Neutral Citation Number: [2022] EWHC 1524 (Admin)

Case No: CO/1001/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/06/2022

Before :

THE HON. MR JUSTICE LANE

- -

Between :
Queen on the Application of

(1) (AB)
(2) OK (by her litigation Friend and Mother AB)
(3) MKD (by his litigation Friend and Mother AB) **Claimants**

- and –

Secretary of State for the Home Department **Defendant**

- -
- -

Mr A Goodman (instructed by **Deighton Pierce Glynn**) for the **Claimant**
Mr J Holborn (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 18 May 2022

- -

Approved Judgment

Judgment Approved by the court for handing down.

Mr Justice Lane :

JUDGMENT

A. THE ORIGINAL CHALLENGE

1. This judicial review originally concerned a challenge to the defendant's decision of 9 February 2022 (as confirmed on 24 February 2020, following administrative review) not to lift the condition on AB's grant of limited leave to remain, preventing AB from accessing public funds (the "NRPF condition").

2. In addition to challenging those decisions, the judicial review seeks to challenge the continued existence, at least in its present form, of paragraph GEN.1.11A of Appendix FM to the immigration rules and the associated guidance published by the defendant. It is the challenge to GEN.1.11A which gives the High Court jurisdiction in respect of the judicial review: see the Consolidated Direction of Lord Chief Justice given in accordance with Part 1 of Schedule 2 to the Constitutional Reform Act 2006 and section 18 of the Tribunals, Courts and Enforcement Act 2007 (21 August 2013, as amended on 17 October 2014).

3. On 23 March 2022, Hill J ordered a rolled-up expedited hearing.

4. As originally pleaded, Ground 1 contends that the defendant's guidance *Family Policy: Family life (as a partner or parent), private life in exceptional circumstances* - version 16.0 (7 December 2021), which informed the February 2022 decisions, unlawfully fails to reflect the defendant's obligations under section 55 of the Borders, Citizenship and Immigration Act 2009 (duty regarding the welfare of children). Section 55 requires the defendant to make arrangements for ensuring that (amongst other things) any functions of hers in relation to immigration, asylum or nationality, are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom. The same criticism is made of GEN.1.11A, as to which the Divisional Court in R (ST and another) v Secretary of State for the Home Department [2021] EWHC 1085 (Admin) declared on 29 April 2021 that this paragraph of Appendix FM was unlawful because it did not comply with section 55, for the reasons given in paragraphs 157-161 of the court's judgment.

5. For the claimants, Mr Goodman questions why, despite the Divisional Court's declaration, GEN.1.11A has not been amended by the defendant, who has only relatively recently placed an amended provision before Parliament for consideration in June 2022.

6. Ground 2 contends that it was irrational and/or unlawful for the February 2022 decisions to be taken without regard to relevant evidence, policy guidance and Article 3 of the ECHR.

7. Ground 3 asserts that the defendant breached her common law duty of procedural fairness and/or took into account irrelevant considerations, in reaching her decisions. Both Ground 3 and Ground 4 involve issues concerning the nature of the requests made by the defendant's caseworkers for information concerning the living conditions and financial circumstances of the claimants; and the defendant's response to the information which the claimants did see fit to provide.

B. THE CHANGED LANDSCAPE

8. For reasons which I will explain, Grounds 2 and 3 do not fall for consideration in the present judgment.

9. By the date of the hearing on 18 May, matters had moved on at pace. The defendant withdrew the February 2022 decisions, conceding that they had been unlawfully made, in that due regard had not been given to the defendant's policy concerning evidential flexibility. The defendant contends that the challenge to the February 2022 decisions is now to be treated as academic. The claimants disagree.

10. On 16 May 2022, the defendant made a new decision in respect of the NRPF condition. A few hours later, that decision was superseded by another decision of the same day, which accordingly represents the only truly "live" decision of the defendant in these proceedings.

11. The second decision of 16 May addresses the most recent evidence provided by the claimants concerning their living conditions. At the defendant's request, the claimants had provided photographic evidence of their accommodation.

12. On 17 May, the claimants made an application to amend their claim, so as to encompass a challenge to the first decision of 16 May (the second decision not having then appeared). At the hearing on 18 May, Mr Goodman spoke to this application, asking me to treat it as also now relating to the second decision of 16 May.

13. For the defendant, Mr Holborn's initial stance was that I should confine myself to the arguability of the challenge to the second decision of 16 May and that the challenge was, on analysis, not arguable. In essence, the claimants had not provided the information sought by the defendant.

14. I am in no doubt that, in the circumstances of this case, there can be no principled objection to the application to amend the grounds so as to encompass the decision-making of 16 May 2022. In R (Turgut) v The Secretary State for the Home Department [2001] 1 WLR 719, the Court of Appeal held that where, on an application for permission to apply for judicial review, the Secretary of State has been given permission to adduce evidence that he has made a new decision in light of the evidence filed by the applicant, but that decision is to the same effect as the first one, it will generally be convenient to substitute the new decision for the first decision, as the decision challenged in the proceedings.

15. Similarly, in Caroopen v Secretary of State for the Home Department [2017] 1 WLR 2339, the Court of Appeal held that there was nothing inherently wrong in the defendant deploying, in legal proceedings challenging the validity of her decision on an application for leave to remain, supplementary letters post-dating the challenge. Accordingly, the court could in principle take such supplementary letters into account in determining that challenge. The matter, however, was, intensely fact-sensitive in nature and would depend on the particular circumstances.

16. It is nevertheless important not to allow an amendment in respect of a different decision to effectively "short-circuit" the judicial review process by depriving a defendant of the opportunity they would otherwise have to see off the claim on the basis that it is

unarguable. Effectively accepting this point, Mr Goodman submitted that, given that Hill J had ordered a rolled-up hearing, I could properly address the challenge in Ground 1 to the 16 May decision-making, in relation to the challenge made in respect of GEN.11.1A and the guidance (16.0), by reference to the alleged failures to comply with the duty under section 55 of the 2009 Act. This challenge to the rules and guidance had been a feature of the claimant's case throughout and there could, therefore, be no procedural unfairness to the defendant if the court were to determine this issue. If the defendant's decision-making fell to be impugned as a result, then there might be no need to consider the other grounds of challenge, concerning the evidence requested and supplied. If, on the other hand, I were to find in favour of the defendant in respect of the section 55 issue, a further hearing would be necessary to adjudicate upon the other grounds of challenge.

C. SCOPE OF THIS JUDGMENT

17. Having indicated my provisional view that this approach was appropriate, Mr Holborn sought instructions and argued the matter on this basis. Accordingly, this judgment deals with (i) the continued presence of GEN.1.11A, in the light of the judgment in ST; (ii) the legality of the guidance in relation to section 55; and (iii) the effect of both of these matters on the defendant's decision-making as to whether the NRPF condition should be lifted in respect of AB, with consequent effects on OK and MKD.

18. The defendant's rationale for NRPF being the "default" position in cases of those, like AB, who have been granted limited leave to remain by reference to Article 8 of the ECHR is articulated in the second decision of 16 May 2022, as follows:-

> "Those seeking to establish their family life in the UK must do so on basis that prevents burdens on the taxpayer and promotes integration. This reflects the public interest in safeguarding the economic well-being of the UK, which is a legitimate aim under Article 8(2) of the European Convention on Human Rights in qualifying the exercise of the right to respect for private and family life.
>
> Under Appendix FM, limited leave under the five-year partner or parent route, as a bereaved partner or as a fiancé(e) or proposed civil partner will be granted subject to a condition of no recourse to public funds.
>
> In all other cases in which limited leave is granted as a partner or parent and Appendix FM, or in which limited leave on the grounds of private life is granted under paragraph 276BE or paragraph 276DG, or in which limited leave is granted outside the rules on the grounds of family or private life, leave will be granted subject to a condition of no recourse to public funds".

19. The statement in the rules of when this "default" position will not apply is contained in GEN.1.11A. This reads as follows:-

> "GEN.1.11A. Where entry clearance or leave to remain as a partner, child or parent is granted under paragraph D-ECP.1.2.,

> D-LTRP.1.2.,D-ECC.1.1., D-LTRC.1.1., D-ECPT.1.2. or D-LTRPT.1.2., it will normally be granted subject to a condition of no recourse to public funds, unless the applicant has provided the decision-maker with:
>
> (a) satisfactory evidence that the applicant is destitute as defined in section 95 of the Immigration and Asylum Act 1999; or
>
> (b) satisfactory evidence that there are particularly compelling reasons relating to the welfare of a child of a parent in receipt of a very low income."

D. CASE LAW ON SECTION 55

20. In ST, the Divisional Court (Laing LJ, Lane J) held that GEN.1.11A was unlawful, in that it did not refer to the best interests of the relevant child, but instead imposed a different, more stringent and narrower test based on "particularly compelling reasons relating to the welfare of a child…"

21. For present purposes, the relevant paragraphs of the judgment are as follows:-

> "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)."

22. It is necessary to see the judgment in ST in the context of the wider case law regarding section 55.

23. In ZH (Tanzania) v Secretary of State for the Home Department [2011] 2 WLR 148, the Supreme Court held that any decision within the ambit of section 55 which was taken without having regard to the need to safeguard and promote the welfare of any child would not be "in accordance with the law" for the purposes of Article 8 (2) of the Convention and that the defendant was required to treat the best interests of a child as a primary consideration, by first identifying what the best interests required, and then assessing whether the strength of any other consideration, or the cumulative effect of other considerations, outweighed the child's best interests. In assessing best interests, a child's British nationality would be of particular importance, besides being relevant in deciding whether it would be reasonable to expect the child to live in another country.

24. In Zoumbas v Secretary of State for the Home Department [2013] UKSC 74, Lord Hodge, giving the judgment of the Supreme Court, endorsed the legal principles set out by counsel for the appellant, with which counsel for the Secretary of State did not disagree:-.

> "(1) The best interests of a child are an integral part of the proportionality assessment under article 8 ECHR;
>
> (2) In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration;
>
> (3) Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant;
>
> **(4) While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order**

> **to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play;**
>
> **(5) It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations;**
>
> **(6) To that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an article 8 assessment; and**
>
> **(7) A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent**." (My emphasis).

25. In Nzolameso v City of Westminster Council [2015] 2 All ER 942, the Supreme Court held, in the context of the duty regarding children in section 11(2) of the Children Act 2004, that the duty regarding a child's best interests required an authority "to have regard to the need to promote, as well as to safeguard, their welfare" (paragraph 27). As an individual rights holder, the child must have their interests considered "in their own right, and not just as adjuncts to other people's rights": Makhlouf v Secretary of State for the Home Department (Northern Ireland) [2017] 3 All ER1 at paragraph 47.

26. In MM (Lebanon) and others v Secretary of State for the Home Department and another [2017] UK SC 10, the Supreme Court took into consideration the approach to best interests taken by the Grand Chamber of the European Court of Human Rights in Jeunesse v The Netherlands (2015) 60 EHRR 17; in particular, the statement at paragraph 109 of the latter court's judgment that although a child's best interests cannot be decisive, they certainly must be afforded significant weight.

27. In R (Project for the Registration of Children's as British Citizens) and others v the Secretary of State for the Home Department [2019] EWHC 3536 (Admin), Jay J allowed a challenge to the legality of the defendant's statutory instrument, setting fees for applications by children to register as British citizens. For the avoidance of doubt, the Court of Appeal [2021] 1 WLR 3049 dismissed the Secretary of State's appeal against Jay J's decision on section 55 of the 2009 Act. There was a further appeal to the Supreme Court on a separate point [2022] 2 W.L.R. 343.

28. Although agreeing with the defendant that the position fell to be addressed "at a reasonably high level of generality", the judge found that nowhere in the "voluminous papers before me" had the defendant identified where the best interests of children seeking registration lay. In particular, nowhere had she:-

> "begun to characterise those interests properly, as identified that the level of fee creates practical difficulties for many (with some attempt being made to evaluate the numbers); and has then said that wider public interest considerations, including the fact that the adverse impact is to some extent ameliorated by the grant for leave to remain, tilts the balance". (paragraph 112).

29. At paragraph 116, Jay J summarised the section 55 duty as follows:-

> "116. Section 55, in contrast to article 3(1) of the UNCRC, only possesses a procedural dimension. By that I mean that a breach is established if it be demonstrated that the Secretary of State has failed to have regard to the best interests of the child, being a convenient way of summarising what the section actually says".

E. R(A) V SECRETARY OF STATE FOR THE HOME DEPARTMENT

30. Since ST was decided, the Supreme Court has handed down an important judgment concerning the test to be applied in determining whether a policy is unlawful by reason of what it says or does not say about the law, in giving guidance for others (such as, here, the defendant's caseworkers). In R (A) v Secretary of State for the Home Department [2021] UKSC 37, the Supreme Court drew heavily on what the House of Lords had said in Gillick v West Norfolk and Wisbech Area Health Authority [1986] AC 112:-

> "38.In our view, Gillick sets out the test to be applied. It is best encapsulated in the formulation by Lord Scarman at p 181 F (reading the word "permits" in the proper way as "sanction" or "positively approve") and by adapting Lord Templeman's words: does the policy in question authorise or approve unlawful conduct by those to whom it is directed? So far as the basis for intervention by a court is concerned, we respectfully consider that Lord Bridge and Lord Templeman were correct in their analysis that it is not a matter of rationality, but rather that the court will intervene when a public authority has, by issuing a policy, positively authorised or approved unlawful conduct by others. In that sort of case, it can be said that the public authority has acted unlawfully by determining the rule of law in a direct and unjustified way. In this limited but important sense, public authorities have a general duty not to induce violations of the law by others.
>
> …
>
> 40.There are further reasons which indicate that this is the appropriate standard. If the test were more demanding there would be a practical disincentive for public authorities to issue policy statements for fear that they might be drawn into litigation on the basis were not sufficiently detailed or comprehensive. This would be contrary to the public interest, since policies often serve useful functions in promoting good administration. Or public authorities might find themselves having to invest large sums on legal advice to produce textbook standard statements of

> the law which are not in fact required to achieve the practical objectives the authority might have in view. Also, if the test were of the nature for which Mr Southey contends, the courts would be drawn into reviewing and criticising the drafting of policies to an excessive degree. In effect they would have a revising role thrust upon them requiring them to produce elaborate statements of the law to deal with hypothetical cases which might arise within the scope of a policy. Such a role for the courts cannot be justified. Their resources ought not to be taken upon such an exercise and it would be contrary to the strong imperative that courts decide actual cases rather than address academic questions of law."

F. FAMILY POLICY GUIDANCE

31. The guidance contained in Family Policy (16.0) begins its analysis, under the heading "Recourse to public funds," with the following general statement of the reasons why the "default" position in a case of the kind with which we are concerned is that the person in question should have no recourse to public funds:-

> "Those seeking to establish their family life in the UK must do so on a basis that prevents burdens on the taxpayer and promotes integration. The changes to the Immigration Rules implemented on 9 July 2012 are predicated in part on safeguarding the economic well-being of the UK, which is a legitimate aim under Article 8 of the ECHR (the right to respect for private and family life) for which necessary and proportionate interference in Article 8 rights can be justified.
>
> The Immigration Rules are approved by Parliament and govern the no recourse to public funds policy in grants of leave made under the family and private life routes under the rules and in grants of leave made outside the private life rules under ECHR Article 8 on the basis of exceptional circumstances.
>
> This approach now carries the full weight of primary legislation, under Part 5A of the Nationality, Immigration and Asylum Act 2002, inserted by section 19 of the Immigration Act 2014 and implemented on 28 July 2014. This sets out public interest considerations concerning the maintenance of effective immigration controls and other considerations, which apply where a court or tribunal is considering whether a decision made under the Immigration Acts breaches a person's right to respect for private and family life under Article 8. In particular, it sets out in section 117B(3) of the 2002 act inserted by section 19 of the Immigration Act 2014, that:
>
> > 'It is in the public interest, and in particular in the interests of the economic wellbeing 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.'"

32. There then follows a paragraph which Mr Holborn says was inserted by the defendant in direct response to the judgment of the Divisional Court in ST. The Divisional Court had found that the references to section 55 of the 2009 Act in the previous guidance, relied on by the defendant in that case, did not have application in respect of these provisions of that guidance, which related to recourse to public funds. The new paragraph reads-

> **"In accordance with Section 55 of the Borders, Citizenship and Immigration Act 2009, the best interests of a child, whether that child is applicant or dependant of the applicant, must be taken into account as a primary, although not the only, consideration in deciding whether it is reasonable to impose or maintain an NRPF condition."**

33. Immediately thereafter, under the heading "The position in Appendix FM", we find this:-

> "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)

34. After passages concerning the criteria for the non-imposition or lifting of the NRPF condition (which include the requirement not to impose or to lift where the applicant's income "is not sufficient to meet a child's particular and essential additional needs"), and regarding evidential flexibility (which also make reference to a child's particular and essential additional needs not being met), we come to the following passage:-

> "**How to assess needs of children dependent on the application**
>
> Is the applicant's income enough to meet the particular and **essential additional needs of any dependent child or children.**
>
> The aim of this consideration is to assess whether a decision to impose, or not lift, the condition of NRPF is reasonable with regard to the parent but would have a disproportionate impact on the child's welfare.
>
> The issues to be addressed are whether the decision that is made would lead to the child:

- experiencing lower level of well-being when they currently enjoy

- being deprived of something beneficial to which they currently have access

not being able to access a specific item or items of recognised benefit normal for a child

Consider here any childcare that may be needed if the parent is working, any needs relating to school attendance (school trips, uniforms), or any other items that a child could reasonably be expected to benefit from but would not otherwise be considered essential such as books or toys.

The best interests of any relevant child

Having assessed the likely effect on any relevant child of imposing or maintaining, an NRPF condition on the applicant, caseworkers then need to form a view on whether it would be in the best interests of a relevant child to impose or to maintain such a condition.

If an NRPF condition would not be in the best interests of any relevant child **and would significantly impact on a child's particular and essential needs,** then you need to decide whether in all the circumstances, and treating the best interests of any

relevant child as a primary (but not the only) consideration, the adverse effect of an NRPF condition on the child is sufficient to outweigh any other considerations to not impose or to lift the NRPF condition:" *(the use of bold type is as per the original, except for the words "and would significantly impact … essential needs", where the emphasis is mine)*

G. THE DECISIONS

35. I can now turn to the decisions. It is unnecessary to set out, in any detail, the 2 February 2022 decisions and the first decision of 16 May 2022, since these are now withdrawn. Although Mr Goodman seeks relief from this court in respect of the three withdrawn decisions, his reasons are dependent upon making good the challenge concerning section 55 of the 2009 Act, which I have permitted him to bring against the second decision of 16 May. I shall, therefore, confine myself to the relevant details of that decision letter.

36. At paragraph 18 above, I have already set out the rationale, contained in that letter, for the imposition of the NRPF condition. Immediately after this passage, there is the following:-

> "This is unless you meet the requirements of paragraph GEN.1.11A of Appendix FM or paragraph 276A02 of the

> Immigration Rules or there are exceptional circumstances set out in the application which require recourse to public funds to be granted.
>
> The condition of no recourse to public funds will not be imposed or will be lifted where:
>
> - the applicant has provided satisfactory evidence that they are destitute; or
> - the applicant has provided 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
> - the decision maker decides not to impose, or to lift, the no recourse to public funds condition code because the applicant has established that there are exceptional circumstances in their case relating to their financial circumstances which, in the view of the decision maker, requires the no recourse to public funds condition code not imposed or to be lifted".

37. There then follows an analysis of the evidence provided by AB. Amongst the matters of concern to the defendant was that the partner of AB (and father of MKD) had opened a bank account in February 2022, as to which information had not been provided by AB. Furthermore, the defendant noted that the partner of AB had "made a Super Priority Visa application for leave to remain on 14 October 2021 and paid the associated fee of £1852.20 and £1560.00 immigration health surcharge. It is noted that in his application [he] claimed he was the sole carer of [MKD]". Information regarding these matters was said not to have been provided.

38. Having explained that AB was considered not to have provided sufficient evidence to demonstrate that there were particularly compelling reasons relating to the welfare of a child of a parent in receipt of a very low income or there were exceptional circumstances in AB's case, such as to require the NRPF condition code not to be imposed or to be lifted, the letter concludes as follows:-

> "Consideration has also been given to section 55 of the Borders, Citizenship and Immigration Act 2009 (duty regarding the welfare of children). We have considered the best interests of your children. As set out above no evidence has been provided which shows that the children are in inadequate accommodation or that their essential living needs are not being met."

39. Following the short adjournment on 18 May, Mr Holborn produced the GCID case records in respect of the decision-making by the defendant's caseworkers, in connection with the February 2022 decisions.

H. DISCUSSION

40. I deal first with the challenge to the continued existence, within the immigration rules, of GEN.1.11A. As has been seen, on 29 April 2021, the Divisional Court granted a

declaration that this provision was unlawful to the extent that it did not comply with section 55 of the 2009 Act. The particular problem with GEN.1.11A lies in paragraph (b), which requires "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". That is a different and materially narrower consideration than what is required by section 55. The case law makes this plain.

41. The proposed new GEN.1.11A would re-cast paragraph (b). I express no view as to whether that re-casting is satisfactory. It will be for Parliament to decide whether to make the change and for the court, if any challenge is brought, to rule on its legality.

42. I am not in a position to adjudicate upon whether the defendant could and should have put the re-cast GEN.1.11A before Parliament sooner than she did. It is, in any event unnecessary to venture down that problematic path. This is because the real nub of the claimant's case on this issue is that, despite its unlawful nature, and despite the Divisional Court's declaration following the judgment in ST, the defendant has continued to treat the present version of GEN.1.11A as if it were, in all respects, valid.

43. Mr Holborn engaged expressly with this aspect of the challenge. He submitted that, regardless of the continued formal existence of the present wording of GEN.1.11A, the defendant's caseworkers are, in practice, operating solely by reference to version 16.0 of the guidance. This guidance is, he says, compatible with ST and, indeed, with section 55 as a whole.

44. I have already recorded Mr Holborn's submission that the passage in the guidance at the end of the "general" section in the part headed "Recourse to public funds" now makes express reference to section 55, explaining that the best interests of a child "must be taken into account as a primary, although not the only, consideration when deciding whether it is reasonable to impose or maintain an NRPF condition". Mr Holborn also points out that, under the heading "Criteria for the non-imposition or the lifting of the NRPF", the bullet point corresponding to GEN.1.11A(b) and its need for particularly compelling reasons relating to the welfare of a child is no longer present.

45. I remind myself that the *Gillick* test, as articulated by the Supreme Court in A, is whether the guidance in question sanctions, authorises or positively approves the defendant's caseworkers to determine applications not to impose, or to lift an NRPF condition, in accordance with the general approach described in present GEN.1.11A(b). I also take account of the important point in paragraph 40 of A that a more demanding test would act as a practical disincentive for the defendant to issue guidance, for fear that she might be drawn into litigation on the basis that the guidance was not sufficiently detailed or comprehensive. As the Supreme Court there stated, the courts are not to be drawn into reviewing and criticising the drafting of policies to an excessive degree.

46. As an abstract proposition, Mr Holborn's submission is unexceptionable. It would have been perfectly possible for the defendant, following ST, to issue guidance which told her caseworkers that GEN.1.11A(b), although technically remaining part of immigration rules, pending any amendment under the process mandated by the Immigration Act 1971, was nevertheless not to be followed because of the declaration of the Divisional Court. Instead, as I have already mentioned, the present guidance merely says, "paragraph GEN.1.11A provides a basis in the Immigration Rules for exceptions to the wider policy on migrants not having recourse to public funds".

47. Although perhaps intended to be a statement about adult migrants, the ordinary meaning of those words plainly has a wider scope. Leaving aside for the moment the claimant's criticism of the test set out later in the current guidance, it might nevertheless still be possible for the defendant to contend that actual decisions are no longer being taken by reference to GEN.1.11A(b). The actual decision-making in the present case, however, points directly to the opposite conclusion. As can be seen in the second decision of 16 May 2022, not only does the defendant say in terms that the NRPF condition will be imposed "unless you meet the requirements of paragraph GEN.1.11A…", the decision letter then says that such a condition will not be imposed or will be lifted where "the applicant has provided 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". Those are the very words of GEN.1.11A(b) found to be unlawful by the Divisional Court.

48. Whatever else might be said in the decision letter, it is, in my view, impossible to escape the conclusion that the combined effect of the present GEN.1.11A and version 16.0 of the guidance is to sanction or authorise unlawful conduct. I do not accept Mr Holborn's submission that I should, for this purpose, disregard what the caseworkers' decisions say, on the basis that these are written in a *pro forma* manner, using a template; the implication being that the defendant has not seen fit to update these, following the judgment in ST. Whilst I accept that there is nothing in the GCID notes that makes express reference to GEN.1.11A(b), the defendant's suggestion that one should simply ignore passages in the decisions specifically purporting to set out the relevant legal test is bizarre. It finds no support in the Supreme Court's judgment in A or any other authority to which my attention has been drawn.

49. I turn to the discrete challenge to the guidance. Again, I remind myself of the approach mandated by A. I also have had regard to the case law regarding section 55 of the 2009 Act.

50. In his submissions, Mr Goodman, on several occasions, emphasised paragraph 10 of Zoumbas. Under principle (4), the Supreme Court considered that it was important to ask oneself the right questions about section 55 in an orderly manner, in order to avoid the risk that the best interests of a child might be undervalued when other important considerations are in play. This feeds into principle (5), that it is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by other considerations.

51. Although those principles were articulated in the context of judicial decision-making, they plainly have relevance to decisions made by the defendant. Whilst it is, in my view, manifest that an administrative or judicial decision will not be unlawful merely because the "best interests" question has not been addressed in what might be considered to be an "orderly" manner, principles (4) and (5) are important in so far as they articulate an approach which, if followed, is at least likely to reduce the risk of a legally-flawed outcome. In this regard, a comparison might be drawn with the high-level judicial exhortations to use a "balance sheet" approach in answering Article 8 proportionality questions: see Polish Judicial Authority v Celinski and others [2015] EWHC 1274 (Admin); Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60; AS v Secretary of State for the Home Department [2019] EWCA Civ 417.

52. With those considerations in mind, I turn to the wording of version 16.0 of the guidance. As is evident, the guidance is designed to assist caseworkers in making decisions within the overall framework of the immigration rules and related law. Guidance which is merely at the same level of generality as the immigration rules is likely to be pointless. What the caseworker wants to know is how to reach decisions in individual cases which are in accordance with the policy of the defendant, whether articulated in the immigration rules (assuming the same to be lawful), or otherwise.

53. In reaching a decision regarding NRPF conditions, information-gathering is crucial. As we have seen, Parliament has ordained that it is in the public interest and in particular the interests of the economic well-being of the United Kingdom, that persons seeking to enter or remain here are financially independent. This is not only because such persons are not a burden on taxpayers but also because they are better able to integrate into society (section 117B(3) of the Nationality, Immigration and Asylum Act 2002). The defendant's caseworkers may, accordingly, need to make detailed enquiries. This is particularly the case where someone has made a paid-for application for leave, indicating that they are self-supporting, but then, shortly after, that person or someone in their household makes an application to lift the NRPF condition on the basis that they do, in fact, require recourse to public funds.

54. Where the application to lift the NRPF condition involves a child, the case law is clear that an examination of that child's position is necessary. It is here that the significance of paragraph 10 of Zoumbas becomes manifest. The caseworker needs, first, to consider what the effects on the child are likely to be of (here) maintaining the NRPF condition. That will generate an answer to the question of whether maintaining the condition would be in the best interests of the child. Although, as Mr Holborn points out, in the present context the answer to that question is almost always likely to be "yes", in the sense that it would generally be in the best interests of the child for there to be access, if necessary, to public funds, what the caseworker needs to know is whether and, if so, to what extent, maintaining the condition would affect the welfare of the child.

55. The passages in the guidance under the heading "Is the applicant's income enough to meet the particular and essential additional needs of any dependent child or children?" are, I consider, designed to address those considerations.

56. One then comes to the passage containing the words which Mr Goodman says are unlawful. To reiterate, they are the words I have highlighted in bold italics in the following paragraph:-

> "If an NRPF condition would not be in the best interests of any relevant child, ***and would significantly impact on a child's particular and essential needs***, then you need to decide whether in all the circumstances, and treating the best interests of any relevant child as a primary (but not the only) consideration, the adverse effect of an NRPF condition on the child is sufficient to outweigh any other considerations to not impose or to lift the NRPF condition."

57. As I understand him, Mr Holborn submits that the words I have highlighted do no more than refer back to the passage a few paragraphs earlier, which tells caseworkers that the aim of the consideration is to assess whether a decision (here) not to lift the NRPF

condition "would have a disproportionate impact on the child's welfare." Mr Goodman by contrast, says that the words unlawfully restrict the defendant's duties under section 55 of the 2009 Act.

58. I consider Mr Goodman is right. If the caseworker concludes that maintaining the NRPF condition would not be in the best interests of any relevant child, then that child's interests are to be treated as a primary consideration in reaching a decision whether to lift the condition. The natural and ordinary meaning of the highlighted words is to prevent that from happening unless the effect of maintaining the NRPF condition "would significantly impact on a child's particular and essential needs". The nature of the offending words is similar to the unlawful GEN.1.11A(b), in circumscribing the section 55 duty.

59. The question of whether not lifting the NRPF condition would have a significant impact on the child's particular and essential needs is, of course, not an irrelevant consideration for the caseworker. On the contrary, the degree of impact is, as we have seen, an essential matter to be determined. This is because the answer is relevant to determining the proportionality of the impact on the child's welfare of maintaining the condition; in other words, whether the "adverse effect... on the child is sufficient to outweigh any other considerations".

60. The essential point, however, remains that in all cases where it would not be in the best interests of the child for the NRPF condition be maintained, the section 55 duty to make the child's interest a primary consideration is operative. The present words tell caseworkers (wrongly) that this is not the position.

61. The claimant's challenges based on section 55 of the 2009 Act accordingly succeed. The defendant's policy guidance "*Family life (as a partner or parent), private life in exceptional circumstances* (version 16.0) falls to be declared unlawful to the extent that it fails to reflect the defendant's statutory duty to have regard to the best interests of children, pursuant to section 55 of the 2009 Act, and in the light of the declaration of the Divisional Court concerning the unlawfulness of GEN.1.11A of Appendix FM to the Immigration Rules.

62. As a result of what I have said about the significance of the reference in the second decision of 16 May 2022 to GEN.1.11A, and in the light of my finding regarding the guidance (version 16.0), the second decision of 16 May falls to be quashed.

63. Subject to hearing counsel (if necessary), I consider that the withdrawn decisions of February 2022 and the first decision of 16 May 2022 should be declared to have been unlawful, rather than quashed. They fall to be so declared, not only because of the admitted failure to apply the defendant's policy of evidential consistency (as regards the February decisions) but also because the substantive decision of February 2022 and the first decision of 16 May contain the problematic elements I have identified in the second decision of 16 May.

64. The parties are invited to make submissions on their respective stances on Grounds 2 and 3, in the light of this judgment.