Neutral Citation Number: [2020] EWHC 1299 (Admin)

Case No: CO/3036/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/05/2020

Before :

LORD JUSTICE BEAN
and
MR JUSTICE CHAMBERLAIN

- -

Between :

R (W, A CHILD BY HIS LITIGATION FRIEND J)	**Claimant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**
-and-	
PROJECT 17	**Intervener**

- -
- -

Alex Goodman (instructed by **Deighton Pierce Glynn**) for the **Claimant**
Steven Kovats QC, Colin Thomann and Tom Tabori (instructed by the **Government Legal Department**) for the **Defendant**
Amanda Weston QC, Bijan Hoshi and Ollie Persey (instructed by the **Public Law Project**) for the **Intervener**

Hearing dates: 6 and 7 May 2020

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Approved Judgment

Lord Justice Bean and Mr Justice Chamberlain :

1. This is the judgment of the court, to which we have both contributed.

2. The Claimant was born in August 2011. He is a British national. His litigation friend is his mother, to whom we will refer as "J". J is a national of Ghana. She came to the UK in 2009 and was granted leave to remain in the United Kingdom ("LTR") as his parent on what is known as the "10-year route to settlement" in 2013. This route involves sequential grants of LTR. Under the policy now in force, LTR is granted for 30 months at a time. Normally, such grants are made subject to a condition that the applicant have "no recourse to public funds" or "NRPF". The effect of that condition is to make the person on whom it is imposed ineligible for almost all benefits paid from public funds, including those intended to maintain the basic welfare of children. J has on various occasions since 2013 been given LTR subject to a condition of NRPF. She works as a carer for mentally disabled people, but the imposition of the condition has led to her and the Claimant enduring periods of destitution. On one occasion they became street homeless, before being housed by a local authority. They have had to move house repeatedly and the Claimant had to move school five times before he was eight years old.

3. Before J's latest application for LTR, she put together evidence to show that she would be destitute if the NRPF condition was imposed. The condition was nonetheless imposed. It remained in place until it was lifted as a result of pre-action correspondence on 9 July 2019. The lifting of the condition was not retrospective and J faced recovery of housing benefit and tax credits paid while it was in place. A judicial review claim was therefore filed on 31 July 2019. It challenged both the imposition of the condition in J's case and also the legal regime under which the condition of NRPF is imposed, which comprises s. 3 of the Immigration Act 1971 ("the 1971 Act"), the relevant paragraphs of the Immigration Rules and of an instruction to caseworkers: *Appendix FM 1.0 Family Life (as a Partner or Parent) and Private Life: 10-Year Routes* ("the Instruction"). As the argument developed, it became clear that the challenge was in substance to the latter two instruments. These comprise what we shall refer to in this judgment as "the NRPF regime".

4. The grounds of challenge were, in brief, as follows:

   (a) Ground 1 was that the imposition of the NRPF condition in J's case was irrational and breached s. 55 of the Borders, Citizenship and Immigration Act 1999, which, as interpreted by the Supreme Court in *ZH (Tanzania) v SSHD* [2011] 2 AC 166, requires the best interests of the child to be taken into account as a primary consideration.

   (b) Ground 2 challenges the effect of the NRPF regime, which is said to be "that an NRPF condition will be imposed in all cases where limited leave is granted on a 10-year route as a partner or parent unless to do so imposes destitution on a person or there are particularly compelling welfare considerations relating to children". In making the decision to adopt this policy, it is said that the Secretary of State "failed to have due regard to the differential impacts of the policy on British children of foreign parents; on non-white British children and on single mothers and their children" contrary to s. 149 of the Equality Act 2010 ("the 2010 Act") and the common law duty to take into account all relevant considerations.

(c) Ground 3 is that the NRPF regime discriminates directly or indirectly against those of non-British national origin or ethnicity contrary to Article 14 read with Article 8 ECHR and contrary to s. 29 of the 2010 Act.

(d) Ground 4 is that the NRPF regime is "contrary to the requirements of the rule of law and to Articles 8 and 14 in that they are collectively overbroad and/or insufficiently precise" in that the discretion afforded to decision-makers is not sufficiently constrained and decision-making is therefore arbitrary.

(e) Ground 5 is that the NRPF regime and conditions imposed under it are unlawful because they "deprive British citizens of the benefit of entitlements under statutory welfare measures which are provided by Parliament to prevent children falling into homelessness and extreme poverty and thereby exceed the permissible scope of an Immigration Rule and policy statement". Mr Kovats characterised this as an argument that the regime is repugnant to statute.

(f) Ground 6 is that the regime fails to ensure that imposing the NPRF condition will not result in inhuman treatment contrary to Article 3 ECHR and so is contrary to s. 6 of the Human Rights Act 1998. Reliance is placed on the decision of the House of Lords in *Limbuela v Secretary of State for the Home Department* [2006] 1 AC 396.

5. In a witness statement accompanying the claim, the Claimant's solicitor, Adam Hundt, explains that, in the 18 months prior to filing this claim, he has represented 20 families with an NRPF condition attached to the grant of leave to remain. "Almost all" have British national children with a mother *en route* to settlement. In 19 of the 20 cases the NRPF condition was lifted either after pre-action correspondence (12 cases including this one) or by settling proceedings (7 cases). The remaining claim was at the pre-action stage at the time when proceedings were issued. It has now been stayed behind this one. The two most recent claims (CO/4615/2018 *M&A* and CO/741/2019 *DAZ & KAZ*) settled on terms favourable to the claimants shortly before the substantive hearings in March 2019. It was a term of the settlement in *M&A* that the Secretary of State would conduct a review of the NRPF policy.

6. In this case, permission was granted by Judge Evans-Gordon. The substantive hearing was listed before Clare Montgomery QC, sitting as a Deputy High Court Judge, on 4 December 2019. She allowed the claim on ground 1, which challenged the condition imposed in J's case, and quashed the NRPF condition in her case. Ms Montgomery adjourned determination of the remaining grounds, which challenged the legality of the regime, because the review of the NRPF policy was due to be published by the Secretary of State by 31 December 2019. That was pushed back to 31 January 2020, then to 31 March 2020 and then to the end of April 2020. The adjourned substantive hearing (of grounds 2-6) was listed for hearing on 24 and 25 March 2020. It did not take place because the judge due to hear it was unavailable.

7. On 3 April 2020, there was a hearing before us to consider the Claimant's application for interim relief, but Mr Alex Goodman, counsel for the Claimant, did not press that application when it became clear that it would be possible to relist the substantive hearing on 6 and 7 May 2020. We subsequently granted an application to intervene by Project

17, a charity focussing on assisting children from migrant backgrounds whose parents are experiencing financial hardship as a consequence of the imposition on a parent of the NRPF condition. Project 17 is so named because the principal means by which it offers this assistance is by helping families to make applications to local authorities for support under s. 17 of the Children Act 1989.

8. The hearing on 6 May 2020 took place remotely, using Skype for Business. For the Claimant, Mr Goodman advanced his ground 6 first. He took as his starting point the Secretary of State's concession in her skeleton argument that, applying *Limbuela*, the regime would be unlawful if it required applicants to become destitute before applying for the NRPF condition to be lifted. Mr Goodman submitted that, on a proper interpretation of the Immigration Rules and Instruction, they fail to give proper effect to the Secretary of State's obligations, as identified in *Limbuela*, prospectively to avoid a situation in which applicants' Article 3 rights will be infringed. Thus, if we were minded to allow the claim on this ground, we need not consider the remaining grounds of challenge. Mr Steven Kovats QC, for the Secretary of State, indicated on instructions that he agreed with that course.

9. In those circumstances, we heard on 6 May 2020 from Mr Goodman and from Ms Amanda Weston QC for Project 17 on ground 6 only. We then heard from Mr Kovats QC, again on ground 6 only. On the morning of 7 May 2020, we announced our decision that the Claimant had succeeded on ground 6 and it was accordingly not necessary to hear further argument on the remaining grounds. We indicated that we would make no order until we had given our reasons in writing in the usual way and that we would then invite written, or if necessary oral, submissions on the terms of an order reflecting our judgment. These are our reasons.

The legal and policy framework

10. Section 3 of the 1971 Act provides as follows:

> "(1) Except as otherwise provided by or under this Act, where a person is not a British citizen
>
> > …(b) he may be given leave to enter the United Kingdom (or, when already there, leave to remain in the United Kingdom) either for a limited or for an indefinite period;
> >
> > (c) if he is given limited leave to enter or remain in the United Kingdom, it may be given subject to all or any of the following conditions, namely—
> >
> > > …(ii) a condition requiring him to maintain and accommodate himself, and any dependants of his, without recourse to public funds".

11. The imposition of an NRPF condition is, therefore, expressly contemplated by the 1971 Act. A person subject to such a condition is a "person subject to immigration control" within s. 115(9) of the Immigration and Asylum Act 1999 ("the 1999 Act"). That, in turn, means that he or she is excluded from eligibility for universal credit, income-based job-seeker's allowance, state pension credit, employment and support allowance, personal independence payment, attendance allowance, severe attendance disablement allowance,

carer's allowance, disability living allowance, a social fund payment, health in pregnancy grant and child benefit: see s. 115(1) & (3) of the 1999 Act. Together, these comprise almost all the benefits to which someone in J's position might otherwise be entitled, including those intended to ensure the basic welfare of dependent children. Those who are not entitled to these benefits are also generally disentitled from receiving other kinds of support available only to those in receipt of means-tested benefits, such as free school meals (though this has been modified during the Covid-19 pandemic).

12. One type of public assistance from which those subject to NRPF conditions are not excluded is support under s. 17 of the Children Act 1989. Such support is, of course, only available for those with dependent children. Families who might in principle qualify for it face considerable practical difficulties in obtaining it, especially if (like many) they have no one to assist them with making the application. These difficulties were explained in a careful and detailed witness statement by Eve Dickson, Project 17's Policy Officer. It is not necessary for us to make findings about the extent of these practical difficulties, because the Secretary of State did not seek to defend ground 6 by reference to the availability of support under s. 17 of the 1989 Act.

13. The Secretary of State's policy and practice as to when and how the NRPF condition is to be imposed and lifted is set out in two sources. First, there are the Immigration Rules, which are required by s. 3(2) of the 1971 Act to be laid before Parliament. They contain statements of the Secretary of State's administrative practice, rather than rules of law in the strict sense: *Hesham Ali v Secretary of State for the Home Department* [2016] 1 WLR 4799, [17] (Lord Reed). The second source of policy and practice are the instructions given by the Secretary of State to immigration officers under para. 1(3) of Sch. 2 to the 1971 Act. These must be "not inconsistent with" the Immigration Rules. They do not, however, have to be laid before Parliament. The effect of the statutory scheme is that anything "in the nature of a rule as to the practice to be followed" must be included in the Immigration Rules: *R (Alvi) v Secretary of State for the Home Department* [2012] 1 WLR 2208. Further guidance was given in *R (Munir) v Secretary of State for the Home Department* [2012] 1 WLR 2192 about how to tell when a policy governing the exercise of discretion outside the Immigration Rules is "in the nature of a rule" and so must be laid before Parliament.

14. The policy of making grants of LTR subject to a condition of NRPF in most cases was introduced on 9 July 2012. Michael Gallagher, the Home Office official responsible for the policy, described it in his first witness statement as part of a "package of reforms… aimed at reducing burdens on the taxpayer, promoting integration and tackling abuse", which he said was "consistent with the position elsewhere in the Immigration Rules that migration to the UK should ordinarily be on a self-sufficient basis".

15. The evidence before us did not include every iteration of the Immigration Rules and Instruction. A useful record of the early development of these documents can, however, be found in the judgments of Kenneth Parker J in *R (NS) v Secretary of State for the Home Department* [2014] EWHC 1971 (Admin) and of Upper Tribunal Judge O'Connor in *R (Fakih) v Secretary of State for the Home Department* [2014] UKUT 00513 (IAC). Initially, it appears that the Immigration Rules said simply that leave granted under the 10-year routes to settlement would be made subject to a condition of NRPF "unless the Secretary of State deems such recourse [sc. to public funds] to be appropriate": *NS*, [20]. There was nothing in the Immigration Rules themselves about the criteria for deciding

whether or not to impose a condition of NRPF. These were set out solely in the Instruction. In the version promulgated on 9 July 2012, it was said that the condition would be imposed save in "exceptional circumstances" and that "[e]xceptional circumstances which require access to public funds to be granted will exist *only* where the applicant is destitute" (emphasis added): *Fakih*, [59]. A revised version was published in October 2013, which indicated that LTR would be granted subject to a condition of NRPF

> "unless there are exceptional circumstances set out in the application which require recourse to public funds to be granted. Exceptional circumstances which require recourse to public funds will exist where the applicant is destitute, or where there are particularly compelling reasons relating to the welfare of a child of a parent in receipt of very low income."

In *Fakih*, at [60], Judge O'Connor noted the omission of the word "only" from this version, but concluded that it did not necessarily signify a change in meaning. At [64], having considered the terms of the Instruction itself, further guidance issued in January 2014 and evidence about how it was applied in practice, he said this:

> "I find that a consideration under the Respondent's Policy of whether 'exceptional circumstances' exist does not admit of any other consideration other than whether an applicant is destitute or whether there are particularly compelling reasons for allowing recourse to public funds relating to the welfare of a child of a parent in receipt of a very low income."

This meant that the guidance was in the nature of a rule and so, applying the test in *Alvi* and *Munir*, had to be laid before Parliament.

16. As a result, the criteria for deciding whether to impose or lift the NRPF condition were included in the Immigration Rules. That was done by way of amendment to Appendix FM to the Immigration Rules. Appendix FM provides a number of bases on which a person may be granted LTR with a view to eventual settlement by virtue of a connection with a family member who is a British citizen, settled in the UK or a refugee or person entitled to humanitarian protection. There are separate provisions governing applications for entry clearance or LTR as a partner (D-ECP and D-LTRP), a child (D-ECC and D-LTRC) and a parent (D-ECPT and D-LTRPT) of such a person. The rules for those applying as partners and parents stipulate that entry clearance or LTR, if granted, will be subject to a condition of NRPF "unless the decision-maker considers, with reference to paragraph GEN 1.11A, that the applicant should not be subject to such a condition". The rules for those applying as children provide that the child will be subject to the same condition as the parent.

17. Paragraph GEN 1.11A provides as follows:

> "Where entry clearance or leave to remain as a partner, child or parent is granted under paragraph D-ECP.1.2., D-LTRP.1.2., D-ECC.1.1., D-LTRC.1.1., D-ECPT.1.2. or D-LTRPT.1.2., it will normally be granted subject to a condition of no recourse to public funds, unless the applicant has provided the decision-maker with:

> (a) satisfactory evidence that the applicant is destitute as defined in section 95 of the Immigration and Asylum Act 1999; or
>
> (b) satisfactory evidence that there are particularly compelling reasons relating to the welfare of a child of a parent in receipt of a very low income."

18. Two features of this wording may be noted. First, the word "normally" had been inserted. We heard submissions about the significance or otherwise of that word – and we shall return to these later. Second, as with the previous formulations considered by Judge O'Connor, the exception in sub-paragraph (a) on its face applies only where the applicant *"is"* destitute as defined in s. 95 of the 1999 Act. Again, the significance of this is a matter to which we shall have to return.

19. The Immigration Rules are supplemented by guidance in the Instruction. In the August 2015 edition, the Instruction provided:

> "The condition of no recourse to public funds will not be imposed, or will be lifted, only where the applicant meets the requirements of paragraph GEN.1.11A of Appendix FM or paragraph 276A02 of the Immigration Rules in that:
>
> 1. the applicant has provided satisfactory evidence that they are destitute; or
>
> 2. the applicant has provided satisfactory evidence that there are particularly compelling reasons relating to the welfare of a child on account of the child's parent's very low income; or
>
> 3. the decision maker exercises discretion not to impose, or to lift, the no recourse to public funds condition code because the applicant has established exceptional circumstances in their case relating to their financial circumstances which, in the view of the decision maker, require the no recourse to public funds condition code not to be imposed or to be lifted.
>
> The decision maker must consider all relevant personal and financial circumstances raised by the applicant, and any evidence of these which they have provided.
>
> Whether to grant leave subject to a condition of no recourse to public funds, and whether to lift that condition where imposed, is a decision for the Home Office decision maker to make on the basis of this guidance.
>
> …
>
> **Making a decision on the condition code**
>
> The onus is on the applicant to provide all of the information and evidence which they would like the decision maker to consider.
>
> Where the decision maker decides that, even though they now have the right to work if they did not before, the applicant is destitute (including accepting

> that any previous means of support are no longer available), that there are particularly compelling circumstances relating to the welfare of a child on account of their parent's very low income or that there are other exceptional circumstances, the decision maker should not impose or should lift the no recourse to public funds condition code (condition code 1) and apply condition code 1A allowing recourse to public funds, when granting leave, or varying its conditions, under the 10 year partner or parent route in Appendix FM or the 10-year private life route in paragraphs 276ADE(1)-276DH of the Immigration Rules, or leave outside the Rules under ECHR Article 8 on the basis of exceptional circumstances.
>
> …
>
> **Subsequent leave to remain applications**
>
> When an applicant who was granted leave to remain without the no recourse to public funds condition code at the initial grant of leave, or has had that condition code lifted, applies for further leave to remain, they will be re-assessed and only granted further leave without the no recourse to public funds condition code if they continue to meet the terms of the policy that applies at the relevant time."

20. There are three features of note here. First, this formulation tells caseworkers when the condition of NRPF "will not" be imposed: "only where the applicants meets the requirements of paragraph GEN 1.11A of Appendix FM" in any of the three ways set out. Second, the wording of (1) tracks the wording of exception (a) in paragraph GEN 1.11A in requiring that the applicant prove that "they are destitute" (i.e. at the time of the application). Third, even if a decision has been made not to impose the condition of NRPF, or to lift it, the question whether to reimpose it falls to be reconsidered on each application for LTR on the basis of "the policy that applies at the relevant time".

21. A new version of the Instruction was issued in February 2018. The first parts of the relevant wording were not materially different, but there were some changes to the guidance under the headings "Making a decision on the condition code" and "Subsequent leave to remain applications" as follows:

> "**Making a decision on the condition code**
>
> Where you decide that, even though they now have the right to work if they did not before, the applicant is destitute (including accepting that any previous means of support are no longer available), that there are particularly compelling circumstances relating to the welfare of a child on account of their parent's very low income or that there are other exceptional circumstances, you should not impose or should lift the no recourse to public funds condition code (condition code 1) and apply condition code 1A. The code 1A allows recourse to public funds.
>
> …

Subsequent leave to remain applications

When an applicant who was last granted leave to remain without the no recourse to public funds condition code, or has had that condition code lifted since they were last granted leave, applies for further leave to remain, they will be re-assessed at every application stage.

They will be granted further leave with a no recourse to public funds condition code unless they continue to meet the terms of the policy that applies at the relevant time. To be granted without the condition of no recourse to public funds, they must evidence that they are destitute (including accepting that any previous means of support are no longer available), that there are particularly compelling circumstances relating to the welfare of a child on account of their parent's very low income or that there are other exceptional circumstances relating to their financial circumstances, such that their underlying financial circumstances have not changed.

The applicant must provide evidence of their financial circumstances relating to destitution, low income or exceptional circumstances at every application stage."

22. A further version was issued in December 2019, in different terms:

"You can exercise discretion not to impose, or to lift, the no recourse to public funds condition code only where the applicant meets the requirements of paragraph GEN.1.11A of Appendix FM or paragraph 276A02 of the Immigration Rules on the basis of the applicant:

- having provided satisfactory evidence that they are destitute or there is satisfactory evidence that they would be rendered destitute without recourse to public funds

- having provided satisfactory evidence that there are particularly compelling reasons relating to the welfare of a child on account of the child's parent's very low income

- having established exceptional circumstances in their case relating to their financial circumstances which, in your view, require the no recourse to public funds condition code not to be imposed or to be lifted.

You must consider all relevant personal and financial circumstances raised by the applicant, and any evidence of these which they have provided. In cases where the circumstances suggest that further evidence is available but has not been provided, you should be prepared to write out and seek that additional evidence.

> Whether to grant leave subject to a condition of no recourse to public funds, or whether to lift that condition where it has been imposed, is a decision for the Home Office decision maker to make on the basis of this guidance."

The text under the heading "Making a decision on the condition code" and "Subsequent leave to remain applications", however, was the same as in the 2018 version.

23. The wording of the December 2019 version of the Instruction differs from the 2015 and 2018 versions in two respects. First, it no longer tells caseworkers when the condition of NRPF "will not" be imposed. Instead of the previous mandatory language, it tells caseworkers when they "can exercise discretion" not to impose, or to lift, the NRPF condition. Second, the first bullet point now goes further than exception (a) in paragraph GEN 1.11A of Appendix FM by indicating that the discretion can be exercised where the applicant either *"is destitute"* or *"would be rendered destitute"*, though it gives no indication of what is meant by the latter. The text under the heading "Making a decision on the condition code" tells caseworkers that they should not impose or should lift the NRPF condition code when the applicant *"is"* destitute, but says nothing about the case where the applicant will imminently become destitute. The text under the heading "Subsequent leave to remain applications" still instructs caseworkers that, on subsequent LTR applications, LTR must be granted subject to a condition of NRPF unless the applicant provides evidence that *"they are"* destitute or that one of the other two limbs applies (again saying nothing about the case where the applicant will imminently be rendered destitute).

24. A new version of the Instruction was issued on 27 April 2020, but there were no changes material to the issue before us.

25. As can be seen, para. GEN 1.11A cross-refers to the definition of "destitute" in s. 95 of the 1999 Act. Section 95(1) has no direct application to those granted LTR under the 10-year settlement route. Its purpose is to confer on the Secretary of State a power to provide or arrange for the provision of support for asylum seekers and their dependents "who appear to the Secretary of State to be destitute or to be likely to become destitute within such period as may be prescribed". By s. 95(3), a person is "destitute" if "(a) he does not have adequate accommodation or any means of obtaining it (whether or not his other essential living needs are met); or (b) he has adequate accommodation for the means of obtaining it, but cannot meet his other essential living needs". There are powers in s. 95(5) & (7) to prescribe, for the purposes of determining whether a person's accommodation is adequate and whether a person's other essential living needs are met, matters that the Secretary of State must, and matters that she may not, have regard to. The statute itself provides in s. 95(6) that the Secretary of State must not have regard to: (a) the fact that the person concerned has no enforceable right to occupy the accommodation; (b) the fact that he shares the accommodation, or any part of the accommodation, with one or more other persons; (c) the fact that the accommodation is temporary; or (d) the location of the accommodation.

26. Regulation 6 of the Asylum Support Regulations 2000 (SI 2000/704) prescribes the income and assets to be taken into account in determining whether someone is destitute. Regulation 7 prescribes the period within which the applicant must be likely to become destitute for the purposes of s. 95(1): 14 days for an applicant and 56 days for a supported person (i.e. someone already in receipt of asylum support). Regulation 8 provides that,

in determining for these purposes whether accommodation is adequate, the Secretary of State must have regard to whether it "would be reasonable for the person to continue to occupy the accommodation" and "whether the accommodation is affordable for him": reg. 8(3).

27. Because determinations under s. 95 cannot be made instantly, s. 98 confers powers to provide temporary support to an asylum seeker "who it appears to the Secretary of State may be destitute" until such time as a determination under s. 95 can be made. There is no similar power to lift a NRPF condition while a determination is being made.

The 2019 review

28. One of the 20 previous claims brought by Mr Hundt on behalf of other clients was *M & A v Secretary of State for the Home Department*. In that case, one of the grounds of challenge was that the decision to formulate and maintain the NRPF policy had been taken in breach of s. 149 of the Equality Act 2010. Permission was granted and the claim was listed for substantive hearing on 19 and 20 March, but a settlement was agreed, which led to a consent order on 6 March 2020. One of the terms of the settlement, recorded in the consent order, was that the Secretary of State would conduct a "public sector equality duty-compliant review of the No Recourse to Public Funds policy, such review to be set in process within six weeks of signing this Order".

29. We have evidence about the conduct of the review. It began on 10 April 2019. The completion was pushed back on a number of occasions, but it has recently resulted in the publication of a "policy equality statement", which was approved by the Immigration Compliance and Courts Minister on behalf of the Secretary of State. Whether that statement demonstrates compliance with s. 149 of the 2010 Act is a matter we would have had to consider under ground 2. Since we are not deciding that part of the claim, it is not necessary to say very much about the statement. It is right, however, to note that 2019 review identified a number of changes to the procedure by which applications for change of conditions are made and assessed. These include the simplification and improvement of the application form, giving applicants the opportunity to attend in person to explain their situation orally, a right to review of adverse decisions, training for caseworkers, flexibility with regard to evidence and telephone assistance for online applicants.

30. The Secretary of State considers that these changes, and others which are currently being considered, will make a significant difference to the way applications for change of conditions are determined. The Claimant is not so sanguine. It is, however, common ground that the 2019 review was concerned with process rather than with the substantive criteria governing the decision whether to impose or lift a condition of NRPF.

The impact of the COVID-19 pandemic on the NRPF policy

31. On 1 April 2020, an operational policy instruction was issued to caseworkers – *OPI 942: Change of Conditions – indicators of enhanced need and case work response*. Its "target audience" was decision-makers dealing with applications for change of conditions, including decisions under Appendix FM where GEN 1.11A is relevant. Its purpose was to set out indicators which, if present, would justify a more flexible approach to the

evidence required, in the light of difficulties caused by the pandemic to the ability of applicants to provide evidence. It provided as follows

> "With the advent of the Covid-19 pandemic the Government has introduced measures to respond to the consequent disruption to civic life and to mitigate its impact. The United Kingdom as a whole is affected, including the migrant population. The Government is determined to deal sympathetically and expeditiously with those individuals and their families who are eligible for leave or further leave on a specified human rights route and whose circumstances are adversely affected by the Covid-19 outbreak.
>
> Caseworkers are instructed to examine applications for Change of Conditions to determine if any of the following factors are present:
>
> a) Evidence of self-employment which cannot be pursued any more due to restrictions arising from Covid-19;
>
> b) Evidence of reliance upon low paid and unpredictable work, such as zero hours contracts, or evidence of being temporarily laid off (known as 'furlough');
>
> c) Being restricted in seeking and taking employment due to the need to look after children. This includes both pre-school children and children who can no longer attend a school due to Covid-19 restrictions;
>
> d) The applicant is a single parent, a situation which may also be affected by (a) to (c) above;
>
> e) The applicant is in accommodation of their own but now has difficulty meeting rental, tenancy or mortgage agreements, even where support derived from the Government's Covid-19 measures is available;
>
> f) The applicant is in shared accommodation which they do not own themselves and has no ability of their own to influence how long they can stay (i.e. no formal rent or tenancy agreement and occupancy is simply "allowed");
>
> g) Essential living needs are provided in the same way as accommodation in (f).
>
> h) The applicant, or a child, partner or relative for whom they are caring has a documented underlying health condition, or is self-isolating;
>
> i) There is evidence that the applicant or a child, partner or relative for whom they are caring has a disability, or special needs, or is in a high risk category;

> j) There are children involved and extra expenditure is justified, for instance on a midday meal, because they are unable to attend school.
>
> Where it is clear from examining the application that one or more of the above factors is involved caseworkers are instructed to observe principles of evidential flexibility. This means that they can grant the change of conditions request without seeking further evidence or documentation if they are satisfied that the application submitted accurately reflects a need for recourse to public funds.
>
> Whilst there is an [*sic* – we read this as a misprint for "no"] automatic presumption that an application will be successful if any of the factors listed above is present, the effect of one or more factor being present is to tilt the request in the applicant's favour. This can still be outweighed by other relevant matters, including the intentional disposal of funds and other countervailing evidence as listed in the current guidance.
>
> The above list is not exhaustive. Each case should still be considered on its own individual merits including the current guidance. The aim is to provide sympathetic and expeditious decision making until the constraints which might affect applicants due to Covid-19 and its restrictions are over."

32. OPI 942 was issued two days before the interim relief hearing before us. Prominent reference was made to it in the Secretary of State's skeleton argument resisting interim relief. It no doubt informed the Claimant's decision not to press his application for interim relief. Ms Hattam says in her sixth witness statement, however, that it does not appear ever to have been published on the Home Office website or otherwise. Mr Gallagher's fourth witness statement, in response, does not say that it was. What he says is that OPI 942 was issued in the belief that there were many migrants who were either self-employed or furloughed and who would therefore suffer reduced income as a direct result of Covid-19 and so would be rendered destitute or at risk of destitution. However, the information on numbers of claims in the first quarter indicated, in the Home Office's view, that this was not so. The OPI was therefore withdrawn on 8 April 2020. A revised version, OPI 949, was prepared and issued on 23 April 2020. Its terms, and tone, are different:

> "Applicants for a Change of Conditions must already hold Leave to Remain with the likelihood of settlement after 120 months or must show that they meet the requirements for such Leave to Remain. A Change of Conditions may then be granted if the applicant is assessed as destitute or at risk of becoming destitute in line with guidance and on the basis of the evidence submitted.
>
> Whilst the onus is on the applicant to provide sufficient evidence for the Change of Conditions to be granted there will be some cases where providing evidence is more difficult than in others. Among these cases will be some where it is foreseeable that repeated requests to the applicant to provide evidence may result in them, or their dependants, having to endure an unduly long period of destitution or risk of destitution compared to more straightforward applications. In such cases, decision makers can be flexible

as to whether they request further additional evidence, if the case falls within a-e below.

Evidential flexibility means that decision makers can grant the change of conditions request without seeking further additional evidence or documentation if they are satisfied that reasonable evidence has been provided in the round and the application accurately reflects a need for recourse to public funds. Cases in which flexibility in requiring further additional evidence can be exercised are as follows:

a) The applicant is a single parent and restricted in seeking and taking employment due to the need to look after children. (This includes both pre-school children and children who can no longer attend a school due to Covid-19 restrictions);

b) Cases where eviction notices have been issued, or eviction has actually taken place.

c) Cases where an identifiable organisation providing essential living needs, e.g. a charity or food bank, is no longer able to provide that support.

d) The applicant is the parent or main guardian of a child who is unable to attend school because of Covid-19 restrictions and the child would meet the current criteria in place for Free School Meals.

e) There is evidence of vulnerability related to pregnancy, a long-term health condition, disability, or mental illness. This includes dependants as well as the applicant.

There is no automatic presumption that an application will be successful, but if the case meets any of the conditions set out above, the effect of that will be to require the decision maker to consider if further information and evidence is necessary. Whether to apply evidential flexibility can still be outweighed by other relevant matters, including the intentional disposal of funds and other countervailing evidence as listed in the current guidance.

Although the above list is not exhaustive it is not expected that there will be many other types of cases where evidential flexibility will be appropriate. Each case should still be considered on its own individual merits including the current guidance."

33. As will be seen, OPI 949 omits any reference to "sympathetic and expeditious decision-making" and the list of circumstances in which evidential flexibility can be exercised has been shortened. It is in any event clear from their terms that both OPI 942 and OPI 949 are concerned with the way in which caseworkers are to assess the evidence submitted by applicants, not with the substantive criteria governing the discretion not to impose, or to lift, a condition of NRPF. Both OPIs expressly require applications to be considered on the basis of "the current guidance" – i.e. that set out in the Instruction.

The relevant legal principles

The "law of humanity"

34. The expenditure of public funds with a view to avoiding destitution is, under our constitution, a matter for Parliament. The main function of the courts is to construe and apply the law that Parliament enacts. In performing that function, however, the courts apply certain presumptions which can be displaced only by clear words. In *R v Secretary of State for Social Security ex p. Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275 ("*JCWI 1*"), the Secretary of State made regulations purporting to exclude from entitlement to social security payments asylum seekers who had made late claims. At p. 292, Simon Brown LJ (with whom Waite LJ agreed) noted that the regulations rendered the asylum seekers' appeal rights nugatory. He continued:

> "Either that, or the Regulations necessarily contemplate for some a life so destitute that to my mind no civilised nation can tolerate it. So basic are the human rights here at issue that it cannot be necessary to resort to the European Convention on Human Rights to take note of their violation. Nearly 200 years ago Lord Ellenborough CJ in *Reg. v Inhabitants of Eastbourne* (1803) 3 East 103, 107, said:
>
> > 'As to there being no obligation for maintaining poor foreigners before the statutes ascertaining the different methods of acquiring settlements, the law of humanity, which is anterior to all positive laws, obliges us to afford them relief, to save them from starving'.

35. Simon Brown LJ in *JCWI* was not simply applying the principle that subordinate legislation will be invalid if repugnant to a statute (including a statute other than its enabling Act). In *R v Hammersmith and Fulham London Borough Council ex p. M* (1998) 30 HLR 10, Lord Woolf MR (giving the judgment of the Court of Appeal) summarised the ratio of *JCWI 1* as follows:

> "by a majority, this Court held that the effect of the 1996 Regulations would be to render the rights of asylum seekers who remain here pending determination of their claim under the Asylum and Immigration Appeals Act 1993 nugatory. This was because they would either be forced by penury to leave before their claims were determined or have to live a life of destitution until then. That court considered such a result would be so draconian that the regulations must be *ultra vires* since only primary legislation could achieve such a result."

36. As this passage shows, Lord Woolf saw *JCWI 1* as an instance of what later came to be known as the "principle of legality". As Lord Hoffmann later said in *R v Secretary of State for the Home Department ex p. Simms* [2000] 2 AC 115, at 131, this principle

> "means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process.

> In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual."

The obligations imposed by the Human Rights Act 1998

37. Since these cases were decided, the Human Rights Act 1998 has come into force. Because the Immigration Rules are "subordinate legislation" as defined by s. 21(f), s. 3 requires that they be read and given effect in a way which is compatible with the Convention rights: see Mahad, [28]-[30]. Even if they cannot be so read, because the material provisions are not mandated by primary legislation, s. 6 obliges the Secretary of State to ignore them if and to the extent that they would require her to act incompatibly with Convention rights: see e.g. *RR v Secretary of State for Work and Pensions* [2019] UKSC 52, [2019] 1 WLR 6430, [29]-[30] (Lady Hale).

Article 3 ECHR and *Limbuela*

38. Article 3 ECHR confers the right not to be subject to torture or to inhuman or degrading treatment.

39. The House of Lords explained in *Limbuela* how Article 3 is to be applied in a context with strong similarities to the present one. S. 95(1) of the 1999 Act allowed support to be provided to asylum seekers who appeared to the Secretary of State "to be destitute or likely to become destitute within such period as may be described". S. 95(3) stated that a person was destitute for the purposes of the section if he did not have adequate accommodation or any means of obtaining it (whether or not his other essential living needs were met), or alternatively had adequate accommodation or the means of obtaining it, but could not meet his other essential living needs. By s. 55 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), Parliament placed constraints on the Secretary of State's ability to provide or arrange support for late asylum claimants under *(inter alia)* s. 95 of the 1999 Act. In general, by s. 55(1) of the 2002 Act, such support could not be provided to an asylum seeker unless the Secretary of State was satisfied that the claim for asylum had been made as soon as reasonably practicable after the person's arrival in the United Kingdom. That was subject to an exception in s. 55(5), which made clear that s. 55 did not prevent "the exercise of the power by the Secretary of State to the extent necessary for the purpose of avoiding the breach for person's Convention rights (within the meaning of the Human Rights Act 1998)".

40. The House of Lords had to consider whether the regime imposed on late applicants amounted to "treatment" within the meaning of Article 3 ECHR. They answered that question in the affirmative. Lord Bingham said this at [7], seeking to identify the point at which the denial of assistance breaches Article 3:

> "Treatment is inhuman or degrading if, to a seriously detrimental extent, it denies the most basic needs of any human being. As in all article 3 cases, the treatment, to be proscribed, must achieve a minimum standard of severity, and I would accept that in a context such as this, not involving the deliberate infliction of pain or suffering, the threshold is a high one. A general public duty to house the homeless or provide for the destitute cannot be spelled out

> of article 3. But I have no doubt that the threshold may be crossed if a late applicant with no means and no alternative sources of support, unable to support himself, is, by the deliberate action of the state, denied shelter, food or the most basic necessities of life. It is not necessary that treatment, to engage article 3, should merit the description used, in an immigration context, by Shakespeare and others in *Sir Thomas More* when they referred to 'your mountainish inhumanity'".

41. The House of Lords held that s. 55 had been deliberately framed so that the Secretary of State did not have to wait until a person was actually suffering from inhuman or degrading treatment. It enabled her to act to avoid such a situation. At [62], Lord Hope (with whose reasons Lord Scott and Lord Brown agreed) said this:

> "The best guide to the test that is to be applied is, as I have said, to be found in the use of the word 'avoiding' in section 55(5)(a). It may be, of course, that the degree of severity which amounts to a breach of article 3 has already been reached by the time the condition of the asylum-seeker has been drawn to his attention. But it is not necessary for the condition to have reached that stage before the power in section 55(5)(a) is capable of being exercised. It is not just a question of 'wait and see'. The power has been given to enable the Secretary of State to avoid the breach. A state of destitution that qualifies the asylum-seeker for support under section 95 of the 1999 Act will not be enough. But as soon as the asylum-seeker makes it clear that there is an imminent prospect that a breach of the article will occur because the conditions which he or she is having to endure are on the verge of reaching the necessary degree of severity the Secretary of State has the power under section 55(5)(a), and the duty under section 6(1) of the Human Rights Act 1998, to act to avoid it."

42. This makes two things clear. First, the fact that someone is "destitute" as the term is defined for the purposes of s. 95 of the 1999 Act does not necessarily mean that he or she is enduring treatment contrary to Article 3 ECHR: the threshold of severity which must be reached to make out a breach of Article 3 is higher than that required for a finding of destitution within the s. 95(3) definition. Second, s. 6 of the Human Rights Act 1998 imposes a duty to act not only when someone *is* enduring treatment contrary to Article 3, but also when there is an "imminent prospect" of that occurring. In the latter case, the law imposes a duty to act prospectively to avoid the breach.

<u>How the Immigration Rules and Instruction should be read</u>

43. In *Mahad v Entry Clearance Officer* [2010] 1 WLR 48, Lord Brown (with whom the other members of the Court agreed) said this at [10]:

> "The Rules are not to be construed with all the strictness applicable to the construction of a statute or a statutory instrument but, instead, sensibly according to the natural and ordinary meaning of the words used, recognising that they are statements of the Secretary of State's administrative policy. The ECO's counsel readily accepted that what she meant in her written case by the proposition 'the question of interpretation is… what the Secretary of State intended his policy to be' was that the court's task is to discover from the

> words used in the Rules what the Secretary of State must be taken to have intended. After all, under section 3(2) of the Immigration Act 1971, the Secretary of State has to lay the Rules before Parliament which then has the opportunity to disapprove them. True, as I observed in the *MO (Nigeria)* case, at para 33: 'the question is what the Secretary of State intended. The rules are her rules.' But that intention is to be discerned objectively from the language used, not divined by reference to supposed policy considerations. Still less is the Secretary of State's intention to be discovered from the Immigration Directorates' Instructions ('IDIs') issued intermittently to guide immigration officers in their application of the rules. IDIs are given pursuant to paragraph 1(3) of Schedule 2 to the 1971 Act which provides that: 'In the exercise of their functions under this Act immigration officers shall act in accordance with such instructions *(not inconsistent with the immigration rules)* as may be given them by the Secretary of State…' (Emphasis added.)"

The Claimant's submissions

44. For the Claimant, Mr Goodman began with the Secretary of State's concession that, if the regime required that an applicant be destitute before the NRPF condition can be lifted, it would be *ultra vires* and incompatible with Article 3, applying the reasoning in *Limbuela*. He submitted, relying on [10] of Lord Brown's judgment in *Mahad*, that paragraph GEN 1.11A of Appendix FM should be construed not as a statute, but according to the natural and ordinary meaning of the words used. Thus construed, paragraph GEN 1.11A means that a decision not to impose, or to lift, the condition of NRPF can be made only where exception (a) or exception (b) applies. Exception (a) on its face requires that the applicant *"is"* (at the time of the application) destitute. The function of the word "normally" is to indicate the default position (that the condition of NRPF will be imposed). Exceptions (a) and (b) exhaustively define the circumstances in which a departure from the "normal" or default position is permitted. Thus, on the Secretary of State's own concession, the regime is *ultra vires* and incompatible with Article 3 ECHR.

45. Mr Goodman submitted that the Instruction could not assist in interpreting paragraph GEN 1.11A for the reason given by Lord Brown in *Mahad*. In any event, he said, it too fails properly to reflect the obligations imposed by Article 3 ECHR because it suggests to caseworkers that they have a discretion to lift the condition of NRPF in the case of imminent destitution, whereas *Limbuela* makes clear that in such a case there is a duty to take proactive steps to prevent the destitution from occurring.

46. Mr Goodman accepted that the Immigration Rules can and must be "read down" pursuant to s. 3 so as to require the non-imposition or lifting of the condition of NRPF in cases of imminent destitution, but submitted that such a "reading down" "would not produce the kind of transparent exposition of the law that is required by the ECHR and the common law in relation to provisions designed to safeguard fundamental rights". In this respect, he relied on various statements of the need for transparency, including that of Lord Dyson in *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245, at [34]:

> "The rule of law calls for a transparent statement by the executive of the circumstances in which the broad statutory criteria will be exercised. Just as arrest and surveillance powers need to be transparently identified through

> codes of practice and immigration powers need to be transparently identified through the immigration rules, so too the immigration detention powers need to be transparently identified through formulated policy statements."

Mr Goodman submitted that the need for a "transparent statement by the executive of the circumstances in which the broad statutory criteria will be exercised" was just as pressing in the present context, where the exercise is capable of leading to inhuman and degrading treatment.

The Secretary of State's submissions

47. For the Secretary of State, Mr Kovats QC submitted that the natural meaning of paragraph GEN 1.11A of Appendix FM is that, subject to the two exceptions there set out, a condition of NRPF will "normally" be applied. The word "normally" would not have been included if the intention had been that, unless one of the two exceptions applied, the condition of NRPF would always be imposed. Given that the wording expressly anticipates circumstances outside exceptions (a) and (b) in which an NRPF condition will not be imposed, or will be lifted, it is to be expected that further detail will be provided in the Instruction.

48. Mr Kovats submitted that the wording used in the December 2019 version of the Instruction makes clear that caseworkers can exercise discretion not to impose, or to lift, the condition of NRPF, among another circumstances, where the applicant "would be rendered destitute" without recourse to public funds. The inclusion of that wording was intended to be clarificatory rather than to herald a change in policy. As to the cross-reference to s. 95 of the 1999 Act, the Secretary of State submits as follows in paragraph 51 of her skeleton argument:

> "True, the Guidance's cross-reference to s.95 does not incorporate in terms all of s.95 and the Regulations made thereunder. But that is because the Guidance provides in its own words the substance of what is provided under s.95 and the 2000 Regulations. There is nothing in the Guidance or anywhere else to suggest that a substantively different test is to be applied in respect of NRPF from that provided in respect of asylum support."

49. If necessary, Mr Kovats submitted that the Immigration Rules and Instruction could and should be read compatibly with Article 3, applying the interpretative obligation in s. 3 of the HRA. The fact that this is an area touching on fundamental rights cannot be a good reason for rejecting, or regarding as insufficient, a s. 3 "reading down", since such a reading down is only available in the context of fundamental rights.

50. As to the suggestion that the regime was insufficiently precautionary, Mr Kovats submitted that the relevant test was whether the scheme was reasonably capable of operating lawfully: *Secretary of State for the Home Department v Joint Council for the Welfare of Immigrants* [2020] EWCA Civ 542 *("JCWI 2"),* at [116]-[119], [156], [177]-[178]. The regime passed that test.

51. Finally, Mr Kovats submitted that invocation of the "law of humanity" added nothing. The *Inhabitants of Eastbourne* case, referred to by Simon Brown LJ in *JCWI 1*, was an orthodox example of statutory construction to address an absence of express legislative

provision for a category of cases (there, the right of aliens to parish relief). There is no such legislative omission here, because the imposition of a condition of NRPF is enabled by s. 3 of the 1971 Act, the Immigration Rules set out the categories of case to which it does, does not and may apply and the Instruction gives practical guidance to caseworkers about how to apply these Rules to the cases before them. It strikes a fair balance between being inflexibly prescriptive and arbitrarily open ended.

Discussion

The tests applicable to a challenge to the Immigration Rules and Instruction

52. In *JCWI 2*, the Court of Appeal allowed an appeal from the judgment of Martin Spencer J holding incompatible with Article 14 ECHR certain provisions of the Immigration Act 2014 under which private landlords are prohibited from letting their properties to irregular immigrants. The main basis of the challenge was that the scheme had an unintended discriminatory adverse effect on those who have every right to rent in the UK but who lack a British passport or a British-sounding name (to whom landlords might refuse to rent for fear of contravening the provisions). The Court of Appeal held that, since what was being challenged were legislative provisions rather than their application in an individual case, in order to make good the challenge, it was necessary to show that the legislative scheme was "incapable of being operated in a proportionate way in all or nearly all cases". Since the legislative scheme was "clearly capable of being operated in a proportionate way in most individual cases – indeed, it seems to me that it is *capable* of being operated by landlords in such a way in *all* individual cases – in my view, this is a complete answer to the claim": [118]-[119] (Hickinbottom LJ, with whom Henderson LJ agreed); and, to similar effect [177]-[178] (Davis LJ).

53. Hickinbottom and Davis LJJ drew this proposition from two decisions of the Supreme Court: *Christian Institute v Lord Advocate* [2016] UKSC 51, (2017) SC (UKSC) 29 and *R (Bibi) v Secretary of State for the Home Department* [2015] UKSC 68, [2015] 1 WLR 5055. The latter is of particular relevance here, because it was a challenge to a provision in the Immigration Rules. The provision in question required the foreign spouse of a British citizen or person settled here to pass a test of competence in English before coming to live in the UK. In a passage cited by Hickinbottom LJ in *JCWI 2* at [118], Lady Hale (with whom Lord Wilson agreed) said this at [2]:

> "The appellants… have set themselves a difficult task. It may well be possible to show that the application of the rule in an individual case is incompatible with the Convention rights of a British partner… It is much harder to show that the rule itself is inevitably unlawful, whether under the Human Rights Act 1998 or at common law."

54. The rule in question provided for exemptions, including one applying where "there are exceptional circumstances which prevent the applicant from being able to meet the requirement": [14]. As in the present case, this was accompanied by guidance in the form of an instruction, the material parts of which were set out at [16]-[20]. At [53], Lady Hale said that "the real problem lies not so much in the rule itself, but in the present guidance". At [54], she added that "there are likely to be a significant number of cases in which the present practice does not strike a fair balance as required by article 8". At [55], she concluded:

> "This does not mean that the rule itself has to be struck down. There will be some cases in which the interference is not too great. The appropriate solution would be to recast the guidance, to cater for those cases where it is simply impracticable for a person to learn English, or to take the test, in the country of origin, whether because the facilities are non-existent or inaccessible because of the distance and expense involved. The guidance should be sufficiently precise, so that anyone for whom it is genuinely impracticable to meet the requirement can predictably be granted an exemption."

At [60], Lady Hale said that she would not strike down the rule or declare it invalid because it "will not be an unjustified interference with article 8 rights in all cases". Since the applicants had challenged only the relevant provision of the Immigration Rules, they must be denied that remedy. "However," she continued:

> "the operation of the rule, in the light of the present guidance, is likely to be incompatible with the Convention rights of a significant number of sponsors. There may well be some benefit, therefore, both to individuals and to those administering the rule, in declaring that its application will be incompatible with the Convention rights of a UK citizen or person settled here, in cases where it is impracticable without incurring unreasonable expense for his or her partner to gain access to the necessary tuition or to take the test."

Since this was not the remedy sought, she decided to invite further submissions before making such a declaration.

55. Lord Hodge (with whom Lord Hughes agreed) considered that the Government should consider amending the guidance (see at [74]), but were less confident as to the appropriateness – on the facts of the case – of a declaration: [76]. Lord Neuberger also expressed concerns about the guidance, because "[i]t does appear virtually certain that there will be a significant number of cases where application of the guidance will lead to infringement of article 8 rights": [101]. At [103], he said this:

> "In those circumstances, I see considerable attraction in granting declaratory relief to reflect the concerns we have about the application of the guidance. This is an important and sensitive topic, and it could be unfortunate if there were no formal record of this court's concern about the application of the guidance. That is particularly true given the public expenditure which has been devoted to these proceedings, coupled with the fact that a declaration may avoid the expenditure of further costs on subsequent proceedings involving a challenge to the guidance. And a formal declaration now would avoid any further delay involved in establishing the correct approach to be adopted to applicants."

At [104], Lord Neuberger said that, because the guidance had not been challenged in the case, he would invite submissions.

56. In our judgment, these passages show two things. First, in a challenge to legislation (including the Immigration Rules, which are treated by the Human Rights Act as subordinate legislation), the challenger must show that the legislation is, as Hickinbottom

LJ put it in *JCWI 2*, "incapable of being operated in a proportionate way in all or nearly all cases". (We note that this test has been criticised in *Re Northern Ireland Human Rights Commission's Application for Judicial Review* [2018] UKSC 27, [2018] HRLR 14, [74], where Lord Mance thought it sufficient to show that the legislation "will inevitably operate incompatibly in a legally significant number of cases", but the point has now been determined at this level by the Court of Appeal in *JCWI 2* and in any event does not directly arise in this case.)

57. The second proposition that can be drawn from the judgments in *Bibi*, however, is that the stringent test applicable to challenges to legislation do not apply where the challenge is to guidance. Here, the question is whether there is a "significant number of cases" in which the application of the guidance will lead to a breach of Convention rights (or of some other rule of law): see *Bibi*, [54] and [60] (Lady Hale) and [101] (Lord Neuberger). The latter test is broadly consistent with that applied – also in the context of a challenge to guidance to caseworkers in the immigration field – in *R (BF (Eritrea)) v Secretary of State for the Home Department* [2019] EWCA Civ 872, [2020] 4 WLR 38, [63] (Underhill LJ):

> "In my view the correct approach in the circumstances of the present case is, straightforwardly, that the policy/guidance… will be unlawful, if but only if, the way that they are framed creates a real risk of a more than minimal number of children being detained. I should emphasise, however, that the policy should not be held to be unlawful only because there are liable, as in any system which necessarily depends on the exercise of subjective judgment, to be particular 'aberrant' decisions—that is, individual mistakes or misjudgments made in the pursuit of a proper policy. The issue is whether the terms of the policy themselves create a risk which could be avoided if they were better formulated."

Simon LJ dissented as to the result but at [84] made clear that he was applying the same test. Baker LJ did not address the test in terms but agreed with Underhill LJ's conclusions generally.

58. In the specific context of challenges to guidance, a test of the kind applied in *Bibi* (does the guidance lead to unlawful results in "a significant number of cases"?) and *BF* (is there a real risk of the guidance leading to an unlawful result in a more than minimal number of cases?) seems to us to be consistent with principle. Guidance of the kind under consideration here is directed to caseworkers. One of its principal functions is to assist them to make lawful decisions. It is well established that the court can and should intervene where guidance is misleading as to the law or will "lead to" or "permit" or "encourage" unlawful acts: *R (Letts) v Lord Chancellor* [2015] 1 WLR 4497, [117] (Green J). This was recently approved (with the gloss that "permit" in this context means something like "sanction") in *R (Bayer plc) v NHS Darlington CCG* [2020] EWCA Civ 449, [196]-[208] (Underhill LJ); see also [214] (Rose LJ).

59. In this case, the Claimant's challenge is to the regime comprising (i) paragraph GEN 1.11A of Appendix FM and (ii) the Instruction. In the light of what we have said above, we consider that the proper approach to the challenge is to ask ourselves two questions:

(a) Does the regime, read as a whole, give rise to a real risk of unlawful outcomes in a "significant" or "more than minimal number" of cases?

(b) If so, can that risk be remedied by amendments to the Instruction alone?

The legal obligations on the Secretary of State

60. The analysis begins with three propositions of law, which, as we understand it, are not in dispute in these proceedings:

(a) There are some cases in which the Secretary of State is not only entitled, but legally obliged, not to impose a condition of NRPF or to lift such a condition.

(b) These include cases where the applicant is suffering inhuman and degrading treatment by reason of lack of resources.

(c) They also include cases where the applicant is not yet suffering, but will imminently suffer, such ill-treatment without recourse to public funds.

61. All these propositions flow from the Secretary of State's concession (at §§49-50 of her skeleton argument) that, in the light of the analysis in *Limbuela*, paragraph GEN 1.11A would be unlawful if it required applicants to become destitute before they could apply for the NRPF condition not to be imposed, or to be lifted. Although the Secretary of State's concession was made on the basis of the reasoning in *Limbuela*, which was itself based on the obligation imposed by Article 3 ECHR, in our judgment, the propositions set out at [60] above would also follow at common law even in the absence of Article 3. Section 3(1)(c)(ii) of the 1971 Act expressly empowers the Secretary of State to impose an NRPF condition. But it imposes no duty to do so and it is silent as to when the condition should be imposed and when it should be lifted. In the light of the case law set out at [34]-[36] above, clear words in primary legislation would be required to authorise the imposition or maintenance of a condition of NRPF where the effect would be (as Lord Bingham put it in *Limbuela*) "by the deliberate action of the state, [to deny] shelter, food or the most basic necessities of life". There are no such clear words. In the absence of them, we would hold that s. 3(1)(c)(ii) of the 1971 Act does not authorise the imposition or maintenance of a condition of NRPF where the applicant is suffering inhuman and degrading treatment by reason of lack of resources or will imminently suffer such treatment without recourse to public funds.

Paragraph GEN 1.11A and the Instruction considered in the light of these obligations

62. In the course of argument, we asked Mr Kovats to identify where, in paragraph GEN 1.11A or the Instruction, caseworkers were told that they were under an obligation not to impose, or to lift, the condition of NRPF where an applicant was suffering, or would imminently suffer inhuman or degrading treatment without recourse to public funds. His answer was that, although nothing to this effect could be found in the Instruction, it could be inferred from the structure of paragraph GEN 1.11A. By saying that the condition of NRPF will normally be imposed unless exceptions (a) or (b) apply, caseworkers could infer that, if exceptions (a) or (b) do apply, the condition of NRPF should not be imposed or maintained. And although exception (a) in paragraph GEN 1.11A applies only where the applicant "is" destitute, the Instruction makes clear that discretion can also be

exercised where the applicant "would be rendered" destitute. It was important not to read either paragraph GEN 1.11A or the Instruction like statutes. They had to be read "sensibly according to the natural and ordinary meaning of the words used, recognising that they are statements of the Secretary of State's administrative policy" (*Mahad* [10]). Read together in that way, Mr Kovats submitted, these instruments would convey to caseworkers that they were under an obligation not to impose, or to lift, the condition of NRPF both where the applicant is suffering inhuman or degrading treatment as a result of lack of resources and where he or she will imminently do so without access to public funds.

63. We are unpersuaded by this argument. The first step – which seeks to spell an obligation out of the language of paragraph GEN 1.11A – is flawed as a matter of basic propositional logic. "X will happen unless Y is done" does not entail that "if Y is done, then X will not happen". We have not overlooked that the Immigration Rules are to be read sensibly, according to the natural and ordinary meaning of the words used, but even so, we do not consider that paragraph GEN 1.11A suggests that caseworkers are under a *duty* to do anything. The obvious words connoting the existence of a duty – "will", "shall", "must", "should" – are absent.

64. In any event, even if paragraph GEN 1.11A were understood as imposing a duty not to impose, or to lift, the NRPF condition in cases where exception (a) or (b) applies, that does not address the case where the applicant is not yet suffering, but will imminently suffer, inhuman or degrading treatment. Paragraph GEN 1.11A says nothing about that case. The current version of the Instruction does, by its use of the words "or would be rendered destitute". As Mr Kovats accepted, however, the section of the Instruction where those words are used does not suggest that there is any duty to act (in this or any other situation). On the contrary, the section set out at [22] above begins with the words "*You can exercise discretion* not to impose, or to lift, the no recourse to public funds condition code only where…" (emphasis added) and ends by telling caseworkers that whether to impose or lift the condition "is a decision for the Home Office decision maker to make on the basis of this guidance". This language tells caseworkers that, where one or more of the exceptions apply, the decision whether to impose, or lift, the condition of NRPF is a matter for them to consider in the exercise of their discretion.

65. It is true that the text under the heading "Making a decision on the condition code" is framed in the language of duty. It tells caseworkers "you should not impose or should lift the no recourse to public funds condition code" if one of the three exceptions is made out. But here, the first exception is that "the applicant *is* destitute". There is no mention of the case where the applicant will imminently become so. Moreover, the text which appears under the heading "Subsequent leave to remain applications" still instructs caseworkers that, on subsequent LTR applications, LTR *must* be granted subject to a condition of NRPF unless the applicant provides evidence that *"they are"* destitute or that one of the other two limbs applies.

66. We recognise that we have subjected paragraph GEN 1.11A of Appendix FM and the Instruction to a detailed logical and linguistic analysis. This is not because we expect the authors of instruments intended to be applied by non-lawyers to apply the same linguistic precision, or the same conventions, as statutory draftsmen. It is because any exercise whose aim is to discern the "ordinary and natural" meaning of a text must start with a careful reading of the language used. That is true of a contract written by and for non-

lawyers and it is no less true of the instruments we are considering here. We have, however, also tried to stand back, read the document as a whole and consider, as Mr Kovats invited us to do, what message caseworkers would draw from it. Even applying this broader and less focussed approach, reading paragraph GEN 1.11A and the Instruction together, we find it impossible to identify the message that the Secretary of State is under a legal obligation not to impose, or to lift, the condition of NRPF in a case where the applicant is not yet suffering, but will imminently suffer, inhuman and degrading treatment without recourse to public funds. On the contrary, the message conveyed seems to us to be that, in that category of case, the decision-maker has a discretion whether to impose, or lift, the condition. This, in our view, has the potential to mislead caseworkers in a critical respect. It gives rise to a real risk of unlawful decisions in a significant, and certainly more than minimal, number of cases.

67. We would add this. As advanced before us, Mr Goodman's argument on ground 6 did not depend to any significant extent on the evidence filed in support of the claim by Adam Hundt, the Claimant's solicitor, by Caroline Hattam, the co-ordinator of the Unity Project, a charity set up in 2017 to assist destitute migrants with LTR subject to a condition of NRPF, and by Eve Dickson on behalf of Project 17. But a reading of that evidence, together with the Secretary of State's evidence in reply, did not suggest to us that the shortcomings we have identified in paragraph GEN 1.11A of Appendix FM and the Instruction were purely technical defects devoid of significance in the real world. As we noted at the outset, Mr Hundt has represented 20 people in the Claimant's situation. In his first witness statement, he explained:

> "The cases follow a familiar pattern. We send a letter of claim, and if not resolved at that stage we issue proceedings, seeking expedition because the Claimant is destitute, and it is usually granted. When the Acknowledgement of Service is due, the Defendant invariably concedes the claim by agreeing to reconsider the decision under challenge…
>
> …Although that enabled the client in question to access public funds and alleviated their destitution, it was nonetheless an unsatisfactory outcome, because it was only achieved after crisis point had been reached; the client had been left out of pocket (usually in significant debt) and they had had to cope with significant uncertainty and distress in the meantime, as well as insufficient funds with which to feed themselves and heat their accommodation."

68. We recognise, as Underhill LJ noted in *BF (Eritrea)* in the passage cited at [56] above, that in any large-scale decision-making system there is the potential for aberrant decisions. The existence of aberrant decisions (even several of them) does not necessarily mean that the system itself is flawed. We also recognise that the 2019 review has resulted in a number of improvements to the application and decision-making processes. It is possible that these will reduce the number of aberrant decisions, though it is too early to say. But the number of aberrant decisions in the past seem to us to underline the need for clarity in the materials which inform caseworkers how they should go about making their decisions. In particular, these materials must, at minimum, identify clearly and accurately the circumstances in which the law requires the condition of NRPF not to be imposed, or to be lifted. At present, paragraph GEN 1.11A and the Instruction, read together, do not do this.

Can the flaws be remedied by amendments to the Instruction alone?

69. Mr Kovats submitted that, whatever may be said about the Instruction, there is no basis for impugning paragraph GEN 1.11A of Appendix FM. Mr Kovats placed considerable emphasis on exception (b) ("there are particularly compelling reasons relating to the welfare of a child of a parent in receipt of a very low income"). That might permit support to be given to an applicant with a child who is not yet suffering, but will imminently suffer inhuman or degrading treatment. However, as Mr Kovats conceded, many applicants with Article 3 rights will have no dependent children; and exception (b) could never apply to them.

70. Mr Kovats's fall-back position was to rely on the word "normally". That word, he said, showed that paragraph GEN 1.11A did not exclude a decision not to impose, or to lift, the condition of NRPF even in a case where neither of the two exceptions applied. We doubt that there is much point in debating whether the word "normally" (in its ordinary and natural sense) has this effect since both parties agree that it is possible to read it in this way, applying the interpretative obligation in s. 3 of the Human Rights Act 1998. If it is necessary to express an opinion on the matter, we would hold that it bears that meaning anyway, because – as Mr Kovats submitted – the word "normally" would otherwise be otiose.

71. This means that it cannot be said that paragraph GEN 1.11A of Appendix FM is incapable of being operated lawfully in all or nearly all cases. It follows that the test for a successful challenge to legislation set out in *Bibi* and *JCWI 2* is not met. But that is not the end of the analysis, because, as Mr Kovats was at pains to emphasise, paragraph GEN 1.11A of Appendix FM and the Instruction are to be read together as a cohesive regime; and the flaw we have identified is a failure by the regime as a whole to identify the legal duty not to impose, or to lift, the condition of NRPF in a case where an applicant is not yet suffering, but will imminently suffer, inhuman and degrading treatment. Given the difficulty of identifying the point at which treatment crosses the Article 3 threshold, the Secretary of State has sensibly avoided referring directly to "inhuman or degrading treatment" and instead used the concept of destitution, as defined in s. 95 of the 1999 Act. A similar difficulty arises in identifying the point at which inhuman or degrading treatment is "imminent". One way of translating this concept into something more certain and manageable for caseworkers would be by cross-referring to the phrase "likely to become destitute" as used in s. 95 of the 1999 Act, and the periods prescribed under that Act. But that would at least arguably be guidance "in the nature of a rule", which (applying the Supreme Court's tests in *Alvi* and *Munir*) would have to be laid before Parliament.

72. There are, however, other ways in which the flaws we have identified in the NRPF regime could be remedied and it is for the Secretary of State to decide how to remedy them.

Conclusion

73. For these reasons, the Claimant succeeds on ground 6. The NRPF regime, comprising paragraph GEN 1.11A and the Instruction read together, do not adequately recognise, reflect or give effect to the Secretary of State's obligation not to impose, or to lift, the condition of NRPF in cases where the applicant is not yet, but will imminently suffer

inhuman or degrading treatment without recourse to public funds. In its current form the NRPF regime is apt to mislead caseworkers in this critical respect and gives rise to a real risk of unlawful decisions in a significant number of cases. To that extent it is unlawful.

74. On 14 May, we sent paragraphs 1-73 above to counsel as a draft judgment and invited submissions on the appropriate form of order to give effect to our conclusions.

75. Mr Goodman sought:

(a) declarations that:

(i) paragraph GEN1.11A to Appendix FM to the Immigration Rules must be read and given effect as requiring a no recourse to public funds condition on a person's leave to be lifted or not to be imposed where that person would otherwise be likely imminently to face destitution;

(ii) the regime governing the imposition and lifting of NRPF conditions (comprising GEN 1.11A and D-LTRPT.1.2 in Appendix FM to the Immigration Rules; and the Instruction *Appendix FM 1.0 Family Life (as a Partner or Parent) and Private Life: 10-Year Routes*) are unlawful in that they fail to identify clearly and accurately the circumstances in which the law requires a "no recourse to public funds" condition not to be imposed, or to be lifted because a person would, without recourse to public funds, imminently face inhuman or degrading treatment contrary to article 3 ECHR and section 6 of the Human Rights Act 1998 and at common law; and

(b) a mandatory order that the Defendant shall not impose NRPF conditions on leave granted pursuant to Immigration Rules D-LTRPT.1.2 and GEN 1.11A. of Appendix FM to the Immigration Rules until the regime is amended so as to remediate the unlawfulness identified.

76. Mr Kovats submitted that the relief should be:

(a) a declaration that, read together, the Immigration Rules Appendix FM paragraphs GEN.1.11A and D-LTRPT.1.2 and the section headed "Recourse to public funds" in the Defendant's guidance document "Family Policy: Family life (as a partner or parent), private life and exceptional circumstances" (v.6.0) are unlawful in that, and to the extent that, they do not adequately reflect or give effect to the defendant's obligation under Article 3 ECHR and s. 6 of the Human Rights Act 1998 and at common law not to impose, or to lift, the condition of no recourse to public funds in cases where the applicant is not yet destitute but will imminently suffer inhuman or degrading treatment without recourse to public funds; and

(b) a mandatory order that the Defendant shall within 7 days of this Order publish an instruction to caseworkers that for applicants applying for, or with, leave to remain under paragraph D-LRTPT.1.2 of Appendix FM to the Immigration Rules, the caseworker is under a duty either not to impose or to lift, as the case may be, a condition of no recourse to public funds if she considers, on the evidence available to her, that the applicant is at imminent risk of destitution without recourse to public funds.

77. We prefer Mr Kovats' draft. The first paragraph closely follows the terms of our judgment. The second should be sufficient to ensure that, in the immediate future, cases of this kind the Secretary of State's *Limbuela* duty is complied with. This relief, taken together, is similar to that granted by the Court of Appeal in *BF (Eritrea)*, when the Secretary of State's guidance was found to be unlawful. We do not consider it necessary or appropriate to go further and make an order precluding the imposition of NRPF conditions as Mr Goodman suggests. It may in due course be thought desirable to amend paragraph GEN 1.11A of Appendix FM so as to make clear on the face of the Rules that in some circumstances there will be a duty, and not merely a discretion, not to impose, or to lift, the NRPF condition; and it may be necessary to do that if the Secretary of State ultimately decides to give effect to our judgment by means of an amendment in the nature of a rule. As we have said, however, that is for the Secretary of State to decide.

78. For the avoidance of doubt, we make no order on Grounds 2 to 5.

79. After having sight of paragraphs 1 to 73 above the parties reached agreement on the issue of damages. The Defendant, without any admission of liability, will pay the sum of £3,000 in full and final settlement. Since the Claimant is a child that settlement requires the approval of the Court. We give that approval.

80. Mr Kovats submitted that, since neither party has been successful on grounds 2 to 5, and much of the evidence and written submissions was directed to those grounds, the Claimant should recover only one third of his costs (other than those already provided for by interlocutory orders). We disagree. The suggestion made by Mr Goodman, and agreed to by Mr Kovats, that we should hear argument on ground 6 first and (having decided that the Claimant succeeded on that ground) go no further, was a pragmatic and sensible course, which shortened the hearing time by half and reflected credit on both parties. The Claimant has succeeded in substance, having demonstrated that the guidance in its present form is unlawful. We order that the Defendant must pay the Claimant's costs, to be assessed in detail on the standard basis if not agreed; and that she must make an interim payment on account in the sum of £50,000.