Neutral Citation Number: [2023] EWHC 196 (KB)

Case No: QA-2022-BRS-000001

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ON APPEAL FROM BRISTOL COUNTY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30th January 2023

Before :

MRS JUSTICE MAY DBE

- -

Between :

THE HOME OFFICE

Appellants

- and -

ASY & Ors

Respondents

- -
- -

Colin Thomann & Tom Tabori (instructed by Government Legal Service) for the Appellants
Alex Goodman & Ben Amunwa (instructed by Deighton Pierce Glynn) for the Respondents

Hearing dates: 17th & 19th October 2022

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MRS JUSTICE MAY

Mrs Justice May DBE:

Introduction

1. This is an appeal against an order of His Honour Judge Ralton sitting in Bristol County Court dated 28 January 2022. By particulars of claim issued on 17 December 2020, the respondents to this appeal (the Claimants") sought damages under section 8 of the Human Rights Act 1998 ("the 1998 Act") for breach of their rights arising under Article 3 of the European Convention on Human Rights ("the Convention") consequent upon the operation by the Secretary for State for the Home Office ("SSHD") of certain provisions of the Immigration Rules (paragraph GEN.1.11A of Appendix FM) and guidance to caseworkers (entitled "Appendix FM 1.0 Family Life (as a Partner or Parent) and Private Life: 10-Year routes") (together "the old NRPF scheme").

2. The old NRPF scheme concerned the imposition and maintenance of a condition disentitling non-British citizens with limited leave to remain ("LLTR") from securing any assistance from public funds, for instance child support, Universal Credit and the like. The condition is known as "no recourse to public funds" ("NRPF"). In *R (W, a Child by his Litigation Friend J) v Secretary of State for the Home Department* [2020] [2020] 1 WLR 4420, the Divisional Court determined that the old NRPF scheme was unlawful. The Claimants relied on the decision in *W* as entitling them to damages for breach of their rights under Article 3 of the Convention. I shall consider *W* in more detail later in this judgment.

3. By directions dated 30 June 2021 His Honour Judge Cotter QC (as he then was) made an order for the trial of a preliminary issue in the following terms:

> "Whether or not the Claimants have a right to damages for breach of their procedural rights under Article 3 ECHR in light of the Defendant's imposition of NRPF conditions on them pursuant to the application to them of the NRPF scheme found by the Divisional Court in *W* to breach the procedural right under Article 3 of the ECHR"

4. By his judgment dated 28 October 2021 and order dated 28 January 2022 His Honour Judge Ralton sitting at Bristol County Court found in favour of the Claimants on the preliminary issue. Permission to appeal his order was refused by the judge but granted following consideration by Foxton J on 6 April 2022. In the meantime, Judge Ralton had proceeded to consider and award substantial amounts in compensation to each of the Claimants. The payment of those awards of damages has been stayed by Foxton J pending the outcome of this appeal.

5. I am grateful to all counsel for their interesting and comprehensive written and oral submissions, which have assisted me greatly.

The Claimants

(1) Anonymity

6. The Claimants are non-British single mothers and their British children. An application was made for anonymisation of all the Claimants on the basis that the children could be identified if their mothers were to be named. There have been no objections to such an

order. Applying CPR rule 39.2(4) I am satisfied that anonymity is necessary to secure the proper administration of justice and to protect the interests of the minor claimants.

(2) Personal circumstances

7. Whist emphasising that he was making no factual findings as such, the judge gave the following summary of the Claimants and their circumstances, which I gratefully adopt:

> "27. All the Claimants were very low earning single parents with minor dependent children. In each case they were granted LLTR with a NRPF condition.
>
> 28. The Claimants' financial circumstances deteriorated; they were unable to meet their basic costs of living and fell into arrears of rent/utility bills and suchlike. They all sought assistance from The Unity Project which is a charity that exists to assist migrants with LLTR in the UK to make CoC applications on the ground that they face destitution without having recourse to public funds.
>
> 29. In the case of [ASY] she was dissuaded from making a CoC application because of the [old NRPF scheme] in late 2018. She made a CoC application in June 2019 which was unsuccessful. On 11th September 2019, with childbirth imminent, she made a fresh application which was granted on the actual destitution ground…It seems that the decision was made on 1st October 2019 but not implemented until 21st October 2019.
>
> 30. In the case of [BTB], she made a CoC application in July 2019 when she was facing imminent eviction; it was granted on the child welfare ground and not the actual destitution ground…However, the factual basis accepted by the Defendant was inadequate accommodation and inability to meet essential living needs from actual earnings so the facts accepted by the Defendant would also support actual destitution.
>
> 31. In the case of [CVD], she made a CoC application in July 2019 when she was in substantial arrears of rent and utility bills; it was granted on 25th September 2019…the available paperwork and the decision letter suggests that the NRPF condition was lifted on the actual destitution ground.
>
> 32. In the case of [DWB] she challenged the NRPF condition but was unsuccessful in 2018. [DWB] made a fresh application in August 2019 which was successful on 25th September 2019 and was implemented on 1st October 2019. There is no witness statement from [DWB] and the Defendant's case record seems to suggest that the condition was lifted on the actual destitution ground but it is not clear.
>
> 33. Therefore, so far as each of the Claimants are concerned save, perhaps for [BTB], it seems that the Defendant accepted when the CoC application was made that they were actually destitute. The circumstances of the individual Claimants show that they and the dependents for whom they cared were at real risk of losing the rooves (sic) over their heads and being

> homeless. There was no evidence of financial support being available from any of the fathers of the children. Mr Tabori tells me that some local authority funded financial assistance may have been available under section 17 Children Act 1989 but I am left with the clear impression (as was the Defendant) that without access to public funds the Claimants were at risk of being left so destitute that their Article 3 rights could have been breached. To adopt the words of Baroness Hale, the Claimants…and their children were at sufficient risk of 'rooflessness' and 'cashlessness' by being deprived of state benefits until the state deemed them to be actually destitute (as opposed to imminently destitute which is the new test after W).
>
> 34. The witness statements of the Claimants all speak of their states of anguish, worry and desperation which would be consistent with the financial straits the Claimants were in."

The old NRPF scheme and the decision in W

8. The development of the legal and policy framework applicable to the old NRPF scheme is set out and discussed at length by the Divisional Court (Bean LJ and Chamberlain J) in *W*, at [10]-[27]. The key policy provisions and guidance bearing upon the Claimants in this case are the same as those which applied to the claimant in *W*. Accordingly I shall not seek to repeat here the detailed analysis undertaken by the Divisional Court, instead providing a brief summary of the main elements.

9. By section 3(1)(b) and (c) of the Immigration Act 1971 ("IA 1971") the SSHD has the power to grant non-British citizens limited leave to remain in the UK ("LLTR"). Such persons are entitled to live and work as ordinary citizens. However section 3(1)(c)(ii) IA 1971 entitles the SSHD to impose a condition of NRPF, further to a policy intention that non-British citizens seeking to come and live in the UK should not be a charge on public funds.

10. The SSHD's policy and practice relating to the imposition, and lifting, of the NRPF condition is to be found in two places. The first is at Paragraph GEN 1.11A of Appendix FM to the Immigration Rules ("the Rules") which at the material time provided as follows:

> "Where entry clearance or leave to remain as a partner, child or parent is granted…it will normally be granted subject to a condition of no recourse to public funds, unless the applicant has provided the decision-maker with: (a) satisfactory evidence that the applicant is destitute as defined in section 95 of the Immigration and Asylum Act 1999; or (b) satisfactory evidence that there are particularly compelling reasons relation to the welfare of a child of a parent in receipt of a very low income."

The second source is contained in guidance in the form of instructions provided by the SSHD pursuant to paragraph 1(3) of schedule 2 to the 1971 Act. The version applicable to these Claimants at the material time is entitled *"Family Migration: Appendix FM Section 1.0b Family Life (as a Partner or Parent) and Private Life: 10-year routes Version 3.0"*, published on 23 January 2019 ("the Guidance"). Under the heading

"Criteria for the non-imposition or lifting of the no recourse to public funds condition code" appeared the following instructions:

> "In all cases where
> - limited leave is granted as a partner or parent under Appendix FM
> …
>
> leave to remain will be granted subject to a condition of no recourse to public funds, unless the applicant provides evidence with their application to show that they meet the terms of this policy.
>
> The decision-maker can exercise discretion not to impose, or to lift, the no recourse to public funds condition code only where the applicant meets the requirements of paragraph GEN 1.11A of Appendix FM or paragraph 276A02 of the Immigration Rules because:
> - The applicant has provided satisfactory evidence that they are destitute or there is satisfactory evidence that they would be rendered destitute without recourse to public funds
> - The applicant has provided satisfactory evidence that there are particularly compelling reasons relating to the welfare of a child on account of the child's parent's very low income
> - The applicant has established exceptional circumstances in their case relating to their financial circumstances which, in the view of the decision maker, require the no recourse to public funds condition code not to be imposed or to be lifted.
>
> The decision maker must consider all relevant personal and financial circumstances raised by the applicant, and any evidence of these which they have provided.
>
> Whether to grant leave subject to a condition of no recourse to public funds, or whether to lift that condition where it has been imposed, is a decision for the Home Office decision maker to make on the basis of this guidance."

11. Persons granted LLTR subject to a NRPF condition may make a Change of Conditions application ("a CoC application") seeking to have the NRPF condition lifted. Such applications are considered by reference to the Rules and Guidance, which were at the material time in the terms set out above. The wording was changed following the decision in *W*, hence the reference in this judgment to the "*old* NRPF scheme".

12. "Destitution" was and is defined in the Guidance by reference to section 95 of the Immigration and Asylum Act 1999 ("IA 1999") which provides that a person is destitute where they do not have adequate accommodation or any means of obtaining it (regardless of whether their essential living needs are met), *or* if they have adequate accommodation or the means of obtaining it but cannot meet their essential living needs.

The Divisional Court decision in W

13. In *W* the child claimant, acting by his mother and litigation friend, J, brought a judicial review challenge to the SSHD's decision in his mother's case to impose a NRPF

condition upon her LLTR. There were several grounds of challenge originally advanced but in the event (the case was listed during the pandemic) the single ground considered and determined by the Divisional Court was that the old NRPF scheme being operated in accordance with the above Rules and Guidance was contrary to section 6 of the 1998 Act because it failed to ensure that imposing an NRPF condition would not result in inhuman or degrading treatment ("IDT") contrary to Article 3 of the Convention. The Divisional Court held that the old NRPF scheme was unlawful because it gave rise to a real risk of unlawful decision-making in a significant number of cases, in particular because the Guidance failed to make clear to caseworkers that the SSHD was under a duty to act prospectively to avoid an imminent breach of a person's Article 3 rights by lifting or not imposing a NRPF condition in cases where the person was not yet destitute but would imminently suffer inhuman or degrading treatment without recourse to public funds.

14. In the course of its judgment, at [38] to [42] the court considered the Supreme Court's decision in *Limbuela* [2006] 1 AC 396. Referring to observations of Lord Hope at [62] of his judgment in that case the Divisional Court in *W* noted as follows, at [42]:

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

15. The Divisional Court's discussion of the issues starts at [52], in the course of which, at [58] it observed that;

> "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."

Having reviewed the relevant principles, the court set itself the following questions, at [59]:

> "(a) Does the regime, read as a whole, give rise to a real risk of unlawful outcomes in a "significant" or "more than minimal number" of cases?
>
> (b) if so, can that risk be remedied by amendments to the Instruction alone?

16. At [60]-[61] of its decision the court dealt with the legal obligations on the SSHD:

> "60 The analysis begins with three propositions of law, which, as we understand it, are not in dispute in these proceedings:
>
> > (a) There are some cases in which the Secretary of State is not only entitled, but legally obliged, not to impose a condition of NRPF or to lift such a condition.

> (b) These include cases where the applicant is suffering inhuman and degrading treatment by reason of lack of resources.
>
> (c) They also include cases where the applicant is not yet suffering, but will imminently suffer, such ill-treatment without recourse to public funds.
>
> 61 All these propositions flow from the Secretary of State's concession…that, in the light of the analysis in *Limbuela*…, paragraph GEN 1.11A would be unlawful if it required applicants to become destitute before they could apply for the NRPF condition not to be imposed, or to be lifted. Although the Secretary of State's concession was made on the basis of the reasoning in *Limbuela*, which was itself based on the obligations imposed by Article 3 of the Convention, in our judgment, the propositions set out at para 60 above would also follow at common law even in the absence of Article 3…In the absence of [clear words] we would hold that section 3(1)(c)(ii) of the 1971 Act does not authorise the imposition or maintenance of a condition of NRPF where the applicant is suffering inhuman and degrading treatment by reason of lack of resources or will imminently suffer such treatment without recourse to public funds."

17. After considering the wording of the Rules and the Guidance the court concluded, at [73] that;

> "The NRPF regime, comprising paragraph GEN 1.11A and the Instruction read together do not adequately recognise, reflect or give effect to Secretary of State's obligation not to impose, or to lift, the condition of NRPF in cases where the applicant is not yet, but will imminently suffer inhuman and degrading treatment without recourse to public funds. In its current form the NRPF regime is apt to mislead caseworkers in this critical respect and gives rise to a real risk of unlawful decisions in a significant number of cases."

18. In accordance with its finding the court made a declaration that, read together, the Rules and Guidance, were;

> "unlawful in that, and to the extent that, they do not adequately reflect or give effect to the defendant's obligation under Article 3 ECHR and s.6 of the Human Rights Act 1998 and at common law not to impose, or to lift, the condition of no recourse to public funds in cases where the applicant is not yet destitute but will imminently suffer inhuman or degrading treatment without recourse to public funds"

19. The SSHD agreed to pay £3000 to *W* with no admission of liability, a settlement that was required to be, and was, approved by the Divisional Court (W being a minor). Accordingly the judgment in *W* did not deal with the issue of whether the unlawfulness which the court had identified gave rise to a civil claim under section 8 of the 1998 Act.

20. The decision in *W* has subsequently been considered by the Supreme Court in *R (oao A) v Secretary of State for the Home Department* [2021] UKSC 37. The Supreme Court disapproved the particular test applied by the court in W, namely whether the rules and guidance gave rise to a real risk of unlawful decisions in a more than minimal number of cases, preferring instead the approach of the House of Lords in *Gillick v West Norfolk*

& Wisbech Area Health Authority [1986] AC 112 which asked whether the guidance in question sanctioned or encouraged unlawful behaviour. However on analysing the way in which the court in *W* had decided the case the justices concluded that the *Gillick* test of unlawfulness would have been satisfied, had the Divisional Court adopted that approach instead.

21. Following the judgment in *W* and pursuant to the court's order, but after the time material to this appeal, the Guidance to caseworkers was amended. It now provides that *"It is mandatory not to impose, or to lift if already imposed, the condition of no recourse to public funds if an applicant is destitute or at imminent risk of destitution without recourse to public funds."* (emphasis added)

Article 3 and remedies for breach

22. Article 3 of the European Convention on Human Rights ("the Convention") provides that "no one shall be subjected to inhuman or degrading treatment or punishment".

23. The court's power to grant remedies in respect of breaches of an individual's rights under the Convention is to be found at sections 6-8 of the HRA, the relevant parts of which provide as follows:

> ***6.-Acts of public authorities***
> *(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right*
> *(2) ….*
> ***7. Proceedings***
> *(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may –*
> *(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or*
> *(b) rely on the Convention right or rights concerned in any legal proceedings, but only if he is (or would be) a victim of the unlawful act.*
> *…*
> ***8.-Judicial remedies***
> *(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.*
> *(2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.*
> *(3) No award of damages is to be made unless, taking account of all the circumstances of the case, including-*
> *(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and*
> *(b) the consequences of any decision (of that or any other court) in respect of that act, the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.*
> *(4) In determining-*
> *(a) whether to award damages, or*
> *(b) the amount of an award,*

> *the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention.*
> *…*
> *(6) In this section-*
> *"court" includes a tribunal;*
> *"damages" means damages for an unlawful act of a public authority; and*
> *"unlawful" means unlawful under section 6(1)."*

24. As provided for under section 8(4)(b), a court asked to consider an award of damages is obliged to take into account principles applied by the European Court of Human Rights ("ECtHR") under Article 41 of the Convention, which states:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party"

25. A Practice Direction pertaining to the recovery of damages was issued by the President of the ECtHR on 28 March 2007. It provides that:

> "7. A clear causal link must be established between the damage claimed and the violation alleged. The Court will not be satisfied by a merely tenuous connection between the alleged violation and the damage, nor by mere speculation as to what might have been."

Rule 60(1) of the ECtHR Rules of Court emphasises the need to find a relevant violation:

> "1. An applicant who wishes to obtain an award of just satisfaction under Article 41 of the Convention <u>in the event of the Court finding a violation</u> of his or her Convention rights must make a specific claim…" (emphasis added)

The requirement for a causal link to be established has been applied to refuse damages in the Article 3 context in the case of *A v UK* (3455/05) (2009) 49 EHRR 29 at [249], and in the Article 8 context in *Jeunesse v Netherlands* (Application no 12738/10) at [131].

26. In *R (on the application of Greenfield) v Secretary of State for the Home Department* [2005] 1 WLR 673 Lord Bingham summarised the requirements for an award of damages under section 8 of the 1998 Act:

> "There are also preconditions to an award of damages by a domestic court under section 8: (1) that a finding of unlawfulness or prospective unlawfulness should be made based on breach or prospective breach by a public authority of a Convention right; (2) that the court should have power to award damages, or order the payment of compensation, in civil proceedings; (3) that the court should be satisfied, taking account of all the circumstances of the particular case, that an award of damages is necessary to afford just satisfaction to the person in whose favour it is made; and (4) that the court should consider an award of damages to be just and appropriate. It

> would seem to be clear that a domestic court may not award damages unless satisfied that it is necessary to do so, but if satisfied that it is necessary to do so it is hard to see how the court could consider it other than just and appropriate to do so."

The decision under appeal

27. There was some discussion before me about the terms of the preliminary issue and whether, as (on one reading) the wording appears to assume the existence of a procedural duty, the point about whether any such duty existed as regards these Claimants was one which it was open to the SSHD to take. However it was clear to me that the existence of any procedural/systems duty, and if so the scope of any duty, was live on the pleadings, moreover the issue is key to analysing the proper outcome on this appeal and plainly has potentially wide implications in other cases. In any event, whatever the precise wording of the preliminary issue as drafted, it is evident from the first paragraph of his judgment (and from elsewhere, see for instance paragraph 42), that the judge identified the existence and scope of any duty as fundamental to the resolution of the issues he had to decide:

> "1. The essential question in this case is whether the Home Office can be made liable in damages under section 8 of the Human Rights Act 1998 for applying an unlawful scheme to the Claimants which could have resulted in a breach of their Article 3 right not to be subjected to degrading or inhuman treatment in the form of extreme destitution."

28. Having set out the background, the judge proceeded to consider Article 3 and destitution, at paragraph 21 of his judgment. He noted, rightly, that destitution of itself would not necessarily amount to IDT, referring to relevant passages of the judgments of the European Court in *Pretty v UK* [2002] ECHR 427 at [52], noted in the Supreme Court's decision in *Limbuela* at [7], dealing with the level of severity required before treatment can be said to amount to IDT.

29. The judge went on to consider the particular circumstances of each of the Claimants, in passages which I have set out above, before addressing the decisions in *Limbuela* and *W*. In relation to the Divisional Court's decision in *W* the judge concluded, at paragraph 42 of his judgment:

> "There is nothing in [*W*] which I consider can be taken as authority for the propositions that:
> (a) There were relevant procedural rights;
> (b) Which had been breached;
> (c) Which gave the victims a right to damages.
>
> I do not consider that I can place any weight at all on the subsequent agreement reached on damages in that case which were made expressly with no admission of liability on the part of the [SSHD]"

30. The reasoning leading to the judge's conclusion is to be found at paragraphs 49 to 58 of his judgment in the section headed "Discussion". The judge cited first from the authorities of *Beganovic v Croatia* [2009] ECHR 992, *R(Gentle and Anor) v Prime*

Minister & Ors [2008] 2 WLR 879 (HL), observing of the decision in the latter case, at paragraph 52 of his judgment:

> "It is common ground between Mr Goodman and Mr Tabori that an investigative duty is parasitic on the duty to protect but it cannot be said that the investigative duty arose only once the substantive duty has been breached; there needed to be an arguable case that the substantive right arose on the facts of their cases. I do not take Gentle as authority for the proposition that a claim for breach of procedural rights cannot succeed absent a breach of the relevant substantive right."

(As I observe later in this judgment, the duty said to exist in the present case has never been put on the basis of a duty to investigate. To that extent *Beganovic* and *Gentle* are of little direct relevance, nevertheless I acknowledge and accept Mr Thomann's point that the final sentence of paragraph 52 appears to ignore the requirement for at least an arguable case of breach of the substantive right arising under Article 3 before an investigative duty can be said to arise.)

31. The judge went on to deal with the decision of Robin Knowles J in *R (DMA and others) v Secretary of State for the Home Department* [2021] 1 WLR 2374. The applicants in *DMA* were failed asylum-seekers who had applied to the Home Office to be housed on account of their living circumstances amounting to destitution. The SSHD had accepted that each was destitute, and that she was accordingly under a duty to provide them with accommodation, but there were then considerable delays in providing it, leading to a judicial review challenge by the claimants in that case of the SSHD's failure to provide them with accommodation. Importantly, as the judge observed, the claimants in *DMA* did not advance their claim on the basis that the delay had caused them to suffer IDT but rather that the SSHD had been under a duty to act to prevent destitution and that she had breached that duty. Knowles J found that the SSHD had breached her duty to provide accommodation within a reasonable time, also that she was in breach of a duty to monitor the provision of accommodation once she had accepted the obligation to provide it. He made declarations to that effect but also made modest awards to each of the *DMA* claimants in respect of non-pecuniary damage as just satisfaction under section 8 of the 1998 Act.

32. Mr Goodman relied heavily on Knowles J's decision before the judge below, as he did on this appeal, as authority for the proposition that damages under section 8 may be awarded for breach of an Article 3 "procedural" duty in circumstances where claimants were not required to show that they had suffered destitution amounting to IDT.

33. At para 57 of his judgment the judge referred to the post-*W* Divisional Court decision in *R(ST) v Secretary of State for the Home Department* [2021] EWHC 1085. *ST* involved a challenge to the revised NRPF regime following the changes to the Guidance referred to above. The judge noted that the court in *ST* dismissed a claim that the SSHD had an Article 3 investigatory duty in respect of the old NRPF scheme before observing:

> "However, I do not read the judgment [in ST] as any authority for the proposition that the Secretary of State cannot be liable for an unlawful regime which, on the evidence, could push a claimant into such destitution as to breach their Article 3 rights."

34. Having referred to the cases mentioned above, the judge proceeded to set out his conclusion in two sentences at paragraph 58 of his judgment:

> "I conclude from the authorities that the Claimants, on the evidence in their cases, have a right to claim damages for breach of their procedural rights under Article 3 ECHR in light of the Defendant's imposition of NRPF conditions on them pursuant to the application to them of the NRPF scheme found by the Divisional Court in *W* to breach the procedural right under Article 3 of the ECHR. In particular I reject the contention that the Claimants must prove actual breach of Article 3."

35. Moving to a consideration of possible remedy under section 8 of the 1998 Act the judge agreed with submissions made on behalf of the SSHD that there was no "strict liability" under section 8, noting at paragraph 61 of his judgment that "there must be a causal link between violation and damage which may be non-pecuniary such as for physical or mental suffering per rule 32 of the ECtHR's rules of court". At paragraph 63 the judge cited the passage from the judgment of Lord Bingham in *Greenfield* set out above before quoting at length from the judgment of Robin Knowles J at [65] in *DMA*, after which he concluded as follows, at paragraphs 66-68 of his judgment:

> "66. Insofar as the Claimants are concerned, the harm started from the date on which the NRPF condition would have been lifted had a lawful regime (ie the current regime) been applied to them. There then passed a period of time in which [ASY] was dissuaded from making a CoC application because she would not have got through the door of the Old Regime and for the Claimants a period of time when the CoC application was made unsuccessfully because the Old Regime was applied. There were further periods of time between the making of (successful) applications, making of decisions on the applications and implementing those decisions. This meant the periods of actual destitution commenced, at the very latest, when the (successful) CoC applications were made and ended on implementation of the decisions to lift the NRPF condition.
>
> 67. *W* was of no benefit to the Claimants; no decision was made for any of the Claimants on the ground of imminent destitution. No other redress has been provided to the Claimants. I have already addressed the effect of denying public funds upon the Claimants.
>
> 68. Accordingly I cannot see how, on the facts of this case, just satisfaction can be achieved without an award of damages."

At a further hearing on 19 January 2022 the judge refused permission to appeal his decision on the preliminary issue before going on to hear and determine quantum. He made pecuniary awards to each Claimant (mother and child) essentially calculated upon a backdating of benefits to the date on which each made their (successful) CoC application, as well as non-pecuniary awards for mental anxiety and distress.

Grounds of appeal

36. The SSHD advances four grounds of appeal:

(1) The judge failed to identify the nature and scope of the Article 3 violation justifying an award in damages;

(2) The judge misconstrued the decision in W;

(3) The judge misunderstood the conditions and scope of Article 3's procedural duty; and

(4) The judge erred in law in his analysis of causation.

The parties' arguments

37. Mr Thomann's grounds sought to challenge the judge's decision on a number of fronts but the first and most important point he made, permeating all those which came after, was that the judge had erred in law in concluding that there was a relevant breach of duty as applied to the situation of these Claimants. He emphasised that none of them could show that they had in fact experienced IDT, moreover when each had made an application for the NRPF condition to be lifted, it had been successful. Their claim was not that they had had their applications wrongly refused (as in W's case); in essence it was that they might have made an earlier CoC application, which might have been granted, had the regime not been unlawful in the way identified by the Divisional Court in *W*.

38. Mr Thomann submitted that the effect of the judge's decision was hugely to expand the just satisfaction route: if the judge was right then once an individual could point to policy guidance found to be unlawful then an action in damages would arise merely by reference to an argument that they might have had a better outcome, irrespective of whether or not they had actually experienced IDT.

39. When I invited him to identify when persons subject to a NRPF condition under the old NRPF scheme would have had a claim for breach Mr Thomann responded that at its highest no claim would result unless or until a claimant could establish that they had actually experienced IDT. His alternative, lower point as he termed it, was that there may be an entitlement to compensation once a person subject to a NRPF condition had brought the fact of their being at imminent risk of destitution to the SSHD's attention through a CoC application, where the SSHD thereafter refused or unreasonably delayed in lifting the NRPF condition. In any event, he argued, there could be no claim unless or until a potential claimant had notified the SSHD of their circumstances; the judge had erred by finding, in effect, that there was an Article 3 claim against the state even before a claimant had made a CoC application to have the NRPF condition lifted.

40. Mr Thomann submitted that there were three aspects of Article 3 which may be engaged in any given case, summarising them as (i) prohibition, (ii) procedural/investigative and (iii) protective. The judge had failed to analyse which of these aspects was engaged in the case before him. This was not a case under (i) since the Claimants did not contend that they had actually sustained IDT. The highest that the Claimants had put their case was that the imposition of an NRPF condition was "liable to" lead to IDT. Nor could this have been a case in which the second aspect was engaged, since the court in *ST* had ruled that an investigative duty was not triggered by operation of the old NRPF scheme. The judge's conclusion at paragraph 58 of his judgment that the mere imposition of the NRPF condition constituted a breach of the Claimants' Article 3 procedural rights was unexplained and was simply wrong, Mr Thomann submitted.

41. Mr Thomann suggested that the Claimants' submissions and the judge's observations appeared most nearly to concern the third aspect, namely a protective duty to ensure against potential breaches of Article 3. He emphasised that such a duty (of the type discussed in *Limbuela*) only arises upon a real and immediate risk to an individual of ill-treatment at the extreme level against which Article 3 is directed; moreover to recover damages a claimant must show a causal link between a violation and harm amounting to IDT, or at the very least imminent IDT. It is not enough, he argued, for a person to say that they had been placed at risk of an Article 3 breach. He submitted that to the extent that the decision in *DMA* found recovery of damages could be made merely where there was a risk of IDT then it was mistaken, adding that the point had not been made or argued before Knowles J. Mr Thomann suggested that *DMA* may better be seen as an instance where a modest award for non-pecuniary damages may be made where there has been a breach of a positive duty to accommodate individuals accepted by the SSHD to be facing imminent IDT.

42. Mr Thomann's next ground of appeal criticised the judge's treatment of the decision in *W*. He submitted that the judge's finding at paragraph 58 - that the Claimants had sustained a procedural breach "in light of" a finding of procedural breach in *W* - was a misreading of what the Divisional Court had said. There had been no finding of a "procedural" breach in W. The court in *W* had found the policy regime to be unlawful because it gave rise to a "real risk of unlawful decisions in a significant number of cases". That is not the same as a finding of procedural breach, as the judge himself had earlier recognised (at paragraph 42 of his judgment). The judge appeared wrongly to have reasoned from the risk of breach discussed by the court in *W* to a finding of actual breach.

43. The third ground of appeal as drafted appeared to me to proceed on an assumption that the "procedural" duty found by the judge to have been breached was an investigative duty; yet it was clear at least by the time of the hearing that the Claimants' case was not based upon breach of any duty to investigate of the kind which was the subject of the decisions in *Beganovic*, *Gentle* or *D v Commissioner of Police of the Metropolis* [2015] 1 WLR (dealing with claims arising from defects in the police investigation in the Worboys case), cited by the judge. This being so, Mr Thomann's submissions at the hearing rightly did not dwell on his third ground.

44. Mr Thomann's final ground of appeal was connected to the question of the proper nature of the duty (if any) which is said to have been breached giving rise to a claim under section 8 of the 1998 Act. He submitted that the judge's failure properly to analyse the nature and scope of the duty relied on led him into error in the matter of causation. There was no duty which had been breached as regards these Claimants, consequently no damages. But in any event, Mr Thomann argued, in order to recover compensation under section 8 it would be necessary to show extreme destitution to the point of IDT, not simply a risk of destitution, or imminent destitution. In basing his decision on a risk of destitution the judge had erred in law.

45. In response Mr Goodman criticised the SSHD's stance that actual IDT was required to be shown before any claim could be made. He emphasised that the claim in this case was not for compensation for a substantive breach of Article 3 but rather for breach of procedural guarantees requiring the state to act to avoid IDT. The purpose of the preliminary issue was to resolve that question, by determining whether damages could

be awarded for breaches of what Mr Goodman termed "Article 3's procedural guarantees against being exposed to a risk of [IDT]".

46. Mr Goodman sought to build upon the (non-controversial) proposition that Article 3 requires the state, in particular circumstances, to protect persons from IDT or to provide effective preventive measures, referring by way of example in the case of young or vulnerable persons to *Denis Vasilyev v Russia* Application No. 32704/04 (17 December 2009) at [98] and *X and Ors v. Bulgaria* Application No. 22457/16 (2 February 2021) at [177]. The circumstances in which the state is required to act will include instances where the state is itself responsible for creating conditions which could lead to IDT, *Limbuela* being an example. In *Limbuela* it was emphasised that in such circumstances the state is required to act prospectively to avoid IDT, not to "wait and see", as Lord Hope observed at [62].

47. Mr Goodman submitted that Article 3 as incorporated and applied under the 1998 Act imposes not only a prohibition on inflicting IDT but a proactive duty on the SSHD to avoid the risk of imminent Article 3 breach in circumstances where the state's deliberate acts have created, or are liable to create, conditions giving rise to such a breach. He argued that that a failure to discharge such a duty will be a breach of the procedural right under Article 3. He characterised this as a right not to be subjected to an administrative system which fails to avoid an imminent risk of IDT, arguing that it is the breach of that procedural right which triggers an entitlement to just satisfaction under sections 7 and 8 of the 1998 Act.

48. Mr Goodman suggested that it was unhelpful to seek to taxonomise duties arising under Article 3 in the way Mr Thomann had attempted to do. Having summarised the SSHD's position as one in which IDT had to be proved before any breach could be established, Mr Goodman took me to a number of cases where breaches of Article 3 had been found in the absence of proof of any IDT: ECtHR decisions in *Beganovich*, also *Ilyas & Ahmed v Hungary*, Application No 47287/15 (2020) 71 EHRR 6; the decision of Bourne J in *R (CSM) v. Secretary of State for the Home Department* [2021] 4 WLR 110 and *DMA*.

49. Mr Goodman proposed that each of the Claimants fell within the class of individuals identified by the Divisional Court in *W* at [60(c)] as being at imminent risk of IDT without recourse to public funds; as such, he argued, each Claimant was subjected to an unlawful scheme denying them recourse to public funds with the result that, when the mother became unable to support her family, she and her child fell into destitution. The scheme which denied benefits to single mothers of British children with LLTR in this way failed to avoid the risk of imminent destitution in their cases, rendering them victims of a violation of their procedural Article 3 rights. Mr Goodman stressed that it was the SSHD's imposition of a NRPF condition which had exposed the Claimants to the risk of imminent destitution and thence IDT, and it was this which gave rise to the positive duty to take action to avoid such a risk. In oral submissions he gave a number of examples as to how such a risk could have been avoided:- for instance by not imposing the NRPF condition on single mothers with LLTR in the first place, or by suspending it until satisfied of their ability to self-fund. He argued that section 6 of the 1998 Act was engaged because the SSHD unlawfully prohibited the Claimants from accessing welfare benefits, thereby creating conditions which put them in a position of destitution contrary to the section 6 obligation not to subject them to a risk of IDT. Once the SSHD's policy had put someone at risk of imminent destitution, she was

already in breach of her Article 3 duty to avoid a risk of IDT. At the point where persons subject to a condition of NRPF experience extreme destitution constituting IDT the SSHD comes under an operational duty to deal with and remove the IDT, but prior to this, and separately, he argued, she was in breach of a procedural obligation to take active steps to avoid imminent destitution.

Discussion and conclusions

Article 3 systems duties

50. Article 3 has been interpreted as charging public authorities with certain obligations. The nature and scope of these obligations is still developing and the manner of describing them has not always been consistent. However they fall into three broad categories of "systems", "operational" and "procedural/investigative", helpfully set out with reference to relevant authorities by Johnson J in the case of *MG v SSHD* [2022] EWHC 1847 at [6] to [8]. The "procedural" obligation contended for by the Claimants in the present case appears to me to fall into the "low-level systems" category identified by Johnson J in *MG*, as Mr Goodman, in one of the footnotes to his skeleton argument, in fact suggested. With gratitude to Johnson J I proposed to adopt his terminology.

51. It is important to be clear about the way in which it is said that these Claimants' Article 3 rights were breached. Whilst it is right that the Divisional Court in *W* found the operation of the old NRPF scheme to be unlawful the wording of the declaration and order made the nature and extent of the unlawfulness plain: the scheme was unlawful only "to the extent that [the rules and guidance taken together] do not adequately reflect or give effect to the defendant's obligation under Article 3 of the Convention and section 6 of the 1998 Act and at common law not to impose, or to lift, the condition of no recourse to public funds in cases where the applicant is not yet destitute but will imminently suffer inhuman or degrading treatment without recourse to public funds". Since the SSHD made a payment to *W* and his mother of £3000 without admission of liability, the Divisional Court was not required to grapple with the issue which has arisen in this case, namely whether a person subject to the scheme, and therefore exposed to a *risk* of being denied access to support from public funds when imminently destitute, is entitled without more to recover compensation for a violation of their rights under Article 3.

52. Each of the mothers in the present case had had the NRPF condition imposed on them already. It was not suggested that the initial imposition of the condition in their cases(s) was unlawful. Each of them in due course made a CoC application to the SSHD for the condition to be lifted and in each case it was lifted. It is not said that those decisions were wrong (clearly not, since the effect was to allow them access to public funds), nor do I understand it to be said that the lifting of the NRPF condition was in any of their cases unreasonably delayed (though I will hear counsel further on this aspect if necessary). The case is not put on the basis that any of the Claimants sustained destitution to the point of IDT; their case is that by operating a system found to be unlawful the state failed adequately to protect them from the *risk* of becoming destitute and that that jeopardy alone entitles them to compensation.

53. Mr Goodman's case rests upon an argument that an Article 3 systems duty to protect against destitution arose at the time the NRPF condition was imposed as a condition of LLTR. This must be, in effect, what the judge below decided, since he awarded

damages calculated from the date of the CoC applications, on the basis that each Claimant must have been imminently destitute at least by then.

54. As Mr Thomann pointed out, if such an obligation were found to exist it would represent a significant extension of the class of Article 3 systems duties. I do not believe that such an extension is justified in principle, or that *W* is authority for a duty arising at the point of imposition of the NRPF condition. Where an individual is not destitute/imminently destitute at the time of being granted LLTR it is not unlawful to impose a NRPF condition. Nor is it unlawful to require a person in respect of whom a NRPF condition subsists to make an application to have it lifted if their circumstances deteriorate. In *ST* the court rejected a submission to the effect that delays in dealing with CoC applications gave rise to a systems breach (at [177]), it had not been suggested that the requirement to make such an application was itself unlawful.

55. It follows that there could be no violation of any Article 3 duty before a CoC application has been made, bringing the circumstances of destitution/imminent destitution to the attention of the SSHD. There is then the question of whether a violation occurs only upon IDT being sustained, or whether it could arise earlier.

Previous decisions relied upon by the Claimants

56. Mr Goodman relied on a number of decisions before the judge below and on this appeal in support of his case that awards under section 8 of the 1998 Act for a breach of an Article 3 duty may be made in the absence of proof of IDT. I have considered these authorities carefully.

57. *Beganovic* concerned a breach of the state's investigative duty. The claimant, a man of Roma origin, had been attacked on the street of a town in Croatia by a group of young men. He contended that the authorities had failed to conduct an effective investigation, delaying and making mistakes until the prosecution became time-barred. Croatia argued, inter alia, that his injuries had been insufficiently severe to engage Article 3. The court disagreed. Having directed itself that ill-treatment must attain a minimum level of severity before Article 3 is engaged, the court considered that acts of violence such as those alleged by the claimant in principle fell within the scope of Article 3 such as to call for an effective investigation by the authorities (the discussion appears at paragraphs 64-68 of the court's judgment). The allegations were arguable and capable of raising a reasonable suspicion of ill-treatment of the necessary degree of severity. The court went on to find that Croatia had failed to fulfil their Article 3 obligation to investigate and deal with the claimant's allegations, awarding the claimant damages pursuant to article 41 of the Convention. As Mr Thomann pointed out, Beganovic is an instance of a well-established principle that a state may come under an Article 3 duty to investigate where a person has been subjected to ill-treatment, or where the evidence raises a reasonable suspicion of such ill-treatment. By definition, in such a case ill-treatment amounting to IDT will already have occurred, alternatively the court will require credible evidence raising a suspicion of its having occurred.

58. The case of *D* likewise concerned a duty to investigate. Green J (as he then was) found that the police were liable to victims for failing adequately to investigate the activities of John Worboys (a taxi driver convicted of multiple rapes in London). He made awards to the claimants of modest amounts to reflect non-pecuniary losses. In that case, of course, the claimants brought proceedings as victims of Worboys' criminal

behaviour, the ill-treatment which they had suffered at his hands was extreme and had already been established. There is no sense in which they had not sustained IDT.

59. CSM did not involve an Article 3 investigative duty. In *CSM* the claimant was a minor and an asylum-seeker who had been detained at an immigration detention centre. He had AIDS, for which he needed to take antiretroviral drugs every day. The staff at the detention centre failed to take adequate steps to obtain those drugs for him, as a result of which he went for some days without them. On the medical evidence Bourne J was satisfied that there was a grave risk to the claimant's health without his antiretroviral medication, and held that the SSHD was in the circumstances under an Article 3 duty to protect him from such a risk of ill-health by ensuring that he received the necessary drugs. Mr Goodman directed me to the headnote recording the result of the case as follows:

> "...in order to show a material breach of the duty under Article 3 of the Human Rights Convention a claimant did not have to show that he had actually suffered serious harm as a result of the breach, although a lack of harm could mean that there was no right to damages; that there was no reason why a more stringent test ought to be applied to the systems duty under Article 3."

60. *CSM* clearly is an example of a case where it was not necessary to the finding of breach of an Article 3 duty that the claimant should have sustained serious harm to the point of IDT. But the circumstances of the claimant in *CSM* were entirely different to those of the Claimants in this appeal: *CSM* was a minor with a potentially serious health condition, being held in a detention centre, entirely dependent upon staff to arrange medical care and obtain the drugs he needed to prevent his AIDS from developing into a life-threatening condition. Being detained, he was not free to go out and obtain a prescription, or fill a prescription, himself. The level of his vulnerability, the gravity and immediacy of the risk to his health without daily antiretroviral drugs, combined with his dependency as a detainee, called for the existence of a systems duty in his case. It is to be noted that the discussion and findings concerning breach of a systems duty were predicated on the fact that staff knew of *CSM's* health condition. Bourne J's identification of the nature of the systems obligation (provision of training and information to staff to inform them in relation to detainees with AIDS (i) that medication must not be missed and (ii) where to obtain it, see [97] of the judgment) nowhere suggests that staff at the detention centre were obliged to take any action unless or until they had been made aware that a detainee had AIDS.

61. The case of *Ilyas & Ahmed* concerned Bangladeshi nationals arriving in Hungary from Serbia. The Hungarian authorities rejected their asylum claims as inadmissible and sent them back across the border into Serbia relying on a recent decree issued by the Hungarian government declaring Serbia a "safe country". The ECtHR found a breach of the applicants' Article 3 rights, on the basis that Hungary had not made a sufficient investigation of conditions in Serbia, or of Serbia's handling of asylum applications, protecting applicants from the risk of refoulement. The court noted, at H10, "consistent general information" at the relevant time that asylum seekers returned to Serbia were at risk of summary removal to Macedonia and thence to Greece, where conditions were incompatible with Article 3. The court's reasoning (at paragraph 163) appears to be that it was this information which gave rise to the procedural duty on Hungary to investigate the risks of treatment contrary to Article 3 before removing the applicants to Serbia. The applicants were awarded non-pecuniary damages.

62. Mr Goodman pointed to the fact that neither of the applicants in *Ilyas* had in fact sustained IDT in the course of their removal to Serbia, or in their treatment once there, characterising the violation as one of breach of a procedural duty to anticipate and protect against Article 3 ill-treatment. The refoulement context is so very different to the facts of the case before me that I find little assistance in this decision; I note, however, that the violation was found to arise in circumstances where the court found that the Hungarian authorities would have been aware of potential issues with Serbia's treatment of refugees, i.e., that the risk of refoulement had been drawn to their attention and they had failed to address it.

63. The principal authority relied on by Mr Goodman and by the judge in the court below was the decision of Knowles J in *DMA*. Mr Goodman summarised the effect of the decision as "a structural scheme, not operated correctly, causing harm", maintaining that, as such, *DMA* was on all fours with the present case. As indicated above, *DMA* concerned asylum seekers denied the right to work or any access to public funds. In that respect they were vulnerable and precariously circumstanced in the same way as the claimants in *Limbuela*. In the case of each of the claimants in *DMA* the SSHD had accepted a duty to accommodate them pursuant to section 4(2) of the IAA 1999, on the basis that they were destitute. The challenge heard by Knowles J arose from delays in the provision of that accommodation once the obligation to provide it had been accepted, however as he pointed out at [183] "the situation [was] best seen as one involving the prevention of inhuman and degrading treatment rather than simply as a case involving the provision of accommodation". Mr Goodman points to *DMA* case as an instance of breach of a systems duty being found where the claimants were not required to establish that they had sustained IDT. Yet Knowles J specifically rejected a submission that the *DMA* claimants' circumstances had not come close to reaching the threshold under Article 3 (at [97]), stressing the SSHD's own description of the claimants as "highly vulnerable people" (at [98]). In this respect there are critical differences between the asylum-seeker claimants in *DMA* and the Claimants here. The claimants in *DMA* were unable to work or to apply for access to public funds; as Lady Hale pointed out in *Limbuela* (at [78]) it is not difficult to imagine that persons subject to those extreme restrictions may very quickly reach suffering to the level contemplated by Article 3. The same is not true of persons with LLTR subject to an NRPF condition, able to work and provide for themselves and, critically, able to make an application for the condition to be lifted in the event of their circumstances changing. It is also to be noted that the decision in *DMA* concerned the SSHD's obligations once the fact of destitution, and thus the need for section 4(2) accommodation, had been brought to her attention. There was no sense in which she was required to intuit that the *DMA* claimants may have been destitute, or imminently destitute, at some earlier point. The case proceeded on the basis that any Article 3 violation must have occurred upon the claimants having notified the SSHD of the fact of their destitution, and after she had accepted that fact, not before.

64. I disagree with Mr Goodman's submission that the finding of a violation in *DMA* precisely matches his case for a violation here. *DMA* is not authority for breach of a duty to prevent destitution absent an individual having first drawn the attention of the SSHD to their situation. Nor is *Limbuela,* where Lord Hope referred to the duty on the SSHD arising "as soon as the asylum-seeker makes it clear that there is an imminent prospect that a breach of the article will occur…" (at [62]).

Nature and extent of any Article 3 duty arising here

65. Persons with LLTR subject to a NRPF condition are in a very different position to asylum-seeker claimants such as those in *DMA* and *Limbuela*. Whilst it may properly be said of the latter that the restrictions imposed upon them have thrust them into destitution, the same is not true of the former class of persons. They are entitled to work and provide for themselves. Most persons with LLTR subject to a NRPF condition will work and will never need state support; that is the policy intention. But some may find themselves struggling, as these Claimants did. At that point, unlike asylum-seekers, they are able to make a CoC application to have the NRPF condition lifted.

66. The ability to work and to apply, if necessary, to have the NRPF condition lifted are key when considering whether it is right to expand the class of low-level systems duties to encompass a duty to protect persons subject to a NRPF condition from destitution. In *MG*, Johnson J declined to find an Article 3 systems duty owed by the SSHD to asylum-seekers living in a hostel to protect them from attack by fellow-inhabitants, reasoning as follows (at [59]):

> "Here, there was no relevant removal of the claimant's autonomy or that of [his attacker]. Neither of them was reliant on the defendant for their own well-being, save to the extent of avoiding destitution and providing access to medical care. Everybody is at residual risk from the violent and criminal actions of others. The risk that materialised in this case was no different in principle from the risk that might impact on anybody."

67. Unlike asylum-seekers, the Claimants here were able to work and could make an application for lifting of the NRPF condition at any time. They were in no sense reliant on the SSHD for their own well-being. To adapt the above reasoning, losing employment or home, or otherwise facing destitution without state support, is a residual risk which everyone faces. Whilst the categories of Article 3 systems duties are never closed, in my view the Claimants' circumstances were not such as to call for an extension of a systems duty owed to them at the point of imposition of the NRPF condition.

68. Having said this, I cannot accept that there can be no violation of a systems duty owed to persons subject to an NRPF condition unless or until they can show that they have sustained IDT. The decision in *W* was based upon an obligation to lift the NRPF condition at the point where a person is imminently destitute, that is to say at a point before actual destitution. The SSHD is not entitled to wait for a person subject to a NRPF condition to sustain actual IDT before lifting the condition, her duty is to act to prevent that point being reached. It follows that I reject Mr Thomann's "higher line" argument to the effect that a violation can only be said to have occurred if a person subject to an NRPF condition can show that they have sustained IDT.

69. I prefer Mr Thomann's alternative, "lower line" submission, as being more consistent with the reasoning of the court in *W*, that a violation of an Article 3 duty owed to persons with LLTR subject to a NRPF condition will occur if, having made a CoC application, the SSHD either wrongly refuses it, or deals with it unreasonably. What is unreasonable will depend upon the circumstances of a particular case. This seems to me also in keeping with the decision in *DMA*, where the systems duty held to have been

breached concerned the regime applied to the provision of accommodation once the need for it had been identified and accepted.

70. Mr Goodman's submissions sought to treat single mothers with British children as a specific class of persons subject to the NRPF scheme, in respect of whom an Article 3 systems duty arises by reason of the imposition of that condition in their case. But I do not see any proper basis for making a distinction between some persons subject to the scheme, to whom a systems duty is owed, and others to whom it is not, certainly there is none within the scheme itself. If Mr Goodman is right that a duty arises merely from the fact of imposition of an NRPF condition then in my view anyone subject to the old NRPF scheme would in principle have had a claim for breach of their Article 3 rights, whether or not their circumstances caused them to make a CoC application seeking to have the condition lifted. There would have been a violation merely by reason of the Guidance having failed to identify a right to protection at the time of imminent destitution, rather than at the point of actual destitution.

71. In my view the only right which persons subject to the NRPF scheme had was to have their applications, whether for a NRPF condition not to be imposed or an existing condition to be lifted, heard and decided in a reasonable time in such a way as to avoid their falling into destitution to the point of IDT. The unlawfulness identified in *W* went solely to the approach taken by the SSHD's caseworkers when deciding such applications.

72. It follows, in my view, that if these Claimants are to identify a relevant violation of their Article 3 right then they must show that the SSHD wrongly decided their applications to have the NRPF condition lifted i.e. that in their case(s) the risk of an unlawful decision identified by the court in *W* actually materialised, either because their CoC application was wrongly refused, or because there was unreasonable delay in deciding it.

73. Whether, in the case of a person who can show that their CoC application was not properly determined, either because it was refused or a decision was unreasonably delayed, that person will be entitled to an award of damages under section 8 of the 1998 Act will depend upon the particular circumstances of the case, applying the principles discussed by Green J in *D.* It is impossible, and would be inappropriate, to lay down any hard or fast rule.

74. I turn now to consider the specific grounds of appeal in the light of the above discussion of the principles to be derived from previous authority, as applied to the NRPF regime.

The Grounds of appeal

75. The judge below was right, at paragraph 42 of his judgment, when he observed that *W* was not authority for (i) the existence of relevant "procedural" rights (ii) breach or (iii) entitlement to compensation. It followed that the judge was required to address each of these in his judgment.

76. The principal difficulty when examining his decision is that the judge nowhere analyses or explains what he means when finding a "breach of [the] procedural right under Article 3...", at paragraph 58 of his judgment. In that paragraph he appears to assume that that is what the court in *W* decided, but this is contrary to his earlier observation at

paragraph 42. His judgment does not set out any detailed analysis of the decision in *W* so as to identify how he arrived at his conclusion that the SSHD had breached a duty owed to these Claimants, nor more particularly what was the nature or scope of the right enjoyed by the Claimants derived from the unlawfulness identified by the Divisional Court in *W*.

77. In the case of these Claimants it seems to be the case that the NRPF condition was lifted within a reasonable time of the CoC applications having been made. In those circumstances I cannot see how any relevant right has been violated. What Mr Goodman appears to be suggesting is that but for the Guidance found in *W* to render the scheme unlawful, his clients would have applied to have the NRPF condition lifted earlier, and should have succeeded. But this is speculation, and in any event very far from establishing that his clients have sustained a breach of their Article 3 right not to be subjected to IDT.

78. In relation to the first ground, therefore, I accept that the judge below failed to identify the nature and scope of the Article 3 violation. He rightly recognised that *W* provided no assistance as to the existence of a "procedural" duty, nor as to breach, but then failed to go on and explain how he arrived at his conclusion that there was such a duty, and why he found it had been breached in the case of these Claimants.

79. Moving to the second Ground, I am satisfied that the judge misconstrued the decision in *W*. At paragraph 58 of his judgment he appears to found his decision that the SSHD owed a systems ("procedural") duty to the Claimants on the decision in *W*. But the court in *W* made no such finding, as the judge had earlier recognised (at paragraph 42 of his judgment). Mr Goodman relied on the reasoning in *W* at [60] (set out at [16] above), but as the next paragraph of the court's judgment in *W* made clear, the matters set out in [60] simply recorded agreed propositions arising from the decision in *Limbuela*, the court did not find any procedural or systems breach in the case of *W* himself. On the contrary, the court approved the making of a payment to *W* expressly on the basis of non-admission of liability.

80. I pass over the third ground since, as I have observed above, it appeared to be based upon an assumption that the judge, in referring to a "procedural" duty must have had in mind the investigative duty arising from a breach (or threatened breach) of Article 3.

81. I understand Mr Goodman's case here to be that the SSHD was under a duty to operate a system which prevented the Claimants from being at any risk of destitution at any stage after the NRPF condition had been imposed. As I have already indicated, I regard this duty more accurately as a proposed extension to the class of low-level systems duties owed by public authorities which, for the reasons I have given, is not an extension which I consider should rightly be made.

82. In the case of persons subject to a NRPF condition it is open to them to apply to the SSHD to lift that condition, as the Claimants did here. On the basis of the court's finding in *W* it would be unlawful if the SSHD were to refuse an application in circumstances where a person was at imminent risk of destitution, or to delay unreasonably in lifting the condition in those circumstances, but that is not the way in which the case has been advanced by these Claimants on this preliminary issue. Unless or until a Claimant can show that their CoC application has been wrongly refused, or that there has been unreasonable delay in lifting the NRPF condition, there is no

relevant violation giving rise to harm, thus no basis for just satisfaction under section 8 of the 1998 Act and the Claimants are not victims of the particular unlawfulness identified in *W*.

83. The final ground of appeal – failure to establish a causal link - has its foundation also in the absence of proper analysis of the scope of any duty and thus the nature of any violation calling for just satisfaction. It is necessary to identify precisely what any Article 3 duty entailed, in order that a causal link may properly be established between the harm claimed and the breach of duty found (if any). This is the first of the two steps referred to by Green J in *D* at [18]. In *Jeunesse*, the ECtHR found that the Netherlands had wrongly refused the Claimant a right of residence, in breach of her Article 8 rights, but refused to make an award of social security benefits on the basis that article 8 does not guarantee a right to such benefits and thus that there was no causal link to the breach.

84. For the reasons I have given I do not consider that, by operating a scheme found to be unlawful for the reasons given in *W*, the SSHD was in breach of a systems duty owed to persons subject to an NRPF condition of their LLTR. There is thus no causal link between the damages claimed and a violation. It has to be remembered that the purpose of Article 3 of the Convention is to protect persons against ill-usage of a very high degree of severity. At no stage did these Claimants suffer destitution to the point of IDT and when they applied to have the condition lifted, their requests were granted.

85. Mr Thomann's "high line" argument was that no causal link had been established as the claimants had not shown suffering to the point of IDT. As I have indicated, I prefer his "lower line" argument, that a Claimant may be able to recover damages for breach of an Article 3 systems duty if the SSHD, having been notified of circumstances amounting to destitution/imminent destitution, refused to lift, or unreasonably delayed in lifting, the NRPF condition.

86. For these reasons I am satisfied that the judge erred in his approach to determining the preliminary issue in this case and his decision must be quashed. I will hear counsel further as to whether there is any residual matter arising from the way in which the Claimants' individual applications to have their NRPF condition lifted were decided.

87. In view of my decision that no entitlement to compensation under section 8 of the 1998 Act arises in this case it is unnecessary to go on and consider points on quantum. However had I reached a different decision on the preliminary issue then I would not have interfered with the first instance assessment of what constituted just satisfaction for the purposes of section 8 of the 1998 Act.

88. Finally I have been informed by counsel that this case was originally listed to be heard in the Bristol District Registry of the High Court but, for reasons of likely delay, was finally heard in the County Court. That deals with the concern which I would otherwise have had about apparent choice of venue, as this was clearly a case which, notwithstanding the likely level of damages, concerned issues of a complexity and breadth of application which made it more suitable for listing in the High Court. Although I have disagreed with him in the outcome, I wish to pay tribute to the judge below for taking on a previously undecided point in a complex area of law. It is always easier to engage with a difficult point when someone else has tackled it first.