

Support Notes on Commissioner's Advice The Human Rights Act 1998

1. Which Rights and Freedoms are Incorporated into Domestic Law?

Appendix 2 to these Support Notes explores in some detail how Inspectors should approach Articles 2, 3, 6, 8 and 14 of the Convention.

1A. By what Means are the Convention rights incorporated into Domestic Law?

There are three main ways in which the Act incorporates the Convention rights into domestic law:

- Section 6 makes it unlawful for public authorities to act in a way that is incompatible with the Convention rights.
- Section 7 allows victims, where a public authority is in breach of Section 6(1), to bring proceedings against the authority, or to rely on the Convention right or rights concerned in any legal proceedings, in the domestic courts.
- Section 3 requires a new approach to the interpretation and application of legislation. So far as it is possible to do so, legislation must be read and given effect in a way which is compatible with the Convention rights.

2. How should the Convention rights be interpreted?

Appendix 1 contains a summary of the main aspects of the interpretive approach of the Court. However, the following points should be emphasized at this stage:

- The Convention is a living instrument. The interpretation of it changes in response to changes in society. Past decisions do not form a binding precedent. Accordingly, these Support Notes will be kept under continuous review.
- The Convention does not include much about socio-economic rights. However, this is an area that may be developed to allow effective enjoyment of the Convention rights.
- At present there is a lack of case law from the Court or domestic courts, which relates directly to issues faced in the social fund context. In addition, in its supervisory role the Court interprets the Convention so as to provide protection for minimum standards in relation to human rights. It is open to public authorities (including Inspectors), and the domestic courts should relevant litigation arise, to determine whether the Convention rights should be allowed greater scope domestically.

3. Inspectors must act in a way Compatible with the Convention Rights

Where there is a real human rights issue in a case and/or where an applicant has raised a human rights issue, an Inspector will need to address the human rights issue explicitly in his decision, outlining his findings clearly. As in other areas, if there is no reason to think a Convention right is in issue, there will be no need for an Inspector to say anything about the right in his decision.

Unless there is a serious risk of incompatibility, it will usually be sufficient to address a human rights issue by including a paragraph, such as the following:

Example 1

I have considered whether [the applicant's] right not to be subjected to inhuman or degrading treatment under Article 3 of the European Convention on Human Rights is engaged. However, I am not satisfied that my decision is likely to subject him to ill-treatment that reaches the minimum level of severity required to show a violation of that right.

Example 2

Under Article 8(1) of the European Convention on Human Rights, the State has positive obligations towards [the applicant], which are engaged in this case, to respect his private life/family life/home. However, my decision is justifiable under Article 8(2). This is because it is in accordance with the law. It seeks to secure fairness between applicants within available resources. It is necessary in a democratic society for the economic well-being of the country or for the protection of the rights and freedoms of others. The interference with [the applicant's] Article 8 rights is a proportionate response to a pressing social need. It follows that my decision in this case is compatible with Article 8.

Where there is a serious risk of incompatibility further explanation would be necessary.

4. What Steps should an Inspector take in order to Identify and Deal Correctly with Human Rights Issues?

A. Decide the Case Under Domestic Law Without Regard to the Convention Rights

No Support Notes

B. Does Deciding the Case Under Domestic Law, Without Regard to the Convention Rights, lead to a Breach of one of the Convention Rights?

Identifying Which Agency of the State May Be Responsible for Providing a Remedy

Examination of the statutory context of a particular need is necessary in order to determine which agency is responsible for averting the breach of a Convention right. For example, in most instances social services are the lead authority for the provision of community care services as defined in section 46(3) of the National Health Service and Community Care Act 1990 (as, for example, in the provision of services for disabled persons under section 2 of the Chronically Sick and Disabled Persons Act 1970). Where there is an identified need for such services, social services will be responsible rather than the social fund, save in exceptional circumstances. "Community care", within the meaning of Direction 4, is a broader concept, and there may be instances here where a local authority does not have lead responsibility.

Other Considerations

Even where the social fund is responsible for averting the breach of a Convention right, Inspectors need to consider which part of the fund should be responsible. The fact that a grant cannot be paid does not necessarily mean that a Convention right has been violated. The State has a measure of discretion in deciding in what way it is going to meet its positive obligations under the Convention. It may choose to meet certain obligations by offering a loan rather than a grant.

Where it is not possible to award a grant or a loan when making a decision under domestic law, without regard to the Convention rights, and where this violates a Convention right, Inspectors will need to consider all the circumstances of the case in deciding where it is most appropriate to remedy the violation. In part this may depend on what primary legislation will allow. Another consideration could be the degree of departure from the normal approach to the interpretation and application of legislation that would be required to remedy a violation; this may vary between grants and loans, depending on the circumstances of the case. In some cases it may be possible to remedy a violation in one part of the fund by using section 3 of the Act to read and give effect to the legislation compatibly; but to remedy the violation in another part of the fund might require that legislation be quashed and/or amended.

In the interests of consistency, if an Inspector considers that a decision on a case under domestic law, without regard to the Convention rights, might lead to the violation of a Convention right, he must consult the R & D Team before proceeding.

C. Does the Approach to Interpreting and Applying Legislation under Section 3 of the Act result in a Compatible Outcome?

Section 3 of the Act applies to the following legislation:

- Primary legislation, whenever enacted. Acts of Parliament are primary legislation. In the social fund context the following are primary legislation: the Social Security Contributions and Benefits Act 1992, the Social Security Administration Act 1992, and the Social Security Act 1998.
- Subordinate legislation, whenever enacted. For the purposes of the Act, subordinate legislation includes “instruments made under primary legislation” (Section 21(1) of the Act). In the social fund context the following are subordinate legislation: the Secretary of State’s directions as well as the various social fund regulations. This is because the power to issue the directions and regulations is found in primary legislation.

Only as a last resort should Inspectors conclude that legislation is incompatible, where it is impossible to read and give effect to legislation in a way that is compatible with the Convention rights. Where this is impossible Inspectors should adopt the approach to legislation outlined in sections 4D and 4E of the Advice Note.

D. Is the Incompatible Legislation Primary Legislation?

No Support Notes

E. Does Primary Legislation Prevent Removal of the Incompatibility?

If primary legislation does not prevent removal of the incompatibility then the subordinate legislation is not valid and it can be struck down. The possibility of striking down subordinate legislation, where primary legislation does not prevent removal of the incompatibility, is clearly implied by Section 3(2)(c) of the Act. Section 10(4) also contemplates a situation where a provision of "subordinate legislation...has been quashed, or declared invalid, by reason of incompatibility with a Convention right...".

How does an Inspector decide whether the primary legislation would or would not allow removal of the incompatibility?

Section 140(2) of the Social Security Contributions and Benefits Act 1992 (as amended by the Social Security Act 1998) confers a general power on the Secretary of State to issue directions. It should generally be possible to remove any incompatibility in directions issued under this power, as the power is a general one. For directions issued under the specific powers listed in Section 140(3) and (4) any revised direction would have to fall within the specific power conferred by the Act. Example 1, in section 6 of these Support Notes, provides an example of how

Direction 21 could be approached – the power to issue this direction is found in Section 140(4)(c) of the Social Security Contributions and Benefits Act 1992 (as amended by the Social Security Act 1998).

5. A Flow Diagram Showing the Steps an Inspector should take to Identify and Deal Correctly with Human Rights Issues

No Support Notes.

6. Examples showing the Steps an Inspector Might take in Addressing Human Rights Issues

Example 1 – Article 8 (see Appendix 2)

Mrs E has applied for 2 beds and a cooker. Mrs E is on a low income, receiving working families' tax credit, and she has no savings. She has a social fund debt of £1000. She has a son aged 2. There was a fire in her home, which destroyed many items, including the family's beds and cooker.

Mrs E and her son have been sleeping on the floor. They have been eating take-away food, but have been running out of money each week. There is a danger to the health of family members, and it is likely that the family will be unable to remain in the home without assistance.

For the purposes of this example, it is assumed that Direction 3 is met and that ability to repay is not an issue.

In this case an Inspector might adopt the following approach:

Decide case under domestic law without regard to the Convention Rights

- (a) An Inspector, deciding the case under domestic law, without regard to the Convention rights, would probably conclude that a crisis loan would be appropriate, but for the fact that the maximum social fund debt limit imposed by Direction 21 has been reached.

Does the decision under domestic law, without regard to the Convention rights, lead to a breach of one of the Convention Rights?

- (b) The Inspector might conclude that the decision under domestic law, without regard to the Convention rights, would lead to a violation of Mrs E's and her son's Article 8 right to respect for their home on the grounds that:
- The State's positive obligations in respect of this right had been engaged...a duty was owed to help them remain in their home.

- Although the maximum social fund debt limit imposed by Direction 21 pursued a legitimate aim, the decision to refuse assistance was disproportionate given the likelihood that the family would not be able to remain in the home without public assistance.
- Having examined the statutory context, the Inspector could not identify an organ of the state that was more appropriate to remedy the violation. He also concluded that the social fund was responsible for providing a remedy by means of a crisis loan.

Does the approach to interpreting and applying legislation under section 3 of the Act result in a compatible outcome?

- (c) The Inspector would conclude that the clear terms of Direction 21 were such that it is not possible to read or give effect to the direction in a way that would be compatible with Article 8.

Is the incompatible legislation primary legislation?

- (d) Direction 21 is subordinate legislation and not primary legislation.

Does primary legislation prevent removal of the incompatibility?

- (e) Primary legislation would not prevent removal of the incompatibility from Direction 21. It would be simple for the Secretary of State to issue a new direction (under Section 140(4)(c) of the Social Security Contributions and Benefits Act 1992 (as amended by the Social Security Act 1998)) that would remove the incompatibility. For example, a direction allowing a larger maximum social fund debt could be issued.
- (f) In such circumstances the Inspector would be proactive, for example, by raising the matter with the Secretary of State in order that a revised direction might be issued, and/or by seeking a declaration from the High Court on the validity of Direction 21.

Example 2 – Article 8 (see Appendix 2)

Mr D has applied for a crisis loan of £800 for a boiler. His boiler has broken down beyond repair. Mr D is without heating and hot water. The contractors require half a day to remove the old boiler and to fit the new one. Mr D suffers from arthritis, high blood pressure, depression and mobility problems. His ill health has been aggravated by his poor living conditions. Mr D has a son, T, who is 7 years old. By virtue of a court order, T has been staying with Mr D on alternate weekends, for some years. T lives 60 miles away, and Mr D's

health and finances are such that he is unable to visit his son. Mr D has felt unable to care for T, without hot water and heating, and T's mother has in any case stopped contact until adequate heating and hot water is provided. Mr D is on incapacity benefit. He has mortgage arrears and has been unable to obtain credit in order to replace the boiler.

An Inspector might, for the purposes of this example, adopt the following approach:

Decide case under domestic law without regard to the Convention Rights

- (b) The Inspector, making a decision under domestic law, without regard to the Convention rights, might consider the item requested an excluded housing cost under Direction 23(2)(f), more specifically a repair, which is not minor, to the dwelling occupied as the home.

Does the decision under domestic law, without regard to the Convention rights, lead to a breach of one of the Convention Rights?

- (c) The Inspector might conclude that the decision under domestic law, without regard to the Convention rights, would lead to a violation of Mr D's Article 8 rights to respect for his home (as in **Example 1**, above) and/or his and T's right to respect for their family life, on the grounds that:

- The State's positive obligations in respect of these rights had been engaged...a duty was owed to help Mr D remain in his home and/or maintain acceptable contact with T.
- Although the exclusion pursued a legitimate aim, the decision to exclude assistance was disproportionate, when the cost of the work required and its impact on others was balanced by the likely impact on Mr D and T.
- Having examined the statutory context, the Inspector could not identify an organ of the state that was more appropriate to remedy the violation. He also concluded that the social fund was responsible for providing a remedy by means of a crisis loan.

Had the Inspector decided that a violation of the Convention rights could have been averted under domestic law, without regard to the Convention rights, on the same or a subsequent application, by the award of alternative items, such as some convector heaters and a water boiler or electric shower, a different approach might have been appropriate. However, any alternative would have to be reasonable. States have a measure of discretion as to the way in which they fulfil their positive obligations. They are not necessarily obliged to meet these obligations in the exact way that an applicant requests.

If, for the purposes of this example, it is decided that there is no reasonable alternative to a boiler, an Inspector might proceed as follows:

Does the approach to interpreting and applying legislation under section 3 of the Act result in a compatible outcome?

- (d) If the Inspector has decided that the decision under domestic law, without regard to the Convention rights, would be incompatible with Mr D's/T's Article 8 rights, he must see whether, using section 3 of the Act, it is possible to read and give effect to Direction 23(2)(f) in a way that is compatible with the Convention rights.
- (e) It is suggested that in this case it would be a **possible** interpretation and application of the law to find that the boiler was a minor repair, and therefore not excluded.

Decide the case accordingly

- (f) Therefore, the Inspector would not exclude the boiler, and would go on to consider Direction 3, and on the facts, an award would be likely.

Appendix 1

The Interpretive Approach of the European Court of Human Rights

- (a) The Court works on the assumption that the Convention encapsulates minimum standards of human rights protection that should apply across all the contracting States. As the Court's interpretation of rights is designed to set minimum common standards, it is open to domestic courts to develop higher levels of protection for rights.
- (b) The Court allows States a "margin of appreciation" in deciding whether the justification for interfering with a right is made out. This means that States are allowed some leeway or discretion in this area. This is because primarily it is the duty of domestic authorities to secure and protect Convention rights. The Court has a supervisory role. It is reluctant simply to substitute its own assessment for that of the domestic authorities, as the latter are generally better placed to make such assessments. It follows that the "margin of appreciation" has no place in domestic law. However, this does not alter the current administrative law tradition, in which courts may respect a discretionary area of judgment of decision-makers who are specially well qualified to make particular judgments.
- (c) The Court treats the Convention as a living instrument, which must be interpreted in the light of present-day conditions. It recognises that ideas about the proper scope and content of fundamental freedoms are dynamic and constantly developing in reaction to world events, other international treaties, changing moral and social structures and beliefs, and scientific and medical developments.
- (d) As the Convention is a living instrument the Court regards its previous decisions as a starting-point, rather than a binding precedent. In addition, any part of a judgment may provide guidance in later cases, even if it does not form part of the ratio decidendi of the case.
- (e) The rights are to be made effective and real, not theoretical or merely illusory. For example, in order to give effect to the right to a fair trial under Article 6 it may be necessary to provide free legal aid.
- (f) In order to make the rights effective and real the Articles impose positive obligations. Some are explicit. For example, Article 14 requires that the "enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination...". The Court has also identified implied positive obligations. For example, the right to life under Article 2 imposes an obligation on the State to protect people against threats to their lives. The right to freedom from torture, or inhuman or degrading treatment or punishment under Article 3 imposes an obligation on the State to take adequate steps to protect people effectively from such treatment from whatever source.

- (g) The Court has great respect for the principles of human dignity, equality, and democracy (which includes a commitment to the values of tolerance, pluralism and broad-mindedness without which democracy would be impossible). Equality is a particularly pervasive value and is expressly protected by Article 14.
- (h) Many of the terms of the Convention are treated as having an **autonomous meaning**. This means that the definition of these terms is independent of any meaning they may have in national law. States, or public authorities within them, cannot restrict the Convention rights by giving narrow definitions to the terms of those Convention rights. The terms of the Convention are also interpreted without regard to the original intentions the drafters of or parties to the Convention. This approach helps to ensure that the terms of the Convention have a consistent meaning across all the Convention States. For example, in Article 8, “private life”, “family life”, “home”, and “correspondence” all have autonomous meanings; “in accordance with the law” has a partly autonomous meaning, and “necessary in a democratic society” has a wholly autonomous meaning.

Appendix 2

Particular Convention Rights

Article 2

- (1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
- (2) Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
 - (a) in defence of any person from unlawful violence;
 - (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

In theory, it would be possible for a decision to engage the right to life under Article 2. The State has positive obligations to protect the lives of people who are vulnerable, for example, by providing life-sustaining medical treatment or Police protection. However, the social fund is designed to supplement existing statutory obligations, such as those of social services, which are obliged to provide last resort provision under Section 21 of the National Assistance Act 1948 (see Appendix 3). It is very unlikely that a decision on a social fund case would violate Article 2. In any case, a breach of Articles 3 or 8 would be likely to occur before a breach of Article 2.

Article 3

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

"Torture" is extremely unlikely to be an issue in the social fund context. This is because it requires inhuman treatment causing very serious and cruel suffering that is inflicted intentionally.

The chance of a successful challenge in relation to "inhuman or degrading treatment" is remote. This is because the ill treatment must reach a minimum level of severity in order to amount to a violation of Article 3. The threshold is a high one and must be established beyond reasonable doubt (see *Ireland v United Kingdom* (1979-80)). Article 3 could be an issue where someone living on the streets requires assistance to escape destitution. However, in such a case there could be a question as to whether there is a more appropriate respondent, such as the local authority in relation to its duties under Section 21 of the National Assistance Act 1948. Many of the successful challenges under Article 3 have concerned the treatment of prisoners. Where the State has control over people, as in prison or hospital, the chances of bringing a successful claim under Article 3 increase.

Article 6

Article 6 concerns the right to a fair trial. This Article is unlikely to present problems for Inspectors:

- Inspectors have jurisdiction over community care grants, budgeting loans, and crisis loans. In relation to the discretionary elements of this part of the scheme applicants have no “right” that is being “determined” by the Inspector, and so Article 6 is not applicable.
- In relation to non-discretionary elements of the discretionary scheme, such as eligibility, Article 6 would apply. However, the natural justice elements included in the Inspector’s review, coupled with the opportunities for a judicial review, mean that there would be no violation of Article 6 (*R (Alconbury Developments Ltd and others) v. Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, and *London Borough of Tower Hamlets v Begum* [2002] EWCA Civ 239).

Article 8

- (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 or morals, or for the protection of the rights and freedoms of others.

Article 8 is the most probable vehicle for a human rights challenge in the social fund context.

The Court has stated that the notion of “respect” is not clear-cut. Its requirements will vary from case to case. Contracting States have been allowed a wide margin of appreciation in Strasbourg litigation. However, there is scope for national authorities and courts, where use of the margin of appreciation is not appropriate, to develop and extend the scope of Article 8.

The Home

Article 8 does not give a right to a substantive benefit such as a home (*Buckley v. United Kingdom* (1997)). However, there are obligations on States to provide some protection for the home in its environment and for the quality of life there. So for example, the appropriate State bodies may have an obligation under Article 8 to use environmental and planning law to control polluters whose activities make it difficult or unhealthy for people to live in their homes in affected areas (*Lopez Ostra v. Spain* (1994)).

Family Life

Article 8 is of particular importance in the area of child-care decision making, including issues such as parental responsibility, access, and care orders. Under Article 8, family life is taken to include a wide range of de facto relationships of personal intimacy and genetic closeness. It may extend beyond biological or legal family relationships if there is a real and subsisting relationship of a family kind. There is an obligation on States to foster family life and the maintenance of family ties, although this is not always possible. It is not explicit in Article 8, but where a child is involved it has been held that the focus must be on the best interests of the child. Account has been taken in this context of the UN Convention on the Rights of the Child, which states, “the best interests of the child shall be a primary consideration”.

Private Life

This includes personal and psychological integrity. Seriously adverse effects on physical or moral integrity could constitute a violation of Article 8. Generally, physical integrity would be subject to the same standards as Article 3.

Private life extends “to secure to the individual a sphere within which he can freely pursue the development and fulfilment of his personality” (Bruggemann und Scheuten v Germany (1981)). However, there must be a reasonably proximate connection between the measure that the State is being asked to take and the applicant’s private life. In *Botta v Italy* (1998) a disabled man argued that there had been a violation of his private life because facilities had not been made available to allow the disabled access to certain beaches. The Court said that positive obligations on the part of a State had been identified in cases where there was a direct and immediate link between the measures sought by an applicant and his private or family life. However, the right asserted by Mr Botta to gain access to the beach at a place distant from his normal place of residence during his holidays, concerned interpersonal relations of such a broad and indeterminate scope that there can be no conceivable direct link between 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. Accordingly Article 8 was not applicable. Article 8 also has application in other areas such as planning consents, privacy rights, confidentiality, freedom of information, personal status and identity, sexual identity and activity.

In the social fund context Article 8 issues could arise, for example, if an applicant were unable to remain in his home without social fund assistance, or in certain circumstances if items or expenses were needed to allow sufficient contact between a parent and child.

Justification

Article 8, unlike Article 3, is a qualified right. Even where Article 8 is engaged and a State has not shown respect for rights protected by Article 8, a State may be able to justify its action or inaction under Article 8(2).

For the interference with Article 8 rights to be justified a state must show the interference was:

“in accordance with the law”

Any interference must:

- (i) not be unlawful in domestic law
- (ii) comply with European standards of legality:
 - There must be a sound foundation in positive domestic law for the State’s interference with the right, so that the interference can be said to be regulated by the law in the jurisdiction concerned.
 - The system of regulation must be adequate to ensure that the rights of all those people affected are taken into account (importing at least some Article 6 standards).
 - The relevant positive law must be sufficiently clear and accessible to people to allow them to predict with reasonable certainty when and how their rights will be affected.

“necessary in a democratic society” for one of the permitted purposes, which are:

- “national security”,*
- “public safety”,*
- “the economic well-being of the country”,*
- “for the prevention of disorder and crime”,*
- “for the protection of health or morals”,*
- “for the protection of the rights and freedoms of others”.*

These terms will generally be interpreted narrowly.

The interference must be:

- (i) A response to a pressing social need to act for that purpose.
- (ii) Proportionate

In deciding proportionality consider:

- Would it have been possible to achieve the legitimate aim by a less intrusive means?
- Has the interference deprived the right-holder of the very essence of the right?
- Was the right of sufficient importance in the circumstances to require particularly strong reasons to justify any interference?
- Does the interference cause harm to the right-holder which is serious enough to outweigh any benefit, which that interference might achieve through furthering a legitimate aim?

In refusing a claim on priority grounds, “the protection of the rights and freedoms of others” and/or the “economic well-being of the country” are likely to be the most relevant of the legitimate aims. The “prevention of disorder” has been related to the consistency of decision making in public authorities”.

Article 14

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 14 does not provide a general protection against discrimination. It provides protection in relation to the enjoyment of the other Convention rights. However, a Convention right does not have to have been violated before Article 14 comes into play. As long as a case comes “within the ambit” of a Convention right Article 14 provides protection in relation to the enjoyment of that right (*Rasmussen v Denmark* (1985)). In *Botta v Italy* (1998) the Court declined to consider Article 14 in conjunction with Article 8, because Article 8 was not applicable.

In *Salgueiro Da Silva Mouta v Portugal* (1999) the Court held that parental responsibility had been awarded in respect of a child to the mother rather than the father, because the father was a homosexual. This case illustrates the process the Court adopts in Article 14 cases. It considered:

- Whether there was a **difference of treatment** of persons in similar situations.
(In this case there had been between the applicant and the child’s mother.)
- What was the **ground** for the difference in treatment.
(In this case it was the applicant’s sexual orientation)
- Whether Article 14 covered the ground for discrimination.
(It held that the ground of sexual orientation was a concept that is undoubtedly covered by Article 14.
It emphasised that the list of grounds in Article 14 is **illustrative** and not exhaustive.)
- Whether the difference in treatment was **acceptable**, that is, that it had an **objective and reasonable justification**. (It would not have if it did not pursue a **legitimate aim** or if there was not a reasonable relationship of **proportionality** between the means employed and the aim sought to be realised.)
(In this case the Court held that the domestic court had undeniably pursued a legitimate aim, namely the protection of the health and rights of the child. However, the distinction on the ground of sexual orientation was not acceptable under the Convention, and so the Court could not find a reasonable relationship of proportionality between the means employed and the aim pursued.)

It held that there had been a violation of Article 8 taken in conjunction with Article 14, and so there was no need to consider if there had been a violation of Article 8 when taken alone.

Inspectors will need to consider whether the way a case would normally be dealt with would result in a difference in treatment for persons in similar situations. However, the persons must be in similar situations. For example, a claim under Article 14 was rejected by the Court in *Van der Musselle v Belgium* (1984). A trainee barrister had argued that he was treated less favourably than apprentices in other professions because, unlike them, he was obliged to work for free by providing free legal representation. The Court held that there were fundamental differences between the various professions and so like was not being compared to like. Similarly, married couples have been held not to be in a position analogous to unmarried couples (*Lindsay v UK* (1986)).

Appendix 3

Section 21 of the National Assistance Act 1948

The National Assistance Act 1948 was passed in order to terminate the Poor Law that existed at the time, and to replace it with new legislation to provide for the “assistance of persons in need”.

Among the provisions of Section 21 of the National Assistance Act 1948 are the following:

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

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

(aa) residential accommodation for expectant and nursing mothers who are in need of care and attention which is not otherwise available to them.]

(b) ...

[(1A) A person to whom section 115 of the Immigration and Asylum Act 1999 (exclusion from benefits) applies may not be provided with residential accommodation under subsection (1)(a) if his need for care and attention has arisen solely –

(a) because he is destitute; or

(b) because of the physical effects, or anticipated physical effects, of his being destitute.

(1B) Subsections (3) and (5) to (8) of section 95 of the Immigration and Asylum Act 1999, and paragraph 2 of Schedule 8 to that Act, apply for the purposes of subsection (1A) as they apply for the purposes of that section, but for the references in subsections (5) and (7) of that section and in that paragraph to the Secretary of State substitute references to a local authority.]

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

...

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

...

(7) Without prejudice to the generality of the foregoing provisions of this section, a local authority may –

- (a) provide, in such cases as they may consider appropriate, for the conveyance of persons to and from premises in which accommodation is provided for them under this Part of the Act;
- [(b) make arrangements for the provision on the premises in which accommodation is being provided of such other services as appear to the authority to be required].

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

(Text in square brackets [] represents amendments to the original text of the Act.)

The Secretary of State has published Approvals and Directions under Section 21(1).

Section 47(1) of the National Health Service and Community Care Act 1990 provides for an assessment process where help is to be given under Section 21 of the National Assistance Act. However, help may be given temporarily before an assessment is made, if the condition of the person in question is such that he requires assistance as a matter of urgency.

In *R v. London Borough of Wandsworth, ex parte O* [2000] EWCA Civ 201 the restriction imposed by Section 21(1A) above was considered. It was held that if an applicant's need for care and attention is to any material extent made more acute by some circumstances other than his mere lack of accommodation and funds, then he qualifies for assistance under Section 21. For example, age, illness, or disability are likely to make someone yet more vulnerable and less well able to survive than if he were merely destitute.