Neutral Citation Number: [2014] EWHC 1971 (Admin)

Case No: CO/12089/2013

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/06/2014

Before :

THE HONOURABLE MR JUSTICE KENNETH PARKER

- -

Between :

THE QUEEN on the Application of NS, ZS, ZS, SS and NS	**Claimant**
- and -	
SECRETARY OF STATE FOR HOME DEPARTMENT	**Defendant**

- -
- -

Amanda Weston (instructed by **Duncan Lewis Solicitors**) for the **Claimants**
Ben Lask and Rob Harland (instructed by **The Treasury Solictor**) for the **Defendant**

Hearing dates: 8-9 April 2014

- -

Approved Judgment

Mr Justice Kenneth Parker :

Introduction

1. The first Claimant (ñC1ò) is a national of Thailand. She entered the UK in February 2003 using a false passport and thereafter remained in the UK. She formed a relationship with, and subsequently married, a British citizen, with whom she had four children, now aged, respectively, 8, 7, 5 and 4. The children are British citizens and are also Claimants in these proceedings. Following the incidence of domestic violence C1 in 2011 ended her relationship with the childrenôs father.

2. C1 sought to regularise her immigration status. C1 applied for leave to remain on 7 November 2012.

3. C1ôs application did not state that she required recourse to public funds. C1 was not in receipt of public funds when she made the application in November 2012. Nor was she permitted to work. It appears that she was solely responsible for caring for all four of her British children on a daily basis. The evidence submitted by C1 in support of her application did not suggest that the Claimants were destitute or that there were any particular concerns relating to the welfare of C1ôs children. There was nothing in C1ôs application to suggest that the means by which she then supported her children would become unavailable to her once her application was granted.

4. The Defendant to this claim, the Secretary of State for the Home Department, on 30 May 2013 granted C1 leave to remain (ñLTRò). A condition of leave was that C1 should not have recourse to public funds (ñNRPFò)

5. The Claimants challenged this decision by a claim filed on 29 August 2013. They challenged at that time only the decision to prohibit C1 from having any access to public funds.

6. By letters dated 11 October and 28 November 2013 the Defendant offered to reconsider her decision on receipt of further evidence as to the Claimantsô circumstances. The Claimants did not submit any further evidence. They did not seek the removal of the NRPF condition under the January 2014 Guidance. (referred to in 26 paragraph below).

7. However, the Defendant issued a supplementary decision on 7 March 2014, in which she considered the representations made in C1ôs claim (ñthe further decisionò). The Defendant also considered the submission, raised in the course of the claim, that C1 ought to have been granted indefinite leave to remain (ñILRò) instead of LTR. The Defendant decided that, on the evidence, C1 was not destitute nor were there particularly compelling reasons relating to the welfare of her children. C1 had not demonstrated that a departure from the normal policy of granting LTR for 30 months was appropriate.

8. Since the decision of 30 May 2013 there has been further policy guidance, and the further decision of 7 March 2014 refers to, and relies on, that guidance. It appears to me that I would do no service to any party if I were to scrutinise the earlier decision of 30 May 2013. I believe that I should focus on the further decision of 7 March 2014,

taking account of the appropriate legislation and policy guidance at the time of that decision.

The Claim

9. The Claimants submit that the Defendant acted unlawfully in that (a) she granted to C1 LTR for a period of 30 months rather than ILR; and (b) prohibited C1 from having recourse to public funds.

The Applicable Legislation and Policy Guidance: Limited Leave to Remain and Indefinite Leave to Remain

10. The power of the Defendant to grant a person leave to remain in the UK is contained in section 3(1)(b) of the Immigration Act 1971 (ñIA 1971ò)

> ñ(1) Except as otherwise provided by or under this Act, where a person is not a British citizené (b) he may be given leave to enter the United Kingdom (or when already there, leave to remain in the United Kingdom) either for a limited or for an indefinite periodò

The Immigration Rules, made under section 1(4) of the IA 1971, are a detailed statement of how the Defendant intends to exercise her powers of control over immigration: see *R(Odelola) v SSHD* [2009] 1 WLR 1230, paragraphs 6 and 7.

11. D-LTRPT 1.1 provides for a 5-year route to settlement on the basis of family life as a parent (with sole or shared responsibility for or access rights to a child in the UK), where additional conditions are satisfied. Leave granted under this 5-year route to settlement is invariably made subject to a condition that the person granted leave should not have access to public funds. That follows logically from one of the requirements of D-LTRPT 1.1 that ñthe applicant must provide evidence that they will be able to adequately maintain and accommodate themselves and any dependents in the UK without recourse to pubic fundsò.

12. It is plain that C1 did not qualify under D-LTRPT 1.1. Her application fell to be considered under D-LTRPT 1.2 which provides:

> ñD-LTRPT 1.2. If the applicant meets the requirements in paragraph LTRPT 1.1 (a),(b) and (d) for limited leave to remain as a parent they will be granted leave to remain for a period not exceeding 30 months and subject to a condition of no recourse to public funds unless the Secretary of State deems such recourse to be appropriate, and they will be eligible to apply for settlement after a continuous period of at least 120 months with such leave, with limited leave as a parent under paragraph D-LTRPT 1.1, or in the UK with entry clearance as a parent under paragraph D-LTRPT 1.1, or in the UK with entry clearance as a parent under paragraph D-ECPT 1.1. ò

13. D-LTRPT 1.2 thus provides for a 10-year route to settlement on the basis of family life as a parent (with sole or shared responsibility for or access rights to a child in the UK). Where an applicant meets the requirements in D-LTRPT 1.1 (a),(b) and (d), she will be granted limited leave to remain for a period not exceeding 30 months. After 10 years she will be eligible to apply for indefinite leave to remain.

14. The requirement to complete a probationary period of LTR before being eligible to qualify for ILR is a common and ordinarily lawful feature of the IR: see *R (Mohammed) v SSHD* [2014] EWHC 98 (Admin), para 32. In general, an applicant will qualify for ILR only if, at the end of the probationary period, she continues to satisfy the IR. The satisfactory completion of the probationary period is the means by which the applicant establishes that she is a person to whom it is appropriate to grant settlement.

15. The Defendant retains a discretion under s.3(1) IA 1971 to grant leave outside the IR, whether for a limited or indefinite period. The Defendant may exercise that discretion where an applicant does not satisfy the IR, or where the applicant qualifies for LTR under the IR but it is, in the particular circumstances of the case, appropriate to grant the applicant ILR: *R (SM) v SSHD* [2013] EWHC 1144 [15] [24].

16. Guidance as to how caseworkers should exercise that discretion is, so far as is material, contained in a document entitled ó*Guidance on consideration of a child*ôs *best interests under the family and private life rules and in Article 8 claims where the criminality thresholds in paragraph 398 rules do not apply*ô (January 2014) (ñthe Childrenôs Best Interest Guidanceò).

17. The Childrenôs Best Interest Guidance provides at §28:

> ñThere is also discretion to grant a longer period of leave where appropriate. There may be cases where a longer period of leave outside the rules is considered appropriate, either because it is clearly in the best interest of a child (and any countervailing considerations do not outweigh those best interests), or because there are other particularly exceptional or compelling reasons to grant limited leave for a longer period or to grant Indefinite Leave to Remain (ILR). The onus is on the applicant to establish that the childôs best interests would not be met by a grant of 30 months leave to remain and that there are compelling reasons that require a different period of leave to be granted.ò (emphasis added).

18. The decision to grant limited leave to remain rather than indefinite leave to remain has recently been considered by Lewis J in *R (Mohammed) v SSHD* [2014] EWHC 98 (Admin) and Mrs Justice Andrews in *R (Omokayode) v SSHD* [2014] EWHC 594 (Admin). At paragraph 7 of Omokayode, the court reviewed *Mohammed* and noted:

> ñ7. In dealing with the submission that the policy was applied in an unfair and unlawful manner and failed to take into account the circumstances of the claimant, his family and his child, because there were no factors militating against a grant of indefinite leave and there were additional compassionate

family and child circumstances militating in favour of granting ILR Lewis J. said:

> ôThat submission reads as if the Defendant is in someway obliged to grant indefinite leave to remain unless there are positive reasons for refusing it. In fact, that is not the position. The Defendant is entitled to adopt a policy whereby those who do not have to remain in the United Kingdom may be granted discretionary leave to remain because of the particular circumstances of the individual or his family. The Defendant is also entitled to adopt a policy whereby an individual will generally need to complete a qualifying period of six years pursuant to the grant of discretionary leave before being eligible for the grant of indefinite leave. That a is lawful, rational, policyõ.

8. I agree with those observations. It follows from the reasoning in that case that where the Secretary of State is adhering to published policy, in exercising a discretion to confer a benefit on someone to which they would not otherwise be entitled, there is no obligation to give reasons for not making an exception to that policy. One cannot draw any inference from the absence of such reasons in the decision letter, let alone the inference that the decision maker has failed to give consideration to whether the case is so exceptional as to warrant departure from policy and grant ILR.ò

Applicable Legislation and Policy: No Recourse to Public Funds ("NRPF")

19. Section 3(1)(c) IA 1971 provides:

> ñ1. Except as otherwise provided by or under this Act, where a person is not a British citizené (c) if he is given limited leave to enter or remain in the United Kingdom, it may be given subject to all or any of the following conditions, namely-é (ii) a condition requiring him to maintain and accommodate himself, and any dependents of his, without recourse to public funds.ò (emphasis added).

20. Where, as in the present case, leave is granted under D-LTRPT 1.2, it is:

> ñé subject to a condition of no recourse to public funds unless the Secretary of State deems such recourse to be appropriateò. (emphasis added).

21. The Defendantõs policy as to the circumstances in which recourse is deemed to be appropriate in cases under the 10-year parent route is set out in the Immigration Directorate Instructions, FM 1.0, Section 8.0 (ñRPF Guidanceò):

> ñleave will be granted subject to a condition of no recourse to public funds, unless there are exceptional circumstances set out

> in the application which require recourse to public funds to be granted. Exceptional circumstances which require recourse to public funds will exist where the applicant is destitute, or where there are particularly compelling reasons relating to the welfare of a child of a parent in receipt of very low incomeò. (emphasis added)

22. The RPF Guidance explains that ódestituteô carries the same meaning as under s.95 of the Immigration and Asylum Act 1999 (ñIAA 1999ò). As such, a person is destitute if he and his dependants do not have adequate accommodation or any means of obtaining it (whether or not their other essential living needs are met); or he has adequate accommodation or the means of obtaining it, but cannot meet his and his dependantsô other essential living needs.

23. The Guidance requires the Home Office caseworker to:

> ñconsider the individual applicantôs financial circumstances, on the basis of the information and evidence provided, to determine whether they are destitute, or whether there are particularly compelling reasons relating to the welfare of a child ò.

24. The RPF Guidance, as updated on 18 October 2013, has the following notable features:

> 1. The onus is on the applicant to evidence destitution, or that there are particularly compelling child welfare considerations, in the light of the information set out in the application and any supplementary information or evidence about the circumstances set out in support of the application.
>
> 2. In order to satisfy one or other of the limbs, the applicant will need to ñprovide evidence, including evidence of their financial position, demonstrating that, on an ongoing basis, they do not have access to adequate accommodation or any means of obtaining it, they cannot meet their other essential living needs, or there are particularly compelling child welfare considerationsò.
>
> 3. Those granted leave under Appendix FM as a parent are free to work in the UK and are generally expected to support themselves through work rather than through recourse to public funds. The caseworker tasked with deciding whether to disapply the NRPF condition should therefore consider any information provided by the applicant about her current or prospective employment and/or that of her partner.
>
> 4. Where the applicant is granted leave to remain as a parent, the case worker should take into account any information provided by the applicant about the availability of child maintenance and whether she has sought this.
>
> 5. Since an applicant granted leave to remain as a parent will already have lived in the UK for a period, she will have to demonstrate good reasons why her previous means of support are no longer available.

> 6. Whilst the fact that an applicant and her family are in receipt of Local Authority support (e.g under s.17 of the Children Act 1989) is relevant, it does not in itself evidence destitution. The caseworker must make his own assessment of the information and evidence provided by the applicant.

25. The RPF Guidance identifies the matters that evidence will need to address, e.g. evidence of the applicantôs financial position; evidence about current or prospective employment; evidence of child maintenance; evidence as to why previous means of support are no longer available; evidence of local authority support. Moreover, the Defendantôs caseworkers are expected to ensure that the evidence relied upon is up to date, provides a reasonably complete picture of the applicantôs financial circumstances (e.g income, savings and assets and rent, bills and other major outgoings) and includes independent and/or documentary evidence capable of corroborating the applicantôs claim.

26. On 21 January 2014 the Defendant published guidance and a form for applicants seeking the removal of a NRPF condition (ñthe January 2014 Guidanceò). Applicants may make such a request if their financial circumstances have changed since they were granted LTR, or if they simply failed to provide the necessary evidence at the time of their application for LTR.

27. In a section headed ñEvidence requiredò, it instructs applicants to provide ñdocumentary evidence that you meet the policy on granting recourse to public fundsò and advises that ñit is up to you to provide sufficient evidence to satisfy the caseworkers that you meet the terms of the policyò. It goes on to state:

> ñYou should provide evidence of your financial circumstances and living arrangements. This could include documents such as
>
> - Bank statements
> - Pay slips
> - Information about level of your rent and bills
> - Rental agreement or mortgage statement
> - P45/P60
> - Letter from Local Authority confirming that support is provided
> - Letter from charity or other organisation providing support
> - Letter from family or friends who are providing support
>
> You will need to explain what your current financial circumstances are, how these may have changed, and how you are currently maintaining yourselfò.

The Grounds of Challenge

28. Ms Amanda Weston submits, on behalf of the Claimants, that the Defendant acted unlawfully by granting C1 LTR rather than ILR. She contends that taking account of the best interests of C1ôs children required the grant of ILR. She put forward the following matters:

    i) C1 faced ten years of uncertainty about where her future lay in which she will be required to submit further applications, the required fee and her case will be óactively reviewedô on four occasions.

    ii) There is no realistic prospect of C1 being removed from the UK while any of her British children, for whom she is the sole carer, remain in their minority.

    iii) It is highly unlikely that C1ôs circumstances would change so that her LTR would be curtailed. It is not a situation in which, for example a spousal relationship might break down or a course of study might come to an end. Article 8 was engaged in this case due to C1ôs established private and family life with her British children, and her rights under Article 8 are only likely to be strengthened with time.

    iv) Employment is harder to obtain with limited leave.

29. Ms Weston rests her challenge on Section 55 of the Borders, Citizenship and Immigration Act 2009, which provides:

> ñ (1) The Secretary of State must make arrangements for ensuring that-
>
> (a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdomé
>
> (2) The functions refered to in subsection (1) are-
>
> (a) any function of the Secretary of State in relation to immigration, asylum or nationality:
>
> (b) any function conferred by or by virtue of the Immigration Acts or an immigration officer;
>
> (c) any general customs function of the Secretary of State;
>
> (d) any customs function conferred on a designated customs officialò

30. Subsection 3 further provides that:

> ñA person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (1)ò

31. That guidance is entitled ôEvery Child Matters: Change for Childrenô and brings into line immigration decision making with the standards applied generally in respect of agencies concerned with making decisions which affect children, such as social services departments.

32. This duty, Ms Weston contends, was intended to -and has- had a fundamental impact, tantamount to a profound cultural shift, on immigration decision making where children are affected. The law will not tolerate piecemeal compliance with the duty and it is not possible to identify areas of immigration functions to which s 55 does not apply.

33. In *ZH (Tanzania) v SSHD* [2011] UKSC 4; [2011] HRLR 15 the Supreme Court noted that s 55 was enacted to incorporate by a directly enforceable individual and general duty in domestic law the UKôs obligation under article 3(1) UNCRC that:

> ñIn all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration .ò

34. Baroness Hale observed at [§23]:

> ñThis is a binding obligation in international law, and the spirit, if not the precise language, has also been translated into our national law. Section 11 of the Children Act 2004 places a duty upon a wide range of public bodies to carry out their functions having regard to the need to safeguard and promote the welfare of children. The immigration authorities were at first excused from this duty, because the United Kingdom had entered a general reservation to the UNCRC concerning immigration matters. But the reservation was lifted in 2008 and, as a result, s. 55 of the Borders, Citizenship and Immigration Act 2009 now provides that, in relation among other things to immigration, asylum or nationality, the Secretary of State must make arrangements for ensuring that those functions óare discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdomôò.

35. The duty applies

> ñé not only to how children are looked after in this country while decisions about immigration, asylum, deportation or removal are being made, but also to the decisions themselves. This means that <u>any decision which is taken without having regard to the need to safeguard and promote the welfare of any children involved will not be óin accordance with the lawô for the purpose of article 8 (2).</u> Both the Secretary of State and the tribunal will therefore have to address this in their decisionsò. [§24] (Emphasis added).

36. Lord Kerr at [§46] added

> ñIt is a universal theme of the various international and domestic instruments to which Lady Hale has referred that, in reaching decisions that will affect a child, primacy of importance must be accorded to his or her best interests. This is not, it is agreed, a factor of limitless importance in the sense that it will prevail over all other considerations. It is a factor, however, that must rank higher than any other. It is not merely one consideration that weighs in the balance alongside other competing factors. Where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them. It is not necessary to express this in terms of a presumption but the primacy of this consideration needs to be made clear in emphatic termsò. (emphasis added).

37. Ms Weston relies strongly in the present context on *R (on the application of SM, and TM, and JD) v SSHD* [2013] EWHC 1144 (Admin). The child claimants in that case were Jamaican citizens, as were their mothers and grandmother, who had come to the UK many years before the claim and overstayed. The child claimants applied, outside the scope of the IR, for ILR. All were granted discretionary LTR for a period of three years. Two issues arose: (1) was the relevant policy document and instruction capable of being read and applied in a way which was compliant with section 55? and (2) if so, did the decision maker read and apply it in that compliant way? Holman J answered both questions in the negative and Ms Weston submits that the ratio of his judgment applies with equal force to the present claim.

The First Ground: Discussion

38. The relevant policy in this case is contained in the Childrenôs Best Interests Guidance. That guidance was prepared following, and in response to, the judgment of Holman J in *R(SM) v SSHD.* The guidance was issued in order to ensure that decisions taken under the family and private life provisions of the IR, and decisions as to whether to grant leave outside the IR, are taken in accordance with the duty under section 55. The Guidance requires that, if a parent who would otherwise qualify for LTR under the IR applies for ILR, the caseworker should give specific consideration to the best interests of any child concerned (see paragraph 17 above). The Guidance expressly states that ócaseworkers must have regard to the best interests of the child as a primary considerationô (My emphasis).

39. The Guidance does recognise that even if a longer period of leave was in the best interests of a child involved, ócountervailing considerationsô might outweigh those best interests. The weighting of competing factors in that manner is not inconsistent with section 55. The best interests of any child involved must be treated as a primary consideration; they are not required to be treated as the primary or the conclusive consideration. The duty under section 55 furthermore does not mandate in every case that the decision should conform with the best interests of a child involved: the childôs best interest may be outweighed by the importance of other policies affecting the decision (see *ZH(Tanzania v SSHD)* [2011] 2 AC 166, at paragraphs 24-26).

40. The Guidance does place the initial onus on the applicant to raise the issue of the best interests of the child involved. Given a context in which the applicant is seeking a period of leave that is substantially longer than that ordinarily provided by the IR, I do not regard this as an objectionable feature, or one that itself is in conflict with, or undermines, the duty under section 55. The applicant should be in a position to explain what children are involved in the decision, and how in broad terms the interests of the children would be adversely affected if, for example, LTR rather than ILR were granted. In some cases of course the Defendant will have independent access to information bearing on the immigration history of the persons involved, and could be expected, consistent with the duty under s 55, to take into account the welfare of a child concerned, even if the applicant did not specifically raise that consideration. Once the decision maker has basic and reliable information concerning the position of any child involved, the decision maker is then required under the Guidance to treat the best interests of any child involved as a primary consideration. Furthermore, once the decision maker can see that the issue of the welfare of a child has arisen, I accept that the decision maker should be pro-active in seeking to obtain, if need be, further information bearing on that issue.

41. As to *R(SM) v SSHD,* Holman J concluded that the Discretionary Leave API in that case was unlawful because it effectively precluded case specific consideration of the welfare of the children from the discretionary decision whether to grant immediate ILR or limited DL (see paragraph 43). By contrast, the childrenôs Best Interest Guidance requires caseworkers to give case specific consideration to the welfare of any child concerned when deciding whether to grant a longer period of LTR, or ILR, to the childôs parent. The flaw in the previous policy has been recognised and addressed in an appropriate manner.

42. I conclude, therefore, that the policy guidance at issue in this case is compliant with the duty under section 55.

43. Turning to the specific decision in this case, I note that C1 in fact initially applied for, and was granted by the decision of 30 May 2013, LTR. C1 did not in fact apply for ILR. In a skeleton argument on her behalf dated 5 December 2013, C1 made representations that she ought to have been granted ILR. These representations were then considered and rejected in the further decision of 7 March 2014.

44. As to the individual points made by Ms Weston, the first point regarding uncertainty appears to be an echo of an important argument in *R(SM)*. However, the facts in *R(SM)* were very different. The challenged decisions were grants of LTR to children, not to an adult. The decision maker had not properly taken into account that the grant of LTR rather than ILR would prolong uncertainty for the children as they developed towards their teenage years and acquired growing awareness of their circumstances (paragraph 51). For example, when one period of limited leave had ended and the defendant had not yet reached a decision to grant a further period, the children might not be able to satisfy service providers (such as the NHS) that they remained entitled to leave to remain in the UK. However, C1ôs children are British citizens. There is no uncertainty as to their entitlement to remain in the UK or, for example, to access NHS services. So far as C1ôs children are concerned, there is no period of ólimboô, as this point has on occasion been described.

45. As to points (ii) and (iii), in my view they overlook the crucial point that C1 was granted LTR on the basis of her role as the carer of her children. At present there is nothing to suggest that she would cease to bear that role, but there is the possibility that her role might in the future not be sustained if, for example, she received a custodial sentence for a criminal offence or her children were removed, for their welfare, from her care. It is correct that ILR may also be revoked (on limited grounds), but the whole point of granting LTR is to trigger active reviews in which the Defendant may assess C1ôs LTR under Immigration Rules as they apply to C1ôs circumstances from time to time.

46. As to employment and travel outside the UK, the Defendant responds that C1 is, and will remain, entitled to a biometric residence permit which confirms her permission to work and enables her to prove her status to employers. C1 may not be able to travel outside the UK when one period of limited leave has ended and the Defendant has not yet reached a decision to grant a further period. However, the period in question need not be lengthy if applications are made in good time, and it is not self-evident that any short term difficulty that C1 might encounter in this respect would have a significant impact on the welfare of her children. In my view, this point comes nowhere near making good C1ôs case on the present issue.

47. In these circumstances, I am not able to conclude that the specific decision to grant C1 LTR, rather than ILR, failed to comply with the duty under section 55, or was unlawful on any other grounds (such as a failure to take account of relevant factors or irrationality).

The Grounds of Challenge: No Recourse to Public Funds

48. The grant of leave in this case prohibited recourse to public funds, in the following terms:

> ñ**Under the Immigration Rules you are not entitled to public funds to help meet your living and accommodation costs (or those of any dependents)…**The term ópublic fundsô is defined in paragraph 6 of the Immigration Rules. The public funds which you are not allowed to claim for and receive are listed below:
>
> - Income based jobseekerôs allowance
> - Attendance Allowance
> - Severe disablement allowance
> - Carerôs allowance
> - Disability living allowance
> - Income support
> - **Child tax credit**

- **Working tax credit**
- A social fund payment
- **Child benefit**
- Housing benefit
- Council tax benefit
- State pension credit
- An allocation of local authority housing
- Local authority homelessness assistance

> It is a condition of your stay that you must not receive any of the public funds listed aboveé **If you do claim and receive any of the public funds listed above, that will be a breach of your conditions of stay which is a criminal offence under section 24 of the Immigration Act 1971. This may result in your prosecution for that offence and/or curtailment of your leave to stay in the United Kingdom. It may also result in any future application for further or indefinite leave to remain being refused**
>
> However, there are some exceptional circumstances in which people who have óno recourse to public fundsô recorded in their passports may be able to receive some of the public funds listed above if, for example, there is an agreement between the United Kingdom and their home country. To find out if this applies in your case you should ask the agency or local authority responsible for the particular fund(s)ò [Emphasis added]

49. Ms Weston stressed that denial of access to ópassportedô benefits meant that the children could not access assistance for low-income families including: no access to free school meals, school trips, school breakfasts, after school or holiday clubs, concessionary rates for swimming and other healthy activities for children. The prohibition also acts to prevent access to student loans, educational grants and bursaries.

50. Ms Weston also drew attention to the fact that if the children had still been living with their father, they would have been entitled to child benefit, tax credit and any relevant means-tested benefits. The children had not been responsible for the break down of the marriage but they were suffering adverse consequences as a result of the breakdown.

51. Ms Weston in essence submits that that the Defendantôs policy:

i) sets the threshold for access to benefits too high to be consistent with the s 55/UNCRC Article 3 duty and

ii) requires the family to fall into extreme hardship before being able to access support and thus fails to safeguard and protect the welfare of children;

iii) discriminates against British children by reason of their parentage and is thus irrational and in breach of article 2 UNCRC

52. Ms Weston submits that, as a criterion for access to public funds (including housing benefit, child benefit, child tax credits, income support) ócexceptional or compelling circumstancesô is a wholly inadequate criterion. The criterion, she contends, inverts the primacy of the best interest consideration, making immigration policy (or economic well being) the primary consideration, which may in effect be upset only on the basis of actual destitution. That approach is unlawful in the exercise of any immigration function which affects a child, a fortiori when the child is a British citizen as in this case.

The Second Ground: Discussion

53. It is necessary to consider the reasons why the Defendant has adopted a general policy of denying recourse to public funds to those who have been granted LTR in the circumstances of C1. For this claim Donna Kajita, a Grade 7 officer in the Family Migration Policy Team in the Immigration and Border Policy Directorate of the Home Office, gave a witness statement setting out the reasons at length. They may be summarised as follows.

54. The decision to make the imposition of a NRPF condition the default starting position in cases under the 10-year route to settlement was part of a package of immigration reforms introduced in July 2012. The package of reforms was aimed at reducing burdens on the taxpayer, promoting integration and tackling abuse. The reforms sought to deliver better family migration, which was fair to applicants, local communities and the taxpayer, and which reflected the qualified nature of Article 8. The reforms were preceded by a major public consultation and were debated at length in Parliament.

55. Previously applicants who did not qualify for leave under the IR, but could establish an Article 8 right to remain in the UK, were granted discretionary leave outside the rules (ñDLò). DL was not subject to a NRPF condition and recourse to public funds was granted indiscriminately to large numbers of migrants. To grant such indiscriminate recourse to public funds, particularly at a time of economic stringency, was considered by the Government to be anomalous and unjustified. Migrants who did not qualify for leave under the IR were without good reason also placed in a more favourable position than those who did so qualify. This anomaly perversely reduced the incentive for migrants to seek to bring themselves within the IR as was contemplated by the IR.

56. It was decided, therefore, to impose a NRPF condition as the default position in cases under the new 10-year parent route, and also under the new 10-year routes to settlement on the basis of family life as a partner (including with dependent children) or on the basis of private life. Migration to the UK, it was considered, should

ordinarily be on a self sufficient basis. That would help safeguard the economic interests of the UK. Migrants to the UK granted limited leave ought not as a matter of course to have recourse to public funds, whether granted limited leave specifically under the IR or by reason of Article 8.

57. Additionally, the imposition of a NRPF condition as the default position in 10-year route cases was necessary in order to ensure coherence with the new 5-year routes to settlement on the basis of family life as a parent (with sole or shared responsibility for or access rights to a child in the UK) or partner (including with dependent children). An ôadequateô maintenance requirement was set for the 5-year route as a parent and a minimum income threshold was set for the 5-year route as a partner (including with dependent children) as a means of reducing the burden on the taxpayer and promoting integration. That policy would have been frustrated if applicants who simply qualified for leave under the 10-year routes were in all cases granted recourse to public funds.

58. The policy was considered to be a reasonable and proportionate means of reducing the burden on taxpayers at a time of general reduction in public expenditures. However, the Defendant recognised that it would be appropriate to grant recourse to public funds in some cases where leave was granted under the 10-year routes. The policy developed by the Government (as set out in the RPF Guidance) therefore required caseworkers to grant recourse in cases where the applicant was destitute, or where there were particularly compelling reasons relating to the welfare of a child of a parent in receipt of a very low income.

59. On this evidence I am satisfied that there were powerful reasons of public policy that led the Defendant to consider that in principle those granted LTR in the circumstances of C1 should be prohibited from having recourse to public funds. However, when the policy is considered as a whole, I do not accept Ms Westonôs submission that the reasons for the policy have been elevated to the primary considerations or the paramount considerations for the decision maker who seeks to apply the policy in any particular case, with the result that the policy would prevail whatever the impact on the welfare of any child concerned. The Defendant clearly recognised that under section 55 the best interests of any child concerned in the decision is a primary consideration for the decision maker, and that, depending on the specific impact, the welfare of a child concerned would prevail over the general policy. In my view, the formulation of the guidance does no more than remind the decision maker of the important reasons supporting the general policy and, given their importance, directs the decision maker to be satisfied that there will be a particularly serious effect on the welfare of any child concerned if the general policy is applied in the particular case.

60. It is clear from the caselaw on section 55 (see paragraphs 33-36 above) that the best interests of a child do not in each case necessarily dictate the outcome. Such interests may yield to other demands of policy, so long as the decision maker has genuinely given weight to those interests as a primary consideration. The primary nature of the best interests of any child concerned has in this context been duly recognised by mandating the decision maker not to impose a NRPF condition where there are particularly compelling reasons relating to the welfare of a child concerned. The policy requires the welfare of a child concerned to trump the general policy in those circumstances. In carrying out that analysis the caseworker must no doubt consider how lack of access to what Ms Weston called ópassported benefitsô would affect the

welfare of a child concerned in the specific case. The wider objectives of the policy are clearly significant, but in my view they are not ôinherently more significantô than the welfare of a child concerned because, depending upon the specific impact, they must yield to the primary consideration: see *Zoumbas v SSHD* [2013] 1 WLR 3690, by Lord Hodge.

61. At the end of the day Ms Westonôs case is in effect that under the guidance the decision maker should be mandated to remove the NPRF condition if he was satisfied that such a condition would, or might, have a significant effect on the welfare of a child. That case implicitly rests on an interpretation of section 55 that would place a very substantial fetter on the making and implementation of public policy, in this case to achieve a fair and coherent immigration regime and to promote what the Defendant believes to be a more equitable distribution of fiscal burdens in a period of relative economic austerity. Such an interpretation, in my view, was not intended by section 55 and is not supported by the caselaw.

62. I readily recognise that many people are likely to believe strongly that the Secretary of State ought to have given greater weight, in the adoption of her policy, to the welfare of any child concerned by the decision, and ought to have directed caseworkers to override the general policy if there were adverse, albeit not exceptionally serious, consequences for the child or children concerned. However, in my view, that final decision as to how to weigh important and competing considerations was a political one for the elected government which ultimately chose to give significant, though far from controlling, weight to the perceived needs of a fair and coherent immigration policy and fiscal equity. This Court, even if it disagreed with the result, may not strike down the public policy choice made by the elected government, if it is satisfied that the welfare of the child was accorded due weight under section 55 as a primary or substantial consideration in the adoption of the policy. I am so satisfied, because the policy demands in clear terms that in certain circumstances the welfare of a child concerned must prevail over other considerations, however significant they otherwise might be. I conclude that there is no good ground for deciding the policy to be unlawful.

63. As to the individual decision in this case, C1ôs application for LTR appeared to suggest that if she were granted LTR and allowed to work in the UK she would be able to support herself and her children. She did provide some limited evidence of her financial circumstances. C1 has not submitted any further evidence relating to her financial circumstances and as to any adverse consequences to the welfare of her children that might result if the NRPF condition was maintained. Under the January 2014 Guidance she was entitled to apply for the removal of the NRPF condition, but she has not so far made such an application. The challenge in this case is essentially one of principle.

64. However, my understanding is that if C1 fails in her challenge to the NRPF condition as a matter of principle, she would wish to submit further evidence in respect of her individual financial circumstances with a view to the removal of the prohibition. That plainly lies in the future and does not affect the merits of the present claim. On the material before me I am not able to say whether the effect on the welfare of C1ôs children in the individual circumstances of this case is such that the NRPF condition must not be applied. However, it is perhaps important to note in this context that the Defendant will consider any evidence tending to show that, without public funds,

those concerned would, either presently or in the foreseeable future, be very seriously affected.

65. The grounds of challenge also claimed that the NRPF condition was not consistent with the rights of C1 under Articles 3, 8 and 14 of the ECHR, and under EU laws (*Zambrano*). In the event these grounds were not pursued in oral argument before me and I do not believe that I need say anything about them.

Conclusion

66. For the reasons stated above I reject the claims that: (1) it was unlawful to grant C1 LTR rather than ILR; and (2) it was in principle (and also in the circumstances of her individual case, on the basis of evidence so far provided by C1in her application and in the course of these proceedings), unlawful to make the grant of LTR subject to a condition that she should not have recourse to public funds.

67. The claim is, therefore, dismissed.