Neutral Citation Number: [2021] EWHC 1085 (Admin)

Case No: CO/5025/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/4/2021

Before :

LADY JUSTICE ELISABETH LAING
and
MR JUSTICE LANE

- -

Between :

ST (a child, by his Litigation Friend VW) & VW	**Claimants**
- and -	
Secretary of State for the Home Department	**Defendant**

- -
- -

Mr Goodman and Mr Amunwa (instructed by **Deighton Peirce Glynn**) for the **Claimants**
Mr Kovats QC, Mr Thomann and Mr Tabori (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 17 and 18 March 2021

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Approved Judgment

Lady Justice Elisabeth Laing DBE :

Introduction

1. VW ('C2') is the mother of ST ('C1'). We describe her immigration history below (paragraph 10). The Claimants ('the Cs') challenge a decision and a scheme:

    i. the Secretary of State's decision on 22 November 2019 to impose a condition of no recourse to public funds ('NRPF') on the grant to C2 of limited leave to remain ('LLR') ('the Decision') and

    ii. the NRPF scheme: that is, paragraph GEN1.11A of Appendix FM to the Immigration Rules ('the Rules') and 'Family Life (as a partner or parent) private life and exceptional circumstances' ('the Guidance').

    This is the judgment of the Court on that challenge.

2. The Cs' solicitors sent a pre-action protocol letter to the Secretary of State challenging the Decision on 10 December 2019. The application for judicial review was filed on 20 December 2019. On 23 December 2019, Freedman J granted the Cs anonymity and interim relief, staying the NRPF condition and treating it as of no effect 'pending the resolution of the application for permission or further order'. On 24 December 2019, the defendant responded to the pre-action protocol letter, agreeing to reconsider the imposition of the NRPF condition. On 27 December 2019, that condition was lifted, but only prospectively.

3. On 16 December 2020 Knowles J made a consent order giving permission to apply for judicial review of the NRPF scheme. The Cs do not have permission to apply for judicial review of the Decision. The Secretary of State conceded in the detailed grounds of defence that the imposition of the condition was incorrect. This led the Court to refuse permission to apply for judicial review of the Decision, on the grounds that the challenge was academic. The Cs renewed their application for permission. By a consent order dated 20 January 2021, that application was adjourned to 'rolled-up hearing' in this Court. As we will explain, the Cs contend that the challenge to the Decision is not academic.

4. The Cs ask, in this Court, for the Decision to be quashed, a declaration that the NRPF scheme is unlawful and damages for breach of their Convention rights.

5. The Cs challenged the Decision and the NRPF scheme on seven grounds. They do not pursue ground 4. The Cs put their grounds in three groups.

6. The Cs described one group of grounds (grounds 1 and 5) as 'the PRCBC grounds'.

    i. Ground 1 of these grounds has two distinct aspects.

        1. The Decision was unlawful, irrational and arbitrary. The Secretary of State did not treat C1's best interests as a primary consideration (contrary to section 55 of the Borders, Citizenship and Immigration Act 2009 ("the 2009 Act") (ground 1)).

        2. The design of the NRPF scheme, and its operation in practice, fail to provide effective protection to the best interests of children and thus breach the duty imposed on the Secretary of

State by section 55 of the 2009 Act. We will describe this as 'the section 55 PRCBC ground'.

ii. The NRPF scheme and decisions taken under it unlawfully deprive British citizen children and their parents of statutory entitlements to benefits which are designed to safeguard fundamental rights (not to be homeless, hungry, destitute or subjected to inhuman treatment) (ground 5). We will describe this as 'the statutory construction PRCBC ground'.

These grounds reflect the two main grounds of challenge in *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2021] EWCA (Civ) 193. The claimants in that case challenged the fees payable for registering a child as a British citizen. The first of these two grounds succeeded in the *PRCBC* case. The second did not.

7. The second group of grounds relies on allegations of breaches of the Equality Act 2010 ('the 2010 Act') and of the European Convention on Human Rights ('the ECHR').

i. The Decision unlawfully discriminated against the Cs

1. contrary to sections 9, 19 and 29(6) of the 2010 Act on the grounds of their colour, and

2. contrary to article 14 of the ECHR (read with article 8 and/or with article 1 of Protocol 1 ('A1P1')) on the grounds of race/colour and/or national origin (ground 3).

We will describe these as 'the 2010 Act ground' and 'the article 14 ground', respectively.

ii. The Secretary of State has designed, and operates, the NRPF scheme without 'due regard' to the equality needs listed in section 149 of the 2010 Act, in particular to the 'differential impacts' of the policy on British children of foreign parents, on non-white British children and on single mothers and their children (ground 2). We will describe this as 'the section 149 ground'.

8. The last group of grounds relies on article 3 of the ECHR and on the common law of humanity.

i. The NRPF scheme 'takes insufficient account of and/or is incompatible with' article 3. The Secretary of State amended the Guidance after the decision of this Court in *R (W) v Secretary of State for the Home* Department [2020] EWHC 1299 (Admin); [2020] 1 WLR 4420 , but those amendments do not cure the flaws identified in that decision because they fail to ensure that NRPF conditions are, either, not imposed in the first place, or removed quickly enough (ground 6). We will describe this as 'the systemic article 3 ground'.

ii. The NRPF scheme has been running for eight years. The Secretary of State has failed to discharge a positive obligation imposed by article 3 to have an effective inquiry to find out what has happened and to learn lessons (cf *R (MA and BB) v Secretary of State for the Home*

Department [2019] EWHC 1523 (Admin) at paragraphs 38 and 42). *MA* and *BB* concerned the physical mistreatment and abuse of immigration detainees by those responsible for detaining them in Brook House Immigration Removal Centre. The Secretary of State accepted in principle that an article 3 investigation was necessary in that case (judgment, paragraph 4) (ground 7). We will describe this as 'the article 3 investigative ground'.

9. At the hearing, the Cs were represented by Mr Goodman and Mr Amunwa. The Secretary of State was represented by Mr Kovats QC, Mr Thomann and Mr Tabori. We thank all counsel for their helpful oral and written submissions. We are also grateful to all members of the legal teams for their hard work in preparing the case for the hearing.

C1's immigration history

10. C was born on 27 November 1979. She is a citizen of South Africa, but was born in what is now Zimbabwe. She arrived in the United Kingdom in 2004 with six months' leave to remain as a visitor. She overstayed. She made applications for leave to remain which the Secretary of State refused. She absconded in August 2007. When she was next encountered, in September 2010, she made a claim for asylum, falsely claiming to be citizen of Zimbabwe. The Secretary of State refused her claim for asylum. Her appeal was dismissed in November 2010. Her appeal rights were exhausted in January 2011.

11. She began a relationship with a citizen of Zimbabwe in 2014. He had indefinite leave to remain ('ILR') in the United Kingdom as a refugee. In February 2016, they had a son, C1. Because C1 was born in the United Kingdom and his father had ILR, C1 is a British citizen. In October 2016, the Secretary of State gave C2 30 months' LLR. The Secretary of State did not impose a NRPF condition on that LLR. As we will explain, C2 has since been given a further period of 30 months' LLR. If she completes ten years of LLR, she will be eligible to apply for ILR, under what is called the 'ten-year route'. We say more about that below, in paragraphs 61-66.

The structure of this judgment

12. In this judgment we will describe

    i. the legislative framework

    ii. the policy framework

        1. the Rules

        2. the Guidance

    iii. the Policy Equality Statements ('PESs') which are relevant to the section 149 grounds

    iv. the submissions on the grounds and our conclusions on them.

    Before we do so, however, it is convenient for us to consider whether the challenge to the Decision is academic.

Is the challenge to the Decision academic?

13. The Cs explain (skeleton argument paragraphs 18 and 52) why, despite the prospective removal of the NRPF condition, the challenge to the Decision is still live. They argue that C2 is exposed to liability for prosecution for claiming benefits while subject to a NRPF condition and/or to action to recover the benefits and/or action to curtail her leave for breaching a condition of her leave, and that it would be open to the Secretary of State to take into account her breach of the conditions of her LLR when she next applies for renewal of her LLR. It is conceivable that such a condition could be re-imposed on C1 if she were given a further period of LLR when her current leave expires. They also contend that the Decision discriminated against C1 (or C2) contrary to the 2010 Act, and contrary to article 14 of the ECHR. The contention that those arguments, if successful, could entitle Cs to compensation in the County Court, or to damages under the Human Rights Act 1998 ('the HRA'), respectively, is a further reason why the challenge to the Decision is not academic.

14. At the start of the hearing of this claim the Court indicated that it would grant permission to apply for judicial review of the Decision and that (in the light of the Secretary of State's concession in correspondence that the Decision was 'incorrect', and of the potential legal consequences of the Decision for C1: see the previous paragraph), its provisional view was that C1 was entitled to the relief which she sought.

15. Paragraph 10 of the Secretary of State's summary grounds of defence, and Mr Kovats' further explanation of the Secretary of State's opposition to the grant of relief, were, in short, that C1 had asked for a fee waiver when she made her application to renew her LLR. In that application, she had said that although she had adequate accommodation, or the means of getting it, she could not meet her other essential living needs. In the waiver application she listed the benefits she was receiving (income support, child tax credit, council tax benefit and housing benefit).

16. On 13 May 2019 the Secretary of State wrote to C1, saying that, on the basis of the current information, the Secretary of State would refuse the application for a waiver. C1 had sent bank statements from one account. The Secretary of State relied on the result of an Equifax search which showed that C1 had four other bank accounts, for which she had not provided statements. The Secretary of State asked for 'at least six months of bank statements' for all C1's accounts.

17. C1's response was not to supply those bank statements, but to pay the fee (£1052.20), and to submit her application for further LLR. In her application form, C1 said what rent she was paying, and listed the benefits she was receiving (see above). She submitted bank statements which showed she was receiving the benefit. She also described, in detail, her relationship with her son, C2, and his relationship with his father. C1 urged

> *'the Secretary of State to take into consideration the welfare of my child in this application. It is necessary to treat the best interest of the child as a primary consideration, I submit that it would not be in the best interest of my son if my application was refused. It would clearly be in the child's best interest to remain in contact with their natural mother and have me in the UK to continue to support him emotionally and physically'.*

18. The defendant's General Caseworker Information Database ('GCID') is a digital case record. A note on the GCID created on 18 June 2019 about C1's application for leave stated that C1's case was being considered under the 'ten-year parent route'. It said

that C1's application did not fall for refusal under S-LTR1.12 to 1.7 and 2.12 to 2.4 of Appendix FM to the Immigration Rules. C1 met the eligibility requirements in E-LTRPT.2.2 – 2.4. She was the 'main carer of the child following breakdown of relationship with the other parent'. VW also met 'the eligibility immigration status requirement' in E-LTRPT.3.1 because 'destitution claim received in time and FP submitted whilst under consideration'. C1 met the requirements in EX.1 of Appendix FM because she was 'main carer of GB cit child'.

19. The GCID record ended as follows:-

> "Has code 1a been assessed? Yes.
>
> Reasons: Destitution claim not accepted so granted under 1.
>
> Outcome:
>
> Grant LTR under D-LTRPT.1.2 for 30 months until 18/06/22 on code 1."

'Code 1' refers to the NRPF condition.

20. The implicit explanation of the Decision, therefore, seems to be that the Secretary of State was not satisfied that C1 was destitute, because she had several bank accounts, and when asked, did not disclose any bank statements relating to them, but, rather than make that disclosure, immediately paid the substantial fee for the application. This implicit explanation seems, at least in part, to be the premise of the Secretary of State's opposition to the grant of relief. There are at least three difficulties with this implicit explanation.

    i. Apart from the letter of 13 May 2019, it is not supported by any contemporaneous document (such as a decision letter, or a GCID note).

    ii. Moreover, as Mr Kovats told us, his clients took a draft witness statement from the relevant caseworker and decided not to serve it.

    iii. Despite this sequence of events, the Secretary of State later conceded in correspondence that the Decision was 'incorrect'. That position was explained in the summary grounds; the caseworker treated the refusal of the fee waiver as the most important piece of evidence, and did not take into account the non-imposition of a NRPF condition on the 2016 grant of LLR, and did not give any weight to C1's assertion that she did need recourse to public funds.

21. The Court asked Mr Kovats to take instructions from his clients. In due course, he reported that in the light of the history we have described, the Secretary of State 'would not oppose a quashing order'. An order quashing the Decision, and this judgment, which records that the Secretary of State accepted that the Decision was incorrect, will provide the legal protection which the Claimant needs. The quashing order means that the Decision is to be treated, for all purposes, as not having been made. The Decision, therefore, cannot form the basis of criminal liability, or for the recovery of any benefits paid to C1 between 22 November and 23 December 2019. The Decision cannot be taken into account in any subsequent decisions by the Secretary of State on future applications for LLR. Subject to our conclusions on the live grounds of challenge, the quashing of the Decision does not mean that the

Secretary of State is disabled from attaching a NRPF condition to a future grant of LLR, as whether such a condition is appropriate will depend on the facts then.

22. It might be thought that this concession would make it unnecessary for us to express any views on the detailed grounds of challenge to the Decision (that is, grounds one, five, three and two: see paragraphs 6 and 7, above). The discrimination grounds, however, are not merely of academic interest, since, as we have also explained, the Cs argue that they are entitled to damages under the HRA in respect of their article 14 claim, and to damages in the County Court in respect of their claim under the 2010 Act. Moreover, those grounds were fully argued. We will therefore consider them. In deference to the detailed arguments we heard, we will also consider the PRCBC grounds of challenge to the Decision. We do not consider, however, that it is necessary, or proportionate, to deal with those arguments other than very briefly.

The legislative framework

23. The legislative framework includes the Secretary of State's powers to grant leave, and the framework for making the Rules. It also includes the provisions about statutory benefits, and their relationship with the Secretary of State's power to impose a NRPF condition on a grant of leave, and the relevant provisions of the 2010 Act and of the HRA. We will also refer, where appropriate, to any cases which we consider are relevant to the grounds of challenge.

The statutory framework: immigration and welfare benefits

The Immigration Act 1971

24. Section 1(1) of the Immigration Act 1971 ('the 1971 Act') describes the freedoms of those who have a right of abode in the United Kingdom (as to which, see section 2). Those who do not have that right may live, work and settle in the United Kingdom by permission and subject to such regulation and control of their entry into, stay in and departure from the United Kingdom as is imposed by the 1971 Act (section 1(2)). Section 1(3) provides for the common travel area.

25. Section 3(1) of the 1971 Act provides (subject to irrelevant exceptions) that a person who is not a British citizen shall not enter the United Kingdom unless given leave to do so in accordance with the provisions of, or made under, the 1971 Act. By section 3(2), he may, if in the United Kingdom, be given leave to remain there for a limited or for an indefinite period. If a person is given limited leave to remain in the United Kingdom, it may be given subject to various conditions, including 'a condition restricting his work …in the United Kingdom' and 'a condition requiring him to maintain and accommodate himself, and any dependants of his, without recourse to public funds' (section 3(1)(c)(i) and (ii)). The necessary implication of those two provisions is that, unless such a restriction is actively imposed on a person's leave to remain, he is free both to work, and to have recourse to public funds. Section 3(3) provides for the variation of leave.

26. Section 1(4) requires that 'the rules laid down by the Secretary of State as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom for persons not having a right of abode' must provide for admitting people for various purposes such as work, study, visits, or as dependants of persons lawfully entering the United Kingdom. Section 3(2) imposes a further requirement about those rules. 'The Secretary of State shall from time to time lay

before Parliament statements of the rules, or of any changes in the rules, laid down 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 periods for which leave is to be given and the conditions to be attached in different circumstances…'.

27. The Rules are the rules referred to in section 1(4) and in section 3(2). The House of Lords considered the status of the Rules in *Odelola v Secretary of State for the Home Department* [2009] UKHL 25; [2009] 1 WLR 1230. One of the issues in that appeal was whether the Rules were 'subordinate legislation' as defined in section 21 of the Interpretation Act 1978, that is, whether they were 'rules…made or to be made under any Act'. It is clear from the judgments of the members of the Appellate Committee that they did not consider that the Rules were subordinate legislation (see, for example, paragraphs 33-35, 37, 38, per Lord Brown, paragraph 6 per Lord Hoffman, and paragraphs 46-47 and 50 per Lord Neuberger). Lord Brown made a similar point in *Mahad v Entry Clearance Officer* [2009] UKSC 16; [2010] 1 WLR 48, at paragraph 10, when making some observations about how the Rules are to be interpreted.

28. In paragraphs 16-18 of *Ali v Secretary of State for the Home Department* [2016] UKSC 60; [2016] 1 WLR 479, Lord Reed, giving the judgment of the Supreme Court, explained (in paragraph 16) that the Rules are policies. They are unusual 'in having a statutory basis, in requiring the approbation of Parliament, and in being published as House of Commons papers'. He added in paragraph 17 that they 'are not law…but a statement of the Secretary of State's administrative practice'. He then qualified that statement by referring to section 86(3) of the 2002 Act. We observe that, after the repeal of that provision, they are not 'treated as law', either. Perhaps inconsistently with the approach in *Odelola*, and, perhaps influenced by the decision in *R (Alvi) v Secretary of State for the Home Department* [2012] UKSC 33; [2012] 1 WLR 2208, he added that 'They are therefore made in the exercise of powers which have been democratically conferred, and are subject, albeit to a limited extent, to democratic procedures of accountability'.

29. Part III of the 1971 Act is headed 'Criminal Proceedings'. Section 24 is headed 'Illegal entry and similar offences'. Section 24(1)(b)(ii) makes it an offence for a person who has limited leave to remain knowingly to fail to observe a condition of his leave. The maximum sentence is a fine or a sentence of six months' imprisonment.

The Welfare Reform Act 2012

30. The Welfare Reform Act 2012 ('the 2012 Act') creates a new benefit, Universal Credit ('UC'). Section 3(1) of the 2012 Act provides that a single claimant is 'entitled' to UC if he meets the 'basic conditions' and the 'financial conditions' for a single claimant. The 'basic conditions' are listed in section 4. They include that the claimant is 'in Great Britain' (section 4(1)(c)). C2 satisfies that condition, by virtue of regulations made under section 4(5), because she has LLR, which is 'a right to reside in the United Kingdom'.

The Immigration and Asylum Act 1999

31. Section 115 of the Immigration and Asylum Act 1999 ('the 1999 Act') is headed 'Exclusion from benefits'. Section 115(1) provides that 'No person is entitled to universal credit under Part 1 of the Welfare Reform Act 2012…while he is a person to

whom this section applies'. The phrase 'universal credit under Part 1 of the Welfare Reform Act 2012' was inserted by paragraph 54 of Schedule 2 to the Welfare Reform Act 2012 ('the 2012 Act').

32. Section 115 of the 1999 Act applies to a person who is 'subject to immigration control' (unless he 'falls within such category or description, or satisfies such conditions, as may be prescribed') (section 115(3)). A person is 'subject to immigration control' in the four circumstances listed in section 115(4). They include that the person 'has leave to …remain in the United Kingdom but is subject to a condition that he does not have recourse to public funds'.

The Nationality, Immigration and Asylum Act 2002

33. Part 5A of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act') was inserted by section 19 of the Immigration Act 2014. Part 5A requires a court or tribunal, when considering whether an interference with a person's right to respect for private and family life protected by article 8 of the ECHR is justified under Article 8(2), to have regard to certain specified matters. By section 117B(3) those include that

> *'(3) It is in the public interest, and in particular in the interest of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons -*
>
> *(a) are not a burden on taxpayers, and*
>
> *(b) are better able to integrate into society.'*

The Borders, Citizenship and Immigration Act 2009

34. Section 55 of the Borders, Citizenship and Immigration Act 2009 ('the 2009 Act') is headed 'Duty regarding the welfare of children'. The effect of section 55(1) and (2) is that the Secretary of State must make arrangements for ensuring that any function of the Secretary of State 'in relation to immigration, asylum or nationality' is discharged 'having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom.'

35. It might be thought, as a matter of language, that this is a high-level organisational duty. The Secretary of State appears, nevertheless, to have conceded, in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4; [2011] 1 WLR 148, that this duty binds every decision maker when making a decision in an individual case (see paragraph 24 of the judgment of Baroness Hale). The Secretary of State took a similar position in *MM (Lebanon) v Secretary of State for the Home Department* [2017] UKSC 10; [2017] 1 WLR 771 (see paragraph 46 of the judgment). We do not consider that it is open to us to depart from that approach.

36. In *MM (Lebanon)* the claimants applied for judicial review of changes to the Rules which imposed a minimum income requirement on a spouse who was settled in the United Kingdom ('the sponsor') when a spouse who was outside the United Kingdom applied for entry clearance to join the sponsor. They claimed that the requirement was an unjustified interference with their article 8 rights. An interested party, a child, also claimed that in formulating the requirement, the Secretary of State had failed to comply with section 55. On appeal, the Supreme Court held that the changes did not

result in an unjustified interference with Convention rights. It held that section 55 imposed an obligation which was distinct from those imposed by the Human Rights Act 1998. The general statement that the duty had been taken into account in drafting the Rules was wrong in law. It was open to the Secretary of State to give detailed guidance in instructions to entry clearance officers, but it should be clear from the substance of provisions in the Rules themselves that section 55 had been 'properly taken into account'. The instructions did not adequately fill a relevant gap in the Rules. The Supreme 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.

37. At the dates which were relevant for the appeals in *MM*, the last sentence of paragraph GEN.1.1 of Appendix FM to the Rules was the same as it is now (see paragraph 18 of the judgment, and paragraph 59, below). Paragraph EX.1 was also in similar terms (see paragraph 21 of the judgment, and paragraph 62, below). There was material in the instructions to the entry clearance officers which dealt with the best interests of children, in the context of 'exceptional circumstances' and which suggested that a high threshold had to be met (judgment, paragraph 24).

38. In paragraphs 49 and 50, the Supreme Court referred to *Ali v Secretary of State for the Home Department* (see paragraph 27, above), to *R (Agyarko) v Secretary of State for the Home Department* [2017] UKSC 11; [2017] 1 WLR 823, and to *Alvi* (see also paragraph 27 above). It said that 'Section 1(4) [sc of the 1971 Act] gives authority to the Secretary of State to make rules as to the practice to be followed in the administration of the [1971] Act…' and that the 1971 Act is 'the modern embodiment of the powers previously exercised under the Royal prerogative, and now entrusted to the Secretary of State, who has constitutional responsibility under Parliament for immigration control and policy. The Rules are to be seen as "statements by the Secretary of State as to how she proposes to control immigration", the scope of that duty being defined by statute…'

39. In paragraphs 52-61, the Supreme Court considered how a provision of the Rules could be challenged on the grounds that it was a disproportionate interference with article 8 rights generally. It would be rare for a provision of the Rules not to be in accordance with the law, or not to pursue a legitimate aim. The question was likely to be whether the provision struck a fair balance between the rights of the individual and the interests of the community. The court would not strike down a provision unless 'satisfied that it was incapable of being operated in a proportionate way and so was inherently unjustified in all or nearly all cases' (paragraph 55).

40. In paragraph 77, the Supreme Court observed that any instructions given by the Secretary of State to entry clearance officers were relevant to the analysis because, either, 'on the one hand, they might so mitigate the effects of the Rules as to make them compatible with Convention rights when they would not otherwise have been so; on the other hand, they might, taken in conjunction with the Rules, serve to create or exacerbate the incompatibility'.

41. The Supreme Court dismissed the challenge to the minimum income requirement. It rejected, however, the Secretary of State's argument that the reference to the section 55 duty in paragraph GEN.1.1 was enough to show that the Rules complied with that duty (paragraphs 90-92) and that the instructions did not remedy that gap: 'Rather

than treating the best interests of children as a primary consideration, they lay down a highly prescriptive criterion…'. The statement in GEN.1.1 was 'wrong in law'. The gap was not filled by GEN.1.10-11, which referred to article 8, but not to section 55. 'This is not simply a defect in form, nor a gap which can adequately be filled by the instructions'. It should be clear from the Rules themselves that section 55 'had been properly taken into account.'

Convention rights

42. Section 1(1) of the HRA defines 'the Convention rights'. They are set out in Schedule 1 to the HRA (section 1(3)). They include articles 3, 8, 14 and A1P1. In interpreting Convention rights, a court must 'take into account' the materials listed in section 2(1) of the HRA.

43. Section 3(1) of the HRA imposes a duty 'So far as it is possible to do so' to read and give effect to primary and subordinate legislation in a way which is compatible with Convention rights. Section 3 does not affect the 'validity, continuing operation or enforcement of any incompatible primary legislation' or of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents the removal of the incompatibility (section 3(2)(b) and (c)).

44. Section 6(1) makes it unlawful for a public authority to act in a way which is incompatible with a Convention right. But section 6(1) does not apply if, '(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently, or (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to, or to enforce, those provisions' (section 6(2)). 'Public authority' includes 'any person certain of whose functions are of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament' (section 6(6)).

Article 3

45. Article 3 of the ECHR provides:

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

Article 8

46. Article 8 provides:

> *1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

Article 1 of Protocol 1

47. A1P1 provides:

> *Protection of property*
>
> *Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*

Article 14

48. Article 14 provides:

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

49. A claim based on article 14 requires the court to decide four questions.

    i. Do the circumstances 'fall within the ambit' of another Convention right?

    ii. Is there a difference in treatment between the claimant and another person whose situation is, in relevant respects, analogous?

    iii. Is the difference in treatment on the grounds of the claimant's status?

    iv. Is the difference in treatment objectively justified?

    See *In re McLaughlin's Application for Judicial Review* [2018] UKSC 48; [2018] 1 WLR 4250 at paragraph 15.

The Equality Act 2010

The discrimination provisions

50. Part 2 of the 2010 Act is entitled 'Equality: Key Concepts'. Chapter 1 is headed 'Protected Characteristics'. Section 4 lists the protected characteristics. They include race. Section 9(1)(b) provides that race includes 'colour, nationality' and 'ethnic or national origins'.

51. Chapter 2 is headed 'Prohibited Conduct'. Section 13 defines direct discrimination. Section 19 defines indirect discrimination. It provides:

> *'(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
>
> *(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—*

> *(a) A applies, or would apply, it to persons with whom B does not share the characteristic,*
>
> *(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*
>
> *(c) it puts, or would put, B at that disadvantage, and*
>
> *(d) A cannot show it to be a proportionate means of achieving a legitimate aim.'*

Section 19(3) provides that the relevant protected characteristics include race, among others. It is convenient for us to refer to 'a provision, criterion or practice' as 'a PCP'.

52. Section 23 is headed 'Comparison by reference to circumstances'. Section 23(1) provides 'On a comparison of cases for the purposes of section 13, 14 or 19, there must be no material difference between the circumstances relating to each case'.

53. Part 3 is entitled 'Services and Public Functions'. So far as is relevant, section 29 provides:

> *'....(6) A person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation...*

Section 31 is headed 'Interpretation and exceptions'. Section 31(4) explains that a 'public function' is 'a function that is a function of a public nature for the purposes of the Human Rights Act 1998'.

54. Schedule 3 is enacted by section 31(10): 'Schedule 3 (exceptions) has effect'. Part 4 of Schedule 3 is headed 'Immigration'. Paragraph 15A applies to age discrimination (paragraph 15A(1)). Section 29 does not apply to anything done by a relevant person in the exercise of relevant functions (in short, functions exercisable by virtue of the Immigration Acts) (paragraph 15A(2). Paragraph 17 of Schedule 3 applies to discrimination on grounds of nationality, or ethnic or national origins (paragraph 17(1)). Paragraph 17(2) provides that section 29 does not apply to anything done by a relevant person in the exercise of functions exercisable by virtue of a relevant enactment. It is common ground that the Decision and the NRPF scheme are the results of the exercise by relevant persons of such functions.

Section 149

55. Section 149(1) requires a public authority, when exercising its functions, to have 'due regard' to the equality needs listed in section 149(1). The focus of the parties' arguments was the need to eliminate indirect discrimination on the grounds of race. It was common ground that, for the purposes of section 149(1)(b), race meant 'colour' only (for reasons explained in the next paragraph but one).

56. There have been many decisions about section 149. It is not necessary to refer to any specifically. Three points are significant for the purposes of this case.

    i. Section 149 does not require a substantive result.

ii. It implies a duty to make reasonable inquiry into the obvious equality impacts of a decision.

iii. It requires a decision maker to understand the obvious equality impacts of a decision before adopting a policy.

57. Section 149(9) enacts Schedule 18. Paragraph 2 of Schedule 18 is headed 'Immigration'. Paragraph 2(1) provides that, in relation to the exercise of immigration and nationality functions, section 149(1)(b) has effect as if it did not apply to the protected characteristics of age, race, religious or belief, but for that purpose, 'race' only means 'race so far as relating to nationality or ethnic or national origins'. 'Immigration and nationality' functions are defined in paragraph 2(2). The phrase means, in effect, functions which are exercisable 'by virtue of' the immigration statutes there listed.

58. Section 149(2) provides that a person who is not a public authority, but who exercises public functions, must in the exercise of those functions, have due regard to the matters listed in section 149(2). Section 150(1) provides that a public authority is a person specified in Schedule 19. The House of Commons and the House of Lords are not specified in Schedule 19. Paragraph 4 of Schedule 18 is headed 'Exceptions that are specific to section 149(2)'. Paragraph 4(1) provides that section 149(2) does not apply to a person listed in paragraph 4(2) in respect of a function listed in paragraph 4(3). As a result, section 149(2) does not apply to House of Commons or to the House of Lords as respects 'a function in connection with proceedings in House of Commons or the House of Lords'.

The policy materials

Immigration Rules (HC 395), as amended

59. Paragraph 2 of the Rules states that Immigration Officers, Entry Clearance Officers and all staff in the Home Office 'will carry out their duties without regard to the race, colour or religion of persons seeking to enter or remain in the United Kingdom'.

60. Appendix FM (Family Members) replaces Part 8 of the Rules. It starts with a statement of its purpose (GEN.1.1). 'This route' is said to be for people who wish to enter or remain in the United Kingdom on the basis of their family life with, among others, a person who is a British Citizen, when the applicant cannot seek leave to enter or remain in the UK as their family member under Part 11 of the Rules. It sets out the requirements which must be met. It is also said to reflect how the balance will be struck between article 8 rights and the various legitimate aims which it lists. That is said also to reflect the public interest considerations in Part 5A of the 2002 Act. Finally, it 'also takes into account the need to safeguard and promote the welfare of children in the UK, in line with the Secretary of State's duty under section 55 of [the 2009 Act]'.

61. GEN 1.11A applies when entry clearance or LLR is granted as a partner, child or parent, under specified paragraphs of the Rules, including paragraph D-LTRPT.1.2, the paragraph under which C2's LLR was granted. Leave will

> *'normally be granted subject to a condition of no recourse to public funds, unless the applicant has provided the decision-maker with:*

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

62. Paragraph R-LTRPT.1 lists the requirements for LLR as a parent. They include that an applicant must meet all the requirements of Section ELTRPT: Eligibility for leave to remain as a parent (paragraph R-LTRPT.1.1(c)(ii)). Those eligibility requirements are listed under four headings in paragraphs E-LTRPT.2.2-5.2. They are relationship requirements, an immigration status requirement, financial requirements (see paragraph E-LTRPT.2.2-2.5) and an English language requirement. The financial requirements include, in short, that the applicant must provide evidence that he can adequately maintain and accommodate himself and any dependants without recourse to public funds, unless paragraph EX.1 applies. However, paragraph R-LTRPT.1(d) enables applicants who do not meet all the eligibility requirements referred to in paragraph (c) (in particular the financial requirement and the English language requirement) also to qualify for LLR if they meet the relationship requirements, the immigration status requirement, and paragraph EX.1 applies.

63. Paragraph EX.1 is headed 'Exceptions to certain eligibility requirements for leave to remain…as a parent'. It applies, in short, if the applicant has a genuine and subsisting parental relationship with a child who is in the United Kingdom and is a British citizen, and, taking into account the child's best interests as a primary consideration, it would not be reasonable to expect the child to leave the United Kingdom. The GCID notes in this case (see paragraph 17, above) show that the Secretary of State considered that this provision applied to C2.

64. In outline, paragraph D-LTRPT.1.1 provides that an applicant who meets the requirements in paragraph R-LTRPT.1.1(a) to (c) for limited leave to remain as a parent will be given LLR for up to 30 months. That LLR will be subject to a condition of no recourse to public funds. Such an applicant will be eligible to apply for settlement after a continuous period of at least 60 months of such LLR.

65. By contrast, paragraph D-LTRPT.1.2 provides, in sum, that if the applicant meets the requirements in paragraph R-LTRPT.1.1(a), (b) and (d) for limited leave to remain as a partner, the applicant will be given LLR for up to 30 months, and subject to a condition of no recourse to public funds unless the decision-maker considers, with reference to paragraph GEN.1.11A, that the applicant should not be subject to such a condition. Such an applicant will be eligible to apply for settlement after a continuous period of at least 120 months in the United Kingdom with such leave.

66. Paragraph E-ILRPT.1.3 of the Rules creates two routes to ILR as the parent of a child in the United Kingdom. The first is that the parent must have completed a continuous period of 60 months' LLR under paragraph R-LTRPT.1.1(a)-(c) (that is, it seems, meeting all the requirements of the Rules, including the financial requirements, and ignoring paragraph EX.1 (see above)). The second is that the parent who does not meet the financial requirements must have completed a continuous period of 120 months LLR (so long as he qualified for LLR during that period under paragraph GEN.3.2(3), which deals with exceptional cases, or paragraph EX.1). C2 was given LLR because she met the requirements of EX.1(a). The policy which emerges from

these paragraphs of Appendix FM is that in order to obtain settlement (ILR) in the United Kingdom as a parent of a British child, an applicant must either complete five years' LLR with no recourse to public funds, or ten years of LLR with the expectation of no recourse to public funds, but, nevertheless, with the possibility of such recourse.

67. We have quoted from paragraph GEN1.11A in paragraph 46, above. Its effect is that that those, like C2, who are on the ten-year route to settlement will nevertheless 'normally' be subject to an NRPF condition, unless satisfactory evidence of destitution or compelling reasons relating to the welfare of a child is adduced. There is no requirement or expectation in Appendix FM that LLR will be given subject to any conditions restricting an applicant's freedom to work. As Mr Kovats pointed out, the expectation that a NRPF condition will be imposed is explained by the fact that, unlike people who are given leave to enter as visitors, who may not work, and students, who have limited permission to work, applicants on the ten-year route to settlement are free to work.

Guidance to caseworkers

General points

68. The most recent guidance is Family Policy – Family Life (as a partner or parent), Private Life in Exceptional Circumstances (Version 13.0), as published on 28 January 2021. It is 96 pages long. Under the heading 'Purpose' the guidance says that it must be used for all decisions falling under certain specified provisions of the Rules, and for decisions outside the Rules 'on the basis of exceptional circumstances (private life)'. Under the heading 'Background' the guidance explains that since 9 July 2012, there has been a new framework for considering applications and claims engaging article 8 of the ECHR, that is, Appendix FM. Article 8 is quoted in full.

69. The guidance recognises that families will choose to stay in the United Kingdom because they consider it is in their best interests to do so. But they cannot do so unless the requirements of the Rules are met. Migration to the United Kingdom costs taxpayers money in the provision of education, benefits and the services of the NHS. Family life must not be established here at taxpayers' expense and migrants must be able to integrate if they are to play a full part in British life.

70. The guidance says that the Rules and the guidance on exceptional circumstances and children's best interests it contains are a clear basis for considering immigration cases so that decision makers can comply with ECHR article 8, as approved by the Supreme Court in *MM (Lebanon)* and *Agyarko*. The Rules reflect the qualified nature of article 8, setting requirements which properly balance the individual right to respect for private or family life with the public interest in safeguarding the economic well-being of the UK by controlling immigration, and in protecting the rights and freedoms of others.

71. The Rules also take into account the need to safeguard and promote the welfare of children. The duty in section 55 of the 2009 (which is described) and the relevant UN Convention mean that 'consideration of the child's best interests must be a primary consideration in immigration decisions affecting them. This guidance and the Immigration Rules it covers form part of the arrangements for ensuring that we give practical effect to these obligations'.

72. The guidance refers to Part 5A of the 2002 Act 'which sets out Parliament's view of what the public interest requires in immigration cases engaging the qualified right to respect for private and family life' under article 8. Part 5A is described. The public interest in the maintenance of effective immigration control and in family migrants being financially independent and able to speak English, as required by the relevant provisions of the Rules 'is now underpinned in primary legislation'.

LLR as a parent

73. Pages 34-46 deal with leave to remain as a parent. This section tells caseworkers 'how to consider applications under [the Rules] based on family life as a parent of a child in the United Kingdom'. It refers to the relevant provisions of Appendix FM. It explains that whether an applicant qualifies for LLR as a parent under the five-, or the ten-year route depends on whether all, some, or no, eligibility requirements are met. All the eligibility requirements must be met if a person is to qualify under the five-year route. The guidance then lists the ways in which a person can qualify under the ten-year route if they do not meet all the eligibility requirements. One of these is that the applicant meets some requirements and qualifies for an exemption from other requirements because EX.1(a) or (b) of Appendix FM applies (this case).

74. There is detailed guidance (pages 41-43) about the requirements to be met by a person applying as a parent. Pages 42-43 deal with the five-year route. A section on page 44 is headed 'Decision to grant…[LLR] as a parent'. A person who meets the requirements of paragraph R-LTRPT.1.1 of the Rules will be given LLR for not more than 30 months. Under paragraph GEN.1.11 and GEN.1.11A, such grants will 'normally be subject' to a NRPF condition, 'unless the applicant has requested otherwise and has provided satisfactory evidence that they are destitute, or 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, or satisfactory evidence that there are exceptional circumstances relating to the applicant's financial circumstances which, in your view, requires you not to impose a [NRPF condition]. For further guidance on the policy, see the following section of this guidance: recourse to public funds'. This part of the guidance accurately quotes paragraph GEN.1.11. The next sentence says that there is 'further guidance on the policy' in the next section of the guidance, 'recourse to public funds'. There is a hyperlink which is intended to take the reader to that section.

75. At page 48, there is a section which explains the purpose of paragraph EX.1. Where it applies, an applicant who does not meet all the requirements to qualify under the five-year route may be given leave under the ten-year route. The guidance asserts that 'The requirements of EX.1(a) reflect the duty in section 55 [of the 2009 Act] to have regard to the need to safeguard and promote the welfare of children, by which we mean their best interests, as reflected in case law, in particular, *ZH (Tanzania)…*'. The guidance continues, 'You must have regard to the best interests of the child as a primary consideration (but not the only or paramount consideration). They [sic] must fully consider the child's best interests'. The provisions of paragraph EX.1 are the quoted and explained.

76. In the section on 'Exceptional circumstances' which starts on page 67, the guidance refers to the judgment in *MM (Lebanon)*. That judgment is said to require that 'in circumstances where refusal of the application could otherwise breach ECHR article

8, we take into account other…sources of income… The court asked that Appendix FM give 'direct effect' to the Secretary of State's existing duties under section 55…and Article 3 of the UN Convention on the Rights of the Child, to take into account, as a primary consideration, the best interests of a child affected by an immigration decision'. It seems that the Rules were amended in response to *MM (Lebanon)*. The guidance then says that the restructured Appendix FM 'now provides a complete framework for our Article 8 decision-making in cases decided under it'.

77. There is then a section headed 'Overview' (page 69). This makes clear that when considering applications for leave from parents who do not meet the minimum income requirements, or who do not otherwise meet the requirements of Appendix FM, the decision maker must take into account, as a primary consideration, the best interests of any relevant child. The guidance makes the same point (twice) about decisions under paragraph GEN.3.1 of Appendix FM (page 71). A similar point is made four times on page 72 and once on page 73 in the context of entry clearance applications.

The best interests of a relevant child

78. Against that background, there is a section (pages 76-79), headed 'The best interests of a relevant child'. It is said to apply 'When making any decision which may affect the welfare of a child, but, in particular, when considering' two specified decisions (under paragraph GEN.3.1 of Appendix FM, whether refusal of an application when the minimum income requirement is not met could have unjustifiably harsh consequences or under paragraph GEN3.2 of Appendix FM whether refusal of an application which does not otherwise meet the requirements of Appendix FM or Part 9 would result in unjustifiably harsh consequences). In such cases, a decision maker 'must take into account, as a primary consideration, the best interests of any 'relevant child''. The guidance says that the changes to the Rules and their specific references to the best interests of a child 'do not change the substance of the consideration which section 55…has always required (and continues to require)'. The Rules and this guidance 'seek to underline that existing obligation'.

79. The guidance then refers to the role of the best interests of a child in the proportionality assessment under article 8, referring to two decisions of the Supreme Court (*ZH (Tanzania)* and *FZ (Congo)* [2013] UKSC 74) which explain that the best interests of a child must be a primary consideration, though not always the only primary consideration, and are not a paramount consideration, as they can be outweighed by others, such as public interest considerations.

80. The next section of the guidance is headed 'How to consider the best interests of a relevant child'. This refers specifically to 'the best interests of a relevant child as a primary consideration within the Article 8 decision-making process'. The guidance then explains that 'what matters is the substance of the attention given to the overall well-being of the child. That must be given distinct consideration, not simply regarded as an adjunct of the family life of their parent or parents'.

81. The guidance requires decision makers not to blame a child 'for any failure by their parent or parents to comply with UK immigration controls. The conduct or immigration history of their non-British citizen parent or parents is relevant to the public interest analysis, and must be given due weight in determining the overall proportionality of the decision under ECHR Article 8, but it does not affect the

assessment of the child's best interests or the need for those best interests to be taken into account as a primary consideration in the Article 8 decision'.

82. The guidance makes clear that the assessment of a child's best interests requires all the 'relevant factors in the particular case' to be considered. There is a 'non-exhaustive list of factors' relevant to the consideration of a child's best interests. It includes 'the child's nationality, with particular importance to be accorded to British citizenship where the child has this'. It also includes 'the family circumstances in which the child is living' and 'the physical circumstances in which the child is living'. The last factor is 'the extent to which the decision will interfere with, or impact on the child's private or family life.' The guidance makes clear that '…other factors may also be relevant in individual cases'.

Recourse to public funds

83. A further section in the guidance is headed 'Recourse to public funds'. It is divided into seven main relevant sections. First, the 'General' position is described. People who would like to establish their family life in the United Kingdom must do so in a way which does not burden the taxpayer and which promotes integration. One purpose of the changes to the Rules in 2012 is 'safeguarding the economic well-being of the UK, which is a legitimate aim under Article 8 …for which necessary and proportionate interference in Article 8 rights can be justified'. The guidance points out that the Rules are approved by Parliament. It refers to section 117B(3) of the 2002 Act, which shows that this policy has been endorsed in primary legislation.

84. The guidance then refers to Appendix FM:

> *'Paragraph GEN.1.11A provides the basis in the Immigration Rules for exceptions to the wider policy on migrants not having recourse to public funds.* ***In all cases where an applicant has been granted leave, or is seeking leave, under the family or private life routes the NRPF condition must be lifted or not imposed if an applicant is destitute or is at risk of imminent destitution without recourse to public funds****.' (original emphasis)*

85. The second main section is headed 'Criteria for the non-imposition or lifting of the no recourse to public funds condition code'. The guidance says that the onus is on an applicant to provide all of the information and evidence they would like the case worker to consider. That information and evidence must be provided with each application. Caseworkers are told that this does not necessarily mean new evidence, and explains why.

86. The guidance requires caseworkers to consider whether an applicant is 'currently destitute or at risk of becoming destitute imminently' in all cases in which LLR is granted as a parent under Appendix FM and in which the applicant specifically asks, either, that a NRPF condition is not imposed, or that such a condition be lifted. The guidance says that '**It is mandatory** not to impose, or to lift if already imposed, the [NRPF] condition code only where the applicant meets the requirements of paragraph GEN 1.11A of Appendix FM' in three cases (original emphasis). Those are where the applicant has provided evidence that he is destitute or at risk of becoming destitute imminently, without recourse to public funds; or where the applicant has provided evidence 'that there are particularly compelling reasons relating to the welfare of a

child on account of the child's parents' very low income', or where the applicant has established 'exceptional circumstances…which require the [NRPF] condition code not to be imposed or to be lifted'.

87. The guidance advises caseworkers to 'be prepared' to write to ask an applicant for more information if the circumstances 'suggest that further evidence is available that would lead to the NRPF condition being lifted or not applied' but the applicant has not provided it; but only if 'the case' would be refused or rejected without it. The guidance then repeats that 'It is mandatory not to impose, or to lift if already imposed, the condition of [NRPF] if an applicant is destitute or at imminent risk of destitution without recourse to public funds.'

88. The third main section is headed 'Destitution'. The guidance explains what is meant by destitution in this context. It refers to the definition of 'destitute' in section 95 of the 1999 Act. Section 95 provides that a person is destitute if they do not have adequate accommodation or any means of obtaining it (whether or not their other essential living needs are met); or if they have adequate accommodation or the means of obtaining it, but cannot meet their other essential living needs. The test is not based on money, so the caseworker 'can' take account of the applicant's individual circumstances. The guidance then explains, in some detail, how this test should be applied in practice. 'All the information and evidence provided about an applicant's individual circumstances (including those of any dependent family members) must therefore be taken into account' in deciding whether to lift, or to impose, a NRPF condition. The guidance then describes the support which an applicant might be receiving from the Secretary of State under section 4 of the 1999 Act, or from a local authority under the Children Act 1989, and the potential impact of the receipt of such support on a decision whether a NRPF condition should be imposed or lifted.

89. The fourth relevant section is headed 'Making a decision on the condition code'. If a caseworker decides that one of the relevant tests is met (see paragraph 85, above) a caseworker must not impose, or must lift, a NRPF condition. The guidance explains that an applicant whose LLR is subject to a NRPF condition may apply, during the currency of that LLR, and without charge, for the condition to be lifted. This section ends with this passage (emphasis in the original):

> *'**It is good practice to check before concluding consideration of an application where a specific request has been made for access to public funds that the risk of imminent destitution has been properly addressed**.'*

90. The fifth relevant section is headed 'Subsequent leave to remain applications'. If an applicant who has been granted LLR without a NRPF condition, or who has had such a condition lifted makes a further application for LLR, they are to be re-assessed when they make the later application. To be granted leave without a NRPF condition, the applicant must 'continue to evidence that without such support' he would meet the relevant tests (see paragraph 85, above). A previous grant of leave with recourse to public funds 'can be a strong indicator' of a continuing need for the NRPF condition not to be imposed, but it should not be automatic. Caseworkers should be satisfied 'on each occasion that access to public funds is permitted, that it is necessary in the light of this guidance'.

Instructions

91. On 21 April 2020, the Secretary of State issued 'OPI 949: Change of Conditions – exercising flexibility in requiring further additional evidence'. An OPI is intended to be an immediate, short-term instruction, which can be issued more quickly than other types of instruction. Although OPI 949 says, against the sidenote 'Review' that it will 'no longer to apply after 30 June 2020', Mr Burr, in his evidence for the Secretary of State, confirmed that it was still in force in March 2021.

92. Its summary describes OPI 949 as providing 'for decision makers to apply a more flexible approach to the evidence required when considering a Change of Conditions request'. It says that the onus is still on the applicant to provide sufficient evidence for a change of condition to be granted. The instruction recognises that it will be more difficult to provide such evidence in some cases than in others. Caseworkers are told that they can be flexible about asking for further evidence if repeated requests for evidence may lead to an applicant, or his dependants '**having to endure an unduly long period of destitution or risk of destitution**' (original emphasis) compared with applicants who make more straightforward applications.

93. 'Evidential flexibility means' that a caseworker may grant a request without asking for more information, if the caseworker is 'satisfied that reasonable evidence has been provided in the round and the application accurately reflects a need for recourse to public funds'. The cases in which a caseworker can be more flexible are then listed, with the qualification that the list 'is not exhaustive' but 'it is not expected that there will be many other types of cases' in which flexibility will be appropriate. Each case should 'still be considered on its own individual merits'. The types of cases listed are those in which, for example, an applicant may face immediate destitution (as defined in the guidance), or in which an applicant may find it difficult to get, or to keep, a job. There is no presumption that applications in such cases will succeed, but caseworkers should ask themselves whether they need more information. Flexibility can be displaced by other factors, such as 'intentional disposal of funds'.

The Policy Equality Statements

94. It is convenient now to summarise the Policy Equality Statements ('PESs') made by the Secretary of State, as they explain, from her perspective, the background to, and aims of, the NRPF scheme, which was introduced in 2012. They also provide a context for our consideration of the legal framework and of the legal arguments based on that framework.

The 2015 PES

95. On 6 April 2015 the Secretary of State produced a PES about the NRPF scheme. The PES described the background to the NRPF scheme. The aim of the policy was to strike the right balance under article 8 between the family life of applicants and the public interest in safeguarding the economic wellbeing of the United Kingdom by controlling immigration. It was important to note that all those affected by the policy have permission to work. There is a public interest in the financial independence of family migrants.

96. The PES considered all the protected characteristics, and though being a child is not a protected characteristic, the effect of the policy on children in accordance with section 55 of the 2009 Act. The NRPF scheme was applied to everyone equally, so there was no direct discrimination. The data about grants under the NRPF scheme in the

calendar year 2014 was considered. There were just over 11,000 grants of LLR in that year. A NRPF condition was imposed in 92% of cases. In 8% of cases, the condition was not imposed or was lifted. Caseworkers' views were sought about the possible reasons for some of the observed differences in the data.

97. The PES then considered the data by reference to each protected characteristic, including race (ethnic or national origins, colour or nationality).

98. Section 5 of the PES shows that a majority of each national group was granted LLR with a NRPF condition. Applicants from the Americas region were more likely to have the condition not imposed or lifted. 41% of those granted LLR were from Africa, and 37% from Asia. It was not known why the percentages varied from region to region. Caseworkers suggested that reasons unrelated to nationality, such as how many children an applicant had, or their level of education, were more likely to have an impact on the ability of an applicant to meet the terms of the policy. The policy took account of the individual circumstances of applicants regardless of race and nationality. Any factors applicants wished to raise with decision makers would be considered. 'Any applicant from any race or ethnic origins or nationality who meets the terms of the policy will have the NRPF condition code not imposed or lifted'. The Secretary of State had a discretion not to impose, or to lift the condition 'in light of the effect on their race, ethnic origins or nationality on their individual circumstances. Any representations made by the applicant would be given careful consideration. The author considered that the design of the policy, which requires decision makers to consider an applicant's individual circumstances, provided an adequate safeguard to deal with any adverse impact on the protected characteristic of race.

99. Section 9 of the PES deals with children in the United Kingdom. The available data did not cover children who depend on a parent's application. Being a child was not a protected characteristic, but the PES nevertheless considered the impact of the policy on children. The author also had regard to the section 55 duty. The policy provided protection for children who are in a family unit which is destitute (as defined). Any applicant affected by destitution could apply to have the condition lifted. The limb of the policy which referred to particularly compelling reasons having regard to the welfare of a child of a parent on a very low income who was not destitute enabled the Secretary of State to consider 'any and every representation made' in an individual case. The conclusion was that the design of the policy, which required decision makers to consider the applicant's individual circumstances, was an adequate safeguard to deal with any adverse impact on children, and 'allows' the section 55 duty to be considered in every case.

100. The conclusion of the 2015 PES was that the 'available data and anecdotal information from caseworkers do not demonstrate that there is any direct or indirect discrimination arising from the NRPF policy'. The policy was designed to take into account all relevant individual circumstances of an applicant and of his or her dependants. It provided for the exercise of discretion in individual cases.

101. On 6 March 2019, the Secretary of State agreed to settle *R (M and A) v Secretary of State for the Home Department* CO/4615/2018. The facts were very similar to the facts of this case, and the grounds of challenge were also similar. As part of that settlement, the Secretary of State agreed to produce a review of the NRPF policy which complied with section 149 of the 2010 Act.

The 2020 PES

102. The 2020 PES again described the NRPF scheme. A relevant part of the context was that a NRPF condition was imposed on many other categories of migrant and that it was authorised by primary legislation. The purpose of the PES was to assess whether the NRPF scheme met the requirements of sections 28-31 of the 2010 Act. Regard had been had to the Secretary of State's obligations under section 149. The PES also considered whether the NRPF scheme fulfilled the duty imposed by section 55. Section 3 explained why the PES was being produced. It referred to the 2015 PES. Since then there had been changes to the legislation and to the Rules. The 6 March 2019 consent order was referred to, which included a commitment by the Secretary of State to review the NRPF scheme in compliance with section 149. That started with an audit of files between April and June 2019, which led to some recommendations. It was also decided to produce the PES.

103. 240 case files were reviewed from applications made in 2018/19. They were chosen at random. The data was at Annexe A. The NRPF scheme was also discussed in regular meetings during 2019 and early 2020 with the children and young persons' sub-group. The stakeholders who took part are listed in section 4 of the PES. The initial findings of the review were discussed, as were the subsequent findings that followed the exercise described in paragraphs 120 et seq below. The PES gives links to Parliamentary debates about the NRPF scheme on 19 March and 9 July 2019.

104. Section 5 of the PES explained that the section 29 duty did not apply to the preparation, making or considering of an Act of Parliament or changes to the Rules, or to race discrimination relating to nationality or ethnic or national origins in the exercise of functions under immigration legislation or the Rules. Section 149 and the exceptions in Schedule 18 were summarised. The PES assessed the NRPF scheme against those duties, taking the relevant protected characteristics in turn. The context was people with LLR under the 10-year route. 'This requires consideration of all the relevant family members, not just the applicant for' LLR.

105. The PES then described the NRPF scheme. A NRPF condition is imposed on many migrants, because, in the view of Parliament and of the Secretary of State, it is in the public interest, in short, because those who are financially independent are not a burden on taxpayers and are better able to integrate. Those considerations are reflected in primary legislation and in the Rules. All those granted leave under the five-year route are subject to a NRPF condition. The 10-year route is available to those who do not meet the requirements of the five-year route but whose circumstances are such that it would be a breach of article 8 to refuse them entry clearance or LRR. They will have an NRPF condition imposed, or not, in accordance with the policy. 'Fairness in the treatment of different classes of migrant would be undermined if those who do not meet the requirements of the [Rules which impose a mandatory NRPF condition] were allowed access to public funds without restriction, or if the Policy did not reflect [many provisions of primary and secondary legislation] which, with specified exceptions, disentitle persons subject to immigration control to specified public funds.' Such a condition encourages people to ensure that they can support themselves and their children. Those on both routes can apply to have the condition lifted. The fair balance between the individual applicant and the interests of society which article 8 requires is relevant to the duty imposed by section 149 and to what is a proportionate means of achieving a legitimate aim for the purposes of the 2010 Act.

106. The PES then summarised the effect of section 29 of the 2010 Act. It does not apply to decisions made under immigration legislation on the grounds of nationality or ethnic or national origins, nor to any PCP based on a person's place of ordinary residence, or to the length of time she has been present in or resident in or outside the United Kingdom. The NRPF condition did not discriminate directly on the grounds of any relevant protected characteristic. The NRPF scheme is a PCP. It applies equally to all those who do, and who do not, share the relevant protected characteristic. The PES considered, in the context of each relevant protected characteristic, whether the PCP placed any applicant or family member at a particular disadvantage when compared with others who did not share that characteristic and whether, if so, that was justified.

107. The PES noted that for the purposes of section 29, 'race' means 'colour'. The Secretary of State does not collect data about colour. The PES noted the effect of the 2015 statistics (see paragraphs 95 and 97, above). The vast majority of applicants were from Africa and Asia. The 2019 study also showed that a high proportion of applicants were from Africa and Asia. 'We do not know why the proportion of applicants granted recourse to public funds varies by region'. The PES repeated the conjecture made in the 2015 PES. Nationality did not seem to be a significant factor in the grant rate, with the exception of applications from nationals of Bangladesh. There was no obvious reason for that.

108. The Secretary of State was confident that 'the Policy takes account of the individual circumstances of applicants regardless of race or nationality'. Colour was not recorded on application forms, and 'any impact on a person of colour will be because of immigration status'. Because most applicants were Ghanaian or Nigerian, and because their children would share their identity, 'there is a disproportionate impact on adults and children sharing the characteristic of being in this particular racial group'. Nevertheless, if the applicant had specific circumstances relating to their race which they believed affected their financial circumstances, those would be considered by the decision maker, who would be able to allow recourse to public funds. There was no evidence that the NRPF scheme put people of colour at a particular disadvantage; but if it did, the NRPF scheme pursues legitimate aims and is a proportionate way of achieving those.

109. Under the heading 'Section 149(1)(a); eliminating discrimination etc', the PES again describes the NRPF scheme, pointing out that when LLR is given under the 10-year route, the NRPF condition can be 'imposed, not imposed, or lifted once imposed'. The NRPF scheme pursues legitimate aims. It enables people to stay in the United Kingdom even though they do not meet the requirements of the five-year route. It is applied on a case-by-case basis. The evidence provided by the applicant is considered.

110. In this context, section 149(1)(a) does not apply to discrimination based on age, or to discrimination based on nationality or ethnic or national origins. The Secretary of State had nevertheless considered 'in depth the particular situation of British citizen children, and, in particular, black British children of migrant parents…as raised by external stakeholders'. There is a material difference between the circumstances of the two sets of British children; that is, that their parents either are, or are not, within the scope of the NRPF scheme. 'The treatment in question is under the Policy and that is treatment which is applied to the parent and is based on the parent's immigration status. The difference in impact on these distinct groups of children is therefore justifiable because of the difference in status of the parents and because the policy

itself is pursuing a legitimate aim in a reasonable, proportionate and objective way'. Children benefitted in practice because parents with children were more likely to have the condition lifted, or not applied, than adults who are not parents. The revised application form has a place for identifying grounds relating to the particular needs of a child and the parents' low income.

111. There was data in 2014 for cases in which the applicant was a child, but not for cases in which children depend on a parent's application. The 2019 review collected data from applications in which a child was included. Applicants with children were more likely to have the condition lifted. 46% of applications for a change of condition were made by applicants with a British child. Applicants with children tended to be women, and those without children, men. There is a material difference between the circumstances of British children who are, and who are not, within the scope of the Policy. The treatment under the Policy is applied to the parent and is based on the parent's immigration status. The public interests described above are repeated. They apply equally to those whose children are British citizens and to those whose children are not. The comparison with the British children of British citizens or of those with settled status was misplaced. Those subject to the treatment by the immigration system are the parents, who are not British citizens and do not have settled status, but who are subject to immigration control.

112. The difference in impact on 'these distinct groups of children is therefore justifiable because the policy itself is pursuing a legitimate aim in a reasonable, proportionate and objective way'. In fact, evidence suggested that the policy was less likely adversely to affect a British citizen child when compared with a non-British migrant child. The other parent of a British citizen child one of whose parents was subject to NRPF scheme was likely not to be subject to immigration control, and to have access to public funds. An in-depth review in 2019 collected data on that point. Sometimes the parent who had access to public funds did not provide for the child. That would put the British child on an unequal footing with other British children. The difference in treatment is based, not on the child's national origins but on the immigration status of the parent who is caring for him or her. But if, in individual cases, the criteria for imposing (or for lifting) the condition are not, or are, met, as the case may be, no NRPF condition will apply. 'In all the circumstances, the application of the NRPF condition with respect to those who do not fulfil the criteria for the lifting of the NRPF condition is, prima facie, considered to be the justified and proportionate consequence of the lawful objectives pursued by the Policy'.

113. The PES explains that the Secretary of State reviewed, in depth, 280 cases in the course of 2019 in which the applicant asked for the NRPF condition to be lifted. This was considered important because 'even if not discriminatory, the policy in practice has a part to play in preventing children being subject to …destitution'. 46% of change of condition applications were made by applicants with a British child. The grant rates for applicants with children were significantly higher than for applicants without children. The grant rate for women with children was much higher than the grant rate for men with children. This could be explained by a range of factors, including that women were more likely to have jobs with lower pay.

114. The authors also considered whether the Policy complied with section 55. It protected children who were in a family unit which is, or would be, rendered destitute, or which would foreseeably become destitute, or there are particularly compelling reasons relating to the welfare of a child of a parent with a very low income. This could apply

to a parent with a very low income, even if their essential living needs were met and they had accommodation. If a parent could not provide those, the parent would qualify not to have the condition imposed, or to have it lifted.

115. Concerns about the impact of the NRPF scheme on children had led the Home Office to strengthen guidance for caseworkers on that point and to change the application form. Anyone who met the terms of the Policy exceptions would have the NRPF condition lifted (or not imposed). The circumstances of individuals and of members of their families were taken into account. It was likely that the data indicated that the Policy was providing appropriate protection for applicants with children.

116. The Home Office had been told anecdotally that many children of parents who were subject to a NRPF condition were supported by local authorities under section 17 of the Children Act 1989. Parents can also be supported under section 17. This was less satisfactory than access to public funds. The Home Office would make this clear in new guidance. The Home Office would continue to draw the inference that, where this support is provided, the family would be destitute without it. No separate assessment would be needed before the NRPF condition was lifted.

117. It had not been possible to find evidence to support the concern expressed by stakeholders that in practice the policy has a disproportionate impact on black single mothers of British children. There were no statistics which would enable that to be tested. The policy applied to single mothers of British children who lack the requisite immigration status, regardless of their colour. There was no evidence that, when imposed, a NRPF condition 'impacts distinctly upon a person depending on the colour'.

118. The Home Office was looking for ways to reinforce the way in which the section 55 duty was given effect by decision makers. The guidance could make clear that mothers with small children may be unlikely to spend enough time working to be able to meet the costs of accommodation and essential living needs. The application form was being changed. The Home Office hoped, by 'a combination of making the application form and process more straightforward and greater emphasis on the section 55 duty's role in preventing destitution' to be better able 'to address the needs of children in a non-discriminatory way whilst maintaining the chief aim of the Policy'. The 'available evidence indicates that the Policy helps to eliminate discrimination…because it provides a route to settlement which strikes a fair balance between the interest of an individual applicant and her family members on the one hand and the interests of society on the other'.

119. The PES also considered the equality aims listed in sections 149(1)(b) and (c).

120. It concluded that the imposition of a NRPF condition on the grant of LLR was a 'fair and practical way' of ensuring migrants could support themselves and their children without 'the country's limited resources, provided by its ordinary residents, being overwhelmed or suffering deficit through incoming migration'. Any negative impacts of the policy were mitigated by appropriate measures. It was for the applicant to provide the necessary evidence, but since February 2019, the Home Office had been writing to applicants to ask for missing information. If an applicant's circumstances changed, they could apply, for free, for the condition to be lifted. The application form was now available on-line and had been changed by the addition of free-text boxes so that applicants could explain if they could not provide evidence.

121. On 27 January 2020, the Secretary of State sent to various stakeholders a document summarising the key findings of the review (Annexe B). Views were sought on a number of potential improvements to the NRPF scheme. The document was also sent to the Cs' solicitors. All the responses were taken into account in the PES. Annexe C to the PES gives 'further details of the evidence base'. It starts by summarising the evidence considered in the 2015 PES. It then described the more recent work. That showed that applications were refused because applicants did not provide enough information. That led the Secretary of State to decide to introduce changes to the process so as to ensure, among other things, that caseworkers were trained to consider destitution and actively asked for missing information rather than simply refusing applications, and introducing an assessment of the likelihood of destitution in the near future.

122. Under the heading 'Discussion with caseworkers', Annex C repeated that the policy was part of a framework which protects the economic wellbeing of the United Kingdom by requiring that applicants have a level of income which means they do not need support from welfare benefits. 'An adult migrant applicant for leave to remain under the parent or partner route, whether the parent of a British citizen child or not, will always either be subject to a NRPF condition or in the position of needing to demonstrate why it should not be applied in their case. In discussion with caseworkers, we found that quite often applications were rejected on the basis that the information provided was incomplete and did not demonstrate the need for access to public funds'. As a result of those discussions, the process had been changed so that the caseworker would ask an applicant for missing information, so that people who did not provide complete information were not automatically excluded from the application process.

123. Annexe C then summarises discussions with stakeholders, including the eight questions which they were asked in a document sent to them on 27 January 2020, and a summary of their responses. Views were divided on whether more information about children should be sought.

124. Question six is headed 'Impact on British children'. It says that the Secretary of State knows the views of some stakeholders on this question and felt that 'this should be acknowledged in a consultation document sent to them'. That was that the NRPF scheme 'although applied to migrant parents, affects British citizen children of those parents when compared to other British citizen children. Views were expressed that the parent's (which was most often the mother's) immigration status should not be determinative of whether one British child can access benefits (including Child Benefit) and another British child cannot. The Unity Project provided views on the impact of this aspect of the policy on black British children. That concern was noted. As explained on page 17 of the PES, that did not come within the scope of the equality duty, and no change was being considered. A more specific consideration of the impact on all children would be introduced to ensure that the section 55 duty was not overlooked.

Submissions

125. We will consider the submissions in the following order:

    i. the PRCBC statutory construction ground

    ii. the section 55 PRCBC ground

iii. the 2010 Act ground

iv. the section 149 ground

v. the article 14 ground

vi. the article 3 systemic ground

vii. the article 3 investigative ground.

The PRCBC statutory construction ground

126. The Cs contend that the NRPF scheme, which is a policy only, cannot lawfully cut down statutory entitlements to benefits. It is a principle of statutory construction that statutory rights cannot be cut down by subordinate legislation. That principle applies a fortiori when a policy is used to cut down statutory entitlements. They contend that the NRPF scheme converts a power to impose an NRPF condition into a 'duty to do so in all cases where LLR is granted under the ten-year route'. By doing so, the executive, it is said, has legislated its own further exceptions to the statutory entitlement to UC which Parliament has not scrutinised or approved.

127. The Cs rely, first, on *R v Secretary of State for Social Security ex p JCWI* [1997] 1 WLR 275. That case concerned the relationship between the regime for income support (which was mainly in delegated legislation) with the statutory right to appeal against the refusal of an asylum claim. Simon Brown LJ held that the effect of changes to that regime, which deprived some asylum seekers of income support, in some cases made the statutory right of appeal 'nugatory', and contemplated for some asylum seekers 'a life so destitute that no civilised nation can tolerate it'. He said that the human rights at issue were so basic that it was not necessary to invoke the ECHR. He referred to the 'law of humanity' recognised in *R v Inhabitants of Eastbourne* (1803) 4 East 103, 107. He decided that the changes to the relevant regulations were ultra vires because 'rights necessarily implicit' in the statutory appeal regime were 'inevitably overborne'. Waite LJ held that the practical effect of the changes was to make 'their ostensible statutory right to a proper consideration of their claims in this country valueless'. He agreed, for the reasons given by Simon Browne LJ, that the regulations were unlawful.

128. The Cs also rely on the *PRCBC* case. In that case, the claimants challenged the fee charged for the registration of a child as a British citizen. The claimants argued that the fee, which was set in delegated legislation made under the primary legislation which conferred the right to registration, was set at a level which was so high as to nullify the statutory right to register a child as a British citizen. The Court of Appeal dismissed that challenge.

129. In paragraph 61 of his judgment in that case, David Richards LJ said in cases in which it is argued that delegated legislation 'has illegitimately curtailed rights conferred by primary legislation' the question is whether 'on a proper construction of the primary legislation, and, if different, the primary legislation under which the subordinate legislation has been made, the delegated legislation was authorised in the terms that it was made'. He observed that in a case in which the relevant power is in 'separate and unconnected primary legislation, it is highly likely, perhaps inevitable, that the power contained in the unconnected legislation will not authorise the making of subordinate legislation that curtails a right conferred by other primary legislation'. At paragraph 121, Singh LJ said 'the *JCWI* principle' was not limited to cases in which the primary

legislation conferring the right and the primary legislation which was said to authorise delegated legislation which removed the statutory right were different. 'If there is a conflict between primary legislation and secondary legislation, it is the latter which must give way'. He had made a similar point in paragraph 28 of his judgment in *R (Al-Enein) v Secretary of State for the Home Department* [2019] EWCA (Civ) 2024; [2020] 1 WLR 1349.

130. The Secretary of State argued that this principle is not engaged on the facts of this case. The amendment made to section 115 of the 1999 Act by the 2012 Act showed that the primary legislation was connected. Section 115 referred expressly to a NRPF condition. For that reason, and because the grant of leave subject to a NRPF condition was authorised by section 3 of the 1971 Act, it was wrong to characterise the NRPF scheme as mere policy. This was not, therefore, a case in which the executive had purported to remove a right conferred by primary legislation by a mere policy, and did not engage the principles of statutory construction on which the Cs relied.

The PRCBC section 55 ground

131. Mr Goodman's first point was that, in this sphere, the level of family income provided by UC was in a child's best interests. UC pitched entitlement, and the level of benefit provided, at a notch above what was necessary to avert destitution, which is the test imposed by the NRPF scheme for access to benefits. It would hardly ever be in a child's best interests not to have the benefits provided by UC. The material provisions of the Rules and of the Guidance did not refer to the best interests of a relevant child, and the tests they contained were not an accurate proxy for a structured and lawful consideration of those interests. Mr Kovats submitted, in short, that this was a different case from *MM (Lebanon)*, that the NRPF scheme was more flexible, and that its language enabled caseworkers to comply with section 55.

The 2010 Act ground

132. The Cs argued that the PCP in this case was the exercise of the power conferred by section 3(1)(c) of the 1971 Act so as to impose NRPF conditions on grants of LLR to the parents of British children with the effect of denying their enjoyment of UC, in particular, to which 'they are otherwise entitled'. The explanation for this choice of PCP is the assertion that some foreign nationals with British children are denied recourse to public funds by statute, but parents such as C2 are denied such recourse by 'the Secretary of State's exercise of discretionary powers as supplementary to the framework prescribed by statute'. The relevant protected characteristic is 'colour'.

133. The comparator chosen by the Cs for the purposes of section 19(2)(a) and (b) is 'white British children dependent on [UC]'. The Cs argue that that comparison complies with section 23 by *eliminating* 'material differences' between the two groups (our emphasis). The Cs accept, however, that the choice of the appropriate comparator is for the tribunal or court which decides the discrimination complaint. The aim is to find a pool of comparators 'in which the specificity of the allegation can be realistically tested' *Grundy v British Airways Plc* [2007] EWCA Civ 1020; [2008] IRLR 74, paragraph 31. The Cs submit that three characteristics of C1's case must be 'neutralised' in order to test whether there is discrimination on the grounds of colour. These are that he is British and has a right of abode in the United Kingdom, that he is a child, and that his welfare depends on his 'enjoyment' of UC. Thus it is that C1 should be compared with a white British child whose parent is entitled to UC. The Secretary of State cannot justify the indirect discrimination which results because the

Secretary of State has not accurately identified the discrimination in issue, and so cannot balance the impact of the discrimination against the importance of the policy. The Secretary of State could have taken less intrusive measures, such as making exemptions for British citizen children.

134. The Secretary of State submits that there are two flaws in the Cs' argument.

    i. The Secretary of State does not apply any PCP to C1. The PCP, as defined by the Cs, is applied to C2. It is C2, not C1, who would be entitled to benefits in the absence of a NRPF condition.

    ii. The Cs have chosen the wrong comparator. For there to be no material difference between the cases of the Cs and of the comparators, the relevant pool must be people whose LLR under the ten-year route is, or may be, subject to a NRPF condition. There is no evidence that in this pool, non-white applicants are at a particular disadvantage to white applicants. The fact that most of those who are subject to a NRPF condition are black is uninformative, as it seems to reflect the characteristics of those who are granted LLR on the ten-year route.

135. The Secretary of State accepts that if the first two arguments are wrong, the NRPF condition puts C1 at a disadvantage. Mr Kovats submits, however, that the PCP can be justified. The broad legitimate aims are preventing burdens on the taxpayer and promoting integration. The four-stage test in *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39; [2014] AC 700 is met. He relies on paragraph GEN.1 of Appendix FM to the Rules, the passages in the guidance which explain the justification for the NRPF scheme, the 2020 PES, paragraph 32 of *R (HC) Secretary of State for Work and Pensions* [2017] UKSC 73; [2019] AC 845 and paragraphs 54-62 of *R (NS) v Secretary of State for the Home Department* [2014] EWHC 1971 (Admin). He also relies on passages in the witness statements of Mr Burr and Mr Gallagher. He points out that to 'dis-apply' the NRPF condition in the case of parents of non-white children would be unlawful direct discrimination on the grounds of colour. Disapplying it in the case of parents of British children would be direct discrimination on grounds of nationality.

136. Mr Goodman's response to the Secretary of State's first argument was to rely on *Ministry of Defence v DeBique* [2010] IRLR 471, a decision of the Employment Appeal Tribunal ('the EAT') (Cox J and lay members). The claimant was a serving soldier from St Vincent and the Grenadines. She was required to be available for duty 24 hours a day, seven days a week ('24/7'). She then had a baby. She arranged less onerous duties with her unit. Her child-care responsibilities clashed with her duties and this led to disciplinary action. She wanted to bring her sister ('S') from St Vincent to care for her baby. S could only enter the United Kingdom as a visitor under the Rules, and could only stay for 6 months. Army policy forbade Commonwealth soldiers to bring adult relatives to the United Kingdom to care for their children. The approach of the army was that that policy reflected the Rules, which were a matter for the Secretary of State (for the Home Department).

137. The claimant resigned. She brought an indirect discrimination claim. The Employment Tribunal ('the ET') held that the 24/7 requirement was a PCP which put women soldiers, who were more likely to be single parents with child-care responsibilities, at a disadvantage, but that, in isolation, it was justified. The ET also held that the disadvantage was made worse by the fact that, unlike British nationals,

the claimant could not have an adult relation to live with her and help her. The ET described this as 'the immigration PCP'. The respondent was the same constitutional entity as the Secretary of State and could not escape responsibility by arguing that it did not make the Rules. The immigration PCP put single parents who were Vincentian nationals at a particular disadvantage compared with British single parents. The ET held that the respondent had not justified the immigration PCP, or the combined effect of the immigration PCP and of the 24/7 PCP, and had indirectly discriminated against the claimant on the grounds of her sex and race.

138. Mr Goodman relied on paragraphs 139-142 of the EAT's judgment in support of a submission that section 19 covers a PCP which is applied, not to the claimant, but to another person. In those paragraphs the EAT was considering an argument by the appellant employer that the ET erred in holding that the immigration PCP was applied to the claimant. The employer submitted that the immigration PCP was not applied to the claimant, but could have applied to S if she had applied for entry clearance. The EAT considered the argument, despite a dispute about whether it had been put to the ET. The ET had found as a fact, with reasons, that the immigration PCP was applied to the claimant. They concluded that it affected the claimant directly and indirectly. It applied directly because it was the employer's policy and the employer applied it to the claimant. The EAT said that 'this finding' (which must mean the finding that the PCP was directly applied to the claimant) was open to the ET on the evidence and unimpeachable. The EAT expressly said that there was no need, therefore, for it to consider arguments based on the concept of associative discrimination.

The section 149 ground

139. Mr Goodman's case was that the Secretary of State, in formulating and continuing the NRPF scheme, had failed to have 'due regard to the differential impacts of the policy of British children of foreign parents; on non-white British children, and on single mothers and their children' and thus failed to have 'due regard' to 'the public sector equality duty'. There were two aspects of this breach: a failure to inquire, and a flawed assumption that the NRPF scheme should continue.

140. The PES showed that more than half of NRPF conditions were imposed on nationals of countries from sub-Saharan Africa. Nearly half the applications to change conditions were by single mothers of British children and almost all of those applications were granted. It could be inferred that black and non-white British children are inherently more likely to be subject to NRPF conditions than white British children. That, in turn, meant that they were more likely to be subject to the consequences of the NRPF scheme, such as extreme poverty, street homelessness, interrupted schooling, and inadequate accommodation, food, clothing and other necessities. He criticises the Secretary of State's admitted failure to keep statistics about the colour of applicants. The Secretary of State acknowledged disproportionate impacts on Ghanaians and Nigerians, but her response '[there is no] evidence that the …NRPF condition, when imposed, impacts distinctly on a person because of their colour' was irrational. The option of applying for a change of conditions was a symptom, not a cure. There can be indirect discrimination even if there is no causal connection between the protected characteristic and the treatment complained of (*Essop v Home Office* [2017] UKSC 27; [2017] IRLR 558 at paragraphs 24 and 25).

141. The section 149 duty had not been complied with when NRPF scheme was adopted. The PES took the continuation of the NRPF scheme for granted. It also made an

unlawful comparison between people who were all subject to the policy, rather than comparing those to whom the policy applied with those who were entitled to benefits.

142. Mr Goodman outlined his oral argument succinctly. He contended that section 149 imposes a duty of inquiry on a public authority and a duty to understand the obvious equality impacts of a policy before adopting it. The weight that could be given to the PES was lessened by the fact that it was done after the event. It showed that there was a disproportionate impact by reference to colour, since it could be inferred that the majority of British children affected by the NRPF scheme are black or brown. The numbers of white British children who were affected by the NRPF scheme were very small, whereas the disproportionate numbers of black or brown British children are affected by it.

143. The PES did not analyse this impact at all by examining the difference which the policy makes to people. That was straightforward: those to whom the policy did not apply received statutory benefits and those to whom it did apply did not. The PES did not do that; it simply jumped straight to a defence which relied on a legal submission. It did not inquire into the impact of the policy. The choice of pool of comparators and the approach to justification were influenced by the litigation. The policy was taken as an ineluctable fact, mitigated by the discretion not to apply the NRPF condition. That was the wrong approach.

144. Mr Kovats submitted that the PES spoke for itself. It should be read as a whole. Its authors knew about the background: the NRPF scheme had been upheld by the Administrative Court in *NS* (see paragraph 134, above), and there had been a PES in 2015. Taken as a whole, the PESs discharged the section 149 duty.

The article 14 ground

145. This claim, like the indirect discrimination claim, relied on the fiction that C1 receives benefits, although as Mr Goodman pointed out, other article 14 claims about benefits have been brought by children before. The Cs have two broad arguments. First, they contend that C1's enjoyment of benefits is not being secured without discrimination on grounds of national or social origin. Their second contention is that the Decision treats C1 in the same way as foreign children when, because he is a British citizen with a right of abode in the United Kingdom, he should be treated differently from foreign children to whom immigration controls apply. For this claim, the Cs compare the British children of British parents and the British children of parents who are not British. Both groups are children, and British, but one group is denied access to public funds and the other is not.

146. Mr Goodman relied on *R (Morris) v Westminster City Council* [2005] EWCA (Civ) 1184; [2006] 1 WLR 505. In one of the appeals, the applicant was a British citizen, but her dependent child was not. The Court of Appeal upheld a declaration that section 185(4) of the Housing Act 1996 was incompatible with the respondent's article 8 rights. Section 185(4) required the local housing authority to ignore, when deciding whether the mother had priority need for housing, the presence in her household of her daughter, 'a person from abroad who was not eligible for housing assistance'. He submitted that the case showed that there was a distinction between immigration status and nationality, that discrimination on the grounds of nationality required weightier justification, and that the discrimination in that case was not justified. It was a close analogy with this case.

147. Mr Kovats relied on *Bah v United Kingdom* (2012) 54 EHRR. The applicant in that case also challenged section 185(4). She, however, was not a British citizen. Neither was her son. She had ILR. He had been admitted to the United Kingdom on a NRPF condition. Although the relevant legislation was amended in response to the decision of the Court of Appeal in *Morris*, the old, unamended provisions applied in this case (judgment, paragraph 39). There was no differential treatment if the appropriate comparator was a British citizen with a child who was subject to immigration control (judgment, paragraph 41). It was not necessary to decide whether a more appropriate comparator was a parent with ILR who had a child who would count under section 185(4) (judgment, paragraph 42). The European Court of Human Rights ('the ECtHR') noted that neither member of the Court of Appeal in *Morris* expressly decided whether nationality was the sole ground of the difference in treatment in that case. The ECtHR decided that 'another in a relevantly similar position' was the unintentionally homeless parent of a child not subject to immigration control. It held that the reason for the difference in treatment was the immigration status of the applicant's son (and the fact that his leave to enter was subject to a NRPF condition). It was the son's conditional legal status and not his national origin which resulted in his mother's treatment under the housing legislation (judgment, paragraph 44).

148. Immigration status could be 'another status' for the purposes of article 14 (judgment, paragraph 45 and 46). Immigration status is not immutable. It involves an element of choice. A difference in treatment based on immigration status does not require as weighty a justification as a difference based on nationality. The subject matter of the case, the provision of housing to those in need, was 'predominantly socio-economic in nature'. The margin of appreciation was therefore 'relatively wide' (judgment, paragraph 47). It is open to states to limit access to a benefit, when the available supply does not meet demand, by 'certain categories of aliens' (judgment, paragraph 49). The domestic legislation was clear and was not arbitrary. It was justifiable to differentiate between those who relied for their statutory priority on a member of their household who was in the United Kingdom unlawfully, or subject to a NRPF condition, and between those who had no such person in their household (judgment, paragraph 50).

149. Mr Kovats submitted that *Bah* was a closer analogy to this case than *Morris*. He further submitted that if there was any differential treatment, it was justified.

The article 3 systemic ground

150. This ground, as originally pleaded, has now been overtaken by the decision of the Divisional Court in *W*. As amended, this ground is a complaint that in the Rules and/or the guidance the Secretary of State has not set up a system which sufficiently recognises the urgency of decisions in cases in which applicants ask for a NRPF condition not to be imposed, or for one to be lifted. The Cs accept, in paragraph 114 of their re-amended grounds, that 'It is not for the Court to legislate or to dictate policy and it is not asked to do so'; yet they ask for a declaration that the NRPF scheme 'contains insufficient safeguards against subjecting people affected to inhuman treatment contrary to article 3 ECHR and the law of humanity in that they fail to ensure that applications are determined in timescales commensurate with those duties'.

151. The Secretary of State accepts (detailed grounds, paragraph 99) that every deserving case must be dealt with properly and efficiently. None of the cases relied on by the

Cs in this context establishes that a policy such as NRPF scheme should contain set time limits. The evidence of Mr Burr (and, we would add, the material referred to in the 2020 PES) shows that the Secretary of State is alive to the need to make decisions quickly, and that the Secretary of State has taken steps to improve the speed with which decisions are taken. Mr Burr explains, in his evidence, that the Secretary of State considered whether to introduce a definition of 'at risk of imminent destitution', but decided not to. The Secretary of State submits that this contributes to 'fact-sensitive and compassionate application of the policy by caseworkers and the prioritisation of urgent cases'.

The article 3 investigative ground

152. Mr Goodman argued that the circumstances were such as to trigger a positive investigative duty imposed by article 3. The circumstances were that the NRPF scheme had been going for eight years 'without respect for article 3 rights'. The claimant in *W* might have been the victim of ill treatment breaching article 3. Such an inquiry must be able to compel witnesses, to hold public hearings and to provide funding for legal representation.

153. He referred to one case, *R (MA and BB) v Secretary of State for the Home Department* [2019] EWHC (Admin) 1523. That case concerned the conduct of officers employed by G4S to supervise the detention of immigrants detained in Brook House Immigration Removal Centre. A television programme showed undercover footage of 'appalling' scenes showing the physical and verbal abuse of detainees (summarised in paragraph 23 of the judgment). The claimants made further allegations about the treatment they had suffered (summarised in paragraphs 24-26).

154. The claimants brought applications for judicial review challenging the failure of the Secretary of State to order an investigation which complied with article 3. The Secretary of State did not dispute that the duty had been triggered (judgment, paragraphs 4, 6, 7 and 38), but argued that it had been discharged by various separate inquiries. The Secretary of State eventually decided to commission an investigation by the Prisons and Probation Ombudsman ('PPO'). By the time of the hearing, the dispute concerned the powers which should be conferred on the PPO to facilitate that investigation. The claimants argued that the PPO should have powers to compel witnesses, to have some hearings in public, and to pay for legal representation for the claimants.

155. The Secretary of State argued that nothing in *W* or in *MA and BB* supports the argument that the Secretary of State has a duty to investigate the operation of the NRPF scheme during the period of its operation.

Discussion

The statutory construction PRCBC ground

156. Mr Goodman's submission is that the 2012 Act confers on a single claimant an unqualified statutory right to UC. The UC regime is complex. Entitlement does not simply depend on whether a single claimant meets the basic and financial conditions. The amendment of section 115 of the 1999 Act by a provision of the 2012 Act (see paragraph 30, above) shows that enacting the 2012 Act, Parliament unarguably also intended that a person to whom section 115 applies should not be entitled to UC. Moreover, Parliament intended that the mechanism which could remove any

entitlement was a decision by the Secretary of State to impose a NRPF condition. That is enough, we consider, to enable us to reject Mr Goodman's submission. The fact that the imposition of a NRPF condition is independently authorised by different primary legislation reinforces that conclusion. It is lawful for a decision maker to have a published policy about how, in the general run of cases, he proposes to exercise a broad statutory discretion. That is what the NRPF scheme is. That does not insulate the NRPF scheme from challenge. Such a policy may be intrinsically unlawful. Grounds 1 and 6 argue that it is, and we consider those separately.

The PRCBC section 55 ground

157. In fairness to the Secretary of State, we have set out or summarised a great deal of material from the Rules and the associated guidance. We consider, first, the position under Appendix FM. 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.

158. There was some debate in skeleton arguments and in oral submissions about the test we should apply when considering this ground. 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 (cf approach of the Supreme Court in *MM (Lebanon)* to the issue on which the claim in that case succeeded).

159. 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 (which refers to *ZH (Tanzania)* and to *FZ (Congo)*). Instead, while it refers to a child, it imposes a different, more stringent and narrower test than the approach in either of those cases. 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.

160. We have considered carefully whether the extensive guidance mitigates this deficiency. Our first observation is that it is unlikely to, because (if paragraph GEN.1.11A is designed to achieve compliance with section 55) it is a misdirection, as it substitutes a different test for the test in section 55. That observation is reinforced by the fact that the section of the guidance which deals specifically with the NRPF condition simply repeats the test in paragraph GEN.1.11A (see paragraph 76, above),

as does the section of the guidance which deals with decisions to grant leave (see paragraph 73, above).

161. We have asked ourselves whether other provisions in the guidance can displace the approach to the NRPF condition which is mandated by paragraph GEN.1.11A and by the two passages in the guidance to which we have just referred. Detailed consideration of the guidance reinforces our sense that paragraph GEN.1.11A is not intended to achieve compliance with section 55, because, in many other different places, the guidance accurately states the general effect of section 55. The difficulty with the guidance, however, is that its many references to section 55 are all in the context of decisions whether or not to grant LLR, rather than in the context of the distinct decision which is relevant in these cases, that is, the decision whether to impose or to lift an NRPF condition. This difficulty is compounded by the factors we mention in the previous paragraph. We have also asked ourselves whether the general statements in the guidance (see paragraphs 70 and 76, above) that section 55 applies to all decisions can displace these factors. As a matter of clear English, when ranged against the provisions of the guidance which deal with the NRPF condition, they cannot. It is perhaps significant, but not, of course, by any means decisive, that the view of the author of the 2015 PES was that the guidance 'allowed' the section 55 duty to be considered in every case (but did not require it).

The 2010 Act ground

162. The Secretary of State's first objection to this claim is well founded. There is no doubt that the PCP is applied to C2, and not to C1. There is also no doubt that the Cs discrimination claim relies on indirect discrimination against C1, not against C2. We consider that an indirect discrimination claim (which, by definition, is itself a claim of an indirect effect) cannot get off the ground if the person who makes the claim is not the person to whom the PCP is applied. *DeBique* does not support Mr Goodman's argument. The EAT's use of the word 'indirectly' in paragraph 141 of its judgment, when describing an alternative finding of the ET, the lawfulness of which was not at issue on the appeal, is not even a slender peg on which to hang a submission that a claimant to whom a PCP is not applied can bring a claim for indirect discrimination.

163. The Secretary of State's second objection to this claim is also sound. We consider that Mr Goodman's design of the comparison ensures, not that there are no material differences between the claimant and any comparator, but that it achieves the result Mr Goodman aims at. C2's immigration status is not factored into the design of the pool at all. His comparison is not between a non-white child whose parent is not British and is subject to immigration control, but between all non-white British children who (or rather, whose parents) are entitled to UC and all white British children whose parent are entitled to UC.

164. The purpose of this stage of the analysis is to test whether the PCP is discriminatory 'in relation to' a relevant protected characteristic of 'B'. Section 19 tests this by asking whether the PCP puts 'B', the person with a relevant protected characteristic, at a 'particular' disadvantage when compared with someone who does not have that protected characteristic. The Cs rely on 'colour' as a protected characteristic because it is the only protected characteristic which is potentially available in this legislative scheme as the basis of an indirect discrimination claim. This PCP may appear to put the Cs at a particular disadvantage when compared with white people who are entitled

to UC; but it also puts the Cs at a particular disadvantage when compared with black people who are entitled to UC. We do not consider that the PCP is discriminatory in relation to the Cs' colour. It is related, rather, to C2's immigration status.

165. There are at least two linked material differences between white British children whose parents are entitled to UC and non-white British children whose parents are not entitled to UC because they have been given LLR subject to a NRPF condition. First (and here we also question the design of the PCP), as we analyse the legislative scheme, parents in the position of C2 are not entitled to UC. Second, the reason why they are not entitled to UC is a consequence of their immigration status, and the imposition of a NRPF condition on their leave. We consider that this comparison, far from enabling us realistically to test the specific allegation, overlooks, or ignores, more relevant comparator groups, and thus prevents the allegation from being tested realistically. It seems to us that the most useful comparison is with white British children of non-British parents who are on the ten-year route to ILR.

166. If we are wrong, and there is any indirect discrimination, we consider that it is objectively justified, applying the test in section 19(2)(d) of the 2010 Act (see paragraph 50, above). There are nine main reasons.

i. The discrimination (if any) on grounds of colour is an accidental product of the fact that large numbers of those who are on the ten-year route, and therefore liable, or subject, to a NRPF condition, are from countries in Africa and Asia.

ii. Parliament has taken the view (expressed in the closely analogous context of Part 5A of the 2002 Act) that it is in the public interest that people who wish to stay in the United Kingdom should be financially independent, because they are not a burden on taxpayers, and are better able to integrate into society. This is part of the legitimate aim.

iii. The relevant parts of Appendix FM of the Rules (which are subject to disapproval by Parliament) express the same legitimate aim.

iv. The ten-year route has been explicitly designed to respect the article 8 rights of the parents of British children who do not meet the financial criteria in the five-year route, and the article 8 rights of those British children, by enabling those parents to stay in the United Kingdom, even though they do not meet the criteria. This is also part of the legitimate aim.

v. The imposition of a NRPF condition creates an incentive to find, and to keep, a job. This is also part of the legitimate aim.

vi. Parents on the ten-year route are entitled to work, although, in reality, particularly if they are single mothers, their ability to work may be limited in practice by their need to look after their child or children.

vii. The potentially harsh effect on of a NRPF condition on parents and children is mitigated by two linked factors.

1. The condition is not automatically, but rather, 'normally' imposed. If a parent and child are (or may imminently become) destitute, the parent can ask for the condition not to be imposed.

2. If the parent's circumstances change, she can apply to have the condition lifted.

These mitigations, which the parent can invoke at any time, mean that the imposition of the NRPF condition is a proportionate means of achieving the legitimate aims we have just described.

viii. As described in the 2020 PES, the Secretary of State has adapted the process so as to ensure that caseworkers actively ask for information and consider destitution and imminent destitution. This helps to make the NRPF scheme a proportionate means of achieving a legitimate aim in practice. We do not underestimate the difficulty of administering the NRPF scheme, nor the likelihood that, in reality, some decisions may not always be made as quickly as is desirable, but the day-to-day management of NRPF scheme is for the Secretary of State, not for the court.

ix. For completeness, we do not consider, in the context of our approach to this case, that whether or not, and if so, to what extent, Parliament has examined, or approved, the NRPF scheme is relevant to whether or not it is objectively justified.

167. One of Mr Goodman's complaints is that the threshold for access to UC for parents on the ten-year route is different, and harsher, than it is for parents who are entitled to UC. In reality, that is an argument for giving such parents the same entitlement to UC as parents who are settled. Whether they should have that entitlement is a policy choice for Parliament and for the Secretary of State, not for the court.

The section 149 ground

168. The focus of this part of the Cs' case was the risk of indirect discrimination. We have summarised the PESs at some length. The PESs are conscientious attempts to consider the equality impacts of the NRPF scheme. The officials concerned made reasonable efforts to find out information. They consulted caseworkers and stakeholders (repeatedly). They noted that the majority of those on the ten-year route were from Africa and Asia, but were unable to find out why. They noted that colour was not a criterion for the imposition of a NRPF condition. They considered the available data by reference to each protected characteristic. The 2020 PES reflected an audit of 240 case files, and consideration of 280 cases in which an application to lift an NRPF condition had been made. The authors considered that the design of the policy enabled decision makers in an individual case to mitigate adverse effects, if any, which might be associated with the protected characteristic of race. The Secretary of State was entitled to conclude that any impact on a person was because of his or her immigration status, and not because of his or her colour. The Secretary of State was aware of a disproportionate impact on the children of Nigerian and

Ghanaian citizens. The Secretary of State specifically considered the position of black British children of non-British parents, which had been raised by stakeholders.

169. In his written submissions, Mr Goodman described the policy as a policy that a NRPF condition would be imposed 'in all cases'. What he meant was that the condition would be imposed in all cases in which it was lawful to impose it. The policy is that such a condition will 'normally' be imposed. Appendix FM also provides for the cases in which it will not be. The NRPF scheme applies to applicants for, and holders of, LLR, who are permitted to work. For the reasons explained at length in the guidance, and in the PESs, the Secretary of State considers that the NRPF scheme is justified, broadly, on economic grounds. It saves the taxpayer money, and gives an incentive, to applicants who are permitted to work, to support their families by getting a job, rather than by relying on benefits.

170. For the reasons given above, we consider that any indirect discrimination claim fails, not least because the policy is objectively justified. We therefore consider that, subjectively, and objectively, the Secretary of State was entitled to take the view in the PES that the NRPF scheme does not give rise to a risk of indirect discrimination. We also consider, having read the PESs that, whether or not, when she introduced the NRPF scheme in 2012, the Secretary of State had the regard which was due to the listed equality needs, the PESs show that she has now complied with section 149. That makes it unnecessary for us to decide whether the assumption in the 2020 PES that section 29 does not apply to the making of the Rules is correct. It might appear questionable in the light of the status of the Rules (see paragraphs 26 and 27, above). For completeness, we should also say that as the PESs fully considered the NRPF scheme, we do not need to decide whether the exceptions to section 149 we summarise in paragraph 57, above, apply to the making of the Rules. For similar reasons, our provisional view is that they do not.

171. Before we leave this ground, we will briefly mention two further points. Mr Goodman criticised the Secretary of State for not keeping statistics about the colour of applicants for LLR. We consider that this criticism is misconceived. Applicants would, rightly, ask why it is necessary to collect such information, all the more so given the statement in paragraph 2 of the Rules which we have quoted in paragraph 58, above. He also criticised a passage in the 2020 PES (see paragraph 107, above) which refers to specific circumstances relating to race affecting an applicant's financial circumstances. We agree with him that this passage reads oddly at first sight. It seems to us that the point being made is that, in the unlikely event that there was such an effect, the policy was flexible enough to enable a decision maker to mitigate it.

The article 14 ground

172. The parties agree that the claim is within the ambit of article 8. We do not consider that we need to decide whether it is also within the ambit of A1P1. We consider, as did the ECtHR in *Bah*, that it is not clear that the Court of Appeal in *Morris* did decide that the basis of the treatment of the respondent and her daughter was solely the daughter's nationality (see paragraphs 36, and 50-52 of the judgment of Sedley LJ and 82 of the judgment of Auld LJ). At best, Sedley LJ was prepared to say, 'if contrary to my preferred approach, it is necessary to decide' the ground of the distinction drawn by section 184(5), it was that 'but for the child's non-British

nationality, Mrs Morris would have been recognised as having a priority need for accommodation'.

173. *Gaygusuz v Austria* (1997) 23 EHRR 364 was followed both by the Court of Appeal in *Morris* and by the ECtHR in *Bah*. It is clear from paragraph 42 of the judgment in *Gaygusuz* that it is only a difference in treatment which is based exclusively on the ground of nationality which must be justified by 'very weighty reasons'. The real basis of the decision of the majority of the Court of Appeal in *Morris* was that, whatever test of justification was applied, the difference in treatment in that case, which might put pressure on British citizens with children who were not British citizens to leave the United Kingdom, was not justified.

174. In this case, any difference in treatment is not based on the nationality of either of the Cs, still less, solely on their nationality. It is squarely based on the immigration status of C2, and, in particular, on the fact that, as a result of the NRPF scheme and the Decision, her LLR was subject to a NRPF condition. It is not necessary for us to resolve differences between the parties about who the relevant comparator might be. We consider, for reasons similar to those which led us to decide that the NRPF condition was a proportionate means of achieving a legitimate aim, that the imposition of the NRPF condition was justified under article 14.

The article 3 systemic ground

175. The relevant arguments were summarised and considered by the Divisional Court in *W*. At that stage, the relevant provisions of the Rules and the guidance which we have summarised were similar, except that they did not refer to the risk of imminent destitution. The Divisional Court held that the test to be applied when considering 'a challenge to legislation including [the Rules] which are treated by [the HRA] as subordinate legislation, the challenger must show that the legislation is, as Hickinbottom LJ put it in *JCW1 2*, "incapable of being operated in a proportionate way in all or nearly all cases" ' (judgment, paragraph 56). The Divisional Court also noted, by contrast, that in order to succeed, a challenge to guidance only had to show that there was a significant number of cases in which the guidance would lead to a breach of Convention rights' (judgment, paragraph 57). We see no reason to apply a different test in this case.

176. This led the Divisional Court to ask whether the NRPF scheme as a whole gave rise to a real risk of unlawful outcomes in 'significant' or 'more than minimal number of cases', and, if so, whether that risk could be cured by amendments to the guidance alone (judgment, paragraph 59). Section 3(1)(c) of the 1971 Act does not expressly authorise the Secretary of State to impose or maintain a NRPF condition when 'the applicant is suffering inhuman or degrading treatment by reason of lack of resources or will imminently suffer such treatment without recourse to public funds' (judgment, paragraph 61). The Divisional Court, having analysed Appendix FM and the guidance, could not find any message to the effect that the Secretary of State was legally obliged not to impose, or to lift, the NRPF condition where the applicant was at imminent risk of inhuman or degrading treatment without access to public funds (judgment, paragraphs 66 and 68).

177. The Secretary of State has given effect to the decision of the Divisional Court, not by amending paragraph GEN.1.11A of Appendix FM, but by amending the guidance. It is clear from the judgment of the Divisional Court that it considered that amendment to the guidance, without any amendment of the Rules, could be sufficient to ensure

compliance with article 3. We consider that the amendments to the guidance meet the concerns expressed by the Divisional Court in *W*. It seems to us that the guidance makes clear to caseworkers that the NRPF condition *must* be lifted or not imposed if an applicant is destitute or *is at risk of imminent destitution* without recourse to public funds (our emphasis). We consider that the definition of 'destitution' in the guidance is clear enough. The words 'at risk of imminent destitution' are ordinary English words which a caseworker can understand without further elaboration. Mr Goodman's main criticism of the guidance was that it did not ensure, in practice, that claims were dealt with fast enough. The guidance is already long, defensive, and repetitive, perhaps in response to court decisions. There is a limit to the extent to which the court can prescribe the way in which the Secretary of State should be required to explain ordinary English words to caseworkers. We consider that that limit has been reached, and that the guidance, as amended, meets the legal test set by the Divisional Court in *W*, and adequately conveys the caseworkers that cases must be dealt with promptly.

Article 3 procedural ground

178. We are not persuaded that *MA and* BB, or any of the cases referred to in *MA and B,* gives any relevant guidance about a case like this one. This is not a case in which there is evidence of any intentional breaches of article 3, such as physical and verbal abuse. That seems to us to be an important distinction between this case and *MA and BB*. We do not consider it arguable that a section 3 investigative duty has been triggered by the fact that the policy has been operated for several years in a way which may well have led to breaches of article 3 because applicants have had to wait longer than they should have had to in order to be given recourse to public funds. The policy has been found to have been unlawful, and that has been corrected. That means that the purposes which, it is said, would be served by an article 3 investigation, could not be usefully served in this case. There is no 'culpable and discreditable conduct to expose to public view', for example; there are no covert 'processes to be discovered or rectified', and there are now no relevant lessons to be learnt. We dismiss this ground of challenge.

Conclusion

179. We have reached four broad conclusions for the reasons we have just given.

    i. We grant permission to apply for judicial review of the Decision.

    ii. The Decision should be quashed.

    iii. The NRPF scheme does not comply with section 55 of the 2009 Act, for the reasons given in paragraphs 157-161, above.

    iv. We dismiss the Cs' remaining grounds of challenge.

180. We will consider the parties' further written submissions about relief and other consequential matters, and resolve any disputes without a hearing, unless we decide that a further hearing is necessary.