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

[2023] EWHC 137 (Admin)

Case No. CO/3074/2021

Civil Justice Centre
33 Bull Street
Birmingham

26th January 2023

Before:

HIS HONOUR JUDGE TINDAL
(Sitting as a Judge of the High Court)

B E T W E E N :

THE KING (on the application of)
BCD by his Litigation Friend EFG)

Claimant

- and -

BIRMINGHAM CHILDREN'S TRUST

Defendant

JUDGMENT

CHRIS BUTTLER KC and KATY SHERIDAN
(Instructed by Central England Law Centre) appeared on behalf of the Claimant

JOSHUA SWIRSKY
(Instructed by Legal Services Department) appeared on behalf of the Defendants

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Hearing Date: Tuesday 22nd November 2022

HHJ TINDAL:

Introduction

1. Are the needs of British children different from those of foreign-born children ? That is the contentious question which the Defendant, Birmingham Children's Trust, argues lies at the heart of this claim for judicial review by the Claimant, a seven-year old British child (anonymised as 'BCD'), through his Jamaican-national grandmother (anonymised and to whom I shall refer as 'EFG'). Many people would have strong *political* views about that question, favouring one answer or the other. Some would say a child's needs are their needs irrespective of their nationality and all children and their needs should be treated the same. Others would say there are fundamental differences between British children and foreign-national children and it would be entirely wrong to treat them in the same way. However, the task of the Court is not to adjudicate political issues, but to decide whether conduct is *lawful*. This case raises important legal issues about how local authorities should meet the needs of children in families ineligible for welfare benefits - as the Home Office terms it in immigration leave conditions: 'No Recourse to Public Funds' ('NRPF'). The Defendant does not dispute the Claimant's evidence from academics which I summarise below that NRPF conditions limit how far children's needs are met, causing a short and long-term impact on their welfare.

2. EFG arrived in the UK from Jamaica in October 2020 to take over care of the Claimant and his two older siblings when their mother was terminally ill with cancer. She tragically died on 29th November 2020. EFG was on a visitor's visa with a NRPF condition. As she could not access mainstream benefits, she applied to the Defendant for support under s.17 Children Act 1989 ('CA'). The claim now focusses on the Defendant's payment of s.17 cash support from February to August 2021 (as later increased due to another aspect of the claim) of £196.24 per week: effectively the same as support at the time to a similarly-composed asylum-seeking family. Therefore, the claim does indeed partly concern whether it is lawful for a local authority to pay such a 'NRPF' foreign national parent or carer of British children the same level of support as such a parent or carer of non-British children, such as an asylum-seeking family. The Claimant contends this is unjustified similar treatment of different cases and is discriminatory under Art.14 of the European Convention of Human Rights ('ECHR') and so unlawful under s.6 Human Rights Act 1998 ('HRA'). The Defendant (a public authority under s.6 HRA standing in the shoes of the City Council in providing social care services under the CA to children in Birmingham), contends that it treats British and foreign national children the same as their needs are the same, hence its framing of the question with which I began. However, in fact over the litigation, the Claimant's case has been put in three different ways.

3. In impressive Skeleton Arguments (for the Defendant by Mr Swirksy and for the Claimant by Mr Buttler KC assisted by Ms Sheridan) the focus was the Claimant's British *nationality*. He relied on *obiter* comments by Lady Hale in *R(HC) v DWP [2017] 3 WLR 1486 (SC)* about a local authority's responsibility to 'children in need' under s.17 CA at p.46 (my underline):

> *"….[T]hese are British children, born and brought up here, who have the right to remain here all their lives; they cannot therefore be compared with asylum-seeking children or the children of asylum-seeking parents, who may end up with no or only a limited right to remain. The [authority] will no doubt also wish to take into account the impact upon the proper development of these children of being denied a level of support equivalent to that of their peers, that is, the other British children around them whose families are dependent on income-related benefits."*

4. However, the Claimant's original Statement of Facts and Grounds was put rather differently:

> *"The Defendant has treated the Claimant and his siblings, British children, identically to children to whom the Policy applies but [who] have precarious immigration status. The Supreme Court [in R(HC)] has made it clear that the two groups 'cannot be compared'. The Claimant is therefore in a significantly different situation to a child with precarious immigration status being provided for under s.17 CA."* (my underline)

Therefore, the contended difference in the original claim was not so much the Claimant's *nationality* as such, but rather that it put him in a different situation from children with precarious *immigration status*. The key difference was the children's 'immigration statuses'.

5. Moreover, in oral submissions, Mr Buttler put the Claimant's case slightly differently again (with no objection from Mr Swirsky), namely that the relevant comparison was between children cared for by 'NRPF' foreign nationals with a right to be in the UK on one hand and children of such adults with no right to be in the UK on the other: i.e. the 'immigration status' of the children's *carer* (or indeed parent). Mr Buttler skilfully argued that whichever way the comparison was put, similar treatment of the Claimant with comparators was discriminatory. Mr Swirsky, equally skilfully, argued whichever way it was put, it was not discriminatory.

6. *R(HC)* was a challenge to Department of Work and Pension ('DWP')-originated regulations disqualifying from income-related benefits the foreign national carer of a British child who fell within the scope of the EU Law '*Zambrano* principle' (deriving from the EU Court of Justice decision *Ruiz Zambrano v ONE [2012] QB 265 (CJEU)*). As explained in *R(HC),* the *'Zambrano* principle' is that non-EU (or 'third country') nationals have the right to remain in an EU country ('*Zambrano* rights') if they are a carer for an EU-citizen child who would otherwise be required to leave the EU and so lose their own EU Treaty rights.

7. However, the Court in *R(HC)* confirmed those EU Law *Zambrano* rights do not include a right to mainstream welfare benefits, merely a level of support sufficient to avoid the children having to leave the EU. This also did not violate Art.14 (read with Art.1 Protocol 1) ECHR, as differential treatment was justified as proportionate to reduce so-called 'benefits tourism'. However, Lord Carnwath and Lady Hale also considered the role of a local authority under s.17 CA, which empowers it to support 'children in need' in their area (whether British or foreign national) when their parent or carer is a 'NRPF' foreign national with no leave or with limited leave to remain in the UK. However, whilst EFG like HC herself, is a *Zambrano* carer, it is not now suggested the case turns on that specific status. Indeed, following Brexit, '*Zambrano* rights' are being phased out under the 'EU Settlement Scheme' ('EUSS'). In October 2022, the Home Office accepted EFG had 'pre-settled status' and it is now agreed she has been at all times been lawfully in the UK (but there was some confusion at the time).

8. The discrimination alleged to breach Art.14 ECHR in this case is neither 'direct discrimination' (i.e. treating one group less favourably because of a prohibited ground than another group e.g. having different rules for women and men); nor 'indirect discrimination' (i.e. applying an apparently neutral policy to two groups, one of which is disproportionately affected e.g. having the same rule for men and women which disadvantages women more). Instead, this Art.14 ECHR discrimination claim is of so-called '*Thlimmenos* discrimination' (c.f. <u>*Thlimmenos v Greece*</u> *(2000) 31 EHRR 15 (ECtHR)*), namely *'without an objective and reasonable justification, failing to treat differently persons whose situations are significantly different'*. In oral submissions Mr Buttler focussed on two 'Art.14 statuses' – the Claimant's nationality and EFG's immigration status. However, on nationality, he focussed on British immigration rights of residence whilst Mr Swirsky focussed on nationality generally. So, in fairness to both, I have split the 'nationality' comparison into two, making three comparisons, consistent with the three different ways in which the claim has been put, as described above:

   8.1 Firstly, the comparison between British and non-British children each cared for by a NRPF foreign carer with leave. This compares *purely the children's nationalities,* relying on Lady Hale's comments in *R(HC)* at p.46 (they are also relied on with (2)).

   8.2 Secondly, the comparison between British children and (foreign) asylum-seeking and other 'precarious immigration status' children each cared for by a similar foreign carer This argument compares *children's nationalities' through their immigration statuses.*

   8.3 Thirdly, treating children cared for by foreign national adults <u>with</u> the right to be in the UK the same as children cared for by foreign national adults <u>without</u> the right to be in the UK. This argument compares the *carers*' *immigration status*.

9. Following an assessment in January 2021, as well as housing and other costs, the Defendant made payments to EFG under its (now former) NRPF Policy ('the Old NRPF Policy'):

9.1 From 19th February to 24th September 2021, EFG received £165.39 per week, which on issue of this Claim in September 2021, the Defendant conceded was lower than the Old NRPF Policy stated it should have been: 'parity' with the Home Office's Asylum Support subsistence rate of £196.24 /wk. 'Back Pay' was then paid for the difference.

9.2 From 24th September to 31st December, EFG received £196.24/wk. However, on 17th August, the children had been made subject to a Child Arrangements Order under s.8 CA to 'live with' EFG and this rendered the family eligible under the Defendant's 'Our Family and Friends' ('OFF') Policy to a weekly payment of £510.85. It is not now disputed that the difference (£3,789.64) was back-paid to 17th August 2021.

9.3 From 31st December, EFG has received £510.85 pw. There is no complaint about that - and it is more than the £318.78 pw in Universal Credit the children's mother received.

The claim has narrowed overall. Ground 1 (irrationality) was not really contested and back-dating to parity with Asylum Support of £196.24 pw was agreed. Ground 2 (claiming 'looked after' status under s.22 CA) became academic when the family became entitled under the OFF Policy. What remains is Ground 3: the Art.14 ECHR discrimination challenge to the payments of £196.24 per week for six months from February to August, on those three comparisons.

10. In this judgment, I will first set out the factual background. Then I consider the statutory framework(s) in considerable detail as there are four which are relevant (mainstream welfare benefits and exclusion from it by 'NRPF' status; Asylum Support, Children Act support, and the complex provisions of the Nationality, Immigration and Asylum Act 2002 ('NIAA')); and how they create five different 'statutory categories' of families with NRPF status. These are key to the Art.14 ECHR challenge which I then consider, before finally making brief observations. It was agreed submissions on relief should follow only if the claim succeeds.

Factual Background

11. The Defendant is a local authority-controlled company (i.e. controlled by Birmingham City Council), incorporated on 1 April 2018. It is constituted in accordance with the duty in s.12A of the Children Act 2004 for local authorities to establish Children's Trust Boards and the power in Section 1 of the Children and Young Persons Act 2008 ('CYPA 2008') for the Council to enter into arrangements for the discharge of care functions. Since 2018, Birmingham City Council's social care functions for children, including s.17 CA support to 'children in need' within Birmingham, have been carried out by the Defendant.

12. Until November 2021, the Defendant operated a policy ('the Old NRPF Policy') of supporting children's parents and carers who had a Home Office visa condition of 'No Recourse to Public Funds' ('NRPF' carers/families) or who were 'NRPF' by virtue of overstaying their leave to remain. I set it out in detail below, but it applied to NRPF families who were destitute, whose need arose in Birmingham and where eligibility was not excluded (e.g. asylum-seekers). It provided for a Needs Assessment and Human Rights Assessment and provided for weekly 'financial subsistence' on top of accommodation in March 2016 of £35.39pw for a single parent, £40 for the first child and £30 each child thereafter. Whilst these rates could be varied in certain circumstances (e.g. a disabled child), those were the standard rates. So, a single parent with three children (without nursing/maternity needs) would be entitled to £135.39. This was said to be 'in line with' weekly subsistence rates paid by the Home Office to asylum seekers *'to ensure there is parity between families who require financial support to meet essential living needs'*. In fact, the Home Office Asylum Support rates increased slightly each year from 2016 to 2021, so that by that year, the weekly figure for an adult and three children was more than under the Defendant's Old Policy which had not been increased year on year. This led to Ground 1 of the claim, which was not contested as I have explained. So, by April 2021, the standard rate under the Defendant's Old Policy had not yet changed, although it was also paying a supermarket voucher of £30 so the overall support to a lone parent/carer with three children was £165.39 (whereas for Asylum Support it was £196.24).

13. According to the Defendant's Family Assessment in January 2021, to which I will return, the Claimant and his two siblings each had different fathers who were not married to their mother and not named on the birth certificates, meaning that none of them had parental responsibility for their respective children (see s.4 CA), nor by the sounds of it, much involvement in their lives – certainly not in the Claimant's case. It appears the children's mother was settled in the UK and possibly their fathers too, so each has British nationality (as discussed later).

14. However, by October 2020, the children's mother (who as I said was in receipt of Universal Credit of £318.73 pw) had a diagnosis of terminal cancer. She did not wish any of the children's fathers to care for them and her initial plan was for the children to be cared for by a friend, unfortunately that friend themselves had no recourse to public funds. Therefore, EFG came over from Jamaica, leaving her home and small business in Kingston, with her sister, niece and grandnephew and local son (and daughters in the USA). As a result of this, EFG's business, already struggling with COVID, had to close down and she had no income from Jamaica. EFG arrived in the UK in October 2020 on a visitor's visa which allowed her to remain in the UK until 9th April 2021, but with a NRPF condition as I have noted.

15. By this stage, EFG's daughter was in the final stages of her cancer. The Defendant was aware of this and according to a later investigation into EFG's complaint, the social worker began a Family Assessment under s.17 CA on 16th October 2020. The Defendant's NRPF team advised the social worker that unless EFG obtained parental responsibility, there was little support that they could provide to her. On 17th November 2020, the social worker completed this first Family Assessment (which I do not believe I have) and stated that the children's mother needed to put in writing that she wished for her children to be cared for by EFG who needed to seek advice about becoming the children's legal guardian.

16. On 20th November 2020, the social worker also prepared a letter of support for EFG's application to extend her visa, noting the children's mother had 'verified her wishes' and stated there was no-one else that could care for the children, who also wanted to be cared for by their grand-mother EFG. The letter of support stated that:

> *"[EFG] has stated she is currently on a 6-month and Birmingham Children's Trust is requesting for Immigration to review the visa and look into the possibility of extending this so that [EFG] can remain in the UK and continue to care for her grandchildren and is secure in the knowledge that her visa will not pose a problem in her ability to take care of the children."*

Therefore, the clear view of the Defendant at that stage was that the children's best interests lay in EFG remaining in the UK to care for the children. As the letter concluded, EFG

> *"…would be able to offer security, warmth and routine and keep the children safe from harm and therefore it is important she remains in the UK and becomes the children's guardian, legal advice has been sought in relation to this".*

17. On 22nd November 2020, only a week before the Claimant's mother's death, she hand-wrote what she called a 'power of attorney' for EFG over her possessions and to care for her children after her death, which she and EFG both signed and dated, witnessed by the 15-year-old child. Whilst this is hardly in precedent form and 'power of attorney' obviously relates to property, this document was plainly for the Claimant's mother a record of her dying wishes, the significance of which she recognised by dual signatures and witnessing by one of the children. This was essentially what the Defendant's social worker had suggested the children's mother do. However, it appears they gave no thought to whether that letter in itself amounted to the appointment of EFG as the children's legal guardian under s.5(3) CA, which would give EFG parental responsibility for them under s.5(6) CA. Instead, the Defendant kept encouraging EFG to speak to a solicitor. However, since EFG had no recourse to public funds and Legal Aid would not be available for such advice, it was frankly not a realistic suggestion.

18. The children's mother tragically died a few days later on 29th November 2020. Therefore, the children had to spend their first Christmas without their mother without any income. The children and EFG were obviously grieving and got by on food parcels from the children's school, which also helped them with utility top-ups. EFG could not afford the children's preferred convenience foods and had to make them Jamaican curry they disliked. The Claimant – only five years old - regularly got upset, often refused to eat and went hungry. Indeed, as at January, EFG had still not been able to afford a funeral for the children's mother, although this was resolved when access was finally given to £2,500 funds in her bank account.

19. However, the Defendant's NRPF team were declining assistance not only because EFG did not (in the Defendant's view) have parental responsibility and needed to apply for it by speaking to a solicitor (although an offer to pay for that advice was not made until February). It was concerned that two of the children's three fathers (not the Claimant's father) offered to care for all three children and there was uncertainty whether they had parental responsibility. The eldest sibling's father offered to support the children and the middle-child's father suggested he had parental responsibility for that child and wanted to care for all three of them. However, in the Defendant's Family Assessment dated 22nd January 2021, it was finally resolved none of the fathers had parental responsibility and recommended EFG care for them:

> *"It is recommended [the] children….remain as a family under the care of their grandmother..her visa needs to be extended to she can stay and take care of them."*

20. On the question of eligibility for NRPF support, as that Family Assessment stated:

> *"The team are unable to support the family at all and recommended a CASS [social services] referral for assessment. They have reviewed the family circumstances and are unable to support until [EFG] has guardianship."*

As EFG was told she did not have parental responsibility, she believed she could not return to Jamaica with the children and so they had to stay in the UK, as did she to care for them. Therefore, EFG was left in the Catch-22 situation of believing she could not take the children back to Jamaica, but nor could she get help from the Defendant to get guardianship here, without which its NRPF team were refusing to provide her support. EFG later brought a complaint against the Defendant's provision of support. The complaint investigator accepted the Defendant had communicated poorly with EFG about how to get parental responsibility, but the complaint was not upheld on any other issues. Since there is no ground of challenge other than in relating to the rate of support from February 2021 to August 2021, I need not refer to the complaint investigation further or say any more about this aspect of the case.

21. In fairness to the Defendant's Social Worker, the January Family Assessment was a thorough and detailed social work assessment of the family's circumstances and needs. Other than its overall recommendation that EFG remain in the UK to care for the children, it determined that the three children were all 'children in need' under s.17 CA and set out 'Child in Need Plans'. In summary, this identified seven different needs and plans to meet those needs:

21.1 *"(1) The children need to live in a safe, secure home environment where they are not exposed to stress or harm or worrying about becoming homeless…Midland Heart housing to support the family. Outstanding fees of £601.88 (as of 25/01/21) that need to be paid before consideration could be taken for moving the tenancy over to [EFG]."*
In fact, it appears those housing costs were not paid until several months later, but in the meantime Midland Heart agreed a licence with EFG and did not evict the family.

21.2 *"(2) To make sure the children continue to attend school so that their educational needs are met…. Support will be offered by* [the children's schools.]
It appears that the children did remain in schools which remained very supportive.

21.3 *"(3) [EFG] to speak to Legal to gain advice regarding Guardianship as…she does not have [parental responsibility]…Names…of solicitors have been given to [her]…[She] needs to apply for Guardianship for the children as their fathers are looking to do this but their mother…made it very clear she did not want [them] having custody of children [who] have stated they wish to remain with their grandmother."*
It was still envisaged EFG get a solicitor (action was by her as well as a social worker), though later, the Defendant paid for an application for a Child Arrangements Order to provide EFG with parental responsibility and cement her as carer of the children.

21.4 *"…(4) There is a need to address the loss of….the children's mother and the impact this has had on the family dynamics. Referral made by school to Edwards Trust [that] needs to work with family so that emotions that have been supressed can be brought to the surface and the impact these have had on each other [so that] the children will be able to grieve the loss of their mother within a supportive network."*
I also note the Family Assessment recorded that one of the children (not the Claimant) had experienced mental health and self-harm issues. This may have fed into that plan.

21.5 *"(5) EFG is on a 6-month visa which will expire March 2021. This may mean [she] will have to return to Jamaica leaving the children behind, or having to uproot the children and take them to Jamaica with her…..[EFG's] visa needs to be extended so that she can stay with her grandchildren and take care of them."*
It was stated that its objective was EFG's visa to be extended or leave to remain.

21.6 *"(6)* [Father to the oldest child] *has stated he was willing to look after the children and apply for a grant towards the funeral. He has asked [EFG] for the children's birth certificates which she has denied. He has subsequently decided not to offer financial support towards the funeral and has threatened [EFG, who should] call the police should she feel threatened or at risk of harm."*

22. Whilst I have quoted the gist of those assessed needs and plans to meet them, I will quote the most relevant one relating to cash finances (also confusingly numbered 4) in full:

"What is the need / desired outcome ? [EFG] is not able to support herself or the children financially and has fallen behind with bills and being able to buy food.
What support will be offered ? Support [EFG] in obtaining financial resources so that she can support the children without relying on friend, neighbours and other agencies.
What needs to happen to address this ? Legal advice to be obtained.
How will we know this has made a difference ? [EFG] will have the financial means to support the family and will be able to pay her bills and buy food.
By whom…By what date ? Legal, Social Worker…. Immediately."

I return to this, but there are five initial points to note about this assessment of 'financial need':

22.1 Firstly, this need was assessed separately from the question of housing and avoiding homelessness and the decision to pay outstanding fees to the landlord of £601.88. Therefore, this assessed need for financial support did not include housing needs/costs.

22.2 Secondly, the assessment assumed there was no reliable source of funds – the children's fathers were not contributing and whilst EFG had gained access to their mother's bank account, much of that went on her funeral costs (or had been used). The assessment had earlier noted that the school and community had had to help with bills.

22.3 Thirdly, the expressed objective was that EFG *"will have the financial means to support the family <u>and</u> will be able to pay her bills and buy food"* (my underline). Therefore, the need was not limited to just paying bills and buying food but also 'supporting the family'. It was explicitly <u>not</u> limited to 'essential living needs'.

22.4 Fourthly, the amount of financial support to cover those needs was not calculated. I checked with Mr Swirsky and was told there was no separate financial assessment.

22.5 Finally, it stated 'what needed to happen to address this' was not financial assessment but 'legal advice to be obtained' and action was by 'social worker and Legal (i.e. the Defendant's legal team, not EFG's solicitor). It seems to have been envisaged that the legal team should consider whether support could be offered immediately despite the NRPF team's refusal to support unless EFG obtained parental responsibility.

23. Indeed, the Defendant's internal legal advice was also prompted by the Claimant instructing immigration support advisers, just after the Family Assessment, on 25th January 2021. Mr Stamp, an adviser and qualified social worker, received a referral from the Claimant's school and took instructions from EFG, spoke to the Defendant and with commendable efficiency, sent a pre-action protocol letter relating to the absence of support on 26th January. The Defendant's NRPF team social worker stated on 28th January 2021 that no financial support could be provided under it until resolved whether the children's fathers had parental responsibility (even though the Family Assessment had found they did not) and until EFG obtained parental responsibility. However, the Defendant committed to various payments:

23.1 Firstly and most importantly, the Defendant finally arranged to pay £1,500 for a solicitor for EFG to obtain a Child Arrangements Order to obtain parental responsibility under the OFF Policy. That order on 17th August 2021 then gave her eligibility for support under that policy, although that was not paid until December.

23.2 Secondly, the Defendant paid both EFG's outstanding electricity bill of £135 and for the family's Sky TV and internet subscription under its general power of competence to do anything which an individual could do under s.1 Localism Act 2011 ('LA').

23.3 Thirdly, the Defendant committed to paying EFG's arrears of rent of £601.88 and liaised with the landlord of the family's home, Midland Heart, over a conversion from a tenancy (which EFG could not have due to her immigration status) to a 'occupation and use agreement' (in effect, a licence). It paid the 'rent' for that in August 2021.

24. Going back to the Defendant's refusal of support under the NRPF policy as late as 28th January 2021, it is not clear why within three weeks, from 17th February 2021 (it appears in two weeks' worth from 11th February), the Defendant started making payments under the NRPF policy to EFG of £135.59 plus £30 supermarket vouchers, totalling £165.39 per week. EFG did not suddenly have parental responsibility, indeed she did not have that until the Order in August. Nor was there any change in the children's needs since the Assessment of 22nd January 2021, nor any financial assessment linking that to £165.39 pw. The only evidence is a remarkably scant witness statement by the Assistant Director of Legal which does not give any evidence whatsoever on justification for the discrimination claim (as I return to below), but simply sets out a very brief chronology. I have taken that into account in noting the payment history, but it does not even explain how the figure of £135.59 plus £30 in food vouchers was reached. However, since that was the standard weekly rate for an adult and three children in the NRPF Policy, plus £30 in vouchers, I find it was simply decided to top up 'the usual rate' by £30 - without any attempt to calibrate the payment to the children's needs it had itself assessed.

25. It is important to note that standard rate in the Defendant's NRPF Policy then was expressly limited to 'essential living needs'. I quote that 'Old Policy' at length later, but on this it said:

> *"Where the decision is that the family is entitled to the provision of financial subsistence from Birmingham Children's Trust, the Trust will pay to meet the essential living needs of families with NRPF. These rates are in addition to support provided for accommodation. The rates below include payments for utilities. The [Weekly] Rates (as at March 2016) [are]: Single Parent: £35.39; Couple: £68; 1st Child: £40; Each child thereafter: £30….Why have we set these rates ? [The] Trust pay subsistence payments to families who have no recourse to public funds and these financial circumstances place the children of the family 'in need' as defined by s.17 CA. Birmingham Children's Trust subsistence rates are in line with rates defined by the Secretary of State for the Home Office for those seeking asylum under s.95 IAA. This legislation requires that provision for asylum seekers meets essential living needs. These rates ensure there is parity between families who require financial support to meet essential living needs."*

Therefore, for a single carer of three children, the rate was £35.39 + £40 + £30 + £30: £135.39. This did not include payments for accommodation itself, but as stated did include utility bills.

26. As I shall explain, Asylum Support payments are statutorily limited to 'essential living needs' which are statutorily prescribed. As confirmed by the evidence of Ms Pinter of the London School of Economics (and the discussion in *R(JM) v SSHD [2022] PTSR 260 (HC)*), in 2020 asylum support payments were £39.63 per person per week on non-accommodation expenses, calculated as £26.89 pw on food and drink; £1.47 pw on toiletries, healthcare and cleaning items, £3.01 pw on clothing and footwear, £4.70 on permitted travel (of a type limited under the regulations), £3.56 for communication including 4p on stationery. But accommodation costs were met separately and in the case of Asylum Support, unlike the Defendant's NRPF Policy, as Ms Pinter explains this did include utility bills. Therefore, for a family of one adult and three children the entitlement was 4 x £39.63: £158.52 plus utilities of £37.72, totalling £196.24 per week. As I have explained, from February 2021, the payments to EFG of £165.39 pw were £30.85 pw less than the entitlement under the Asylum Support rate, contrary to what the Defendant's NRPF Policy said about 'essential living needs' 'parity' with that. Unlike the Asylum Support rate, the NRPF Policy rate had not been updated since 2016. This was in part the subject of Ground 1, settled in September by the back payment of £30.85 pw since February, making £196.24 pw. In December a higher rate was again back-paid – this time to August, so £196.24pw from February to August is now the payment under challenge.

27. As might have been expected from payments significantly below the statutorily-assessed 'essential living needs' of the Asylum Support payment, EFG and her family struggled to cope on £165.39 per week from February until September when it was retrospectively raised to £196.24 per week. Indeed, contrary to the Defendant's commitment in the January Family Assessment to "*Support [EFG] in obtaining financial resources so that she can support the children without relying on friend, neighbours and other agencies",* as the Defendant's own evidence accepts in February and March 2021, as well as a few food parcels from it, EFG had to rely on charity payments totalling £700 to support them. This amounts to the equivalent of 23 weeks of the difference of £30.85 between the payments and Asylum Support rates.

28. Even with that charity the family still struggled. Despite total finances roughly equivalent to £196.24 for roughly 23 weeks of those six months, I find the children's (especially the Claimant's) 'essential living needs' for food and clothing were still not met, despite the best efforts of EFG, who said in her 9th September 2021 statement (before the increase to £196.24)

> *"The financial support I have been receiving has barely been enough to put sufficient food on the table for me and the children. It certainly has not been enough to provide the children with their normal day-to-day lifestyle they had when their mother was alive and in receipt of mainstream benefits."*

In EFG's second statement from July 2022, once on £510.85 per week since December (up to £525.07 from April 2022), she recalled this period in 2021 as 'living hand to mouth':

> *"I received £135.39 per week plus a £30 ASDA voucher…about half the amount of money coming in when the children's mother was alive. It was very difficult to support myself and three children on the equivalent of £165 a week (from which I was also expected to pay utilities). That is only £5.80 a day, for all our needs. It was not enough to support the children. I therefore had to rely on help from the school and the local church and local community for food parcels and other help. There was limited choice of food in these food parcels which made it very difficult to keep the children happy."*

Later in the statement, EFG describes how the Claimant (then only five years old) did not eat healthily and started to gain unhealthy weight, increasing needs for clothing. She also said:

> *"….[I]t was barely enough to pay for the gas, electricity and food for the children. I was unable to afford clothes, particularly school uniform. This is something the school helped me with by providing school uniform that had been given to the school by other children. I was not very happy at having to provide [the Claimant] with second-hand uniform and I could also see that [he] was uncomfortable having to wear uniform passed on from other children….."*

29. Therefore, even the Defendant's payments and charity support combined was barely enough to provide sufficient food to the children and in particular the Claimant ate unhealthily and so gained weight. Consequently, the Claimant needed more clothes which she was not able to provide without school support. Therefore, I find the Claimant's 'essential living needs' for food and clothing were not met in this period. EFG continued in a passage to which I return:

> *"It looks to me like [the Claimant] feels humiliated by the help that I have had to get from the school and the church in order to make ends meet and feed and clothe the children. [He] is young and has not been able to articulate his feelings but I can tell that he has been embarrassed at times when he hears me talking about financial matters and having to ask for help from different places. I try not to keep anything from any of the children and try to explain when I think it is appropriate to do so why things are difficult for us. [He] knows that I am from Jamaica and that I do not have a British passport and that this is what has been causing problems for us ever since his mother died. [He] also understands that he is being treated unfairly and differently from his peers. He expresses this to me. He sees what his friends are able to get from their parents and queries why he can't get the same things, for example toys or swimming classes. He often asks me: my friend is a boy just like me and he is my friend, so why can't I get the same things as him ? While he doesn't completely understand the details and impacts of citizenship and immigration status he understands that he is in a different position to his peers and that there is no obvious reason why it should be like that."*

30. It is worth noting one further aspect of even the (then) Asylum Support rate of £39.63 per person per week. I described above the different expenses it was intended to cover, calculated to the last penny and limited by statute to 'essential living needs'. This not only meant EFG struggling with school uniform and other clothing, or with a healthy diet for the Claimant. As I shall describe, the statutory framework specifically excludes from the calculation of statutory 'essential living needs' the following items which most people would think 'essential living needs' for children: 'toys and other recreational items' (which would include things like children's books), 'entertainment expenses' and (for modern children) 'computers and the cost of computer facilities'. Even stationery is limited to 4p on the Asylum Support rate, meaning EFG and her family would have needed to save up even for crayons for example. This chimes with what EFG says about the Claimant's own experience during 2021 of his peers having things that he could not have like toys or swimming classes (let alone technology devices etc). These limitations were inherent in Asylum Support, but EFG received *less*.

31. Back in February 2021, Mr Stamp had also sought to resolve EFG's immigration status by applying for pre-settled status under the EU Settlement Scheme (intended in part to codify the EU law '*Zambrano'* right to leave), enclosing the November letter of support from the Defendant's social worker. This continued EFG's leave to remain under s.3C Immigration Act 1971 pending the determination of that application. The Home Office responded on 26th April 2021 initially refusing the application as it did not consider EFG a '*Zambrano*' carer as she had a 'realistic prospect' of obtaining leave under the ordinary immigration rules as a carer for British children. However, on 9th June, in *R(Akinsanya) v SSHD [2021] 1 WLR 5454*, the High Court held the policy of refusing *Zambrano* rights because of potential availability of leave under the immigration rules was a misunderstanding of *Zambrano* and unlawful. Therefore, on 22nd June 2021, Mr Stamp resubmitted EFG's application (along with 200 others at the time) relying on this decision. Jumping forward, the Court of Appeal in January 2022 (*[2022] 2 WLR 681 (CA)*) held that *Zambrano* rights only arose if a primary carer for a British child had no other right to remain in the UK and the British child would be forced to leave the EU, not just because the primary carer could have but had not applied for leave. However, it also held the relevant EEA Regulations had in effect not just put *Zambrano* rights on a statutory footing, but widened their scope by also including those with limited leave.

32. There was a gap of two months between the initial refusal of EFG's leave application and its renewal, so on the face of it EFG had no leave to remain from 26th April 2021 until her leave application was acknowledged on 12th November 2021 (although it was not finally granted until October 2022, shortly before this case was heard). However, since the wider rights under the EEA Regulations only came later, that raises the issue of whether her EU Law '*Zambrano* rights' were automatically triggered and plugged that gap in EFG's leave to remain. Mr Swirsky just before the hearing conceded that EFG has been lawfully in the UK at all times. As for reasons I will explain it makes a real difference, I will examine the correctness of that concession below. However, whilst I accept that it would have appeared to the Defendant that EFG was not in the UK lawfully from 26th April 2021, it would not have made any difference from mid-February to 26th April in any event. Nor does the Defendant suggest that it has ever taken any account of any change in EFG's legal right to be in the UK after 26th April 2021 (or even after her initial leave ran out in March 2021) either at the time or in its retrospective payments to EFG. In any event, the 'regularisation' of EFG's immigration status in November 2021 came after the claim and the increase in weekly support to £196.24 and whilst it pre-dated the increase to £510.85 per week, as I shall explain, that had more to do with (and was back-dated to) the Child Arrangements Order on 17th August 2021.

33. On 17th August 2021, EFG finally obtained an interim Child Arrangements Order in respect of the three children, giving her parental responsibility for them. After several months of the Defendant unhelpfully simply telling her to see a solicitor to apply (despite not having funds to pay or eligibility for Legal Aid), as noted in February 2021 the Defendant finally funded a solicitor. However, rather than pursuing an application for Guardianship (which would have just provided EFG with parental responsibility), doubtless due to the attitude of the children's fathers, it was decided to apply for a Child Arrangements Order (also regulating with whom the children lived). An interim order was made by the Family Court on 17th August 2021, immediately conferring parental responsibility to EFG, which was finalised in March 2022.

34. As the Defendant's statement observes, the grant of a Child Arrangements Order and parental responsibility to EFG in August 2021 (nine months after her daughter's death) meant that she became eligible for support under its 'Our Friends and Family' ('OFF') Policy. Under this, as I shall explain below, the Defendant pays an allowance in certain circumstances to non-parental carers of children under a Child Arrangements Order who have either been 'looked after' by the Defendant under s.23 CA in the previous 12 months and ordinarily resident in Birmingham, or if circumstances justify the Defendant making an exception to those criteria. The allowance eventually paid to EFG was £510.85 from December 2021 (back-dated to August). However, EFG did not have the benefit of that much higher payment straight away. Just before that Child Arrangements Order was obtained, EFG's Law Centre solicitor on 23rd July 2022 had sent another pre-action protocol letter to the Defendant challenging the rate of support and indeed the lawfulness of the NRPF policy which had been left behind by uprating of Asylum Support rates (which I understand had led to several previous challenges). This letter was acknowledged on 6th August when the Defendant asked for until the end of August to respond, although it does not appear to have done so even then.

35. In fact, EFG then issued this claim on behalf of the Claimant on 9th September 2022, seeking interim relief of payment of £196.24 per week (i.e. the Asylum Support rate) which flowed from Ground 1: the contention the failure of the NRPF policy to keep up with it was unlawful, (though it also challenged that rate). In the Defendant's Summary Grounds of Resistance of 13th September 2021, it did not really dispute Ground 1 and indicated that it intended to amend its NRPF policy. In a Consent Order of 27th September 2021, it agreed to pay the rate of £196.24 pw and back-date the difference since February (i.e. £1018.05). It also provided £100 to EFG for school uniforms. However, I stress that Ground 1 was not fully addressed by payment of Asylum Support, as it also argued that rate would be irrational, but as permission was not given to pursue Ground 1 and it has not been renewed, it has fallen away anyway.

36. Ground 2 of the claim has also now fallen away. It was the contention that children had been 'accommodated' by the Defendant under s.20 CA, so were 'looked after' under s.22 CA and so eligible for financial support as such. It is not disputed that such financial support is effectively the same as under the OFF Policy. On 29th October (*before* EFG's EU Settlement Scheme application was formally acknowledged by the Home Office on 12th November, granting EFG not only leave to remain but potential eligibility for mainstream benefits), the Defendant offered payments under the OFF Policy of £510.85 per week. That is 2½ times the amount of statutory Asylum Support and significantly more than the children's mother's mainstream benefits of just under £320 per week. Unsurprisingly, EFG accepted those on 19th November and the weekly payments of £510.85 began on 31st December 2021. It is not now disputed that the difference between £510.85 and £196.24 back to 17th August was paid. Further, on 11th March 2022, HHJ Williams limited permission to Ground 3: the Art.14 ECHR discrimination challenge now limited to £196.24 pw from 17th February to 17th August 2021.

37. With that period of claim in mind, it may be helpful to summarise the support in time periods:

37.1 Before the weekly support payments started in February, the Defendant paid £135 for electricity and arranged the renewal of Sky TV, but this was under the Localism Act.

37.2 From 17th February 2021, under the NRPF Policy the Defendant paid £135.39 plus £30 vouchers per week, later back-paid up to £196.24 a week up to 17th August 2021.

37.3 The Defendant also delivered some food parcels in this period, which helped at the time, but are not suggested to make any difference to this case legally.

37.4 After February, £1,500 was paid to a solicitor to apply for a Child Arrangements Order, but this was under the OFF Policy (indeed to obtain eligibility under it).

37.5 In August 2021, seven months after it committed to do so, the Defendant paid the arrears of rent / occupation to the family's landlord. This was under the NRPF Policy, but as it explicitly stated, accommodation costs were separate from weekly payments.

37.6 In Summer 2021, the Defendant paid for children's activities and £45 for a family trip to Yorkshire. These were paid under the NRPF Policy and represent the only payments under it until 17th August neither for 'essential living needs' nor for accommodation. However, they are a far cry from the assessed needs in January for financial support.

37.7 In September, (after the disputed period) the Defendant paid £100 for school uniforms.

As I have explained, around the same time, the Defendant back-paid up to £196.24 per week from 17th February and continued to pay that until December when it back-paid up to £510.85 per week from 17th August. The only payments under the NRPF Policy in the six-month period of challenge are the £196.24 pw in support, accommodation costs and summer activities/trip.

38. It is important to stress that what made EFG and her family eligible under the Defendant's OFF policy was simply the making of the Child Arrangements Order on 17th August, not any change in their needs. There is no evidence whatsoever that the children's needs either generally or specifically for financial support had changed in any way since the Family Assessment in January 2021. Nor is there any evidence why the family were paid £510.85 pw under the OFF Policy when their needs were the same as when due £196.24 pw under the Old NRPF Policy. Obviously, their *eligibility* was different, due to the Child Arrangements Order, but not their *needs*. One might therefore infer that the appropriate level of weekly financial support to meet their assessed needs in January 2021 was *always* for £510.85 per week.

39. However, I need not reach a final view about whether the family's needs were always for £510.85 per week unless the discrimination claim succeeds and on the issue of relief, because even if I cannot precisely calculate the weekly sum to meet their 'assessed welfare needs', I do find that £196.24 pw did not meet those, for three alternative and/or cumulative reasons:

39.1 Firstly, I find that £196.24 did not even met the children's 'essential living needs' as categorised in the Asylum Support regime. The charity payments of £700 together with £165.39 from the Defendant made the rough equivalent of £196.24 for about 23 weeks of the six months in dispute. However, I have found EFG was still unable to meet the children's basic needs - especially the Claimant's needs for food (she could only give him an unhealthy diet, so he gained weight) and clothing (as a result). Both of those are 'essential living needs' under the Asylum Support statutory regime.

39.2 Secondly, even if £196.24 per week was enough for EFG to meet the children's 'essential living needs', as statutorily defined, the 'assessed welfare need' went further It committed the Defendant to providing '*Support in obtaining financial resources so that [EFG] can support the children without relying on friend, neighbours and other agencies'.* Since EFG had to have resort to those charity payments, the Defendant's payments did not meet its own 'assessed welfare need' for the children.

39.3 Thirdly, in any event, even including those charity payments, these and £196.24 per week together did not meet the need assessed in the Defendant's Family Assessment which committed it to support enabling EFG to *'have the financial means to support the family and will be able to pay her bills and buy food'* (my underline). There is no suggestion this 'assessed welfare need' of 'supporting the family' was limited to 'essential living needs' (excluding toys, books and recreational activities). On the contrary, this assessed welfare need was for 'means to support the family' on top of bills/food etc. The Defendant failed to provide support it assessed it should.

The Defendant's Policies and their application

40. Whilst the Defendant's Old NRPF Policy is no longer itself the subject of the Claimant's challenge, it is clearly central to it. However, before quoting and analysing it in detail, I prefer to start with a brief summary of two other policies: the OFF Policy and the New NRPF Policy, which the Defendant implemented in October 2021, partly prompted by this claim. This will throw the elements of the Old NRPF Policy that are critical to this claim into sharper relief.

41. The Defendant's OFF Policy, unlike the Old (and New) NRPF Policies, does not set out indicative weekly rates of support, although it does say (in section 5) that the maximum allowance payable would be the same to a foster carer looking after the same child. However, even if £510.85 per week is simply the Defendant's standard fostering rate for three children, the Child Arrangements Order only changed *eligibility* under the OFF Policy, it did not change the children's *needs*, nor were those needs or practical circumstances assessed to have changed since January 2021 by the Defendant. Indeed, section 6 of the OFF Policy explains the legal basis of the payment by the Defendant for EFG to instruct a solicitor to apply for a Child Arrangements Order. The three alternative eligibility criteria are either that the children are being 'looked after' by the Defendant (which it denied in its Summary Grounds of Resistance), or the application was made during Care proceedings (which it was not), or as 'a direct alternative to Care Proceedings'. Speaking as a Family Judge, it plainly was such an alternative. These were three children whose sole caring parent died and whose fathers did not have parental responsibility and either did not put themselves forward to care or there were significant social work concerns about them. In the absence of EFG coming forward, Care proceedings were inevitable. So, EFG was in part a direct alternative to a foster carer.

42. This also presumably explains – again I have no evidence of this from the Defendant - why once EFG obtained the Child Arrangements Order on 17th August 2021, she was considered eligible under the OFF Policy. After all, its eligibility criteria (under section 4) applied to children ordinarily resident in Birmingham cared for by a non-parent in their best interests under a Child Arrangements Order where either the children had been 'looked after' by the Defendant in the previous year (which it denied in its Summary Grounds of Resistance) or where its Designated Manager considered the individual circumstances 'justified exception', including whether the order was an alternative to Care proceedings, as I have said, it was. However, except the Child Arrangement Order itself, all of that had been the case since the previous November when the mother died. So, the only reason why EFG would not have been eligible from that time onwards under the OFF Policy was that she did not actually have a Child Arrangements Order. So, there was purely a change in *eligibility*, not a change in *needs*.

43. Of course, EFG's case was perhaps unusual for a 'NRPF' family. The OFF Policy will not normally apply to the more 'typical' situation of destitute foreign national 'NRPF' families who are not asylum-seekers. Their children may not be ordinarily resident in Birmingham, at least initially. They are perhaps less likely to be cared for under a Child Arrangements Order (only available in the Family Court if they are 'habitually resident' in the UK) by an adult not their parent. Of course, it is not uncommon for *unaccompanied* asylum-seeking children to be the subject of Care proceedings or of an alternative order to them, but *families* are different.

44. On the other hand, such families would squarely fall within the scope of the Defendant's NRPF Policies, both Old and New. As noted above, the New NRPF Policy came into effect in October 2021 with immediate effect (para 2.5). It applies to families who are 'NRPF' with children assessed to be 'in need' under s.17 CA. It is said to reflect these 'general principles':

> *"1.5 It is the duty of the Trust in respect of the children it finds to be in need, to safeguard and promote their welfare and, insofar as is consistent with that duty, to promote their upbringing by their families, by providing a range and level of services appropriate to those needs.*
>
> *1.6 Services may include accommodation, assistance in kind and cash.*
>
> *1.7 [Section 17 CA] does not impose a specific housing duty towards each child in need. Services provided under the section are not intended to be a substitute for central government welfare benefits.*
>
> *1.8 Relevant services may also be provided to a family member of the child in need if, on assessment..to do so would safeguard and/or promote the child's welfare.*
>
> *1.9 An adult parent who has no recourse to public funds is likely to be ineligible for section 17 services by reason of Schedule 3 to the Nationality, Immigration Asylum Act 2002. [B]ut when it is in the best interests of the child for the family to remain together, payments may be made to the extent that such services are considered necessary to prevent a breach of right[s under the ECHR].*
>
> *1.10 Support is generally provided on a short-term basis pending voluntary departure from the UK or a decision of the Home Office or a relevant immigration decision and consequent grant of leave to remain or removal action, or the availability of other means of support…"*

Pausing there, it is notable this New Policy considers that s.17 CA imposes a duty on it to 'safeguard and promote the welfare' of children it assesses 'in need'; and that a NRPF parent 'is *likely* to be ineligible' for s.17 services except to the extent they are considered necessary to avoid ECHR breach. I emphasise the word 'likely': as it recognises not <u>all</u> are ineligible.

45. The new Policy explicitly refers to '*Zambrano* carers' of British children and states at p.3.5:

> *"The Trust recognises that the children of Zambrano carers who are British citizens who have a right to reside in the country and who, in terms of safeguarding and promotion of welfare, have the right to be treated in the same way as any other British child with British nationality. It is the Trust's view that this policy, when applied in conjunction with the Trust's overall provision of support…achieves that objective."*

That appears to be a reference to p.2.4 of the New Policy which states that:

> *"The Trust supports NRPF families in three ways: (1) by securing suitable accommodation for them where that is necessary; (2) by providing them with services under Part III Children Act 1989 where their assessment supports a need for any such service; and (3) by providing them with financial support under this policy."*

46. It is important to bear those distinctions in mind when analysing the 'subsistence payments' under the New Policy, which are in addition to provision of services under the Children Act. Under clause 8, the weekly 'indicative rates' per person (including a child), not including rent or accommodation charge, are £43 plus an *additional* £7.63 for water and £21.88 for gas and electricity utility charges. There is also nursing money of £5 for children under 1 year and £3 for children aged 1-3 and a maternity grant of £325. It states these subsistence rates will be reduced if there are other relevant means in the UK or abroad if reasonable to use and

> *"If an assessment identifies a need for extra subsistence, consideration will be given to paying a higher rate, the final decision to be that of the delegated senior manager."*

Subject to such an increase in the indicative rates, clause 2.3 of the New Policy states:

> *"The[se] indicative rates…are considered sufficient, with prudent housekeeping, to be adequate <u>not merely</u> to meet the nutritional and other <u>essential living needs</u> of clients having regard to local prices and supplies, <u>but also to safeguard and/or promote the child's welfare</u>. They are to be seen in the broader content of a package of support which includes accommodation and other local authority services where the assessment identifies them, being services that central government does not provide. The policies of other local authorities and approaches in other statutory schemes have been considered to ensure the rates are not wholly out of line. However, the Council has set its own rates, having regard to local conditions, and has not merely imported rates from any other source. Utility rates are based on average costs provided by the industry. Amounts of support will vary from case to case and will be the subject of individual assessment."* (my underline).

Importance of individual assessment was also stressed elsewhere in the Policy e.g. clause 10.

47. I would make these observations about the New Policy 'subsistence rates' relevant to this case

47.1 Firstly, leaving aside nursing and maternity elements, at £43 per person, in any family they work out more than under the Defendant's Old NRPF Policy which was £35.39 for an adult, £40 for the first child and £30 for each child thereafter. Also, the Old Policy also did not include a separate element for utility bills as the New Policy does.

47.2 Secondly, the indicative subsistence rates under the New NRPF Policy are slightly more than the Asylum Support rate (that also addressed accommodation-related utility bills separately) which was at the time in 2021 £39.63 per person per week for 'essential living needs'. Since both policies make separate provision for utility bills, focussing on the indicative weekly payment, the New NRPF Policy provided £3.37 per person more than statutorily-prescribed 'essential living needs' of Asylum Support

47.3 Thirdly, clause 2.3 of the Defendant's New NRPF Policy draws the distinction I foreshadowed above between (i) 'essential living needs' like nutritional requirements (e.g. food and drink) and (ii) support to 'safeguard and/or promote the child's welfare', which I have termed 'assessed welfare needs' (e.g. bereavement work from the Edwards Trust). The Old NRPF Policy makes this same distinction implicitly.

48. In that context, I turn to the relevant aspects of the Old NRFP Policy, which appears to date from 2016 originally given the 2016 rates for Asylum Support. These were not updated in 2018 even though the policy itself was expressly updated when the Defendant was founded:

> *"This [Policy] sets out how Birmingham will support families with children who have no recourse to public funds ('NRPF'). It applies to situations in which a family has no legal entitlement to financial support or assistance from the state. If the family includes….children, they are likely to be children in need and the.. Trust has a statutory duty under s.17 [CA]…['NRPF'] applies to a person who is subject to immigration control in the UK and has no entitlement to welfare benefits or public housing…[It] may be stamped on the visa of a foreign national living in the UK. If not…it should be assumed person does have access to public funds. …Other groups of migrants who have [NRPF] include: Asylum Seekers, Refused Asylum Seekers and Visa Overstayers… [Under s.17 CA]. The Trust has a duty to safeguard and promote the welfare of children in need in their area and to promote their upbringing by families by providing appropriate services. The services may be provided to the family in general or to any member of the family, as long as they are provided with a view to safeguarding and promoting the child's welfare. They may include providing accommodation and giving assistance in kind or in cash…."*

49. Unlike the New Policy, in the Old NRPF Policy, there was no reference to *Zambrano* carers even though the *Zambrano* case is noted in its appendix. However, its 'eligibility criteria' could (and here did) apply to 'NRPF' foreign national carers of British children like EFG:

> *"There is a two-stage assessment process to determine whether [the Defendant] has a duty to support the family: An eligibility test and an assessment of need*
>
> *Eligibility Test*
>
> *To satisfy the eligibility test, it is necessary to establish three conditions:*
>
> - *The need arose in Birmingham*
> - *The family are destitute*
> - *The Children's Trust is not prohibited from providing support under s.54 and Sch.3 [Nationality, Immigration and Asylum Act 2002 'NIAA']*
>
> *…To establish the second condition, ask:*
>
> - *Do the family have income or savings ?....*
> - *Could others provide the family with help ?....*
> - *Do the family have any items of value they could sell ?*
> - *Can the family be supported by other organisations ?*
>
> *Families with no recourse to public funds presenting as destitute will commonly seek provision of accommodation costs and subsistence under s.17 CA*
>
> *In establishing the third condition:*
>
> - *Sch.3 NIAA 2002 sets out several classes of persons who are ineligible for assistance under the Children Act 1989. In particular, the…Trust cannot provide support to a family with an existing claim for asylum. In this situation, the Home Office has a duty to provide support….*
> - *To determine whether the restrictions on providing support under s.17 CA apply, it will be necessary to establish the family's immigration status. It may be necessary to check with UK Visas and Immigration…."*

50. The Old NRPF Policy incorporated an assessment of whether the children were 'in need', which would apply to British families. But the Old NRPF Policy does not appear to have been designed with British children with lifelong rights of residence in mind (my underline):

> *"Assessment of Need*
>
> *An assessment of need will take the form of a Family Assessment, This should establish whether any child of the family is a child in need and what support networks are available to support under s.17 CA…The assessing worker should consider whether each child's identified needs could be met by means such as…*

- *Home Office support to asylum seekers; or*
- *Voluntary return for visa overstayers provided the child would not become a child in need in their country of origin and no breach of their human rights would result*

The Family Assessment should be completed, discussed and shared with the family. The assessment should come to a clear view, agreed by the team manager, about whether the children require provision as children in need. If the area resource panel agree, a child in need plan setting out what is to be provided with be produced and shared with parents." (I interpose to say I have not been shown that here, which may have contained the 'financial assessment' which is conspicuous by its absence).

51. This impression that the Old NRPF Policy was not designed with British children in mind is reinforced by the fact that the 'Family Assessment' fed into a 'Human Rights Assessment' - which I have not seen either, if it was done in this case (my underline):

"The findings from that assessment should be incorporated into the Human Rights Assessment. [This] *will consider whether there are any legal or practical obstacles to the family returning to their country of origin. If there are no such obstacles, the denial of support by the…Trust does not constitute a breach of human rights. There are substantial restrictions on the support that can be provided under s.17 CA to families that are unlawfully in the UK…..The human rights assessment provides an opportunity to explore all of the options of a family who have requested support under s.17 CA but are excluded by Sch.3. The relevant questions are:*

- *Whether there are any legal or practical barriers to the family returning to the parent's country of origin; and if not;*
- *Whether returning the family to the parent's country of origin would constitute a breach of Art.3, 8 or 6 of the Convention on Human Rights…..*

[After addressing EEA nationals and quoting Arts.3, 6 and 8 ECHR, it continues]

The worker must reach a conclusion as to whether the child would cease to be a child in need on returning to the parent's country of origin. The assessment must also balance the views expressed by the parent and the information that is known to the Trust about the parent's country of origin… The human rights assessment must conclude with the options that the…Trust will offer the family in order to prevent a breach of human rights…The options are:

- *To provide short-term support in the UK under s.17 CA and advise the family to seek advice from an immigration solicitor;*
- *To offer assistance to the family in returning to the parent's country of origin…."*

52. Therefore, under the Old NRPF Policy the findings of the 'Family Assessment' whether the children are 'in need' and if so, what provision should be made, fed into a 'human rights assessment' which was mainly focussed on whether the family could 'return' to the parent's country of origin with assistance from the local authority; or if that would constitute a breach of the ECHR, to provide 'short-term support' in the UK and to get immigration advice. The Old NRPF Policy dealt with other such situations which do not arise here, such as 'Families who are ineligible for support after assessment', 'The family returns process', 'Parents who refuse to return to their country of origin after assessment' and 'Families who are granted indefinite leave to remain in the UK', as well as inter-agency working etc. However, of course in this unusual case, returning the children to EFG's county of origin was flatly against the Defendant's own Family Assessment conclusion. However, striking by its absence in eligibility criteria was any requirement for a carer to have parental responsibility. So, it is unclear why the Defendant's NRPF team initially refused to support EFG and of course when weekly payments started in February 2021, she still did not have it. Indeed, EFG did not have parental responsibility throughout the period which remains under challenge.

53. Turning to the central issue of support rates, I re-quote the key section for convenience:

> *"Support and Refusal of Support*
>
> *Where the decision is that the family is entitled to the provision of financial subsistence from Birmingham Children's Trust, the Trust will pay to meet the essential living needs of families with NRPF. These rates are in addition to support provided for accommodation. The rates below include payments for utilities. The [Weekly] Rates (as at March 2016) [are]: Single Parent: £35.39; Couple: £68; 1st Child: £40; Each child thereafter: £30; Nursing money £5 (expectant mother/child under 1 year); Maternity Grant 150 (first child) £100 (subsequent).*
>
> *The overall level of financial support per family will be considered in line with the Government's cap on receipt of mainstream benefits, for example subsistence payments will not exceed the following: £500 per week (for couples with child living with them; [or] for single parents whose children live with them). This may mean the amount the family gets paid for subsistence will go down to make sure the total amount is not above the cap level. The subsistence and monies paid for rent and utilities cannot exceed the current benefit cap.*
>
> *Why have we set these rates ?[The] Trust pay subsistence payments to families who have no recourse to public funds and these financial circumstances place the children of the family 'in need' as defined by s.17 CA.*

Birmingham Children's Trust subsistence rates are in line with rates defined by the Secretary of State for the Home Office for those seeking asylum under s.95 [Immigration and Asylum Act 1999]. This legislation requires that provision for asylum seekers meets essential living needs. These rates ensure there is parity between families who require financial support to meet essential living needs."

54. I make some observations on these rates below but as I said, the challenge is no longer to the Old NRPF Policy itself that has now been replaced. However, unlike the New Policy, the Old did not explicitly distinguish between such 'essential living needs' of children in need and their families on one hand and their 'assessed welfare needs' which go further on the other. However, in fairness the Old Policy did provide for departure from those rates in some cases:

"The needs of each child/family will be considered on a case-by-case basis when the Trust exercises its duty pursuant to s.17. The amount of financial support may vary:

- *Subsistence payments may be higher to meet health and wellbeing needs of a child;*
- *Subsistence payments may be higher if the child has specific additional needs;*
- *Subsistence payments may be lower if the family are residing in accommodation which provides for essential living needs;*
- *Subsistence payments may be lower if the family are in receipt of any other income.*

Any proposal to fund families above…rates above needs to be agreed at Area Resource Panel where a clear rationale should be presented, based on…child's assessed needs."

55. Moreover, the Old NRPF Policy specifically identified some children having needs beyond 'destitution': i.e. families with a disabled child, children needing safeguarding, 'care leavers' or children subject to care proceedings. Moreover, whilst the OFF Policy is not mentioned, the Old Policy addressed Child Arrangements Orders under s.8 CA and the prohibition in s.13 CA on removing children who 'live with' an adult under that order being removed from the UK without written consent of all those with parental responsibility or Court permission:

"When undertaking child in need assessments, workers should make enquiries about any court orders that apply to the child. Orders under s.8 CA….may affect the provision that can be offered to a family. For example, a Child Arrangements Order may require a child to remain in the UK, or prohibit the child being taken out the country for more than a stated period. However, where such orders are in place it is open to a parent or other party (but not normally the…Trust) to seek a variation of the order in the courts. Therefore, if for example a Child Arrangements Order directs that the child will live with one parent it may be appropriate for that parent to seek the permission of the court to remove the child from the UK."

56. Therefore, the Old NRPF Policy did clearly differentiate between a range of different situations. On one hand, some indicated a decrease in support, such as if the family had another source of income or the family's accommodation itself provided for essential living needs, or indeed no support for ineligible families. On the other hand, some cases indicated an increase in the level of support, such as where needed to meet 'the health and wellbeing need of a child', or if the child had 'specific additional needs'. Specific instances of this were given, such as disabled children, children needing safeguarding, care-leavers etc.

57. However, despite all this differentiation between situations within the Old NRPF Policy, there was no specific differentiation between: (i) adult carers with leave to remain as opposed to those without it; or (ii) British children as opposed to non-British children. I have already noted there was no reference to *Zambrano* carers, but nor can I find explicit reference to British children, even though the appendix to the Old NRPF Policy cited cases on overstaying foreign national parents caring for British children: *R(ZH Tanzania) v SSHD [2011] UKSC 4* – and *R(M) v Islington LBC [2004] EWCA Civ 235* – the latter a case about local authority support under s.17 CA I consider further below. Moreover, despite the Old NRPF Policy having been either updated (or perhaps even written) in 2018, there is no reference to *R(HC)* - decided in 2017. Overall, as I say, my impression is the Policy is not framed with British children in mind. Certainly, there is no apparent consideration in it that the two options of short-term support and return to parental country would be any different for British children.

58. Of course, the Defendant argues the policy made no distinction between British and non-British children because such a difference is not 'relevant' under an Art.14 ECHR comparison, which I consider below. Moreover, the Defendant is not the only public body which does not differentiate between British children cared for by foreign national carers who are NRPF. Ms Pinter's evidence was there was no data available from the Home Office on the numbers of British children affected by NRPF restrictions on their carer's leave to remain. However, data on requests to the Home Office to lift the NRPF condition found that 46% of requests concerned families with a British child. Ms Pinter also referred to the report *'Children in poverty: No recourse to public funds'* published in 2022 by the Parliamentary Work and Pensions Committee,[1] which at pg.39 records success rates of such requests to delete NRPF conditions by late 2021 were 80%. Whilst a challenge to the NRPF system generally was rejected in *R(ST) v SSHD [2021] 1 WLR 6047 (DC)*, it upheld a challenge to this specific request process as not referring to considering the best interests of children.

[1] https://publications.parliament.uk/pa/cm5802/cmselect/cmworpen/603/report.html

59. I return to the central issue of the Defendant's Old NRPF Policy and its indicative 'subsistence payments' of *'Single Parent: £35.39; Couple: £68; 1st Child: £40; Each child thereafter: £30'* As I have quoted, these were intended 'to *meet the essential living needs of families with NRPF'* including utilities but not including accommodation and to ensure '*parity between families who require financial support to meet essential living needs'* i.e. Asylum Support payments to Asylum Seekers. I have noted the Defendant's failure to uprate these figures from the 2016 values meant by 2021 there was in fact no such 'parity' with families on Asylum Support. I note from the evidence of Mr Stamp and the Claimant's solicitor Mr Bates that this was the subject of numerous challenges in Birmingham over time, which doubtless played some part in the Defendant's decision to replace the Old NRPF Policy with the New Policy in October 2021 (as noted, its indicative rates are very slightly higher than Asylum Support). This of course was also just after the settlement of Ground 1 of this claim in September 2021, which now is limited to the payment of the equivalent of the Asylum Support rate of £196.24 in the six months between 17th February and 17th August 2021.

60. The Claimant also led evidence from Dr Jolly, an academic social worker. Like Ms Pinter in relation to asylum support rates, it is evident that Dr Jolly's research on NRPF families challenges current provision as inadequate. In this field, the Court is very familiar with the Clausewitzian phenomenon of Art.14 ECHR litigation as the continuation of lobbying by other means, as Lord Reed recently noted at p.162 of *R(GC) v DWP [2021] 3 WLR 428 (SC)*. However, whilst the political agenda of Ms Pinter and Dr Jolly is neither here nor there in this litigation, their factual evidence is not challenged and is illuminating. Dr Jolly's research in 2018 into the NRPF Policy in Birmingham indicated that payment to a parent and two children was £105.30 per week, whereas the national local authority average was then £118.15 per week, Asylum Support was £113.25 per week and mainstream welfare benefit was £225.14 per week. As Dr Jolly observed, all these rates are well below academic measures of relative poverty. Moreover, Dr Jolly's research suggested that NRPF families in the West Midlands were in receipt of s.17 CA support for an average of 875 days – well over two years – compared to a national average of 589 days – well below two years. Dr Jolly and Ms Pinter's statements were also not challenged that payments at Asylum Support levels and below harm long-term impacts on children's welfare: relative food poverty (as with the Claimant himself) and so poorer health and indeed lower educational attainment. In fairness, despite Ms Pinter's and Dr Jolly's evident 'agenda', these conclusions were not only not disputed before me but broadly consistent with the views of the Parliamentary Committee. Speaking of Parliament, against that background, I now turn to the statutory frameworks.

The Statutory Frameworks

61. Mr Buttler suggested this was the first ECHR case he had undertaken which turned purely on statutory interpretation. Whilst I would not go that far, I agree that the statutory frameworks (plural) are central. I therefore set them out in some detail under five sub-headings and analyse the key provisions and authorities on each from the numerous cases to which I was referred:

61.1 The mainstream welfare benefits scheme and 'no recourse to public funds' exclusion;

61.2 The Asylum Support scheme in ss.95-6 Immigration and Asylum Act 1999 ('IAA');

61.3 Part III Children Act 1989 ('CA'), in particular s.17 and Sch.1 CA;

61.4 Schedule 3 Nationality, Immigration and Asylum Act 2002 ('NIAA').

61.5 The different 'statutory categories' of support in NRPF cases.

Mainstream Welfare Benefits and 'NRPF' exclusion

62. s.115 Immigration and Asylum Act 1999 ('IAA') is the central provision on exclusion on immigration grounds from various mainstream benefits – for example Universal Credit:

> *"(1) No person is entitled to universal credit under Part 1 of the Welfare Reform Act 2012* [and various other benefits]*…while…a person to whom this section applies…..*
>
> *(3) This section applies to a person subject to immigration control…*
>
> *..(9) "A person subject to immigration control" means a person…who— (a) requires leave to enter or remain in the United Kingdom but does not have it; (b) has leave to enter or remain in the United Kingdom which is subject to a condition that he does not have recourse to public funds; (c) has leave to enter or remain in the United Kingdom given as a result of a maintenance undertaking; or (d) has leave to enter or remain in the United Kingdom only as a result of* [having a pending appeal]*."*

I have underlined s.115(9)(b) IAA and the 'NRPF condition' which, as explained in *R(ST) v SSHD [2021] 1 WLR 6047 (DC)* at p.25, derives from s.3(2) Immigration Act 1971

> *"[An individual]….if in the UK, may be given leave to remain there for a limited or for an indefinite period. If a person is given limited leave to remain in the UK, it may be given subject to various conditions, including 'a condition restricting his work . . . in the United Kingdom' and 'a condition requiring him to maintain and accommodate himself, and any dependants of his, without recourse to public funds'. (section 3(1)(c)(i) and (ii)). The necessary implication of those two provisions is that, unless such a restriction is actively imposed on a person's leave to remain, he is free both to work, and to have recourse to public funds. s.3(3) provides for the variation of leave."*

63. The key reasons for exclusion from mainstream benefits, including Universal Credit, on immigration grounds is encapsulated in s.117B(3) Nationality Immigration and Asylum Act 2002 ('NIAA') - albeit it relates to Art.8 ECHR immigration claims to remain in the UK:

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

A similar point on Parliament's reasons for exclusion from welfare benefits had been noted by Lord Hoffmann in *R v Westminster CC exp NASS [2002] 1 WLR 2956 (HL)* ps.19-20:

> *"There was a time when the welfare state did not look at your passport or ask why you were here. [It] paid contributory benefits on basis of contribution and means-tested benefits on basis of need…[I]mmigration status was a matter between you and the Home Office, not…the social security system. As immigration became a political issue, this changed. Need is relative, not absolute. Benefits which in prosperous Britain are regarded as sufficient only to sustain the bare necessities of life would provide many migrants with a standard of living enjoyed by few in the misery of their home countries. Voters became concerned that the welfare state should not be a honey pot which attracted the wretched of the earth. They acknowledged a social duty to fellow citizens in need, but not a duty on the same scale to the world at large."*

64. *Westminster* concerned allocation of support for asylum-seekers whose need for it arose from disability in addition to destitution as between the Home Office and local authorities. (It is of relevance here and I return to it). In *R(M) v Slough [2008] 1 WLR 1808 (HL)* at p.28, Lady Hale called this an *'inverted and unseemly turf war between local and national government'.* In *R(HC)* she and the Supreme Court returned to this 'turf war'. As she said at p.40, 'third-country' (non-EU) foreign nationals are generally excluded from benefits and social housing:

> *"Third-country nationals are not, in general, entitled to income-related benefits; and so…the Department for Work and Pensions extended this rule to Zambrano carers. Third-country nationals are only entitled to be allocated social housing or given homelessness assistance if this accords with the Government's immigration and asylum policy, broadly only if they have leave to enter or remain without a condition that they have no recourse to public funds* [i.e. 'NRPF']*; and so… the Department for Communities and Local Government excluded Zambrano carers from eligibility. Third-country nationals are only entitled to child benefit and child tax credits in broadly the same circumstances; and so HMRC excluded them from eligibility."*

65. The Court in *R(HC)* rejected challenges to this exclusion from mainstream benefits in both EU Law and Art.14 ECHR discrimination, the latter as Lord Carnwath explained at p.32:

> *"[T]he Strasbourg court has long accepted that the allocation of limited public funds in the social security and welfare context is pre-eminently a matter for national authorities, subject only to the requirement that their decisions should not be 'manifestly without reasonable foundation'…The Government's reasons for not providing support to Zambrano carers….included the objectives of reducing costs by allocating benefits to those with the greatest connection with this country, of encouraging immigrants here unlawfully to regularise their stay, of encouraging [third country nationals] wishing to have children here to ensure that they had sufficient resources to support themselves and their children, and of reducing 'benefits tourism'… I find it impossible to say that these objectives fall outside the wide margin of discretion allowed to national governments in this field."*

However, as Lord Carnwath went on to explain – and as I shall return to below – that did not in fact mean that individuals excluded from DWP mainstream welfare benefits had 'no recourse to public funds' *at all,* because if they cared for children, those children may be 'children in need' whom local authorities may have to support under s.17 CA. As he suggested at p.36, any such responsibility had simply been re-allocated from national to local government. (Therefore, it might be thought that 'no recourse to public funds' is an inaccurate title, but as that is the name of the leave condition and the relevant policy, I will still use it).

Asylum Support

66. However, before turning to s.17 CA in NRPF cases, it is helpful to turn to the 'Asylum Support' regime introduced by the IAA. Of course, if individuals' claims for asylum are accepted, they are 'refugees' with leave rendering them *not* 'subject to immigration control' under s.115 IAA. However, pending that determination, 'asylum-seekers' and their dependent children, unless they have leave to remain on some other basis, *are* 'subject to immigration control' and ineligible for mainstream benefits as clarified by p.13 of the IAA's Explanatory Notes: a new innovation and aid to statutory interpretation, as Lord Steyn discussed in *Westminster* at ps.1-6. P.13 of those Notes stated s.95 IAA and related sections were designed:

> *"…[T]o create a new safety net support scheme for asylum seekers in genuine need. The scheme will be funded and administered nationally by the Home Office, thus lifting the current burden on local authorities…"*

67. ss.95-6 IAA so far as material state (my underline):

> *"(1) The Secretary of State may provide, or arrange for the provision of, support for—(a) asylum-seekers, or (b) dependants of asylum-seekers, who appear to [them] to be destitute or to be likely to become destitute within such period as may be prescribed.*
> *(2) In prescribed circumstances, a person who would otherwise fall in (1) is excluded.*
> *(3) For the purposes of this section, a person is destitute if—(a) he does not have adequate accommodation or any means of obtaining it (whether or not his other essential living needs are met); or (b) he has adequate accommodation or the means of obtaining it, but cannot meet his other essential living needs.*
> *(4) If a person has dependants, subsection (3) is to be read as if the references to him were references to him and his dependants taken together….*
> *(5) In determining, for the purposes of this section, whether a person's accommodation is adequate, the Secretary of State—(a) must have regard to such matters as may be prescribed for the purposes of this paragraph; but (b) may not have regard to such matters as may be prescribed for the purposes of this paragraph….*
> *(7) In determining, for the purposes of this section, whether a person's other essential living needs are met, the Secretary of State— (a) must have regard to such matters as may be prescribed for the purposes of this paragraph; but (b) may not have regard to such matters as may be prescribed for the purposes of this paragraph…..*
> *(8) The Secretary of State may by regulations provide that items or expenses of such a description as may be prescribed are, or are not, to be treated as being an essential living need of a person for the purposes of this Part….*
> *96(1) Support may be provided under s.95 (a) by providing accommodation appearing to the Secretary of State to be adequate for the needs of the supported person and his dependants (if any); (b) by providing what appear to the Secretary of State to be essential living needs of the supported person and his dependants (if any)…"*

68. The regulations made under ss.95 and 96 are the Asylum Support Regulations 2000 ('ASR') and Regs. 4, 9 and 10 state so far as material (my underline):

> *"4(1) The following circumstances are prescribed for the purposes of subsection (2) of section 95 of the Act as circumstances where a person who would otherwise fall within subsection (1) of that section is excluded from that subsection (and, accordingly, may not be provided with asylum support).*
> *(2) A person is so excluded if he is applying for asylum support for himself alone and he falls within paragraph (4) by virtue of any sub-paragraph of that paragraph….*

(4) A person falls within this paragraph if at the time when the application is determined….(b) he is a person to whom social security benefits apply…

9(3) None of the items and expenses mentioned in paragraph (4) is to be treated as being an essential living need of a person for the purposes of Part VI of the Act.

(4) Those items and expenses are– (a) the cost of faxes; (b) computers and the cost of computer facilities; (c) the cost of photocopying; (d) travel expenses, except the expense mentioned in paragraph (5) [from asylum support accommodation to longer-term home]; (e) toys and other recreational items; (f) entertainment expenses….

10(2) As a general rule, asylum support in respect of the essential living needs of [a] person may be expected to be provided weekly in….a cash payment of £40.85…"

Therefore, under s.95-6 and Reg.9-10 ASR, other than adequate accommodation, the Home Office is only empowered to meet the 'essential living needs' of an asylum-seeker. As I noted above, those are statutorily-prescribed in Asylum Support payments. From February 2022, the prescribed rate has been £40.85 pw per person. But after the circulation of this judgment in draft, Fordham J in *R(CB) v SSHD [2022] EWHC 3329 (Admin)* held the £40.85 rate was unlawful, as was the failure to increase it since February given the sharp rise in inflation, requiring the Home Office to increase it to £45. *R(CB)* does not affect the rate from February to August 2021 in this case (but I return to its significance for the Defendant's New NRPF Policy at the end). Back in mid-2021, for a family of one adult and three children, Asylum Support entitlement was 4 x £39.63: £158.52 plus utilities of £37.72, totalling £196.24 pw.

69. However, where the household of a recipient of asylum support includes a dependent child under 18, s.122 IAA can convert Home Office's power to support into a duty (my underline):

"122(1) In this section "eligible person" means a person who appears to the Secretary of State to be a person for whom support may be provided under section 95.

(2) Subs (3)-(4) apply if an application for support under s.95 has been made by an eligible person whose household includes a dependant under…age of 18 ("the child").

(3) If it appears to the Secretary of State that adequate accommodation is not being provided for the child, he must exercise his powers under section 95 by offering, and if his offer is accepted by providing or arranging for the provision of, adequate accommodation for the child as part of the eligible person's household.

(4) If it appears to the Secretary of State that essential living needs of the child are not being met, he must exercise his powers under section 95 by offering, and if his offer is accepted by providing or arranging for the provision of, essential living needs for the child as part of the eligible person's household."

70. Nevertheless, the duty under s.122(4) IAA to a relevant child to offer provision of their essential living needs is limited in scope. In *R(JK:Burundi) v SSHD [2017] 1 WLR 4567 (CA)* the reduction in the level of Asylum Support to child dependents to parity with that for adults and limitation to 'essential living needs' in a cash payment (then of £36.95 per week) was challenged as in breach of the separate statutory duty on the Home Office under s.55 Borders, Citizenship and Immigration Act 2009 ('BCIA') to discharge its functions *'having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom'*. However, the Court held the reduction in rate complied with the EU Asylum-Seekers Reception Standards Directive 2003 ('RCD') and also that s.55 BCIA did not require a 'welfare standard', only a 'subsistence standard' of essential living needs, as Gross LJ said:

> *"58… the natural meaning of the language used in both the IAA 1999 and the RCD points to a subsistence level of support rather than any heightened standard. 59…[T]he aim of [s.95 IAA] is averting destitution. So too, all of sections 95, 96 and 122 speak of the provision of 'essential living needs'. The language of the RCD is likewise plain: it is to ensure 'minimum standards' for the reception of asylum seekers that will 'normally suffice to ensure them a dignified standard of living' and 'adequate for the health of claimants and capable of ensuring their subsistence…It is further clear that the subsistence standard of living applies to children as well as adults…Read in combination, the duty imposed by s.112 IAA and the RCD on the Secretary of State is to make provision for essential living needs meeting minimum standards at a level to ensure a dignified standard of living, adequate for the health and ensuring the subsistence of [their] child dependants. Accordingly, at least as a matter of language, the standard set is one of subsistence rather than anything more…. 67…The language of the statutory and other provisions in question provide for a subsistence rather than a welfare standard. Proper consideration of the 'best interests' of the child neither requires nor permits the rewriting of either the IAA 1999 or the RCD to provide some different and welfare driven standard…."*

71. In summary, the 'essential living needs' fixed by Regs.9-10 ASR and under s.95-6 IAA are purely a 'subsistence' rather than a 'welfare' standard of support even when there are child dependents. That 'subsistence standard' equates to the Home Office meeting 'essential living needs' by a weekly cash payment (in mid-2021) of £39.63 per person (adult and child) in the household, albeit separate from accommodation and its expenses (such as utilities), broken down as I have explained into food and drink, toiletries, healthcare and cleaning items, clothing and footwear, permitted travel and communication.

72. Therefore, even leaving aside the limitations on the separate accommodation costs (such as no specific provision for furniture, bed linen etc) the weekly 'essential living needs' payment for a child of £39.63 in 2021 included no allowance for toys, books, or recreational or entertainment expenses (such as going to the swimming pool or to the cinema), all of which are specifically excluded under Reg.9(4) ASR. Nor did it make any separate provision for school uniform or indeed more than 4p a week on stationery such as crayons and colouring. This is because, as Gross LJ explained in *R(JK)* at p.59, the statutory 'aim' of s.95-6 IAA and Regs.9-10 ASR is of 'averting destitution' for asylum-seeking families.

73. Moreover, in addition to limiting non-accommodation financial support to children of asylum-seeking families to 'essential living needs', s.122(5)-(7) also disentitle those otherwise eligible for such support with from local authorities under various provisions (including s.17 CA):

> *"(5) No local authority may provide assistance under any of the child welfare provisions in respect of a dependant under the age of 18, or any member of his family, at any time when—(a) the Secretary of State is complying with this section in relation to him; or (b) there are reasonable grounds for believing that— (i) the person concerned is a person for whom support may be provided under section 95; and (ii) the Secretary of State would be required to comply with this section if that person had made an application under section 95.*
>
> *(6) "Assistance" means provision of accommodation or of any essential living needs.*
>
> *(7) "The child welfare provisions" means — (a) section 17 of the Children Act 1989.."*

74. In <u>*R(A) v NASS*</u> *[2004] 1 WLR 752 (CA)*, Waller LJ at p.21 explained why ss.122(5)-(7) CA meant even disabled *children* of asylum-seekers were the responsibility of the Home Office:

> *"The reason why disabled children of asylum seekers do not fall under s.21 National Assistance Act 1948 is that provision applies only to those over 18. The corresponding provision for disabled children would be [s.17 CA]. However, that section is expressly excluded by s.122. There is thus no provision other than s.95 IAA under which a disabled child of an asylum seeker can be provided with accommodation."*

Whilst *R(A)* concerned accommodation, ss.122(5)-(7) IAA also addresses 'essential living needs': again the responsibility of the Home Office and also restricted to Asylum Support payments - though those may be higher than the 'general rule' of £39.63 pw. However, as s.122(6) IAA says "'*Assistance" <u>means</u> provision of accommodation or of any essential living needs'* rather than 'includes', this suggests local authorities can lawfully meet welfare needs of children under s.17 CA *additional to* 'essential living needs'. (That seems the assumption of p.7A Sch.3 Nationality, Immigration and Asylum Act 2002 ('NIAA') discussed below).

75. Finally, whilst I was not referred to it, I should refer to the position of 'failed asylum-seekers' (often now called 'refused asylum-seekers' although to avoid confusion, I keep the statutory language of Sch.3 NIAA). They are people whose asylum claims have been refused and their appeal rights exhausted, but those with child dependents under 18 in the UK living with them remain eligible for ordinary Asylum Support due to the saving provision in s.94(5)-(6) IAA:

> *"(5) If an asylum-seeker's household includes a child who is under 18 and a dependant of his, he is to be treated (for the purposes of this Part* [i.e. Asylum Support, rather than Asylum claims generally]*) as continuing to be an asylum-seeker while— (a) the child is under 18; and (b) he and the child remain in the UK.*
>
> *(6) Subsection (5) does not apply if, on or after the determination of his claim for asylum, the asylum-seeker is granted leave to enter or remain in the UK (whether or not as a result of that claim)."*

(I merely note in passing the similar provision for accommodation centres in s.18 NIAA). Other 'failed asylum-seekers' (e.g. perhaps if their dependent child with them in the UK has turned 18) fall within the more restricted form of Home Office provision under s.4 IAA:

> *"…(2) The Secretary of State [SoS] may provide, or arrange for the provision of, facilities for the accommodation of a person if— (a) he was (but is no longer) an asylum-seeker, and (b) his claim for asylum was rejected…*
>
> *(3) The SoS may provide, or arrange for the provision of, facilities for the accommodation of a dependant of a person for whom facilities may be provided…*
>
> *(10)…SoS may make regulations permitting a person…provided with accommodation under this section to be supplied also with services or facilities of a specified kind.*
>
> *(11) Regulations under subsection (10)– (a) may, in particular, permit a person to be supplied with a voucher which may be exchanged for goods or services, (b) may not permit a person to be supplied with money, (c) may restrict the extent or value of services or facilities to be provided, and (d) may confer a discretion."*

Regulations governing accommodation (under s.4(5) IAA) are the Immigration and Asylum (Provision of Accommodation to Failed Asylum Seekers) Regs 2005. Reg.3 provides accommodation may only be provided to an individual (and dependants) if they appear to be destitute and are taking all reasonable steps to leave the UK, or unable to leave the UK due to a medical reason or there is no viable route of return, or has been granted permission to claim judicial review, or *"provision of accommodation is necessary for the purpose of avoiding a breach of ECHR rights"* (a phrase to which I return). I have not found any regulations under s.4(10) IAA, but I understand the 'voucher' is a pre-paid card at the Asylum Support rate.

Children Act Support

76. The child social care obligations on local authorities are contained mainly in Part III Children Act 1989 ('CA'). As Lord Hope explained in R(G) v Barnet LBC *[2003] 3 WLR 1194 (HL)* at ps.66-70 as not only overhauling the law relating to children and their residence and contact within separated families; and local authority child protection interventions, but also for local authorities to support not simply intervene in 'family life' (including within Art.8 ECHR) by their social care responsibilities in Part III CA: ss.16B to 30A CA. Two sets of provisions were considered in *R(G)*: those relating to 'looked after children' in ss.20-24 CA which are no longer live here; and the wider but weaker provision s.17 CA that is central to this case.

77. I will set out s.17 CA in detail, so far as material:

> "*17(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.*
>
> *(2) For the purpose principally of facilitating the discharge of their general duty under this section, every local authority shall have the specific duties and powers set out in Part 1 of Schedule 2.* [see below]
>
> *(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….*
>
> *(4A) Before determining what (if any) services to provide for a particular child in need in the exercise of functions conferred on them by this section, a local authority shall, so far as is reasonably practicable and consistent with the child's welfare–*
> *(a) ascertain the child's wishes and feelings regarding the provision of those services; and (b) give due consideration (having regard to his age and understanding) to such wishes and feelings of the child as they have been able to ascertain….*
>
> *(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….*
>
> *(8) Before giving any assistance or imposing any conditions, a local authority shall have regard to the means of the child concerned and of each of his parents….*

(10) For the purposes of this Part 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, and "family" , in relation to such a child, includes any person who has parental responsibility for the child and any other person with whom he has been living.

(11)… in this Part—"development" means physical, intellectual, emotional, social or behavioural development; and "health" means physical or mental health…..

78. Whilst most of the provisions in Part 1 of Sch.2 CA are not relevant, the following are:

"7. Every local authority shall take reasonable steps designed— (a) to reduce the need to bring— (i) proceedings for care or supervision orders with respect to children within their area; (iii) any family or other proceedings with respect to such children which might lead to them being placed in the authority's care….

8. Every local authority shall make such provision as they consider appropriate for the following services to be available with respect to children in need within their area while they are living with their families— (a) advice, guidance and counselling; (b) occupational, social, cultural or recreational activities; (c) home help (which may include laundry facilities); (d) facilities for, or assistance with, travelling to and from home for the purpose of taking advantage of any other service provided under this Act or of any similar service; (e) assistance to enable the child concerned and his family to have a holiday….

10. Every local authority shall take such steps as are reasonably practicable, where any child within their area who is in need and whom they are not looking after is living apart from his family— (a) to enable him to live with his family….if, in their opinion, it is necessary to do so in order to safeguard or promote his welfare."

79. *R(G)* concerned a foreign national mother of a baby who was ineligible for mainstream welfare benefits and housing. She argued that as her son had been assessed as a 'child in need', they had a right to be housed together under s.17 CA (or s.20 CA which I will not deal with as it is no longer said to arise in this case). The Lords held that whilst accommodation for 'children in need' as assessed could be provided under s.17 CA, it was not intended to replace the detailed legislative obligations on local authorities under housing legislation. s.17 CA did not create a specifically enforceable duty to meet a need even if it had been assessed.

80. This analysis of the legal effect of s.17 CA – as a so-called 'target duty' rather than a directly-enforceable duty - is unaffected by s.11 Children Act 2004 ('CA04') which echoes s.55 BCIA in applying to local authorities (among other public bodies) a duty under s.11(2) CA04 to:

> *"….make arrangements for ensuring that– (a) their functions are discharged having regard to the need to safeguard and promote the welfare of children…"*

s.11(4) also requires local authorities to have regard to guidance from the Secretary of State. The guidance for s.17 CA is *'Working Together'* (2018) which sets out required practice for local authorities undertaking assessments to determine whether a child is 'in need' under s.17 and sets out a general framework for individual assessment of the needs of such children.

81. The cumulative legal effect of s.17 and Part 1 Sch.2 CA as interpreted in *R(G),* taken together with s.11 CA04 and an earlier version of 'Working Together' was explained by Ryder LJ in *R(C) v Southwark LBC [2016] HLR 36 (CA),* which concerned three Nigerian children and their Nigerian mother who was an overstayer – i.e. she remained in the UK after her leave had expired. The Judge and Court of Appeal held the sequence of careful assessments had not been irrational or otherwise challengeable on public law grounds. Of particular relevance for this case, they also found the rates set for support by the local authority had not been irrationally 'pegged' to the Asylum Support Rate and reflected the children's assessed needs. Ryder LJ at ps.12 and 14 (later approved in *R(HC*) explained how s.17 CA works in law:

> "*12 It is settled law that the s.17 scheme does not create a specific or mandatory duty owed to an individual child. It is a target duty which creates a discretion in a local authority to make a decision to meet an individual child's assessed need. The decision may be influenced by factors other than the individual child's welfare and may include the resources of the local authority, other provision that has been made for the child and the needs of other children (see R(G) v Barnet LBC…). Accordingly, although the adequacy of an assessment or the lawfulness of a decision may be the subject of a challenge to the exercise of a local authority's functions under s.17, it is not for the court to substitute its judgment for that of the local authority on the questions whether a child is in need and, if so, what that child's needs are, nor can the court dictate how the assessment is to be undertaken. Instead, the court should focus on the question whether the information gathered by a local authority is adequate for the purpose of performing the statutory duty, i.e. whether the local authority can demonstrate that due regard has been had to the dimensions of a child's best interests for the purposes of s.17 CA 1989 in the context of the duty in s.11 of the Children Act 2004 to have regard to the need to safeguard and promote the welfare of children….*

14 A local authority that provides support for children in need under the 1989 Act is acting under its powers as a children's services authority…. and not as a local housing authority. The limited nature of the local authority's power is important. The local authority appropriately remind this court of the statement of principle in this regard which is to be found in R. (Blackburn Smith) v Lambeth LBC [2007] EWHC 767 at [36], per Dobbs J 'the defendant's powers [under s.17] were never intended to enable it to act as an alternative welfare agency in circumstances where Parliament determined the claimant should be excluded from mainstream benefits."

82. In *R(C)*, Ryder LJ also made the following observations of particular relevance to this case:

"18 In this case it is now common ground that the local authority does not have a written policy in relation to the assessment of children of families who have no right of recourse to public funds. Without hearing detailed submissions on the question, I venture to suggest that to have a separate policy outside the published guidance for just one category of children in need (i.e. those who do not have a right of recourse to public funds) would in the nature of this statutory scheme be difficult given that each child's needs are to be individually assessed by reference to the framework….

21 Given that the legislative purpose of s.17 CA 1989 in the context of s.11 of CA 2004 is different from that in ss.4 and 95 IAA 1999, it would be difficult for a local authority to demonstrate that it had paid due regard to the former by adopting a practice or internal guidance that described as its starting point either the child benefit rate or either of the IAA support rates. The starting point for a decision has to be an analysis of all appropriate evidential factors and any cross-checking that there may be must not constrain the decision maker's obligation to have regard to the impact on the individual child's welfare and the proportionality of the same.

22 There is no necessary link between s.17 CA 1989 payments and those made under any other statutory scheme; quite the contrary. The s.17 scheme involves an exercise of social work judgment based on the analysis of information derived from an assessment that is applicable to a heterogeneous group of those in need. That analysis is neither limited nor constrained by a comparison with the support that may be available to any other defined group, no matter how similar they may be to the s.17 child in need. In any event, the circumstances of those who qualify for s.17 support, those who have just arrived seeking asylum and those who have failed in their application to be granted asylum are sufficiently different that it is likely to be irrational to limit s.17 support to that provided for in a different statutory scheme."

83. As I said, ps.12 and 14 of Ryder LJ's judgment was quoted and endorsed by Lord Carnwath in *R(HC)*. However, like Lady Hale's observations this was *obiter* as *R(HC)*, as I have explained, was actually a challenge to the exclusion of *Zambrano* carers from mainstream welfare benefits on which EU Law and Art.14 ECHR challenges were rejected. However, from the Court's acceptance of that exclusion from mainstream welfare benefits flowed their observations that welfare responsibility was shifted onto local authorities under s.17 CA, although they heard no argument on its effect because the claim against the local authority had been stayed pending the challenge to the DWP. Nevertheless, at ps.44-5, Lady Hale described what the claimant received from the local authority as 'a typical use of s.17 money': train fares to travel to her family and later an offer of one room and £45 a week which after proceedings was replaced with a larger home and £55 a week for subsistence and £25.50 a week for utilities before the claim against the local authority was stayed. Having approved ps.12 and 14 of Ryder LJ's judgment in *R(C)* quoted above, Lord Carnwath added at ps.36-7:

> *"36 As that judgment [of Ryder LJ in R(C)] makes clear, section 17 is designed to cover a wide range of circumstances in which a local authority may need to take action to protect the interests of children in their area, temporary (as in that case) or more long-lasting. The duty arising in the present context is perhaps unusual in that arises from a responsibility imposed by EU law on member states. It is also likely to continue so long as no other sources of support are available to the child. On the view I have taken the allocation of responsibility for that support, as between central and local government, is an issue of national rather than EU law. However, that does nothing to diminish the importance of the duty.*
>
> *37 It must always be remembered that the primary objective is to promote the welfare of the children concerned, including the upbringing of such children by their families. The assessment of need must remain the responsibility of the local authority (as Ryder LJ made clear), but, given that this is a national responsibility, it is clearly desirable that there should be a degree of consistency as between authorities. The legislation allows for the provision of national guidance. Judicial review is available as a backstop, but it is likely to be unsatisfactory for the levels of appropriate support to be left for determination by the individual authorities on a case-by-case basis, subject only to control by the courts by reference to conventional Wednesbury principles…. On this aspect I agree also with the observations of Baroness Hale of Richmond PSC at paras 43—46 of her judgment."*

I quoted p.46 of Lady Hale's judgment at the start of my judgment and return to it below.

84. Whilst it does not form part of the Children Act 1989, as the Defendant invoked it to support the family with utility bills before the weekly payments started in February 2021, I should briefly mention the local authority's 'general power of competence' under s.1 Localism Act 2011 ('LA') *'to do anything that individuals generally may do'* even if they are *'in nature or extent unlike anything the authority or other public bodies may do'*. However, s.2(2) provides:

> *"The general power does not enable a local authority to do— (a) anything which the authority is unable to do by virtue of a pre-commencement limitation* [defined by s.2(4) as] *a prohibition, restriction or other limitation expressly imposed by an* [earlier] *statutory provision."*

Therefore, an authority cannot use s.1 LA to do something it is restricted from doing under an earlier statutory provision: *R(Kalonga) v Croydon LBC [2021] PTSR 1953 (HC)* p.52. As a result, s.1 LA cannot be used as (and was plainly not intended as) a short-cut round the limitations on local authority support in earlier provisions like s.122(5) IAA or s.17 CA.

Schedule 3 of the Nationality, Immigration and Asylum Act 2002

85. I now turn to the last piece in the jigsaw of statutory frameworks – Schedule 3 which is within Part 3 Nationality, Immigration and Asylum Act 2002 ('NIAA'). The Explanatory Notes state:

> *"Part 3 of the Act also contains provisions making certain categories of person ineligible for support unless provision is made in regulations to the contrary. Examples include those who have refugee status in another EU Member State and persons unlawfully in the UK. Part 3 additionally prohibits, subject to certain exceptions, the provision of support to asylum seekers who fail to make their asylum claim as soon as reasonably practicable after their arrival in the UK."*

86. The key issue of statutory interpretation in this case is the meaning of paragraph 3 of Sch.3:

> *"Paragraph 1 does not prevent the exercise of a power or the performance of a duty if, and to the extent that, its exercise or performance is necessary for the purpose of avoiding a breach of….a person's Convention rights."*

However, to construe it in its statutory setting, it is helpful to set out almost all of Sch.3 NIAA with explanations and not in its running order, but rather in five segments:

86.1 The technical and interpretation provisions: s.54 NIAA and ps.15-17 Sch.3 NIAA

86.2 The central prohibition on specified support: p.1 Sch.3

86.3 The classes of those people caught by that prohibition: ps.4-7A Sch.3

86.4 The exceptions to the prohibition: ps.2-3 (just noting the latter before returning to it)

86.5 The consequential and ancillary provisions: ps.8-14 Sch.3

87. Sch.3 NIAA takes effect under s.54 NIAA, which simply states:

> ***"****Schedule 3 (which makes provision for support to be withheld or withdrawn in certain circumstances) shall have effect."*

P.15 Sch.3 empowers the Secretary of State (i.e. the Home Office) to amend the schedule by providing that the prohibition in p.1 Sch.3 does or does not apply to a particular class of person or support or to add or amend exceptions to it. In fact, quite aside from that power, Sch.12 Immigration Act 2016 made a number of more far-reaching changes to Sch.3, although none of them have yet been brought into force and I discuss it as it was in 2021. P.16 Sch.3 makes provision for statutory instruments. P.17 is the interpretation clause and states, as is material:

> *"(1) In this Schedule— "asylum-seeker" means a person— (a) who is at least 18 years old, (b) who has made a claim for asylum (within the meaning of section 18(3)), and (c) whose claim has been recorded by the Secretary of State but not determined,*
>
> [This does not include the statutory saving for those with children in s.94(5) IAA]
>
> *"Convention rights" has the same meaning as in the Human Rights Act 1998 ['HRA']*
>
> *"child" means a person under the age of eighteen,*
>
> *"dependant" and "dependent" shall have such meanings as may be prescribed by regulations made by the Secretary of State,*
>
> *(2) For the purpose of the definition of "asylum-seeker" in sub-paragraph (1) a claim is determined if— (a) the Secretary of State has notified the claimant of his decision, (b) no appeal against the decision can be brought (disregarding the possibility of an appeal out of time with permission), and (c) any appeal which has already been brought has been disposed of* [which I will call 'appeal rights exhausted']…."

88. P.1 Sch.3 disentitles 'a person to whom this paragraph applies' from support it specifies:

> *"1(1) A person to whom this paragraph applies shall not be eligible for support or assistance under—(g) section 17, 23C, 23CZB, 23CA, 24A or 24B of the Children Act 1989 (welfare and other powers which can be exercised in relation to adults)… (j) section 188(3) or 204(4) of the Housing Act 1996 (accommodation pending review or appeal), (ka) section 1 of the Localism Act 2011 (local authority's general power of competence), (l) a provision of the [IAA 1999], (m) a provision of this Act; (n) Part 1 of the Care Act 2014 (care and support provided by local authority)*
>
> *(2) A power or duty under a provision referred to in sub-paragraph (1) may not be exercised or performed in respect of a person to whom this paragraph applies (whether or not the person has previously been in receipt of support or assistance under the provision)."*

89. Whilst s.115 IAA excludes those 'subject to immigration control' from mainstream benefits, p.1 Sch.3 NIAA also disentitles a subset of those excluded people ('a person to whom this paragraph applies') from a wide range of local authority support not encompassed by s.115 IAA, including homelessness accommodation pending review/appeal in the Housing Act 1996, adult social care and support in the Care Act 2014 (the successor to the NAA considered in *Westminster*), the general power in s.1 Localism Act 2011 used to pay EFG's utility bills discussed above, as well as various provisions of the Children Act 1989 ('CA'), including critically in this case, s.17 CA. It appears to be modelled on the then-recent exclusion of s.17 CA support for those eligible for Asylum Support in s.122(5)-(7) IAA 1999 discussed earlier.

90. Whilst Sch.3 next turns in ps.2-3 to the exceptions to that prohibition in p.1, it aids understanding first to consider its coverage, in the sense of the classes of people to whom the prohibition applies, before considering its exceptions. There are currently four classes:

90.1 P.4 of Sch.3 is headed: "*First class of ineligible person: refugee status abroad"* although in fact it is limited by p.4(2)(b) to those with refugee status in an EEA state.

> *"(1) Paragraph 1 applies to a person if he—(a) has refugee status abroad, or (b) is the dependant of a person who is in the United Kingdom and who has refugee status abroad.*
>
> *(2) For the purposes of this paragraph a person has refugee status abroad if—(a) he does not have the nationality of an EEA State and is not a British citizen and (b) the government of an EEA State has determined that he is entitled to protection as a refugee under the Refugee Convention."*

90.2 P.5 has been repealed following Brexit as it related to citizens of other EEA states.

90.3 P.6 of Sch.3 is headed '*Third class of ineligible person: failed Asylum seeker'* but actually only applies to a subset of 'failed asylum-seekers' (with their dependants) who have not co-operated with Home Office removal directions (my underline):

> *"6(1) Paragraph 1 applies to a person if (a) he was (but is no longer) an asylum-seeker, <u>and</u> (b) he fails to cooperate with removal directions…*
>
> *(2) Paragraph 1 also applies to a dependant of a person to whom that paragraph applies by virtue of sub-paragraph (1)."*

90.4 P7 is headed '*Fourth class of ineligible person: person unlawfully in United Kingdom'* although it specifically excludes asylum-seekers:

> *"7 Paragraph 1 applies to a person if—(a) he is in the United Kingdom in breach of the immigration laws within the meaning of section 50A of the British Nationality Act 1981 and (b) he is not an asylum-seeker."*

90.5 P.7A is headed: '*Fifth class of ineligible person: failed asylum-seeker with family'*:

> *"7A(1) Paragraph 1 applies to a person if– (a) he– (i) is treated as an asylum-seeker…by virtue only of s.94(3A) (failed asylum-seeker with dependent child)) IAA* [Query – s.94(5) ?]*…(b) the Secretary of State has certified that in his opinion the person has failed without reasonable excuse to take reasonable steps– (i) to leave the UK voluntarily, or (ii) to place himself in a position in which he is able to leave the UK Kingdom voluntarily, (c) the person has received a copy of the SoS's certificate, and (d)….14 days, beginning with the date on which the[y] receives the copy of the certificate, ha[ve] elapsed.*
>
> *(2) Paragraph 1 also applies to a dependant of a person to whom that paragraph applies by virtue of sub-paragraph (1)…."*

(I believe the reference should be to s.94(5) IAA as that is what covers 'failed asylum-seekers with dependent children' and s.94(3A) IAA appears no longer to exist). So, p.7A must assume local authorities can support those that would be treated as 'failed asylum-seekers with a family' but who have <u>not</u> been served with a p.7A certificate. Given the bar in s.122 (5)-(7) IAA on local authorities supporting them with accommodation and essential living needs, p.7A must be intended to cover what I have called 'additional welfare needs' which falls outside that bar in s.122(5)-(7). In *R(A)* this did not apply to accommodation, but the judgments were silent on this issue.

Therefore, in summary terms and slightly re-ordered, the four ineligible classes are: (i) Those with Refugee status in EEA state (p.4); (ii) Failed Asylum Seekers without child dependants in UK who have not complied with removal directions (p.6); (iii) Failed Asylum Seekers with dependant children in UK (or without leave) who have been served with a Home Office certificate under p.7A; (iv) Non-asylum-seekers unlawfully in the UK (p.7).

91. I now return to the exceptions to that prohibition in ps.2 and 3 Sch.3 NIAA (although I subdivide p.2). I start with p.3, which I only briefly mention now but analyse in detail later:

> *"Paragraph 1 does not prevent the exercise of a power or the performance of a duty if, and to the extent that, its exercise or performance is necessary for the purpose of avoiding a breach of….a person's Convention rights."*

p.3 does not just bring into play Art.3 ECHR and 'inhuman treatment' in refusing support, but also Art.8 ECHR family life rights the local authority should not stifle by withholding support if there is a pending arguable Art.8 claim for leave: <u>*R(Clue) v BCC*</u> *[2010] 4 All ER 423 (CA),* <u>*R(Kimani) v LLBC*</u> *[2004] 1 WLR 272 (CA*) and <u>*R(Grant) v LLBC*</u> *[2005] 1 WLR 181 (CA).* I will find below that if p.3 applies, it imposes an 'ECHR breach cap' for s.17 CA support.

92. That leads on to the exceptions in the first part of p.2(1) of Sch.3, which states:

> *"(1) Paragraph 1 does not prevent the provision of support or assistance—(a) to a British citizen, or (b) to a child."*

However, in *R(M)*, like *R(Clue)* a case of an unlawful overstaying foreign national mother with British children (again ineligible within p.7 Sch.3), it was held that even though s.17 CA support was for the 'child in need' rather than the parent or adult carer, since they were the recipient of financial support, that was not covered by p.2(1)(1) or (b) Sch.3. As Buxton LJ observed at ps.17-19 of *R(M)*, this produced 'surprising results' that had the effect of 'completely ignoring' the child's British citizenship:

> *"That is essentially because the reality will often or usually be that services to protect the child will be provided, as in the present case, by providing services to the child's family or at least to the child's custodial parent. That is what is envisaged by section 17(1)(b), read with section 17(3), of the Children Act 1989. p.1(1)(g) of Schedule 3 to the 2002 Act must, therefore, be read at least in part as addressing that case; and thus as providing that where a Children Act 1989 power is exercised through assistance to an adult, the power, even though it is a power to assist the child, is taken away if the adult in question falls within one of the ineligible classes…"*

In other words, the focus is on the *recipient* of the support. If it is the child (e.g. direct provision of nursery care, counselling etc), then p.2(1)(b) permits it, irrespective of the child's nationality. If it is the carer (e.g. financial support as in issue here), p.2(1)(b) does not apply and p.2(1)(a) only applies if the carer is a British citizen (which will be rare within Sch.3).

93. In <u>*R(MN and KN) v Hackney LBC*</u> *[2013] EWHC 1205 (Admin)*, Lord Leggatt (as he now is) helpfully summarised the effect of p.2(1)(a) and (b) Sch.3 on s.17 CA cases at p.18:

> *"(1) The claimants and their parents are all in the United Kingdom in breach of immigration laws (and are not asylum-seekers). P1 of Schedule 3 therefore applies so as to make them all prima facie ineligible for support or assistance under section 17…*
>
> *(2) However, as the claimants are children, paragraph 1 does not prevent the provision of support or assistance to them (see paragraph 2(1)(b) Sch.3).*
>
> *(3) Nevertheless, paragraph 1….prevents powers under section 17 from being exercised so as to provide support or assistance to the claimants' parents.*
>
> *(4) All this is subject to paragraph 3, which allows a power under section 17 to be exercised if and to the extent that its exercise is necessary for the purpose of avoiding a breach of the Convention rights of any member of the claimants' family."*

94. The other 'exceptions' in p.2 Sch.3 operate more like qualifications or mitigations of the full disentitling effect of the p.1 prohibition than true 'exceptions' to it. ps.2(1)(c),(d) and (e) and ps.(2)-(6) set out enabling provisions. The main ones are p.8 Sch.3 (empowering regulations providing for assistance to depart the UK), p.9 Sch.3 (enabling accommodation pending such assisted departure) and p.10 (enabling accommodation of those unlawfully in UK). The regulations are Regs. 3-4 Withholding and Withdrawal of Support (Travel Assistance and Temporary Accommodation) Regulations 2002 (the 'Withholding Regulations'), which state:

> *"3(1) A local authority may make arrangements ("travel arrangements") enabling a person with refugee status abroad…. to leave the United Kingdom..*
>
> *(2) A local authority may make arrangements for the accommodation of a person in respect of whom travel arrangements have been or are to be made pending the implementation of those arrangements.*
>
> *(3) A local authority may make arrangements for the accommodation of a person unlawfully in the United Kingdom who has not failed to co-operate with removal directions issued in respect of him.*
>
> *(4) Arrangements for a person by virtue of (2) or (3)— (a) may be made only if the person has with him a dependent child, and (b) may include arrangements for the child*
>
> *4(3) Travel arrangements and arrangements for accommodation may not include cash payments to a person in respect of whom the arrangements are made and must be made in such a way as to prevent the obtaining of services or benefits other than those specified in the arrangements.*
>
> *(4) A local authority must have regard to guidance issued by the Secretary of State..."*

In *R(M)*, it was held a local authority could accommodate a family with an unlawfully overstaying parent and British children under Reg.3(3) Withholding Regulations for longer than the 10 days suggested in the Home Office Guidance and potentially until removal directions had been set (which was only possible after an application for leave was refused).

95. Finally, this discussion of the regulations made under ps.8-10 Sch.3 leads to the ancillary and consequential provisions of Sch.3. As I have said, p.8 enables regulations (i.e. the Withholding Regulations discussed) empowering local authorities to facilitate travel arrangements, p.9 for accommodation pending such return and p.10 accommodation for those unlawfully in the UK who have not had removal directions set. p.11 enables further provision for regulations under ps.8-10. p.12 enables regulations to address cases where travel assistance is refused. All of those provisions are implemented by the Withholding Regulations (although I have not cited the 'travel refusal' provisions and various other provisions of them).

The 'statutory categories' of support available to 'NRPF families'

96. The interpretation of p.3 Sch.3 NIAA is said by Mr Buttler to be central to this case because he argues that not all families who are 'NRPF' are in the same statutory position – what I will call the same 'statutory category' of support. Mr Buttler argues that families falling within 'the human rights exception' in p.3 NIAA and asylum-seeking families are in different 'statutory categories' of support, both from each other and from those like EFG and her British children with her as their adult carer who is entitled to be in the UK even if they are 'NRPF', whether by virtue of an express condition or as a *Zambrano* carer. Mr Buttler relies on these suggested different 'statutory categories' as part of his main discrimination argument in oral submissions: the 'relevant difference' of the adult carer's immigration status.

97. By contrast, Mr Swirsky argued though different NRPF families may fall within different statutory *frameworks* for support, it was lawful to pay them the same weekly cash payment for 'essential living needs', which were the same irrespective of immigration status or nationality: there were no different *categories* for *that*. Therefore, it was lawful to pay EFG under s.17 CA the Asylum Support rate for those 'essential living needs' whilst providing other support for the children's 'welfare' under s.17 CA on top, as the Defendant did with bereavement counselling for the children and the family holiday. Moreover, the Old NRPF Policy was flexible enough to recognise various situations of additional *need* justifying higher payment. British nationality was legitimately *not* one of those situations.

98. Whilst presented as a debate about the meaning of p.3 Sch.3 NIAA, on reflection this debate spans the respective meanings of s.95-6 and 122 IAA / Regs.9-10 ASR and s.17 CA as well. This is the reason I have felt it necessary to set out all the statutory frameworks in such detail. It is also the reason why I find it helpful to remind myself of the fundamental principles of statutory interpretation, recently summarised (indeed in the context of British citizenship for children) by Lord Hodge in <u>*R(PRCBC) v Home Secretary*</u> *[2022] 2 WLR 343 (SC)* at p.29:

> "*The courts in conducting statutory interpretation are 'seeking the meaning of the words which Parliament used'…'Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context'. Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained…."*

99. The statutory language shows the purpose of s.17 CA and Sch.1 CA is *'to safeguard and promote the welfare of children'*. This is borne out not only by the statutory context to Part III Children Act 1989 discussed in *R(G)*, but also by Lord Carnwath's comment in *R(HC)* at p.37:

> "*It must always be remembered that the primary objective is to promote the welfare of the children concerned, including the upbringing of such children by their families"*

Lady Hale also made the same point (before going onto comment on nationality) at p.46:

> *"In carrying out that review, the local authority will no doubt bear in mind, not only their duties under s.17, but also their duty under s.11 [CA04], to discharge all their functions having regard to the need to safeguard and promote the welfare of children, and their duty, under s.175 Education Act 2002, to exercise their education functions with a view to safeguarding and promoting the welfare of children. Safeguarding is not enough: their welfare has to be actively promoted."*

100. The explicit statutory focus in s.17 CA on 'promoting welfare' makes the statutory scheme of s.17 different from that of Asylum Support in s.95-6/122 IAA and Reg.9 and 10 ASR which limits support to 'adequate accommodation' and 'essential living needs'. This is borne out by the precision with which 'essential living needs' are defined and calculated in the ASR. It is this exclusion of toys, recreation and entertainment which in statutory language clearly illustrates the Asylum Support scheme provides 'subsistence' support and a far cry from s.17's 'promotion of welfare', notwithstanding s.11 CA04, as Gross LJ explained in *R(JK)*.

> *"…The language of the statutory and other provisions in question provide for a subsistence rather than a welfare standard. Proper consideration of the 'best interests' of the child neither requires nor permits the rewriting of either the IAA 1999 or the RCD to provide some different and welfare driven standard…."*

Further evidence of the 'capping' of Asylum Support to 'subsistence' levels is offered by exclusion of such support under s.17 CA support from such families in ss.122(5)-(7) IAA. This difference between 'NRPF s.17 support' and Asylum Support was stressed in *R(C)*, not only by Ryder LJ at the passages quoted above, but also by Moore-Bick LJ at p.44:

> *"…[A] level of support considered adequate simply to avoid destitution in the case of a failed asylum-seeker is unlikely to be sufficient to safeguard and promote the welfare of a child in need and by extension the essential needs of the parent on whom the child depends for care. Ultimately what matters is whether the assessment when completed adequately recognises the needs of the particular child."*

Therefore, I agree with Mr Buttler that the focus of s.17 CA on 'welfare' on one hand and of Asylum Support on 'essential living needs' or 'subsistence' on the other is entirely different.

101. Of course, with a non-asylum seeking but NRPF family with 'children in need' under s.17 CA, *part* of those 'needs' is likely to be a need for support with 'essential living needs'. I agree with Mr Swirsky that such 'essential living needs' as statutorily-defined, such as food and drink, essential clothing and footwear, communication etc may very well be the same with an asylum-seeking family as a 's.17 NRPF family'. However, that does not mean there is no difference between 'essential living needs' and 'welfare': a distinction accepted in the Defendant's New NRPF Policy at p.2.3: *"The[se]..rates are considered sufficient..not merely to meet …essential living needs… but also to safeguard and/or promote the child's welfare."* This was why the New Policy chose an 'indicative rate' above the Asylum Support rate that is statutorily-limited to 'essential living needs'. The fundamental difference is that under the Asylum Support regime the Home Office are *limited* to such 'essential living needs' (which may be more in some families than others – hence the prescribed rate being a 'general rule'); whereas in s.17 NRPF cases, the local authority are *not limited* to 'essential living needs', as most obviously indicated by p.8 Sch.1, including family holidays and 'occupational, social, cultural or recreational activities' – very different from Reg.9 ASR excluding 'toys and other recreational activities'. Of course, some non-asylum seeking children's *assessed needs* for financial support under s.17 CA will only be for the provision of 'essential living needs'. Those children may have no other assessed needs at all, or all the rest of their assessed needs can be provided directly to them (e.g. a free play-group, counselling etc). But that depends on this being the conclusion of *the specific child's assessment*, as Ryder LJ said in *R(C)*.

102. As an aside, that does not apply here. As I discussed above at ps.38-39 of this judgment, the Defendant's own Family Assessment in January 2021 assessed the children's financial needs as for the Defendant to have financial means to 'support her family' without relying on charity and in addition to bills and food. Therefore, the Defendant's own assessment of need plainly went beyond 'essential living needs' or 'subsistence'. Moreover, as I also found, even taken with the charity payments, the Claimant's 'essential living needs' for food and clothing were not being met. Whilst there is no enforceable *duty* to meet an assessed need under s.17 CA (*R(G)*), the Defendant has advanced no explanation for its failure to do so. The original Ground 1 also argued that the Asylum Support rate of £196.24pw would have been irrational in any event for reasons echoing *R(C)*. In the Summary Grounds of Defence, the Defendant was not able to put forward any real answer to that either. As permission was limited to Ground 3, I focus on that. However, I return towards the end to the fact that the Defendant did not in the Summary Grounds of Defence or evidence since set out any answer to the point that paying EFG the Asylum Support rate of £196.24 pw was effectively contrary to *R(C)*.

103. In any event, (i) non-asylum-seeking NRPF families generally eligible under s.17 CA are plainly in a different 'statutory category' to (ii) asylum-seeking families (either undetermined or 'failed' but preserved by s.94(5) IAA). (i) are eligible for unrestricted support for assessed needs of children from the local authority under s.17 CA but no support at all from the Home Office. By contrast, (ii) can only have accommodation and 'essential living needs' met by the Home Office, although they can potentially have (only) *additional* welfare needs for children met by the local authority under s.17 CA, at least unless they are 'ineligible' as certified under p.7A Sch.3 NIAA, in which case such support can only be direct to the child under p.2 Sch.3 or to the adult only 'to the extent necessary to avoid ECHR breach' under p.3 Sch.3 NIAA.

104. That reference to p.3 Sch.3 NIAA leads on to another point raised in Mr Swirsky's original Skeleton Argument which might justify paying £196.24 per week in domestic law and so be relevant to Art.14 ECHR too. Mr Swirsky argued for any periods where EFG was unlawfully in the UK as an overstayer (e.g. after the expiry of her visitor's visa in April 2021), then she would fall within p.7 Sch.3 NIAA and following *R(M)* and *R(MN)* and financial support paid to her would fall within p.3 Sch.3: the human rights exception. This raised the proper interpretation of that paragraph. Whilst Mr Swirsky has conceded EFG was lawfully in the UK at all times, as I have said, I will examine the correctness of that concession.

105. For convenience, I will repeat and underline that 'human rights exception' in p.3 Sch.3 NIAA:

> *"Paragraph 1 does not prevent the exercise of a power or the performance of a duty if, and <u>to the extent that</u>, its exercise or performance is necessary for the purpose of avoiding a breach of….a person's Convention rights."*

Mr Buttler argued 'to the extent that' effectively 'capped' s.17 CA support to an 'ineligible' person within Sch.3 to <u>only</u> that which is '*necessary' to avoid ECHR breach.* Mr Swirsky argued that if any s.17 CA support was needed to avoid ECHR breach, it was not 'capped'.

106. *<u>R(Limbuela) v Home Secretary</u> [2006] 1 AC 396 (HL)* concerned the similar statutory provision of s.55(5)(a) NIAA, immediately following s.54 NIAA which empowers Sch.3.

> *"This section shall not prevent…the exercise of a power by the [Home Office] to the extent necessary for the purpose of avoiding a breach of a person's Convention rights"*

In a few paragraphs, Lord Bingham put his peerless judicial finger on several key points:

106.1 Firstly, at p.2, he not only identified the statutory purpose not only of s.55 NIAA but the wider legislative purpose of restricting access of migrants to public funds;

106.2 Secondly, at ps.3-4, he explained how s.55 NIAA imposed a statutory prohibition on support for late asylum claims, subject to a number of exceptions, including for children – quite separately from the exception to ensure compliance with the ECHR;

106.3 Thirdly, at ps.6-7, he articulated the threshold for the violation of Art.3 ECHR:

> *"…if a late applicant with no means and no alternative sources of support, unable to support himself, is, by the deliberate action of the state, denied shelter, food or the most basic necessities of life."*

106.4 Fourthly at ps.8-9 he articulated the threshold for the Home Office's (logically, earlier) duty to support to avoid such a breach and suggested ordinarily it would be triggered by non-finite street homelessness, serious hunger, or lack of access to basic hygiene.

106.5 Finally and critically here, on the meaning in s.55(5)(a) of '*to the extent necessary for the purpose of avoiding a breach of a person's [ECHR] rights',* I underline his p.5:

> "[The *SoS]'s freedom of action is closely confined. He may <u>only</u> exercise his power to provide or arrange support where it is necessary to do so to avoid a breach <u>and to the extent necessary for that purpose</u>. He may not exercise his power where it is not necessary to do so to avoid a breach <u>or to an extent greater than necessary for that purpose</u>. Where (<u>and to the extent</u>) that exercise of the power is necessary, the [SoS] is subject to a duty, and has no choice, since it is unlawful for him under s.6 [HRA] to act incompatibly with a [ECHR] right. Where (and <u>to the extent</u>) exercise of the power is not necessary the [SoS] is subject to a statutory prohibition, and again has no choice."*

107. I consider that p.3 Sch.3 NIAA must mean that s.17 CA (and other p.1 barred) support to 'ineligible' people is 'capped' at *the extent of* such support which is necessary to avoid an ECHR breach, rather than being 'uncapped' once *some* support is necessary to avoid breach:

107.1 Firstly, the meaning of 'to the extent that' in p.3 Sch.3 is (to use the words of Lord Hodge at p.30 of *R(PRCBC)*) clear, unambiguous and does not produce absurdity and so should be read to mean what it says in a way not displaced by external context. It limits the *extent* to which support must be provided under s.17 CA etc to that '*necessary for the purpose of avoiding a breach of….a person's [ECHR] rights'*. It restrains not just *whether* support can be provided, but *how much* support can be.

107.2 Secondly, I approach 'Parliamentary Intention' (as Lord Hodge put it at p.31 of *R(PRCBC)*), as an objective assessment of the meaning which a reasonable legislature would be seeing to convey in the words it chose. The words 'to the extent that' clearly indicate a Parliamentary intention to limit the *extent* of support, not just the *availability* Otherwise, it would weaken Parliament's prohibition of support listed in p.1 Sch.3, by bringing it back in full measure if the unavailability *of any support at all* would breach the ECHR, rather than limiting support to that *necessary* to avoid such a breach.

107.3 Thirdly, as Lord Hodge suggested at p.29 of *R(PRCBC)*, looking at the wider context of the NIAA, it is not seriously arguable that 'to the extent that' in p.3 Sch.3 under s.54 means something different than 'to the extent' in s.55(5)(a) as interpreted in *R(Limbuela)*. Whilst p.3 refers to powers and duties, that is because it covers a list of statutory provisions, some of which are powers and others are duties. s.55(5)(a) only covers provisions listed in s.55(2), including ss.4 and s.95 IAA, which are all *powers*. s.122 which converts s.95 IAA to a *duty* to dependent children has a specific exception under s.55(5)*(b)*. In Sch.3, p.2(1) permits uncapped *direct* provision to children: *R(M)*, but financial support to their ineligible carer, has a deliberate 'ECHR breach cap'.

108. However, I am conscious that *R(Limbuela)* was only concerned with the Art.3 ECHR rights of adults and not other ECHR rights, especially those of children, as Lord Bingham noted at p.4. Conversely in *R(M)* and *R(Clue)*, the Court was concerned with (British) children of ineligible carers and stressed Art.8 ECHR family life was also relevant to 'avoiding ECHR breach' in p.3 Sch.3. In *R(Clue)* at p.63, Lord Dyson drew on comments in *R(M)* to state that:

> *"[I]n enacting Schedule 3, Parliament cannot reasonably have intended to confer a general power on local authorities to pre-empt the determination by the [Home Office] of applications for leave to remain. In my judgment, save in hopeless or abusive cases, the duty imposed on local authorities to act so as to avoid a breach of an applicant's Convention rights does not require or entitle them to… in effect, determine such an application themselves by making it impossible for the applicant to pursue it."*

Therefore, to avoid Art.8 ECHR breach only requires support necessary to enable a family to maintain their Art.8 family and private lives, i.e. support sufficient to enable the family to stay in the UK pending an Art.8 immigration claim (analogous to EU *Zambrano* rights in *R(HC)*). For children with a developed 'family and private life' in the UK, this 'raises' the bar for support from the 'basic necessities of life' threshold for Art.3 ECHR breach described by Lord Bingham in *R(Limbuela)*, but is still limited *to the extent necessary to avoid* an ECHR breach.

109. *R(C)* was a p.3 Sch.3 case involving an ineligible (overstaying) mother and her non-British children, yet the Court still considered support should not be 'benchmarked' to the Asylum Support rate (actually the family received much more). This plainly shows those 'ineligible' families within p.3 Sch.3 NIAA are in a different statutory category to asylum-seekers (unless they are 'failed' and fall within ps.6 or 7A Sch.3). However, *R(C)* did not quote or construe p.3 Sch.3, cite *R(Limbuela)* or consider the 'ECHR breach cap' issue, as it did not concern comparing support to those generally eligible under s.17 CA and 'ineligible' carers as a result of p.3 Sch.3. I find they are also two different 'statutory categories' for three reasons:

109.1 Firstly, I have already explained why p.3 Sch.3 restricts s.17 CA support available to 'ineligible carers' of children under Sch.3 'to the extent necessary' to avoid an ECHR breach. This is the clear meaning of the language, which is unambiguous: *R(PRCBC)*. Conversely, those not 'ineligible' within Sch.3 are only restricted by s.17 CA 'need'.

109.2 Secondly, that interpretation is consistent with the statutory context of p.3 Sch.3: it provides an exception to the bar in p.1 Sch.3, which itself only applies to the 'ineligible categories' in Sch.3, including 'failed asylum seekers with families' served with a certificate relating to leaving the UK as well as 'those unlawfully in the UK'. Therefore, the purpose of p.3 is plainly to avoid ECHR breaches risked by the p.1 bar – to relax the bar, to the extent necessary to avoid ECHR breach as discussed.

109.3 Thirdly, this must be the true construction of p.3 Sch.3, because if it did not restrict the extent of support under s.17 CA, Schedule 3 in relation it would be otiose. By contrast, the clear meaning from the wording, context and plain Parliamentary intention of p.3 and Sch.3) is that it was intended to restrict s.17 CA (and other) support for the 'ineligible' groups listed in Sch.3: those with no good reason to stay in the UK.

110. I was not addressed about what level of payments to 'ineligible' carers of 'children in need' under s.17 CA was 'necessary' to avoid ECHR breach under p.3 Sch.3 NIAA, which in my judgement must vary depending on the facts of the case. However, *R(C)* is clear that support remains under s.17 CA and depends on an individual needs assessment for the child (which the Old NRPF Policy envisaged, although with a specific 'Human Rights Assessment' for p.3 Sch.3); and rates even 'capped' by p.3 still cannot be 'benchmarked' against other statutory schemes such as Asylum Support (which the Old NRPF Policy did). But support under s.17 CA as 'capped' by p.3 Sch.3 obviously has a lower *potential* ceiling than general support under s.17 CA which is simply governed by the child's assessed needs, albeit operating in the way described in *R(C)* as approved in *R(HC)*. However, as I have discussed, the Claimant and his siblings' needs were assessed by the Defendant with the objective of providing EFG with '*the financial means to support the family <u>and</u> [to] be able to pay her bills and buy food'*. This was not limited to 'essential living needs' and indeed was plainly a higher level of support. Indeed, given its wide scope I accept it was at a higher rate than simply necessary to avoid ECHR breach. Therefore, it follows that EFG, the Claimant and his siblings were not just potentially but actually in different 'statutory categories' than both asylum seekers and those ineligible carers who were subject to a p.3 'ECHR breach cap'. (I simply note these distinctions are respectively key to the 'child nationality / immigration status' and 'adult immigration status' complaints of discrimination which I consider in detail later).

111. This means there is a clear difference in the ceiling of support in the two 'statutory categories' of s.17 CA support, namely (i) ineligible carers with a p.3 'ECHR breach cap' of support and; (ii) others with the right to be in the UK and not 'ineligible' who are not 'capped' (by anything but the child's assessed needs). This therefore raises the question of which category EFG (and by extension, the Claimant and his siblings), was in – and the correctness of Mr Swirsky's concession that EFG was always lawfully within the UK at all times, even if there was confusion about that at the time and the position was only confirmed relatively recently.

112. I am satisfied that EFG has been lawfully in the UK throughout. In *R(Akinsanya)* the Court of Appeal held that EU *Zambrano* rights only arose if a primary carer for a British child had no other right to remain in the UK. In *Sanneh v SSHD [2016] QB 455 (CA)* (which went to the Supreme Court on a different point as *R(HC)*), it was held that *Zambrano* rights 'kicked in' automatically. It follows that for EFG, she was unquestionably lawfully in the UK until her visitor's visa expired in March and was unquestionably lawfully in the UK until 26th April because her leave was automatically extended under s.3C Immigration Act 1971. Whilst her acknowledged leave expired on the initial refusal of her EUSS application on 26th April 2021, it was just at that point (see *R(Akinsanya)*) that her EU *Zambrano* rights arose automatically (see *Sanneh*) and therefore, EFG continued to be in the UK lawfully, as she was throughout, even without Home Office leave until that was granted in November 2021. In short, EFG was lawfully in the UK throughout, so Sch.3 NIAA did not apply in this case.

113. NRPF families who are not current asylum-seekers, caught by the prohibition on general statutory support in p.1 Sch.3 NIAA and not saved by any of the exceptions in Sch.3 are in a different statutory category for support again. Leaving aside direct support to the children, non-British adult carers can only be financially supported under the Withholding Regulations, which is limited in the ways in which I have described and generally to travel assistance and the provision of accommodation pending that. However, as *R(M)* shows, in some cases that accommodation would be on a longer-term basis at least until the adult fails to comply with Home Office removal directions (so including accommodation pending an extant application for leave to remain where removal directions could not be set until its determination).

114. Finally, some non-asylum seeking NRPF families may not be *entitled* to any public support, not just for mainstream welfare benefits. A carer may be 'ineligible' for local authority support too under p.1 Sch.3 if they have accommodation and support from friends or relatives sufficient to avoid an ECHR breach under p.3 Sch.3 and do not need support under the Withholding Regs, provided the child has no assessed needs for direct provision under p.2 Sch.3. But in these circumstances, s.1 LA may empower an authority *voluntarily* to assist.

115. In summary, foreign-national adult carers of dependant children with 'no recourse to public funds' (as either a leave/admission condition or without leave to remain) are ineligible for mainstream welfare benefits. However, leaving aside the complexities of housing statutes and support for 'looked after children' under ss.20-30 CA, there seem to be broadly five categories of local authority financial support payable to the parent / adult carer within 'NRPF families':

'Cat.1' If adult carers are (i) not asylum-seekers (actually or deemed under s.94(5) IAA); (ii) not ineligible under Sch.3 NIAA and (iii) the child(ren) (whether British or foreign-national) are assessed by the local authority as 'in need' and requiring support, s.17 CA is engaged in full. Whilst not a duty *(R(G))*, the extent of financial support depends on the authority's assessment of the child(ren)'s *welfare* needs for financial support in their case: *R(HC)*/*R(C)*. This is the category EFG and the Claimant were in.

'Cat.2' If the adults are (i) asylum-seekers (even if their claim has been refused, unless they have leave to remain), (ii) with dependant children under 18 still in the UK (irrespective of their nationality); and (iii) the family is 'destitute' under s.95 IAA i.e. lacking adequate accommodation and/or the means to meet 'essential living needs', s.122 IAA (iv) limits local authority s.17 CA support to 'additional welfare needs', and <u>not</u> 'essential living needs' or 'accommodation' (as in *R(A)*); but (v) also obliges the Home Office to ensure the child is adequately accommodated and their 'essential living needs' are met. The latter is 'generally' done at the prescribed rate - in 2021 £39.63 each pw, which is a *subsistence* level to cover only those 'essential living needs' and not 'generally' elevated by the 'welfare duty' under s.11 CA04: *R(JK)*.

'Cat.3' If an (i) adult foreign-national carer of dependant child(ren) (irrespective of their nationality) (ii) falls in one of the 'ineligible classes' in Sch.3 NIAA, (iii) local authority support can be provided directly to the child (e.g. child counselling etc) but (iv) practical/financial support which also benefits the ineligible adult under s.17 CA (and s.1 LA etc) (v) is limited under ps.1 and 3 to the extent necessary to avoid ECHR breach: *R(Limbuela)*/*R(M)*/*R(Clue)*. This should not be benchmarked to Asylum Support, but assessed in individual cases depending on the needs of the children: *R(C)*.

'Cat.4' If (i) adults unlawfully in the UK are ineligible under Sch.3 NIAA and (ii) there is no exception in ps.3 (ii) or direct support to the child under p.2, the p.1 bar prohibits local authority support under the listed provisions (including s.17 CA), but not under the Withholding Regs as in *R(M)* (accommodation and travel assistance but not cash).

'Cat.5' If failed asylum-seekers are ineligible for local authority support under ps.6 or 7A Sch.3 with no exception in ps.3 or p.2(1)(a)-(b) Sch.3, authorities cannot support them at all but the Home Office can under s.4 IAA (accommodation and voucher not cash).

Art 14 ECHR Discrimination

General Principles

116. As I have explained, my findings that the Defendant's payment of £196.24 pw from February to August 2021 met neither the children's 'essential living needs' nor their 'assessed welfare needs' are not enough for the Claimant to succeed: he must prove Art.14 discrimination. However, those findings do mean the Claimant has shown that the appropriate level of financial support should rationally have been significantly higher than the Asylum Support rate of £196.24 per week (plus the accommodation costs and miscellaneous other small payments). This means that the discrimination claim is not only for a 'nominal difference' as in the recent case of *R(MD) v Home Secretary [2022] PTSR 1182 (CA)* to which I return. So, if the discrimination claim succeeds, the nature of 'just satisfaction' will depend partly on calculation of any financial loss, which is not straightforward. Therefore, we agreed we would cross that bridge with further submissions if we came to it. I will first consider general principles in an Art.14 welfare support *Thlimmenos* discrimination claim (as discussed in *R(DA) v DWP [2019] 1 WLR 3316 (SC)*, qualified in *R(GC) v DWP [2021] 3 WLR 428 (SC))*. Then I will address the four key issues in the Art.14 discrimination claim: 'other status', 'comparison', 'relevant difference' and finally 'justification'. After I reach my conclusion on Art.14 ECHR, I will then offer some extremely brief observations I hope will be helpful.

117. The Defendant is a 'public authority' under the Human Rights Act 1998 ('HRA'). s.6 states:

> *"(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.* [i.e. under the European Convention of Human Rights ('ECHR')]
> *(2) Subsection (1) does not apply to an act if— (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions."*

The relevant Convention rights here are Art.8, Art.1 Protocol 1 ('A1P1') and Art.14 ECHR:

> *"8.1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others*

A1P1 Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

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

118. I raised *R(SC)* with Counsel because it had quite recently reconsidered the approach to justification in the present context of alleged Art.14 ECHR discrimination in welfare support. Lord Reed PSC distinguished between the three main forms of Art.14 discrimination now recognised by the European Court of Human Rights ('ECtHR'):

"47 Generally, in order for an issue to arise under article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations: Guberina v Croatia (2016) 66 EHRR 11, para 69. That is the situation in an ordinary case of direct discrimination: there is an actual difference in treatment between comparable cases, directly based on a prohibited ground of discrimination.

48 In addition, 'the right not to be discriminated against . . . is also violated when states without an objective and reasonable justification fail to treat differently persons whose situations are significantly different': Guberina, para 70. In other words, article 14 may impose a positive duty to treat individuals differently in certain situations. One of the judgments cited by the court was Thlimmenos v Greece (2000) 31 EHRR 15, which illustrates the nature of the discrimination in such cases. The applicant had received a criminal conviction as a result of his refusal, for religious reasons, to wear a military uniform. He was refused admission to the profession of chartered accountant because he had been convicted of a serious crime. Since his conviction did not imply any dishonesty or moral turpitude which might render a person unsuitable to enter the profession, the court held that 'there existed no objective and reasonable justification for not treating the applicant differently from other persons convicted of a felony' (para 47). The discrimination lay in not introducing an exception to a general rule.

49 Thirdly, 'The court has also accepted that a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group, and that discrimination potentially contrary to the Convention may result from a de facto situation. This is only the case, however, if such policy or measure has no 'objective and reasonable' justification, that is, if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality' between the means employed and the aim sought to be realised': Guberina, para 71….This is what is described in the Convention case law as 'indirect discrimination'. It can arise in a situation where a general measure or policy has disproportionately prejudicial effects on a particular group. It is described as 'indirect discrimination because the measure or policy is based on an apparently neutral ground, which in practice causes a disproportionately prejudicial effect on a group characterised by a salient attribute or status."

119. So, there are important differences between the three different forms of discrimination:

119.1 As between direct and indirect discrimination, in *R(MD)* a judge mischaracterised carefully-phrased complaints of indirect and *Thlimmenos* discrimination (as I will now explain, two different types of complaint about *similar* treatment) as a complaint of direct discrimination (i.e. a complaint of *different* treatment), so went clearly wrong.

119.2 Whilst *Thlimmenos* and indirect discrimination both involve two (or more) groups which are treated the same way, as Lord Reed explained in *R(SC)*, indirect discrimination occurs where a neutrally-formulated measure has a *disproportionately prejudicial effect* on a particular group affected by it without an objective and reasonable justification (e.g. the historical workplace requirement for full-time work which affected women due to greater child-care commitments). But *Thlimmenos* discrimination occurs when the state *"without objective and reasonable justification fail[s] to treat differently persons whose situations are significantly different' In other words, article 14 may impose <u>a positive duty to treat individuals differently</u> in certain situations."* (my underline). Mr Thlimmenos' successful complaint was not that *the same rule disproportionately prejudiced* those of his faith, but rather that his faith put him in a *different situation* which *required a different rule*. There is an analogy to 'reasonable adjustments' for disabled people (although the ECtHR treats such 'reasonable accommodation' as a free-standing claim). Fittingly, there is a subtle but significant difference between Indirect and *Thlimmenos* discrimination, which as Lord Reed showed, is well-recognised by the jurisprudence of the ECtHR.

119.3 By contrast, as Lord Wilson memorably described in *R(DA)* at ps.40-45, *Thlimmenos* discrimination is direct discrimination 'turned inside out'. Rather than a complaint of *different* treatment like direct discrimination, the complaint is of *similar* treatment. In *R(DA)*, whilst some lone parent claimants challenged the revised benefit cap as directly discriminatory against them in that they were treated differently than others not affected by it, Lord Wilson re-characterised their complaint as more realistically a failure to make an exemption for them as well – i.e. *Thlimmenos* discrimination.

So, *R(DA)* (read with *R(SC)*) is a helpful guide to the elements of *Thlimmenos* discrimination:

120. Firstly, as Lord Wilson explained in *R(DA)* at p.35, Art.14 ECHR is not free-standing - alleged discrimination under Art.14 ECHR must fall within the 'ambit' of another ECHR right. In *R(DA)*, Lord Wilson analysed challenges to the benefit cap as plainly falling with the ambit of Art.8 ECHR family life because, as he put it at ps.35 and 37:

> *"It cannot seriously be disputed that the values underlying the right of all the appellants to respect for their family life include those of a home life underpinned by a degree of stability, practical as well as emotional, and thus by financial resources adequate to meet basic needs, in particular for accommodation, warmth, food and clothing….*[However, the effect of the cap may be that] *the family, no doubt with great difficulty, has to move to cheaper accommodation; or that the mother builds up rent arrears and so risks eviction or otherwise falls into debt; or that, like one of the mothers, she has to cease buying meat for the children; or, as in cases recorded by Shelter, that she has to go without food herself in order to feed the children or has to turn o› the heating. Whatever their individual effect, provisions for a reduction of benefits to well below the poverty line will strike at family life."*

Whilst the Claimant originally argued this case fell within the 'ambit' of A1P1, as Lord Reed explained in *R(SC)* at ps.41-43, the right to benefits as a 'possession' under A1P1 ECHR only applies to those directly entitled to them – i.e. adults not children. Since the Claimant here is a child, I prefer to analyse his complaints as falling within the 'ambit' of Art.8 ECHR as they plainly do for similar reasons as in *R(DA)* given the effect of the limited financial support on his and his family, as I described above. When I raised this point with Mr Swirsky at the start of the hearing, he did not object to this slight re-formulation, nor did he suggest it made any difference in this case. (In any event, what I will call the 'adult immigration status' complaint) turns on the impact on the Claimant and his siblings of limited provision to EFG – A1P1 applies in any event insofar as it relates to her right to possession of welfare support). There was no dispute in argument about the 'ambit' requirement and I accept it is satisfied.

121. Secondly, as Lord Wilson explained in *R(DA)* at ps.38-39, Art.14 does not limit actionable discrimination within the ambit of another ECHR article like Art.8 or A1P1 to the grounds explicitly listed in it: '*sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth'* but also apply to discrimination on grounds of '*other status'*, which he suggested had a 'broad' meaning, although the issue of 'status' in this case is complex and I consider it separately below. For now, I simply repeat the three ways in which I will analyse the present Art.14 claim:

121.1 Firstly, the comparison between (i) British and (ii) non-British children each cared for by a NRPF foreign carer with leave. This compares *purely the children's nationalities,* relying on Lady Hale's comments in *R(HC)* at p.46 (they are also relied on with (2)).

121.2 Secondly, the comparison between (i) British children cared for by a 'NRPF' adult and (ii) foreign-national children in 'asylum-seeking families'. This argument compares the *children's nationalities as manifesting in their 'immigration status'.*

121.3 Thirdly, the comparison between children cared for by (i) foreign national adults <u>with</u> the right to be in the UK the same as children cared for by (ii) foreign national adults <u>without</u> the right to be in the UK. This compares the *adult's immigration status*.

122. Thirdly, I turn to the form of those comparisons. As explained, in *Thlimmenos* discrimination, unlike direct discrimination, the comparison is not with those *treated differently* who are said to be *relevantly similar*, but those *treated the same* who are said to be *relevantly different*. In *R(DA)*, as Lord Wilson explained at p. 46, the lone parents with children under two or under five affected by the benefit cap and the DWP contended for different 'comparators': (a) dual-care parents with a child aged under 2 or under 5; (b) lone parents without a child aged under 2 or under 5; or (c) all others subjected to the benefit cap. Noting that Lady Hale had in <u>*AL(Serbia) v SSHD*</u> *[2008] 1 WLR 1434 (HL)*, called protracted argument about comparators 'an arid exercise', Lord Wilson said in *R(DA)* at p.47:

> *"Blessed is simplicity. The complaint made by the appellants is that their cohorts should not have been subjected to the revised cap. The natural corollary is… they are comparing their cohorts with all others subjected to the cap: so the natural comparator is the group at (c). Nevertheless, in arguing there has been an objectionable similarity of treatment between the[m]…and all others subjected to the cap….the appellants may seek to highlight their objection by reference to subgroups, such as those at (a) and (b), whose situations are alleged to be relevantly different."*

However, as in this case there are three different comparisons, there is slightly less 'blessed simplicity': the comparisons are slightly different in each and so I also return to this issue.

123. Fourthly, with *Thlimmenos* discrimination, again for reasons discussed above, the next issue is whether the 'situations' of the complainant and those of a different 'status' but treated the same were 'relevantly and significantly different'. In *R(DA)* at ps.48-51, Lord Wilson called this issue 'different situations' and he encapsulated the issue in this way at p.48:

> *"In DH v Czech Republic (2007) 47 EHRR 3 the Grand Chamber of the ECtHR said in para 175 that 'discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations'. Re-cast to cover the type of discrimination recognised in the Thlimmenos case, the proposition is that it means treating similarly, without an objective and reasonable justification, persons in relevantly different situations."*

Lord Wilson found in *R(DA)* there was 'relevant difference' because as he said at p.51:

> *"There is clear prima facie evidence that in the terms of the re-cast proposition the DA and the DS cohorts are in a relevantly different situation from those others who have been treated similarly to them by their common subjection to the revised cap."*

He gave various reasons for that conclusion – that in the case of a lone parent of a child under two, it was contrary to her interests and those of her child that she should constrained to work, especially when other benefit rules had recognised that; and that it created 'extra difficulty' for them beyond that faced by non-lone parents subjected to the cap, exacerbated by the lack of free childcare; and this extra difficulty was illustrated by the statistics and he concluded:

> *"[W]hile the effect of the cap on all households who suffer it is to reduce their income below the poverty line, poverty has a disproportionate effect on the young children within these cohorts, stunting major aspects of their development in the long term…"*

'Relevant and significant difference' was the main dispute between Counsel and I return to it.

124. Finally, there is justification. The general approach to ECHR justification was settled in *Bank Mellat v HM Treasury (No.2) [2014] AC 700 (SC)* by Lord Reed at p.74 (in the minority but endorsed on this issue in the leading majority judgment by Lord Sumption at p.20):

> *"(1) Whether the objective of the measure is sufficiently important to justify the limitation of a protected right,*
>
> *(2) whether the measure is rationally connected to the objective,*
>
> *(3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and*
>
> *(4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter."*

125. In *R(DA)* Lord Wilson also noted the ECtHR's approach to justification in Art.14 at ps.48-50:

> *"In Carson v United Kingdom (2010) 51 EHRR 13 the Grand Chamber explained in para 61 what was meant by the absence of objective and reasonable justification: 'in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised'. Clarity of language aids clarity of thought. It is worthwhile to stress that the frequent reference to 'justified discrimination' in the domestic discussion of the concept is, as a matter of law, the expression of a contradiction in terms. As the terminology long favoured by the Grand Chamber shows, justification negatives the very existence of discrimination. In the DH case the Grand Chamber proceeded to explain in para 177 that, once the applicant had shown a difference in treatment of persons in relevantly similar situations, the burden of proof lay on the state to establish that it was justified; and in para 178 that what shifted the burden on to the state was 'prima facie evidence'."*

126. Lord Wilson in *R(DA)* then addressed what he called 'the focus of justification' at ps.53-4:

> *"In A v Secretary of State for the Home Department [2005] 2 AC 68 Lord Bingham of Cornhill stated in para 68: "What has to be justified is not the measure in issue but the difference in treatment between one person or group and another'. In the first benefit cap case Baroness Hale DPSC in para 188 of her dissenting judgment cited Lord Bingham's statement and concluded: 'It is not enough for the Government to explain why they brought in a benefit cap scheme. That can readily be understood. They have to explain why they brought in the scheme in a way which has disproportionately adverse effects on women'. I conclude that what the Government has to justify in the present case is its failure to amend the 2006 Regulations so as to provide for exemption of the DA and DS cohorts from the revised cap…."*

127. However, in *R(DA)* at ps.55-66, Lord Wilson articulated the 'test of justification' at ps.65-6 in terms which respectfully need to be read in the light of Lord Reed's judgment in *R(SC)*:

> *"[I]n relation to the Government's need to justify what would otherwise be a discriminatory effect of a rule governing entitlement to welfare benefits, the sole question is whether it is manifestly without reasonable foundation. Let there be no future doubt about it. How does the criterion of whether the adverse treatment was manifestly without reasonable foundation fit together with the burden on the state to establish justification…? For the phraseology of the criterion demonstrates that it is something for the complainant, rather than for the state, to establish.*

The rationalisation has to be that, when the state puts forward its reasons for having countenanced the adverse treatment, it establishes justification for it unless the complainant demonstrates that it was manifestly without reasonable foundation. But reference in this context to any burden, in particular to a burden of proof, is more theoretical than real. The court will proactively examine whether the foundation is reasonable; and it is fanciful to contemplate its concluding that, although the state had failed to persuade the court that it was reasonable, the claim failed because the complainant had failed to persuade the court that it was manifestly unreasonable."

128. In adopting the 'manifestly without reasonable foundation' approach, Lord Wilson in *R(DA)* followed *R(MA) v DWP [2016] 1 WLR 4550 (SC)*. However, when *R(MA)* went to Strasbourg as *JD & A v United Kingdom [2020] HLR 5*, the ECtHR suggested that approach was confined to transitional measures and otherwise 'very weighty reasons' were required for justification. However, in *R(SC)*, Lord Reed found those observations in *JD* were out of line with established ECtHR jurisprudence and he summarised the true position at ps.157-159:

"I am not persuaded by the argument, based on JD, that the 'manifestly without reasonable foundation' formulation can never have any part to play, even in relation to differences of treatment on 'suspect' grounds, outside the context of transitional measures…. Nevertheless, it is appropriate that the approach which this court has adopted since Humphreys [2012] 1 WLR 1545 should be modified in order to reflect the nuanced nature of the judgment which is required, following the jurisprudence of the European court. In the light of that jurisprudence as it currently stands, it remains the position that a low intensity of review is generally appropriate, other things being equal, in cases concerned with judgments of social and economic policy in the field of welfare benefits and pensions, so that the judgment of the executive or legislature will generally be respected unless it is manifestly without reasonable foundation. Nevertheless, the intensity of the court's scrutiny can be influenced by a wide range of factors, depending on the circumstances of the particular case, as indeed it would be if the court were applying the domestic test of reasonableness rather than the Convention test of proportionality. In particular, very weighty reasons will usually have to be shown, and the intensity of review will usually be correspondingly high, if a diference in treatment on a 'suspect' ground is to be justified. Those grounds, as currently recognised, are discussed in paras 101—113 above [i.e. sex or gender, birth status (i.e. birth outside marriage or adoption), nationality, sexual orientation, race or ethnic origin, religious belief, or disability]

[A]s I have explained, they may develop over time as the approach of the European court evolves. But other factors can sometimes lower the intensity of review even where a suspect ground is in issue…. besides the cases concerned with transitional measures…Equally, even where there is no 'suspect' ground, there may be factors which call for a stricter standard of review than might otherwise be necessary, such as the impact of a measure on the best interests of children. It is therefore important to avoid a mechanical approach to these matters, based simply on the categorisation of the ground of the difference in treatment. A more flexible approach will give appropriate respect to the assessment of democratically accountable institutions, but will also take appropriate account of such other factors as may be relevant…the courts should generally be very slow to intervene in areas of social and economic policy such as housing and social security; but, as a general rule, differential treatment on grounds such as sex or race nevertheless requires cogent justification."

129. I should finally add on *R(DA)* that the detailed discussion in the former of the UN Convention of the Rights of the Child ('UNCRC') must be read in the light of *R(SC)* which stressed the UNCRC as an unincorporated treaty has no direct legal force in the UK, although the best interests of the child are in any event a relevant consideration on the question of justification. Against that background, I can turn to my detailed conclusions on 'status', 'comparison', 'relevant difference' and finally 'justification' on the three bases of claim at each stage.

Art.14 Status

130. I prefer to deal with the three bases on which the Art.14 claim is put issue by issue rather than basis by basis because there is considerable overlap between them on each issue, especially 'status'. As I have said, but it is helpful to repeat, the three bases of claim are:

120.1 Firstly, the comparison between (i) British and (ii) non-British children each cared for by a NRPF foreign carer with leave. This compares *purely the children's nationalities,* and I call it (for want of a better expression) the 'pure nationality argument'.

130.2 Secondly, the comparison between (i) British children cared for by a 'NRPF' adult and (ii) foreign-national children in 'asylum-seeking families'. This argument compares the *children's nationalities as linked to rights of residence / immigration status.* I will call it the 'child nationality / immigration status' argument'.

130.3 Thirdly, treating children cared for by (i) foreign national adults <u>with</u> the right to be in the UK the same as children cared for by (ii) foreign national adults <u>without</u> the right to be in the UK. This compares the *adult's immigration status* although strictly the children cared for are the focus. I call this the 'adult immigration status argument'.

131. When Mr Buttler developed what I am calling the 'adult immigration status' argument in oral submissions, he initially suggested that it related to 'nationality'. However, as he contended for comparison between children with adult carers with and without the right to be in the UK, I suggested in reality the argument focussed not on nationality (of the child or adult) but on the adult's *immigration status*. That is not the same as someone's nationality, since a foreign national can be settled in the UK and have an unrestricted long-term right of residence. I referred Mr Buttler to Lord Carnwath's comment in *R(HC)* at p.31 in the course of rejecting the *Zambrano* carer's Art.14 / A1P1 complaint at her exclusion from mainstream benefits:

> *"The 'status' on which [she] relies…is either immigration status, or, more narrowly, the status of Zambrano carer and child. I do not think that either can assist [her] under article 14. Discrimination on the basis of immigration status is of course a fundamental and accepted part of both EU and national law, but cannot in itself give rise to an issue under article 14. In so far as Mrs HC's differential treatment arises from her status as a third-country national, she can have no complaint. So far as concerns her Zambrano status, that is a creation of European law, and such differences of treatment as there are, as compared to other categories of resident, do no more than reflect the law by which the status is created."* (my underline).

As I result, I raised whether the Claimant could rely on 'immigration status' under Art.14.

132. With impressive instant recall of authority on his feet, Mr Buttler questioned whether that passage in *R(HC)* could stand with the ECtHR's decision in *Bah v UK [2012] HLR 2*, which was not mentioned or cited to the Court in *R(HC)*. Certainly, I accept that in *Bah*, the ECtHR explicitly recognised 'immigration status' as a class of 'other status' within Art.14. In *Bah*, the Court was addressing the English statutory provisions excluding those 'subject to immigration control' from eligibility under housing legislation. In that case, a mother from Sierra Leone had been granted Indefinite Leave to Remain so was no longer 'subject to immigration control' and so eligible for housing. She applied to bring over her son from Sierra Leone and he was granted leave with a NRPF condition. She applied for re-housing for both of them but was refused 'priority need' on the basis that at the time her son did not 'count' as he was 'subject to immigration control' (this provision was then subject of a declaration of incompatibility in *R(Morris) v Westminster CC [2006] HLR 8 (CA*) and later amended but still applied to Mrs Bah). She argued that she had been treated differently on the basis of her son's nationality, but the ECtHR distinguished *Morris* (where the parent was a British citizen) and found that Mrs Bah had been treated on the ground not of her son's nationality (i.e. Sierra Leonean) but of his immigration status. As the ECtHR in *Bah* explained at p.44:

"The court finds that, on the facts of this applicant's case, the basis upon which she was treated differently to another in a relevantly similar position, who…is considered to be the unintentionally homeless parent of a child not subject to immigration control, was her son's immigration status. The court specifically notes in this regard that the applicant's son was granted entry to the United Kingdom on the express condition that he would not have recourse to public funds. The court finds that it was this conditional legal status, and not the fact that he was of Sierra Leonean national origin, which resulted in his mother's differential treatment under the housing legislation."

However, the ECtHR went on to recognise 'immigration status' at ps.45-6:

"The court does not agree with the Government that immigration status cannot amount to a ground of distinction for the purposes of art.14, since it is a legal rather than a personal status. The court has previously found that a person's place of residence constitutes an aspect of personal status within the scope of art.14 (see Carson cited above at [70]–[71]), in spite of the fact that a person can choose their place of residence, meaning that it is not an immutable personal characteristic. Similarly, immigration status where it does not entail, for example, refugee status, involves an element of choice, in that it frequently applies to a person who has chosen to reside in a country of which they are not a national. The court further notes the Grand Chamber's judgment in A v United Kingdom (2009) 49 E.H.R.R. 29 GC at [182]–[190] in which, although it was not found necessary to consider the complaints under art.14, the Grand Chamber nonetheless upheld the findings of the House of Lords that there had been impermissible discrimination on the grounds of nationality or immigration status. In so doing, the court tacitly accepted immigration status as a possible ground of distinction within the scope of art.14. Finally, the court recalls that it has in its previous case law found that a large variety of different statuses, which could not be considered to be "personal" in the sense of being immutable or innate to the person, amounted to "other status" for the purposes of art.14 (see Clift v United Kingdom (7205/07) July 13, 2010 at [58], for a review of the court's case law on this question). The court finds therefore, in line with its previous conclusions, that the fact that immigration status is a status conferred by law, rather than one which is inherent to the individual, does not preclude it from amounting to an "other status" for the purposes of art.14. In the present case, and in many other possible factual scenarios, a wide range of legal and other effects flow from a person's immigration status."

Nevertheless, the Court observed 'immigration status' would not be as 'weighty' a ground of discrimination as nationality, which as I will note, Lord Reed observed in *R(SC)* at ps.105/114

133. However, as Mr Buttler reminded me on another issue, ordinary domestic rules of precedent still apply to the HRA and ECHR, so I cannot depart from the *ratio* of a domestic case binding on me on the basis that the ECtHR has decided differently (although it may sometimes be a reason to grant permission to appeal): *Kay v Lambeth LBC [2006] 2 AC 465 (HL)*. However, that assumes Lord Carnwath actually decided in *R(HC)* at p.31 'immigration status' *cannot* amount to 'other status' within Art.14 ECHR. In fact, I do not accept what Lord Carnwath said at p.31 of *R(HC)* compels me to find 'immigration status' falls outside Art.14 in this case.

134. Firstly, Lord Carnwath at p.31 of *R(HC)* did not in terms say that 'immigration status' could *never* amount to 'other status' within Art.14 ECHR. As I underlined, he said that neither of *R(HC)*'s two proposed 'statuses' *'could assist her under Art.14*'. One was simply her *'status as a third-country national'* which he clearly considered *'cannot itself give rise to an issue under Art.14 ECHR'*. The other was her '*Zambrano* status' which did '*no more than reflect the law by which the status is created'.* Neither is the 'immigration status' on which the Claimant relies either for himself (as I will describe) or through EFG: not just a foreign national carer, but one with the *right to be in the UK*. Until April 2021, that right was derived from her domestic leave to remain, which is inconsistent with *Zambrano* rights to remain (*R(Akinsanya)*). Therefore, at least from February to April 2021, in my judgement, this case is distinguishable from *R(HC)*, which may limit the scope of this argument, not extinguish it.

135. Secondly, I do not consider *R(HC)* even limits this argument, as domestic case-law on 'other status' has moved on since 2017 when *R(HC)* was decided. Whilst Lord Carnwath did not cite any authority for his view on 'status' on p.31 of *R(HC)*, at that time the approach was typified by the observation of Lord Wilson in *Mathieson v DWP [2015] 1 WLR 3250 (SC)* at p.21 that:

> *"…[S]tatus generally comprise[s] personal characteristics and inquiry should focus 'on what somebody is', rather than what he is doing or what is being done to him'."*

However, in *R(Stott) v SoSJ [2018] 3 WLR 1831*, where Lord Carnwath was in the minority, the majority of the Supreme Court led by Lady Black considered the ECtHR's widening approach to 'other status' justified it departing from an earlier Lords decision. In *R(DA)*, Lord Wilson at p.39 suggested the approach to 'other status' in *Stott* was 'broad' and reiterated his comment in *Mathieson* at p.22 that if the impugned treatment fell within the ambit of an ECHR right, *'the ECtHR was reluctant to conclude the complainant had no relevant status*'. This is consistent with the latest authoritative word on this topic in the context of welfare support in *R(SC)*. Lord Reed at ps.69-71 summarised and endorsed the approach of Leggatt LJ (as he then was) in the Court of Appeal in *R(SC)*, reflecting authority from *Mathieson* onward:

".....Status could not be defined solely by the difference in treatment complained of: it must be possible to identify a ground for the difference in treatment in terms of a characteristic which was not merely a description of the difference in treatment itself. On the other hand…there seemed to be no reason to impose a requirement that the status should exist independently, in the sense of having social or legal importance for other purposes or in other contexts than the difference in treatment complained of. .....Being a child member of a household containing more than two children could be regarded as an individual characteristic or status for the purposes of article 14. That was so even if that status was given more precise definition by the legislation. ....I would add that the issue of 'status' is one which rarely troubles the European court. In the context of article 14, 'status' merely refers to the ground of the difference in treatment between one person and another. Since the court adopts a stricter approach to some grounds of differential treatment than others when considering the issue of justification, as explained below, it refers specifically in its judgments to certain grounds, such as sex, nationality and ethnic origin, which lead to its applying a strict standard of review. But in cases which are not concerned with so-called 'suspect' grounds, it often makes no reference to status, but proceeds directly to a consideration of whether the persons in question are in relevantly similar situations, and whether the difference in treatment is justified. As it stated in Clift v United Kingdom, para 60, 'the general purpose of Art.14 is to ensure that where a state provides for rights falling within the ambit of the Convention which go beyond the minimum guarantees set out therein, those supplementary rights are applied fairly and consistently to all those within its jurisdiction unless a difference of treatment is objectively justified'. Consistently with that purpose, it added at para 61 that 'while… there may be circumstances in which it is not appropriate to categorise an impugned difference of treatment as one made between groups of people, any exception to the protection offered by Art.14 of the Convention should be narrowly construed'. Accordingly, cases where the court has found the 'status' requirement not to be satisfied are few and far between."

In this case, the form of 'immigration status' relied on is not only different from the form of the status relied on in *R(HC)*, it is also *different from the treatment* complained of: i.e. the limitation of support to the Asylum Support rate when support to them was not statutorily limited in that way because of their *separate* immigration status. This is unlike in *R(HC)* where the status was *the same as the treatment,* as Lord Carnwath stressed at the end of p.31. In my judgment, on the approach in *R(Stott), R(DA)* and *R(SC),* 'other status' is established.

136. Thirdly, in *R(SC)*, 'immigration status' was explicitly recognised as 'other status' (albeit *obiter* since it did not concern immigration status), as Lord Reed noted at p.114:

> *"The counterpart of the strict approach taken, other things being equal, to differences in treatment on the grounds discussed above, is less strict scrutiny, other things being equal, of differences in treatment on other grounds, such as age, immigration status (see, for example, Bah v United Kingdom (2011) 54 EHRR 21), prisoner status…and marital status…. However…the case law does not support a straightforwardly binary approach, as a range of factors may be relevant in particular circumstances. For example, although age has not been treated as a 'suspect' ground, the best interests of children have been treated by the European court as an important factor in assessing proportionality under article 14, reflecting the fact that individuals in that age group have particular needs and vulnerabilities."*

Whilst an *obiter* passage in one case cannot oust the *ratio* of another, I note Lord Carnwath in *R(HC)* also dismissed the Art.14 claim on justification of 'immigration status' at p.32:

> *"In any event, the Strasbourg court has long accepted that the allocation of limited public funds in the social security and welfare context is pre-eminently a matter for national authorities, subject only to the requirement that their decisions should not be 'manifestly without reasonable foundation: 'see R(MA)… para 32, per Lord Toulson. The Government's reasons for not providing support to Zambrano carers….included the objectives of reducing costs by allocating benefits to those with the greatest connection with this country, of encouraging immigrants here unlawfully to regularise their stay, of encouraging TCNs wishing to have children here to ensure that they had sufficient resources to support themselves and their children, and of reducing 'benefits tourism'….I find it impossible to say that these objectives fall outside the wide margin of discretion allowed to national governments in this field."*

Therefore, even if Lord Carnwath at p.31 of *R(HC)* was ruling out 'immigration status' as capable of amounting to 'other status' within Art.14 (which I respectfully consider he was not, as I have said), I would most respectfully observe that given his view on justification, the observation on 'status' was not strictly necessary to the decision, so *obiter*. If so, given *Bah* was not cited in *R(HC)* and given *R(SC)*, I would find the immigration statuses of EFG ('a foreign national carer of children with the right to be in the UK') and the Claimant (a British child with the right of abode in the UK) amount to 'other status'. However, as stressed in *Bah* consequently it is not a 'suspect ground' of discrimination like 'nationality' - so more fitting for the 'manifestly without reasonable foundation' approach to justification even after *R(SC)*.

137. I should now address the link between the Claimant's 'nationality' (agreed to fall in Art.14) and his 'immigration status'. As shown by *Bah*, those statuses are different – the ECtHR found the son's did not 'count' not because of his Sierra Leonean (or indeed non-British) nationality as such, but the fact he was 'subject to immigration control' – i.e. his 'immigration status'. However, for British nationals, the two go hand in hand, as Buxton LJ said in *R(M)* at ps.23/29:

> *"As a British citizen the child enjoys, by section 2(1)(a) of the Immigration Act 1971 , the right of abode in the United Kingdom. By section 1(1) of that same Act: "All those who are in this Act expressed to have the right of abode in the United Kingdom shall be free to live in, and to come and go into and from, the United Kingdom without let or hindrance ..." That proud statement seems plainly to say that immigration controls simply do not apply to a British citizen, and he cannot be expelled against his will…*
>
> *I am very doubtful whether it is open to a local authority, which has no powers of immigration control, effectively to force upon a British citizen a decision not to assert the right given her by section 2(1)(a) of the Immigration Act."*

This was picked up in *R(Clue)* to clarify how Art.8 ECHR applied to p.3 Sch.3 NIAA. In *R(PRCBC)*, which concerned British citizenship, Lord Hodge noted the British Nationality Act 1981 gave British citizenship to a child born in the UK to at least one parent who is either a British citizen or who has Indefinite Leave to Remain ('ILR'), but also some born outside the UK by descent; or by registration if one parent becomes a British Citizen or gains ILR.

138. It is against that well-known legal context that Lady Hale's comments in *R(HC)* at p.46 about s.17 CA support so heavily relied on by the Claimant in this case must be seen (my editing):

> *"The authority will no doubt take into account that [(i)] <u>these are British children, born and brought up here, who have the right to remain here all their lives;</u> they cannot therefore be compared with asylum-seeking children or the children of asylum-seeking parents, who may end up with no or only a limited right to remain. They will no doubt also wish to take into account [(ii)] <u>the impact upon the proper development of these children of being denied a level of support equivalent to that of their peers, that is, the other British children around them</u> whose families are dependent on income-related benefits. That level of support is not fixed at a level designed to lift children out of poverty, as officially defined, but at a level much closer to subsistence."*

One reason I have split Mr Buttler's 'nationality' argument relying on this passage into two is because in it, Lady Hale seems to me to be making two different points: (ii) is a more general point about who the 'peers' are of British children and is about 'pure nationality'. But (i) is a specific point about British children's legal 'right of abode': i.e. *immigration status*.

139. Therefore, even if I am wrong in my analysis that EFG's 'immigration status' counts as 'other status' within Art.14 ECHR, I am satisfied that the Claimant's and his siblings' 'immigration status' is an inextricable part of his 'nationality' (or indeed, 'national origin' given they were born in the UK with citizenship under the 1981 Act). Whether one analyses the Claimant's and his siblings' statutory right to abode in the UK as his 'immigration status' or as a key aspect of his 'nationality', it plainly falls within Art.14 ECHR either way. That is also material to the contended 'non-comparability' of 'asylum-seeking children' or the 'children of asylum-seeking parents' whom Lady Hale had in mind at p.46 of *R(HC)*, with which Lord Carnwath expressly agreed. Whilst it is possible that an adult asylum-seeker can have a child with a British citizen in the UK who would then have British citizenship, Lady Hale plainly had in mind at (i) of p.46 the non-comparability of *foreign* children from asylum-seeking families without the right of abode 'with no or limited right to remain'. So, that 'non-comparability' was inextricably linked with *immigration status*. Whilst Mr Buttler rolled the two together, given *Bah* I have split them to ensure that I make the correct comparison in both the pure nationality and nationality/immigration arguments which (relevantly and significantly) differ.

Comparison

140. This brings me on to comparison. As I have said, with *Thlimmenos* discrimination, unlike with direct discrimination, the comparison is not with those *treated differently* who are said to be *relevantly similar*, but those *treated the same* who are said to be *relevantly different*. I address the vexed question of 'relevant difference' in the next heading, but here I do not find the 'comparison' as simple as Lord Wilson found it in *R(DA)*. Not only am I hardly Lord Wilson, equally in *R(DA)* the 'same treatment' was simple to identify: the revised benefit cap. It is partly as I am cautious with comparison after *Bah* and *R(MD)* that I have teased two comparisons (one of nationality and one of immigration status) into three (with one mixed).

141. However, before I turn to that, I elaborate a little on the nature of the Art.14 comparative exercise. In *R(DA)*, Lord Wilson referred to Lady Hale's comments in *AL(Serbia)*, which was a case where unaccompanied child asylum-seekers complained they had been differently treated than asylum-seekers with children who were entitled under a concessionary policy after 3 years in the UK to apply for Indefinite Leave to Remain. The Lords held the difference in treatment was justified by the administrative delays in the system and the different situation of families (not least because the claimants' 'other status' of 'unaccompanied children' was not a 'suspect ground' within Art.14). However, as Lord Wilson noted in *R(DA)*, in the course of that decision in *AL(Serbia)*, Lady Hale said she found the parties' debate as to the comparative exercise under Art.14 ECHR, an 'arid exercise', as she explained at ps.23-28:

"23…[T]he article 14 right [is] different from our domestic anti-discrimination laws. These focus on less favourable treatment rather than a difference in treatment. They also draw a distinction between direct and indirect discrimination. Direct discrimination, for example treating a woman less favourably than a man, or a black person less favourably than a white, cannot be justified. This means a great deal of attention has to be paid to whether or not the woman and the man, real or hypothetical, with whom she wishes to compare herself are in truly comparable situations. The law requires their circumstances be the same or not materially different from one another. 24 It will be noted, however, that the classic Strasbourg statements of the law do not place any emphasis on the identification of an exact comparator. They ask whether 'differences in otherwise similar situations justify a different treatment'. Lord Nicholls put it this way in R (Carson) v [DWP] [2006] 1 AC 173, para 3: 'the essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to that question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact.__
25 Nevertheless….in only a handful of cases has the [ECtHR] found that the persons with whom the complainant wishes to compare himself are not in a relevantly similar or analogous position (around 4.5%). This bears out the observation of Professor David Feldman, in Civil Liberties and Human Rights in England and Wales, 2nd ed (2002), p 144, quoted by Lord Walker of Gestingthorpe in the Carson case, at para 65: 'The way the court approaches it is not to look for identity of position between different cases, but to ask whether the applicant and the people who are treated differently are in 'analogous' situations. This will to some extent depend on whether there is an objective and reasonable justification for the difference in treatment, which overlaps with the questions about the acceptability of the ground and the justifiability of the difference in treatment. This is why, as van Dijk and van Hoof observe . . . 'in most instances of the Strasbourg case law . . . the comparability test is glossed over, and the emphasis is (almost) completely on the justification test'….

28 I say all this because so much argument has been devoted in this case, and in too many others, to identifying the precise characteristics of the persons with whom these two young men should be compared. This is an arid exercise. They complain that they, who arrived here as children without their families and are still without their families, have been treated differently from other people who arrived here as children with their families and are still with their families. That is obviously correct. It matters little whether this is described as being 'parentless and childless' (as the appellants would have it) or as 'not being part of a family unit' (as the Secretary of State would now have it). It is common ground that their condition, however described, falls within the residuary category of 'other status' for the purposes of article 14."

142. Of course, *AL(Serbia)* was a direct discrimination case and the present one is a *Thlimmenos* case, where the comparative exercise is 'inside out' as Lord Wilson put it in *R(DA)*. However, he did not suggest the principle was different in *R(DA)* – on the contrary, he cited Lady Hale's observations about the 'aridity' of comparator debates in *AL(Serbia)* itself. So, it is important not to get bogged down in nuances of comparison as unlike (some parts of) the Equality Act 2010, the comparison need not be exact. Having said that, it is also critical that the comparison is meaningful and tests the appropriate discrimination argument – as shown by *R(MD);* and indeed the appropriate Art.14 status, as shown by *Bah.* Therefore, I must now consider whether the Claimant and EFG have been treated 'the same' in a *Thlimmenos* sense.

143. With the 'adult immigration status' argument, Mr Buttler argues EFG is a foreign national carer <u>with</u> a right to be in the UK who has been treated the same as a foreign national carer <u>without</u> a right to be in the UK, such as carers who were 'ineligible' under Sch.3 NIAA, like a carer unlawfully in the UK under p.7 Sch.3 NIAA as in *R(M)* or *R(C),* or indeed a 'failed asylum seeker with a family' under p.7A Sch.3 NIAA. Mr Buttler argues they were or would have been treated the same as EFG under the Old NRPF Policy, in the sense of only being financially supported with 'essential living needs' at the Asylum Support rate. Mr Swirsky did not dispute that – indeed he argued not only <u>would</u> they have been treated the same as EFG (and so the Claimant and his siblings), they <u>should</u> have been treated the same – there was no 'relevant difference'. In other words, both Counsel effectively turned 'inside out' (as Lord Wilson put it in *R(DA)*), what Lord Nicholls said about direct discrimination in *R(Carson)*. Both effectively agreed there was no obvious difference in *treatment* between the claimant and comparator, so that their *treatment* could be regarded as 'the same' for the purposes of *Thlimmenos* comparison and instead concentrated their submissions on relevant and significant difference and then on justification.

144. Nevertheless, I have reflected whether EFG (or the Claimant through her) have or would have been treated the same as such 'ineligible' carers and families reliant on establishing support as necessary to avoid 'ECHR breach' under p.3 Sch.3. I am conscious those other families may not have received £196.24 pw as EFG only did as a result of these proceedings. Moreover, the Defendant also made other payments, such as £1,500 to instruct a solicitor, the housing expenses and the summer trips/activities. However, I find the Claimant as the child of an adult foreign national carer with the right to be in the UK like EFG has been treated effectively the same as a child of an adult foreign national carer with no right to be in the UK:

144.1 Firstly, whilst EFG may now have been 'topped up' to £196.42 a week, at the time she received 'the going rate'. By conceding under Ground 1 that the weekly rate of £196.42 should have been paid from the start, the comparative exercise should assume the Defendant would have paid an adult carer of children without the right to be in the UK the same, otherwise it would be relying on its own unlawful conduct to defeat a comparison. Indeed, the Old NRPF Policy at the time provided all NRPF families eligible for support should be paid the same for 'essential living needs', namely the (2016) Asylum Support rate: *"Where the…family is entitled to…financial subsistence from [BCT, it] will pay to meet the essential living needs of families with NRPF"* (my underline). This was as true for families who had been through a 'human rights assessment' as they were in one of the ineligible categories under Sch.3 NIAA (the comparator family), as it was for those who were not (EFG's family). It follows that the comparator family would have been paid the same – assumed now to be £196.24 pw. After all, that is the relevant aspect of the Defendant's conduct under challenge

144.2 Secondly, the other payments made before February 2021 were made under the Localism Act and payment to EFG's family solicitor under the OFF Policy. Moreover, no complaint is made about 'rent' (which only came in August, right at the end of the period of complaint and the school uniforms in September afterwards). The modest sums on a summer trip and activities could have been made even with 'ineligible' adult carers by direct support to the child (or third-party for them) under p.2 Sch.3 NIAA and presumably would. There was no meaningfully 'different treatment'.

144.3 Thirdly, even if that is wrong and there was meaningfully 'different treatment', as there is no need for an 'exact comparison' (*AL(Serbia)),* the question is not whether other support prevents *Thilemmnos* comparison, but whether it addresses any 'relevant difference' *in situation* there was. Very modest (if any) 'difference' in treatment of a few miscellaneous payments would clearly not 'cancel out' a 'relevant and significant difference' in situation. Another reason to focus on that issue, as both Counsel have.

145. However, before turning to 'relevant and significant difference', I must also address the other 'comparisons' within the 'pure nationality' and 'child nationality/immigration status' arguments. Again here (indeed more so given his submissions of 'no significant difference') Mr Swirsky *relies on* similar treatment. But this still needs care as shown by *Bah* and *R(MD)*– partly why I teased the Claimant's argument apart into 'pure nationality' and 'nationality/ immigration status'. For example, 'asylum-seeker' is not a 'nationality' – it is an 'immigration status' which needs comparison with another one – the 'right of abode' of a British citizen (an intrinsic aspect of their 'nationality'). Therefore, the comparisons are slightly different:

145.1 For the 'child nationality/immigration status' argument, in my judgement the appropriate comparator is Lady Hale's example in *R(HC)* of '*asylum-seeking children or the children of asylum-seeking parents, who may end up with no or only a limited right to remain'*. That also has the advantage that it is a comparison which has always been at the heart of the case and which the Defendant has addressed in detail. It has not taken the point that the 'same treatment' is *by two different public bodies* – the Defendant and Home Office. However, this is doubtless because in this case, the Defendant explicitly chose to pay the Asylum Support rate, as its Policy said:

> "…[These] *subsistence rates are in line with rates defined by the Secretary of State for the Home Office for those seeking asylum under s.95 [IAA]. This legislation requires that provision for asylum seekers meets essential living needs. These rates ensure there is parity between families who require financial support to meet essential living needs."*

Where one public body contends that it is paying to one group the same rate as another public body pays to another group because there should be 'parity' between the groups, it cannot then complain this is not 'the same treatment' for a *Thlimmenos* comparison. As I say, Mr Swirksy does not complain about that and indeed relies on the similarity of treatment as explained by similarity of situation – just as the Old Policy contended.

145.2 But for *pure* child nationality, the most apposite comparator would appear to be a *non-British child* of a foreign carer like EFG with the right to be in the UK. As Buxton LJ said in *R(M)* at p.17, the child's British nationality is irrelevant to what I have called their 'statutory category' and they are in the same one as the non-British child given their carer's similar immigration status. It is perfectly plain in that comparison the treatment would have been identical, not least because (unlike the New NRPF Policy), the Old NRPF Policy does not refer to the child's nationality as being relevant at all.

145.3 Alternatively, even if these are not 'exact' comparators in either case, that does not matter: *AL(Serbia)*. Ultimately there was no real dispute on the comparison issue.

Relevant and Significant Difference

146. By contrast, I turn to what in the skeleton arguments, focussing on the Claimant's nationality, appeared to be the main battle-ground. Mr Buttler's skeleton relied heavily on Lady Hale's comments at p.46 of *R(HC)* (which I repeat one final time for convenience with my editing):

> *"The authority will no doubt take into account that [(i)] these are British children, born and brought up here, who have the right to remain here all their lives; they cannot therefore be compared with asylum-seeking children or the children of asylum-seeking parents, who may end up with no or only a limited right to remain. They will no doubt also wish to take into account [(ii)] the impact upon the proper development of these children of being denied a level of support equivalent to that of their peers, that is, the other British children around them whose families are dependent on income-related benefits. That level of support is not fixed at a level designed to lift children out of poverty, as officially defined, but at a level much closer to subsistence."*

As I have explained, here Lady Hale is making two different points arising from British nationality. (i) relates the children's different immigration statuses and I return to it below. However, (ii) is not relevant to immigration status but is relevant to the 'pure nationality' comparison – that British children from families excluded from mainstream benefits as in *R(HC)* may suffer developmental impact that non-British children would not - of being denied the equivalent level of support to their peers – other British children in families on benefits.

147. I turn to that 'pure nationality' comparison first. Lady Hale's second 'development' point in *R(HC)* at p.46 is also recognised by the Defendant in its New NRPF Policy at p.3.5:

> *"The Trust recognises that the children of Zambrano carers who are British citizens who have a right to reside in the country and who, in terms of safeguarding and promotion of welfare, have the right to be treated in the same way as any other British child with British nationality. It is the Trust's view that this policy, when applied in conjunction with the Trust's overall provision of support…achieves that objective."*

I have underlined that observation because the Defendant there accepts that quite aside from their 'right to reside' (*'and'*) in terms of their safeguarding and promotion of welfare (i.e. the objectives of s.17 CA support), British children have a right to be treated the same way as any other British children. It must follow that non-British children do not have such a 'right'. So, the Defendant there implicitly accepts 'relevant and significant' difference between them. As Lord Wilson stressed in *R(DA)*, that does not mean there is discrimination, because the same treatment of people in 'relevantly and significantly different situations' may be *justified*. Nevertheless p.3.5 encapsulates the 'relevant and significant difference' on 'pure nationality'.

148. In case it should be thought I am side-stepping the more complex arguments on 'significant and relevant difference' with the 'pure nationality' comparison, there is a longer route to the same destination. I start out with why I am calling it 'significant and relevant difference' when Lord Wilson in *R(DA)* called it 'relevant difference'. In *Adam v Romania (2021) 72 EHRR 11* ps.87-89 (since followed in cases such as *Toplak v Slovenia (2022) 74 EHRR 20* p.111) the ECtHR revisited this 'threshold'. I referred the parties to *Adam* for this reason and also as it was a case of nationality-based *Thlimmenos* discrimination (under Art.12 Protocol 1 which has not been incorporated into British law by the HRA, but the Court said at p.82 the principles were identical to Art.14). In *Adam*, the Court found no 'significant difference' requiring justification where ethnic Hungarian pupils in Romania choosing to study in Hungarian had a different curriculum and a different exam timetable (with one less rest day than others).

149. The Court in *Adam* set out the principles on *Thilemmnos* 'difference' at ps.87-89:

> *"87…The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when states, without an objective and reasonable justification, fail to treat differently persons whose situations are significantly different. The prohibition deriving from art.14 will therefore also give rise to positive obligations for the Contracting States to make necessary distinctions between persons or groups whose circumstances are relevantly and significantly different. In this context, relevance is measured in relation to what is at stake, whereas a certain threshold is required in order for the Court to find that the difference in circumstances is significant. For this threshold to be reached, a measure must produce a particularly prejudicial impact on certain persons as a result of a protected ground, attaching to their situation and in light of the ground of discrimination invoked.*
>
> *88 For instance, the Court considered applicants who had been in particular need of protection for reasons directly related to their status—severe disability and gender respectively—and who, if left without protection, had risked exceptional hardship or their personal safety, had been in a significantly different situation with respect to the measure complained of. [A]n applicant who had been convicted for refusing to wear military uniform was in a significantly different situation to someone convicted of a serious crime because, unlike the latter, the applicant had been convicted for exercising his freedom of religion and not..dishonesty or moral turpitude. The Court also found that, with regard to eligibility for a residence permit for family reasons, a homosexual couple was in a significantly different situation to heterosexual partners who had decided not to regularise their situation.*

89 On the other hand, the Court was not convinced that, because of its doctrine concerning worship in its temples, an applicant religious organisation had been in a significantly different position from other churches for the purposes of tax exemptions. Likewise, the Court considered that biological children and foster children were in a relevantly similar objective situation for the purpose of the manner in which a survivor's pension had been divided between them."

150. There is a question what *Adam* actually decided. It is clear the 'relevance' of a difference 'measured in relation to what is at stake' is the relevance of the difference to the '*treatment*'. If a difference in situation is *irrelevant* to being given the same treatment, there is no *Thlimmenos* discrimination. So, differences between biological and foster children may be relevant in lots of contexts, but irrelevant to the division between them of a survivor's pension: a reference to <u>*Ruskowska v Poland*</u> *(6717/08) (01/07/14)*. However, a difference must not just be 'relevant' to the same treatment, but also 'significant'. That was described in *Adam* at the end of p.87 as a 'threshold', that '*must produce a particularly prejudicial impact on certain persons as a result of a protected ground, attaching to their situation and in light of the ground of discrimination invoked'*. The footnote to this cited <u>*JD v UK*</u> *[2020] HLR 5* (ECtHR) p.85:

"The court has also held that a policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory, regardless of whether the policy or measure is specifically aimed at that group. <u>Thus, indirect discrimination</u> prohibited under art.14 may arise under circumstances where a policy or measure produces a particularly prejudicial impact on certain persons as a result of a protected ground, such as gender or disability, attaching to their situation. In line with the general principles relating to the prohibition of discrimination, this is only the case..if such policy or measure has no objective and reasonable" justification…."

I underline the express reference to *indirect* discrimination, not *Thlimmenos* discrimination to which *JD* refers instead at p.84 (because *Adam* arguably blurred the boundary between them):

"The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States, without an objective and reasonable justification, fail to treat differently persons whose situations are significantly different (see Thlimmenos) [Indeed, that is a direct quote from p.44 of it] *The prohibition deriving from art.14 will therefore also give rise to positive obligations for the Contracting States to make necessary distinctions between persons or groups whose circumstances are relevantly and significantly different."*

However, as *R(SC)* makes clear, 'indirect' and '*Thlimmenos*' discrimination are different.

151. As Mr Buttler skilfully submitted, the answer to this conundrum is to focus not just on one sentence in *Adam* that may on one interpretation blur the boundary between *Thlimmenos* and indirect discrimination, but to look at how the ECtHR in *Adam* actually applied the 'significance' threshold. The Hungarian pupils' two main complaints were how the school curriculum was put together and how the exams were sequenced. In rejecting each argument, the Court found (at ps.100 and 103 respectively) that the arrangements *'did not place an excessive burden on them'* (as well as falling within the state's 'margin of appreciation'). Even comparing the Hungarian-speaking pupils' experience of the exams to their Romanian-speaking counterparts who had an extra day's rest between exams, the Court said at p.104:

> *"The same conclusion remains valid even when the alleged imbalance is regarded exclusively from the standpoint of the exams that the applicants had to take over consecutive days, unlike their Romanian peers, who had a day of rest in between. Given the particular circumstances, the Court is not convinced that the inconvenience suffered by the applicants was so significant as to reach the threshold…"*

Therefore, notwithstanding the test for indirect discrimination creeping into p.87 of *Adam*, the ECtHR's analysis was not that the exam timetable had a disproportionately prejudicial effect on Hungarian-speaking pupils *comparative* to Romanian-speaking ones, but rather that the inconvenience the former experienced was insufficiently 'significant' to reach the threshold.

152. As Mr Buttler submits, this is not a test of 'comparative disadvantage' as with indirect discrimination, but one of 'materiality of disadvantage' – like 'detriment' in the Equality Act 2010. This interpretation *clarifies* the boundary between *Thlimmenos* discrimination on one hand and indirect discrimination on the other and fits the helpful distinction drawn in *Adam* of cases either side of the 'significance threshold' at ps.88 and 89. Indeed, once one 'de-couples' it from its origin in p.84 of *JD* which related to indirect discrimination, it is also a tenable (if slightly strained) reading of the last sentence of p.87 of *Adam* itself:

> *"For this threshold to be reached, a measure must produce a particularly prejudicial impact on certain persons as a result of a protected ground, attaching to their situation and in light of the ground of discrimination invoked."*

There is no specific *comparative* element there as in indirect discrimination. The 'materiality' approach is also entirely consistent with Lord Wilson's approach to 'relevant difference' in *R(DA),* where he looked at both material impact (it being strongly against the interests of a child under two and their lone parent that she be constrained to work – no comparison entailed); and comparative impact (the extra difficulty *compared* to dual parents). The latter was not *required* to establish 'relevant difference', but added weight to that conclusion.

153. Having clarified the test of 'relevant and significant difference', is the threshold crossed in the 'pure nationality argument' ? Mr Swirsky argued vigorously that the British nationality itself of a child of a foreign national adult carer with a right to be in the UK (or for that matter of an asylum-seeker) was irrelevant to financial support under s.17 CA (see *R(M)*) and in any event, submitted that any 'relevant difference was 'insignificant' as expressed in *Adam*. As he said, children's needs for food, shelter, clothing etc did not differ with a child's nationality. That may be true, but it does not address the difference between British and non-British children which the Defendant's own New NRPF Policy implicitly recognises flowing from Lady Hale's last observation at p.46 in *R(HC)*. British children within the NRPF Policy in terms of safeguarding and promotion of welfare, have the 'right' to be treated in the same way as any other child with British nationality - that does not apply to non-British children. So, British and non-British children may have the same basic (or 'essential living') needs, but in terms of safeguarding and promoting their welfare *beyond* basic needs, British children have a 'right' to similar treatment with other British children that non-British children do not. 'Right' is the word the Defendant uses, not Lady Hale, nor myself. I would prefer to describe British children within the NRPF as having a 'need' to be treated the same way as other British children because of the impact on their development, that non-British children do not.

154. Mr Swirsky skilfully 'packaged' this issue as the question with which I started this judgment: 'Are the needs of British children different from those of foreign-born children ?' Put in those terms, as I observed, many people would have the instinctive reaction 'Of course not'. However, that question misses the point – or in fairness, skilfully disguises it. As Mr Swirsky's skeleton said in its penultimate paragraph: '*In dealing with a judicial review claim, a Court cannot deal in generalities, it must have regard to the facts of the case being decided'.* I wholeheartedly agree. The facts of this particular case illustrate the 'difference' with a British child well. EFG's statement said about the time from February to August 2021:

> *"[The Claimant] knows that I am from Jamaica and that I do not have a British passport and that this is what has been causing problems for us ever since his mother died. [He] also understands that he is being treated unfairly and differently from his peers. He expresses this to me. He sees what his friends are able to get from their parents and queries why he can't get the same things, for example toys or swimming classes. He often asks me: my friend is a boy just like me and he is my friend, so why can't I get the same things as him ? While he doesn't completely understand the details and impacts of citizenship and immigration status he understands he is in a different position to his peers and that there is no obvious reason why it should be like that."*

155. This is not the *Thlimmenos* comparison, but it encapsulates how the Claimant keenly experienced a similarity with other British children that a non-British child would not. Unlike a *non-British* child, EFG could not explain that to the Claimant as due to him being different from other British children - the Claimant was and saw himself as 'the same'. Of course, that is only one difference in the countless differences in children's needs – each child is unique. But it is one difference that does flow from nationality. Of course, it is not innately British – it is universal and reflects the experience of living in one's 'home country' as opposed to 'abroad'. Presumably, Jamaican children there compare themselves to each other in a way British children staying there do not. Here, a 'NRPF' British child's 'need' to equal treatment with other British children and the impact on his welfare of the privations of NRPF is a 'relevant' difference with non-British children and 'significant' as a '*particularly prejudicial impact on certain persons as a result of'* British nationality. As the Claimant, a young child with limited understanding experienced, this was a 'relevant and significant difference' as a British child from a non-British child – the difference the Defendant now implicitly accepts in its New NRPF Policy. Indeed, it is not only a 'relevant and significant difference', but the Claimant's experience evidences 'comparative prejudice' too even if I am wrong about *Adam*. Of course, it may be justifiable, which I consider below. *However, I cannot stress strongly enough that I am <u>not</u> saying that British children 'need more' than foreign children, still less that they are 'better' or have some other unique 'innate quality' of 'Britishness'.*

156. However, on the child nationality/immigration status argument, the position is clear. British children plainly do relevantly and significantly differ from non-British children *when each are in the UK* in their 'right of residence' on one hand or 'immigration status on the other'. Again, the boot would be on the other foot in Jamaica. This shows the 'nationality / immigration status' comparison flows from *different legal status* within a country. On this point, the comparison is with the same treatment (in the sense of the same level of weekly support) for the Claimant and his siblings with British nationality and right of abode as for '*asylum-seeking children or the children of asylum-seeking parents, who may end up with no or only a limited right to remain',* as Lady Hale put it in *R(HC)*, whom she contended *'cannot be compared with'* '*British children, born and brought up here, who have the right to remain here all their lives'.* But Mr Swirsky submitted those comments were *obiter* and unlike *R(HC)*, here support was short-term, pending an application for a Child Arrangements Order and eligibility under OFF Policy, which followed and was back-dated to August 2021. Moreover, the policy also applied to children of carers unlawfully in the UK who may be eligible for support for longer. He suggested the needs of asylum-seeking children were the same.

157. In my judgment, there are three ways the Claimant's British nationality carrying with it a right of abode is a 'relevant and significant difference' with children from asylum-seeking families:

157.1 Firstly, there is Lady Hale's point in p.46 of *R(HC)*: ('*These are British children, born and brought up here, who have the right to remain here all their lives')*. In other words, British children's right of abode (so potential need for support) is *permanent*. Ultimately, asylum-seekers' immigration status is *temporary*, even if sometimes 'long term' - becoming either 'refugees' (or other 'settled' status) or a 'failed asylum-seeking family'. By contrast, s.17 CA support for British children may be longer-term.

157.2 Secondly, there is less scope for 'family returns' of British children to the adult's country of origin curtailing either the duration or indeed the extent of s.17 CA support on the basis that longer-term needs may need to be met. Even if the Defendant's plan was for the children to move onto the OFF policy as later happened, that was all the more reason to meet longer-term needs rather than to limit it to essential living needs.

157.3 Thirdly, there is also Ryder LJ's point in *R(C)* at p.22: *"[T]he circumstances of those who qualify for s.17 support, those who have just arrived seeking asylum and those who have failed in their application to be granted asylum are sufficiently different that it is likely to be irrational to limit s.17 support to that provided for in a different statutory scheme."* Here as I found, the Claimant and his siblings' assessed needs for financial support were indeed for more than the 'essential living needs' which they (did not quite) receive through Asylum Support and this was 'significant' given they had a serious impact on the family financially and also on the children's welfare.

158. Finally on 'relevant and significant difference', I turn to what was the main thrust of Mr Buttler's submissions: what I have called the 'adult immigration status' argument of comparison between the Claimant as a child of an adult carer with the right to be in the UK and a child of an adult carer who does not have that right. It is on this point and on justification where the 'statutory categories' become central, which is why I have considered them in detail. I will not recapitulate all that but for convenience only my summary of the different 'statutory categories' of local authority support to 'NRPF' foreign national carers of children:

'Cat.1' If adult carers are (i) not asylum-seekers (actually or deemed under s.94(5) IAA); (ii) not ineligible under Sch.3 NIAA and (iii) the child(ren) (whether British or foreign-national) are assessed by the local authority as 'in need' and requiring support, s.17 CA is engaged in full. Whilst not a duty *(R(G))*, the extent of financial support depends on the authority's assessment of the child(ren)'s *welfare* needs for financial support in their case: *R(HC)*/*R(C)*. This is the category EFG and the Claimant were in.

'Cat.2' If the adults are (i) asylum-seekers (even if their claim has been refused, unless they have leave to remain), (ii) with dependant children under 18 still in the UK (irrespective of their nationality); and (iii) the family is 'destitute' under s.95 IAA i.e. lacking adequate accommodation and/or the means to meet 'essential living needs', s.122 IAA (iv) limits local authority s.17 CA support to 'additional welfare needs', and not 'essential living needs' or 'accommodation' (as in *R(A)*); but (v) also obliges the Home Office to ensure the child is adequately accommodated and their 'essential living needs' are met. The latter is 'generally' done at the prescribed rate - in 2021 £39.63 each pw, which is a *subsistence* level to cover only those 'essential living needs' and not 'generally' elevated by the 'welfare duty' under s.11 CA04: *R(JK)*.

'Cat.3' If an (i) adult foreign-national carer of dependant child(ren) (irrespective of their nationality) (ii) falls in one of the 'ineligible classes' in Sch.3 NIAA, (iii) local authority support can be provided directly to the child (e.g. child counselling etc) but (iv) practical/financial support which also benefits the ineligible adult under s.17 CA (and s.1 LA etc) (v) is limited under ps.1 and 3 to the extent necessary to avoid ECHR breach: *R(Limbuela)*/*R(M)*/*R(Clue)*. This should not be benchmarked to Asylum Support, but assessed in individual cases depending on the needs of the children: *R(C)*.

'Cat.4' If (i) adults unlawfully in the UK are ineligible under Sch.3 NIAA and (ii) there is no exception in ps.3 (ii) or direct support to the child under p.2, the p.1 bar prohibits local authority support under the listed provisions (including s.17 CA), but not under the Withholding Regs as in *R(M)* (accommodation and travel assistance but not cash).

'Cat.5' If failed asylum-seekers are ineligible for local authority support under ps.6 or 7A Sch.3 with no exception in ps.3 or p.2(1)(a)-(b) Sch.3, authorities cannot support them at all but the Home Office can under s.4 IAA (accommodation and voucher not cash).

159. I accept Mr Buttler's 'adult immigration status' argument that the Claimant – irrespective of his own nationality – was cared for by a foreign national carer with the right to be in the UK, so fell into what I have called 'Category 1' support. I have also found the children's assessed needs were '*the financial means to support the family and be able to pay…bills and buy food'*. This was not only more than 'essential living needs' equivalent to Asylum Support, but also plainly more than the level of support 'necessary to avoid ECHR breach' in 'Category 3'– there was no suggestion in the assessment the Claimant and his siblings' assessed needs were limited to either 'essential living needs' or 'support necessary to avoid ECHR breach'. Therefore, the assessed needs of the Claimant and his siblings were not 'capped' to either of these ceilings like children in Category 2 (for Home Office support) and 3 respectively.

160. However, EFG and the children in 'Category 1' received the same as I have found would have been received by a family in 'Category 3' by a foreign national carer with no right to be in the UK and 'ineligible' under Sch.3 NIAA who had by virtue of p.3 Sch.3 NIAA a 'ECHR breach cap' on the financial support the authority could provide. This different 'statutory category' point itself establishes 'relevant and significant difference' in the *Thlimmenos* sense. 'Category 3' families had a 'ECHR breach cap' in support due to the adults' immigration status. By contrast, in 'Category 1', the Claimant and his siblings' entitlement to support was not 'capped' by EFG's immigration status to the rate necessary to avoid ECHR breach – and I found higher than it, so was 'levelled down'. This was a 'relevant and significant difference' as the payment was limited to 'essential living needs' and this had a significant impact on the Claimant and the family as a whole, as I have described in detail and need not repeat yet again.

Justification

161. I turn then at long last to justification, where cases such as *R(Carson)* and *AL(Serbia)* suggest that Art.14 ECHR cases are typically decided. Yet strikingly, Mr Swirksy's skeleton argument spent no more than a short paragraph on it, referring back to the three stated bases of justification in the Detailed Grounds of Resistance ('DGR'), focussing on the Claimant's British nationality (even though the Statement of Facts and Grounds also raised the linked question of immigration status, as I noted at the start):

161.1 The first justification (at ps.57-58 of the DGR) contends differential treatment of families with British children *'would introduce a level of bureaucracy into the process'.* I will call this the 'Convenience' justification.

161.2 The second justification (I take next in the DGR at ps.61-62) contends differential treatment of families with British children would have to extend not simply to cash support but also to provision of services which would be more *'challenging if not impossible'* to differentiate as between children on the basis of their nationality. Whilst it was also argued this would have administrative and legal implications, the main thrust of this point is *practicality* and I will call it the 'Practicality' justification.

161.3 The third justification (at ps.59-60 of the DGR) contends differential treatment of families with British children would open up the Defendant to legal challenges of discrimination alleged by families of different nationalities as well as to processes (e.g. an NRPF family from an affluent country seeking more than from a less affluent one) and resources should be spent on supporting children, not litigation. However, Mr Swirsky adopted my suggestion the real thrust of this was not so much avoiding litigation, but avoiding discrimination itself – so I call this the 'Equality' justification.

162. The DGR summarised its case on justification at p.64, following the *Bank Mellat* structure

162.1 These three justifications were legitimate aims since they were sufficiently important objectives so as to justify interference with Convention rights.

162.2 The Defendant's similar treatment of NRPF families with British children was rationally connected to all of those objectives.

162.3 There was no less intrusive measure to achieve the same objectives: there is no 'halfway house' between different and similar treatment for British children.

162.4 The impact of the Defendant's similar treatment did not outweigh the legitimate aims:

> *"The day-to-day needs of a child living in Birmingham are the same whether they are British or another nationality. The Defendant is not treating British children worse, it is simply choosing not to treat them better than other nationalities…[A]ny adverse effect of the Defendant's approach on British children is not such as to outweigh the severity of the problems that would ensue if the Defendant were compelled to treat British children better…"*

163. However, it is striking that what is <u>not</u> alleged as a justification is so-called 'benefits tourism' and associated public policies stemming, as Lord Hoffmann explained in *Westminster*, from political concerns about a so-called 'honey pot': welfare support drawing economic migrants to the UK. As noted, this justification was key to Lord Carnwath's rejection of the Art.14 challenge to exclusion of *Zambrano* carers from mainstream benefits in *R(HC)* at p.32:

> *"In any event, the Strasbourg court has long accepted that the allocation of limited public funds in the social security and welfare context is pre-eminently a matter for national authorities, subject only to the requirement that their decisions should not be 'manifestly without reasonable foundation: see R (MA)… para 32, per Lord Toulson. The Government's reasons for not providing support to Zambrano carers….included the objectives of reducing costs by allocating benefits to those with the greatest connection with this country, of encouraging immigrants here unlawfully to regularise their stay, of encouraging TCNs wishing to have children here to ensure that they had sufficient resources to support themselves and their children, and of reducing 'benefits tourism'….I find it impossible to say that these objectives fall outside the wide margin of discretion allowed to national governments in this field."*

This well-established national governmental 'Benefits Tourism' justification is <u>not</u> relied on by the Defendant. In *R(HC)*, the Court effectively found it was legitimate to allocate responsibility for welfare support for people in this situation to local authorities, as Lord Carnwath said at p.36. Local authorities cannot then 'pass the buck' anywhere else.

164. Moreover, differential support of NRPF families with British children (or to anticipate, to families in different 'statutory categories') would not realistically undermine any of the public policy objectives Lord Carnwath summarised at p.32 of *R(HC)*. On the contrary, it would actually support two of them: by allocating benefits to those with greatest connection to the UK (British children) and encouraging immigrants to regularise their stay (by treating 'ineligible families' in Sch.3 worse than those with right to remain, as Parliament clearly intended). However, as will be seen, the Claimant does rely on 'benefits tourism' justification.

165. As noted, in *R(SC)*, Lord Reed encouraged a more nuanced approach to justification:

> *"158…[A] low intensity of review is generally appropriate, other things being equal, in cases concerned with judgments of social and economic policy in the field of welfare benefits…so the judgment of the executive or legislature will generally be respected unless it is manifestly without reasonable foundation. Nevertheless, the intensity of the court's scrutiny can be influenced by a wide range of factors, depending on the circumstances of the particular case…In particular, very weighty reasons will usually have to be shown, and the intensity of review will usually be correspondingly high, if a difference in treatment on a 'suspect' ground is to be justified."*

One of the examples Lord Reed gave of such 'suspect grounds' was 'nationality' at p.105:

> *"105 The 'very weighty reasons' requirement was next extended to differences in treatment based exclusively on nationality: Gaygusuz v Austria (1996) 23 EHRR 364. That case, like many later cases concerned with differential treatment on the ground of nationality, was concerned with entitlement to welfare benefits, but predated formulation of the 'manifestly without reasonable foundation' approach in the context*

However, by contrast, at p.114, Lord Reed suggested a difference with 'immigration status':

> *"The counterpart of the strict approach taken, other things being equal, to differences in treatment on the grounds discussed above, is less strict scrutiny, other things being equal, of differences in treatment on other grounds such as age and immigration status (see, for example, Bah…)…. However…the case law does not support a straightforwardly binary approach, as a range of factors may be relevant in particular circumstances. For example, although age has not been treated as a 'suspect' ground, the best interests of children have been treated by the ECtHR as an important factor in assessing proportionality under article 14, reflecting the fact that individuals in that age group have particular needs and vulnerabilities."*

Therefore, as the 'status' relied on in the three comparisons I have been examining is slightly different, it is necessary to consider each individually, although with repetition minimised.

166. I will start with the adult 'immigration status' argument. In *Bah*, the ECtHR accepted 'immigration status' (there of the applicant's child) could be an Art.14 'status', but then found differential treatment on immigration status in housing eligibility was justified. It said at p.47:

> *"The court recalls that the nature of the status upon which differential treatment is based weighs heavily in determining the scope of the margin of appreciation… Immigration status is not an inherent or immutable personal characteristic such as sex or race, but is subject to an element of choice…..Given the element of choice involved in immigration status, therefore, while differential treatment based on this ground must still be objectively and reasonably justifiable, the justification required will not be as weighty as in the case of a distinction based, for example, on nationality. Furthermore, given that the subject matter of this case—the provision of housing to those in need—is predominantly socio-economic in nature, the margin of appreciation accorded to the Government will be relatively wide (see Stec cited above at [52])."*

That reference to *Stec* is to the 'manifestly without reasonable foundation' test: (*R(DA)* p.58).

167. Therefore, as immigration status and *Bah* was specifically cited in *R(SC)* as an example of a 'lower standard of review' and *Bah* itself specifically links it to the 'manifestly without reasonable foundation' test, I will take the approach Lord Wilson suggested in *R(DA)* at p.66:

> *"[W]hen the state puts forward its reasons for having countenanced the adverse treatment, it establishes justification for it unless the complainant demonstrates that it was manifestly without reasonable foundation. But reference in this context to any burden, in particular to a burden of proof, is more theoretical than real. The court will proactively examine whether the foundation is reasonable; and it is fanciful to contemplate its concluding that, although the state had failed to persuade the court that it was reasonable, the claim failed because the complainant had failed to persuade the court that it was manifestly unreasonable."*

I examine the three justification arguments: 'Convenience', 'Practicality' and 'Equality' before considering whether the treatment was 'manifestly without reasonable foundation'.

168. 'Convenience' was abandoned as a justification by Mr Swirsky in argument although I will still examine it 'proactively'. As Mr Buttler pointed out, it is not burdensome to check an adult's immigration status. Indeed, that is an enquiry a local authority was explicitly obliged to make under the Old NRPF Policy (to check someone's eligibility). It is hardly likely to slow down support for children and the Defendant has produced no evidence to support administrative inconvenience, which undermines a claim for justification on such a basis – *R(JP) v Home Secretary [2020] 1 WLR 918 (HC)*. Mr Swirsky was right to abandon this.

169. ‘Practicality’ is different. Many welfare support schemes do not assess support ‘from scratch’ but use similar ‘indicative rates’ which could then be adjusted to the particular circumstances (up or down) as the Defendant’s Old NRPF Policy purported to do with its ‘subsistence rates’:

> *“The needs of each child/family will be considered on a case-by-case basis when the Trust exercises its duty pursuant to s.17. The amount of financial support may vary:*
>
> - *Subsistence payments may be higher to meet health and wellbeing needs of a child;*
> - *Subsistence payments may be higher if the child has specific additional needs;*
> - *Subsistence payments may be lower if the family are residing in accommodation which provides for essential living needs;*
> - *Subsistence payments may be lower if the family are in receipt of any other income”*

170. It is well-established that ‘Practicality’ of the administration of a scheme of social welfare recognises that support cannot always be precisely matched to need and that broad criteria and ‘bright-line rules’ are in principle legitimate to facilitate proper functioning of such schemes.

170.1 In *Bah*, in finding immigration status-related exclusion of public housing support was justified, the ECtHR accepted at p.49 that broad criteria of support were legitimate:

> “*The court finds that it is legitimate to put in place criteria according to which a benefit such as social housing can be allocated, when there is insufficient supply available to satisfy demand, so long as such criteria are not arbitrary or discriminatory. As the court has previously held, any welfare system, to be workable, may have to use broad categorisations to distinguish between different groups in need (see Runkee v United Kingdom (42949/98 and 53134/99) May 10, 2007 at [39]). The court also recalls its finding in the case of Ponomaryov v Bulgaria (5335/05) June 21, 2011 at [54] (not yet final), that States may be justified in distinguishing between different categories of aliens resident on its territory and in limiting the access of certain categories of aliens to “resource-hungry public services”. The court takes the view that social housing is such a public service.”*

170.2 In *Mathieson*, although agreeing the claim of discrimination in the time-limitation of a benefit with a disabled child in hospital should succeed, Lord Mance said at p.51:

> *“Courts should not be over-ready to criticise legislation in the area of social benefits which depends necessarily on lines drawn broadly between situations which can be distinguished relatively easily and objectively ….In R (Animal Defenders International) v Secretary of State for Culture, Media and Sport [2008] AC 1312, Lord Bingham’s speech on this…read…at para 33:*

"[L]egislation cannot be framed so as to address particular cases. It must lay down general rules..[which] means that a line must be drawn, and it is for Parliament to decide where. The drawing of a line inevitably means that hard cases will arise falling on the wrong side of it, but that should not be held to invalidate the rule if, judged in the round, it is beneficial'."

170.3 Likewise, in *R(MD)* at p.146, Underhill LJ accepted the Home Office's justification defence to a claim of indirect discrimination that withholding of additional support to trafficking victims with children in receipt of asylum support had disproportionately prejudicial effects on women as they were more likely to be lone parents:

"In my view it was indeed plainly within the wide discretion available to the Secretary of State in a decision of this character to set a fixed rate of child support notwithstanding that inevitably some parents would have greater financial needs than others. No doubt the financial needs of lone parents might be expected to be greater —overall, though certainly not in all cases—than those of co-parents; but I do not believe that that is sufficient to require the Secretary of State to make special provision for them. Nor do I believe that it makes a difference that the comparatively few male victims of trafficking with dependent children are less likely to be lone parents."

Therefore, I accept that setting 'indicative rates' to be 'calibrated' to individual cases is plainly a legitimate approach and its 'bright lines' should not be subjected to '(over)anxious scrutiny'.

171. However, with the 'adult immigration status' argument, the 'Practicality' justification misses the point. This argument assumes it was legitimate to use 'Asylum Support' as a 'starting point' for individual 'calibration' (unlike the 'nationality / immigration status' argument). This argument also assumes British and non-British children's needs in principle are the same (unlike the 'pure nationality argument'). Instead, the 'adult immigration status' argument relies on the different 'statutory categories' of s.17 CA support based on adult immigration status. In other words, reflecting Lord Wilson's articulation in *R(DA)* at ps.53-4 of the 'focus of justification' in the *Thilemmnos* discrimination challenge, what is under scrutiny is not the Policy itself, but the decision to treat the Claimant/EFG who were in one 'statutory category' for those whose carers had a right to be in the UK, the same as NRPF families in another 'statutory category' who did not e.g. those unlawfully in the UK. In conceding that EFG was always lawfully in the UK, Mr Swirsky noted there was some confusion about it after leave expired in April 2021. However, the Defendant's decision was taken in February 2021 when it knew EFG had leave to remain in the UK and it did not reconsider its approach from April.

172. I have found the Claimant and his siblings' assessed needs for support were not limited to 'essential living needs' or those 'necessary to avoid ECHR breach', nor were they limited to those levels of financial support by EFG's 'statutory category' which I have called 'Category 1' that did not restrict financial support (other than to assessed need). Yet EFG received the same financial support as a 'Category 3' 'ineligible' carer who was 'capped' in that way. That is not only a 'relevant and significant difference' in situations, it was also not justified by Practicality, as it was not a question of determining the precise level of non-cash support depending on immigration status, merely which 'statutory category' a family were in and whether or not cash support was 'capped' or simply determined on assessed need.

173. Whilst there is no challenge to the Old NRPF Policy itself, it illustrates the point. Strikingly, it was full of legal references, including the eligibility test and the human rights assessment:

> "*In establishing the third condition* [of the eligibility test]*: Sch.3 NIAA 2002 sets out several classes of persons who are ineligible for assistance under the Children Act 1989. In particular, the…Trust cannot provide support to a family with an existing claim for asylum. In this situation, the Home Office has a duty to provide support…. The human rights assessment must conclude with the options that the…Trust will offer the family in order to prevent a breach of human rights…The options are:*
>
> - *To provide short-term support in the UK under s.17 CA and advise the family to seek advice from an immigration solicitor;*
> - *To offer assistance to the family in returning to the parent's country of origin…."*

However, at no point did the Old Policy make a clear differentiation between what I have called 'Category 1' and 'Category 3' – the latter 'ineligible carers' under Sch.3 NIAA and the former families like those of EFG for whom support was not capped in that way. Indeed, it envisaged 'human rights assessment' for both. But differentiation was not complex or impractical – it just reflected statutory provisions explicitly mentioned. Indeed, the Old NRPF Policy was full of other differentiations based on legal categories - children with a disability, care leavers and even those with Child Arrangements Orders. Mr Swirksy submitted the Defendant's approach avoided a 'two-tier' system where two disabled children with the same needs would be treated differently. But that is an inevitable consequence of the statutory frameworks. A disabled asylum-seeking child is supported by the Home Office; a disabled child with an adult carer with NRPF leave will be supported by the local authority: *R(A)*. That is not even a 'two-tier system', it is two separate systems. In this argument, I assume a disabled child in a 'Category 3' family has the same *needs* as one in a 'Category 1' family, but he has a *cap on financial support* that the latter does not (but no cap on direct provision).

174. Be that as it may, the challenge here is not to the system or the policy, but the level of support i.e. the payment of £196.24 pw. 'Practicality' cannot justify payments to EFG and her family:

174.1 Firstly, there is no 'rational connection' between the justification of 'Practicality' and the treatment. The suggested difficulty of calibrating non-cash support to (here) 'immigration status' is a 'straw man'. This challenge is about the level of *cash* support of £196.24 pw. That is capped by the adult's immigration status – direct provision to the child (which is what Practicality focusses on) is not, due to p.2 Sch.3 *R(M)*. For whatever reason (that the Defendant has not even attempted to explain), it made no differentiation between 'Category 1' 'uncapped' financial support and 'Category 3' 'ECHR breach cap' financial support. In short, the support EFG received was 'levelled down' to the same lower level as those in very different families.

174.2 Secondly, whilst it was perfectly legitimate for the Defendant to operate 'bright lines', there were less intrusive means of doing so, namely differentiation between different families in different statutory categories laying behind the legal framework the Old NRPF Policy itself mentioned. Such differentiation would not have involved calibrating the precise level of direct provision (or indeed cash support) to immigration status, but rather recognising cash support to those in one 'statutory category' was 'capped' by the human rights assessment whilst to another (including EFG) it was not. Ideally that would have been done in the Old Policy itself, but as it was not, then differentiation could have been made in the support paid. There is no explanation why it was not done (or could not have been) or of a belief at the time EFG was ineligible (which she was not in February 2021) as there is no evidence on it from the Defendant.

174.3 Finally, the adverse impact on the Claimant and his siblings so vividly described by EFG shows that the Defendant left them living 'hand to mouth' for six months. This far outweighs the legitimate aim of Practicality in the operation of the Policy, especially as it does not explain non-differentiation between *cash support* to different 'statutory categories'. Even if the explanation is that 'essential living needs' are the same, as I found, the Defendant itself assessed the Claimant and his siblings' needs for financial support and neither limited it to the 'ECHR breach cap' nor 'essential living needs', yet limited cash support to 'essential living needs', even as back-dated (together with accommodation and miscellaneous modest other payments). For the six months between February and August 2021, this left EFG not even able to meet 'essential living needs' even with reliance on charity – something its own assessment stated that support was required to enable them to live independently of it. This serious impact far outweighed the limited relevance 'Practicality' had here.

175. I turn finally on the 'adult immigration status' basis to the 'Equality' justification. There is no doubt that avoiding discrimination is a legitimate aim, not only in principle but also in avoiding legal challenges based on that discrimination. In the case of *Ladele* v *Islington LBC*, joined with similar Art.9 ECHR challenges in *Eweida v UK (2013) 57 EHRR 213*, a Christian registrar refused to undertake civil partnership ceremonies for same-sex couples due to her religious beliefs and ultimately lost her job as a consequence. Whilst recognising that she was manifesting her religious beliefs within the ambit of Art.9 read with Art.14 ECHR, the Court found that the employer had a legitimate aim of avoiding discrimination, as it said at p.105:

> *"The Court of Appeal held that the aim pursued by the local authority was to provide a service which was not merely effective in terms of practicality and efficiency, but also one which complied with the overarching policy of being "an employer and a public authority wholly committed to the promotion of equal opportunities and to requiring all its employees to act in a way which does not discriminate against others". The Court recalls that in its case law under art.14 it has held that differences in treatment based on sexual orientation require particularly serious reasons by way of justification It has also held that same-sex couples are in a relevantly similar situation to different-sex couples as regards their need for legal recognition and protection of their relationship, although since practice in this regard is still evolving across Europe, the Contracting States enjoy a wide margin of appreciation as to the way in which this is achieved within the domestic legal order. Against this background, it is evident that the aim pursued by the local authority was legitimate."*

By analogy here, I accept that the Defendant's aim of avoiding nationality discrimination (another 'weighty reasons' ground within Art.14 ECHR, as I have discussed) was a legitimate aim, not only in principle (which I entirely accept the Defendant here maintains) but also the practical consequence of avoiding legitimate challenges of nationality discrimination. I am also prepared to accept the same applies to avoiding 'immigration status' discrimination. However, I do not accept avoiding *misconceived* challenges of discrimination (especially by judicial review with its permission stage which often filters out misconceived claims against public authorities) can amount to a legitimate aim. The desire to avoid them is of course understandable, but it cannot amount to a sufficiently important objective so as to justify interference with Convention Rights and I did not understand Mr Swirsky to argue otherwise.

176. This matters to the 'adult immigration status' argument because here, the Claimant's suggested differential treatment of NRPF families based on their adult carer's immigration status does not engage 'nationality' at all, but rather 'immigration status', as in *Bah* at p.49:

"*The court finds that it is legitimate to put in place criteria according to which a benefit such as social housing can be allocated, when there is insufficient supply available to satisfy demand, so long as such criteria are not arbitrary or discriminatory…..States may be justified in distinguishing between different categories of aliens resident on its territory and in limiting the access of certain categories of aliens to "resource-hungry public services"."*

Whilst Lord Carnwath in *R(HC)* was not referred to *Bah* on 'status' at p.31, he made a very similar point to *Bah* on justification at p.32 – i.e. what I called the 'Benefits Tourism' point:

"[T]he objectives of reducing costs by allocating benefits to those with the greatest connection with this country, of encouraging immigrants here unlawfully to regularise their stay, of encouraging TCNs wishing to have children here to ensure that they had sufficient resources to support themselves and their children, and of reducing 'benefits tourism'….I find it impossible to say that these objectives fall outside the wide margin of discretion allowed to national governments in this field."

177. In fairness to Mr Swirsky, this was not the way the case was originally put and I return to his argument on the two 'nationality' arguments. However, on the 'adult immigration status' point, 'Equality' as a legitimate aim in principle has no real purchase for the simple reason that whilst avoiding 'immigration status' discrimination is a legitimate aim, treating EFG and her family differently than those with a different 'immigration status' to her – i.e. those without the right to be in the UK, would not even arguably amount to such discrimination. Complaints to the contrary would be misconceived because it is perfectly justified to differentiate in welfare support between those in different 'statutory categories'. That is not only because that is supported by the legitimate aims of 'scarce public resources' in *Bah* and the various objectives Lord Carnwath listed in p.32 of *R(HC)* I have compendiously labelled 'benefits tourism'. Such 'immigration status differentiation' is also inherent in the statutory framework under which the Defendant was operating – it lies behind the 'statutory categories'. As Mr Buttler submitted, those catgories and frameworks derive from primary legislation, and compliance with them is a defence to any claim under s.6(2) HRA (unlike secondary legislation as confirmed by the Supreme Court in ***RR v DWP*** *[2019]1 WLR 6430* – like *JD* in the ECtHR, another sequel to the 'Bedroom Tax' case *R(MA)* and so part of the same line of cases as *R(DA)* and *R(SC)*). In other words, it is not rationally connected to the legitimate aim of avoiding discrimination to treat EFG and the Claimant similarly to others in relevantly and significantly different situations due to the adult's immigration status, simply because such adults may possibly make *misconceived* complaints of immigration status discrimination.

178. Indeed, as I said above in relation to the 'Practicality' challenge, if the Old Policy had explicitly differentiated between the 'statutory categories' based on immigration status, it could have made clear to all that s.17 CA support was restricted only by assessed welfare need for those who were entitled to be in the UK, *irrespective of their nationality*, including EFG. Such differentiation based on immigration status would have been obviously unchallengeable because immigration status is a 'low intensity review' ground on the 'manifestly without reasonable foundation' approach. Whilst there is no challenge to the Policy as such, there is no rational justification based in 'Equality' for the limitation of the support to EFG and her family to less than assessed need. Yet this happened by the limitation of the weekly support payments to the Asylum Support rate – the same as those with a different immigration status.

179. So, the 'Equality' point cannot justify payments to EFG which treated her family the same as others of different immigration status in relevantly and significantly different situations:

179.1 Firstly, for the reasons given, there was no 'rational connection' between this treatment and the legitimate aim of 'Equality' because there would be no arguable discrimination in treating differently those in different 'statutory categories' of eligibility for support based on adult immigration status. Indeed, there would be a defence based on the primary legislation grounding those 'statutory categories'. The risk of misconceived legal challenges is not rationally connected to the legitimate aim and is not in itself a legitimate aim. So the 'Equality' point cannot assist here.

179.2 Secondly, alternatively for the reasons given, there was a less intrusive means of achieving the legitimate aim, by the clear differentiation of support by reference to 'statutory category' which would have addressed any concern about 'Equality'. I would also repeat the points made under this heading with 'Practicality' above.

179.3 Thirdly, again for the reasons stated under the 'balance' heading under 'Practicality' above, the huge impact on the Claimant and his family was not outweighed by a legitimate aim which although incredibly important in itself, was not realistically affected by differentiation on immigration status inherent in the statutory scheme.

180. For all those reasons, in the 'adult immigration status' argument, the same treatment of the Claimant and his family by application of a rate derived from a relevantly and significantly different and more limited 'statutory category of support' for those of a different immigration status, which had the effect of limiting the support given to the Claimant's family to below its needs as assessed by the Defendant was 'manifestly unreasonable'. It caused a dramatic impact on the Claimant and his family which manifestly cannot be justified by the 'Convenience', 'Practicality' or 'Equality' arguments. I say that in summary because:

180.1 There was a relevant and significant difference between EFG, the Claimant and his siblings whose eligibility for support was unrestricted and their comparators whose was restricted. Since I have found the Claimant and his siblings' assessed needs were greater than the level of the restriction, their support was effectively 'levelled down'.

180.2 The Defendant's payment of £196.24 pw to EFG and Claimant and his siblings (leaving aside modest other payments not said to make a real difference) which limited her support to that given to carers of children in a different 'statutory category' was manifestly unreasonable. This was not only because it had no rational connection with any of the legitimate aims, but also because there were less intrusive means of doing so and limiting payments to 'essential living needs' rather than meeting the childrens' assessed welfare needs had a dramatic and serious discriminatory impact on the Claimant and his siblings which plainly outweighed the legitimate aims even insofar as they applied to them, which they only did to a very limited extent, if at all.

180.3 Moreover, quite aside from all the legal analysis, I find on what evidence I have (which is precious little from the Defendant and none on any of the relevant justifications), the Defendant effectively ignored its own January 2021 careful assessment of the children's needs and in February 2021 without any apparent thought or consideration of those needs and paid EFG the Asylum Support rate that it paid to people in completely different situations. This in itself was manifestly unreasonable.

As I will uphold the Art.14 ECHR discrimination argument for that reason, it is therefore not strictly necessary to consider either the 'nationality/immigration status' or 'pure nationality' arguments. But I will do so more briefly and in fairness to the Defendant as they were the way the case was originally put against them. For the reasons given, I consider them in turn but hopefully without undue repetition with the fuller analysis already given.

181. Turning to the 'child nationality / immigration status' argument, to re-iterate I found that there were three aspects to 'relevant and significant difference' between British children with the right of abode and the children of asylum-seekers: (i) British children's 'right of abode' is permanent (as may be their need for support), whereas asylum-seeker's 'immigration status' is temporary; (ii) Consequently, here is less scope for the possibility of 'family returns' curtailing the duration or extent of support; and (iii) Ryder LJ's point in *R(C)* at p.22:

> "*[T]he circumstances of those who qualify for s.17 support, those who have just arrived seeking asylum and those who have failed in their application to be granted asylum are sufficiently different that it is likely to be irrational to limit s.17 support to that provided for in a different statutory scheme."*

182. In this argument, the criticism is not that British and non-British children have intrinsically different 'needs' (unlike the 'pure nationality' argument); or that families in different 'statutory categories' should be treated differently by the Defendant (unlike the 'adult immigration status' argument), but rather that it was unjustified for the Defendant to have paid the Asylum Support rate limited to 'essential living needs' to EFG with her children eligible for s.17 CA support with assessed needs not limited to 'essential living needs' – in other words, precisely Ryder LJ's point in *R(C)*. For reasons I can deal with more briefly, I will find that nether 'Convenience', 'Practicality' or Equality' can justify the same treatment.

183. The relevant status here is 'nationality' which is an established 'suspect ground', but is linked here with 'immigration status' which is not, although the best interests of the child are relevant - *R(SC)*. However, the immigration status of a child in *Bah* did not elevate the standard of justification from 'manifestly without reasonable foundation' and I take the same approach as before. I likewise simply record that Convenience no more assists the Defendant than it did with the 'adult immigration status' argument. It is, if anything, easier to establish the British nationality of a child from their passport their carer is likely to have or can quite easily get.

184. Whilst for the same reasons as above I accept that Practicality is a legitimate aim, for slightly different reasons I find it cannot justify the same support of the Claimant and his family as British children as would be received by children of an asylum-seeking family, even though I assume for this argument that the 'essential living needs' of a British and non-British child are materially the same. The difficulty for the Defendant is that it *limited* its financial support to those 'essential living needs' through paying the Asylum Support rate (the statutorily-limited amount of financial support for children of asylum-seeking families). This is contrary to what the Court of Appeal said local authorities should do in *R(C)*, as Ryder LJ said (in the sentence quoted above which I rely on but need not repeat, just after the following):

> *"21 Given that the legislative purpose of s.17 CA 1989 in the context of s.11 of CA 2004 is different from that in ss.4 and 95 IAA 1999, it would be difficult for a local authority to demonstrate that it had paid due regard to the former by adopting a practice or internal guidance that described as its starting point either the child benefit rate or either of the IAA support rates. The starting point for a decision has to be an analysis of all appropriate evidential factors and any cross-checking that there may be must not constrain the decision maker's obligation to have regard to the impact on the individual child's welfare and the proportionality of the same.*

22 There is no necessary link between s.17 CA 1989 payments and those made under any other statutory scheme; quite the contrary. The s.17 scheme involves an exercise of social work judgment based on the analysis of information derived from an assessment...That analysis is neither limited nor constrained by a comparison with the support that may be available to any other defined group, no matter how similar…"

185. Whilst these observations were made in the context of a domestic law challenge, they are plainly relevant to questions of justification. Ultimately, despite the warning in *R(C),* the Defendant chose not just to adopt a NRPF policy with a 'starting point' of the Asylum Support rate, but actually chose to provide financial support at that level effectively as a 'finishing point'. Moreover, I have found that the level of assessed need in the Claimant and his siblings' case was significantly higher than 'essential living needs' and that even with charity provision, at times the Claimant's 'essential living needs' were not even met, despite EFG's best efforts. As s.17 CA is not a duty to meet assessed need (*R(G)*), it might theoretically have been possible for the Defendant with evidence to explain why it chose the Asylum Support rate to support the Claimant and his siblings to whom it did not apply and who had been assessed as needing more. However, it has provided no evidence about that – indeed no explanation at all. It did not contest the irrationality challenge on this basis in Ground 1 (which whilst Ground 1 is no longer live is relevant to 'rational connection'). To make matters worse, the Defendant has not provided any evidence to support the 'Practicality' justification either. (As an aside, it has also not explained its delay in introducing its New NRPF Policy (despite the fact its old one was seriously out of date) earlier, which would have led to a higher rate of support above the Asylum Support level for EFG and avoided this challenge completely - and some others).

186. So, the 'Practicality' point cannot justify paying the Asylum Support rate for the Claimant and his siblings at the same level as children from asylum-seeking families would receive:

186.1 Firstly, there was no 'rational connection' between this treatment and the legitimate aim of 'Practicality' because the Defendant not only failed to 'calibrate' the 'indicative rate' to the assessed need as the Old Policy envisaged it would, it adopted a level of support plainly less than the level it has assessed itself that it should provide, without explanation. It also paid a rate from another statutory scheme with a different purpose which here at least was, as Ryder LJ suggested in *R(C)* 'irrational' – at least in the absence of any explanation whatsoever for it which has not been given here as I have said. The rate was limited by statute when the support to the Claimant and his siblings was not so limited. That makes this case different from *R(MD),* where the judge had found the policy rational. It is telling this aspect of Ground 1 was not contested either.

186.2 Secondly, whilst it was perfectly legitimate for the Defendant to operate 'bright lines', there were less intrusive means of doing so, namely the rate in the New NRPF Policy it adopted itself partly in response to this case which it had delayed doing for a considerable time, as evidenced by its failure to update the rates since 2016. The New Policy adopts the same 'indicative rates' for subsistence 'calibrated to individual circumstances', but it specifically broke the link with the Asylum Support rate and acknowledged that the new indicative figures addressed 'essential living needs' but also 'promotion of welfare', reflecting the statutory terms of s.17 CA itself. This resembles the situation in ***R(K) v SSHD*** *[2019] 4 WLR 92 (HC)*, where it was held that cutting asylum-seeking trafficking victims' support payments down to the Asylum Support rate but leaving non-asylum-seeking trafficking victims' payments at the higher rate was *Thlimmenos* discrimination, in part because a new policy had come in which took a less intrusive approach. Here payment of the Asylum Support rate of £196.24 only provided for 'essential living needs' (even if they were not in fact met, as I have found), but not for other welfare needs which the Defendant assessed.

186.3 Finally, the adverse impact on the Claimant and his siblings so vividly described by EFG far outweighed the extent to which the payment of the Asylum Support rate assisted the 'practicality' of support, not least as it related to non-cash support. On this point I can simply repeat the conclusions under this sub-heading on the 'adult immigration status' argument. Indeed, that Asylum Support rate *caused* that impact.

187. I turn to the 'Equality' justification in relation to the 'child nationality / immigration status' argument. It is not the same as with 'adult immigration status', which is an established ground of differentiation in welfare support. By contrast, child nationality and right of abode is effectively 'ignored' within Sch.3 NIAA: *R(M)*. Nevertheless, for a mixture of similar reasons, whilst Equality is obviously a legitimate aim, it cannot justify the same treatment of the Claimant and siblings as British children with the right of abode as with asylum seekers.

187.1 Firstly, there was no 'rational connection' between the legitimate aim of avoiding nationality (and immigration status) discrimination and paying EFG the Asylum Support rate to meet the needs of the Claimant and his siblings. It is true their 'essential living needs' for food, drink, clothing etc would be the same, but the difference is that asylum seekers are statutorily-capped at those needs, whereas children eligible for unrestricted s.17 CA support are not. It is not 'discriminatory' to decline to apply rates fixed for one statutory scheme to a completely different one. On the contrary, as Ryder LJ said in *R(C)*, it is likely to be (and here without any explanation I find is) irrational.

187.2 Secondly, there was a 'less intrusive means' of avoiding discrimination, namely that taken in the new NRPF Policy of adopting a 'starting-point' close to the Asylum Support rate but making it clear it covers not only 'essential living needs' to which Asylum Support is statutorily limited, but also 'the promotion of welfare'. To the extent that this 'differentiates' from Asylum Support, it does so modestly and with a clear explanation which could not realistically give rise to a *discrimination* complaint.

187.3 Thirdly, I accept paying the Asylum Support rate avoided perceived 'discrimination' with children of asylum seekers in the sense of accepting their 'essential living needs' would be the same, as Mr Swirsky said. However, it did not weigh in the balance the very real differences between them, not only the different statutory scheme, but also the difference in the right of abode and likely duration of support and indeed the difference in the reduced likelihood that the family would leave the UK. The Defendant failed to strike a fair balance given it 'levelled down' to the Asylum Support rate, ignoring its own assessment of (higher) need – in fact not even meeting 'essential living needs' with charity, with serious consequences for the Claimant and his siblings.

For those reasons and those summarised above in relation to the 'adult immigration status' argument, I find the payment of £196.24 pw was not only unjustified but manifestly unreasonable and so I uphold the 'child nationality / immigration status' argument too.

188. Finally, I turn to the 'pure nationality' argument that I have found rather less clear-cut. If I am right about either of the other two ways in which the Claimant puts his case, it is academic. Indeed, it is fair to say this is not an argument the Claimant specifically ran - 'stripping out' any relevance of child right of abode and immigration status, let alone adult immigration status. I adopted this comparison to ensure that all my comparisons were valid and in case I was wrong that 'immigration status' fell within Art.14 given *R(HC)* (although I emphasise the 'child nationality / immigration status' argument is at root about *nationality*). Nevertheless, to ensure I address all Mr Swirsky's arguments on nationality including those unrelated to asylum-seekers and the right of abode, I will consider it relatively briefly.

189. I stressed earlier that I found a 'relevant and significant difference' between British and non-British children (leaving aside the 'right of abode') on a limited but important basis, which has nothing to do with British children 'needing more' or being 'better' etc. I accept British and non-British children may have the same basic (or 'essential living') needs, but in terms of safeguarding and promoting their welfare *beyond* basic needs, British children have a 'need' to similar treatment with other British children that non-British children do not have. As I said, 'need' is softer than the word 'right' Defendant itself used in its New NRPF Policy:

"The Trust recognises that the children of Zambrano carers who are British citizens who have a right to reside in the country ***and*** *who, in terms of safeguarding and promotion of welfare, have the* ***right*** *to be treated in the same way as any other British child with British nationality. It is the Trust's view that this policy, when applied in conjunction with the Trust's overall provision of support…achieves that objective."*

190. It seems to me that if there were *cogent* evidence that the Defendant had taken this factor into account with the Claimant and his siblings, but nevertheless decided that it did not change the 'assessed need', then the 'pure nationality' argument may not have succeeded. I say this because this 'relevant and significant' difference between British and non-British children is much more elusive and child-sensitive than their legal right of abode as a British national or the immigration status of their adult carer. It is also less susceptible to differentiation in treatment – it does not lend itself to separate 'categories' like immigration status; or differentiation between different statutory frameworks with different purposes, like s.17 CA and s.95 IAA, as Ryder LJ said in *R(C)*. However, as he also said that s.17 CA requires '*an exercise of social work judgment based on the analysis of information derived from an assessment'* that *'has regard to the impact on the individual child's welfare and its proportionality',* then it is also incumbent on those assessing an individual child's needs to take into account that with a British child, they may have a need to be treated '*in the same way as any other British child with British nationality'* as the Defendant's New Policy puts it.

191. Mr Swirsky mentioned that differential treatment based on nationality would potentially put the Defendant in breach of its Public Sector Equality Duty under s.149 Equality Act 2010 ('EqA'). It is worth setting out material parts of that much-misunderstood provision (although I need not wade into the swathes of case-law, to which I was not referred), with my underline:

"(1) A public authority must, in the exercise of its functions, have due regard to the need to— (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act; (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

(3) Having due regard to the need to advance equality of opportunity… involves having due regard… to the need to— (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic connected to that characteristic; (b) take steps to meet the needs of persons who share a relevant protected characteristic… different from the needs of persons who do not share it"

192. Whilst s.149(1)(a) EqA certainly requires 'due regard' to the need to eliminate discrimination, it also requires it to *'take steps to meet the needs of persons who share a relevant protected characteristic… different from the needs of persons who do not share it'*. s.149 EqA applies to the protected characteristic of 'race' which by s.3 EqA includes 'nationality'. Therefore, the local authority's s.149 EqA obligation is to take 'due regard' not only of the need to avoid discrimination (which I accept entirely lies behind its submissions to me, even though I have disagreed with them and indeed found their justifications had no rational basis at times). They must also take 'due regard' of the need to take steps to meet needs one nationality may have than another may not. (One obvious example is having information interpreted which I am sure the Defendant already does). However, I have found that in this very limited respect, British children have a 'relevant and significant' different need to non-British ones – i.e. to similar treatment with other British children (in itself raising questions of discrimination perhaps). Indeed, a need which the Defendant itself promotes in status by calling it a 'right'.

193. However, that does not mean the Defendant through the side-winds of s.149 EqA and Art.14 ECHR must pay NRPF British children the same as mainstream benefits, ignoring all the statutory provisions preventing that I have discussed. Nor does it require the Defendant to have a different 'category' of support for 'British children' – on the contrary, the 'statutory categories' I have set out are unaffected by the child's nationality – even within Sch.3: *R(M)*. It just requires the Defendant to pay 'due regard' to that 'difference' with British children as one of many factors in the mix of a needs assessment. Indeed, a policy which already explicitly refers to that in the way the Defendant's New NRPF Policy does may suffice. Certainly, if there is evidence that 'pure nationality' (as opposed to the right of abode) has been taken into account in an assessment, but for good reasons makes no difference to the level of support (the obvious example being short-term support for a newborn baby), that is likely in my judgment to suffice to justify the same treatment of different situations on this *specific* point.

194. However, there is no evidence whatsoever that any regard (let alone 'due regard') was given by the Defendant of the Claimant and his siblings' British nationality and this additional factor. A factor which the Claimant himself keenly experienced as I have said. There is no reference to this that I have been able to find in the otherwise reasonable needs assessment. Neither is there any reference to it in the Old NRPF Policy - as I have said that seems to assume NRPF children will <u>not</u> be British nationals. Moreover, there is no evidence whatsoever explaining why the level of support was chosen as it was, especially below the level of assessed need. So, not without rather more hesitation than on the 'adult immigration status' and 'child nationality / immigration status' arguments I also uphold this argument:

194.1 Whilst I accept that Practicality is a legitimate aim for reasons I have given (and do not accept Convenience is for the reasons I have given), Practicality is not rationally connected to 'pure nationality' because it simply involves paying 'due regard' to a need of British children which the Defendant itself now calls a 'right'. That is perfectly straightforward and does not involve the precise calibration of the levels of non-cash (or cash) support to the question of the child's nationality, just its inclusion as a factor as part of the wide assessment of need required by s.17 CA. In any event, there is a less intrusive means – again the recognition of the issue in the policy itself as in the Defendant's New NRPF Policy. Moreover, to the extent that 'Practicality' was advanced by ignoring the Claimant and his sibling's nationality in determining the level of support, given that I have found that support even with charity payments did not meet 'essential living needs' and impacted the Claimant in just this way, the omission cannot be said to be immaterial or to have made no difference. The impact of that on the Claimant and his siblings far outweighs the advancement of Practicality.

194.2 Whilst I accept Equality is a legitimate aim, indeed one reflected in statutory obligations on the Defendant such as s.149 EqA, so too is the need to pay due regard to meeting different needs. The Defendant has provided no evidence whatsoever that it did that and indeed all the evidence before me is that it ignored not only the Claimant and his siblings' nationality but even its own assessment of their needs. Whilst there was here a rational connection between Equality and deliberately ignoring the Claimant's nationality with a view to avoiding discrimination, for the same reasons as in relation to Practicality above, there was a less intrusive means and no fair balance.

194.3 On an Art.14 discrimination complaint on grounds of pure nationality affecting the best interests of a child, I do not consider the 'manifestly without reasonable foundation approach is apt. I consider weightier reasons are required but for the reasons given, are conspicuously lacking. In any event, for all the reasons I have given already, I would find the treatment here was manifestly unreasonable.

It therefore follows that I uphold the Art.14 discrimination claim on all bases. For the reasons given above, when handing down the judgment I will hear argument on remedy. However, to assist the parties, I will give very brief observations on that and the New NRPF Policy first.

Observations

195. Whilst this was not a challenge to the Old NRPF Policy itself, especially with time limits for judicial review claims that is now likely to be of historical interest. The New NRPF Policy is quite different and some of those differences have been important to the Claimant's success. The Defendant may reflect that is to be expected, as it delayed implementing a New Policy for so long that it was still operating on 2016 Asylum Support rates in 2021. However, the New Policy is now a year old and I see is due for review (if it has not been reviewed already). In the light of *R(CB) v SSHD [2022] EWHC 3329 (Admin)*, the Defendant's review may wish to take into account the dramatic rise in the cost of living during 2022 and indeed the mandated rise in the Asylum Support rate to £45 pw. Otherwise, having finally in its New NRPF Policy overtaken Asylum Support rates, the Defendant may now find itself once again below them. Whilst it is not my role to help it avoid future challenges, I hope these brief observations do assist in its important work supporting some of the most vulnerable children in our society.

196. Firstly, the New Policy does not appear to differentiate between the 'statutory categories'. The Defendant may consider that providing the New Policy is operated properly and support calibrates to individual circumstances it does not need to. However, clear differentiation of statutory categories is more likely to ensure the right level of support. Indeed, that was one of the things which went wrong in this case. Another, although strictly irrelevant to the case, is the delay in the Defendant helping EFG put herself in a better financial position – especially with the delays in supporting legal advice. Another aspect no-one appears to have considered is an application to the Home Office to lift the NRPF condition as discussed in *R(ST)*. Frankly, given the now high success rates - around 80% with families, I'd have thought local authorities would do everything they can to assist NRPF families to have NRPF conditions removed.

197. Secondly, I repeat my earlier other observations on the subsistence rates themselves which are more generous than the indicative rates under the Old Policy. Leaving aside nursing and maternity elements, at £43 per person, in any family they work out more than under the Defendant's Old NRPF Policy which was £35.39 for an adult, £40 for the first child and £30 for each child thereafter. Also, the Old Policy also did not include a separate element for accommodation-related utility bills as the New Policy does. However, whilst the indicative subsistence rates under the New NRPF Policy are £3.37 a week more than the present Asylum Support rate of £40.85, if they are not increased they will be £2 a week less than the amount Fordham J in *R(CB)* ordered Asylum Support should now be prescribed under the ASR to meet 'essential living needs' alone. This would again become difficult to square with *R(C)* and indeed the explicit terms of the New Policy which also distinguishes 'welfare needs'.

198. Thirdly, it is clause 2.3 of the Defendant's New NRPF Policy draws that distinction between 'essential living needs' like nutritional requirements (e.g. food and drink) and support to 'safeguard and/or promote the child's welfare', which I have termed 'assessed welfare needs'. However, I have noted this sentence at clause 2.3 of the New NRPF Policy: '*The[se] indicative rates…are considered sufficient, with prudent housekeeping, to be adequate not merely to meet the nutritional and other essential living needs of clients having regard to local prices and supplies, but also to safeguard and/or promote the child's welfare'*. This must not be read in isolation. The Defendant was presumably not then saying it costed £3.37 per week to 'safeguard and promote a child's welfare' beyond that child's 'essential living needs'. Rather clause 2.3 of the New NRPF Policy envisioned its 'subsistence payments' slightly higher than statutorily-prescribed 'essential living needs' to be seen: '*in the broader content of a package of support which includes accommodation and other local authority services where the assessment identifies them, being services that central government does not provide'*. So, the subsistence payments (and presumably where necessary, accommodation) are intended to meet the 'essential living needs' of families but the Defendant's support goes further, not only with the modest additional level of weekly payments but crucially augmented by direct provision of services assessed as needed for the child (unaffected by Sch.3 NIAA).

199. I go no further than this because the 2021 rates in the New Policy are potentially relevant to what relief should be granted for 2021 in this claim. There is an argument which I raised with Mr Swirsky that the Claimant's (now successful) challenge was predicated on the payment of *the Asylum Support rate*. The New NRPF Policy has broken that link and indeed in various respects I took it into account in order to uphold the Claimant's claim. It would not therefore surprise me if the Defendant argued that 'just satisfaction' for the Claimant's claim should be limited to the difference between £196.24 pw and the rates EFG would have received under the New Policy without a non-pecuniary award, not least as payments of over £500 pw have now been back-dated to August 2021. However, in his submissions, Mr Buttler argued that the pecuniary loss should be the difference between £196.24 and £510.85 on the basis (with which I have some sympathy as I said above) that the needs had not change between February and August 2021. As I understand it, that would be calculated in the region of £5750.68. Certainly, this is not a case like *R(MD)* of nominal loss on the basis that comparators were unjustifiably paid more. This is a case where I have found EFG was unjustifiably paid less. Mr Buttler also argued that 'just satisfaction' would require a non-pecuniary award, although he accepted that it is not uncommon for a Court to hold that the decision (particularly with a pecuniary award) is sufficient 'just satisfaction' – on the principles discussed in *R(MD)*.

200. I am happy to say the parties took me up on my suggestion in my draft judgment circulated shortly before Christmas 2022 and settled quantum in the sum of £10,000. Since the Claimant is a child, I have when handing down this judgment today on 26th January 2023 approved that settlement and the parties' agreed order. This therefore concludes both my judgment and the proceedings. I wish EFG and her family a much easier time for the rest of their childhood.