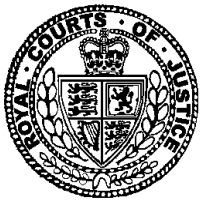

Neutral Citation Number: [2021] EWHC 2656 (Admin)

Case No: CO/3473/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/10/2021

Before:

THE HONOURABLE MR JUSTICE LINDEN

- -

Between:

THE QUEEN (On the application of ALLAN LEONARDO CONTRERAS CARDONA)	**Claimant**
- and –	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Mr Ali Bandegani (instructed by ITN Solicitors) for the Claimant
Mr Zane Malik QC and Mr Will Hays (instructed by the Government Legal Department) for the Defendant

Hearing date: 27 July 2021
- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII, if appropriate, and/or publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10.30am on Monday 4 October 2021

MR JUSTICE LINDEN:

Introduction

1. The Claimant is a citizen of Honduras. On 20 September 2018, he arrived in this country with his wife and their daughter, who was then aged 21 months, and they claimed asylum. At the time of the hearing before me, nearly 3 years later, that application had yet to be determined although I was told that an outcome was expected by 21 September 2021 *"absent special circumstances"*.

2. On 31 January 2020, the Claimant was granted permission to work pending the determination of his application for asylum. In accordance with Rule 360A of the Immigration Rules, that permission was limited to employment in jobs on the Shortage Occupations List ("SOL/the SOL condition"). As Bourne J found in **IJ (Kosovo) v Secretary of State for the Home Department** [2020] EWHC 3487 [31]-[32]:

> *"31 The SOL is a list of skilled jobs, many very specialised. It includes various categories of doctors, nurses and therapists, teachers in a few specified subjects, IT professionals, social workers, engineers, chefs with a certain level of expertise and artists of a number of specified kinds. The Migration Advisory Committee estimates that it covers about 1% of UK employment.*
>
> *32 It seems reasonable to assume that very few if any of the individuals who come to the UK in circumstances comparable to those of the claimant will be able to occupy such positions. The SOL restriction prevented the claimant from taking up the job (as a cleaner) which she was offered."*

3. Similarly, the Claimant does not have the skills or qualifications which would enable him to take up one of the occupations on the SOL. But, he says, there are jobs available in Portsmouth where he and his family are living, for example as a replenishment assistant in a supermarket, which local employers would be willing to offer him and which he would like to take up.

4. Following the grant of permission to work, correspondence therefore took place between the parties in the course of which it was argued on behalf of the Claimant, in effect, that the SOL condition should not have been applied to him and, on 13 May 2020, judicial review proceedings were issued ("the First Claim"). In this context, the Defendant then considered whether she should exercise her residual discretion to depart from the Immigration Rules by disapplying the SOL condition in the Claimant's case. In a decision dated 24 June 2020 she declined to do so ("the Decision"), and it is this decision which is challenged in the present proceedings ("the Second Claim").

5. The Decision is set out in a one-page letter. This briefly summarised the background to the First Claim, said that the matter had been given further consideration and identified the materials which had been considered in coming to a decision. The letter then said:

> *"It has been concluded that no exceptional and/or compassionate reasons exist both generally or by reference to Section 55 of the Borders, Citizenship and Immigration Act 2009, and it is therefore not appropriate to exercise discretion in your case. Your personal circumstances on which you rely exist for a large number of asylum seekers who are waiting for an asylum decision and granted limited*

PTW. Consequently, exercising the exceptional residual discretion to depart from the established policy would substantially undermine the effect of Paragraph 360 and 360A of the Immigration Rules, and the balance that is struck by those Rules in protecting the public interest. Therefore, it is not justified to depart from the established policy and your PTW remains restricted to the SOL."

The Claim

6. On 2 July 2020, I refused permission on the papers in the First Claim. The Claimant gave notice of his intention to renew his application orally but, in the meantime, the Second Claim was issued on 24 September 2020. By a Consent Order sealed on 12 January 2021, the First Claim was then withdrawn.

7. After consideration of a renewed application for permission at an oral hearing in the Second Claim on 21 April 2021, permission was granted by Henshaw J in respect of some of the Claimant's pleaded grounds but not others: see [2021] EWHC 1780 (Admin). In particular, he granted permission in relation to Grounds 2 and 3:

   i) Ground 2 alleges that the Defendant's policy, *"Permission to work and volunteering for asylum seekers"* ("the Work Policy"), fails to comply with section 55 Borders, Citizenship and Immigration Act 2009 ("the 2009 Act") which enacts a duty on her part to make arrangements for ensuring that those who exercise relevant immigration functions have regard to the need to safeguard and promote the welfare of children. The version of the Work Policy which was in force at the time of the Decision was Version 8, which was dated 22 May 2019, and the Claim Form and "Grounds of Review" criticise its terms and seek declaratory relief in relation to that version. The two pleaded criticisms of the Work Policy (at paragraph 52 of the Grounds of Review) are, first, that decision-makers are only directed to consider section 55 of the 2009 Act in deciding whether or not to grant permission to work in accordance with the Immigration Rules, and not when considering whether to exercise discretion to depart from the Rules. Second, it is contended that what is said in the Work Policy about the operation of section 55 in this context is flawed in respects which I consider below.

   ii) Ground 3 alleges that the Decision itself was irrational in that the reasons given by the Defendant did not sufficiently explain her decision and/or did not address the particular considerations in the Claimant's case.

8. There is no challenge by the Claimant to the Immigration Rules themselves.

9. It is also important to note that Henshaw J refused permission in relation to Ground 1 of the Second Claim. This alleged that Version 8 of the Work Policy operated as an unlawful fetter on the Defendant's residual discretion, in exceptional circumstances, to depart from the Immigration Rules, essentially because it did not identify the fact that there is such a discretion. Nor, therefore, did the Work Policy identify the factors which would be taken into account in exercising this discretion. Henshaw J pointed out that, although it was arguable that the Work Policy was deficient in failing to identify the existence of the residual discretion, and indeed such an argument had been upheld in **R (C6) v Secretary of State for the Home Department** UKUT 0094 (IAC), this was

beside the point because, in the present case, the residual discretion had been exercised by the Defendant.

10. Ground 4, which alleged that the Work Policy was contrary to Article 8 of the European Convention on Human Rights ("ECHR"), was abandoned by the Claimant at the permission stage.

The Hearing

11. For the purposes of the Second Claim the Claimant relied on his Grounds of Review dated 23 September 2020. He did not submit a witness statement in support of his Claim Form.

12. By notice dated 15 July 2021, the Claimant then applied to rely on further evidence, namely his "updated" witness statement dated 14 July 2021 and a statement of Ms Laura Smith (Interim Legal Director of the Joint Council for the Welfare of Immigrants ("JCWI")) dated 15 July 2021. This, in turn, exhibited a statement by her predecessor Ms Nicola Burgess, dated 30 March 2021, which had been filed in the case of **R (on the application of NB & Others) v Secretary of State for the Home Department** [2021] 4 WLR 92. The Claimant also applied to rely on more than 600 pages of further reports and documents which are in the public domain. At the beginning of the hearing, however, Mr Bandegani indicated that this application was not pursued.

13. The Defendant relied on the 3-page witness statement of Dr Miv Elimelech, Deputy Director for the Asylum and Family Policy Unit of the Home Office, dated 30 June 2021. For the most part, this contained general assertions, arguments about the case, or statements of what is known in any event. It did not exhibit any supporting documents. I did not find it particularly helpful in determining the issues in the case.

14. Given Mr Bandegani's reliance, in his skeleton argument at least, on **Mathieson v Secretary of State for Work and Pensions** [2015] 1 WLR 3250, I drew the attention of the parties to the decision of the Supreme Court in **R (SC & Others) v Secretary of State for Work and Pensions** [2021] UKSC 26 in advance of the hearing. In the event, neither side considered that this decision materially impacted on the issues in the present case. Having heard their arguments, I agree.

Submissions in the light of the draft judgment

15. My draft judgment was circulated in the usual way on 1 September 2021. By email dated 8 September 2021, Mr Hays helpfully drew attention to the decisions of the Supreme Court in **R (A) v Secretary of State for the Home Department** [2021] UKSC 37 and **R (BF (Eritrea)) v Secretary of State for the Home Department** [2021] UKSC, which were handed down on 30 July 2021, albeit without making any submissions as to their effect. By email dated 9 September 2021, I therefore gave the parties the opportunity to make any submissions or applications which they wished to make in relation to these cases and, in response, I received written submissions dated 16 September 2021 on behalf of each of the parties. Mr Malik QC submitted that in the light of these decisions (a) I should dismiss Ground 2; or, alternatively, (b) I should decline to determine Ground 2 on the grounds that it is academic; or, alternatively, (c) I should grant the Defendant permission to appeal my decision on Ground 2.

16. I therefore gave Mr Bandegani until 4pm on 22 September 2021 to reply in writing. His position was that the decisions of the Supreme Court did not make a difference to the outcome in the case and that I should refuse permission.

17. I broadly agree with Mr Bandegani for reasons which I will explain, where appropriate, below. I have, however, taken into account the parties' additional submissions on **A** and **BF (Eritrea)** into account in coming to my conclusions.

Legal Framework

Relevant primary legislation

18. Section 3(1) of the Immigration Act 1971 provides, so far as material, that:

> *"Except as otherwise provided by or under this Act, where a person is not a British citizen —*
>
> *(a) he shall not enter the United Kingdom unless given leave to do so in accordance with the provisions of, or made under, this Act;*
>
> *(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 —*
>
> *(i) a condition restricting his work or occupation in the United Kingdom…*"

19. Section 3(2) of the 1971 Act deals with the making of the Immigration Rules as follows:

> *"(2) The Secretary of State shall from time to time (and as soon as may be) lay before Parliament statements of the rules, or of any changes in the rules, laid down by him as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter, including any rules as to the period for which leave is to be given and the conditions to be attached in different circumstances;… "*

20. Section 55 of the Borders, Citizenship and Immigration Act 2009 provides, so far as material that:

> *"**55 Duty regarding the welfare of children***
>
> *(1) The Secretary of State must make arrangements for ensuring that—*
>
> *(a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and* (emphasis added)
>
> *(b) any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need.*

(2) The functions referred to in subsection (1) are—

(a) any function of the Secretary of State in relation to immigration, asylum or nationality;

(b) any function conferred by or by virtue of the Immigration Acts on an immigration officer;

(c) any general customs function of the Secretary of State;

(d) any customs function conferred on a designated customs official.

(3) A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (1). ….”

21. In **R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department** [2021] 1 WLR 3049 (“the **PRCBC** case”) David Richards LJ helpfully summarised the effect of section 55 as follows at [70]:

“(i) Section 55 was enacted to give effect in domestic law, as regards immigration and nationality, to the UK’s international obligations under article 3 of the 1989 United Nations Convention on the Rights of the Child (“UNCRC”). The UK is a party to the UNCRC and in 2008 withdrew its reservation in respect of nationality and immigration matters. Article 3 provides that: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” Although section 55 uses different language, it is conventional and convenient to refer to a duty under section 55 as being to have regard, as a primary consideration, to the best interests of the child.

(ii) The duty is imposed on the Secretary of State. She is bound by it, save to the extent (if any) that primary legislation qualifies it; we were not referred to any qualifying legislation.

(iii) The duty applies not only to the making of decisions in individual cases but also to the function of making subordinate legislation and rules (such as the Immigration Rules) and giving guidance. The fact that subordinate legislation or rules are subject to the affirmative vote of either or both Houses of Parliament does not qualify the Secretary of State’s statutory duty under section 55.

(iv) The best interests of the child are a primary consideration, not the primary consideration, still less the paramount consideration or a trump card. This does, however, mean that no other consideration is inherently more significant than the best interests of the child. The question to be addressed, if the best interests point to one conclusion, is whether the force of other considerations outweigh it.

> *(v) This in turns means that Secretary of State must identify and consider the best interests of the child or, in a case such as the present, of children more generally and must weigh those interests against countervailing considerations."*

The relevant Immigration Rules

22. Rule 360 of the Immigration Rules provides as follows:

> *"**360**. An asylum applicant may apply to the Secretary of State for permission to take up employment if a decision at first instance has not been taken on the applicant's asylum application within one year of the date on which it was recorded. The Secretary of State shall only consider such an application if, in the Secretary of State's opinion, any delay in reaching a decision at first instance cannot be attributed to the applicant."*

23. Rule 360A and 360 B then provide:

> *"**360A**. If permission to take up employment is granted under paragraph 360, that permission will be subject to the following restrictions:*
>
> *(i) employment may only be taken up in a post which is, at the time an offer of employment is accepted, included on the list of shortage occupations published by the United Kingdom Border Agency (as that list is amended from time to time);*
>
> *(ii) no work in a self-employed capacity; and*
>
> *(iii) no engagement in setting up a business.*
>
> ***360B**. If an asylum applicant is granted permission to take up employment under paragraph 360 this shall only be until such time as his asylum application has been finally determined."* (emphasis added)

24. Rules 360C-360E make equivalent provisions for asylum seekers whose applications have been refused but who have made further submissions to the Defendant.

25. I agree with Mr Malik that the effect of these provisions is that, where an application for permission to work is made, the caseworker has to consider, as a matter of fact, whether the applicant's application for asylum or submission has been outstanding for more than a year. If it has been, a judgment has to be made as to whether to grant permission, typically by reference to the question whether the delay is attributable to the applicant. If permission is granted, there is no other judgment to be made under the Rules: the conditions applicable to the grant of permission, set out in Rule 360A, are mandatory. The only other discretion which a case worker has is to depart from the Rules.

26. In **R (Rostami) v Secretary of State for the Home Department** [2013] EWHC 1494 (Admin) Hickinbottom J (as he then was) dismissed a challenge to the application of the SOL condition to the claimant which included grounds which contended that this aspect of Immigration Rules 360-360E was inconsistent with the Council Directive 2003/9/EC ("the Reception Directive") and/or contrary to Article 8 ECHR. He

considered the question of proportionality in the context of there being long delays in determining applications for asylum, the subsistence levels of support provided to asylum seekers pursuant to sections 95 and 98 Immigration and Asylum Act 1999, the wish of asylum seekers to work, and their interest in doing so. He accepted that there were *"formidable obstacles"* in the way of an asylum seeker obtaining a SOL post and that the particular claimant's chances of securing such employment were *"slim"*. But he held that the relevant Rules pursued legitimate aims and were not disproportionate. At [92] he gave 14 reasons for this conclusion which included:

> *"i) The Claimant no doubt has an interest in working, and in the conditions imposed on any permission to work; but he has no right to work in the UK, under domestic or EU law.*
>
> *ii) Article 11(2) of the Reception Directive, read with article 11(4), clearly envisages Member States imposing conditions on an asylum seekers right to enter the domestic labour market, with the purpose of protecting the interests of Member State nationals and others with a right to work in that State.*
>
> *iii) The SOL achieves a number of legitimate and linked public interest objectives. In the labour market, it seeks to prioritise the citizens of the UK and the rest of the EU territories, a legitimate public policy which, as I have indicated in (ii) above, is specifically recognised in article 11 of the Reception Directive: it thus ensures that asylum seekers are granted access to the UK labour market without adversely impacting on UK nationals or other EU citizens, as they are only filling positions that have been identified as requiring skills which resident labour can fill. By doing so, UK work output is also increased. It also seeks to place asylum seekers in no better position than economic migrants who seek to come to the UK under the Points Based System. That discourages economic migrants from making unmeritorious asylum claims to obtain a preference in the labour market. That too is a legitimate political aim. These are strong public interest factors. The protection of the domestic labour force is particularly weighty factor at times of rising unemployment amongst UK nationals and other EU citizens.*
>
> *iv) Furthermore, we are here in an area of policy within the scope of immigration, social benefits and economic strategy. In such areas of high policy, the State has a wide margin of appreciation, because they involve the balancing of particularly important public interest factors and the rights and interests of individuals. Those individuals include not only the Claimant and other asylum seekers, but also individuals who do have a right to work but are or may become unemployed. In such areas, the courts are particularly cautious before interfering with decisions made by the State."*

27. At [92](vi) Hickinbottom J accepted that a bright line rule was permissible:

> *"vi) In such areas as these, the courts have also frequently found "bright line" rules generally acceptable, notwithstanding that some hardship to some people affected might result. Stanley Burnton LJ explained the practical necessity of having such rules in* ***Miah v Secretary of State for the Home Department*** *[2012] EWCA Civ 261 (at [25]),…"*

28. Bearing in mind the scope for asylum seekers to carry out voluntary work he said:

> *"xii) Leaving aside the obvious financial benefits that accrue from employment, I do not find that the inability to work, in itself, has had any significant adverse effect on the Claimant, or on asylum seekers as a whole. He, and they, suffer from low income and generally being in limbo, during consideration of their asylum applications; but not specifically from an inability to work. There is no compelling evidence that the Claimant, or asylum seekers generally, suffer to any significant extent by an inability to make social contact through work."*

29. Mr Bandegani notes, correctly, that in **Rostami** the court was not called upon to consider section 55 of the 2009 Act but, as Mr Malik notes, the Claimant in the present case does not challenge the Immigration Rules themselves. This case is about the exercise of discretion outside the Rules.

30. It is also worth noting the decision of Flaux J (as he then was) in **Ghulam v Secretary of State for the Home Department** [2016] EWHC 2639 (Admin) in which there was a challenge to the levels of support which are made available to asylum seekers under section 95 and 98 Immigration and Asylum Act 1999. One of the contentions was that the Defendant's decisions in this regard were in breach of section 55 of the 2009 Act. This was rejected. At paragraph 249, Flaux J said:

> *"In my judgment, the correct analysis is that the requirement to make the best interests of the child a primary consideration arises in the overall context or framework of setting the asylum support rate in respect of dependent children in accordance with the [Reception] Directive and the 1999 Act. Of course…, it may be that the needs of children as regards health and welfare differ in certain respects from those of adults, but there is no requirement for the imposition of a higher standard of support than the objective minimum under the Reception Directive."*

31. The overall effect of **Rostami** and **Ghulam** is, then, that the fact that the Immigration Rules require the application of the SOL condition without exception has been held to be consistent with the Reception Directive and Article 8 ECHR, having regard to the public policy aims of the Rules. The level of support which is provided to asylum seekers, given that they are prevented from earning a living, has also been held to be permissible under the same Directive with specific regard to-section 55 of the 2009 Act and the interests of children. As Mr Malik points out, this is important context for the arguments in this case, particularly under Ground 3.

Ground 2

Additional factual context

32. The Claimant emphasised the length of the delays in processing asylum applications, particularly given the Covid-19 pandemic. As noted at the outset of this judgment, he has been waiting for approximately 3 years. He also emphasised the financial difficulties which he and his family face given the level of support which is provided pursuant to the 1999 Act. In his Grounds of Review he highlights a briefing from the Children's Society based on a study in 2012 (and therefore some time ago) which found that the level of these benefits for a couple with a 4 year old child was 67% of the Income Support which such a family would receive. He also says that the level of

payments (which I understand is currently £39.63 per week) is approximately the average weekly spend on essential items of the poorest 10% of UK citizens according to a study by Refugee Action in 2014. And he says that the pandemic has affected the availability of food from foodbanks owing to reduced donations and greater demand. He also emphasises that there are jobs available and his wish to work both for financial reasons and for reasons of well-being and self-esteem.

33. Mr Malik seeks to put these points in context. He points out that, in addition to accommodation with the necessary utilities and financial assistance to cover essential needs, the children of asylum seekers have access to education and healthcare. He also emphasises the policy objectives which underpin the government's approach and that this approach was found to be lawful in **Rostami** and **Ghulam**. As he points out, these are areas of *"high policy"* in which the courts are not entitled, or in a position, to second guess the decisions which are made by government.

The Work Policy.

34. The Introduction to the Work Policy makes clear that its purpose is to explain:

> *"how caseworkers must consider applications under Part 11B, paragraphs 360 to 360E of the Immigration Rules for permission to work from those who have lodged an asylum claim or further submission which remains outstanding. It also provides guidance on the fact that asylum seekers can undertake volunteering at any stage of the asylum process."* (emphasis added)

35. There is then a section in which Immigration Rules 360-360E are briefly summarised and the fact that asylum seekers are encouraged to carry out voluntary work is emphasised. Next, there is the following passage which explains the aims of the relevant Rules and the Work Policy:

> *"**Policy intention***
>
> *The policy objectives in restricting permission to work for asylum seekers and failed asylum seekers whilst their claim is considered are to:*
>
> *• ensure a clear distinction between economic migration and asylum that discourages those who do not need protection from claiming asylum to benefit from economic opportunities they would not otherwise be eligible for*
>
> *• prevent illegal migration for economic reasons and protect the integrity of the asylum system so that we can more quickly offer protection to those who really need it*
>
> *• be clear that asylum seekers can undertake volunteering as this provides a valuable contribution to the wider community and may help those who qualify for leave to remain here to integrate into society"*

36. Then there is the specific section which is in contention. This is the only section of the Work Policy which refers to the position of children. The passage states the following:

> *"**Application in respect of children***

> *Considering an application for permission to work is an immigration function and as such must take into account the need to safeguard and promote the welfare of children in the UK. This is in accordance with requirements under Section 55 of the Borders, Citizenship and Immigration Act 2009. This means caseworkers need to take account of the impact on children of a refusal to grant permission to work.*
>
> *Those who do not cooperate with the asylum process and are responsible for the delay in considering their claim should not be granted permission to work. It may be argued that refusing permission is not in the best interests of a child. Provision is made in the asylum process for the essential safeguarding and well-being needs of children who are dependent on their parents' claim through appropriate support and accommodation arrangements where this is needed. It is therefore very unlikely that a decision to refuse permission to work for an adult would adversely impact on a child or override the public interest in refusing permission to those who do not comply with the process in accordance with the Immigration Rules.*
>
> *Paragraph 360 of the Immigration Rules only applies to the principal applicant in an asylum claim and there is no provision to grant permission to work to dependants on the claim.*
>
> *Children under the age of 18 should not be given permission to take employment. However, unaccompanied asylum-seeking children or children dependent on their parents are entitled to secondary education whilst their claim is being considered. They are also able to take part in work experience placements or training if that forms part of their education.*
>
> *For further information on the key principles to take into account, see: Section 55 Children's Duty Guidance. "*(emphasis added)

37. I will call this *"the Impugned Section"* and the highlighted second paragraph *"the Impugned Paragraph"*. Links to section 55 of the 2009 Act and the Guidance on this topic are embedded in the Section. The Guidance referred to is statutory guidance issued under section 55, called *"Every Child Matters"* and dated November 2009. This document explains the operation and requirements of section 55 in terms which were not criticised by Mr Bandegani.

38. Thereafter, the Work Policy provides more detailed guidance on the application process for permission to work. However, Version 8 of the Work Policy did not refer to the fact that the Defendant has a residual discretion to depart from the Immigration Rules. Nor did it give any guidance as to the exercise of this discretion. In **IJ (Kosovo)** (supra) Bourne J held that this rendered the Work Policy misleading in that it suggested that paragraph 360A of the Rules was a bright line rule from which there was no discretion to depart [75]. He also held that, in the context of people trafficking, this created a real risk of unlawful decisions being made in a significant number of cases in as much as the policy of the Defendant was to make decisions on leave in accordance with the Council of Europe Convention on Action against Trafficking in Human Beings ("ECAT"), Article 12 of which required the parties to *"adopt such legislative or other measures as may be necessary to assist victims in their physical, psychological and social recovery"* [76]-[77]. Accordingly, he granted a declaration that the Work Policy

was defective because it did not identify the Defendant's residual discretion or the ECAT objectives which are relevant to its exercise adding, at [78], that *"How that defect is rectified will be a matter for the defendant."*.

39. **IJ (Kosovo)** was followed in **R (C6) v Secretary of State for the Home Department** (supra) in which UTJ Stephen Smith held that the Work Policy was unlawful to the extent that it *"is a blanket policy, admitting of no possibility of exceptions"* [79].

40. In the light of the **IJ (Kosovo)** decision the Work Policy was amended to add a section which deals with the *"Application of discretion"*. The current version is Version 10, dated 4 May 2021, to which I refer below.

The Claimant's arguments under Ground 2

41. Mr Bandegani advanced detailed arguments as to why Version 8 of the Work Policy was contrary to section 55 of the 2009 Act, criticising it both for what it said and for what it did not say. In broad terms, his criticisms were that the Impugned Section of the Policy was the only passage which referred to section 55 and the position of children. It did so only in the context of decisions whether to grant or refuse permission to work and only in the context of decisions under the Rules. The text of the Impugned Paragraph – referring to the unlikelihood that refusal of permission would adversely impact on the child etc – was itself problematic in that it set up a test of exceptionality which is inconsistent with section 55 and which, in any event, was based on the fallacy that denying a carer the opportunity to earn is very unlikely to impact adversely on the child given the statutory support for asylum seekers which is available. It also gave primacy to immigration policy. Version 8 was silent as to the residual discretion available to the Defendant and how it would be exercised, and it did not spell out for caseworkers the requirements and implications of section 55 and that they apply at every stage of the decision-making process.

42. At the hearing, Mr Bandegani relied on the following passage from the decision of the Divisional Court (Bean LJ and Chamberlain J) in **R (W) v Secretary of State for the Home Department** [2020] EWHC 1299 (Admin). Having referred to the decision of the Supreme Court in **R (Bibi) v Secretary of State for the Home Department** [2015] 1 WLR 5055 [54], [60] and [101], and the decision of the Court of Appeal in **R (BF (Eritrea)) v Secretary of State for the Home Department (Equality and Human Rights Commission intervening)** [2020] 4 WLR 38 [63], the Divisional Court said this:

> *"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 (Equality and Human Rights Commission intervening)** [2015] 1 WLR 4497, para 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 Clinical Commissioning***

Group *[2020] PTSR 1153, paras 196—208 (Underhill LJ); see also para 214 (Rose LJ)."*

43. Mr Malik submitted, at the hearing, that the test is the "real risk" test stated by the Court of Appeal in **BF (Eritrea)**. Quite properly, in his written submissions dated 16 September 2021 he pointed out that this was wrong and relied on the law as stated in the Supreme Court in **A v Secretary of State for the Home Department** (supra) and **BF (Eritrea) v Secretary of State for the Home Department** (supra).

44. Mr Bandegani submitted that in coming to a conclusion about the issues in relation to the Impugned Section, the interpretation of the Policy is a matter for the Court: see **R (Mandalia) v Secretary of State for the Home Department** [2015] 1 WLR 4546 [31]. I agree that Dr Elimelech's "evidence", at paragraphs 11 of her witness statement, about what the words of the Work Policy mean is, therefore, no more than her interpretation or argument and therefore of no assistance. Given that the primary concern in this type of claim is as to whether the terms of the disputed policy or guidance will induce decision-makers to make unlawful decisions, however, in my view the issue for the court is as to how the policy will be interpreted by the reasonable caseworker: see **A** (supra) [34]. The court is therefore entitled to take account, as part of the context in which a policy is to be interpreted, of any evidence as to the expertise or other materials which the relevant decision-makers will bring to, or take account of, in their decision-making. In the present case, however, no such evidence was vouchsafed by the Defendant, which is a point to which I will return below.

Analysis of the key cases for the purposes of the Claimant's arguments

45. Specifically in relation to section 55 of the 2009 Act, Mr Bandegani also relied on the decisions of Holman J in **R (SM) v Secretary of State for the Home Department** [2013] EWHC 1144 (Admin), of the Supreme Court in **R (MM (Lebanon) v Secretary of State for the Home Department** [2017] 1 WLR 771 and of the Divisional Court (Laing LJ and Lane J) in **R (ST) v Secretary of State for the Home Department** [2021] EWHC 1085. I will consider each of these cases in turn.

SM

46. In **SM** the issue was whether the Defendant's 2009 policy document entitled *"Discretionary Leave"* complied with section 55 of the 2009 Act in cases where children were applying for indefinite leave to remain in the United Kingdom, outside the scope of the Immigration Rules. Holman J held that it did not. Although the Introduction to the policy referred to section 55 and required border officers to have due regard to this provision and to *"Every Child Matters"* in making their decisions, the text of the policy later laid down what was in effect a rule that an applicant had to have completed six years of discretionary leave to remain before being eligible for indefinite leave to remain. This, held Holman J, was contrary to section 55, which required a case specific consideration of the welfare of the particular child applicant in coming to a relevant decision. The provisions of the policy prevented this from occurring until such time as the child had completed six years of discretionary leave: see in particular [37], [41]-[43] and [57].

47. I did not understand the proposition that section 55 requires consideration of the welfare of the particular child to be controversial in the present case. Mr Malik submitted, and

I agree, that **SM** was a case in which the relevant policy document effectively provided that this would not take place until the child had completed six years' discretionary leave and was therefore contrary to section 55. There is an issue in the present case as to whether the Immigration Rules and the Work Policy prevent consideration of the welfare of the child in accordance with section 55 but, in any event, subject to the arguments under Ground 3 the particular circumstances of the Claimant were considered.

MM (Lebanon)

48. In **MM (Lebanon)** the challenge was to the minimum annual income requirement ("MIR") applicable to a spouse who wished to sponsor an application for leave to enter the United Kingdom by a spouse who was outside the European Economic Area. The MIR was introduced as part of a new Appendix FM to the Immigration Rules which dealt with applications from family members. The Supreme Court rejected an argument that the MIR breached Article 8 ECHR but held that the relevant Immigration Rules did not comply with section 55 of the 2009 Act, and that the accompanying guidance contained in the Instructions to entry clearance officers did not adequately fill the gap left by the Rules, particularly in regard to treating the best interests of the child as a primary consideration. The Court granted declarations that the Rules and the Instructions were unlawful, and that the Rules failed, unlawfully, to give effect to the duty imposed on the Secretary of State by section 55: see [109] and [110].

49. Paragraph GEN 1.1 of Appendix FM stated, as part of a general introduction, that the Appendix had taken into account *"the need to safeguard and promote the interests of children in the UK in line with the duty under section 55 of the 2009 Act"*, but the Supreme Court held that it needed to be clear from the substance of the particular Rules themselves that the statutory duty had been properly taken into account. This was not clear, and the general statement in GEN 1.1 that it had been was therefore wrong in law: see [90] and [92].

50. The Instructions to entry clearance officers provided for an *"exceptional circumstances"* exception. The guidance in the Instructions as to how this exception should be applied stated that the Rules themselves reflected the position of the Defendant on proportionality and how the balance should be struck between individual rights and the public interest. Exceptional circumstances were likely to occur *"only rarely"*. It was explained that *"exceptional"* in this context meant circumstances in which refusal would result in unjustifiably harsh consequences for the applicant or their family, such that it would not be proportionate under Article 8 ECHR.

51. Decision-makers were also told in the Instructions that consideration of the putative exceptional circumstances must include consideration of any factors relevant to the best interests of the child *"in the UK"* but that applying the Rules would *"only rarely"* lead to a disproportionately detrimental effect on the best interests of the child. The Instructions stated that:

> *"The key issue is whether there are any factors involving the child in the UK that can only be alleviated by the presence of the applicant in the UK."*.

52. Examples were then given of where this might be the case, such as if the child was undergoing a major medical procedure, and it was emphasised that other means of

meeting the child's interests would need to have been considered and ruled out: see [22]-[24].

53. At [89] the Supreme Court noted that:

> *"89 We have already explained how the internationally accepted principle requiring primary attention to be given to the best interests of affected children is given clear effect in domestic law and policy. The same principle is restated as part of the considerations relevant to the article 8 assessment in* ***Jeunesse*** *60 EHRR 17, para 120…, requiring national decision-makers to: "advert to and assess evidence in respect of the practicality, feasibility and proportionality [of any such removal of a non-national parent] in order to give effective protection and sufficient weight to the best interests of the children directly affected by it." ….*

54. At [91] and [92] the Court said:

> *"91 In our view the instructions in their present form (quoted at para 24 above) do not adequately fill the gap left by the Rules. Rather than treating the best interests of children as a primary consideration, taking account of the factors summarised in* ***Jeunesse****, they lay down a highly prescriptive criterion requiring "factors . . . that can only be alleviated by the presence of the applicant in the UK", such as support during a major medical procedure, or "prevention of abandonment where there is no other family member . . .". It seems doubtful that even the applicant in* ***Jeunesse*** *itself would have satisfied such a stringent test. ….*
>
> *92 We have no doubt therefore that the guidance is defective in this respect and needs to be amended in line with principles stated by the Strasbourg court…."* (emphasis added)

55. The Supreme Court also emphasised, at [92], that:

> *"Nor is the gap filled by GEN.1.10—11 which refer to the separate consideration under article 8, but not section 55. This is not simply a defect of form, nor a gap which can be adequately filled by the instructions. The duty imposed by section 55 of the 2009 Act stands on its own feet as a statutory requirement apart from the HRA or the Convention. While the detailed guidance may be given by instructions, it should be clear from the Rules themselves that the statutory duty has been properly taken into account. We would grant a declaration that in this respect both the Rules and the instructions are unlawful"*

56. I accept Mr Malik's submission that the correct analysis of **MM (Lebanon)**, so far as the Supreme Court's criticism of the Instructions is concerned, was not of the reference to exceptionality, nor of the statement or prediction that the interests of the child would only rarely justify a departure from the Rules. It was of the laying down of a highly prescriptive criterion which required a narrower approach than that which was required by section 55 of the 2009 Act. Whereas section 55 required the interests of the child to be a primary consideration in the context of a balancing exercise, the Instructions required the presence of the applicant in the United Kingdom to be the only way of meeting those interests if the MIR was to be disapplied. This aspect of **MM (Lebanon)** is, then, another example of a case where the guidance to decision-makers expressly required them to take an approach which was inconsistent with section 55.

57. I note, however, that there is a helpful discussion of **MM (Lebanon)** in the **ST** case, to which I now turn.

ST

58. **ST** was a challenge to the provisions relating to the application of the *"no recourse to public funds"* ("NRPF") condition to the grant of limited leave to remain. GEN 1.11A of Appendix FM to the Immigration Rules provided that the NRPF condition would normally be applied unless the applicant had 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."* (emphasis added)

59. As the Divisional Court noted, however, (e.g. at [75] and [78]-[82]) there were various passages in the guidance to caseworkers which correctly stated the requirements of section 55 of the 2009 Act.

60. At [157] the Court stated the principle to be derived from **MM (Lebanon)** as follows:

> *"….It is clear from **MM (Lebanon)** that the general statement in paragraph GEN.1.1 of Appendix FM to the Rules that the Rules comply with the duty imposed on the Secretary of State by section 55 does not decide the question whether, as a matter of law, any particular provision of Appendix FM of the Rules does so comply. Whether its provisions do so is to be decided by a construction of the relevant provisions of Appendix FM, and of any guidance which might mitigate (or exacerbate) the apparent effect of the Rules."* (emphasis added)

61. Noting that there had been debate as to the circumstances in which a court should intervene where the challenge was of this nature, at paragraph [158] the Divisional Court said this:

> *"…. This ground does not concern 'systemic unfairness' (cf cases like **R (BF (Eritrea)) v Secretary of State for the Home Department** [2019] EWCA (Civ) 872, paragraph 63, per Underhill LJ). Nor is it a challenge to the Rules or the guidance based on their incompatibility with Convention rights (cf **R (Bibi) v Secretary of State for the Home Department** [2015] UKSC 68; [2015] 1 WLR 5055). The real question here is whether in framing Appendix FM and the guidance, the Secretary of State has complied with her section 55 duty, by ensuring that, when caseworkers decide whether to impose a NRPF condition, they comply with section 55. That depends on whether the relevant provision of Appendix FM requires, expressly, or in substance, read on its own or with the guidance, that a person who is deciding whether to impose, or to lift, a NRPF condition must comply with section 55 when he makes that decision. That is a straightforward question of construction…"* (emphasis added)

62. At [159]-[161] the Court turned to consider this question. At [159] it said:

> *"Paragraph GEN.1.11A does not refer to the best interests of a relevant child, still less does it reflect the approach to the best interests of a child which is encouraged in the guidance…. Instead, while it refers to a child, it imposes a different, more stringent and narrower test ..We consider, applying the reasoning in* ***MM (Lebanon)****, that that does not expressly comply with section 55. Nor does it achieve substantial compliance, because it substitutes for the requirements of section 55 a test which does not have the same effect."*

63. **ST** was, then, a case in which the Rule itself expressly addressed the position of children but laid down a test which was narrower than section 55, and therefore incompatible with the Defendant's duty under that section. The Divisional Court then turned to question whether the guidance made good this deficiency. It held that it did not, essentially because:

    i) The Rule itself contained a misdirection;

    ii) The sections of the guidance which dealt with the NRPF and decisions to grant leave repeated the test in GEN 1.11A;

    iii) The many references in the guidance to section 55 were all in the context of decisions whether or not to grant limited leave to remain, rather than in the context of the distinct decision which was relevant in these cases, i.e. the decision whether to impose or to lift an NRPF condition;

    iv) The general statements in the guidance that section 55 applied to all decisions could not displace these factors.

64. **ST** therefore usefully states the principles to be applied in the present case and illustrates how they apply. In particular:

    i) Given that the issue in the present case is whether the Defendant has complied with section 55(1) of the 2009 Act, and given that the section requires that she makes arrangements for ensuring that the relevant functions are discharged having regard to the need to safeguard and promote the welfare of children, I respectfully agree with the Divisional Court's characterisation of *"the real question"* in the passage at [158] of its judgment, cited at paragraph 61 above. That question is whether the requisite arrangements have been made by the Defendant and this will turn on the evidence of such arrangements, in this case in the form of the Rules and the Work Policy. Since the arrangements relied on in this case take the form of documents, the question whether they fulfil the Defendant's obligations under section 55 involves determining the meaning and effect of those documents and then consideration of whether they fulfil the requirements of section 55 and/or are consistent with the Defendant's obligations under that section 55.

    ii) At [35], having summarised the effect of sections 55(1) and (2), the Divisional Court in **ST** said that *"It might be thought, as a matter of language, that this is a high-level organisational duty."* but the Court noted that it had been conceded in **ZH (Tanzania) v Secretary of State for the Home Department** [2011] 1 WLR 148, and effectively in **MM (Lebanon)**, that the section binds every decision maker in every case. By the same token, it is open to the Defendant to

show, as she seeks to in this case, that whatever the terms of the Rules or the applicable guidance, her decision in a particular case correctly had regard to the matters required by section 55 to be taken into account. This was not in dispute in the present case.

iii) I would add that, whilst typically the arrangements in question will take the form of Rules and guidance as to the application of the Rules, in principle it ought to be open to the Defendant to prove that the requisite arrangements are in place through other or additional types of evidence such as evidence about the training and experience of caseworkers, or the particular caseworker in question, which shows that they can be assumed to have applied the relevant guidance. This is relevant, for example, to the Defendant's reliance on the availability of the guidance in *Every Child Matters* as part of her answer to the Claimant's case.

The decisions of the Supreme Court in A and BF (Eritrea)

65. The essential points made by the Supreme Court in **A** and **BF (Eritrea)** were, firstly, that, absent a specific duty to give guidance on a particular issue, a court will not interfere with a statement of policy by a public body merely on the basis that it should have said more and/or that what it says does not exclude, or do enough to exclude, the risk of erroneous and/or unlawful decisions by decision-makers and/or that it leaves open the possibility of those to whom it was addressed seeking to implement it by unlawful means. If the court is to intervene, the policy or guidance must positively lead to unlawful decisions if applied in accordance with its true meaning, as opposed to merely failing to prevent them. The test is whether the guidance sanctions or positively approves or encourages unlawful conduct (per Lord Scarman in **Gillick v West Norfolk and Wisbech Area Health Authority** [1986] AC 112), whether it authorises or approves such conduct by those to whom it is directed (per Lord Templeman in the same case): see **A** [38]. Where it does:

> *"….it can be said that the public authority has acted unlawfully by undermining the rule of law in a direct and unjustified way. In this limited but important sense, public authorities have a general duty not to induce violations of the law by others."*

66. Secondly, in **A** at [41] Lords Sales and Burnett explained that the application of the test:

> *"calls for a comparison of what the relevant law requires and what a policy statement says regarding what a person should do. If the policy directs them to act in a way which contradicts the law it is unlawful. The courts are well placed to make a comparison of normative statements in the law and in the policy, as objectively construed. The test does not depend on a statistical analysis of the extent to which relevant actors might or might not fail to comply with their legal obligations: see also our judgment in BF (Eritrea)."*

67. The policy in question is *"to be read objectively, having regard to the intended audience….it was only if the guidance, on a reasonable reading of it.."* fails that test that it will be found to be unlawful: **A** at [34]. In **BF (Eritrea)** at [51] the Supreme Court held that the Court of Appeal had erred in adopting an approach which involved:

> *"comparing a normative statement with a factual prediction, ie comparing the underlying legal position with what might happen in fact if the persons to whom the policy guidance is directed are given no further information. If correct, this would involve imposing on the person promulgating the guidance a very different, and far more extensive, obligation than that discussed in Gillick. It would transform the obligation from one not to give a direction which conflicts with the legal duty of the addressee into an obligation to promulgate a policy which removes the risk of possible misapplication of the law on the part of those who are subject to a legal duty. There is no general duty of that kind at common law."*

68. The Supreme Court also disapproved the formulation of the test at [58] and [59] of the **W** case (supra) on which Mr Bandegani relied, albeit the reasoning of the Divisional Court in that case adopted the right approach: see **A** (supra) at [74].

69. In **A** at [46], having analysed the decision of the Court of Appeal in **R (Bayer plc) v NHS Darlington Clinical Commissioning Group** [2020] PTSR 1153 and having endorsed a passage from the judgement of Rose LJ at [214] **Bayer** the Lords Burnett and Sales went on to say this:

> *"In broad terms, there are three types of case where a policy may be found to be unlawful by reason of what it says or omits to say about the law when giving guidance for others: (i) where the policy includes a positive statement of law which is wrong and which will induce a person who follows the policy to breach their legal duty in some way (ie the type of case under consideration in Gillick); (ii) where the authority which promulgates the policy does so pursuant to a duty to provide accurate advice about the law but fails to do so, either because of a misstatement of law or because of an omission to explain the legal position; and (iii) where the authority, even though not under a duty to issue a policy, decides to promulgate one and in doing so purports in the policy to provide a full account of the legal position but fails to achieve that, either because of a specific misstatement of the law or because of an omission which has the effect that, read as a whole, the policy presents a misleading picture of the true legal position. In a case of the type described by Rose LJ, where a Secretary of State issues guidance to his or her own staff explaining the legal framework in which they perform their functions, the context is likely to be such as to bring it within category (iii). The audience for the policy would be expected to take direction about the performance of their functions on behalf of their department from the Secretary of State at the head of the department, rather than seeking independent advice of their own. So, read objectively, and depending on the content and form of the policy, it may more readily be interpreted as a comprehensive statement of the relevant legal position and its lawfulness will be assessed on that basis."*

70. Importantly, as I read this passage, the Supreme Court was not suggesting in this passage that each case should be examined with a view to deciding whether it falls into any of these categories and, if so, which. The categories are intended to be illustrations, to be found in the case law, of how positive statements or omissions, or a combination of the two, in policies or guidance may authorise, encourage or approve unlawful conduct on the part of those to whom they are directed.

71. It will readily be apparent that the analysis in the **SM**, **MM (Lebanon)** and **ST** cases is entirely consistent with the decisions of the Supreme Court in **A** and **BF (Eritrea)**. The

three are all cases in which the relevant rules and/or the guidance by the Defendant to decision-makers working in her department misstated the requirements of section 55 and/or required/encouraged them to act in a way which was contrary to those requirements. The rules and/or the guidance contradicted section 55. These cases are therefore capable of falling within categories (ii) and if not (iii) identified by Lords Sales and Burnett. But the important point is that the terms of the rules and/or the guidance were inconsistent with the section 55 duty and were liable to induce decisions by case workers which did not comply with that section. Framing the point in terms of *"the real question"* identified in **ST**, they were all cases in which the rules and/or guidance failed to comply with section 55 because they failed to ensure that decision-makers had regard, in the manner required, to the requisite matters when discharging the relevant functions.

Discussion of Ground 2

72. It seemed to me to be implicit in some of Mr Bandegani's arguments that he accepted that the Impugned Paragraph and, indeed, the Impugned Section were not applicable in the present case. His own case was that the Impugned Section was not applicable to decisions made outside the Rules. So I put to him that:

i) Even if the Impugned Section was applicable in principle, under Version 8 the first, and quite possibly only (see **IJ Kosovo**), decision which a caseworker would make in relation to an application for permission to work would be under the Immigration Rules, rather than outside the Rules.

ii) In the case of a decision under the Immigration Rules, if the application or submission has not been outstanding for more than a year there is no discretion and, if permission is granted, Rules 360A and 360D require that the SOL condition be applied, rather than this being a matter of discretion.

iii) It is apparent from these aspects of its context, and the text of the Impugned Paragraph itself, that this paragraph is addressing the position of children in cases where the application or submission has been outstanding for more than a year but there is an issue as to whether permission to work should be granted under the Rules. As noted above, this will almost invariably be where there is an issue as to whether the delay is attributable to the applicant and arguably the Impugned Paragraph, in general terms, suggests that it is very unlikely that the interests of the child will be a reason for granting permission in such a case.

iv) What follows from this is that the Impugned Paragraph was not applicable in the Claimant's case, which involved a decision outside the Rules in a case in which the application for asylum had been outstanding for more than a year and there was no suggestion that the delay was attributable to him. Nor is there any real evidence that the Impugned Paragraph was applied in the present case.

73. After some hesitation Mr Bandegani agreed. I pointed out that this rendered his arguments about the Work Policy somewhat academic in the present case. Moreover, permission to argue that the Policy was unlawful because it did not refer to the residual discretion had been refused by Henshaw J, effectively because, again, the issue was academic on the facts of the present case. Furthermore, the point had been accepted in **IJ (Kosovo)** and the Work Policy had since been amended.

74. Mr Bandegani nevertheless invited me to rule on his arguments about the Impugned Section of the Work Policy and Mr Malik supported him in this. Since the points had been fully argued, and since some of the issues in relation to this part of the guidance to caseworkers continue to have wider implications, I was willing to do so: see **R (L, M and P) v Devon County Council** [2021] EWCA Civ 358 [48]-[53], and I did so in my draft judgment. In short, I agreed with Mr Bandegani that insofar as the *"Application in respect of children"* section of Version 8 of the Work Policy was intended to be the section of the Policy which discharged the Defendant's obligations under section 55 of the 2009 Act, i.e. to constitute the arrangements which ensured that regard was had to the requisite matters when decisions as to permission to work were made, it failed to achieve this for various reasons. Having considered the decisions of the Supreme Court in **A** and **BF (Eritrea)** and the parties' written submissions on them, that remains my view.

75. As noted above, one of the alternatives advocated in writing by Mr Malik after I had circulated my draft judgment was that if I was not willing to reverse my decision on Ground 2, I should decline to decide the point on the grounds that it is academic, had not been argued in the light of the rulings in **A** and **BF (Eritrea)** and therefore had not been "fully argued". I was not attracted by the suggestion that I should find in the Defendant's favour or not at all despite the fact that I had originally been pressed by both parties to decide it. More importantly, I did not consider that any unfairness would result from acting on Mr Malik's original invitation to decide the point, given that the arguments at the hearing involved a comparison of the Defendant's obligations under section 55, which were not in dispute, with the meaning and effect of the Impugned Paragraph as a matter of construction. Mr Malik's (correct) analysis of **SM**, **MM (Lebanon)** and **ST** was that they were all cases in which the rules and/or the guidance in issue were inconsistent with, or contradicted, what was required by section 55. He made his submissions as to the construction of the relevant passages from the Work Policy and he argued that, on his construction, they were consistent with section 55. He also made submissions in writing as to the effect of the decisions of the Supreme Court in **A** and **BF (Eritrea)** which I have taken into account, and I have not disagreed with his analysis of these decisions.

76. What I disagree with is Mr Malik's proposed application of the correct principles to the Work Policy in the present case. The starting point is that the relevant Immigration Rules make no reference to section 55 of the 2009 Act. On the contrary, the rules that there may only be permission to work after an asylum application or submission has been outstanding for a year, and that the SOL condition will be applied without exception, are inconsistent with the requirement, implied by section 55 and referred to in **SM**, to take into account the welfare of the particular child as a primary consideration in every case where they are relevant. Although Dr Elimelech made the broad assertion, in her witness statement, that in formulating immigration policy the government gives due regard to section 55, this was at a very high level of generality and she did not give any evidence that section 55 was considered in framing Rules 360A and 360D. Still less did she give evidence as to what the thinking was in relation to the issue when the Rules were framed. Even if she had given detailed and authoritative evidence on the point, specifically in relation to the areas where there is no discretion under the Rules, in the light of **MM (Lebanon)** it is highly debatable as to whether this would have been admissible or sufficient.

77. Secondly, one therefore has to look elsewhere for evidence of arrangements to ensure that, in deciding whether to grant permission to work and, if so, whether to apply the SOL condition, the requisite matters are taken into account in accordance with section 55. The only evidence of arrangements which relate specifically to these decisions in the present case is the terms of the Work Policy. However, as a matter of construction the Impugned Section of the Policy draws attention to the need to take into account the interests of children only in the context of deciding whether to grant permission to work, and only in relation to decisions made in accordance with the Rules. Indeed, Mr Malik accepted this and said that it was *"unsurprising"*.

78. This feature of Version 8 of the Work Policy is part and parcel of the point that, as Bourne J held in **IJ (Kosovo)**, as a matter of construction Version 8 created the misleading impression that there is no residual discretion to depart from the Rules in this context. Consistently with this point, the only area of judgment for the caseworker under the Rules is whether to grant or refuse permission to work and there is therefore no reference in Version 8 to a discretion to disapply the SOL condition or any other requirement of the Rules, still less any statement that section 55 would apply to the exercise of such a decision. Putting the point in the terms of the approach of the Divisional Court in **ST**, Version 8 of the Work Policy, including the Impugned Section, therefore does not constitute evidence of arrangements which comply with section 55 in relation to decisions to disapply the one year rule or about the application of the SOL condition. On the contrary, it does nothing to counteract the requirement, under the Immigration Rules, that these rules will always be applied regardless of any interests to which section 55 applies.

79. Mr Malik argued that as a matter of general public law it is permissible not to make statements of policy as to how a discretion will be exercised, and he relied on **R (Gurung) v Secretary of State for the Home Department** [2013] 1 WLR 2546 [21] for the proposition that it is permissible to provide that a discretion will be exercised in exceptional circumstances but to leave open what may amount to exceptional circumstances. I accept these propositions, and they are in effect confirmed by **A** and **BF (Eritrea)** at least where there is no duty to give guidance on an issue. But, in my view, they do not provide an answer in the present case.

    i) In contrast to **Gurung**, the present case is not one in which the existence of the discretion was identified by Version 8 of the Policy; on the contrary, the erroneous impression given is that there is no such discretion.

    ii) As to the argument that it is permissible to say nothing, section 55 of the 2009 Act enacts a positive duty to make *"arrangements for ensuring that"* (emphasis added) the relevant functions are discharged having regard to the specified matters. To the extent that the Work Policy fails to make the point that all decisions in relation to permission to work (not just those which are made in accordance with the Rules) are subject to section 55 where the interests of a child are "in play", then, it does not, in itself, make such arrangements. Moreover, this is not a case in which nothing was said on the subject of section 55 and decision-making in relation to permission to work; it is a case in which what was said in the Policy created the misleading impression that there is no room for section 55 other than in the context of decisions which were in accordance with the Rules because there is no discretion to depart from them: see **IJ (Kosovo)**.

80. For these reasons, then, Version 8 of the Work Policy did not make the arrangements required by section 55 of the 2009 Act as far as decisions outside the Rules are concerned. As noted above, Version 10 now refers to the residual discretion but the Impugned Paragraph is in the same terms and, as will be seen below, the passage which now deals with the residual discretion is stated in general terms rather than referring specifically to the position of children or section 55. I comment further on the new passage below, in the final section of this judgment.

81. Thirdly, as far as decisions under the Rules are concerned, even in the context of the limited role of the Impugned Paragraph, what is said is materially flawed, inaccurate and misleading. Having drawn attention to the need to apply section 55 it was, in my view, permissible for the guidance to address the question how to deal with a case where the delay in processing an application or submission is wholly or partly attributable to the applicant but the interests of children are involved. This seems to me to be a question on which caseworkers would potentially welcome guidance and, in any event, such guidance would be desirable so as to encourage consistency of decision-making. However, what is said in the last sentence of the Impugned Paragraph is problematic, not least because it does not make sense. For ease of reference, the sentence says:

> *"It is therefore very unlikely that a decision to refuse permission to work for an adult would adversely impact on a child **or** override the public interest in refusing permission to those who do not comply with the process in accordance with the Immigration Rules."* (emphasis added)

82. Mr Malik argued, at paragraph 45 of his skeleton argument, that this sentence does not create a test of exceptionality and nor was it based on a logical fallacy:

> *"The passage must…be read as a whole. Read as a complete sentence, it is simply saying that (a) there may be cases where refusing permission to work would not adversely impact on a child's needs (e.g., a case where, although not typical, the family is well-off and not receiving benefits); and (b) there may be other cases where refusing permission to work would have an adverse impact on the child's needs (in the sense that any income from employment could be spent on the child) but that this consideration would not override the public interest, especially given that an adequate baseline of benefits and support are provided to the child by the state."*

83. No doubt this is closer to what the passage ought to say, but I find it very difficult indeed to spell it out from the last sentence of the Impugned Paragraph, whether read in the context of the paragraph as a whole or otherwise. My own suggestion to Mr Malik in the course of the hearing was that, where the drafter had used the word, *"or"* they may have actually meant *"sufficiently adversely to"* or *"so as to"*. It may be that the sentence ought to have read:

> *"It is therefore very unlikely that a decision to refuse permission to work for an adult would adversely impact on a child **sufficiently adversely to/so as to** override the public interest in refusing permission to those who do not comply with the process in accordance with the Immigration Rules."*

84. But, as I also put to Mr Malik, a policy which gives rise to differing interpretations as between Leading Counsel and the court, or does not make sense, is unlikely to *"ensure"*

that the requisite matters are taken into account in the manner required, or otherwise to achieve the aims of that policy. Here the passage is proffered as the *"arrangements"* discharging the Defendant's positive duty under section 55 of the 2009 Act. The test is as to how the passage would be read by a reasonable caseworker and I do not accept that the sentence would be read by such a person in either of the ways discussed above. Still less does the wording *"ensure"* that the approach would be understood in either of these ways.

85. The position is worse than that, however because, fourthly, the Impugned Paragraph does contain a fallacy. It says that because support is available under section 95 of the 1999 Act: "*It is therefore very unlikely that a decision to refuse permission to work for an adult would adversely impact on a child"*. The conclusion does not follow from the premise and will, in any event, be false in a number of cases. In cases where an applicant is able to secure employment in an occupation on the SOL, if permission to work is granted they have the opportunity to earn substantially more than they would receive under section 95 of the 1999 Act and this, in turn, is likely to benefit any children in their care. It was common ground that, in other cases, even a low paid worker is likely to be able to earn more than they would be paid pursuant to section 95. If the Impugned Paragraph applied to decisions whether to apply the SOL condition, then, it would be fallacious for essentially the same reasons.

86. I note that if the last sentence of the Impugned Paragraph was intended to be worded in the way which I have suggested at paragraph 83, above, there would be no fallacy. Then, arguably the Paragraph would merely predict that, given the support which is provided to asylum seekers, the levels of which comply with the law and are considered appropriate as a matter of policy, and given the importance of the policy objective of encouraging compliance with the immigration process, it is very unlikely that the adverse impact of refusal on the interests of the child in a given case will have sufficient weight to lead to the grant of permission to work in a case where the delay is attributable to the applicant. In the light of my analysis of **MM (Lebanon)** at paragraph 56 above, a statement to this effect would be likely to be permissible.

87. However, that is not what the Impugned Passage says. Given that caseworkers are mandated to apply the guidance (see paragraph 34, above), a reasonable case worker would, in my view, read it as directing them to approach the matter on the basis that it is very unlikely that refusal of permission to work would impact adversely on a child of the applicant given the provision of support to asylum seekers, rather than to weigh the actual adverse impact of a refusal of permission to work in the particular case with the policy objective of encouraging compliance with the immigration process. Rather than being directed that they should consider the question of adverse impact on the child on its merits, the caseworker is misled into approaching the question on the basis of a general proposition as to the likelihood of an adverse impact on the child which will be false in a number of cases. The fallacy pointed to by Mr Bandegani therefore means that the Impugned Section does not ensure that the interests of the child are taken into account in the requisite manner when considering the question of delay, on the contrary it is misleading as to the correct approach and encourages decision making which is not in accordance with section 55.

88. That seems to me to be sufficient for the Impugned Section to fail the test under section 55 and/or in **A**. But I would add, fifthly, that the first sentence of the Impugned Paragraph, when read with the last sentence, is liable to compound the problem. As

noted above, the first sentence states that "*Those who do not cooperate with the asylum process and are responsible for the delay in considering their claim should not be granted permission to work"*. On one reading this is a restatement of a rule, which gives paramount or decisive importance to immigration policy in every case, rather than a statement of principle which may be departed from in exceptional cases. On this reading, the balance of the paragraph then addresses a potential argument that this stance may not be in the best interests of a child of an applicant and purports to justify the position under the Rules by reference to a false point about it being very unlikely that there will be any adverse impact on children rather than pointing out that the interests of the child may outweigh the fact that the delay is attributable to their carer. Although the opening and final paragraphs of the Impugned Section provide a basis for suggesting that this is not the right reading – the references to section 55 and the *"Children's Duty Guidance"* must mean that the interests of the child are to be taken into account and, logically, this must mean that they may outweigh the carer's delay in a given case – bearing in mind that this is a case in which there is a positive duty to make arrangements/give guidance, the Section as a whole fails to ensure that a reasonable caseworker will carry out the requisite balancing exercise correctly albeit on the basis that the child's interests will have to be particularly compelling to outweigh the public policy considerations which underpin the requirement to comply with the immigration process.

89. Sixthly, however, I do not accept Mr Bandgani's argument that the Impugned Section itself had to spell out how section 55 is to be applied. In my view, subject to addressing the criticisms made above, in principle it would be open to the Defendant to emphasise that the function of decision-making in relation to applications for permission to work, whether under or out with the Rules, is subject to section 55 and to refer the decision-maker to the guidance in *Every Child Matters*.

Conclusion

90. I therefore uphold Ground 2.

Ground 3

91. As noted above, this Ground alleges that the Decision was insufficiently reasoned and does not disclose that relevant considerations were taken into account and/or demonstrate that irrelevant considerations were left out of account. The argument was not developed in any detail by Mr Bandegani in his skeleton argument but he said that it was no answer to the Claimant's complaint under this head that section 55 was referred to by the decision-maker, nor that he claimed to have taken into account the relevant materials *"because no reasoning of any kind is provided explaining to the Claimant why his particular application failed"*. Mr Bandegani went on to dismiss the following passage from paragraph 10 of Dr Elimelech's witness statement as an ex post facto rationalisation of the Decision rather than a true account of what the decision maker actually did:

> *"In the present case, in considering whether to exercise discretion in the claimant's favour, due consideration was given to all the relevant factors in the case including the best interests of the child. However, despite treating the best interests of the child as a primary consideration, in all the circumstances, it was decided to refuse the Claimant's request to take up employment outside the SOL."*

92. The relevant principles are very familiar. In **South Bucks District Council v Porter (No 2)** [2004] 1 WLR 1953 Lord Brown said this, albeit in the planning context:

> *"36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration…. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."*

93. I agree with Mr Bandegani that the evidence of Dr Elimelech referred to above is of no assistance. She does not identify the source of her information or suggest that that she had looked at the Claimant's file or spoken to the decision-maker. Paragraph 10 of her witness statement appears to be no more than a submission based on the text of the Decision letter and Mr Malik did not dispute this characterisation when I put it to him in argument.

94. The Decision purported to be responding to an application in a letter from the Claimant's solicitors dated 9 April 2020. The Decision letter also stated that the information in his application for permission to work and his judicial review bundle dated 30 April 2020 had been considered, but these did not appear to have been included in the Bundle. In the light of the Claimant's arguments it seemed to me to be obviously relevant to consider the application which he made which led to the Decision. Since it was being said that the Decision failed to address relevant matters, it would be instructive to see what those matters were: what information and arguments were put forward and, particularly in relation to the arguments in relation to section 55, what was said about the circumstances of his daughter.

95. Mr Bandegani did then arrange for the letter of 9 April 2020 to be put before the Court and this showed that the case which was put to the Defendant for determination did not go materially beyond what I have summarised above at paragraphs 1-3 and 32. Essentially the same arguments were put forward by reference to the Claimant and his family. The general case as to why the SOL condition is undesirable, both in principle and in the case of the Claimant and his family, was made. But nothing was said about their case which differentiated it from the typical experience of asylum seekers in this country which results from the delays in processing applications for asylum and the application of government policy as to the desirability of the SOL condition and as to the appropriate level of support to be provided to asylum seekers. Crucially, this was also true of what was said about the Claimant's daughter. She and her age were mentioned but other than this, and a general assertion that the Defendant's treatment of the Claimant's application for permission to work fell foul of the United Nations

Convention on the Rights of the Child, there was no specific information about her, still less information which differentiated her or the Claimant's family from the families of other asylum seekers who are in the United Kingdom awaiting determinations of their applications for asylum.

96. On a fair reading, the Decision letter therefore reflects the application which was made. It shows that the reason why the Claimant's application failed was that he had not put forward any information or evidence related to himself or his daughter which, when taken into account as required by section 55 of the 2009 Act or otherwise, suggested that an exception to the Rules should be made in his case. The view of the decision-maker was that the Claimant's circumstances and those of his daughter, as described, were typical of asylum seekers in this country. The concerns which he raised had, in effect, already been taken into account by policy-makers, alongside the aims which underpin the Immigration Rules and the levels of support provided under the 1999 Act, in coming to a view as to the approach which should be adopted in the typical case. There was nothing put forward by the Claimant in relation to his situation or that of his daughter which outweighed those policy aims. Consideration of the information and evidence which was put before the decision-maker shows that this assessment was at the very least open to him and that he committed no error of law and did not leave out of consideration any relevant factor in making it.

97. I therefore reject Ground 3.

Version 10 of the Work Policy

98. As I have noted, in the light of the decision in **IJ (Kosovo)** the Work Policy was amended. The Impugned Section remained as was, but the following passage now appears towards the end of Version 10, to deal with the issue of residual discretion:

> *"**Application of discretion***
>
> *Where the Immigration Rules are not met, it will be justifiable to refuse an application for permission to work unless there are exceptional circumstances raised by the claimant. If caseworkers consider that the circumstances of an application are exceptional, they should refer the matter to a technical specialist to review whether the matter should be considered on a discretionary basis (under our residual discretion flowing from Section 3 of the Immigration Act 1971). Such discretion would allow a grant of permission to work, notwithstanding the requirements of the Immigration Rules. What amounts to exceptional circumstances will depend upon the particular facts of each case. A grant of permission to work on a discretionary basis is expected to be rare and only in exceptional circumstances.*
>
> *In cases involving victims and potential victims of trafficking the primary objectives of the Council of Europe Convention on Action against Trafficking in Human Beings (ECAT) will be a relevant consideration, particularly with regards to their physical, psychological and social recovery. The caseworker should consider all the factual information and evidence submitted ensuring it is fully addressed particularly where a decision has been taken to consider the application on a discretionary basis."*

99. In the course of his submissions I raised with Mr Bandegani the points that his pleaded case, from Claim Form to skeleton argument dated 15 July 2021, challenged Version 8, that the Decision was not in fact taken pursuant to the Work Policy and that the passage from Version 10 set out above had not been introduced until after the Decision in any event. When I said that therefore the issue as to the lawfulness of Version 10 did not appear to arise, and it was not clear to me that I should adjudicate it or the question whether the addition of this passage meant that the Work Policy is now compliant with section 55, he agreed. He said that his case was based on Version 8 and he invited me to decide the case on the basis of this Version. Later in his submissions, however, he had a change of heart and urged me to adjudicate the lawfulness of Version 10.

100. Mr Malik's skeleton argument referred to Version 10. In the course of the hearing he said that whilst he agreed that the issue did not strictly arise, he also invited me to adjudicate the compliance or otherwise with section 55 of Version 10. However, essentially this was on the basis that it would be helpful for me to express a view.

101. I do not think that it would be appropriate for me to decide the lawfulness of Version 10.

i) It is well established that the courts do not give advisory opinions. Here, as I have pointed out, the decision was not made pursuant to Version 10. Nor does the Claimant's pleaded case challenge Version 10 and nor could it, for a number of reasons which I have pointed out. The issue does not arise.

ii) I appreciate that it might be argued that there are public interest reasons why I should nevertheless address Version 10 but, with respect to Counsel, unlike the points which I have decided in relation to Version 8 the issues in relation to Version 10 were not fully argued. With respect to him, not only had Mr Bandegani not developed arguments about Version 10 in writing; his preparation for the hearing was evidently very much directed at Version 8 and he appeared to be caught off balance by my pointing out that even this issue did not arise in the present case.

iii) As I have also noted, no challenge to the Immigration Rules was made by the Claimant whereas it may be that the question whether Version 10 constitutes sufficient *"arrangements"* for the purposes of section 55 of the 2009 Act requires more detailed consideration of the extent to which this section was taken into account in framing the Rules. Dr Elimelech touched on policy-making but her evidence was at a very high level of generality and she did not give any evidence that section 55 was considered in framing Rules 360A and 360D or as to what the thinking was in relation to this issue when the Rules were framed.

iv) In addition to this, no doubt because of the way in which the Second Claim was pleaded, no evidence was provided by either side specifically about how Version 10 operates in practice, nor of a case in which it has been applied. By way of example, there was no evidence about who the *"technical specialists"* referred to in the new section are, what training and experience they have and how they go about their task when a case is referred to them. The passage which states "*If caseworkers consider that the circumstances of an application are exceptional, they should refer the matter to a technical specialist to review whether the matter should be considered on a discretionary basis…"* is ambiguous as to who

makes the decision. On one reading the caseworker applies an exceptional circumstances test and makes a decision, and this is then reviewed by the technical specialist, but it may be that what happens is that the caseworker refers the case if there is the possibility of a decision outside the Immigration Rules. It may be that neither of these approaches applies.

v) Although an implication of Mr Malik and Dr Elimelech's arguments was that I could take it that caseworkers and technical specialists are well familiar with *Every Child Matters* and could be depended on to apply this guidance when making decisions under the residual discretion, there was no evidence about this. The implication of the drafting into the Work Policy of a section which specifically deals with the position of children and reminds case workers that section 55 applies, and of the existence of the guidance in *Every Child Matters*, tends to support the view that it is necessary for the Policy to say something on this subject rather than proceed on the basis that it is a given that they will refer to the relevant general guidance and/or adopt the correct approach.

vi) The hypothetical nature of the exercise proposed by Counsel is accentuated by the fact that, if my findings on the Impugned Section are accepted, amendments to the Work Policy will presumably be made. The question of whether the resulting Version 11 is compliant with section 55 overall may well depend on what these amendments are.

102. For all of these reasons, then, I think it would be ill-advised for me to give a firm ruling on whether Version 10 now complies with section 55. The issue is obviously an important one and I do not consider that it would be in the public interest for me to decide it effectively *"on the hoof"*. This was my view when I circulated my draft judgment and it is reinforced by the fact that no arguments have been put to me about the effect, if any, of **A** and **BF (Eritrea)** on the lawfulness of Version 10.

Relief

103. I will invite the parties to agree an order or, if they cannot agree, to make submissions on the question of relief in the light of this judgment.