Neutral Citation Number: [2014] EWHC 2561 (Admin)

Case No: CO/15518/2013

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/07/2014

Before :

JOHN HOWELL QC
Sitting as a Deputy of the High Court

- -

Between :

The Queen on the Application of:	**Claimant**
(1) PO	
(2) KO	
(3) RO	
- and -	
The Council of the London Borough of Newham	**Defendant**

- -
- -

Ms Shu Shin Luh (instructed by **Coram Children's Legal Centre**) for the **Claimants**
Mr Bryan McGuire QC (instructed by **Solicitors to the Defendant**) for the **Defendant**

Hearing dates: 4 and 5 July 2014

- -

Approved Judgment

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

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JOHN HOWELL QC

John Howell QC :

1. This is a claim for judicial review brought by three children, who are Nigerian nationals, about the level of financial assistance that the Defendant, the Council of the London Borough of Newham, provided under section 17 of the Children Act 1989 to meet the subsistence needs which they and their mother had (as they were destitute) while the Secretary of State for the Home Department was considering whether or not they and their mother should be granted leave to remain in this country.

2. After permission to make this claim was granted by David Elvin QC (sitting as a Deputy High Court Judge) on December 2nd 2013, the Claimants and their mother were granted leave to remain here by the Secretary of State on January 20th 2014. Thereafter they were eligible for assistance with their housing, and to the benefits, that others in this country normally are. The Council has also acknowledged, in the skeleton argument filed by Mr Bryan McGuire QC (who appeared on its behalf), that it made three errors when dealing with the Claimants' case and it has offered to reconsider the adequacy of payments made to them and whether to backdate any additional sum which they should have received. The Council proposes to do this in accordance with its "Policy and practice guidance in respect of those with no recourse to public funds" ("**the NRPF Policy**").

3. The Claimants contend, however, that any decision made in accordance with the NRPF Policy would be unlawful. In the circumstances as they now are, that remains the only issue, among the many raised by Ms Shu Shin Luh (who appeared on behalf of the Claimants), with which it is necessary to determine.

THE BACKGROUND TO THIS CLAIM AND TO THE ISSUE TO BE DETERMINED

4. In March 2002, when she was 1, the First Claimant, PO, arrived in this country from Nigeria with her mother, BO, who is also a Nigerian national, on a visitor's visa. They overstayed their visa. They were joined here in 2003 by PO's father, AO, who is another Nigerian national. He also arrived in this country on a visitor's visa and overstayed. It appears that they may have returned to Nigeria in December 2004 and then returned on a two year visa in January 2005. BO had two further children, born in this country, with AO: KO, the Second Claimant, who was born in December 2005, and RO, the Third Claimant, who was born in December 2009. While BO was pregnant with RO, AO was arrested and convicted of fraud in 2009. An application that they had made for leave to remain in this country, relying on Article 8 of the European Convention on Human Rights, was refused in May 2010; their appeal was dismissed on September 16th 2010 and a further appeal was dismissed by the Upper Tribunal on May 17th 2011.

5. AO and BO eventually separated in August 2011. In September 2011 BO made a further application for leave to remain this country under Article 8. This was refused by the Secretary of State for the Home Department on February 8th 2012 with no right of appeal. On October 15th 2012 BO's solicitors asked the Secretary of State to reconsider that decision. It appears that the Council was only informed that such a request had been made on March 14th 2013. By then, however, the Claimants had

already been referred to the Council by the Children's Society for a "children in need" assessment and they had solicitors acting on their behalf who were in contact with the Council. They and their mother were due to be evicted from the accommodation in which they had been staying on March 15th 2013.

6. Faced with their imminent homelessness, the Council recognised in practice that the family was destitute and that the Claimants, who were then aged 12, 7 and 3, were children in need.

7. Accordingly, on March 15th 2013, the Council provided the family with accommodation in a two bedroom flat, with a kitchen, living room and bathroom, in Ilford in Redbridge. The Council met the cost of the rent and council tax for, and of the water, gas and electricity consumed at, the premises, some £1,302 a month.

8. Following intervention by the Claimants' solicitors, from April 18th 2013, the Council paid £50 per week to meet the subsistence needs of the family. It appears that this simply reflected the set rates that "senior management" at the Council had decided should be paid to families who had no access to normal benefits. Despite a number of requests made on the Claimants' behalf before this claim for judicial review was filed, no written policy governing these rates and no explanation of their basis was provided by the Council. Indeed, in response to this claim for judicial review which impugned them, the Council has not produced any document even setting out what these rates then were, much less any document recording the decision to adopt them or providing reasons for their adoption. Mr McGuire told me there are none.

9. The Claimants were also in school in Newham. In May 2013 the Council also provided BO with an oyster card with credit of £19.60 per week to enable her to take and collect the Claimants from school by bus.

10. On August 1st 2013 solicitors acting for the Claimants sent yet another letter before claim complaining that the Council had still not carried out any assessment of the Claimants' needs or provided appropriate support for them under section 17 of the Children Act 1989. On August 6th 2013 BO and the claimants made an application for leave to remain under the Immigration Rules. The Council asked to be given until August 15th 2013 to respond to the letter before claim. In the event no response from the Council to this letter before claim was made before this claim for judicial review was filed on October 16th 2013. The claim impugned the failure to carry out any lawful assessment of the Claimants' needs and the financial support being provided to meet the subsistence needs which they and their mother had.

11. In its Acknowledgement of Service dated October 30th 2013, indicating an intention to contest the claim, the Council sought an extension of time for filing its summary grounds of resistance. In these summary grounds, dated November 4th 2013, the Council revealed, for the first time, that it had in fact completed a core assessment with respect to the Claimants on May 7th 2013 and it asserted that the provision made for them was adequate. These grounds were accompanied by a witness statement by Ms Judith Kinobe, a Practice Manager employed by the Council, that asserted that "the support being given to this family in comparison with families on benefits is adequate as their accommodation and bills are paid for". These documents were also accompanied by disclosure of a Core Assessment of PO and her siblings completed in May 2013, as well as a copy of the NRFP Policy that had been approved, shortly

before, on October 31st 2013. The disclosed Core Assessment recorded that the family were destitute and required help with travelling costs, weekly subsistence and housing accommodation. It indicated that "a weekly subsistence of £50.00 has been approved for [their mother] and her children" and that "she will also receive weekly support with travel" but it provided no indication why it was considered (if it was) that £50 was sufficient in respect of their subsistence needs or how that amount had been determined or by whom it had been approved.

12. On November 12th 2012 His Honour Judge Dight gave the Claimants permission to make further submissions arising from the disclosure provided by the Council. The Claimants accordingly filed a Reply, dated November 15th 2013, that supplemented their initial grounds. The Reply impugned the core assessment completed in May 2013, the financial support provided and the NRFP Policy to the extent that any reliance was placed on it. As I have mentioned, on December 2nd 2013, Mr David Elvin QC gave the Claimants permission to bring this claim for judicial review. At the outset of the hearing before me I gave the Claimants permission to supplement the grounds on which this claim is made by reliance on their Reply (as that was formally required) without prejudice to the question whether (as Mr McGuire contended) relief should be refused in any event even if any ground of challenge could be made good.

13. As I have also already mentioned, on January 20th 2014, the Secretary of State gave BO and the Claimants limited leave to remain in this country. Accordingly they became eligible as others in this country normally are for assistance with housing and various benefits. It appears that they began to receive income support on April 25th 2004, child benefit for PO and KO in mid May 2014 and child tax credits on June 26th 2014. The last payment from the Council to meet their subsistence needs was made on May 19th 2014. On June 30th 2014 they were required to leave the flat that had been provided by the Council and they are now accommodated in one room in an establishment providing bed and breakfast arranged by Redbridge Borough Council.

14. In its skeleton argument, having acknowledged that three errors were made when dealing with the Claimants' case, the Council offered to reconsider the adequacy of payments made to them and whether to backdate any additional sum that they should have received. The Council proposed to do this in accordance with its NRPF Policy. The Claimants contended, however, that any decision in accordance made in accordance with this policy would be unlawful.

15. Having heard submissions at the outset of this hearing, I decided that that remained the only issue, among the many Ms Luh wished to pursue, that was not academic in the circumstances as they then were. In my judgment I had no jurisdiction, for example, to order the Council to pay backdated payments in respect of the Claimants' subsistence (as she invited me to do) on the basis that they should have received an amount equivalent to what a similar family in receipt of income support, child benefit and child tax credits would have done. The decision as to what services a local authority should provide under section 17 of the Children Act 1989 is one vested in that authority by Parliament. The court's function is limited to reviewing the legality of what the Council may decide, or does not decide, to do and requiring it to reconsider if what it decided to do, or not to do, was unlawful: see eg ***R v Barnet LBC ex p Shah*** [1983] 2 AC 309 per Lord Scarman at pp350-351. It is not for this court to determine (or to substitute its judgment for that of the local authority as to) what may be the appropriate amount in cash that should be paid towards the subsistence needs

of a destitute family which includes children in need whom a local authority determine should be assisted by any such payments under section 17 of the 1989 Act: cf ***R (Refugee Action) v the Secretary of State for the Home Department*** [2014] EWHC 1033 (Admin) per Popplewell J at [3]. The most, therefore, that the Claimants could have obtained, if they had established some flaw in the Council's consideration of their case, was an order requiring the Council to reconsider it. Given that the Council has recognised that it made errors when dealing with the Claimants' case and that it had offered to reconsider what amounts should have been paid towards the subsistence needs of the family, I decided that the only remaining issue with which the court should deal was whether any such decision made in accordance with the NRPF policy (as the Council proposed on such a reconsideration) would be unlawful (as the Claimants contended).

THE LEGAL BACKGROUND AND THE COUNCIL'S NRPF POLICY

16. Those adults from outside the European Economic Area who have no right of abode, or leave to be, in this country are generally ineligible for any support or assistance to help meet any needs they have for accommodation, income and other services under numerous enactments[1]. Those with dependent children may receive assistance in different circumstances from different authorities.

(a) those who are claiming or who have claimed asylum

17. This general exclusion from such benefits does not apply to asylum seekers or, in certain limited circumstances, to failed asylum seekers[2].

18. The Secretary of State may provide support for asylum seekers and their dependants if they are destitute. An asylum seeker is destitute if he does not have adequate accommodation or any means of obtaining it for himself and any dependent he may have (whether or not their other essential living needs are met) or, if he has such accommodation or the means of obtaining it, he cannot meet his and their other essential living needs. In those circumstances the Secretary of State may provide support for them under section 95 of the Immigration Act 1999 ("***asylum support***"). Asylum support may include the provision of accommodation that appears to the Secretary of State to be adequate for the needs of the supported person and his dependants (if any) and the provision of what appears to the Secretary of State to be the essential living needs of the supported person and his dependants (if any).

19. As a general rule, asylum support in respect of essential living needs is provided weekly in the form of cash in the amounts specified in regulation 10 of the Asylum Support Regulations 2000. Provided any accommodation does include provision for such needs (such as breakfast or board) these amounts per week are for:

A qualifying couple:	£72.52
A Lone parent aged 18 or over:	£43.94
Any other single person aged 18 or over:	£36.62

[1] see paragraphs 1, 2(1)(b) and 7 of Schedule 3 to the Nationality, Immigration and Asylum Act 2002, section 50A of the British Nationality Act 1981.
[2] see paragraphs 6, 7 and 7A of Schedule 3 to the Nationality, Immigration and Asylum Act 2002.

A person aged at least 16 but under 18 (except a member of a qualifying couple): £39.80

A person aged under 16: £52.96

As a general rule, the Secretary of State will also pay an additional £5 per week for a child until his first birthday and £3 per week until his third[3]. In addition to these sums payable as a general rule, the Secretary of State may provide additional support in order to enable the essential living needs of the supported person and his dependents (if any) to be met if she considers that the circumstances of a particular case are exceptional: see section 96(2) of the Immigration and Asylum Act 1999; ***R (Refugee Action) v the Secretary of State for the Home Department*** [2014] EWHC 1033 (Admin) at [36].

20. It should be noted, however, that, while a person is receiving or may be provided with asylum support, neither he, nor any child who is a dependent of his, nor any member of his family may be provided with accommodation or assistance with any essential living needs by a local authority under section 17 of the Children Act 1989: see section 122 of the Immigration Act 1999; ***R (Refugee Action) v Secretary of State for the Home Department*** *supra* at [74] and [77].

21. Asylum support is provided until the asylum claim is finally determined. However, if an asylum-seeker's household includes a child who is under 18 and a dependant of his when his claim is determined, he is to be treated as continuing to be an asylum-seeker, while the child is under 18 and they all remain in the United Kingdom, unless and until he is granted leave to enter or remain here[4]. Asylum support will continue to be provided, therefore, in such cases generally to such families, if they are otherwise destitute, unless they fail to take reasonable steps to leave voluntarily without any reasonable excuse[5].

22. Those having temporary admission to this country and, in certain limited circumstances[6], other failed asylum seekers and their dependents who are destitute, may be provided with accommodation and services and facilities of a specified kind by the Secretary of State under section 4 of the Immigration Act 1999 ("***section 4 support***"). In practice it appears that such failed asylum seekers and their dependants who receive section 4 support are generally provided with accommodation and an Azure pre-paid payment card, to cover food and essential toiletries only, which they can use at certain supermarkets and shops. Its value per person is £35.39 per week.

23. Normally a destitute failed asylum seeker who has a child will remain eligible for asylum support. But such an individual may have a child after the final determination of his or her claim in which case they will not be eligible for asylum support. When an individual receiving section 4 support has a dependent child, however, the Secretary of State may also provide vouchers, redeemable for goods and services,

[3] see regulation 10A of the Asylum Support Regulations 2000.
[4] see section 94(5) of the Immigration Act 1999.
[5] see paragraph 7A of Schedule 3 to the Nationality, Immigration and Asylum Act 2002. They will then be subject to the general exclusion from benefits by virtue of paragraph 1 to that Schedule unless provision of assistance is necessary for the purpose of avoiding a breach of a person's Convention rights or rights under the EU Treaties: see paragraph 3 of that Schedule.
[6] see the Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005.

worth £5 per week for a child until his first birthday and £3 per week until his third birthday and a voucher redeemable for clothing for any child until his sixteenth birthday worth £5 per week[7].

24. If the Secretary of State is satisfied that a person for whom section 4 support is provided nonetheless has an exceptional need for essential living needs, she may provide for that need[8].

25. In ***R (VC and others) v Newcastle City Council*** [2011] EWHC 2673 (Admin), [2012] PTSR 546, Mumby LJ thought that the Secretary of State had accurately described section 4 support as an austere regime, which is made available to failed asylum seekers to provide a minimum level of humanitarian support and that, as she said, it is intended to provide the minimum support necessary to avoid a breach of a person's Convention rights: see at [87]. The Divisional Court held in that case that a local authority is not barred from providing under section 17 of the Children Act 1989 for the accommodation or essential living needs of a child or members of his family who are in receipt of, or eligible for, section 4 support (in contrast to the position of those in receipt of, or who may be provided with asylum support): see at [86]-[94], [98].

(b) others with children in need but with no right to benefits

26. Asylum support and section 4 support are not available to those, such as the Claimants' mother, BO, who remain in this country after any leave to be here which they had has expired. There are other adults who equally are debarred from receiving assistance by virtue of the general exclusion to which I have referred. Children are not subject to this general exclusion and they remain potentially eligible for assistance under Part III of the Children Act 1989.

27. Part III of the Children Act 1989 is concerned with children in need. For this purpose, section 17(10) provides that

> "A child shall be taken to be in need if—
>
> (a) He is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by a local authority under this Part;
>
> (b) His health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services; or
>
> (c) He is disabled".

28. For this purpose "development" means physical, intellectual, emotional, social or behavioural development; and "health" means physical or mental health[9]. In practice a child without accommodation cannot normally be reasonably regarded as anything other than a child in need: see ***R v Northavon District Council ex p Smith*** [1994] 2

[7] see regulations 7 and 8 of the Immigration and Asylum (Provision of Services or Facilities) Regulations 2007.
[8] see regulation 9 of the Immigration and Asylum (Provision of Services or Facilities) Regulations 2007.
[9] see section 17 (11) of the Children Act 1989.

AC 202 per Lord Templeman at p406; ***R (G) v Barnet London Borough Council*** [2003] UKHL 57, [2004] 2 AC 208 per Lord Nicholls at [19], Lord Hope at [72] and [99].

29. Under section 20 of the 1989 Act every local authority is required to provide accommodation for any child in need within their area who appears to them to require accommodation as a result of the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care. This duty is owed to the child alone. It does not involve providing accommodation with, or any assistance to, any adult member of that child's family if that person also needs it: see ***R (G) v Barnet London Borough Council*** *supra* per Lord Hope at [100]-[104].

30. Section 17 of the 1989 Act provides, however, that:

> "(1) It shall be the general duty of every local authority (in addition to the other duties imposed on them by this Part)—
>
> (a) To safeguard and promote the welfare of children within their area who are in need; and
>
> (b) So far as is consistent with that duty, to promote the upbringing of such children by their families, by providing a range and level of services appropriate to those children's needs.
>
> (3) Any service provided by an authority in the exercise of functions conferred on them by this section may be provided for the family of a particular child in need or for any member of his family, if it is provided with a view to safeguarding or promoting the child's welfare.
>
> (6) The services provided by a local authority in the exercise of functions conferred on them by this section may include providing accommodation and giving assistance in kind or. . . in cash.
>
> (10)...."family", in relation to [a child in need], includes any person who has parental responsibility for the child and any other person with whom he has been living."

31. In ***R (G) v Barnet London Borough Council*** *supra* the Appellate Committee held that the duty imposed by section 17(1) was a general duty for the benefit of children in need in the local authority's area generally; that it did not create a duty owed to each and every child in need in its area; and that, in discharging it, the local authority may have regard to the resources which may be required. Thus, when it appears to a local authority that a child within its area is in need, they are under a duty to assess his needs for its services: ***ibid*** at [77], [110] and [117]. But it is under no duty to provide any services which any child is assessed to need, although any refusal to do so is amenable to judicial review and is likely to be subject to strict scrutiny, particularly if there is no available argument for denying them to the child in need of them based on

a lack of resources: see ***R (VC) v Newcastle City Council*** *supra* per Mumby J at [21]-[27].

32. Adults, who are unlawfully here and who are subject to the general exclusion from benefits to which I have referred, are not normally eligible for assistance under section 17 of the 1989 Act[10]. They may be assisted under these provisions only if, and to the extent that, such provision is necessary for the purpose of avoiding a breach of a person's Convention rights or a person's rights under the EU treaties[11]. When the family is destitute, such provision may be necessary if providing accommodation for a child in need alone (under section 20 of the 1989 Act), for example, would be incompatible with the right to respect for their private and family life that the child and other members of his family have under article 8 of the European Convention on Human Rights. It may well be possible, however, for families who are not lawfully here to live together abroad compatibly with their rights under that Convention and to be assisted with the costs of travelling there. But, where an adult member of the child's family has made an application for leave to remain and the local authority are satisfied that it is not obviously hopeless or abusive, the Court of Appeal held in ***R (Clue) v Birmingham City Council*** [2010] EWCA Civ 460, [2011] 1 WLR 99, that it should not refuse the assistance under section 17 of the 1989 Act which it would otherwise have provided if that would have the effect of requiring the adult to leave the United Kingdom, thereby forfeiting his claim for leave to remain. Different considerations would apply if there was no such claim or if the authority is satisfied that it is obviously hopeless or abusive. If a local authority is entitled to assist adult members of the family of a child in need under section 17 of the 1989 Act, however, it remains the case that it can do so only to the extent necessary for the purpose of avoiding a breach of a person's Convention rights or a person's rights under the EU treaties. That may affect the extent of the support that it may be able to offer such an adult.

(c) the Council's NRPF Policy

33. The Council's NRPF policy aims to provide "the framework upon which assessments of eligibility and need should take place so as to allow correct, robust and legally sound decisions to be made in relation to what support is provided on a case by case basis" for those having no recourse to public funds and who are destitute[12].

34. The NRPF Policy requires social workers to consider whether any child is in need; whether any adult qualifies for adult social services and whether the family is destitute. It provides that, when interviewing children and parents, social workers should explore as fully as possible with them any existing sources of help and support in the community and from voluntary groups, social networks etc[13]. Where alternative support and schemes are available, the Council's expectation is that such support will be accessed, unless there are good reasons why this should not be done in a particular case[14]. The Policy also states that, where the adult does not qualify for support in their own right but the child is eligible for support, then, in consideration of the child's

[10] see paragraph 1(1)(g) of Schedule 3 to the Nationality, Immigration and Asylum Act 2002.
[11] see paragraph 3 of Schedule 3 to the Nationality, Immigration and Asylum Act 2002.
[12] see paragraphs [1.1] and [1.4] of the NRPF Policy.
[13] see paragraph [5.1.4] of the NRPF Policy.
[14] see paragraph [2.2] of the NRPF Policy.

right to respect for his private and family life under article 8 of the European Convention on Human Rights, the Council will provide support in a way designed to enable the family to stay together should this be considered in the child's best interests. Accommodating children away from their parents will only be considered where there are significant safeguarding concerns[15].

35. If the conclusion of an assessment is that support should be provided then a "Child in Need Plan" is to be devised setting out the type of support to be provided. The two main types of support envisaged are housing and financial support. The latter is the subject matter of this claim. In relation to it, the NRPF Policy provides that:

> "5.2.4 Financial:
>
> Financial support can be agreed, if a need is indicated by the Child in Need Assessment. Subsistence payments are paid weekly, in line with local guidance. While guidance exists and will be relied upon, subsistence payments will be determined on a case by case basis considering the individual situation of the family.

Type of person/people	£/week
Couple with up to 2 children	£50.00
Couple with 3 children (additional children, £7 per week)	£60.00
Lone Parent with 1 child	£30.00
Lone Parent with 2 children (additional £7 per week)	£35.00
Baby under 12 months old	An additional £5
Pregnant women and children under 3 years old	An additional £3
Where overheads such as gas and electricity are not included in accommodation	Additional £10/week

> 5.2.5 In exceptional circumstances, additional financial support may be required, for

[15] see paragraph [3.2.4] of the NRPF Policy.

> example due to a crisis or emergency. LBN can provide time-limited additional financial support, but requests must be made by the allocated case worker using Appendix 2.
>
> 5.2.6 Where a person states in writing that he or she is not satisfied that the rate paid meets the subsistence needs of the family and that a further sum is required to meet those subsistence needs, LBN will conduct an internal review within 21 days of receipt of that written request in order to determine whether any and if so what further sum is required. LBN will have the discretionary power to backdate any enhanced payment."

36. As paragraph [5.2.6] makes plain, the standard rates of the "subsistence payments", set out in the table in paragraph [5.2.4], are designed to meet the "subsistence needs" of the individuals involved. In addition to a need for accommodation and subsistence, a child may also have what the NRPF Policy describes as "care and attention needs" but these are to be dealt with in the same way (so far as possible) as those who have recourse to public funds[16].

37. The NRPF Policy provides no explanation how the standard rates of these subsistence payments were determined. However, in a witness statement made on the Council's behalf, one of their social workers, Ms Ngozi Alike, stated that "the payment rate paid to families was derived from Child benefit rates which are £20.30 for the eldest child and £13.40 for subsequent children."

SUBMISSIONS

38. On the Claimants' behalf Ms Luh submitted that the NRPF Policy was unlawful given that it had never been published but that it was otherwise unlawful in any event. She submitted that it made the standard rates of subsistence an inflexible starting point and end point in the assessment of what was required; that the policy fettered the local authority's discretion by reference to rates unrelated to children's needs; that their basis in child benefit rates was arbitrary, since child benefit was not intended to meet subsistence needs, and not transparent, since it was unclear how the standard payment rates of subsistence were derived from them; that what needs the payments were intended to meet was likewise not transparent; and that the rates were too low to be sufficient. For a family of four (such as the claimants') the weekly payment prescribed is £42 (although they had received £50 per week). That, she submitted, fell far below any acceptable comparable standard. They were far below the appropriate yardstick of "mainstream benefits" (namely income support, child tax credits and child benefit) which, so she submitted, would have afforded this family, had they been eligible, £235.91 per week for their support (after meeting utility bills and travel costs). Moreover the standard payments were less than the payments which the Secretary of State makes to meet essential living needs as part of asylum support (which, for a family such as the Claimants', would be £202.72 per week) or the

[16] see paragraph [5.2.8] of the NRPF Policy.

provision made for food and toiletries as part of section 4 support (which for a family of four such as this, she submitted, would be £142.76 per week). They would leave children in absolute child poverty (as measured under the Child Poverty Act 2010). While the Policy provided for a review in paragraph [5.2.6] that was merely to see whether there were exceptional circumstances for departing from the standard payment rates for subsistence from which, in reality, as the evidence showed, there was no flexibility to depart as being insufficient.

39. On behalf of the Council, Mr McGuire accepted that the NRPF Policy had not been published in any form. But he submitted that, for present purposes at least, that was irrelevant: the Policy was known to the Claimants and they could make representations with respect to it when their case was reconsidered. Mr McGuire did not accept that it was appropriate to compare the standard rates of payment for subsistence needs in the Policy with national schemes of support that had been formulated for purposes not necessarily identical to the Council's and that took no account of local conditions, prices or services available from the local authority and others, having regard to the decisions in ***R (Satu) v the London Borough of Hackney*** [2002] EWHC 952 (Admin) at [20]-[25] and [2002] EWCA Civ 1843 at [25]. But he also accepted that child benefit was not intended to meet the subsistence needs of a child and that to use it as a measure of what a child might require to meet such needs would be wrong. He nonetheless submitted that, when properly construed, the NRPF Policy was a lawful means of determining what payments should be made to meet the subsistence needs of a family who were destitute and otherwise eligible for support under it. He submitted that the Policy required a determination of what subsistence payments were required on a case by case basis. Although the standard payment rates provided guidance, such a case by case assessment was what paragraph [5.2.4] specifically called for, even before matters fell to be considered under paragraph [5.2.5] or reviewed under [5.2.6]. Secondly, even ignoring that point, he submitted that it was lawful to have standard rates provided that the Council was prepared to depart from them in exceptional circumstances, as paragraph [5.2.5] stated they were. But, thirdly and most significantly, he submitted that paragraph [5.2.6] required consideration to be given, in any case where those involved are not satisfied that the rate paid meets the family's subsistence needs, to a review of whether any, and, if so, what further sum may be required untrammelled by anything previously stated in the Policy. The family's needs and expenditure could be looked at in detail, pound by pound. Mr McGuire submitted that, if social workers in the Council had not understood the Policy in this way, that was irrelevant: whether the policy was lawful depended on its true construction.

CONSIDERATION

40. The NRPF Policy was approved on October 31st 2013. It appears to have been applied since then by the Council, even though it has not been published or (so it appears) made available to others, in particular to those whose cases may affected by its application. The Claimants have only obtained it as part of the disclosure which was ordered after this claim for judicial review was filed. Mr McGuire did not suggest that there was any reason why the NRPF Policy should not be available to those who might be affected by its application. In my judgment failure to do so would be unlawful. As Lord Dyson SJC stated in ***R (WL (Congo) v the Secretary of State for the Home Department*** [2011] UKSC 12, [2012] 1 AC 245, at [35],

> "The individual has a basic public law right to have his or her case considered under whatever policy the executive sees fit to adopt provided that the adopted policy is a lawful exercise of the discretion conferred by the statute: see *In re Findlay* [1985] AC 318, 338e. There is a correlative right to know what that currently existing policy is, so that the individual can make relevant representations in relation to it."

41. I accept, however, that, as Mr McGuire submitted, the fact that the Policy has not been published does not prevent these particular Claimants making representations with respect to its application to their case when the Council may reconsider it (if the Policy is otherwise lawful) as they are now in possession of it.

42. Under section 17(1) of the Children Act 1989 the Council has a general duty to provide a range and level of services appropriate to the needs of children in need in its area to safeguard and promote their welfare and, so far as it is consistent with that, to promote the upbringing of such children by their families. The NRPF Policy is one which sets out services (in the form of the provision of accommodation and financial assistance) that the Council may make available to destitute children in need in their area whose family have no recourse to public funds for support so that they may remain together. This claim is directed at whether the level of such services for which Policy provides is "appropriate to those children's needs" in order "to safeguard and promote their welfare" as section 17 of the 1989 Act requires. That is a matter which it is for the Council to determine. But its determination is one that, in my judgment, may be impugned on traditional *Wednesbury* grounds or as being incompatible with the Convention or EU rights of those who may be affected by the Policy.

43. There were times during Ms Luh's submissions when it seemed to me that she came close to submitting that a local authority could not have standard rates in the sort of cases to which the Policy applies. There may perhaps be cases in which the needs of children in need are so varied that a policy specifying what they should normally be provided with to meet them would not be appropriate even if hedged around with exceptions, as Templeman LJ was minded to think: see ***Attorney-General (ex rel Tilley) v Wandsworth London Borough Council*** [1981] 1 WLR 854 at p858. But, whether or not such a suggestion is now consistent with discharge of the general duty imposed by section 17 of the 1989 Act, in my judgment it has no validity in this case. A local authority making payments in respect of the subsistence needs of child, who is in need simply because his family is destitute, and those of his family must inevitably have some conception of how much is normally "appropriate to those children's needs" in order "to safeguard and promote their welfare". As Popplewell J stated in ***R (Refugee Action) v the Secretary of State for the Home Department*** *supra* at [38], "the normal needs of children...will not be exceptional". It would be administratively absurd (if not impossible), and productive of unnecessary expense, if the amount required had to be assessed in each individual case without any guidance as to what is normally appropriate. Moreover, in practice, such an approach devoid of any general guidance would inevitably lead to unjustifiable and unfair differences in the amounts paid to different families in a similar position depending on the views of the individual or individuals making, or approving, such assessments. It is a common feature of welfare legislation that it provides for certain specified amounts to be payable to meet an individual's basic needs, as is the case, for example, with income

support and payments to meet the essential living needs of those having asylum support. In my judgment, therefore, there was nothing unlawful as such in the Council prescribing various standard rates of payment to meet the subsistence needs of the families to whom the NRPF Policy applied provided the policy allowed for exceptions from it in exceptional circumstances: see eg ***In re Findlay*** [1985] AC 318 per Lord Scarman at p336; ***R v North West Lancashire Health Authority*** [2000] 1 WLR 977 per Auld LJ at p991.

44. Nonetheless "the starting point in the policy against which any exceptional circumstances have to be rated must be properly evaluated" as Auld LJ put it in ***R v North West Lancashire Health Authority*** *supra* at p992g. In my judgment the determination of standard rates of payment to meet the subsistence needs of those to whom the NRPF Policy applies was flawed, however, in more than one respect. The starting point which it contains, therefore, cannot lawfully be relied on.

45. Child benefit (from which it is said the standard payment rates in the NRPF Policy were derived) is a non-means-tested benefit[17] paid to those, normally their mother, who are, or who are treated as being, responsible for children or qualifying young persons,. It is not a benefit designed to meet the needs which a child has for support in financial terms. Thus, when considering what means-tested benefits should normally be payable to support a family with children, child benefit is payable in addition to (and falls to be disregarded when calculating any income for the purpose of calculating) income support[18] and income-based jobseeker's allowance[19]. For the financial year 2013-14, an adult (entitled to income support or income-based jobseeker's allowance was taken to require £65.62 per week for each child under 16[20] in addition to the child benefit of £20.50 each week for the first child, and £13.55 for any other child, that he or she may receive. This is not to suggest that the Council need pay in respect of each child, say, the lower rate of child benefit and the lower applicable amount under income-based Jobseeker's allowance, currently in total £75.83 per week. Those on such benefits are likely to have costs that families to whom the NRPF Policy applies do not have such as, for example, furnishing and equipping their accommodation. Such benefits may equally provide for a higher standard of living than respect for the Convention rights of adults, or than the subsistence needs of children, to whom that Policy applies may require. It merely shows that child benefit is not intended by itself to meet the financial costs of bringing up a child in normal circumstances even for those reliant on means-tested benefits.

46. More significantly, child benefit is not a benefit that is designed to meet the subsistence needs of the children in respect of whom it is payable by itself, as Mr McGuire accepted. That can be illustrated by the difference between the current rates

[17] Previously tax-free, it has, since January 7th 2013, been subject to a High Income Child Benefit Tax Charge. If a person or their partner, if they have one, has an individual adjusted net income of more than £50,000, the person with the higher income will be liable to a tax charge on some or all of the Child Benefit they are entitled to receive. The tax charge is 1% of the Child Benefit paid for every £100 of income received over £50,000 and up to £60,000 and a charge equal to the full amount of Child Benefit paid for income over £60,000.

[18] see regulation 40(2) of, and paragraph 5B(2) of Schedule 9 to, the Income Support (General) Regulations 1987.

[19] see regulation 103(3) and paragraph 6B(2) of Schedule 7 to the Jobseeker's Allowance Regulations 1996.

[20] see Schedule 2 of the Income Support (General) Regulations 1987 and Schedule 1 of Jobseeker's Allowance Regulations 1996 as amended by Schedules 2 and 9 to the Social Security Benefits (Up-rating) Order 2013 respectively.

of child benefit and the amount that the Secretary of State currently pays to meet the "essential living needs" of those on asylum support. Such payments have to meet the minimum requirements of Directive 2003/9, known as the Reception Directive. These include the requirements that the asylum support provided must be adequate to ensure that its beneficiaries can maintain an adequate standard of health and that they can meet their subsistence needs and enjoy a dignified standard of living: see ***R (Refugee Action) v the Secretary of State for the Home Department*** *supra at* [85]-[87]. Ms Luh asked me to infer that the rates payable by the Secretary of State in respect of essential living needs by way of asylum support were unlawfully low in any event. It is true that they have not been increased (whether to reflect inflation or otherwise) since they were set at the current rates for 2011-12 and that the Secretary of State's decision not to increase them for 2013-14 was quashed by Popplewell J in ***R (Refugee Action) v the Secretary of State for the Home Department*** *supra*. But Popplewell J was not persuaded, on the evidence he had. that the sums payable were so obviously insufficient to meet essential living needs in 2013-14 that no reasonable person could have thought otherwise: see at [134]. For present purposes I take it that they were not unreasonable, albeit not overly generous, amounts to pay by way of asylum support to meet essential living needs or, as Popplewell J put it at [121] "to keep [those receiving them] above subsistence level destitution". The sum payable by way of asylum support for a child aged between 3 and 16 is £52.96 per week. That is nearly 4 times the current weekly amount of child benefit for a second child, namely £13.55. There may be some difference between a child's "essential living needs" and their "subsistence needs" as the Council conceives them and between the time which a family may typically have to rely on asylum support and on assistance from the Council, although Mr McGuire was unable to explain to me precisely what either might be. Nonetheless, faced with that sheer scale of difference in the rates payable for "essential living needs" and for "child benefit", in my judgment no reasonable authority could have based its assessment of what was appropriate to meet the subsistence needs of a destitute child on the amounts payable in respect of child benefit. Indeed Mr McGuire did not seek to defend such an approach.

47. But that is not the only flaw in the determination of the standard payment rates to meet subsistence needs in the NRPF Policy. These rates apply when the Council has decided to support the adults in the family of the children whose subsistence needs they are seeking to meet appropriately by such payments. As Mr McGuire accepted, if the Council are seeking to keep the family together when that is in the children's interests and to respect their Convention rights, it would make no sense to leave the adults to starve. The amounts payable to such adults may not exceed what is necessary to avoid a breach of the Convention rights of those involved. But such amounts should be additional to those which the Council considers are appropriate to the needs of the children involved. If the payment rate to families was derived from child benefit rates (as the Council has stated in its evidence), it would be reasonable to expect that the standard rates of payments to meet the subsistence needs of the family would exceed the amounts which would have been payable by way of child benefit in respect of the children involved to take account of the subsistence needs of the adult members of their family. But it is apparent, from comparing the standard rate payments under the NRPF Policy which are to be made to a couple with two children and a lone parent with two children, that the Council's assumption is that an adult normally requires £15 per week to meet their subsistence needs and a child only needs £10 per week. That figure for each child can be compared with the child benefit rates,

which the Council say that they used, of £20.30 per week for the first child and £13.40 per week for any further child in the family. Child benefit for two children would be £33.70 whereas the Council will only pay £20. Even if child benefit rates could reasonably have been regarded as an appropriate measure of the cost of meeting a child's subsistence needs, the Council has provided no explanation, nor did Mr McGuire suggest one, for such a reduction. Nor is there any explanation for the reduction to £7 for certain subsequent children in the family (instead of £13.40) nor for the fact that the Council considers that to meet the subsistence needs of a third child in the family requires £10 per week if there are two parents, but only £7 per week if there is only one parent, to look after them. There is thus no rational explanation of how the standard payments to meet the subsistence needs of the children to whom this Policy applies can be derived from the child benefit rates, even if those could reasonably be regarded as a measure of what is normally required for that purpose.

48. Nor, in any event, is there any rational way in which the rate of standard payments to meet an adult's subsistence needs of £15 per week (which is less than half what the Secretary of State provides by way of asylum support to meet the need for food and toiletries only so as to avoid a breach of Convention rights, some £35.39 per week) could be derived from child benefit rates.

49. In my judgment, therefore, the Council's explanation how the standard payment rates were derived provides no rational basis for the amounts chosen. The starting point for the Policy is accordingly flawed. Indeed Mr McGuire did not seriously seek to defend it or to contend otherwise.

50. Mr McGuire's submissions in seeking to support the lawfulness of the continued application of the Policy (provided that it was appropriately publicised) were instead designed in effect to show that, on its true construction, the standard rates of payment to meet subsistence needs prescribed in the Policy would have no material influence on what would be assessed to be appropriate whenever in fact they were inadequate.

51. First Mr McGuire submitted that the Policy required a determination of what subsistence payments were required on a case by case basis. Although the standard payment rates provided guidance, such a case by case assessment was what paragraph [5.2.4] specifically called for, even before matters fell to be considered under paragraph [5.2.5] or reviewed under [5.2.6]. In my judgement this submission fails to reflect the terms and structure of the Policy. As is stated in paragraph [5.2.4], payments are made weekly in line with local guidance "that will be relied on". That guidance comprises the standard payment rates to meet subsistence needs set out in that paragraph. Those rates plainly represent what the Council thinks appropriate normally. They may be increased "in exceptional circumstances" as paragraph [5.2.5] states. They may also be reduced. As I have indicated, the Policy provides that, where alternative support and schemes "are available", the Council expects such support to be "accessed" unless there is good reason why not in a particular case and social workers are expected to explore with children and their parents as fully as possible any existing sources of help and support. If there are any, no doubt the standard payments prescribed would be reduced accordingly. Such is the case by case assessment in accordance with the Policy envisaged. Thus any increase from the standard rates of payment would require "exceptional circumstances" as stated by paragraph [5.2.5]. Indeed, were it otherwise, it is hard to understand what the point

was of prescribing standard rates of payment to meet subsistence needs in the Policy, or stating that such guidance "will be relied on", as the Council has done.

52. This is indeed how the Council itself has understood its own Policy. As Ms Alike stated in her witness statement filed on behalf of the Council referring to the Claimant's mother, "the local authority will not increase her subsistence payment as the children have not been assessed to have needs beyond those of other families that are given the same amount as per our No Recourse to Public Funds Policy."[21] In other words subsistence payments will not be increased above the standard prescribed rates absent exceptional circumstances.

53. Secondly, Mr McGuire submitted that it was lawful to have standard rates of payment provided that the Council was prepared to depart from them in exceptional circumstances, as paragraph [5.2.5] stated they were. Ms Luh in effect submitted that this statement did not reflect the real policy: the standard rates were not only the starting point, but also the end point, of any assessment. She referred to statements in the assessments of the Claimants' needs made by the Council that it has "an inflexible policy for subsistence payment provided to families with No Recourse to Public Funds". I am not prepared to find, however, that paragraph [5.2.5] is in effect mere window-dressing that has no significance or use. There is no reason to assume that the Council would never increase the amount it may pay in "exceptional circumstances", such as a crisis or emergency, or if, for some reason, as Ms Alike's witness statement necessarily implies, if a family's children had greater needs than destitute children normally have for subsistence. What the standard payments prescribed "will be relied upon" (to use the language in paragraph [5.2.4]) for, however, is to determine the amount that will normally be required to meet a family's subsistence needs. That said, I accept (as I have already explained) Mr McGuire's submission that it is lawful for the Council to have standard rates of payment provided that it is prepared to depart from them in exceptional circumstances. But, for such an approach to be lawful in practice, it is necessary that the standard rates to meet normal subsistence needs are lawfully determined. Here, however, the starting point, from which any departure requires exceptional circumstances to be justified, was not for the reasons I have given.

54. Finally Mr McGuire submitted that paragraph [5.2.6] required consideration to be given, in any case when those involved are not satisfied that the rate paid meets the family's subsistence needs, to whether any, and, if so, what further sum may be required untrammelled by anything previously stated in the Policy. This paragraph alone, so he suggested at one point, would "save" the Policy. I reject that submission. In my judgment what paragraph [5.2.6] envisages is an "internal review" of what has been previously approved. Its function is to determine whether any, and, if so, what further sum is required in line with the Policy. It is not merely unrealistic to suppose that such a internal review will be conducted untrammelled by, or without regard to, anything previously stated in the Policy. It would also be contrary to the statement made in paragraph [5.2.4] that the guidance which the standard payment rates provide as to what amount is appropriate to meet the normal subsistence needs of a destitute family "will be relied on". That is what they are in the Policy for. In my judgment,

[21] see also to the same effect the Single Assessment of PO started on January 6th 2014 and completed on January 31st 2014 by Ms Alike, which was approved by Mrs Judith Kinobe on February 3rd 2014 under "analysis / risks / strengths / recommendations".

therefore, when payments have been made in accordance with such guidance, the internal review is one to ascertain whether or not there are "exceptional circumstances" as result of which "additional financial support may be required" (as stated in paragraph [5.2.5]) of the NRPF Policy.

55. I have a further concern about Mr McGuire's approach that paragraph [5.2.6] alone would normally save a Policy based on standard rates of payment to meet normal subsistence needs that were unlawfully determined even had his construction of that paragraph been correct. That paragraph requires a "written request" for an internal review by those adversely affected. I leave aside the fact that they cannot reasonably be expected to make such a request if they do not know of the opportunity to make one, because the Policy and what it provides for is unknown to them (as it will have been, other than in the Claimants' case) since it has not been publicised. What Mr McGuire's submission comes to is that, provided those adversely affected do not complain and ask for more, payments in accordance with the standard rates would be lawful even though they have not been lawfully determined.

56. In my judgment this internally inconsistent, indeed somewhat paradoxical proposition ignores the fact that a local authority are under the duty to assess what level of services are appropriate to the subsistence needs of the children to whom the Policy applies under section 17(1) of the 1989 Act. Where what is in issue is what is normally required to meet the subsistence needs of families who are destitute, the authority must first make its own assessment of the level of services appropriate to meet those needs lawfully. Moreover, relying on those affected to complain in order to rectify the failure to identify the normal level of services appropriate to such needs lawfully and the initial assessment of what they need based on that flawed approach in their case, ignores the duty which the authority itself has to assess their needs for services from it. The fact that families do not complain cannot of itself mean that the authority can reasonably be satisfied, as it should be, when it makes its own assessment that such payments are appropriate to the children's needs in order to safeguard and promote their welfare. Destitute families may survive on, and indeed, given their circumstances, may not complain about, the amounts with which they are provided even if they are not appropriate for that purpose. For the purpose of determining this claim for judicial review, however, I need say nothing further on this matter, since it follows from my judgment that the Council will in any event have to reconsider its policy before reconsidering the Claimants' case if it wishes to rely on it.

57. It likewise follows that I do not propose to deal further with Ms Luh's extensive submissions about the comparators and basis on which the Council ought to have considered, or should now consider, how much a destitute family may normally need to meet its subsistence needs. That is a matter for the Council to consider afresh as it will need to do in the light of this judgment.

CONCLUSION

58. Accordingly, for the reasons I have given, in my judgment it would be unlawful for the Council to apply its NRPF Policy as it stands, or to treat the standard rates of payment which it contains as appropriate to meet the normal subsistence needs of a family, in any reconsideration of the Claimants' case without first reconsidering what standard rates would provide an appropriate level of financial support to meet the normal subsistence needs of destitute families.