



Neutral Citation Number: [2019] EWHC 766 (Admin)

Case No: CO/1039/2019
CO/1040/2019

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

Birmingham Civil Justice Centre
33 Bull Street
Birmingham
B4 6DS

Date: 28/03/2019

Before :

MR JUSTICE JULIAN KNOWLES

Between :

NN	<u>Claimant</u>
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	<u>Defendant</u>

LP	<u>Claimant</u>
-and-	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	<u>Defendant</u>

Chris Buttler and Miranda Butler (instructed by **Duncan Lewis**) for the **Claimants**
Emily Wilsdon (instructed by **GLD**) for the **Defendant**

Hearing date: **21 March 2019**

Judgment Approved by the court
for handing down
(subject to editorial corrections)

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The Honourable Mr Justice Julian Knowles:

1. On 20 March 2019 I heard two on notice oral applications by the Claimants, LP and NN, for interim relief. The Secretary of State was represented at the hearing. At the conclusion of the hearing I gave my decision granting interim relief and I made other directions about the future course of these proceedings. An agreed order has been drawn up giving effect to my decision. I said I would give brief reasons in writing for my decision, and this I now do.
2. The Claimants NN and LP are both victims of modern slavery/people trafficking and have been recognised as such by the Defendant in Conclusive Grounds (CG) decisions dated 1 February 2019 and 30 January 2019 respectively. In summary:
 - a. LP is originally from Albania. She was trafficked to the UK and held captive from August 2016 until March 2017 during which she was repeatedly raped. She became pregnant and now has a one-year old daughter. She managed to escape in March 2017.
 - b. NN is originally from Vietnam. He was trafficked to the UK. He ended up working on a cannabis farm. He tried to escape, and was badly beaten including by having some of his teeth knocked out. He was arrested and prosecuted and imprisoned, and since his release he has been living in a Salvation Army safe house. He has been diagnosed with PTSD and depression.
3. NN has claimed asylum and his application is pending. LP's claim for asylum was refused by the Defendant and she is currently appealing to the First-tier Tribunal.
4. These claims for judicial review concern aspects of the Defendant's policy towards victims of modern slavery/trafficking. As victims of trafficking the Claimants are entitled to two things:
 - a. Support pursuant to Article 12 of the Council of Europe Convention on Action against Trafficking in Human Beings (ECAT) and Article 11 of the Directive 2011/36/EU on Preventing and Combating Trafficking in Human Beings and Protecting its Victims (the Directive) (which I will call 'the support duty').
 - b. A determination whether they should be granted leave to remain pursuant to Article 14 of ECAT (ECAT leave).
5. In simple terms, the support duty involves payment of £65 per week, accommodation at a safe house and provision of a support worker. Those not entitled to this receive basic accommodation and subsistence payments of £37.75 per week pursuant to s 95(1) of the Immigration and Asylum Act 1999 and the Asylum Support Regulations 2000. This is called NASS support (after the National Asylum Support Service) and is restricted to meeting the cost of avoiding destitution: *(R(JK)(Burundi) v Secretary of State for the Home Department)* [2017] 1 WLR 4567, [59]. Hence, those receiving benefits pursuant to the support duty are in a more advantageous position than those who are not.
6. The relevant aspects of the Defendant's policy at issue in these claims are as follows:

- a. As well as support between RG and CG decision, the Defendant's policy provides for a package of support until 45 days after the positive CG decision (the 45 day rule). The Claimants contend that the support duty in Article 12 of ECAT and Article 11 of the Directives includes support after the CG decision.
 - b. An application for ECAT leave will be determined at the same time as a CG decision, unless the individual has claimed asylum, in which case the ECAT leave decision will be deferred until the asylum decision has been taken (the scheduling rule). It is argued in NN's case that this means that victims of trafficking who claim asylum suffer delay, often in excess of one year, in determination of their right to ECAT leave. This, it is said, results in significant financial disadvantage and risks delaying psychological recovery.
7. LP and NN challenge these policies as being unlawful.
8. LP's grounds of challenge, in summary, are as follows:
- a. The 45-day rule is incompatible with ECAT and the Directive and so unlawful because:
 - (i) The support duty subsists until the individual leaves the UK. This proposition is founded upon a concession to that effect made by the Secretary of State in *R(PK (Ghana)) v Secretary of State for the Home Department* [2018] 1 WLR 3955, [46].
 - (ii) The support duty is discharged by the provision of payments pursuant to the support duty and not just NASS support, *per* Mostyn J in *R(K and AM) v Secretary of State for the Home Department* [2018] EWHC 2951 (Admin), [25] *et seq.*
 - b. The withdrawal of the support duty at 45-days does not involve an assessment of LP's individual needs but is a blanket rule and hence unlawful. This proposition is founded upon *R(EM) v Secretary of State for the Home Department* [2018] 1 WLR 4386, [66].
9. NN also challenges the 45-day rule on the basis I have set out above at [8(a)(i) and (ii)]. In addition, he challenges the scheduling rule:
- a. As being inconsistent with Article 14 of ECAT which, he argues, requires that a renewable residence permit *must* be granted if the competent authority considers that the victim's stay is necessary owing to their personal situation. He also challenges it on the grounds it fails to take account of the victim's particular needs.
 - b. As being discriminatory and so in breach of Article 14 of the European Convention on Human Rights.
10. In their applications for interim relief, the Claimants sought orders that the Defendant not reduce the level of their financial and other support pursuant to the support duty pending the outcome of their claims.

11. In addition, shortly before the hearing, those representing the Claimants sought an order for interim relief for all of those currently receiving support under the support duty (whether before the Court on judicial review proceedings or not).
12. Ms Wilsdon attended the hearing on behalf of the Secretary of State and made some oral submissions against the grant of interim relief. Despite the hearing having been ordered by His Honour Judge Cooke sitting as a judge of the High Court on 15 March 2019, the Secretary of State filed no evidence or written submissions. I make clear no blame attaches to Ms Wilsdon for that; she was only instructed very shortly before the hearing and she did her best to assist.

Discussion

13. This is an application for (in effect) interim injunctive relief. The test I have to apply is therefore the *American Cyanamid* test, modified for the public law context.
14. Following submissions, I was satisfied that the Claimants have good arguable cases on the grounds of challenge as presented. That was principally because:
 - a. Ms Wilsdon very fairly acknowledged that the concession in *PK*, supra, to which I have referred, presented some obstacles for her in relation to the support duty challenge, but made clear that whether that concession would be maintained was something which the Defendant wished to consider.
 - b. Furthermore, so far as the challenge to the scheduling rule is concerned, permission has been granted on similar grounds by Andrew Baker J in *R(JP) v Secretary of State for the Home Department* (CO/4606/2018) and *R(BS) v Secretary of State for the Home Department* (CO/4608/2018).
15. I turn to the balance of convenience and prejudice if interim relief is not granted.
16. So far as the individual Claimants are concerned, I was satisfied that they will suffer irremediable prejudice if their current levels of support are not maintained pending the outcome of these claims. For example, LP's support worker has made a witness statement setting out the adverse effects it will have on LP's ability to access her GP and other primary services if support is removed. She considers that it will adversely impact upon her young daughter. LP is plainly in a very distressed and fragile state which the support worker considers will deteriorate if her support is cut. The evidence in NN's case also persuaded me that he, too, would be at risk if his support is cut having regard in particular to his mental health issues.
17. Ms Wilsdon submitted that I should not grant interim relief. She said that it was possible to request an extension of the 45-day period. The support duty is provided by the Salvation Army under contract to the Home Office, and the Salvation Army subcontracts its role to other providers. Ms Wilsdon told me, and I accept, that there is a contractual duty on the Salvation Army to make, and the Home office to consider, such requests. However, the problems with this submission struck me as follows:
 - a. There was no evidence in front of me. Obviously, I accepted so far as it went what Ms Wilsdon told me, but her submissions were no substitute for proper evidence;

- b. In particular, there was no evidence about the criteria that are applied in relation to requests for extensions. Ms Wilsdon told me that a policy on extensions was currently being drafted, but was unable to tell me more than that. It is therefore impossible to know what the outcome would be if LP and NN applied for an extension.
18. I accepted that there will be financial consequences for the Defendant from the grant of interim relief. However, when set against the potential harm to the Claimants, both of whom have been accepted by the Defendant as having been trafficked and very badly mistreated, I was nonetheless satisfied that the balance of prejudice came down in favour of the grant of relief.
19. For these reasons, I granted interim relief in the form recorded in the order which has the effect of maintaining LP's and NN's current level of support until further order.
20. In relation to the grant of interim for all of these similarly situated, I accepted Ms Wilsdon's submission that given the resource implications for making an order potentially affecting many hundreds (possibly into the thousands) of persons, the Defendant should have the opportunity to file evidence. I therefore ordered that the Defendant should file evidence within 14 days; the Claimants have seven days thereafter to reply; and that there should be a rolled up permission and general interim relief hearing before the end of term (15 April 2019). I ordered interim relief for all persons similarly situated to LP and NN until that date.