duty as to amount to a denial or contradiction of that duty before Article 8 will be infringed. We think that this puts the position somewhat too high, for in considering whether the threshold of Article 8 has been reached it is necessary to have regard both to the extent of the culpability of the failure to act and to the severity of the consequence. Clearly, where one is considering whether there has been a lack of respect for Article 8 rights, the more glaring the deficiency in the behaviour of the public authority, the easier it will be to establish the necessary want of respect. Isolated acts of even significant carelessness are unlikely to suffice.

WHEN SHOULD DAMAGES BE AWARDED?

The nature of a claim for damages under the HRA

49. The Law Commission in its helpful and informative report on Damages under the Human Rights Act 1998 (October 2000) suggests that the obvious analogy to a claim for damages under the HRA is a claim against a public authority in tort (paras 4.14 and 4.15). The Commission adds (para 4.26) that in the majority of situations it will be "possible and appropriate to apply the rules by which damages in tort are usually assessed to claims under the HRA" and that it may be "appropriate to treat those rules as the prima facie measure to be applied" unless they are in conflict with the Strasbourg approach. However, the report also contains timely warnings as to the dangers of drawing the analogy too strictly. As is stated earlier in the report, "the exercise is difficult and the comparisons must be treated with care" (paras. 4.12 and 4.13). This is particularly important in cases such as those before us because there is a basic distinction between a claim under the HRA for compensation in respect of the consequences of maladministration and a claim by a member of the public against a public officer for damages for breach of a duty owed in tort. In the former case the claimant is seeking a remedy that would not be available in this jurisdiction for misfeasance prior to the HRA.

50. As we shall see, whereas damages are recoverable as of right in the case of damage caused by a tort, the same is not true in the case of a claim brought under the HRA for breach of the Convention. The language of the HRA and the jurisprudence of the ECtHR make this clear.

The relevant provisions of the HRA

51. Sections 6 to 8 of the HRA are the relevant sections. They provide insofar as material:

"Section 6 - Acts of public authorities

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if-

(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

(3) In this section "public authority" includes-

(a) a court or tribunal, and...

(b) any person certain of whose functions are functions of a public nature,…

Section 7 - Proceedings

(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6 (1) may-

(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or

(b) rely on the Convention right or rights concerned in any legal proceedings
but only if he is (or would be) a victim of the unlawful act.

(2) In subsection (1)(a) appropriate court or tribunal means such court or tribunal as may be determined in accordance with rules; and proceedings against an authority include a counterclaim or similar proceeding.

(3) If the proceedings are brought on an application for judicial review, the applicant is to be taken to have a sufficient interest in relation to the unlawful act only if he is, or would be, a victim of that act.

…

(5) Proceedings under subsection (1)(a) must be brought before the end of -
(a) the period of one year beginning with the date on which the act complained of took place; or
(b) such longer period as the court or tribunal considers equitable having regard to all the circumstances,
but that is subject to any rule imposing a stricter time limit in relation to the procedure in question.

(6) In subsection (1)(b) 'legal proceedings' includes-

(a) proceedings brought by or at the instigation of a public authority; and

(b) an appeal against the decision of a court or tribunal.

(7) For the purposes of this section, a person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act…

Section 8 - Judicial remedies

(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

(2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.

(3) No award of damages is to be made unless, taking account of all the circumstances of the case, including-
(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and
(b) the consequences of any decision (of that or any other court) in respect of that act,
the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

(4) In determining-
(a) whether to award damages, or
(b) the amount of an award,
the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention.

(5) A public authority against which damages are awarded is to be treated-

…

(b) for the purposes of the Civil Liability (Contribution) Act 1978 as liable in respect of damage suffered by the person to whom the award is made.

(6) In this section-
'court' includes a tribunal;
'damages' means damages for an unlawful act of a public authority; and
"unlawful" means unlawful under section 6(1)."

Reference should also be made to two articles of the ECHR that are not included in Schedule 1 of the HRA. The first is Article 13 which requires everyone whose rights and freedoms are violated "to have an effective remedy". The second is Article 41 which is referred to in section 8 HRA and requires the ECtHR to afford "just satisfaction" to an injured party if this is not provided by a domestic court.

Features of a claim for compensation under the HRA

52. The sections of the HRA cited above establish a code governing the award of damages which has to be applied with due regard to the Strasbourg jurisprudence. However, as we shall show, the assistance to be derived from that jurisprudence is limited. The remedy of damages generally plays a less prominent role in actions based on breaches of the articles of the ECtHR, than in actions based on breaches of private law obligations where, more often than not, the only remedy claimed is damages.

53. Where an infringement of an individual's human rights has occurred, the concern will usually be to bring the infringement to an end and any question of compensation will be of secondary, if any, importance. This is reflected in the fact that, when it is necessary to resort to the courts to uphold and protect human rights, the

remedies that are most frequently sought are the orders which are the descendents of the historic prerogative orders or declaratory judgments. The orders enable the court to order a public body to refrain from or to take action, or to quash an offending administrative decision of a public body. Declaratory judgments usually resolve disputes as to what is the correct answer in law to a dispute. This means that it is often procedurally convenient for actions concerning human rights to be heard on an application for judicial review in the Administrative Court. That court does not normally concern itself with issues of disputed fact or with issues as to damages. However, it is well placed to take action expeditiously when this is appropriate.

54. That damages or compensation should play a different role in relation to claims in respect of public law rights from that which it plays in private law proceedings is not confined to the ECHR and the HRA. It also true of claims for infringement of Community Law (see ***Dillenkofer v Germany*** [1997] QB 259) and, for claims for infringement of human rights, under, for example, the Indian constitution (see ***Nilabathbehara v State of Orpassa*** [1993] 2 SCC 746 paras.10, 16, 17 and 22).

55. The code recognises the different role played by damages in human rights litigation and has significant features which distinguish it from the approach to the award of damages in a private law contract or tort action. The following points need to be noted:

a. *the award of damages under the HRA is confined to the class of unlawful acts of public authorities identified by section 6(1) - See sections 8(1) and (6).*
b. *the court has a discretion as to whether to make an award (it must be "just and appropriate" to do so) by contrast to the position in relation to common law claims where there is a right to damages - See section 8(1).*
c. *the award must be necessary to achieve "just satisfaction"; language that is distinct from the approach at common law where a claimant is invariably entitled, so far as money can achieve this, to be restored in the position he would have been in if he had not suffered the injury of which complaint is made. The concept of damages being "necessary to afford just satisfaction" provides a link with the approach to compensation of the ECtHR under Article 41.*
d. *the court is required to take into account in determining whether damages are payable and the amount of damages payable the different principles applied by the ECtHR in awarding compensation.*
e. *exemplary damages are not awarded.*

56. In considering whether to award compensation and, if so, how much, there is a balance to be drawn between the interests of the victim and those of the public as a whole. The requirement to adopt a balanced approach was recognised in the White Paper ("*Rights Brought Home*") where the following comments were made under the heading "Remedies for failure to comply with the Convention":

> 2.6 A public authority which is found to have acted unlawfully by failing to comply with the Convention will not be exposed to criminal penalties. But the court or tribunal will be able to grant the injured person any remedy which is within its normal powers to grant and which it considers appropriate and just in the circumstances. ***What remedy is appropriate will of course depend both on the facts of the case and on a proper balance between the rights of the individual and the public interest. In some cases, the right course may be for the decision of the public authority in the particular case to be quashed. In other cases, the only appropriate remedy may be an award of damages…***" (Emphasis added).

The court has a wide discretion in respect of the award of damages for breach of human rights. Scorey and Eicke in *Human Rights Damages* do not view this wide discretion as problematic. Instead they consider it to derive from the nature of the new approach created by the HRA: 'Given that it is anticipated that the majority of cases in which civil claims will be brought under the HRA will be by way of judicial review which has always been discretionary, it is appropriate that s 8(1) HRA also has a broad discretionary nature…' *Also the language of a 'just and appropriate' remedy is not novel, either to the United Kingdom or to the other human rights instruments*" (A4-035). In their analysis of the phrase 'just and appropriate', Scorey and Eicke consider the case-law in respect of similarly phrased statutes in Canada and South Africa and conclude that it would not be surprising if the English Courts took an approach similar to that of those jurisdictions. In essence this involves determining the "appropriate" remedy in the light of the particular circumstances of an individual victim whose rights have been violated, having regard to what would be "just", not only for that individual victim, but also for the wider public who have an interest in the continued funding of a public service (Scorey and Eicke, A4-036). Damages are not an automatic entitlement but, as Scorey and Eicke also indicate, a remedy of "last resort" (A4-040).

The Strasbourg principles

57. Section 8(4) of the HRA requires the Court to take into account the principles applied by the ECtHR when deciding whether to award damages and the amount of an award. Both the decisions of that Court and the HRA make it plain that when damages are required to vindicate human rights and to achieve just satisfaction, damages should be awarded. Our approach to awarding damages in this jurisdiction should be no less liberal than those applied at Strasbourg or one of the purposes of the HRA will be defeated and claimants will still be put to the expense of having to go to Strasbourg to obtain just satisfaction. The difficulty lies in identifying from the Strasbourg jurisprudence clear and coherent principles governing the award of damages.

58. The Law Commission Report states:
"Perhaps the most striking feature of the Strasbourg case-law, … is the lack of clear principles as to when damages should be awarded and how they should be measured."(para. 3.4)

The Law Commission correctly suggests that part of the explanation for this is the absence of a common approach to damages in the different jurisdictions. It also refers to the views of different commentators, including the statement of Karen Reid (*A Practitioner's Guide to the ECHR* p.398)
"The emphasis is not on providing a mechanism for enriching successful applicants but on its role in making public and binding findings of applicable human rights standards."

Lester and Pannick comment in Human Rights Law and Practice 1998 Ch. 2:
"The case-law of the ECtHR lacks coherence, and advocates and judges are in danger of spending time attempting to identify principles that do not exist."

59. Despite these warnings it is possible to identify some basic principles the ECtHR applies. The fundamental principle underlying the award of compensation is that the Court should achieve what it describes as *restitutio in integrum.* The applicant should, insofar as this is possible, be placed in the same position as if his Convention rights had not been infringed**.** Where the breach of a Convention right has clearly caused significant pecuniary loss, this will usually be assessed and awarded. The awards of compensation to homosexuals, discharged from the armed forces, in breach of Article 8, for loss of earnings and pension rights in ***Lustig-Prean and Beckett v United Kingdom*** (2001) 31 EHRR 601 and ***Smith and Grady v United Kingdom*** (2001) 31 EHRR 620 are good examples of this approach. The problem arises in relation to the consequences of the breach of a Convention right which are not capable of being computed in terms of financial loss.

60. None of the rights in Part 1 of the Convention is of such a nature that its infringement will automatically give rise to damage that can be quantified in financial terms. Infringements can involve a variety of treatment of an individual which is objectionable in itself. The treatment may give rise to distress, anxiety, and, in extreme cases, psychiatric trauma. The primary object of the proceedings will often be to bring the adverse treatment to an end. If this is achieved is this enough to constitute 'just satisfaction' or is it necessary to award damages to compensate for the adverse treatment that has occurred? More particularly, should damages be awarded for anxiety and distress that has been occasioned by the breach? It is in relation to these questions that Strasbourg fails to give a consistent or coherent answer.

61. *Clayton and Tomlinson* have analysed the claims for compensation made to the ECtHR. They set out their results and comment on these at paragraphs 21.32-3:
"The Court does not routinely award compensation to successful applicants. Between 1972 and 1991 applicants sought non-pecuniary damages in 51 cases where the Court held that the judgment alone gave just satisfaction. It has been suggested that these cases share certain general characteristics:

- the Court was very divided on the merits;
- a large majority of cases concerned individuals who were accused of (or were guilty of) criminal offences; and
- they often involved procedural errors in civil or administrative hearings.

The same pattern continued from 1992 until the new Court was established in November 1998. The Court found its judgment sufficient to meet the moral injury caused in 79 of the cases.

Although section 8(4) requires the court or tribunal to examine Convention principles, analysis of the case law on just satisfaction is likely to be of limited assistance. There are serious concerns about the lack of consistency

in the case law (for example, over the treatment of criminal fines as financial loss and the appropriate methodology for valuing property), about the obscure nature of the basis on which the Court makes awards of specified amounts of compensation and about the moral judgments the Court makes when evaluating different types of applicants (such as the claims of convicted criminal and terrorists to just satisfaction)."

62. The disinclination of the ECtHR to pay compensation for procedural errors is consonant with its disinclination to recognise that maladministration resulting in delay engages Article 8 at all, unless this has led to serious consequences. Such an approach is not, however, open in the case of the very different language of Article 5, which deals expressly with delay. Article 5 provides:

"Article 5- Right to liberty and security

5.1 Everyone has a right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) …

(b) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drugs addicts or vagrants;

5.4 Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5.5 Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation."

63. In ***R (KB and others) v Mental Health Review Tribunal*** [2003] EWHC 193 (Admin) Stanley Burnton J had to consider three cases that he heard together in which damages were claimed by mental health patients whose rights under Article 5(4) had been infringed because of inordinate delay in processing their claims to mental health review tribunals. We commend the quality of his judgment. He concluded that Article 5.5 did not make an award of damages mandatory in such cases. It was complied with provided that it was possible to make an application for compensation; it did not preclude the Contracting States from making the award of compensation conditional upon proof that procedural delay had resulted in damage.

64. Stanley Burnton J. gave particular consideration to the question of whether compensation should be awarded where delay has caused frustration and distress. He concluded at paragraph 41:

"I conclude that there is no "clear and constant jurisprudence" of the European Court on the recoverability of damages for distress under Article 5.5 in the absence of deprivation of liberty. There are two principles applied by the Court: that damages are not recoverable in the absence of deprivation of liberty, and that damages are recoverable for distress which may be inferred from the facts of the case. It follows that this Court must itself determine the principles it is to apply."

65. The principle that he decided should be applied, having due regard for the vulnerability of mental health patients detained by the State, he set out at paragraph 73:

"Thus, even in the case of mentally ill claimants, not every feeling of frustration and distress will justify an award of damages. The frustration and distress must be significant: of such intensity that it would in itself justify an award of compensation for non-pecuniary damages. In my judgment, an important touchstone of that intensity in cases such as the present will be that the hospital staff considered it to be sufficiently relevant to the mental state of the patient to warrant its mention in the clinical notes."

This principle has no application to the Article 8 cases which we are considering, for the consequences of delay must amount to more than distress and frustration before Article 8 will even be engaged. This impressive judgment demonstrates, as does the judgment of Sullivan J in *Bernard*, that, especially at first instance, courts dealing with claims for damages for maladministration should adopt a broad-brush approach. Where there is no pecuniary loss involved, the question whether the other remedies that have been granted to a successful complainant are sufficient to vindicate the right that has been infringed, taking into account the complainant's own responsibility for what has occurred, should be decided without a close examination of the authorities or an extensive and prolonged examination of the facts. In many cases the seriousness of the maladministration and whether there is a need for damages should be capable of being ascertained by an examination of the correspondence and the witness statements.

66. In determining whether damages should be awarded, in the absence of any clear guidance from Strasbourg, principles clearly laid down by the HRA may give the greatest assistance. The critical message is that the remedy has to be "just and appropriate" and "necessary" to afford "just satisfaction". The approach is an

equitable one. The "equitable basis" has been cited by the ECtHR both as a reason for awarding damages and as a basis upon which to calculate them. There have been cases where the seriousness or the manner of the violation has meant that as a matter of fairness, the ECtHR has awarded compensation consisting of "moral damages". The Law Commission stated in its report that the ECtHR took account of "a range of factors including the character and conduct of the parties, to an extent which is hitherto unknown in English law".

67. The scale and manner of violation can therefore be taken into account. Scorey and Eicke state that *"where particularly grave violations have been found, the [ECtHR] is much more willing to accept that the non-pecuniary damage sustained is also more severe and is also more amenable to accepting the claims of pecuniary loss"* (A2-041). The example cited is the case of ***Aksoy v Turkey*** [1997] 23 EHHR 533, where the applicant had been detained, tortured and finally released without charge and damages were awarded for pecuniary loss and for non-pecuniary loss (distress to the father of the applicant who continued the case after his son had died).

68. In addition to the violation committed being particularly serious, the manner or way in which the violation took place has in some cases been considered sufficiently serious to lead the ECtHR to award damages.

69. The case of ***Halford v United Kingdom*** [1997] 24 EHRR 523 can be contrasted with ***Kopp v Switzerland*** [1998] 27 EHHR 93. In the former, the ECtHR considered the police force's surveillances of the applicant's telephone (to obtain information regarding a sex discrimination claim she was pursuing in the employment tribunal) to be a "serious infringement of her rights" (article 8 and 13), particularly in the light of the improper use to which the police wished to put the material obtained. The applicant was awarded £10,000 as non-pecuniary damages (even though they rejected her claims that she suffered a stress-related illness as a result of the breach). In contrast, in the latter case, a lawyer whose home telephone was tapped as part of an investigation by the Public Prosecutor relating to the possibility that his wife was disclosing confidential information from the Department of Justice where she worked (she was subsequently acquitted) was refused his claim, although the monitoring of his telephone lines had seriously perturbed his relations with his family and the members of his firm. The Court did not seem to view the breach as having a serious impact. They described the breach of Article 8 as meaning simply that the applicant "did not enjoy the minimum degree of protection required by the rule of law in a democratic society" and without giving more reasoning stated the "the finding of a violation of Article 8 constitutes sufficient compensation".

70. This factor is similar to that called "degree of loss" by the Law Commission in its report, where it states that "In a number of cases, the [ECtHR] has held that, although the applicant has clearly suffered some non-pecuniary damage, the loss suffered is insufficient to render an award of damages necessary" (para. 3.44). For example, in ***Silver v UK*** [1983] 6 EHHR 62, a case on unlawful interference with correspondence by prison authorities, the ECtHR stated: *"it is true that those applicants who were in custody may have experienced some annoyance and sense of frustration as a result of the restrictions that were imposed on particular letters. It does not appear, however, that this was of such intensity that it would in itself justify an award of compensation for non-pecuniary damage."*

HOW SHOULD DAMAGES BE ASSESSED?

71. This question arises in relation to injury which is not quantifiable in financial terms. In this jurisdiction the principles governing awards of 'general damages' are well established by case precedent. The same is not true of the Strasbourg jurisprudence. *Clayton and Tomlinson* comment at paragraph 21.41:
"If the Court decides to award compensation, then it is guided by the particular circumstances in every case, having regard to what it describes as equitable considerations. The Court has given little guidance about how the discretion should be exercised, the relevant factors appear to be the applicant's conduct and the extent of the breach."

72. An infringement of a Convention right may have similar consequences to a tort giving rise to a claim under our domestic law – indeed the same act may constitute both a tort and a breach of a Convention right. An example is the comparison between a breach of Article 5(1), the right to liberty, and the tort of false imprisonment. Stanley Burnton J had to give consideration to this example in ***R (KB and others) v Mental Health Review Tribunal.*** Where a breach of Article 5(4) results in a patient continuing to be detained in a hospital where he would otherwise have been released, the consequence of the breach bears close comparison with the consequences of the tort of false imprisonment. Should the English court, when awarding damages under the HRA, use the damages awarded for the tort of false imprisonment as a model?

73. In considering this question, Stanley Burnton J referred to a possible principle suggested by Lord Woolf CJ when writing extra-judicially. He suggested that not only should damages be moderate (an approach which has since been endorsed by decisions in this jurisdiction) but also that damages should be on the low side in comparison to those awarded for torts in our courts. This suggestion was criticised by the Law Commission. It was not followed by Sullivan J in *Bernard* nor by Stanley Burnton J. It should in future be ignored.

74. We have made plain that the discretionary exercise of deciding whether to award compensation under the HRA is not to be compared to the approach adopted where damages are claimed for breach of an obligation under civil law. Where, however, in a claim under the HRA, the court decides that it is appropriate to award damages, the levels of damages awarded in respect of torts as reflected in the guidelines issued by the Judicial Studies Board, the levels of awards made by the Criminal Injuries Compensation Board and by the Parliamentary Ombudsman and the Local Government Ombudsman may all provide some rough guidance where the consequences of the infringement of human rights are similar to that being considered in the comparator selected. In cases of maladministration where the consequences are not of a type which gives rise to any right to compensation under our civil law, the awards of the Ombudsman may be the only comparator.

75. We have indicated that a finding of a breach of a positive obligation under Article 8 to provide support will be rare, and will be likely to occur only where this impacts severely on family life. Where such a breach does occur, it is unlikely that there will be any ready comparator to assist in the assessment of damages. There are good reasons why, where the breach arises from maladministration, in those cases where an award of damages is appropriate, the scale of such damages should be modest. The cost of supporting those in need falls on society as a whole. Resources are limited and payments of substantial damages will deplete the resources available for other needs of the public including primary care. If the impression is created that asylum seekers whether genuine or not are profiting from their status, this could bring the Human Rights Act into disrepute.

76. Similar considerations apply to delay in processing asylum claims or the procedure for admitting the relatives of refugees. Those admitted are likely, at least initially, to require support. In view of the numbers involved, some delay in the processing of asylum claims is inevitable and, at times, in the interest of the asylum seekers themselves, the process is understandably lengthy. The factors that weigh against recognising administrative delay as engaging Article 8 militate equally in favour of either no award or modest awards where Article 8 is engaged.

77. In ***Bernard*** Sullivan J observed that an award of damages should not be minimal as this would undermine the respect for Convention rights but that a restrained or moderate approach to quantum would provide the necessary degree of encouragement to public authorities whilst not unduly depleting welfare funds. He rightly observed that there was no comparable tort. He looked for assistance when assessing damages to three comparators: (1) damages for discomfort, inconvenience and injury to health arising out of breaches of repairing covenants in residential tenancies; (2) awards of the Local Government Ombudsman on behalf of disabled persons deprived of benefits or assistance as a result of administration; (3) JSB guidelines for damages for personal injuries where there has been full recovery and where the damages are principally for pain and suffering. He concluded that the second was the best comparable as he was dealing with "in essence an extreme example of maladministration which had deprived the mother of much needed social services care (suitable accommodation) for a lengthy period; some 20 months". Sullivan J assessed damages at £10,000 - £8000 to the mother and £2000 to the father – the total being right at the top end of the range of relevant awards made by the Ombudsman. Sullivan J's award to the mother was also right at the top end of the range of damages that could properly be awarded for a breach of Article 8 on the facts of the case before him.

78. We consider that Sullivan J acted appropriately in turning to the awards made by the Ombudsman for guidance on the appropriate compensation, indeed the fact that compensation can be obtained from the Ombudsman is an important factor when considering questions of procedure, to which we now turn.

WHAT PROCEDURES SHOULD BE FOLLOWED TO ENSURE THAT THE COSTS OF OBTAINING RELIEF ARE PROPORTIONATE TO THAT RELIEF?

79. In the course of the hearing of these appeals the court asked the parties to indicate the scale of costs incurred by them in the court below. The reason for the request was misunderstood by some of the media and

possibly the parties. The object was not to make any criticism of the lawyers before us. On the contrary, from the way cases have been presented before us we have every reason to believe that they were appropriately conducted in the court below. However, we were concerned that, even if the proceedings were conducted as economically as possible, the cost of the proceedings would be totally out of proportion to the damages likely to be awarded. This has proved to be the position, even after making generous allowance for lack of experience of the parties and the courts with litigation in relation to damages under the HRA and the fact that initially the relief sought included other remedies in addition to damages.

The precise figures are not important. What is important is that in each case the combined costs of both sides were many times greater than damages that could reasonably have been anticipated. The costs at first instance of each party were totally disproportionate to the amount involved. When the total costs of both sides are looked at including the appeal, the figures are truly horrendous, and the situation is made even more worrying by the fact that all the parties are funded out of public funds and this court sought, as no doubt did the courts below, to try to save costs by engaging in an intensive reading programme out of court. When we deal with the individual cases we shall set out the costs that have been incurred.

80. The reality is that a claim for damages under the HRA in respect of maladministration, whether brought as a free-standing claim or ancillary to a claim for other substantive relief, if pursued in court by adversarial proceedings, is likely to cost substantially more to try than the amount of any damages that are likely to be awarded. Furthermore, as we have made plain, there will often be no certainty that an entitlement to damages will be established at all.

81. What can be done to avoid a repetition of this situation in future proceedings? Based on the experience available at present we suggest as follows in relation to proceedings which include a claim for damages for maladministration under the HRA:

i. The courts should look critically at any attempt to recover damages under the HRA for maladministration by any procedure other than judicial review in the Administrative Court.

ii. A claim for damages alone cannot be brought by judicial review (Part 54. 3(2)) but in this case the proceedings should still be brought in the Administrative Court by an ordinary claim.

iii. Before giving permission to apply for judicial review, the Administrative Court judge should require the claimant to explain why it would not be more appropriate to use any available internal complaint procedure or proceed by making a claim to the PCA or LGO at least in the first instance. The complaint procedures of the PCA and the LGO are designed to deal economically (the claimant pays no costs and does not require a lawyer) and expeditiously with claims for compensation for maladministration. (From inquiries the court has made it is apparent that the time scale of resolving complaints compares favourably with that of litigation.)

iv. If there is a legitimate claim for other relief, permission should if appropriate be limited to that relief and consideration given to deferring permission for the damages claim, adjourning or staying that claim until use has been made of ADR, whether by a reference to a mediator or an ombudsman or otherwise, or remitting that claim to a district judge or master if it cannot be dismissed summarily on grounds that in any event an award of damages is not required to achieve just satisfaction.

v. It is hoped that with the assistance of this judgment, in future claims that have to be determined by the courts can be determined by the appropriate level of judge in a summary manner by the judge reading the relevant evidence. The citing of more than three authorities should be justified and the hearing should be limited to half a day except in exceptional circumstances.

vi. There are no doubt other ways in which the proportionate resolution of this type of claim for damages can be achieved. We encourage their use and do not intend to be prescriptive. What we want to avoid is any repetition of what has happened in the court below in relation to each of these appeals and before us, when we have been deluged with extensive written and oral arguments and citation from numerous lever arch files crammed to overflowing with authorities. The exercise that has taken place may be justifiable on one occasion but it will be difficult to justify again.

THE FACTS AND OUR CONCLUSIONS AS TO EACH APPEAL

82. We will now examine the facts relating to each appeal and set out conclusions. We will set out the facts in some detail but we will deal with the argument much more summarily because we have anticipated our reasons for our conclusions by what has already been stated in this judgment.

The first appeal: Ala Anufrijeva (suing as the personal representative of Matriona Kuzjeva deceased) and another v the Mayor and Burgesses of the London Borough of Southwark ('Southwark')

83. This appeal is from a decision of Newman J dated 4 December 2002. The judge dismissed a claim for damages based on alleged infringement of the appellants' rights under Article 8 ECHR, holding that no breach of Article 8 has occurred.

84. The decision followed a trial over eight and a half days in which the judge heard oral evidence from four witnesses called by the appellants and eight witnesses for the respondents. There was also substantial documentary evidence before the court. To hear evidence in judicial review proceedings is unusual. But in this case in view of the allegations that were being made the parties were ordered to deliver statements of case and the action proceeded as if it were an ordinary High Court action. Because of the allegations that were made, we accept that in this case the oral evidence could not be avoided.

85. Mrs Anufrijeva (Mrs A) married the second appellant (Mr A) in 1977. After their marriage Mrs A's mother, the first appellant, Matriona Kuzjeva (Mrs K) came to live with them in their home in Vilnius, Lithuania. They had three children, Nadezda, born in 1978, Anna Marija, born in 1987 and Bogdan born in 1993. Mrs K participated fully in family life, although from 1985 she had serious health problems in the form of a heart condition and cancer of the stomach.

86. On 31 August 1998 all six family members arrived in the United Kingdom and claimed asylum on the ground of a fear of persecution because of their Russian ethnic origin and imputed political opinion.

87. Mrs A applied to the respondent ("Southwark") for housing for the family immediately upon their arrival, as homeless persons under Part VII Housing Act 1996 (the "HA"). Southwark exercised their discretion under section 188 of the HA to provide temporary accommodation on 3 September 1998 and granted the family a non-secure tenancy of 10 Elkstone Court for six months. On 24 October 1998 Southwark accepted a full housing duty under section 193 of the Act.

88. 10 Elkstone Court was a maisonette on two floors, connected by a steep flight of stairs. Three bedrooms, the bathroom and lavatory were upstairs, the kitchen and living room were downstairs. Mrs K occupied an upstairs bedroom with her grandson.

89. Within two weeks Mrs K had fallen down the stairs and became frightened to use them. This was reported to the housing officer. In the same month, one of the daughters also fell down the stairs and broke her arm. Southwark fitted a handrail. The need to use the stairs seriously impaired Mrs K's ability to participate in family life in the kitchen, although the evidence was that she continued to come down to the lower floor, with assistance, for the next two years.

90. By 13 October 1998, a Vulnerability Assessment form had been completed and forwarded to Southwark's special housing unit by the Southwark Refugee Project. It recorded an urgent request for re-housing to enable Mrs K to be able to access kitchen, bathroom and bedroom without having to use stairs.

91. Over the next few months Mrs K's health deteriorated. By 30 January 1999 she had been admitted to King's College Hospital suffering from angina, chest pain, palpitations, vaginal bleeding and anaemia. She suffered two cardiac arrests. After further tests and reviews, she was admitted for a hysteroscopy, D&C and cervical biopsy on 9 June 1999.

92. During her stay in hospital, solicitors instructed by the family wrote to the Southwark Special Needs Unit expressing concern about Elkstone Court as detrimental to the health of Mrs K and requesting secure suitable accommodation. Mrs K was discharged from hospital on 28 June 1999. On the following day, the appellants' solicitors applied for a Needs Assessment under s.47 National Health Service & Community Care Act 1990 ("NHSCCA"). The request sought, amongst other things, an assessment of need of suitability of accommodation and adaptations. The stated need for assessment was 'Risk: stairs, fell once and had angina attack'.

93. On 16 August 1999, Southwark offered the family 36 Comus House as permanent accommodation. It was a ground floor flat with four bedrooms. It was rejected by the family on the basis that the bathroom was too small to allow a carer to assist Mrs K, although the need for such assistance had not previously been specified.

94. Elkstone Court had from the time of its grant to the family been scheduled for demolition and by August 1999 theirs was the only part of the property that was occupied. The family was asked to leave. In response, the family's solicitors requested a review under section 202 Housing Act 1996. By a letter dated 9 September 1999 Southwark informed the family that their refusal of the Comus House was deemed to be an unreasonable refusal and refused consent to an independent inspection. The family then also sought a review of the suitability of Comus House.

95. The section 47 request for a Needs Assessment had reached a social worker by 25 August 1999, who then requested assessments from an occupational therapist and a physiotherapist. The Assessment was completed on 21 September 1999 and noted that numerous steps had been taken to help Mrs K and that all her current needs were adequately met. A letter of support for medical re-housing was written to the housing department on 12 October 1999 asking; "Please can you re-house this family as a matter of urgency as the impact of living in overcrowded conditions, and its unsuitability has impacted on young and older members of this family".

96. Newman J summarised the events of the first year in these terms:
"In the course of the year since the members of the family arrived in the United Kingdom the defendant housed them, responded to a request for a section 47 assessment, offered alternative accommodation, provided equipment for greater safety and mobility within the property, offered equipment for greater mobility outside the property, provided assistance to access outside amenities, assessed the day to day caring needs of Mrs K and concluded they were adequately met by the family and referred the family's accommodation needs for consideration on grounds of medical re-housing."

97. In November 1999, the family was told that Southwark regarded the offer of Comus House as discharging its obligations under section 193 Housing Act 1996 and that the eviction process would continue. In the same month Mr A's asylum application was refused. Southwark consequently gave notice that the appellants were no longer eligible for housing under Part VII of the Housing Act 1996 and advised them to attend the Asylum Assessment team for assessment under the Children Act 1989.

98. In February 2000, the solicitors requested a community care assessment and an assessment for residential accommodation. A Part 1 assessment was completed on 17 February 2000 which concluded that Mrs K was increasingly isolated and lonely, which was having a detrimental effect on her mental well-being. She was unable to join family activities within the home and was in need of urgent re-housing to more appropriate (one level) accommodation. The appellants contended that this assessment gave rise to a duty to re-house the family pursuant to section 21 National Assistance Act 1948.

99. Mr A appealed against Southwark's decision that it had discharged its section 193 obligations. Correspondence followed, culminating in an agreement by Southwark to make a "fresh decision" on eligibility under Part VII of the Housing Act 1996 and to review the suitability of the "current accommodation". Mr A agreed to withdraw the appeal. On 26 June 2000, Southwark indicated that, having considered the position, it was satisfied that Mr A was not eligible for assistance. Mr A then sought a review of both the eligibility and suitability decisions. Southwark upheld the position in a letter dated 17 August 2000.

100. In the meantime the family had applied to Southwark's Asylum Support team. The judge summarised the position by then as follows:
"In summary, in the 12 months to the end of August 2000 (2 years from the date of arrival) the defendant was, as a matter of law, discharged from a duty under the HA, under a duty pursuant to the Asylum Support (Interim Provisions) Regulations 1999 and arguably subject to a duty under section 21 National Assistance Act 1948. Further it was required, if requested, to carry out an assessment under NHSCCA 1990. In the period in question the defendant decided on eligibility, carried out a section 47 assessment, reconsidered its eligibility decision and at all material times held itself out as willing to provide accommodation in accordance with the Asylum Support (Interim Provisions) Regulations."

101. On 8 September 2000, the family's solicitors requested an assessment of Mrs K's needs under the Chronically Sick and Disabled Persons Act 1970, including an assessment of housing needs. On 12 September 2000,

Southwark offered Mrs K a placement in a Residential Home pending the exhaustion of the appeal rights. The family rejected this offer.

102. Southwark alleges that on 27 October 2000, they served a notice to quit Elkstone Court terminating the tenancy on 27 November 2000 to allow for demolition. The family was offered bed and breakfast accommodation by the Asylum Team but refused it, requesting another assessment urgently under section 47 NHSCCA 1990. While the assessment was being carried out the family was offered the only three bed-roomed property at 11 Palamon Court available to Southwark's temporary accommodation unit but this was rejected because the bathroom was upstairs.

103. The section 47 Assessment was completed by a social worker, Liz Duncan, on 21 December 2000. The main family concern was stated to be that Mrs K could not fully participate in family life due to the layout of the accommodation. The Care Plan included the need to liaise with the Housing Department with a view to alternative accommodation being provided for the family, although Liz Duncan's evidence at the trial was that there were many more urgent cases for re-housing facing the respondent at that time. At around that time, and in the ensuing months Mrs K's health declined and she was largely confined to bed.

104. Southwark issued possession proceedings with a return date of 14 February 2001. The appellants made a claim for judicial review, asserting imminent homelessness, for which permission was granted by Forbes J on 9 February 2001. Southwark responded to the grant of permission with a brief history in which it was contended that the appellants did not face immediate eviction. It was conceded in the points of defence that 'the current accommodation was not suitable for the first claimant's needs', a concession that has never been withdrawn.

105. On 20 February 2001, Elias J ordered that suitable accommodation be found within eight weeks. Liz Duncan assumed responsibility for compliance with the order. 49 Gordon Road was offered to the family, but rejected as there were some steps leading to the kitchen and bathroom and it appeared by March 2001 that Mrs K would need a further operation, which might leave her wheelchair bound.

106. Despite this rejection an occupational therapist was asked to make an assessment of the suitability of 49 Gordon Road on behalf of Southwark. Mrs K was not available to view the property so that an assessment of her mobility could not be carried out. On 30 March 2001, Southwark maintained that 49 Gordon Road was suitable and persisted in this assertion despite a reply to questions from Mrs K's GP on 3 April 2001, which conflicted with the assessment. The appellants disagreed.

107. Mrs K was diagnosed with a recurrence of gastric cancer and given a prognosis of "a few months to two years". On 4 May 2001, Lightman J adjourned the judicial review proceedings by consent, Southwark having agreed to start a multidisciplinary section 47 assessment and to use its best endeavours to find suitable accommodation near the hospital at which Mrs K was being treated.

108. Mrs K was discharged to Elkstone Court and the respondent visited to assess her needs and her mobility on 22 May 2001. A reassessment of mobility was agreed. On 31 May 2001, Ouseley J ordered that it should be carried out within seven days of notification that Mrs K was available.

109. A property agreed to be suitable for both parties was proposed but then became unavailable. On 3 July, Collins J required the respondent to provide suitable accommodation within 8 weeks. Further properties were discussed by both parties (often rejected by the appellants because of the distance from the hospital) before Mrs K was re-admitted to the hospital on 2 September 2001. She died aged 87 on 4 September 2001.

110. Again the judge summarised the events of the final year for Mrs K:
"In summary, between September 2000 and September 2001 the following occurred. The defendant, through its asylum team, offered the family accommodation. It offered Mrs K a residential home placement. It sought possession of Elkstone Court. It responded to an application for an assessment. It produced a care plan. It responded to judicial review proceedings, stating that it would not evict Mrs K. It responded to each court hearing thereafter. It offered 49 Gordon Road as alternative accommodation and various properties thereafter. It gave instructions for a variety of assessments to be made and Mrs K was assessed."

111. The appellants contended before Newman J that from the outset Elkstone Court was unsuitable accommodation for the family and Mrs K because of the stairs; despite recognising a need for the family to be

re-housed in August 1999 Southwark failed to effect this over the ensuing two years; the consequences for Mrs K's physical and mental decline were serious; despite this, Southwark deliberately employed delaying tactics, including the carrying out of unnecessary assessments. Extensive internal management faults were also alleged.

112. In relation to the factual contentions the judge found:
   a. *that Southwark from the outset provided a home and endeavoured to meet the wishes of the family*
   b. *it was not for the court in this claim to determine whether 36 Comus House was suitable; it was certainly not manifestly unsuitable since the only objection related to the size of the bathroom;*
   c. *the accommodation at Elkstone Court was believed by the social worker, Liz Duncan, to be dry, warm and to meet the essential needs of Mrs K;*
   d. *the delay in responding to the family's needs was not excessive;*
   e. *allegations of bad faith and deliberate misconduct, which had been made, were rejected in their entirety.*

113. We have already set out the conclusions of Newman J as to what the appellants had to prove in order to establish an infringement of Article 8. Far from finding that Southwark had "so far departed from the performance" of their statutory duty "as to amount to a denial or contradiction of their duty to act", Newman J conclusions were that, overall, Southwark had been assiduous in seeking to accommodate the special needs of Mrs K. He questioned whether Southwark had been right to concede in their points of defence that they owed a section 21 duty and held that in any event this duty would reflect the deterioration in the health of Mrs K that had taken place. The concession could not be treated as dating back to the time when the family first moved into Elkstone Court. In the light of the judge's findings of fact, the appellants' claim was doomed to failure.

114. Sedley LJ gave leave to appeal and we accept that he was right to conclude that the issues identified including "the interface between Article 8 and the obligations created by domestic legislation" would benefit from clarification from this court. Sedley LJ was also concerned as to how Newman J's approach could be reconciled with that of Sullivan J in *Bernard*. Again we recognise that when the two judgments are set side by side differences in approach can be detected. In relation to both these concerns we hope that in the earlier part of this judgment we have provided such clarification as is possible in the absence of clear guidance from Strasbourg.

115. Mr Clayton sought to attack Newman J's judgment root and branch. He submitted that his analysis of the law set the threshold of infringement of Article 8 far too high and also sought to attack his findings of fact as not open on the evidence. The judge's findings were made after over 6 days of oral evidence. It is notoriously difficult in this court to reverse findings of fact made by the trial judge on the basis of oral evidence. In the present case we can see no basis for impugning the judge's findings of fact. The accommodation provided to the appellants' family was not ideal, but on the judge's finding it fell far short of placing the family in the type of conditions that would impose a positive obligation under Article 8 to install them in superior accommodation. Southwark's good faith having been accepted by the judge, Southwark undoubtedly made reasonable efforts to accommodate the family. There was no conduct which could arguably amount to an infringement of Article 8. The reality is that this appeal had no prospect of success.

116. Without making any criticism of anyone involved in the hearing, we can understand why this case attracted such adverse comment in the press. The case can give the impression to an outside observer that the Appellants were behaving unreasonably, appearing to exploit every avenue in order to get a remedy which on any drawing of a balance between their human rights and the interests of the public would seem difficult to justify. However, this case was treated by all concerned as a test case and we have no reason to think that the Appellants were acting other than on responsible legal advice and on this basis we make clear that we do not suggest they have acted inappropriately.

117. During the hearing, a member of the court (Lord Woolf CJ) speculated as to the amount of the costs incurred and mentioned a possible figure of £100,000, which was immediately corrected by counsel as being too high. This may have unintentionally fanned the criticism in the press. This is very much regretted. The court also deplores the difficulties experienced by the appellants, as a result of the media presence on their doorstep, in attending court. The Court learned of this from Mr Clayton and immediately made arrangements for the appellants to be escorted to court by the local police, for which assistance we are grateful. However, the fact

remains that the costs in the court below of both sides were unconscionably high and out of all proportion to the issues at stake. We repeat that we do not question that the costs were properly incurred. but the detailed figures we are now given are as follows and speak for themselves:

The Appellants' costs for the judicial review stage and the Queen's Bench stage (excluding the appeal) are roughly £52,000, split between the judicial review proceedings (£13,000) and the Queen's Bench proceedings (39,000).

Southwark's costs for the judicial review stage and the Queen's Bench stage (excluding the appeal) are: roughly £60,000, split between the judicial review proceedings (£10,000) and the Queen's Bench proceedings (£50,000).

To that figure have to be added the costs of this appeal.

We recognise that the appellants had some success on interim applications but the problem with litigation over housing issues in the High Court is that every application in the course of proceedings can be expensive. In the event, the figure for total cost of £100,000 admittedly "plucked out of the ether" proves to have been roughly accurate for the costs of both sides in this case.

The second appeal: R (on the application of N) v The Secretary of State for the Home Department ('the Home Office')

118. This appeal by the Home Office is from a decision of Silber J in favour of N. The story starts on 1 February 2000 with the arrival of N, a Libyan national, in the UK, whereupon he claimed asylum. He also claimed and was granted income support, housing benefit and council tax benefits.

119. His asylum application was dealt with by the Home Office, who sent him a temporary admission form and Statement of Evidence form (SEF) on 5 June 2000. The envelope containing those documents was incorrectly addressed and it was returned to the Home Office two days later. No further copy of the letter was sent, although N's solicitors began to correspond with the Home Office on his behalf on 8 June 2000.

120. N's claim for asylum was refused on 11 December 2000 on the ground that he had not returned the SEF. The decision was, for an unknown reason, not notified to N until 14 February 2001, when it was served with removal directions for his return to Libya 'at a time and place to be notified'. In the meantime N's solicitors had told the Home Office on 17 January 2001 that the SEF had never been received and provided full details of the asylum claim. Correspondence followed and representations were made on N's behalf by his MP but the Home Office maintained the refusal of leave to N to enter on non-compliance grounds.

121. On 21 February 2001, a notice of appeal was lodged on N's behalf against the refusal of leave to enter. By January 2002 the appeal notice had still not been processed by the Immigration Service and passed on to the Special Adjudicator, despite communications from N's solicitors trying to establish what had happened to it.

122. On 11 May 2001, the Home Office issued a CIPU Bulletin dealing with the serious human rights violations to which failed asylum seekers were then subject on their return to Libya. It was based on information from Amnesty International and advice from the Foreign and Commonwealth Office in London in 2000 and noted that the UK government had placed a temporary hold on further removals while it made further enquiries. The Bulletin noted that exceptional leave to remain for a period of six months would be granted to failed Libyan asylum seekers. This information was known to the Home Office when the removal directions in N's case were issued. When N's MP raised the issue of the policy described in the Bulletin, the Home Office Minister explained that N could not benefit from it because his application for asylum had been refused on non-compliance grounds.

123. Under the view of the law then relied on by the Home Office, it was thought that N ceased to be entitled to his social security, housing and council tax benefits as soon as the decision was taken to refuse his application for asylum. It was also thought that he was liable to repay the benefits received in respect of any period after that date, irrespective of the date on which he was notified of the decision. His rent ceased to be paid on 12 March 2001 and his income support stopped on 9 April 2001. He was told he was liable to repay £ 758.60 in benefits by the DSS on 30 April 2001. This view of the law has now been shown to be erroneous by the decision of the House of Lords in favour of Miss Anufrijeva, in which the appellants' daughter brought separate and independent proceedings against the Home Office in relation to the question of whether her

statutory entitlement to income support terminated when her claim for asylum was determined by the Secretary of State or when, significantly later, she was informed that it had been rejected. Her claim failed in the Court of Appeal but succeeded in the House of Lords - ***R (Anufrijeva) v Secretary of State for the Home Department*** [2003] UKHL 36. It is now clear that notification of a decision is necessary before it takes effect.

124. N fell into arrears with his rent and council tax. On 7 June 2001, he was served with Notice of Seeking Possession by his landlords, who then issued possession proceedings in September 2001. He was also served with a summons to attend before the Magistrates Court on 13 September 2001 for non-payment of council tax. Orders were later made against N in both of these proceedings.

125. N had applied to the National Asylum Support Services (NASS) for assistance when his income support ceased in April 2001. NASS was told that there was an urgent need for the application to be dealt with speedily because of the threat to N's accommodation if rent was not paid and that N needed to remain in his existing area to receive medical treatment.

126. He began to receive support in the form of emergency vouchers in July 2001 and was told that accommodation had been reserved for him in Birmingham. After protests from his solicitors, supported by N's GP, NASS indicated that, on advice from their medical advisor, they accepted that N's relocation was "not necessary". NASS did not, however, make any payment for the accommodation at which he was living. A liability order in respect of unpaid council tax of £618.45 was made on 13 September 2001. A possession order was made in the county court on 5 December 2001, suspended on condition N repaid £2.70 per week towards the arrears of rent and costs of £1,690.04 and paid the current rent of £47.39 per week. N's vouchers amounted to just over £36 per week for all his subsistence needs. Accordingly, N had no means available to him to meet the debts accrued. He sold most of his possessions.

127. NASS maintained the refusal to meet the costs of N's accommodation on 19 December 2001 and their decision to require him to move.

128. On 3 January 2002, N issued the present proceedings, challenging the decision to refuse the asylum claim on non-compliance grounds and the failure to process his appeal. He also sought to quash the decision not to apply the policy of granting exceptional leave to remain to him as a Libyan asylum seeker.

129. Within a month, on 7 February 2002, the Home Office withdrew the non-compliance refusal and agreed to give N's asylum claim substantive consideration by an interview in the near future. On the same day, the Immigration Appeal Tribunal held that the CIPU Bulletin meant that a Libyan asylum seeker "had inevitably to be treated as a refugee".

130. The effect of the decision to reconsider the asylum claim meant that N's entitlement to income support was restored. He was still, however, required to repay arrears of housing benefit, the possession order was not set aside and the debt under the county court judgment remained outstanding.

131. On 3 May 2002, N was granted refugee status and indefinite leave to enter the UK. After that decision the only purpose of pursuing the present proceedings was to claim damages.

132. The material consequences of the withdrawal of benefits as a consequence of the refusal of N's asylum application were detailed by Silber J at paragraphs 89 and 90 of his judgment. N had obtained a one-bedroom flat rented out by the Family Housing Association. He furnished this with money borrowed from the community. When his support stopped he had to sell all his furniture and his fridge, washing machine and cooker. All that he had left was the carpet, on which he slept. As he had no cooking facilities he had to eat cold food. He was unable to repay those from whom he had borrowed money. He was unable to pay bus fares and, in consequence, could not continue to follow a computer course and an English course on which he was engaged.

133. In addition to his material deprivations N experienced severe depression. This started in 2001 but received no treatment until N consulted a Consultant Psychiatrist, Dr Yasin in May 1992. Based on N's account, Dr Yasin formed the following conclusions, as described by the judge at paragraphs 92-4 of his judgment:
"…the claimant had 'symptoms of major depressive disorder using the DSM4 Diagnostic Criteria Code 296. He had 'depressive moods most of the time' and had 'lost pleasure in all day-to-day activities'. Dr. Yasin noted that the claimant, who had poor concentration, considered himself worthless and was thinking about suicide. It was pointed out by Dr.

Yasin that the claimant had no previously psychiatric history and nor had any of his family and that the symptoms which Dr. Yasin found were precipitated by his fear for his life and being deported.

Dr Yasin thought that the claimant ought to increase the number of anti-depressants he was receiving from his general practitioner and that he ought to receive counselling. He did not believe that medication alone was going to alleviate all the claimant's problems. He believed that if the claimant was deported, his conditions would get worse as the claimant perceives that his life would be in danger, but if his case is looked at favourably, Dr Yasin did believe that his condition would improve but not suddenly. The view of Dr Yasin was that on the balance of probabilities, the claimant's depression was most likely to be precipitated by the events, which occurred following the decision of the Secretary of the State not to grant him a visa. He thought that the risk of the claimant harming himself remained significant due to the severity of his depression and his loss of self-confidence, the claimant does not see any future and he felt that he has lost more than a year of his life, as he was unable to study or do anything.

It was considered significant by Dr Yasin that the claimant became depressed when the Home Office notified him that his visa would not be extended and on hearing that he was to be deported, he became frightened for his life. Those feelings were, according to Dr Yasin, compounded by what he perceived as lack of support and his benefits stopped."

134. In his skeleton argument in support of the judgment below Mr Clayton advanced two different grounds for contending that N's Article 8 rights were infringed. First he contended that the material deprivation to which he was subjected meant that N had been denied "his dignity as a human being and had been condemned to conditions which made it virtually impossible for him to have any meaningful private life for the purposes of Article 8."

135. We refer to our conclusions in paragraph 43 above. Article 8 does not place on a State an obligation to provide an individual with a home. Even less does it require the State to provide support which enables an individual to furnish a home, or to pay bus fares in order to attend courses. The first way that Mr Clayton advanced his appeal is not viable. Nor, as we shall now show, did these arguments reflect the basis upon which Silber J found in favour of his client.

136. The alternative way that Mr Clayton put his case was to argue that the administrative deficiencies in handling N's claim for asylum and assistance caused damage to N's mental health, thereby infringing his Article 8 rights and entitling him to damages. This was the basis upon which the judge found in favour of N. It is necessary to examine this part of the judge's reasoning in a little detail.

137. Silber J first considered the effect on N of the manner in which his asylum application was handled in the context of his claim under Article 3, which did not succeed. He held at paragraphs 97 to 99:
"The position of the claimant was not the same or very similar to that of a person who has been expelled and who knows that he will definitely have to leave the country and return to Libya where he will be subject to the Libyan regime for seriously mistreating failed asylum seekers. In sharp contrast, the claimant merely had the worry that he might suffer this fate. This concern must have been greatly alleviated by the prospect that the result of the refusal of the claimant's application for asylum might be overturned in one of the three ways that I have outlined.

To my mind, it was a very regrettable error of the Home Office to refuse the claimant's application and I do not belittle the claimant's worry and concern. Dr Yasin considers that his depression was most likely precipitated by the events triggered off by the refusal letter and the claimant summarises his claim in paragraph 11 of his witness statement by saying that:-

'My whole life is on hold at the moment because of the decision to refuse my asylum application and the fact that I cannot do anything about my appeal'.

In addition, there is the additional and justifiable complaint about the failure of the Home Office to process the appeal. There is clearly a world of difference between, on the one hand, the position of a person who has been refused asylum and whose appeal is being dealt with expeditiously and, on the other hand, the position of somebody like the claimant, whose appeal was lodged in February 2001 and in respect of which nothing had happened until 11 months later especially with no acceptable explanation or justification being put forward by the defendant. I have already explained in paragraph 2 that the claimant's solicitors of 25 June 2001 shows that they were told about why this delay had occurred and that shows serious errors by the Home Office. To my mind, this delay was bound to cause the claimant excessive anxiety, especially when it is combined with the lack of financial help so that, in the words of Dr. Yasin the claimant's 'whole life is on hold at the moment…'"

138. Turning to Article 8, Silber J first quoted the following statement from the judgment of the ECtHR in ***Bensaid*** (2001) 31 EHRR 1 at paragraph 47:
"Mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity…the preservation of mental stability that is in that context an indispensable condition to effective enjoyment of the right to respect for private life"

139. Silber J went on at paragraphs 110 and 111 to express the following conclusions:
"Article 8 is expressed in terms of effect on the citizen and it refers to "respect for his private and family life…" and so when considering a breach of this Article has occurred, it is necessary at that stage to focus substantially on the effects on the claimant. As I have explained, the claimant stated that after he had received the letter of refusal from the Home Office on about 14 February 2001, his life changed noticeably and radically because thereafter he suffered from depression and from anxiety which led to him being unable to eat or sleep properly.

Even assuming that the Home Office is entitled to a wide margin of appreciation then nevertheless in the light of the extended meaning given to Article 8 so that it covers mental health, I consider that the claimant's rights under Article 8 have been contravened as is evidenced by the serious damage to his mental health."

140. Later in his judgment Silber J made the following findings at paragraphs 156, 158 and 160:
"…officials at the Home Office were well aware by October 2000 that if the claimant was returned to Libya, he would have been subject according to the CIPU Bulletin to "serious human rights violations, including torture." They must also have appreciated that by refusing his asylum application and by serving a removal direction on him, this would, or at least could, have had a very serious effect on the claimant who would be at risk of damage to his mental health. This is so especially as the claimant was in a particularly vulnerable position as he had explained with supporting information why he believed in his statement to the Home Office of 16 October 2000 "that I have no doubt that if I return to Libya I will be killed by the authorities".

The Home Office officials must have realised that the claimant would have been seriously and adversely affected by the removal directions and by the refusal of his asylum application as until they were reversed, he could at very short notice have been returned to Libya in circumstances in which a claim under Article 3 was, in the words of the CIPU Bulletin, "likely to succeed". In this case, the claimant was not removed but the very imminent threat of such return which could take place in the words of the removal direction at a time and place to be determined showed that the claimant was at risk of treatment which could constitute infringement of his Convention rights. Dr. Yasin points out that the claimant on hearing that he was to be deported, he became very frightened for his life.

The defendant's officials must have known that without housing benefits, council tax refund and subsistence payments, the claimant would have experienced very great difficulties in surviving as he could not afford to pay for accommodation or for food and any other of the necessities of life without any assistance from his friends and colleagues in his community and they did not know that he was to receive this. Further he would not have been in a position to repay the benefits that were being claimed as a result of the refusal of the claimant's asylum application. In those circumstances, the defendant's officials must have known or ought to have known that the claimant was at least at risk of mental anguish or of degrading and humiliating treatment in which no action was being taken to process his appeal or to reconsider his application in the light of the cogent material supplied by him. Thus, I find that there was an obligation imposed on the defendant to protect the claimant from degrading or humiliating treatment and from mental illness of the kind necessary to engage Article 8, because for the reasons that I have stated in the words of E the defendant knew or ought to have been aware that *'the [claimant] was suffering or at risk of [degrading or humiliating treatment of the kind necessary to engage Article 8]'."*

141. Mr Sales attacked these findings. He submitted that the Home Office had no reason to suspect that N was psychiatrically vulnerable and could not reasonably anticipate that he would suffer psychiatric harm as the result of their actions. Mr Clayton did not challenge these submissions. He submitted that the 'egg-shell skull principle', whereby a defendant must take his victim as he finds him, applied. The Home Office were aware that asylum seekers were often vulnerable and fragile and that a failure to process their claims effectively and with reasonable efficiency would have adverse consequences on their well-being. They had to take the consequences of the fact that N proved particularly vulnerable.

142. Silber J's decision, if correct, has far reaching implications. The Home Office had no reason to suspect that N was psychiatrically vulnerable. He received an initial decision refusing him asylum which, while erroneous, was open to appeal. His predicament was no different from that experienced by literally thousands of asylum seekers in the past. It was not reasonably to be anticipated that the decision in question *would* precipitate psychiatric harm. Equally it will always be foreseeable that an important adverse decision *may* cause psychiatric harm if the recipient of the decision is particularly vulnerable. If Silber J is correct it will follow that any significant decision constituting maladministration, or even unjustified delay in reaching such a decision, will risk constituting an infringement of Article 8 if it induces stress which results in psychiatric harm.

143. We have reached the conclusion that Silber J was in error in holding, on the primary facts found by him, that Article 8 was infringed. Where the breach of a human right has the incidental effect of causing psychiatric harm, that fact can properly be reflected in an award of damages. That, however, is not this case. Here it is the causing of the psychiatric harm which has itself been held to be the infringement of Article 8. Where a public authority commits acts which it knows are likely to cause psychiatric harm to an individual, those acts are capable of constituting an infringement of Article 8. Maladministration will not, however, infringe Article 8 simply because it causes stress that leads a particularly susceptible individual to suffer such harm in circumstances where this was not reasonably to be anticipated. No lack of respect for private life is manifested in such circumstances. The egg-shell skull principle forms no part of the test of breach of duty under the HRA or the Convention.

144. For these reasons the appeal in the case of *N* will be allowed.

145. In this case the costs of the hearing below were still substantial but not of the order of the previous case. They were:
The Secretary of State's costs up to and including the first instance judgment are:
£19,800 (of these £8,700 are solicitor's fees and £11,000 are counsel's fees). N's costs have been given a provisional estimate of £11,742.44. Of these £6,042.44 are counsel's fees and £4,700 are solicitor's fees.

The third appeal: M v Secretary of State for the Home Department

146. This appeal is from the decision of Richards J dismissing the claim of Valentino M ("M"). M is a refugee from Angola. When he fled from Angola in 1996 he left behind his family, consisting of two sons, born on 3 July 1986 and 7 August 1991, a daughter born on 10 November 1995, and his mother, who was helping him to look after them. They remained in Angola until 1998 when the civil war caused them to travel to Kinshasa in the Democratic Republic of Congo. M re-established contact with them in 1999 and began to send them financial support.

147. In the meantime, on 14 May 1996, M had arrived in the UK and claimed asylum. His claim was refused in October 1996. His appeal to the Special Adjudicator was supported by evidence that he was suffering from a psychotic illness, schizophrenia, for which he was receiving treatment, but it was dismissed on 22 March 1999. Leave to appeal to the Immigration Appeal Tribunal ("IAT") was refused but subsequently granted by consent after a challenge by way of judicial review. The substantive appeal to the IAT was thereafter dismissed but was the subject of a successful appeal to the Court of Appeal, which remitted the claim to a freshly constituted IAT.

148. The IAT heard the appeal on 8 January 2001. At the hearing the parties were told that the IAT proposed to allow the appeal and the Home Office Presenting Officer, Mr Banks, did not oppose this. The formal determination would follow.

The first period of delay

149. At the end of the hearing, M's solicitor discussed the question of family reunion with Mr Banks. Although there was a dispute about what was agreed so far as timing was concerned, the solicitor agreed to forward details of M's family so that the application process could be got underway as quickly as possible. The details were thereafter supplied in a letter of 11 January 2001, which for some reason did not reach Mr Banks.

150. The IAT determination was promulgated on 26 February 2001 and sent to the parties. The determination was not, however, placed on M's file.

151. On 22 March 2001, M's solicitor asked for the issue of a status letter or letter confirming the grant of refugee status in the very near future in order to proceed with the family reunion application. Again the letter of 22 March 2001 was not placed on the file.

152. On learning that the file had not left the Presenting Officers' Unit, the solicitor sent a letter before action to the Treasury Solicitor on 18 May 2001. On 26 June 2001, a copy of that letter, including the IAT determination, reached the Unit, which by that time was trying to progress M's case. The request for issue of a status letter was sent to the National Implementation Unit in Leeds on 11 July 2001 and given priority because of the delay (at that time it was normally taking about three months to draft status letters). The letter was accordingly drafted on 2 August 2001 and sent to M's solicitor. In the ordinary way a further two-week delay would then follow, while the draft letter was sent to the port of entry for validation and service. Another error then occurred. The file was not sent to the port. It was retrieved following the issue of the present judicial review proceedings on 8 August 2001 which led to the issue of a status letter dated 31August 2001.

153. Shortly before this date, M had been notified that his income support had been stopped on 27 July 2001, pending the grant of his status letter. Income support had been maintained since the refusal of his asylum claim as a result of an error working in his favour, but he was left with a five week period without benefits during which time he was reliant on friends and had to borrow money to send to his family in Kinshasa. Although his benefit was later backdated to cover this period he found the experience humiliating.

Events following the issue of the status letter. The second period of delay

154. M sent a copy of his status letter to his family in Kinshasa. They duly made the two-hour journey to the British Embassy where they presented themselves at the reception. Richards J broadly accepted the appellant's mother's account of that visit, of which the Embassy had no record. They were asked if they had travel documents, which they did not. The receptionist indicated that they must go to the office of the UNHCR in Kinshasa and that the Embassy would not deal with them any further.

155. In late October, when she was next able to travel, M's mother went to the UNCHR office, where she was told that the office did not issue travel documents and that she needed to contact a lawyer in the UK.

156. M's solicitor wrote to the Home Office's Joint Entry Clearance Unit (JECU) on 7 December 2001 requesting urgent assistance. At that stage, M's understanding of what had happened in Kinshasa was incomplete and some confusion followed. The enquiry was dealt with by the Entry Clearance Officer (ECO) at the Embassy in Kinshasa and full details were sent by the solicitor to the ECO on 3 January 2002.

157. On 6 February 2002, the JECU informed the solicitor that the family would need to hold valid passport or refugee travel documents in order for entry clearance to be granted.

158. The solicitor disputed this assertion, claiming that possession of a travel document was not a prerequisite to the making of a valid application. In her experience where a family did not have travel documents the diplomatic post concerned would issue its own 'GV3' travel document on which the entry clearance could be endorsed.

159. On 1 March 2002, the Treasury Solicitor proposed an appointment at the Embassy for the family to provide the required evidence for the application to be processed. On the same day the JECU asked the Embassy to treat the letter of 3 January as a formal application for entry clearance.

160. Contact details were duly provided and assurances sought by the solicitor on 11 March and 8 April 2002 that travel documents would not be required, since the appellant's family could not be expected to approach the Angolan Embassy in Kinshasa. On 9 April 2002, the Treasury Solicitor stated that "satisfactory identification documents" would need to be produced, which could lead to certificates of identification for visa purposes (GV3s) if the applications were successful. The interviews thereafter took place in late April and early May, the delay having been caused by the absence of an ECO in Kinshasa until 11 April 2002.

161. Blood samples and DNA profiling were carried out in order to establish the family links with M, and other investigations were made. The issue of visas and GV3s for the family was then authorised on 22 November 2002.

162. The family were granted entry clearances to the UK notwithstanding that, according to the Home Office, there were problems about the mother's and the eldest child's eligibility. The decision was taken on pragmatic

grounds having regard to the delay that had occurred, for which the Home Office apologised on a number of occasions.

163. Richards J held that the first period of delay was 'unlawful' under our domestic principles of public law. After meticulous consideration of the facts, he held that the second period was not. Mr Nicol QC, for M, sought to attack this finding of fact. He failed to persuade us that the judge's conclusions were contrary to the evidence, but at the end of the day this issue was of no importance. Richard J's decision would have been the same even if he had found that the second period of delay resulted from fault on the part of officials.

164. Richards J held that this case was on all fours with *Askar*, to which we have referred at paragraph 46. The only difference was that the delay in *Askar* was longer – even than the two periods of delay combined. He held that the determinative point in *Askar* 'must have been the lack of prejudice to the eventual determination of the claims'. Mr Nicol rightly contended that *Askar* was not binding and attempted, unsuccessfully, to argue that unlawful delay in bringing about the family reunion necessarily infringed the right to respect for family life.

165. The reasoning that led Richards J to reject M's claim appears in the following passages from paragraphs 109 and 110 of his judgment:
"I think it better to go back to the language of Article 8(1) and to the interests that it seeks to protect, and to ask myself in simple terms whether what happened in this case can fairly be said to have involved a lack of effective respect for the claimant's family life.

My answer to that question is 'no'. There were enormous administrative failings; everything took much longer than it should have done; and some, but far from all, of the delay was the responsibility of the authorities. But in January 2001, at the very beginning of the period on which the case has focused, the Presenting Officer showed himself to be sympathetic to the claimant's wish to be reunited with his family and requested details with a view to speeding things up once the IAT's determination was promulgated. The general picture thereafter is not of people obstructing the applications by the claimant or his family (the September visit to the British embassy in Kinshasa being the low point in that respect) but of people trying, albeit often inadequately, to provide responses and to move things along when the matter came to their attention. Then at the end of the period, in November 2002, a discretion was exercised in the family's favour so as to enable them to be reunited without further delay. Looking at what had happened over the period as a whole, in my judgment it did not involve any lack of respect for the claimant's family life".

166. Despite Mr Nicol's eloquent arguments, we can find no fault in this reasoning.

167. As to costs: M's costs up to and including the hearing in the Administrative Court were £29,138. The costs of the Home Office are estimated at £21,200.

168. For the reasons that we have given the second appeal will be allowed and the first and third appeals dismissed.

Mr Richard Clayton, QC and Nicola Braganza (instructed by Ole Hanson & Partners) for the Appellant Anufrijeva
Mr Joshua Swirsky (instructed by Southwark Legal Services) for the Respondent London Borough of Southwark
Mr Richard Clayton, QC and Stephanie Harrison (instructed by TRP) for Respondent 'N'
Mr Philip Sales and Mr Sean Wilken (instructed by the Treasury Solicitor) for the Appellant Secretary of State for the Home Department
Mr Andrew Nicol, QC and Mr Duran Seddon (instructed by Refugee Legal Centre) for the Appellant 'M'
Mr Philip Sales and Mr Jason Coppel (instructed by the Treasury Solicitor) for the Respondent Secretary of State for the Home Department