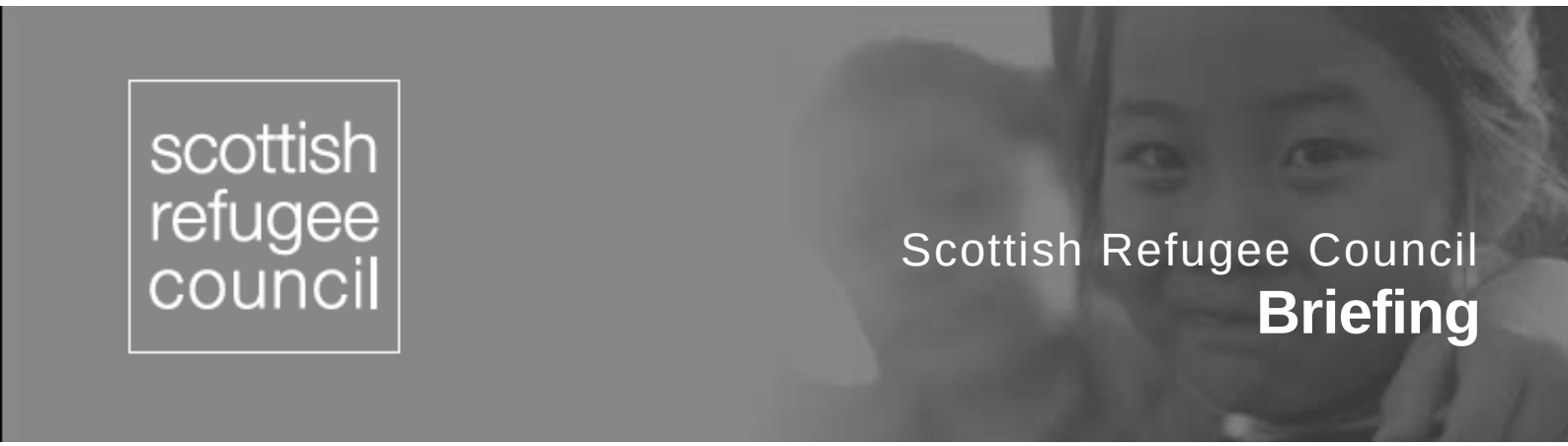

scottish refugee council

Scottish Refugee Council
**Briefing**

# Summary of Senior Counsel's Opinion on the Slough Judgement

## 18 May 2009

### *Introduction*

At the COSLA Strategic Migration Partnership meeting of 8 December 2008, a paper was tabled by the UK Border Agency explaining the recent High Court ruling (M v Slough Borough Council 2008 1 WLR)[1] and asserting its applicability to Scottish Local Authorities. It also proposed a course of action to inform Local Authorities of the ruling.

Extract from the UKBA paper:

*The recent judgement in the House of Lords (case M v Slough Borough Council) has redefined the interpretation of Local Authorities responsibilities to provide support to individuals who require additional support.*

*Local authorities provide residential accommodation to individuals who by reason of age, illness, disability or any other circumstances are in need of care and attention. As a consequence of the judgement, to now qualify for support, an individual has to have a care need which requires some additional help over and above provision of accommodation, for example, assistance with personal care or household tasks. As a result, a number of individuals currently supported are no longer eligible, and some of these may be eligible for asylum support (section 95/4).*

Scottish Refugee Council subsequently sought an opinion from Jonathon Mitchell QC on the applicability of this case in Scotland and answers to other related questions to clarify the entitlement of asylum seekers to Local Authority assistance. This opinion was provided on 30 April 2009.

This briefing provides a short summary of the key issues raised in the Counsel's opinion. This briefing is not legal opinion. In no way is it intended to replace the Counsel's opinion, attached as an appendix, and should be read in conjunction with it.

[1] This is referred to as the 'Slough judgement' throughout this briefing

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### *Key issues raised in the opinion*

1. *The Slough judgement has no direct applicability in Scotland*. This is because the judgement is a decision based on the wording of section 21 (1) of the National Assistance Act 1948 as amended. The wording of the Scottish legislation, section 12 of the 1968 Social Work (Scotland) Act 1968, is not the same nor is there any equivalent wording.

2. Section 12 of the 1968 Act gives Local Authorities in Scotland a power to support any person above the age of 18 who is *'in need requiring assistance'*. The definition in the 1968 Act contains no limitation to persons requiring *'care and attention.'* This was the pivotal aspect of the Slough judgment.

3. In any case section 20 of the Local Government in Scotland Act 2003 should be the starting point to examine whether a local authority has a power to act in a particular way rather than any specific provision in legislation, such as section 12 of the 1968 Act.

### *Limitations to provide assistance*

4. Recent Scottish cases listed in the opinion (p. 3, paragraph 4) prove that whether there is or is not *a duty* to provide assistance in a particular case in Scotland, there is *a power*.

5. *The Assessor for Edinburgh v Brodie 1976 SLT 234* determined that there was no power on local authorities to provide accommodation assistance other than *'residential accommodation'* i.e. accommodation in an institution or hostel. However, the Counsel's opinion is that if *Brodie* were to be re-examined then it is suggested that this limitation would not stand.

6. Previous Counsel's opinion sought by Glasgow City Council in the case of *Habinmana v Glasgow City Council* considered the impact of *Brodie* in limiting the powers under section 12 of the 1968 Act to provide assistance. However this opinion did not consider the effect of the much broader provisions in the 2003 Act (see paragraph 3 above) as a relevant source of power to accommodate asylum seekers and thus this previous opinion is *'beside the point.'*

7. The ambit of section 22 of the Children (Scotland) Act 1995 *is* affected by the Slough judgement. The duty under section 22 is to promote the welfare of '*children in need'*, defined by section 93 (4) as children who are *'in need of care and attention'*. Thus what is said as to the meaning of this phrase in the Slough judgement is applicable. However it is highly improbable that there is any practical impact as any abandoned child is unlikely not to be in need of care and attention as defined by the Slough judgement.

8. Section 25 of the Children (Scotland) Act which sets out the duty to provide accommodation for children in Scotland who have no adult carer is unaffected by the Slough judgement.

### *Local Government in Scotland Act 2003*

*9.* Section 20 of the Local Government Act 2003 gives a very broad power to Scottish Local Authorities to provide any accommodation whatsoever to anyone physically present in their area if in their discretion, they consider this likely to promote or improve the well-being of persons within their area. This would include the provision of accommodation (or financial assistance) to rent or purchase accommodation to any asylum seeker physically present in their area, whether destitute or not and however their need or requirement for accommodation or assistance arose (see however paragraph 13).

*10.* The power in Section 20 is unlimited by the requirement for *'care and attention'* in the Slough judgement; nor is it limited by the 1968 or 1995 Acts.

*11.* Section 20 is a power and not a duty. A local authority may lawfully instigate a policy whereby it provided assistance to those who required care and attention, in line with the Slough judgement, unless there was a duty owed under other legislation, such as *Westminster City Council & Anor v Morris*.

*12.* Scottish Local Authorities are empowered to provide any form of accommodation to asylum applicants whose need for assistance arises not solely because of destitution (i.e. those with care needs), whether in a residential establishment or otherwise, just as they would in the case of a person not subject to immigration control. Equally under the 2003 Act they are empowered to provide financial assistance, whether or not it could have been provided under the strict constraints of the 1968 Act.

*13.* The judgement in *ex parte Khan* negates the duty on English Local Authorities to provide for people whose need for assistance arises solely because of destitution. Whilst this has not been tested in Scotland, the Counsel opinion surmises that a Scottish court is likely to reach the same conclusion because the difference in the language in the equivalent Acts (English: sec 3 Local Government Act 2000; Scottish: sec 22 Local Government Act) is negligible.

*14.* Action might be taken against a Local Authority if there was a case in which there was agreement between UKBA and an asylum seeker that on the facts of the case the responsibility was that of the local authority which operated (or refused to operate) its discretionary powers in a manner which resulted in a breach of Article 3 of the ECHR.

### *Conclusion*

*15.* There are '*basic errors'* in the UKBA paper which demonstrates an *'incorrect assumption that a decision on an English Statute which has a particular effect in England must necessarily have the same effect in Scotland even without the statute."*

*16.* The Slough judgement has no direct applicability in Scotland and Scottish Local Authorities are not acting *ultra vires* as suggested in the UKBA paper.

**18 May 2009**

**OPINION OF SENIOR COUNSEL FOR SCOTTISH REFUGEE COUNCIL**

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1. By email of 31 March 2009 with papers attached, supplemented by letter of 2 April, I am asked for my opinion on a number of inter-related questions relative to the effect of the decision in *M v Slough BC* 2008 1 WLR 1808 in Scotland. I will answer these as they are asked, but I should first say that (i) *Slough* was a decision on an English statutory provision which is inapplicable in Scotland, the terms of Scottish legislation being materially different; (ii) the starting point for the question as to whether a Scottish local authority has power to act in a particular way is normally, and is in this case, section 20 of the Local Government in Scotland Act 2003, rather than any specific provision such as section 12 of the Social Work (Scotland) Act 1968.

**I. Does the UKBA paper correctly state the meaning of the Lords' decision in *Slough*?**

2. The paper contains in this regard two critical assumptions. The first, which is the subject of later questions so not dealt with here, is that the decision in *Slough* is determinative of local authority powers in Scotland. The second is the summary of that decision as being that "*an individual has to have a care need which requires some additional help over and above provision of accommodation*".

3. In my opinion, that may be an over-broad reading of the critical passage in *Slough*, that being paragraph 33 in the speech of Lady Hale. The '*care need*' must, in terms of section 21 (1) of the National Assistance Act, be a need not merely for '*some additional help*' but for '*care and attention which is not otherwise available…*'; the connotation of '*care and attention*' is that it is something personal, or as Lady Hale put it '*looking after*'. The UKBA paper is however a brief summary, and I

doubt whether the author intended anything different. I do not think it could be said that it did not correctly convey the meaning of *Slough*. It certainly does not seem to narrow it. The author of the paper is further correct, I think, in the general comment that the practical effect of the decision is that a number of individuals are no longer eligible in terms of section 21, although that correctness is limited to England and Wales.

**II. Can the applicability of *Slough* be disavowed in Scotland in such a way a to avoid *Brodie* becoming the default position?**

4. *Slough* has no direct applicability in Scotland. It is a decision on a form of words which is to be found in section 21 (1) of the National Assistance Act 1948 as amended; this is quoted in full at paragraph 12 of the judgment. Neither those words, nor any equivalent, are to be seen in the Scottish provision which replaced that section more than forty years ago, section 12 of the Social Work (Scotland) Act 1968. That section provides, so far as accommodation is concerned, that it may be provided to '*any relevant person'*. That phrase refers to subsection (2), in terms of which a '*relevant person'* is one who, not being less than 18 years of age, is '*in need requiring assistance'*: in other words, a '*person in need*'. The expression '*person in need'* is defined in section 94, importantly with an expansion in section 21 (6)[1]. The definition contains no limitation to persons requiring '*care and attention*'; while they are the subject of the first sub-category, the second is entirely general in a manner inconsistent with the decision in *Slough*[2]. Any person who suffers from illness or mental disability is within the scope of the power to provide assistance; a far broader class than in England. In England, there is in certain cases a duty, because there are directions made by the Secretary of State, and there is extensive authority on the nature and effect of the duty, for example the well-known decision in *R*

[1] The manner in which section 21 (6) is expressed makes plain, in my opinion, that the doubt expressed by the commentator to the Act in *'Scottish Social Work Legislation*' as to whether section 21 powers and duties are indeed limited to '*persons in need*' is not well founded. That subsection makes no sense if they are not so limited.
[2] The fourth subcategory has no content, as no regulations have been made.

*v Sefton BC ex parte Help the Aged* 1997 4 All ER 532. In Scotland also, this is in certain cases a duty; *MacGregor* v *South Lanarkshire Council* 2001 SC 502, and see also discussion in *Crossan v South Lanarkshire Council* [2006] CSOH 28 and in *Argyll & Bute Council v SPSO* [2007] CSOH 168. But, whether there is or is not a duty to provide assistance in a particular case, there is a power.

5. Staying for the moment with the ambit of the power under the Social Work (Scotland) Act, section 13A of the Act was added by the National Health Service and Community Care Act 1990. This provision is in some ways equivalent to the English section 21 of the National Assistance Act 1948 as it was amended by the 1990 Act; see paragraph 13 of *Slough*. It is however restricted to '*nursing*' rather than '*care and attention'*; if anything, '*nursing*' is narrower than '*looking after'* in Lady Hale's paraphrase. This section, however, is without prejudice to the more general provisions of section 12, and cannot limit it.

6. The language of the exclusion from the right to assistance (or power to provide it) under sections 12 (2A) and 13A (4) of the 1968 Act, added by section 120 (1) and (2) of the Immigration and Asylum Act 1999, is identical to the exclusion under section 21 (1B) of the 1948 Act, added by section 116 of the 1999 Act, but nothing turns on this for present purposes. It is interesting, however, to note that the drafter of these provisions was aware that the underlying provisions were different. Section 12 (2A) of the 1968 Act refers to '*assistance… (whether by way of residential accommodation or otherwise)*'; section 21 (1B) of the 1948 Act refers only to '*residential accommodation*'.

7. The question, however, whether the power under section 12 to provide accommodation is limited in the manner described in *Assessor for Edinburgh v Brodie* 1976 SLT 234 is more difficult. That decision held that local authorities were not empowered by section 12 to provide accommodation in the form of an ordinary dwelling house, although it is far from clear whether or how far this decision was dependent on the apparent fact that the house in question contained no adaptations for

the disabled. I have to say that I find this a rather strange conclusion, because section 12 was designed to substitute for section 21 of the National Assistance Act 1948 which had been held by the House of Lords in *Vandyk v Oliver* 1976 AC 659 to give such a power, (see pages 690 and 697 and indeed the whole speech of Lord Edmund Davies) and I would be surprised if it had ever been intended or believed to cut down that power. It is far from clear that the court in *Brodie* heard any real argument from counsel on behalf of the ratepayer on the proper construction of section 12, which was not the subject of the case, and which on its face appears to be an untrammelled power to provide assistance. If assistance can, as it clearly can, be provided by way of cash to rent housing, it is a strange view that it cannot be provided directly by way of housing[3]. Indeed, if the correctness of *Brodie* were to be put in issue in a litigation now, I am inclined to the view that it would be held to be wrong as being inconsistent with the interpretation of the phrase '*residential accommodation'* in section 21 given in *Vandyk*. Nevertheless, it is a binding decision of a court equivalent to the Inner House, and must meantime be regarded as determinative of the proposition that section 12 of the 1968 Act confers no power on Scottish local authorities to provide assistance by way of accommodation other than in a '*residential establishment'*, in other words a hostel or institutional setting.

8. I should add that I am aware that Glasgow City Council have counsel's opinion, in the case of *Habinmana v Glasgow CC*, to the effect that *Brodie* so limits the powers under section 12. That opinion was limited to the question of the extent of powers under section 12 of the 1968 Act. I understand that counsel was asked only to consider the question of the ambit of section 12, in the context of a petition brought explicitly to focus issues said to arise under that section, but it is unfortunate that she was not asked to, and did not, consider the effect of the 2003 Act. In consequence her opinion was, if I may so, to some extent beside the

[3] But it is not impossible. In *Slough*, Lady Hale appeared to assume that section 21 (which does *not* provide for cash payments to relevant persons) did not allow the provision of housing.

point because it assumed that section 12 was the only relevant source of power to accommodate asylum seekers in private housing and that is an incorrect assumption in my opinion.

**III. What is the scope for reliance on Article 3 of ECHR in relation to those (a) disbenefited by the CSMP's implementation of *Slough* and (b) unable to avail themselves of section 4?**

9. See below, because this is the longstop.

**IV To what extent does the position under the Children (Scotland) Act 1995 differ from the position relative to adults, and does that remain unaffected by the Lords decision?**

10. Different considerations arise under sections 22 and 25 of the 1995 Act.

11. So far as section 22 is concerned, the duty is to promote the welfare of '*children in need*', which phrase is defined by section 93 (4) (a) for this purpose as children who are '*in need of care and attention*' for certain specific reasons. There is thus a limitation not found in the case of adults under the 1968 Act. At one level, the ambit of section 22 is obviously affected by *Slough*, because what was there said as to the meaning of the phrase '*care and attention'* is here equally applicable. At another, however, there may be little or no practical effect. An abandoned child, for example, is unlikely not to be in need of care and attention, in the *Slough* sense, in terms of section 93 (4) (a) (i)[4].

12. So far as section 25 is concerned, the duty to provide accommodation for children who, in effect, have no responsible adult carer. This is entirely unaffected by *Slough*, because the duty has nothing to do with the considerations there discussed; and it is not for practical purposes limited by the Immigration and Asylum Act 1999, because children to whom a duty is owed under this section will not fall within section 122 of the 1999 Act.

[4] *Kelly v Monklands District Council* 1985 SC 333.

**V. Are there powers or duties under other legislation, for example the Local Government in Scotland Act 2003, which could usefully be invoked?**

13. Yes: a power, but not a duty. The natural starting point in 2009 for the question as to whether a Scottish local authority has power to act in a particular way is section 20 of the Local Government in Scotland Act 2003. This is a very broad power. It is, in my opinion, plain on the face of that section that, reading it on its own (I deal with limitations later in this opinion), it authorises Scottish local authorities to provide any form of accommodation whatsoever to anyone physically present in their area if, in their discretion, they consider this likely to promote or improve the well being of persons within their area, i.e. those persons; thus, although it would not authorise a Scottish local authority to provide accommodation to people who were outwith their area, it would (leaving aside the limitations of the 1999 Act) authorise the provision of accommodation (or financial assistance to rent or purchase accommodation) to any asylum seeker physically present in their area, whether destitute or not, and however their need or requirement for accommodation or assistance arose. There are several authorities on the equivalent English provisions which show their generality; see in particular Elias J in *R v Enfield LBC ex parte J*, [2002] EWHC 432, the Court of Appeal in *R v Oxfordshire CC ex parte Khan*, [2004] EWCA Civ 309, in *London Borough of Lambeth v Grant* [2004] EWCA Civ 1711, and in *Westminster City Council & Anor v Morris* [2005] EWCA Civ 1184[5].

14. The power under section 20 of the 2003 Act is quite unlimited by any discussion of the question whether the 1968 Act or the 1995 Act permits accommodation to be provided; and it is quite unlimited by what was said in *Slough* as to the requirement for '*care and attention*'. This is, however, a power and not a duty; section 20 is permissive. A local authority might lawfully adopt a policy that it would operate that

[5] There are minor differences in the language of section 2(1) of the Local Government Act in England, but I do not think that these affect this issue at all.

power so as to provide assistance to those who required care and attention, in line with *Slough*, but would not do so otherwise unless a duty were owed under other legislation (subject to human rights considerations, which on the facts of particular cases may make it a duty to operate a power; see for example *Westminster City Council & Anor v Morris* above).

15. The general power under section 20 of the 2003 Act is however limited under section 22. That raises the question as to whether there is elsewhere a statutory provision which prohibits or prevents the authority from providing accommodation in any circumstances relevant to this opinion so as to constitute a '*limiting provision*'. The Immigration and Asylum Act 1999 does not in this context operate as a direct prohibition; it operates by a series of statutory prohibitions on forms of provision to assistance to certain asylum seekers under earlier legislation, such as section 12 of the 1968 Act[6]. The group of prohibitions in sections 116 to 121 are identically-phrased and the only relevant distinction to be drawn is as to what it is that they have an effect on

16. So far as asylum seekers (i) to whom section 115 of the Immigration and Asylum Act 1999 was disapplied by SI 2000/705 as having claimed asylum before 3 April 2000, and (ii) whose need for assistance under section 12 arises not solely because of destitution[7], there is however no limiting provision because on its face sections 116 to 121 of the 1999 Act do not apply to them. It follows that, in these two classes of case (of which I take it the second is by far the more significant), Scottish local authorities are empowered to provide any form of accommodation, whether in a residential establishment or otherwise, just as they would in the case of a person not subject to immigration control. Equally they are empowered to provide financial assistance, whether or not it could have been provided under the strict constraints of the 1968 Act. It may

[6] The Nationality, Immigration and Asylum Act 2002 will change the exact form of that prohibition when sections 44 and 46 are brought into force.
[7] *Westminster CC v NASS*, 2002 1 WLR 2956.

be noted that this is line with argument advanced by counsel for the Home Secretary in the English cases, see e.g. *ex parte J* above, at paragraph 50.

17. The more difficult question is whether the power to provide accommodation (or financial support) under the Local Government Act extends to all persons to whom section 115 of the 1999 Act applies; that is to say all other asylum seekers than the two classes noted in the last paragraph. This is the matter which formed the principal argument in *ex parte Khan*, above; it was there held that it did not, because the group of sections 116 to 121 were limiting provisions under section 3 of the Local Government Act 2000, which is equivalent to section 22 of our Act; see paragraphs 29 to 44, which I will not attempt to paraphrase. While I think it could faintly be argued, as it was in that case, that that is not so, it is my opinion that a Scottish court would reach the same decision for the same reasons. I do not think that the slightly different language of section 22 of the Scottish Act and section 3(1) of the English Act justify a different result. It follows that the power to provide accommodation does not in general extend to asylum seekers whose need for assistance arises solely because of destitution.

**III. What is the scope for reliance on Article 3 of ECHR in relation to those (a) disbenefited by the CSMP's implementation of *Slough* and (b) unable to avail themselves of section 4?**

18. It is not CSMP, but its members, who implement the law in this respect. I have not seen all relevant documents, but I do not understand that members or participants become bound to accept its views or decisions. If CSMP takes the view that a particular view of the law is correct, or is to be followed, it is nevertheless local authorities and central government who act on that view. If one sees CSMP as a manifestation of COSLA, that remains the case. COSLA does not have responsibilities to asylum seekers.

19. This is I think a very fact-specific question, and I am not entirely clear what the questioner has in mind. The logic of *Limbuela* is that it is normally Westminster government, not local authorities, which would be subject to an Article 3 challenge in the case of people who fell between stools. *Westminster City Council & Anor v Morris* [2005] EWCA Civ 1184 does suggest that a local authority might be under a duty to operate its powers in a particular way if a failure to do so had the consequence that Convention rights were breached, and I can see that a challenge along these lines might be made, but I would expect that this would be directed against central government as it, and the local authority, would presumably be agreeing in this situation that on any view the case was not for the local authority. If there was a case in which there was agreement between UKBA and an asylum seeker that on the facts of the case the responsibility was that of the local authority which operated (or refused to operate) its discretionary powers in a manner which resulted in a breach of Article 3, then action might be taken against the local authority. So also if the authority which appeared to be responsible was a health board: *R on the application of YA v Health Secretary* [2009] EWCA 225. If the issue was as to a failure to provide support under section 4, that would seem to result in a possible challenge, on the principles enunciated in *Limbuela*, against UKBA/NASS. However I do not feel that on the limited material available, and without a factual knowledge of cases which the Scottish Refugee Council will have but which I do not have, I can sensibly say more.

**VI Do I have anything to add?**

20. No, not at this time, although I appreciate that some parts of this Opinion may raise further questions. One matter I should raise, however, is the question of disclosure of legal advice in the light of paragraphs 16 and 17 of the Minutes of meeting of 17 December 2008. These seem to contemplate, as does UKBA, that legal advice will be given by non-lawyers, who will presumably take the legal opinions of others and transpose these in some way. This is a complex and subtle

area of law, and this form of hearsay advice is surprising. I am aware that Glasgow at least has taken counsel's advice, and also that stakeholders represented at that meeting by a number of other participants have contradictory counsel's advice (although they may have forgotten this). There are obvious dangers here, well shown by the basic errors in the UKBA paper, the author of which seems to have little knowledge of the statutory position in Scotland and to make the incorrect assumption that a decision on an English statute which has a particular effect in England must necessarily have the same effect in Scotland even without the statute. So far as this opinion is concerned, I take my usual view that albeit it is my copyright and is not given to anyone other than those who sought it, the memorialists are free to use, distribute, or quote from it as they wish.

THE OPINION OF

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