



Neutral Citation Number: [2023] EWHC 2476 (Admin)

Case No: CO/2256/2023; AC-2023-LON-001882

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/10/2023

Before :

THE HONOURABLE MR JUSTICE SAINI

Between :

THE KING
on the application of

(1) PA
(2) NA (by her Litigation Friend and Mother PA)

Claimants

- and -

SECRETARY OF STATE FOR THE HOME
DEPARTMENT

Defendant

Alex Goodman KC and Ben Amunwa (instructed by Deighton Pierce Glynn) for the
Claimants
Alan Payne KC and Jack Holborn (instructed by Government Legal Department) for the
Defendant

Hearing dates: 4-6 October 2023

Approved Judgment

This judgment was delivered orally in RCJ Court 1 at 10.30am on 6 October 2023 and also
by release to the National Archives in approved form later that day.

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MR JUSTICE SAINI

Mr Justice Saini :

1. This is a substantive judicial review hearing which began on 4 October 2023. Subject to my consent, the proceedings have been compromised today, 6 October 2023, under the terms of an agreed order which includes declaratory relief. I need to approve the terms of the declarations and the order itself. One of the Claimants is a minor. For the reasons I will summarise in this short judgment, I am satisfied that I should make those declarations and an order in the terms of the draft before me.
2. I will begin with a brief outline of the facts but will confine myself to those matters necessary to explain why I am making the declarations. What I say is based on facts which are agreed or which do not appear to me (on the pleadings) to be in dispute. There are other facts in issue and nothing I say is intended to express any concluded findings in relation to those matters, some of which may remain alive and relevant in ongoing appeals in the immigration system.
3. The First Claimant is a national of Ghana. She is aged 43 years and entered the UK on 16 October 2021, with leave to remain as the married dependant of an international student until 3 February 2023. I will call her student dependant visa “the SLTR”. The SLTR was subject to various conditions including a standard *no recourse to public funds* (“NRPF”) condition. The First Claimant was, however, entitled to work.
4. The First Claimant’s position is that on arrival her husband abandoned her at the airport, the marriage broke down and, thereafter, they divorced. She says she has had no further contact with her former husband.
5. On 15 December 2021, the First Claimant gave birth to her daughter, the Second Claimant. It is the First Claimant’s case that the Second Claimant’s father is a person she met in Ghana. He has been referred to as “OS” in these proceedings. On 28 July 2022, Her Majesty’s Passport Office (‘HMPO’) issued the Second Claimant with a British passport on the assumption that OS was a British National.
6. On 21 October 2022, the Defendant granted the First Claimant a fee waiver in relation to an in-time application made by the First Claimant to switch from her SLTR to a five-year parent route (based on her parental relationship with the Second Claimant). I will call this “the family life application”. The effect of section 3C of the Immigration Act 1971 (“1971 Act”) is that the First Claimant’s SLTR (subject to the same conditions as originally imposed) was extended pending the outcome of the family life application.
7. On 13 February 2023, the First Claimant applied to have the NRPF condition lifted so that she could access state benefits (“the CoC application”). It appears that from around 31 March 2023 the Claimants were provided with hotel accommodation and support payments by Enfield Council pursuant to section 17 of the Children Act 1989.
8. There followed some correspondence between the parties and on 18 May 2023 the Defendant refused the CoC application. I will call this “the May decision”. Insofar as material, it provided as follows:

“We can only change the conditions of leave for persons granted leave to remain in the UK on the basis of their family

or private life under Appendix FM or paragraph 276ADE of the Immigration Rules, or leave outside the rules on the basis of exceptional circumstances relating to family or private life.

You were granted on Student Dep Partner- LTE on a Short Term Student - Visa

Dependant Partner Application. As a result, we are unable to alter the conditions of your leave.”

9. The Defendant accepts that the implication of this reasoning is that she did not have to consider any exercise of a discretion to lift the NRPF condition. On 19 June 2023, the Claimants issued these proceedings challenging the legality of the May decision and the Immigration Rules and guidance said to have been applied in making that decision. In her summary grounds, the Defendant conceded the decision was flawed and withdrew it. On 11 July 2023, Lang J granted permission to challenge the withdrawn decision (and the policies under which it was made) for detailed reasons given in her order. Lang J did not consider the challenge to be academic and gave directions for an expedited substantive hearing, given the challenging conditions in which the Claimants were living.
10. On 21 July 2023, HMPO revoked the Second Claimant’s British passport. On 9 August 2023, the Defendant issued decisions refusing: (i) the family life application, and (ii) the CoC application (the “NRPF Refusal”). The refusal of the family life application attracted a statutory right of appeal on human rights grounds. The NRPF Refusal: (i) gave various reasons as to why the Defendant was not prepared to exercise her discretion to lift the NRPF condition, and (ii) invited the First Claimant (if she wished) to make a further CoC request, with up to date evidence, if she chose to exercise her statutory right of appeal against the refusal of the family life application. On 22 August 2023, the First Claimant filed an appeal in the First-tier Tribunal (Immigration and Asylum Chamber) against the refusal of the family life application. That had the effect of extending her section 3C leave whilst the appeal is pending.
11. On 23 August 2023, the Claimants applied to amend their Claim Form and Statement of Facts and Grounds to respond to the August decision. That amendment application was opposed and came before me at the substantive hearing, but for the reasons set out below I did not have to rule upon it.
12. On 30 August 2020, HMPO agreed to: (i) give the Claimants the opportunity to provide evidence of the Second Claimant’s entitlement to a British passport, and (ii) consider whether in light of any evidence provided the Second Claimant was a British National without payment of a further fee.
13. On 31 August 2023, the Claimants invited the Defendant to review the August decision in light of subsequent developments and made an open offer to settle these judicial review proceedings on certain terms. On 5 September 2023 the Defendant reiterated the position that if the First Claimant wished to have the NRPF condition

lifted she should “make a further request (supported by updated evidence)”. On 11 September 2023, the Defendant rejected the Claimant’s open settlement offer.

14. The substantive judicial review and amendment application came before me for hearing on 4 October 2023. At the hearing the Defendant filed and served an Operational Policy Instruction (‘OPI’) issued internally on 4 October 2023. It is entitled ‘OPI 1415: Change of conditions – discretion in applications outside of family life, private life or Hong Kong BN(O)’. I have appended a copy of OPI 1415 to this judgment. That is in the interests of transparency and accessibility. This policy document also addresses, in part, the complaints made in the compromised judicial review proceedings including those introduced by way of draft amendments.
15. Following gentle encouragement from me at the substantive hearing, the First Claimant made a fresh request, supported by up to date evidence, for the NRPF condition to be lifted; and the Defendant agreed to reconsider the matter in a short time-scale. The parties had reached an unhelpful “stand-off” with one side not wishing to make a further application and the other saying a revised application had to be made.
16. On 5 October 2023, the second day of the substantive hearing, the Defendant reconsidered the First Claimant’s CoC application, in light of further representations from the Claimants’ solicitors. By a letter sent after court hours on the evening of 5 October 2023, the Defendant granted the First Claimant recourse to public funds. The Defendant accepts that the First Claimant is destitute, and that in her particular circumstances, the NRPF condition will be lifted for the remainder of her leave under section 3C of the 1971 Act. This is pending the outcome of her appeal and is to enable her to provide sufficient maintenance and accommodation for her child (the Second Claimant).
17. In these circumstances, and save in relation to costs, the parties agreed an order which I am content to make, subject to being satisfied in relation to terms of the declaratory relief. I turn to that matter.
18. The Defendant rightly concedes that the May decision was unlawful. That is because the Defendant has a statutory discretion to consider lifting or not imposing the NRPF condition on the LLTR of those granted leave to remain including students and dependants. The Defendant failed to recognise the existence of that discretion, or failed to consider exercising it in making the May decision. That was unlawful under classic public law grounds, either as a misdirection in law or a fettering of discretion. In these circumstances, I have approved declarations in the following terms which I consider correctly reflect the position in law under the 1971 Act:

“a. The Defendant retains a discretion under section 3(1)(c)(ii) of the Immigration Act 1971 to lift (or not impose) the NRPF condition in relation to a grant of limited leave to remain, including in the case of migrants granted limited leave to remain other than on the family, private life and British national (overseas) routes;

b. the Defendant's failure to adequately identify for caseworkers the statutory discretion in relation to change of conditions applications to lift NRPF for those granted Student leave was unlawful".

19. This resolves the challenge to the May decision. As to the draft amendments to the claim concerning the August decision, these have been addressed or overtaken in large part by the issuing of OPI 1415. That document identifies the existence of the discretion to remove the NRPF condition in student cases, the matters considered relevant in deciding to remove (or to not impose) such a condition, as well as the need for decision makers to give primary regard to the rights and interests of a child (see section 55 of the Borders, Citizenship and Immigration Act 1999).
20. Finally, I consider it important to recognise and commend two organisations, The Unity Project and Project 17. They each provided substantial assistance to the First Claimant and her baby daughter at a very difficult time. They also provided evidence to me in these proceedings which identified the real challenges faced by those who may find themselves destitute as a result of conditions limiting their access to state assistance. It is hard to see how the Claimants could have achieved the positive outcome to these proceedings without the assistance of these organisations.
21. I will make an order on the terms before me and will hear Counsel on the issue of costs where there remain substantial matters in dispute.

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Title

OPI 1415: Change of conditions – discretion in applications outside of family life, private life or Hong Kong BN(O)

Target audience

Permission to stay teams

Summary

This OPI provides interim guidance for caseworkers on the use of discretion in a 'change of conditions' application in an immigration route which is outside of a family life, private life or Hong Kong BN(Overseas) route.

Main text

Background

Most temporary migrants must demonstrate that they can financially support themselves and their dependants when applying for permission to enter or stay in the UK. For this reason, the majority of temporary migrants are granted permission subject to a condition that they cannot access public funds: no recourse to public funds (NRPF). Those here without lawful status are also subject to NRPF.

Those with permission to stay granted under a family or private life route, or the Hong Kong British National (Overseas) route can apply to have their NRPF condition lifted by making a 'change of conditions' application. The NRPF condition will be lifted on these routes:

- if they are destitute or at risk of imminent destitution
- there are reasons relating to the welfare of a relevant child which outweigh the considerations for imposing or maintaining the condition (treating the best interests of a relevant child as a primary consideration)
- the applicant is facing exceptional circumstances affecting their income or expenditure.

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Exercising discretion

This OPI is to highlight that section 3(1)(c)(ii) of the 1971 Immigration Act provides the Secretary of State power to exercise discretion in considering whether to vary the conditions of **any** leave granted, including the lifting of NRPF from permission granted in all immigration routes.

In considering whether to lift (or not impose) a NRPF condition on someone present in the UK there is a wide discretion which requires all relevant matters to be taken into account. In particular, the following must be taken into account:

- in any application involving a child the best interests of that child must be considered as a primary, although not the only consideration Section 55 Guidance
- where an applicant, or their dependant children, cannot reasonably be expected to return to their home country NRPF must be lifted if it is established that they are destitute, or at imminent risk of destitution or there are other particularly compelling reasons relating to the welfare of the child or other matters.
- where an applicant, or their dependant children, can reasonably be expected to return to their home country the expectation is that they should do so. Particularly compelling circumstances will need to be established to require the NRPF condition to be lifted.

If a caseworker receives a 'change of conditions' application which is outside of a family, private life or Hong Kong BN(O) route, you should refer to a Senior Caseworker in the first instance.

No change of conditions application should be considered void on the basis of the immigration route within which the applicant has been granted permission to enter or stay on.

Further guidance will be issued in due course.
