Neutral Citation Number: [2025] EWHC 20 (Admin)

Case No: AC-2024-BHM-000193

IN THE HIGH COURT OF JUSTICE
KINGS BENCH DIVISION
ADMINISTRATIVE COURT

Birmingham Civil Justice Centre
Bull Street,
Birmingham

Date: 7th January 2025

Before:

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

- -

Between:

THE KING (on the application of)
LR (a child by mother and Litigation Friend LC)

Claimant

- and -

COVENTRY CITY COUNCIL

Defendant

- -

Mr Ranjiv Khubber and **Ms Serena K. Sekhon**
(instructed by **Central England Law Centre)** for the **Claimant**
Mr Richard Alomo (instructed by **Coventry City Council**) for the **Defendant**

Hearing date: 21st November 2024

- - - - - - - - - - - - - - - - - -

JUDGMENT

- - - - - - - - - - - - - - - - - -

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

HHJ TINDAL:

Introduction

1. This case concerns some of the poorest families in our community. It is a judicial review claim relating to local authority provision to families who have 'no recourse to public funds', namely no access to the mainstream benefits and housing systems due to their restricted immigration status. However, such families can be supported either by the Home Office (if asylum-seekers), or by local authorities as here. The case examines several legal aspects of this field including: statutory interpretation, the inter-relationship between statutory schemes (especially rates of support); the lawfulness of a local authority's policy of support to families in this position, which affects many families supported by that authority's policy; and the lawfulness of an assessment of need in one individual family's case. But hopefully I will not lose sight of the human aspect of life for all families in this difficult position.

2. The Defendant, Coventry City Council, has a 'No Recourse to Public Funds' ('NRPF') policy and the Claimant is a 15-year old whose family is supported under it. I anonymised her as 'LR' and her mother and litigation friend as 'LC'. The Claimant, her mother and two younger brothers 'LA' (now 13 years old) and 'LG' (now 6 years old) are Nigerian nationals, although LG was born in the UK after the rest of the family arrived here in 2012. At that time, the family had leave to remain, but that subsequently expired and they 'over-stayed' without leave. As a result, they are ineligible for the main benefits system. LC separated from her husband in 2023 due to domestic abuse and applied to the Home Office for leave to remain in November 2023, which is still not determined. In the meantime, the family has received support from the Defendant under its NRPF policy of accommodation, bus passes and financial support (cash). At times the latter has been lower than Asylum Support rates (in 2024 £49.18 per week per person), but since soon after the challenged assessment on 24th April 2024, the family has received the cash equivalent of Asylum Support (for the four of them, £196.72 per week).

3. This claim is a sequel to *R(BCD) v Birmingham Children's Trust* [2023] PTSR 1277 where I held a different NRPF policy discriminated in breach of Art.14 ECHR. In the course of doing so, I decided the effect of s.17 Children Act 1989 ('ChA') and Sch.3 Nationality, Immigration and Asylum Act 2002 ('NIAA') were that families lawfully in the UK but ineligible for the mainstream benefits system (as in *R(BCD)*), were in a different 'statutory category' either from families seeking asylum, or from families unlawfully in the UK (like the Claimant's family in the present case) whose entitlement to support was more restricted. In *R(BCD)*, the real issue was whether families lawfully in the UK (which I found all that family to be) were in a different 'statutory category' than asylum-seeking families, so my conclusion that families unlawfully in the UK were in yet another statutory category was not an essential finding. In *R(BCD)*, whilst the claimant argued for that and the defendant against it, in this case the roles are reversed. Mr Alomo for the Defendant supports that finding, whilst Mr Khubber and Ms Sekhon for the Claimant submit it was wrong. I gave permission in this case to re-argue this point and reserved it, as if my finding in *R(BCD)* was wrong, it would be better and quicker for me to correct it. I was also conscious that it would be better for the point to be decided in a case in which it was determinative and involving a family unlawfully in the UK, like this case.

4. I also gave permission to argue the other grounds of challenge, which raise different but related issues to *R(BCD)*. They rather overlap and repeat, which is why I tried to pin them down when granting permission on all four grounds. But they rather morphed again in oral argument and in the Claimant's post-hearing note ('CPHN'). What I will call Ground 1A is the interpretation of Sch.3 NIAA, revisiting *R(BCD)* and what I called a 'cap' (CPHN paras.4(i), (ii) and Annexe 1). Ground 1B alleges current support breaches Art.8 ECHR (CPHN para 4(iv)). (The point in para 4(iii) CPHN I saw as part of Ground 3 when I granted permission and I consider it there). Next, I consider the Claimant's challenge to the Defendant's *policy* (Ground 4 and CPHN paras.5(ii) and (iii)). However, again para.5(i) CPHN is not a challenge to the *policy*, but to the *assessment* and again I consider as part of a 'wide' Ground 3). Then I consider both the original 'narrow' Ground 3 and the 'wide' version incorporating those other legal challenges at CPHN paras.4(iii), 5(i) and 6. Finally, I consider Ground 2: an irrationality challenge (discussed briefly at CPHN para.7).

Background

5. I take the factual background from the helpful Skeleton Arguments, the documents in the bundle and statements on one hand by the Claimant, her mother and their solicitor Mr Bates; and the other, from Mr Heeley, a Social Worker and the Defendant's Strategic Lead for Help and Protection. Whilst there were a few minor factual differences between the parties, nothing turns on those differences. However, I also will bear in mind the support to the Claimant's family from the Defendant has fluctuated over the last 18 months. I will consider first the background to and the terms of the Defendant's NRPF policy, then the Claimant's family's circumstances, then the challenged assessment and claim.

The background to and terms of the Defendant's NRPF Policy

6. In *R(BCD)* at [40]-[95], I endeavoured to explain the legislative and policy background to local authority NRPF policies and there is no need to repeat all that here. However, in very brief summary, those who are 'subject to immigration control' as requiring leave to remain, are ineligible for support under the mainstream welfare benefits system and local authority social housing. The Divisional Court in *R(ST) v SSHD* [2021] 1 WLR 6047 upheld this system. Whilst this is called 'No Recourse to Public Funds' ('NRPF'), that is a misnomer as such individuals and families can receive support under other statutory schemes. However, support under each scheme differs, so in *R(BCD)* at [96]-[115], I described them as different 'statutory categories' of support. For example, asylum-seekers (unless disabled) and their families are ineligible for support from local authorities, but can access Home Office Asylum Support to avoid 'destitution'. It provides for 'subsistence needs' like accommodation; and money for food, toiletries and clothing, but not children's 'welfare needs' like toys (see *R(BCD)* at [66]-[75]), typically by a weekly payment per person, currently in 2024 £49.18. By contrast, non-asylum-seeking NRPF families can be provided by local authorities under s.17 Children Act 1989 ('ChA') with accommodation, services and financial support: taking into account not just 'subsistence needs', but also children's 'welfare needs': *R(C) v Southwark LBC* [2016] HLR 36 (CA). So, in *R(C)*, the Court of Appeal held that it would be unlawful to fix s.17 ChA support at the same level as the weekly Asylum Support per person payment. That underpins all the grounds of challenge in this case to differing extents.

7. The conclusion in *R(C)* on the *level* of support to NRPF families entitled to local authority support came after *R(M) v Islington LBC* [2005] 1 WLR 884 (CA) and *R(Clue) v Birmingham CC* [2010] PTSR 2051 (CA) discussed the *type* and *duration* of local authority support to NRPF families, given the implementation of the restrictions on support in the Nationality, Immigration and Asylum Act 2002 ('NIAA'). Before *R(M)*, cases usually focussed on local authority support to fund NRPF families to return to their country of origin (see e.g. *R(Kimani) v Lambeth LBC* [2004] 1 WLR 272 (CA)). However, in *R(M)*, the Court of Appeal held a local authority could provide accommodation to NRPF families under para.10 Sch.3 NIAA and Withholding and Withdrawal of Support Regulations 2002 ('WWSR') pending the resolution of a family's application for leave to remain in the UK, provided they were not in breach of removal directions. Moreover, in *R(Clue)*, the Court of Appeal held that a local authority should not refuse financial support to a NRPF family pursuing an application for leave to remain under Art.8 ECHR (unless it was obviously hopeless or abusive) if that refusal would effectively require the family to leave the UK and abandon that application. I return to both cases (and the challenged part of *R(BCD*) later as they are relevant to Ground 1A*)*.

8. Particularly in an ongoing 'Cost of Living Crisis', what may seem to other families like very small differences in financial support can make a huge practical difference to NRPF families. As discussed in *R(BCD)* at [26] and [58]-[60] and in the research Mr Bates quotes in his statement from Project 17 in 2019, the Joseph Rowntree Foundation in 2022 and by Asylum Matters in 2023, life on Asylum Support or its near-equivalent is extremely hard. Even on the lower 2022 figures, the Joseph Rowntree Foundation estimated the 'destitution threshold' based on the average weekly spend of the poorest 10% of society as significantly higher than the then-Asylum Support rate. In 2023, Asylum Matters found 80% of families on Asylum Support cannot buy the clothes they need and 45% cannot buy the food they need, so parents often go hungry to feed their children, as the Claimant's mother has done at times. Project 17 surveyed how such poverty affects children and how teenagers in particular compare themselves to their peers at school and acutely feel shame for their relative poverty, not only in cash terms but in contemporary essentials like internet access; and how this affects their mental health, as is true of the Claimant.

9. As against this, Mr Bates also fairly includes a document from the NRPF Network, which is a network of local authorities to support them to make NRPF policies and provide support consistently with national standards. The March 2023 NRPF Network paper explains in 2021/2022, local authorities nationally spent £64 million supporting NRPF households without central government funding, even though central government – i.e. the Home Office - imposes NRPF conditions and excludes families from the mainstream benefits system (and then takes considerable periods of time in adjudicating their applications for leave, as in the present case, over a year), leaving local authorities to foot the bill for their support. Consequently, as Mr Heeley explains, local authorities like the Defendant have to draw their NRPF funding primarily from Childrens' Services Budgets, which means for every pound spent on NRPF families there is £1 less to spend on safeguarding children generally. Given that NRPF families have trebled in number in the Defendant's area in the last two years, unsurprisingly its NRPF budget of £289,000 has overspent by £200,000. Whilst both sides point to that overspend for different reasons, I consider it is only marginally legally relevant, but obviously it is practically important.

10. Against this challenging landscape, many local authorities, including the one in *R(BCD)* and the Defendant in this case, have re-drafted their NRPF policies along broadly similar lines, explained by the NRPF Network in their March 2023 paper. It advises local authorities on setting an appropriate standard 'subsistence rate', depending on whether accommodation and utilities are provided without charge separately, but also including basic goods and services and how that can be 'benchmarked' against Asylum Support rates as 'a floor beneath which subsistence rates should not fall' (as I said in *R(BCD)*). But citing *R(C)* (albeit by its unreported title of *R(C, T, M and U)),* the NRPF Network emphasise 'flexibility' in support:

> "Whilst a minimum subsistence rate can be a useful tool for local authorities to set a baseline for basic living support, the approach is only viable when combined with a policy of providing additional support where it is needed. Examples of additional support include travel to a day centre or an appointment, payment of unavoidable fees when seeking to confirm identity or progress immigration matters, and paying costs related to a child's schooling where those costs aren't covered by their school."

In short, the recommended NRPF Network approach is to provide accommodation and support which meets NRPF families' subsistence needs', but with the flexibility of increasing that support to meet additional 'welfare needs' of the kind described, also including things like bus passes, school uniform etc. As a convenient shorthand, one might call this model a 'subsistence-baseline, welfare top-up' approach, to differentiate it from the Asylum Support 'subsistence-only' approach.

11. Mr Heeley in his statements effectively suggests the Defendant takes such a 'subsistence baseline, welfare top-up' approach in its s.17 ChA NRPF provision. In summary over his two statements, Mr Heeley describes an approach where social workers first undertake a 'multi-agency screening assessment' drawing on information from the Home Office, Police, Probation, Health (including GPs) and Education (including schools). NRPF families are given a social worker to conduct a Children and Family Assessment within 45 working days. Pending that assessment, families receive accommodation and the equivalent of the current Asylum Support rate. The assessment considers the needs of the family and the individual children and if there are no identified needs beyond finance and housing, the family will be referred to the NRPF support 'Hub' to assess those needs and arrange provision. Such families without 'additional needs' are then supported not by a social worker, but a Child and Family worker who will support them in liaison with the Home Office about pending immigration applications and can provide additional direct support. Those needs are kept under review and if they change, a social worker will re-assess them in a full Children and Family Assessment.

12. As Mr Heeley also explains in his first statement, its NRPF policy has several objectives: compliance with the law; clarity and consistency in provision to avoid unequal or even arbitrary treatment; safeguarding and welfare of vulnerable children and adults; resource management under significant financial constraint; and demonstrating a public commitment to NRPF families. Mr Heeley suggests:

> "10 The Section 17 budget is allocated based on the specific needs of the child and their family, not on their wants or preferences…[F]unding decisions are made with the primary goal of addressing the essential needs that are necessary to safeguard and promote the child's welfare.

> 13….Coventry Children Services assess the circumstances of each child and family to determine what support is required to ensure the child's safety, health, and well-being. This typically includes providing financial assistance for necessities such as food, clothing, and shelter, or funding services that help maintain a stable home environment.
>
> 14.The key principle is that the Section 17 budget is used to meet critical needs, particularly when failing to do so could lead to more severe outcomes, such as the need for the child to be taken into care. It is not intended to cover non-essential items or services that, while desirable, are not necessary for the child's welfare.
>
> 15.When drawing from the Section 17 budget, social worker managers do have the discretion to go beyond a minimum base rate of support, depending on the specific circumstances and needs of the child and family. While the primary focus is on meeting essential needs, there is flexibility to provide additional support if it is deemed necessary to safeguard and promote the child's welfare.
>
> 16.For example, if a family is facing unique challenges that require more than just basic support such as needing specialised services, emergency housing, or additional financial assistance to prevent a crisis. This discretionary support is assessed on a case-by-case basis, ensuring that the level of assistance provided is proportionate to the child's needs and the potential risks involved.
>
> 17.This discretion allows social workers…to respond to the specific situations they encounter, going beyond a one-size-fits-all approach and ensuring each child receives the level of support they need to thrive…

This is the context against which one must read Mr Heeley's comment that:

> "9.…The support provided is intended to prevent destitution and ensure that children within NRPF families are not at risk."

13. This 'subsistence baseline, welfare top-up' approach is echoed in the main body of the Defendant's NRPF Policy, updated in 2024, which materially provides:

> "5.2 Assessing Need under Section 17 Children Act 1989….
>
> Assessment Considerations
>
> As part of the assessment, the local authority would need to establish what other support options are available to the family in the UK, or whether return to country of origin may resolve the family's inability to self-support in the UK when the parent is in an excluded group.
> The courts have been clear that the purpose of section 17 is to provide a safety net of support for families who either cannot leave the UK or who are lawfully present in the UK but are prevented by their immigration status from being able to claim benefits usually provided to families with a low income. The local authority must gather information which is adequate for the purpose of performing its statutory duty under section 17 Children Act 1989 and must also have due regard to the child's best interests in the context of having regard to the need to safeguard and promote the welfare of children.
> Any information and evidence already gathered by the local authority as part of its initial enquiries must be considered within the child in need assessment, in balance with other factors relating to the welfare of the child:

- How the family's financial and housing circumstances are affecting the child's health and development and what assistance the child needs and how the child would be affected if they do not receive such help;
- How urgently the family needs assistance;
- Details of medical conditions affecting the child or family members;
- Details of the child's current and previous schools;
- If the child's other parent is not in the family household, their details including nationality and immigration status, what contact the parent and child has with them and whether they are providing any support.

Depending on the family's particular circumstances, information and documents relating to the family's finances and housing will need to be requested. The child in need assessment must consider all relevant information, all findings and the reasoning behind them must be fully documented, with the parents being given an opportunity to respond…..

Considerations when Parents are in an Excluded Group

When a parent is in one of the groups of people that are excluded from receiving accommodation and financial support under section 17, a human rights assessment will also need to be undertaken in conjunction with the child in need assessment to determine whether support must be provided to prevent a breach of the family's human rights. If return to country of origin is being considered, the child in need assessment should also address the child's needs within the country of origin and how they may or may not be met, as this….would be relevant to the human rights assessment….

Providing Support

The local authority has a power to provide a wide range of services in order to meet assessed needs under section 17 Children Act 1989. The local authority is not under a duty to meet all formally assessed needs; section 17 is a target duty and may take into account its resources in determining which needs are to be met, but such a decision must be reached rationally and the local authority must act reasonably.

The Court in *R (C, T, M & U)* [aks. R(C)]...set out the following principles:

- An assessment must be carried out to determine the needs of a particular child, in line with statutory guidance and with proper consideration of the best interests of the child;
- Support for families with NRPF should not be fixed to set rates or other forms of statutory support without any scope for flexibility to ensure the needs of an individual child are met;
- Local authorities must undertake a rational and consistent approach to decision making, which may involve cross-checking with internal guidance or other statutory support schemes, so long as this does not constrain the local authority's obligation to have regard to the impact of any decision on a child's welfare.

The Asylum Support webpage (GOV.UK) sets out the basis for housing, financial support, access to NHS healthcare and schools which may be available for an asylum seeker and their family while waiting to find out if they will be given asylum.

> Ongoing Duty to Reassess Need
>
> Section 17 is an ongoing duty, and when a family's circumstances change the local authority must decide whether this means that the child's needs must be reassessed.
>
> Excluded Groups
>
> 5.3 Assessments when the Exclusion under Sch.3 Nationality, Immigration and Asylum Act 2002 Applies: Human Rights Assessment
>
> When a family with NRPF requests support, the local authority must establish whether the parent is in an excluded group, and therefore the family can only be provided with the support or assistance that is necessary to prevent a breach of their human rights– a 'human rights assessment'….
>
> Section 54 and Schedule 3 Nationality, Immigration and Asylum Act 2002 (as amended) set out categories of person who are not eligible for support from local authorities, being families where a parent is: In breach of immigration laws, for example, is a visa overstayer, illegal entrant, or appeal rights exhausted (ARE) in-country asylum seeker; An ARE asylum seeker who has failed to comply with removal directions; A person with refugee status that has been granted by another EEA country. They can only receive 'support or assistance' under section 17 Children Act 1989 if such support is necessary to prevent a breach of their human rights.
>
> Schedule 3 does not mean that assistance can automatically be refused to a family when the parent is in an excluded group, because support must be provided where this is necessary to avoid a breach of the family's human rights. The purpose of Schedule 3 is to restrict access to support for a family where the parent is in an excluded group because they either have no permission to remain in the UK, or can no longer self-support, and when returning to country of origin (where they may be able to access employment and receive services), would avoid a breach of human rights which may occur if they remain destitute in the UK. This means that, along with establishing whether there is a child in need, local authorities must identify whether there are any legal or practice barriers preventing the family's return to the parent's country of origin, as return cannot be considered unless these are cleared…by….a human rights assessment.
>
> The Schedule 3 exclusions do not apply to all families with NRPF. A family will not be excluded from receiving assistance under section 17 where the parent has one of the following immigration status types: Leave to enter or remain in the UK with the NRPF condition; ….Asylum seeker…Such families are not excluded from section 17 support and would need to be provided with assistance if they are found to be eligible for this…."

(I should say that no point is taken about this apparent inaccuracy about asylum-seekers, although in fairness local authorities can support *adult* disabled asylum seekers with care needs: *R(TMX) v Croydon LBC* [2024] ACD 42 (HC), albeit not disabled children from asylum-seeking families, because they are excluded from s.17 ChA support by s.122 CA: *R(A) v NASS* [2004] 1 WLR 752 (CA)). This main body of the policy is essentially the same as the 2023 version, also in the bundle.

14. No complaint is made in the present case about that main body of the Defendant's NRPF policy. Rather the challenge focusses on the following page of an associated document, neither exhibited nor referred to in the policy, that simply states (in full):

> "**2024/2025 NRPF Support Rates per Week**
> £49.18 per person
> £9.50 Child under 1 year
> £5.25 Child aged 1-3 years
> £5.25 Pregnant mother
> Gas £24.10
> Electricity £24.10
> Water £8.40
> Maternity grant, one off payment £300 if not supported by DWP.
> Bus passes/School Uniform can also be provided as required."

It is agreed that the £49.18 per week figure (and the additional rates for children aged up to 3 years, for a pregnant mother and the maternity payment, which are not relevant to the Claimant's family) are exactly the same as the 2024 Asylum Support rates. However, the figures for gas, electricity and water bills, not paid to the Claimant's family who have free accommodation, are not included in the Asylum Support scheme, but that typically also provides free accommodation too. In reality, it is only the bus passes and school uniform that in practical terms add to what is provided in money or in kind under Asylum Support. Nevertheless, the Defendant relies on this to reject the Claimant's allegation these rates are identical with Asylum Support rates, whilst the Claimant argues the additional sums make no difference, as the lawful flexibility in what I will call the 'Main NRPF Policy' is unlawfully fettered by this apparently exhaustive 'Support Rates Page' as I call it.

The Initial Assessment of and support to the Claimant's Family

15. The Claimant's family, then comprising her father, her mother, the Claimant herself and her younger brother LA, arrived in the UK in 2012 with leave to enter and remain on a visitor visa. Whilst her mother and LA briefly returned to Nigeria, the Claimant and her father stayed in the UK, re-joined by her mother and LA in 2013. Their visitor visas expired, but they did not apply to renew them, so became 'over-stayers' unlawfully in the UK and remained so when LG was born in 2018.

16. In May 2023, following domestic violence by the children's father on their mother (which I need not detail and which has not been disputed), the Police referred the family to the Defendant's Children's Services department. LC also received help from a charity to get a non-molestation order against her husband. The Defendant initially placed LC and the three children in emergency accommodation in a hotel and provided the family with £135 per week and travel vouchers to and from school.

17. On 1st August 2023, the Defendant completed a Children's and Family Assessment ('the initial assessment'). This noted no basic care, health, or education concerns with any of the children who were all attending schools which were supporting them with food and clothing vouchers. LC had appropriately protected the children by leaving their father after the domestic abuse and whilst conditions in the hotel were not ideal, 'the children have been seen a number of times and always appeared safe, well and relatively happy'. Nevertheless, the children were considered 'in need' under s.17 CA and a Child in Need Plan was recommended to be implemented.

18. Shortly after the Initial Assessment, on 17th August 2023, the family moved to their current accommodation in two rooms in a house with four bedrooms and a shared kitchen, bathroom and toilet. LC and the two boys share one room whilst the Claimant has her own room. The Defendant has enquired about a third room for the family but would be charged £70 a night. That accommodation is provided to the family for free without charges for utilities, except internet services which the family have had to fund since they have been paid £196.72 from June 2024.

19. In November 2023, the Claimant's mother made an application, assisted by her present solicitors, for leave to remain under the Immigration Rules and Art.8 ECHR. This was based on the family's long residence in the UK for over a decade (albeit without leave to remain for most of that period), where LG was born and where the Claimant and LA have spent most of their lives (she was only 3 years old when she came to the UK and he was less than 2 years old). That has still not been adjudicated by the Home Office, although a decision is now (over)due and could arrive any time. A grant of leave to the family would probably remove their NRPF status, whilst refusal would clearly continue it pending any appeal. However, for the moment, they have an arguable application for Art.8 leave just as in *R(Clue)*.

20. The Defendant supported the Claimant's family immigration application and also provided additional support on top of the £135 per week, with additional payments of £35 for the May 2023 half-term and £30 for the October 2023 half-term and £20 over Christmas. The family have also been supported by charities and their school – the Claimant and LA have been provided with a school laptop and allowed to attend parties and school trips and the Claimant undertook her Duke of Edinburgh challenge. The Claimant's mother subsequently received £30 at Easter 2024 which she used to treat the children with the cinema and fast food.

21. Nevertheless, the Claimant, who from the assessments and her statements is clearly highly intelligent and articulate, has vividly described the effect of her relative poverty on her self-image (as Mr Bates points out, consistent with the Project 17 survey in 2019). The Claimant described her experiences in late 2023:

> "During the last half of last year there were several instances where I [went] out with my friends and they had to buy food for me because I either didn't have enough money or no money at all. I know they did this because they felt sorry for me and wanted to include me. However, this made me feel inferior to them and very uncomfortable. I know they don't look down on me but that is what I felt. I compare myself to them and I feel very different to them. This is not nice. I know they like me and want to spend time with me, but I always feel a little bit uncomfortable when I am with them."

22. In January 2024 the Claimant's solicitors wrote to the Defendant seeking higher payments than £135 per week, pointing out that this figure was well below the revised Asylum Support figure of £49.18 per person per week (which in the family's case would be £196.72). Bizarrely, this prompted a re-assessment by the Defendant that actually *reduced* the family's payments to £117 a week from 15th January 2024 as the new Asylum Support rates had not been adopted as a 'subsistence baseline' by the Defendant.

Understandably on 26th January 2024, the Claimant's solicitors sent a letter before claim relying on *R(BCD*) to say the Asylum Support was a 'baseline' yet the £117 a week fell well below it, inconsistently with *R(BCD)*.

23. Equally unsurprisingly, on 31st January 2024, the Defendant agreed to pay the family £196.72 per week and to continue to provide bus passes. That is what they currently receive. But that payment only lasted a month in February 2024, before it fell in early March to between £192-£194 per week until adjusted to £196.72 early June 2024. I will return to the Claimant mother's description of the difference that made.

24. In the meantime, the family continued to struggle with the under-payment. For example, in February 2024, only just after the family initially started receiving the £196.72 before it fell again, the Claimant began to notice that – with the very best of intentions towards her - her friends had also stopped doing things with her that cost money, but had stopped inviting her to those activities like the cinema or shopping:

> "This makes me feel left out because I know they do this amongst themselves. I don't like to think about this. I don't think they will stop being my friends but I have a small worry that eventually they will. I feel ashamed and I feel like I am just there, not really contributing to the group…
> I remember Valentine's Day this year very well. My friends and I had planned the day very carefully a long time in advance. We were going to be at a friend's house and we had all been given tasks to do, like getting food, buying and doing decorations and finding outfits. I really looked forward to this. However, I quickly realised that I wouldn't be able to do my part because I couldn't afford to buy the things I needed to buy. This made me so upset and I decided to drop out completely. I stayed at home instead of being with my friends. It was not a nice experience and I remember I felt very upset for a long time and I probably wasn't nice towards my mother."

This incident encapsulates the effect that her poverty has on the Claimant's own sense of self and identity within her friendships, as well as how that starts to fray the fabric of her relationships with her family. Mr Khubber argues the family's poverty is relevant to both the Claimant's 'private life' and their 'family life' under Art.8 ECHR. I consider whether it engages Art.8 in Ground 1B below.

The Challenged Assessment and subsequent claim

25. In February 2024, the Defendant also began its re-assessment of the family's needs, which it completed on 24th April 2024 ('the challenged assessment'). On 23rd February 2024, the Claimant's solicitors sent detailed representations about that.

26. In fairness – and doubtless due to her natural stoicism and loyalty to her family - the Claimant put a brave face on her situation in discussion with the social worker:

> "We spoke about school and you said you were a little worried about tests and it can be stressful. I know school is important for you and reminded you all teachers speak very positively about you, you are hard-working, polite and a good student...We spoke about home life and you said generally you are happy at home. You told me you enjoy spending time with your family and get on with your mum. LG can be annoying sometimes but you love him. You also said that you would like to do more activities outside of school and that you cannot afford

> to do this. You mentioned about wanting to have private singing lessons. I appreciate and understand your wanting for this, and hopefully in time you will be able to do more, however at the moment your mum does not have a lot of spare money….
>
> You told me that this was because she is awaiting to receive the correct status and I said this was correct. You told me you do have a nice time home and you enjoy reading, watching tv shows, seeing friends….I mentioned to you that if you would like more books to read then let your mum know and she will tell me as we have lots of donations of books. You also told me ….you are not worried about things at home. We spoke about your dad and you said you do not want to see or talk to him right now. I asked what was making you feel this way and you told me it was because of how he treated your mum. We spoke for a short while about this and I highlighted that this was fine and it is your decision…..I asked if there was anything you would like to talk about further and you said no."

27. Similarly, the Claimant's brothers also gave a social worker a positive picture. LG, who was only 5 at the time, raised the usual gripes of children of that age about sibling relationships, although LA who was then 12 did mention money:

> "You told me home was good, you chill out, watch tv, go and see friends. You said that you would like to go out more, but you do not have money for this. I said that I was aware this was difficult and explained about your mum being on a tight budget whilst we are supporting her through her home office application. You appeared understanding of this and we spoke about hopefully in the near future, your situation as a family will change and your mum will be entitled to regular benefits etc. You said that you were not worried about anything at home, just that you would like to do more."

The social worker commented that:

> "[LG] is not as aware as [the Claimant – LR] and [LA] in relation to the family's financial difficulties due to his age, however it is clear that this weighs upon [LR] and [LA]. Both have spoken to me about wishing they had more money to engage in more activities with their friends outside of school however are understanding that there are limitations to what they can do, which is through no fault of their mother. I have explained that the family are completely reliant on Children's Services for finances and that this has been assessed to ensure they are receiving the legal requirement."

The social worker again noted no concerns in the children's basic care, health, or education. Their school attendance was in excess of 90% and all the children were meeting their education milestones, with the Claimant described as a 'good' student in all her core subjects. The social worker commented that this was a 'testament' to their mother's parenting despite the financial constraints, adding:

> "Whilst I appreciate that the children do not have access to materials, finances and experiences that some of their peers may have, I do not feel that their emotional health is significantly impacted by this. They talk lovingly and warm about each other and I witness positive interactions between all of the siblings. Schools speak very highly of all the children and have not raised any issues about their mental health."

28. The children's mother LC did report difficulties with her mental health and flashbacks to the abuse by the children's father and there was discussion about referral for the appropriate therapy to support her. Commenting positively on her care of the children, the social worker observed that:

> "[LC] continues to provide the children with a good level of basic care, even during these more difficult times. It is clear that the family's lack of finances does impact on their quality of life however this is not to a level that is of a safeguarding concern. [LC] is committed to ensuring that all of the children's basic care needs are met and manages her finances well to achieve this.… [LC] would like to be able to do more with the children out of school however her finances make this very difficult.… [LC] has stated many times that she loves her children lots and wants the best for them. [LC] feels that generally, the children are happy at home. [LC] said the children are 'holding up' during these more difficult times.…
>
> [LC] was asked what she thought was working well and she said –
> - The family have each other.
> - They hang out together and sometimes go out if there is some spare money. This is about once a month.
> - School is going very well for the children.
> - They do movie nights at the house together.
>
> [LC] was asked what she was worried about and said –
> - The children want to go out more and want more 'stuff' like new tracksuits and want money.
> - [LC] worries about [The Claimant LR's] English subject at school. She would like her to have extra tuition. [LC] said this also worries [LR]…
>
> [LC] is now receiving the updates *[sic]* Asylum Support Rate which is £192.72 a week. [LC] also receives 5 adult bus tickets and 15 child tickets every week. [LC] said she manages well with the money and budgets everyday. The children have enough to eat. If [LC] has any spare money she will spend this on the children. [LC] said that the children are understanding of their financial position. At holidays, [LC] is given some extra money to take the children out. For example, over the Easter holiday, [LC] was provided with £30 extra so she could take the children to the cinema. [LC] would eventually like to work so will explore this once her application with the Home Office is complete."

29. The social worker's final analysis concluded that (my italics):

> "Since the [initial assessment] in August 2023, Children's Services have supported [LC] and children to obtain suitable temporary accommodation and provided financial support. This is ongoing whilst the[ir] immigration application sits with the Home Office. No clear timescales have been given for when we will receive an outcome for the application so until then, [LC] is completely dependent on Children's Service for accommodation and finances. In the months following the [initial assessment], [LC] and the children experienced instability with their hotel accommodation and lower weekly sustenance payments. The family are now living in a house…which is more suitable for the family and caters to all the children's basic care needs. Whilst not ideal as it is still temporary accommodation, [LC] has stated that the family are managing okay living there. [LC] is now all receiving the updated Asylum Support amount, which is £192

> every week [*sic*]. [LC] has said that she successfully budgets this money to ensure that the children's basic care needs are met. [LC] also receives bus tickets every week to ensure she can get the children to their schools. *I can appreciate that this tight budget does not always allow the children to engage in wider activities outside of the family home however it is not presenting as a safeguarding issue*. The children all appear happy and healthy and have been seen at home and school. I have spoken with [LA] and [LR] about their position, and how this differs from their peers, and they appear understanding and hopeful that in time, this may change. It is really positive to see the school supporting [LC] and the children through a variety of ways. All school trips have been fully funded by the school for the children and therefore they have not had to miss out on fun and educational experiences. [LG] receives free school dinners and the schools have also accessed their boot funds to provide some essential items for the children. Both pastoral teams are aware of the children's current lived experience and therefore can observe and notify LC/services if they are worried about the children. Both schools have said how polite, friendly, hard-working and lovely LG, LA and LR are. LC should be very proud that despite the difficulties she has faced, and continues to face, all three children have great school feedback and are polite and friendly…..Throughout this updated assessment, there has been no safeguarding concerns raised or highlighted. The children are well cared for, [LC] manages her finances well and the children all attend school daily. *The family are living to their current means, which does mean that the children do not get to routinely engage in lots of wider activities which appears to be the family's main worry. Children's Services provide the statutory support rates and whilst it would be lovely to be in a position where this could be increased so the family could have more day trips out, electronic devices etc, this is not possible*. I have visited the family many times over the past year, as have other colleagues, and they are always welcoming, warm and friendly. [LC] and the children have a good relationship with Children's Services and communicate very well. As there are no ongoing safeguarding concerns, and an updated Children and Families Assessment has been completed, it is possible that the family will be transferred over to the NRPF team….[LC] will continue to receive the same level of financial and housing support."

30. The social worker's manager essentially adopted the same view:

> "….This assessment reflects the current needs of the family and reaffirms that [LC] is doing incredibly well to ensure that the children's needs continue to be met despite the challenges they face in a temporary home. [LC] is in receipt of the updated Asylum support amount, which is £192 [*sic*] every week, alongside travel vouchers which enable the family to continue accessing the same schools and the community on a weekly basis. There is an absence of safeguarding concerns which has been the case since the referral where [LC] demonstrated her ability to protect and prioritise the safety and needs of the children despite concerns relating to her status. Until the outcome of the Home Office application, [LC] and the children will continue to be supported…Ongoing efforts will be made to find them accommodation that is more attuned to the needs of the family and regular updates will be sought in respect of the outstanding immigration status."

31. Whilst the social worker and manager appear to have thought the Asylum Support rate for the family was £192, in fact as the Defendant had already accepted, it was £196.72. This was finally corrected in June 2024, with a back-payment of the shortfall back to February 2024. This followed a second letter before claim by the Claimant's solicitors in May 2024 contending: (i) the family were still receiving below the Asylum Support amount; (ii) the Defendant was failing to meet the children's welfare needs, in particular relating to activities, although the only ones specified were: (1) Swimming classes - £30 per month per child; (2) Rock and roll classes - £34 per term (for LG); (3) English tuition - £5 per hour; and (4) Singing classes (both for the Claimant, which discussed her desire for in her first statement); (iii) irrationality in refusing to meet those needs as identified in the assessment; (iv) misdirection of law in suggesting 'it was not possible' to provide support above the 'statutory support rates' when there were no 'rates' for s.17 CA; and (iv) the NRPF policy was unlawful in the light of *R(BCD)*. On 28th May 2024, the Defendant peremptorily rejected these challenges in its brief pre-action response, which I am bound to say that I hope is not typical of its responses.

32. On 16th July 2024, the Claimant issued the present claim, pursuing four grounds of challenge which I have disaggregated above. She did not pursue a challenge for the period where the family were paid less than the Asylum Support rate. Ground 1 rolled together point (ii) in the May pre-action letter, Art.8 ECHR and a new challenge to my 'statutory category' interpretation in *R(BCD)*. I consider those are three distinct points I will consider separately: the interpretation point as Ground 1A in discussing the legal framework, the Art.8 point as Ground 1B and the 'assessed/welfare needs' points as part of the 'irrationality' in Ground 2 (which I consider last). The 'misdirection of law' point was pursued as Ground 3 and the 'unlawful policy' point was pursued as Ground 4.

33. On 18th July 2024, I gave urgent consideration to the claim, anonymised the Claimant and her family and directed an expedited Acknowledgement of Service. That was filed on 24th July 2024 with Summary Grounds of Defence drafted by Mr Alomo which denied all four grounds. In summary, those endorsed my 'statutory category' interpretation in *R(BCD)* and so argued financial support was limited to that necessary to avoid breach of Art.8 ECHR, which did not require additional financial support for this family. He also argued the policy was lawful because it was not limited to Asylum Support rates. He contended there was no misdirection of law or irrationality. On 1st August 2024, I granted permission as discussed above and listed the substantive hearing before myself in November to expedite the claim. (As I raised some authorities at the hearing, I also allowed Counsel to file post-hearing notes).

34. The Claimant's statement filed in September 2024 vividly describes a frustrating summer holidays where the family's finances limited what they could do, especially as they were not provided with bus passes for most of it, so the Claimant could not see her friends very much, nor afford to get one a birthday gift, exacerbating her sense of shame, frustration, upset and isolation. The Claimant's mother also experienced stress over money as her bank account was frozen and she has not been able to obtain school uniforms (the Claimant's shoes are too tight and her bag has holes) and has visited a food bank. She also describes how she finds the Child and Family Worker is less helpful from the social worker. But as this post-dates the challenged assessment, I simply note it without factoring it into my decision.

Legal Framework (and Ground 1A)

'The Statutory Categories'

35. As explained, 'NRPF' families can access statutory support schemes. But there is no one scheme which governs their eligibility, which turns on a complex miscellany of legislation. In *R(VC) v Newcastle CC* [2012] PTSR 546 (DC) at [16], Munby LJ (as he then was) endorsed counsel's description of this legislative interface as a 'monstrous labyrinth'. Given the vulnerability of NRPF families, in *R(BCD)* at [61]-[114], to assist them, their advisers and authorities, I tried to find a way through that labyrinth by reviewing the legislation and how I thought it created five 'statutory categories' of support for 'NRPF families' (albeit they were not exhaustive of the forms of support available) which I set out at [115]. I will only summarise them:

    (i) *Category 1*: Unrestricted support under s.17 Children Act 1989 ('CA') for eligible NRPF families (typically those lawfully in the UK);

    (ii) *Category 2*: Asylum Support under ss.95-96 of the Immigration and Asylum Act 1999 ('IAA') for asylum-seeking families.

    (iii) *Category 3*: s.17 CA support restricted by Sch.3 Nationality, Immigration and Asylum Act 2002 ('NIAA') to direct support to the child under s.17 under para.2 NIAA, and/or accommodation to the family under para.10 NIAA, and/or other support to the family *to the extent necessary* to avoid ECHR breach under para.3 Sch.3 NIAA;

    (iv) *Category 4*: Support to families within Sch.3 NIAA limited to that under para.10 and Withholding and Withdrawal of Support (Travel Assistance and Temporary Accommodation) Regulations 2002 ('WWSR'); and

    (v) *Category 5*: Support from the Home Office under s.4 IAA for refused or 'failed' asylum-seeking families (but not all such families, as I explain).

36. I have italicised 'to the extent necessary' in Category 3 as that is the part challenged by the Claimant of the interpretation of para.3 Sch.3 I adopted in *R(BCD)*. Whilst there was no other challenge to those statutory categories, I have nevertheless re-examined them proactively to satisfy myself they remain useful. The key point to re-emphasise, as I said in *R(BCD),* is the categories describe *different types of support* available under the various statutory schemes, they do not indicate *different types of people* entitled (or not) under them. Therefore, in *R(VC)*, not cited in *R(BCD)*, the Divisional Court held whilst 'failed asylum seeking' families *may* be eligible for Home Office support under s.4 IAA (i.e. Category 5), that *in itself* did not disentitle them from s.17 CA support (i.e. under Categories 3 or 4). However, as explained in *R(VC)* at [41] and [89] (see *R(BCD)* at [74]-[75]), an asylum-seeker with a dependent child at the time of their asylum claim is still eligible for Asylum Support until the child reaches 18 (i.e. stays in Category 2), so is ineligible for s.17 CA support under s.122(5) IAA By contrast, if an asylum-seeker's child was born only *after* asylum was refused, they are ineligible for Asylum Support and *may* be eligible for s.17 CA support. They are most likely to be in Categories 3 or 4 if they fall within paras.6 and 7A Sch.3 NIAA for failing to comply with removal directions or after 'certification' as unreasonably failing to leave. This shows the categories differentiate *support*, not *groups*. With that caveat, I hope they remain useful. As the law changes, obviously the categories will change as well.

37. In *R(BCD)*, the statutory categories were relevant to the successful challenge that the NRPF policy there violated Art.14 ECHR by unjustifiably failing to differentiate between

different groups with different Art.14 'statuses': children's nationalities, children's immigration status and adult immigration status. I found at [171]-[180] of *R(BCD)* that similar treatment of families with different 'statuses' and circumstances was not justified by equality or practicality, since legislation already differentiated between them creating the different 'statutory categories' of support. There is no such challenge in the present case, where Art.8 not Art.14 ECHR is invoked and where the alleged failure to differentiate is said to violate domestic law, in effect by a local authority limiting a NRPF family entitled to s.17 CA support in Category 1 (or Category 3, which turns on the *R(BCD)* interpretation issue) to the same payment as Asylum Support under Category 2 when the Court of Appeal in *R(C) v Southwark LBC* [2016] HLR 36 described that as unlawful.

38. As discussed in *R(C)* and *R(BCD)* at [66]-[75], provision under s.17 CA 1989 is different to provision under the Asylum Support scheme in s.95 IAA, which states:

> "(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 the Secretary of State to be destitute or to be likely to become destitute within such period as may be prescribed….
>
> (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."

However, s.122 IAA converts that power to meet essential living needs to avoid 'destitution' under s.95(1) IAA into a duty to children under ss.122(3)-(4):

> "(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… accepted by….arranging for the provision of essential living needs for the child as part of the eligible person's household."

Made under s.95(1) IAA, the Asylum Support Regulations 2000 ('ASR') Reg.9 excludes from 'essential living needs': computers, toys, recreation and entertainment. Reg.10(2) provides that 'essential living needs' 'as a general rule' are met by a weekly cash payment per person, increased to £49.18 after the previous rate was found unlawful in *R(CB) v SSHD* [2023] 4 WLR 28. Since *R(BCD)*, it was held in *R(HA) v SSHD* [2023] PTSR 1899 essential living needs should generally be met by the Home Office with cash. While there are uplifts for children under 3 and maternity grants, Asylum Support is 'capped' (here an apt word, but see below) at set rates for accommodation and for 'essential living needs'. Gross LJ in *R(JK Burundi) v SSHD* [2017] 1 WLR 4567 (CA) at [67] explained 'essential living needs' are limited to 'subsistence needs' to avoid destitution and meet minimum living standards rather than including 'welfare needs' to promote children's welfare.

s.17 Children Act 1989

39. Whilst it is unnecessary to set out the whole range of statutory schemes for the issues arising in this case, it is helpful to set out s.17 Children Act 1989 ('ChA') and discuss its differences with the Asylum Support scheme, before parts of Sch.3 Nationality, Immigration and Asylum Act 2002 ('NIAA') to consider whether, when and if so how it qualifies, restricts or 'caps' (as I said in *R(BCD)*) s.17 ChA.

40. s.17 ChA provides, so far as is material in the present case:

> "(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.
>
> (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."

41. So far as material, Part 1 of Sch.2 (see s.17(2) ChA above) also provides:

> "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."

'A family' can include adult siblings with accommodation, but an authority may not be obliged to meet their other needs: *R(OA) v Bexley LBC* [2020] PTSR 1654. Also relevant is s.11(2)(a) Children Act 2004 ('ChA 2004') requiring local authorities to 'make arrangements for ensuring that their functions are discharged having regard to the need to safeguard and promote the welfare of children'.

42. In *R(C)*, Sir Ernest Ryder SPT explained the effect of s.17 ChA taken in combination with s.11 ChA 2004 at [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, for example *R. (G) v LBC* [2004] 2 A.C. 208 at [113] and [118]). 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."

43. That analysis was endorsed by the Supreme Court in *R(HC) v DWP* [2019] AC 845, where Lady Hale observed (albeit *obiter*) at [46]:

> "In carrying out [a] review, the local authority will no doubt bear in mind, not only their duties under s.17, but also their duty under s.11 of the Children Act

> 2004, to discharge all their functions having regard to the need to safeguard and promote the welfare of children, and their duty, under s.75 of the 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."

In *R(HC)* at [37], Lord Carnwath agreed about the effect of s.17 CA:

> "[T]he primary objective is to promote the welfare of the children concerned, including the upbringing of such children by their families."

As with any statutory discretion, decisions under s.17 ChA must be consistent with that statutory purpose: *Padfield v Minister of Agriculture* [1968] AC 997 (HL). So must policies guiding such decisions: *R(PSC) v DHCLG* [2020] 1 WLR 1774 (SC).

44. This primacy of welfare in s.17 ChA distinguishes it from the duty on the Home Office in the Asylum Support scheme in s.122 IAA to meet children's 'essential living needs': as said in *R(JK Burundi)*: it only entails meeting subsistence needs, not welfare needs. As Sir Ernest Ryder SPT emphasised in *R(C)* at [23] and [21]:

> "[23] In so far as it was submitted that destitution as defined by s.95 IAA 1999, i.e. an inability to meet essential living needs or inadequate accommodation, or by s.4 IAA 1999, i.e. destitution in the context of accommodation, is relevant to s.17 CA 1989, the difference between the purposes of the two statutory schemes must be borne in mind. The latter scheme is to be applied to those persons who would otherwise be ineligible for recourse to public funds in order to avoid a breach of their Convention rights. Furthermore, the s.17 scheme, unlike the IAA schemes, is not the subject of regulations that make provision for the support which is to be made available to the defined group for a specific purpose.
>
> [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."

I will return in dealing with Ground 4 to [21] and what Sir Ernest Ryder meant by 'starting point', but the key point is that s.17 ChA is fundamentally different from Asylum Support. Therefore, as he added in *R(C)* at [22], 'it is likely to be irrational to *limit* s.17 support to that provided in a different statutory scheme', e.g. Asylum Support. However, I emphasise he said 'limit', to which I also return on Ground 4. However, I first turn to Ground 1A, where my interpretation in *R(BCD)* of para.3 Sch.3 NIAA is challenged along with my suggestion there that it creates a separate 'statutory category' of support than for families with unrestricted s.17 ChA support.

Ground 1A: The effect of para. 3 NIAA Sch.3 Nationality, Immigration and Asylum Act

45. In *R(BCD)* at [85]-[95], I set out and contextualised Sch.3 made under s.54 NIAA in some detail, which it is unnecessary to repeat here, but I will repeat the key parts:

> "*Paragraph 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).
> (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).
>
> *Paragraph 2*(1) Paragraph 1 does not prevent the provision of support or assistance—(a) to a British citizen, or (b) to a child…(c) under or by virtue of regulations made under paragraphs 8, 9 or 10 below, or (d) in a case in respect of which, and to the extent to which, regulations made by the Secretary of State disapply paragraph 1….
>
> *Paragraph 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.
>
> *Paragraph 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 he is not an asylum-seeker….
>
> *Paragraph 10*(1) The Secretary of State may make regulations providing for arrangements to be made for the accommodation of a person if— (a) paragraph 1 applies to him by virtue of paragraph 7, and (b) he has not failed to cooperate with removal directions issued in respect of him.
> (2) Arrangements for a person by virtue of this paragraph— (a) may be made only if the person has with him a dependent child, and (b) may include arrangements for a dependent child."

46. Whilst I only mentioned them in *R(BCD)*, I will also set out in more detail here the Parliamentary Explanatory Notes to those key provisions (my italics):

> "[S]ection [54] introduces Schedule 3, which *restricts* the type of support and accommodation provided to those who are European Union (EU) or EEA citizens; those with refugee status in other EU/EEA states; failed asylum seekers and persons unlawfully present in the UK.
>
> Paragraph 1 (1) (a) - (m) of Schedule 3 lists the various pieces of legislation … under which support and/or accommodation to individuals in these categories will be *restricted*. Sub-paragraph (2) provides that any powers or duties imposed by the legislation in Paragraph 1 may not be exercised in respect of any person to whom this applies, regardless of whether that person has received support or not in the past.
>
> Paragraph 2 provides a safety net to children under 18. Children will remain eligible for support or assistance, as will adults provided for in regulations as eligible to receive it.
>
> Paragraph 3 addresses our international obligations. Nothing prevents local authorities or the National Asylum Support Service (NASS) exercising powers or performing duties *to the extent that it is necessary to avoid breaching any European Convention on Human Rights (ECHR) right*…

> Paragraph 7 provides that persons who are unlawfully present in the UK, and who are not asylum-seekers, are ineligible for support.
>
> Paragraph 9 allows the Secretary of State to make arrangements, by regulation, for persons to be provided with accommodation until the time of their journey home. Only persons with dependent children will have accommodation arranged. Paragraph 10 makes the same arrangement for persons unlawfully in the UK. Again, only persons with dependent children will be provided with accommodation as long as they have not failed to co-operate with removal directions issued in respect of them.

In *R(BCD)* at [87]-[93], without considering those Explanatory Notes, I suggested paragraph 1 Sch.3 acted as a 'prohibition'. As I shall discuss, on reflection, a better description of paragraph 1 is 'restriction', which is also preferable to characterising para.3 as acting as a 'cap' on support as I did in *R(BCD)* at [91] and [107]. In the present case of a family without current leave to remain in the UK who are in breach of immigration laws, para.7 Sch.3 applies the restriction on support under s.17 ChA in para.1 Sch.3 NIAA, subject to the exceptions in para.2 and para.3.

47. Before turning to the meaning of para.3, para.2(1)(c) Sch.3 permits accommodation under para.10 (and regulations made under it i.e. Regs. 3(3) and (4) WWSR), from a local authority to an adult and their dependent child(ren) (if 'in need' under s.17 CA) unlawfully in the UK under para. 7 if they have not failed to comply with removal directions. In *R(M) v Islington LBC* [2005] 1 WLR 884, the majority of the Court of Appeal held para.10 Sch.3 and Reg.3 WWSR enabled accommodation pending removal directions (including during applications for leave to remain). Moreover, para.2(1)(b) Sch.3 enables direct provision of services under s.17 to a child (see *R(VC)* at [50]). This could include the sorts of direct services listed in para.8 Sch.2 ChA or other provision 'in kind' under s.17(6) ChA. Indeed, even if the para.1 restriction applies, as accommodation can be provided under para.10 and Reg.3 WWSR and services in kind to the child direct is permissible under para.2(1)(b), only services to the adults or whole family (e.g. cash) are caught by para.3. So, in *R (MN) v Hackney LBC* [2013] EWHC 1205 (Admin), Leggatt J (as he was) helpfully summarised the effect of these overlapping provisions at [18]:

> "(1) The claimants and their parents are all in the United Kingdom in breach of immigration laws (and are not asylum seekers). Paragraph 1 of Schedule 3 therefore applies so as to make them all prima facie ineligible for support or assistance under s.17 …
> (2) However, as the claimants are children, paragraph 1 does not prevent the provision of support or assistance to them (paragraph 2(1)(b) Schedule 3).
> (3) Nevertheless, paragraph 1 … prevents powers under s.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."

48. I therefore return to the proper interpretation of paragraph 3 Sch.3 which states:

> "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."

I considered the interpretation of this provision in *R(BCD)* at [105]-[111] and concluded that it effectively 'capped' provision at the extent required to avoid a breach of the ECHR. My core reasoning was at [107]-[109], which I repeat:

> "107 I consider that paragraph 3 of Schedule 3 NIAA must mean that section 17 CA (and other paragraph 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 paragraph 3 of Schedule 3 is (to use the words of Lord Hodge DPSC at para 30 of *R (PRCBC) v SSHD* [2023] AC 255) 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 section 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 [31] *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 paragraph 1 of Schedule 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 [29] of *R(PRCBC)*, looking at the wider context of the NIAA, it is not seriously arguable that 'to the extent that' in paragraph 3 of Schedule 3 under s.54 means something different than 'to the extent' in s.55(5)(a) as interpreted in *R(Limbuela) v SSHD* [2006] 1 AC 396…..In Schedule 3, paragraph 2(1) permits uncapped *direct* provision to children: *R (M)* [2005] 1 WLR 884, 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 article 3 ECHR rights of adults and not other ECHR rights, especially those of children, as Lord Bingham noted at para 4. Conversely in *R (M)* and *R (Clue) v Birmingham CC* [2010] PTSR 2051, the court was concerned with (British) children of ineligible carers and stressed article 8 ECHR family life was also relevant to "avoiding ECHR breach" in paragraph 3 of Schedule 3. In *R (Clue)* at para 63, Dyson LJ 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."

To avoid article 8 ECHR breach only requires support necessary to enable a family to maintain their article 8 family and private lives, i e support sufficient to enable the family to stay in the UK pending an article 8 immigration claim. 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 breach described by Lord Bingham in *R(Limbuela)* but is still limited *to the extent necessary to avoid* an ECHR breach.

109 *R (C) v Southwark LBC* [2016] HLR 36 was a paragraph 3 of Schedule 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 paragraph 3 of Schedule 3 to the NIAA are in a different statutory category to asylum seekers (unless they are "failed" and fall within paragraphs 6 or 7A of Schedule 3). However, *R (C)* did not quote or construe paragraph 3 of Schedule 3, cite *R(Limbuela)* or consider the 'ECHR breach cap' issue, as it did not concern comparing support to those generally eligible under section 17 CA and 'ineligible' carers as a result of paragraph 3 of Schedule 3. I find they are also two different "statutory categories" for three reasons:

109.1 Firstly, I have already explained why paragraph 3 of Schedule 3 restricts section 17 CA support available to "ineligible carers" of children under Schedule 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 Schedule 3 are only restricted by section 17 CA "need".

109.2 Secondly, that interpretation is consistent with the statutory context of paragraph 3 of Sch.3: it provides an exception to the bar in paragraph 1 of 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 paragraph 3 is plainly to avoid ECHR breaches risked by the paragraph 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 paragraph 3 of Sch.3, because if it did not restrict the extent of support under s.17 CA, Schedule 3 would be otiose. By contrast, the clear meaning from the wording, context and plain parliamentary intention of paragraph 3 (and Schedule 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."

49. Mr Khubber and Ms Sekhon take issue with my interpretation of para.3 Sch.3 in *R(BCD)* on three levels: (i) as a matter of statutory language inside and outside the NIAA; (ii) as inconsistent with certain observations in *R(M)* and *R(Clue)* and (iii) inconsistent with the interpretation of para.3 in the Defendant's NRPF policy. I say at once I cannot see how (iii) assists: the interpretation of a statutory provision is unlikely to be guided by how it has been interpreted by one public body and indeed for reasons I will explain, the approach in that policy primarily reflects *R(Clue)* and other cases, so (iii) really adds little to (ii). However, it is worth teasing apart point (i) to differentiate on one hand the

argument based on the statutory language of the NIAA itself; and on the other hand, its external legislative background. This is because of the distinction drawn by Lord Hodge in *R(PRCBC)* at [29]-[30]:

> "29 The courts in conducting statutory interpretation are 'seeking the meaning of the words which Parliament used': *Black-Clawson International Ltd v Papierwerke AG* [1975] AC 591, 613 per Lord Reid. More recently, Lord Nicholls of Birkenhead stated: 'Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context' (*R v Secretary of State for the Environment exp Spath Holme Ltd* [2001] 2 AC 349, 396.) 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. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in *Spath Holme*, p 397: 'Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament'.
>
> 30 External aids to interpretation therefore must play a secondary role. Explanatory Notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions…and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty…But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity."

(I note *R(PRCBC)* was applied when interpreting the phrase 'Convention rights' in para.3 Sch.3 NIAA in *R(CVN) v Croydon LBC* [2023] 1 WLR 3950 (HC)). I will therefore address firstly the meaning of the statutory language of para.3 and the 'statutory setting' or 'internal context' within the NIAA, secondly its 'statutory background' or 'external context' of other NRPF statutory schemes; then thirdly *R(M)*, *R(Clue)* and the wording of the NRPF policy under challenge in this case.

50. On the issue of statutory language, I repeat and italicise paras.1, 2 and 3:

> "1(1) A person to whom this paragraph applies shall not be *eligible* for support or assistance under— … (g) section 17… Children Act 1989 (welfare and other powers which can be exercised in relation to adults).
>
> 2(1) Paragraph 1 does not prevent...provision of support…(b) *to a child*…
>
> 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."

Mr Khubber submitted my interpretation of para.3 Sch.3 in *R(BCD)* went wrong in placing the wrong emphasis on the phrase 'to the extent that'. Instead, he places emphasis on the concept of 'eligibility'. The essence of his submission is that paras.1, 2 and 3 Sch.3 are concerned with *eligibility* for provision (e.g. under s.17 ChA) rather than *level* of provision. He submits the Claimant and her family are caught by para.1 as overstayers unlawfully in the UK under para.7 (albeit with an Art.8 ECHR application for leave to remain pending determination). The Claimant and her brothers are children, so are eligible for provision due to para.2(1)(b), but their mother LC is not. Her eligibility for s.17 ChA support (which as para.1 says is a power that can be exercised for adults) turns on para.3. So, Mr Khubber submits:

> "It is clear that paras.1, 3 and 4-7 focus on persons who are ineligible for assistance because of their *immigration context*. It is that…the exclusion is focussed on in terms of the ECHR obligation and not 'service provision' – no 'cap' is suggested in the language of [Schedule 3]....directed rather as it is to 'ineligibility'."

In short, Mr Khubber submits that eligibility is 'binary': para.1 'switches off' eligibility for people in paras 4-7 Sch.3, but it is 'switched back on' for provision to a child under para.2(1)(b) and/or if any support at all to the adult or family generally within s.17 ChA is necessary to avoid an ECHR breach under para.3 Sch.3. He relies on *R(W) v SSHD* [2020] 1 WLR 4420 (DC) at [42]) as showing that 'necessary for the purpose of avoiding a breach' in para.3 means it is prospective and proactive: to *avoid* an ECHR breach, not to *correct* one after it has occurred. He also submits that 'to the extent that' is not concerned with the *level* of support to avoid a breach, but its *duration*: to enable support for a long as 'necessary' (e.g. pending an application for leave as in *R(Clue)*). Finally, he submits I was wrong in *R(BCD)* to equate para.3 Sch.3 with s.55(5)(a) NIAA which states:

> "This section shall not prevent … the exercise of a power to the extent necessary for the purpose of avoiding breach of a person's [ECHR] rights."

In *R(Limbuela) v SSHD* [2006] 1 AC 396 (HL) at [5], Lord Bingham said:

> "The Secretary of State's freedom of action is closely confined. He may *only* exercise his power to provide or arrange support where it is necessary to do so to avoid a breach and to the extent necessary for that purpose. He may not exercise his power where it is not necessary to do so to avoid a breach or to an extent greater than necessary for that purpose."

Mr Khubber accepts that Lord Bingham there made clear that s.55(5)(a) NIAA *did* govern the *level* of provision necessary to avoid ECHR breach. However, he submits that the context and purpose of s.55 NIAA (which applies to late claimants for asylum) on avoiding destitution is different from para.3 Sch.3 NIAA, which as made clear in *R(C)* is concerned with regulating s.17 ChA and so 'welfare'.

51. On the issue of external context, Mr Khubber submits that his suggested interpretation is consistent with the background to para.3 Sch.3 NIAA in provision of social welfare to NRPF families not eligible for mainstream support. Even before the NIAA, Parliament placed NRPF families in a different system: requiring them to rely on s.17 ChA rather than mainstream benefits and housing, so focussing on the children's welfare rather than the adults' rights. Sch.3 NIAA must be seen in that context. Therefore, he calls para.1 an 'immigration barrier': it restricts support under s.17 ChA and other provisions, but only to a subset of NRPF families in what he calls 'ineligible' groups: failed asylum seekers who have not complied with removal directions (para.6) or certified as unreasonably failing to

leave the UK voluntarily (para 7A) or as here under para.7 Sch.3 non-asylum-seekers in the UK unlawfully. However, where exceptions apply, e.g. paras.2 or 3 Sch.3 NIAA, that immigration barrier is removed to restore full eligibility for s.17 ChA.

52. Finally, on the issue of case-law and policy, Mr Khubber relies on *R(Clue)* and a case I raised with Counsel, *R(M) v Islington LBC* [2005] 1 WLR 884 (CA). On 'restoring full s.17', he relies on what Buxton LJ said in *R(M)* at [44] (my italics):

> "The guidance, if it does indeed treat all three ineligible cases together, makes clear that the [10 days]….accommodation that is all that Islington can offer is intended.. to encourage or force Mrs M to leave the UK; even though, paradoxically…[it] has no power to make travel arrangements. It is therefore necessary to consider whether that will lead to a breach of Convention rights; because, *if it will, paragraph 3 of Schedule 3 to the 2002 Act requires reversion to the original Children Act 1989 powers*."

Mr Khubber also relies on the observations of Dyson LJ (as he was) in *R(Clue)*:

> "48….As is made clear by paragraph 3 of Schedule 3 to the 2002 Act, paragraph 1 does not prevent the performance of a duty if and to the extent that its performance is necessary for the purpose of avoiding a breach of a person's Convention rights notwithstanding that the person is in the UK in breach of the immigration laws and the case is a paragraph 7 case…..
>
> 54 When a local authority considers whether to provide assistance to a person pursuant to Schedule 3, it must first decide whether paragraphs 6 or 7 applies, i e, whether the person was, but no longer is, an asylum-seeker who has failed to co-operate with removal directions issued in respect of him (paragraph 6*)* or he is in the UK in breach of the immigration laws or is an asylum-seeker: paragraph 7. Secondly, if paragraphs 6 or 7 do apply, the local authority must decide whether and, if so, the extent to which it is necessary to exercise a power or perform a duty for the purpose of avoiding a breach of a person's Convention rights. Where there is available to a local authority a range of different types of assistance that would avoid a breach of Convention rights, the local authority should identify what types of assistance it may provide to avoid a breach of Convention rights and then choose between them."

Mr Khubber submits that there was no suggestion in *R(Clue)* at [54] that para.3 limits the extent of support to avoid a breach of the ECHR as I suggested in *R(BCD)*. Indeed, Mr Khubber suggests his interpretation of any support necessary to avoid ECHR breach 'switching back on' full eligibility is reflected in the Defendant's policy (in material respects the same in the 2024 version as the 2023 version):

> "[Applicants] can only receive 'support or assistance' under section 17 [CA] if such support is necessary to prevent a breach of their human rights… Schedule 3 does not mean that assistance can automatically be refused to a family when the parent is in an excluded group, because support must be provided where this is necessary to avoid a breach of the family's human rights. The purpose of Schedule 3 is to restrict access to support for a family where the parent is in an excluded group because they either have no permission to remain in the UK, or can no longer self-support, and when returning to country of origin (where they may be able to access employment and receive services), would avoid a breach of human rights which may occur if they remain destitute in the UK. This means that, along with establishing whether there is a child in need, local authorities

> must identify…any legal or practice barriers preventing the family's return to the parent's country of origin, as return cannot be considered unless these are cleared. This is done by undertaking a human rights assessment."

53. I have reflected carefully upon these submissions on para.3 Sch.3 NIAA and I am acutely conscious of its importance to many NRPF families without leave to remain in the UK like the Claimant's family. It is a salutary judicial discipline, especially at my level, to be conscious that as I do not work in the Administrative Law field full-time, lawyers and authorities working in that field day in-day-out may have a clearer view. Despite that, having considered it carefully, I am driven once again to the same conclusion, if anything even more firmly, for these reasons.

54. On the statutory language, I readily accept that para.3 Sch.3 is intended to avoid not correct an ECHR breach (to which I return in considering Ground 1B); and that Sch.3 is structured so the 'barrier' on 'eligibility' in para.1 for the so-called 'ineligible groups' such as those unlawfully in the UK in para.7, has exceptions in para.2 and para.3 (which suggests 'ineligible' is a misnomer: I prefer 'restricted'). I also accept para.2 is indeed 'binary': if support is *for a child* (defined in para.17 simply as a person under 18), then *the child's* support is unrestricted. But I cannot accept that para.3 is similarly 'binary', as unlike para.2, it contains the phrase 'to the extent that'. It is normal English to say that people's 'eligibility' for support can *vary in extent*. Nor can I accept 'to the extent that' is concerned only with the duration rather than level of support, otherwise para 3. would say 'for the period that' not 'to the extent that'. Indeed, as Mr Alomo said, Mr Khubber's interpretation would render the phrase 'to the extent that' in para.3 effectively otiose. I remain of the view in *R(BCD)* at [107.3] 'to the extent that' in para.3 means essentially the same as 'to the extent' in s.55, which in *R(Limbuela)* was interpreted to restrict the 'extent' in the sense of level of support necessary to avoid ECHR breach. Whilst s.55 has a different statutory purpose than s.54, its language is sufficiently similar in an adjacent section to indicate the same meaning: *R(PRCBC)* at [29]. Whether ECHR articles are negative prohibitions or positive obligations (and both Art.3 and Art.8 may be either: see Ground 1B) does not in my view affect the meaning of para.3. I maintain my view in *R(BCD)* at [107.1]-[107.2] and [109.1]-[109.2] that 'to the extent that' indicates Parliament intended (see *R(PRCBC)* at [31]) only 'the extent' of support 'necessary' to avoid ECHR breach should be provided *to the family* under para.3, not least as support *to the child direct* under para.2 is unrestricted and as confirmed in *R(M)*, para.10 and Reg.3 WWSR enable the family to be accommodated by an authority until removal directions despite para.3. Moreover, the statutory language 'the exercise or performance [of the power or duty] is necessary for the purpose of avoiding a breach of a person's Convention rights' points in the same direction. Only such support as is *necessary* to avoid ECHR breach should be provided through para.3 (as opposed to paras.2 and 10). Otherwise, if it was genuinely the case that if *any support at all* was 'necessary' to avoid breach but then support were completely unrestricted as Mr Khubber says, then it follows at least part of that support would be *unnecessary* to avoid ECHR breach, which would distort the meaning of para.3, if not totally turn it on its head.

55. As to external context, as Lord Hodge said in *R(PRCBC)* at [30], it cannot displace words which are 'clear and unambiguous and do not produce absurdity', as I find the words in para.3 are in the way I have interpreted them. In any event, the external context supports rather than undermines the interpretation I prefer and adopted in *R(BCD)*. But I would slightly alter what I said there at [109.3]: the Parliamentary intention (or purpose) of

para.3 was to *restrict* support to specified groups like over-stayers *to the extent necessary to avoid ECHR breach*, because otherwise they would otherwise be entitled to the same support as NRPF families lawfully in the UK. So, para.3 Sch.3 restricting support to over-stayers and specified others relative to lawful NRPF families goes with the grain of the wider legislation to discourage over-staying etc. That is consistent with the Explanatory Notes (as 'external aids': *R(PRCBC)* [30]) for para.1 stating Sch.3 *restricts* support to targeted groups and for para.3 which states that it does not prevent support 'to the extent that it is necessary to avoid breaching any ECHR right', which again supports my interpretation.

56. Therefore, both statutory language and external context point in the same direction: that para.3 Sch.3 restricts support beyond that permitted by accommodation under para.10 and direct support to a child under para.2 to the extent necessary to avoid ECHR breach. That is entirely consistent with the approach to 'conforming interpretation' under s.3 Human Rights Act 1998 ('HRA') generally (and indeed like the Principle of Legality on which it is modelled: *R(PRCBC)* at [33] and [40]-[43]). In that way, this 'to the extent necessary' interpretation ensures compliance with the ECHR as a local authority is required to do under s.6 HRA. As Mr Khubber says, *R(W)* shows para.3 must be exercised proactively to avoid a breach. However, that supports my 'to the extent necessary' interpretation because it encourages proactive intervention by targeted support rather than leaving a breach to occur.

57. Moreover, whilst Mr Khubber relies on Buxton LJ's observation in *R(M)* at [44], it needs to be seen in context. The main issue in *R(M)* was whether para.10 Sch.3 and Reg.3 WWSR permitted accommodation for more than the 10 days suggested by Guidance for a family being returned to another country. Maurice Kay LJ and Waller LJ held that it permitted accommodation until non-compliance with removal directions. Buxton LJ disagreed but found that since only 10 days' accommodation would breach Art.8 ECHR, para.3 Sch.3 then enabled a local authority to fund a family's return to country of origin even for groups where there was no specific power to do that under Sch.3. Buxton LJ's comments at [32],[33],[42] and [44] show he saw Sch.3 as a 'complete code' excluding s.17 ChA unless an exception applied, when support then 'reverted' to s.17 ChA as he said at [44] as Mr Khubber quotes. However, Buxton LJ at [44] was not commenting on the *extent* of support under para.3. Indeed when commenting on that at [45]-[49], he limited necessary s.17 ChA support to return to country of origin and did not say it was unrestricted. In any event, in *R(M)*, Buxton LJ dissented (see [31] and [43]) but Waller LJ in the majority *did* consider the extent of support under para.3 was restricted. Agreeing only 10 days' accommodation would violate Art.8, he said at [79] (my italics)

> "What Islington would have to determine is what power or duty they could perform under s.17 to prevent the breach of convention rights; *their freedom to go back to s.17 is only to the extent that the exercise of the power under s.17 'is necessary' for the purpose of avoiding a breach."*

He added *'If that means all that could be supplied was accommodation*', then it did not matter whether the interpretation of the guidance he favoured or Buxton LJ favoured was correct (because accommodation could be provided under para.3 anyway). But he also suggested the suggestion that para.3 enabled funding of air tickets would give the authority a power it did not have under Sch.3 only because it proposed to act in breach of the ECHR. In any event, Waller LJ and Maurice Kay LJ found accommodation under para.10 was not limited to 10 days and could continue until breach of removal directions

when set (see [57]/[60]/[81]). Waller LJ's suggestion para.3 could mean that 'all that was supplied was accommodation' is inconsistent with the submission that para.3 'switches back on' full eligibility.

58. In my view, there is nothing in *R(Clue)*, *R(C)* or indeed the Defendant's NRPF policy that points a different way. At [48] of *R(Clue)*, Dyson LJ was doing no more than stating the fact that para.3 applies to families unlawfully in the UK, which had been overlooked in *R(Grant) v Lambeth LBC* [2005] 1 WLR 1781 (CA). I repeat that Dyson LJ said at [54] that an authority 'must decide *whether and, if so, the extent to which it is necessary*' to give support to avoid ECHR breach and that where an authority had available a range of different types of assistance that would do so, it should identify them '*then choose between them*'. If Mr Khubber were right, Dyson LJ would not have said either. In truth, *R(Clue)* was not really concerned with how para.3 affected the *level* of support, but *whether and for how long* support should be given to a 'restricted' family: i.e. that an authority should not pre-empt a (not obviously hopeless or abusive) Art.8 claim for leave by refusing support if that would have the effect of requiring the family to depart the UK, forfeiting that claim. Likewise, the part of the Defendant's NRPF policy quoted simply reflects *R(Clue)* and *R(C)*, which did not really consider the effect of para.3 Sch.3, although Sir Ernest Ryder SPT at [3(iii)] said the Art.8 challenge was whether the authority breached Art.8 ECHR in 'providing the family financial support *at a level less than that which it knew was necessary* to prevent breach': consistent with my view. Moreover, the policy stating assistance cannot be automatically refused to an 'excluded group' simply reflects *R(DK) v Croydon LBC* [2023] PTSR 2112.

59. I would reach this view anyway, but I am fortified in it by the judgment of Mr John Howell QC DHCJ in *R(PO) v Newham LBC* [2014] EWHC 2561 (cited without criticism in *R(C)* and another case about *level* of support. He said at [32] and [47]:

> "A local authority is entitled to assist [parents] of a child in need [but] only to the extent necessary for the purpose of avoiding a breach of a person's [ECHR] rights… *That may affect the extent of the support that it may be able to offer such an adult….. The amounts payable to such adults may not exceed what is necessary to avoid a breach of the [ECHR] rights* of those involved. But such amounts should be *additional* to those the Council considers are appropriate to the needs of the children involved." (my italics)

60. For those reasons, I find myself of essentially the same view as I expressed in *R(BCD)*: that the effect of para.3 Sch.3 NIAA is to restrict (to use the word in the Explanatory Note) non-accommodation support to a NRPF family (as opposed to a child direct) within Sch.3 to the extent necessary to avoid ECHR breach. I also maintain my view in *R(BCD)* at [111] that families with such 'restricted' support are in a different 'statutory category' ('Category 3') than NRPF families entitled to unrestricted s.17 support (i.e. 'Category 1'). However, on reflection, I agree with Mr Khubber that my word 'cap' in *R(BCD)* was inapt: it may encourage 'capping' of support merely 'restricted' under para.3 Sch.3, but not restricted to children direct under para.2 or by accommodation pending removal directions under para.10. So, whilst it is not for the Court to dictate how an assessment should be undertaken (see *R(C)* at [12]), authorities may wish to bear the following principles in mind:

    a. Authorities should not refuse to assess for support families in a 'restricted group' in Sch.3 (*R(DK)*, save as discussed there), as support could still be provided: (1) in the form of accommodation to the family under para.10 / Reg.3 WWSR; (2) direct

to children under para.2(1)(b); or (3) to the family 'to the extent necessary to avoid ECHR breach' by para.3 (as discussed).

b. The fact a family are 'restricted' by Sch.3 does not mean children are not 'in need' under s.17(10) ChA with needs requiring authority provision: *R(VC)*. In *R(Zoumbas) v SSHD* [2013] 1 WLR 3690 (SC) Lord Hodge said at [10(7)], a child must not be blamed for their parent's conduct. If anything, being 'NRPF' with precarious immigration status will *increase* a child's needs, given the parents' likely lack of means: (see s.17(8) and *R(VC)* at [30]).

c. So, authorities should therefore undertake a full s.17 ChA needs assessment as described in *R(C)*, not least given the possibility of accommodation or direct child support irrespective of ECHR breach. Given s.17(4A), the assessment should ascertain and consider the child's wishes and feelings.

d. If children in a 'restricted' family in Sch.3 are assessed as 'in need', as discussed in *R(C)* the authority must have due regard to safeguarding *and* promoting the children's welfare, the statutory purpose. As Lady Hale emphasised in *R(HC)*, 'safeguarding is not enough, their welfare has to be actively promoted'. Whilst there is no duty to meet assessed needs as such (*R(G), R(C)*), the authority must act consistently with that statutory purpose: *Padfield*. I suggest that it would tend to promote that purpose if the authority met needs so far as practicable in ways not engaging the 'ECHR restriction' in para.3 Sch.3, like accommodation under para.10 Sch.3 / Reg.3 WWSR and direct provision 'in kind' (s.17(6)) to the child under para.2(1)(b). That may include much of the provision listed in para.8 Sch.2 CA quoted above (such as counselling, occupational, social, cultural or recreational activities, home help (if a child has need for it, even if the parent not child is disabled), transport, or even provision of holidays or breaks).

e. However, in relation to assessed needs which can only be met through non-accommodation provision to the family engaging para.3 Sch.3 (e.g. cash to the parent for family living expenses), the authority should also assess, independently or within the needs assessment, what extent of *additional* support (as Mr Howell QC said in *R(PO)*) is necessary to avoid ECHR breach ('a human rights assessment'). I will expand upon this sub-paragraph having considered Arts.3 and 8 ECHR, to which I now turn in Ground 1B.

Ground 1B: Current financial assistance is in breach of Art.8 ECHR

61. Whilst the Claimant disagreed with my interpretation of para.3 in *R(BCD)* (that I have just reaffirmed), she does rely on my comments in *R(BCD)* on the question of what 'extent' or level of support is 'necessary' under para.3 Sch.3 NIAA to avoid breach of Art.3 and or Art.8 ECHR, which I considered in passing at [108]/[110]:

> "108 [Having discussed *R(Clue)*, I said:] Therefore, to avoid article 8 ECHR breach only requires support necessary to enable a family to maintain their article 8 family and private lives, i.e. support sufficient to enable the family to stay in the UK pending an article 8 immigration claim. 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 article 3 ECHR breach described by Lord Bingham in *R (Limbuela)* but is still limited *to the extent necessary to avoid* an ECHR breach….

> 110 I was not addressed about what level of payments to 'ineligible' carers of 'children in need' under section 17 CA was 'necessary' to avoid ECHR breach under paragraph 3 of Schedule 3 to NIAA, which in my judgment must vary depending on the facts of the case. However, *R (C)* is clear that support remains under section 17 CA and depends on an individual needs assessment for the child …and rates even 'capped' by paragraph 3 still cannot be 'benchmarked' against other statutory schemes such as asylum support… But support under section 17 CA as 'capped' by paragraph 3 Schedule 3 obviously has a lower *potential* ceiling than general support under section 17 CA which is simply governed by the child's assessed needs, albeit operating in the way described in *R(C)* approved in *R(HC)*."

62. In this case, I have been addressed on that issue in detail. 'Convention Rights' in para.3 Sch.3 NIAA include all ECHR rights incorporated by s.1 Human Rights Act 1998 ('HRA'): *R(CVN) v Croydon LBC* [2023] 1 WLR 3950. In *R(CVN)*, Dexter Dias J (as he now is) held that a 'former relevant child' under s.23C ChA could still be supported even once he became a 'failed asylum seeker' 'ineligible' under para.1 Sch.3 NIAA as it was necessary to avoid breach of not only the Art.3 ECHR prohibition on 'inhuman and degrading treatment' (i.e. destitute homelessness), but also Art.2 Prt.1 ECHR (the right not to be denied education). This shows that 'Category 3' support under s.17 ChA to a 'restricted' family can sometimes be 'necessary' under para.3 Sch.3 to avoid breach of more than one 'Convention Right'. The relevant rights here are Art.3 and Art.8, which are separate rights with separate principles: *R(TMX) v Croydon LBC* [2024] EWHC 129 (Admin) at [108]. So, when conducting a 'human rights assessment' for a 'restricted' family within Sch.3 NIAA as mentioned at [60e] above, having borne in mind [60a]-[60d], an authority should assess what non-accommodation support for the family (e.g. cash) is necessary to avoid breach of not just Art.3 ECHR, but also Art.8 ECHR (and any other relevant ECHR articles e.g. Art.2 Prt.1 ECHR). For reasons I will now explain, an authority that wishes to avoid challenge will 'cross-check' its proposed provision to ensure it is no lower than the equivalent of Asylum Support to avoid breach of Art.3 ECHR, but should also reflect on whether *additional* provision is necessary to enable Art.8 family life to continue. Depending on this, the fact such a 'restricted family' is 'only' entitled to 'Category 3 support' will not *necessarily* mean they receive less than an unrestricted family entitled to 'Category 1' support.

Support necessary to avoid breach of Art.3 ECHR

63. The leading case on Art.3 remains *R(Limbuela)* v SSHD [2006] 1 AC 396 (HL) where late-claiming asylum-seekers were refused Asylum Support under s.55(5)(a) NIAA (quoted above), leaving them sleeping rough (or at risk of doing so) and reliant on charity for all their needs. This was held to be 'inhuman or degrading treatment' violating Art.3 ECHR as the Home Office had not simply tolerated but created their predicament by refusing support. Lord Bingham explained at [7]-[9]:

> "7….Treatment is inhuman or degrading if, to a seriously detrimental extent, it denies the most basic needs of any human being. As in all Article 3 cases, the treatment, to be proscribed, must achieve a minimum standard of severity, and I would accept that in a context such as this, not involving the deliberate infliction of pain or suffering, the threshold is a high one. A general public duty to house the homeless or provide for the destitute cannot be spelled out of article 3. But I have no doubt that the threshold may be crossed 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…..
>
> 8 When does the [Home Office] duty under s.55(5)(a) arise ? The answer must in my opinion be: when it appears on a fair and objective assessment of all relevant facts and circumstances that an individual applicant faces an imminent prospect of serious suffering caused or materially aggravated by denial of shelter, food or the most basic necessities of life. Many factors may affect that judgment, including age, gender, mental and physical health and condition, any facilities or sources of support available to the applicant, the weather and time of year and the period for which [he] has already suffered or is likely to continue to suffer privation.
>
> 9 It is not in my opinion possible to formulate any simple test applicable in all cases. But if there were persuasive evidence..a late applicant was obliged to sleep in the street, save perhaps for a short and foreseeably finite period, or was seriously hungry, or unable to satisfy the most basic requirements of hygiene, the threshold would, in the ordinary way, be crossed."

Building on that, Lord Hope added in *R(Limbuela)* at [62]:

> "The best guide to the test that is to be applied is to be found in the use of the word 'avoiding' in section 55(5)(a). It may be, of course, that the degree of severity which amounts to a breach of article 3 has already been reached by the time the condition of the asylum-seeker has been drawn to his attention. But it is not necessary for the condition to have reached that stage before…s.55(5)(a) is capable of being exercised. It is not just a question of 'wait and see'. The power has been given to enable the Secretary of State to avoid the breach. A state of destitution that qualifies the asylum-seeker for support under section 95 of the 1999 Act will not be enough. But as soon as the asylum-seeker makes it clear that there is an imminent prospect that a breach of the article will occur because the conditions which he or she is having to endure are on the verge of reaching the necessary degree of severity the Secretary of State has the power under section 55(5)(a), and the duty under section 6 of the Human Rights Act 1998, to act to avoid it."

64. *R(Limbuela)* was applied recently in *R(TMX)* by Alan Bates DHCJ in deciding both: (i) whether the claimant's predicament met the high threshold of 'degrading' or 'inhuman'; and (ii) if so, whether the defendant was responsible for that 'treatment'. On the first question, in *R(TMX)* at [112]-[125], he pointed out in *R(Limbuela)*, Lord Bingham at [9] had eschewed a single test for Art.3 breach, so whilst Lord Bingham's 'denial of the basic necessities of life' approach applied to homeless destitution, with degrading living circumstances the threshold was whether there was 'imminent prospect of serious suffering caused or materially aggravated by refusal of support'. He held that was met by squalid living conditions where a disabled person was bed-bound and had to use the toilet in a room shared with his family, affecting his mental health. On the second question, in *R(TMX)* at [126]-[142], he noted on similar facts in *R(Bernard) v Enfield LBC* [2002] EWHC 2282, Sullivan J had found no breach of Art.3 ECHR because a local authority did not 'intend' to subject someone to squalid living conditions, but held that had been overtaken by *R(Limbuela)*: as Lord Bingham said at [7] (and [6]), an actual decision to refuse support was 'deliberate action of the state' amounting to 'treatment'.

65. *R(Limbuela)* had also been applied in *R(W) v SSHD* [2020] 1 WLR 4420 (DC). The claimant British Citizen child's mother had leave to remain with imposition of a NRPF condition preventing her from working, causing destitution, temporary homelessness and repeated school moves. The Immigration Rules stated a NRPF condition should 'normally' be imposed unless the applicant for leave to remain evidenced that 'he or she *was* destitute as defined in s.95 IAA or there were particularly compelling reasons relating to the welfare of a child of a parent in receipt of very low income'. The Divisional Court (Bean LJ and Chamberlain J) held the guidance in the Rules was unlawful (to which I return in Ground 4), as it was inconsistent with *R(Limbuela)*'s 'imminent prospect' of Art.3 breach. Having quoted what Lord Hope said at [62] of it, in *R(W)* the Divisional Court said at [42]:

> "This makes two things clear. First, the fact that someone is 'destitute' as the term is defined for the purposes of s.95 [IAA] does not necessarily mean that he or she is enduring treatment contrary to Art.3 of the Convention: the threshold of severity which must be reached to make out a breach of Art.3 is higher than that required for a finding of destitution within the s.95(3) definition. Second, s.6 of the Human Rights Act 1998 ('HRA') imposes a duty to act not only when someone *is* enduring treatment contrary to Art.3, but also when there is an 'imminent prospect' of that occurring. In the latter case, the law imposes a duty to act prospectively to avoid the breach."

As a corollary, firstly as para. p.3 Sch.3 empowers (and s.6 HRA requires) a local authority to provide support where it knows an individual or family do *or will imminently* lack shelter, food, or the most basic necessities of life (*R(Limbuela)*) or endure 'degrading' living conditions causing 'serious suffering' (*R(TMX)*), it has a positive obligation to give support immediately to *prevent* those outcomes or if they have already arisen to *correct* them. Secondly, the Art.3 breach threshold is stricter than 'destitution' which full Asylum Support under s.95 IAA is calibrated to avoid. So, the equivalent of *full* Asylum Support - provided that it is up to date and checked against local living costs (see *R(CB) v SSHD* [2023] 4 WLR 28 and the NRPF Network guidance quoted above - is likely to avoid a prospective Art.3 breach. A wise authority will cross-check its s.17 provision to a family is *at least that* to avoid breach of Art.3. As the NRPF Network put it, a 'subsistence minimum'.

Support necessary to avoid breach of Art.8 ECHR

66. Whilst Art.8 ECHR is extremely familiar, it may assist to quote it:

> "8(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 8(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."

67. From Lord Sales' review in *R(AM Belarus) v SSHD* [2024] 2 WLR 1075 (SC) at [51]-[55] and [59(1)-(6)] of Art.8 in the immigration and welfare support context, Art.8 ECHR not only imposes 'negative prohibitions' on state interference in 'private life' and 'family life', but can in some circumstances impose 'positive obligations' to provide benefits.

Either way, *if* Art.8(1) is engaged, Art.8(2) will tend to turn on the familiar four-stage test of 'proportionality' commonly known as 'legitimate aim', 'rational connection', 'less intrusive measure' and 'fair balance'. However, with an alleged breach of positive obligations of support from the state, the first hurdle is Art.8(1) is whether *engaged at all*. In *R(AM Belarus)* the Home Office was entitled to refuse leave to remain to an undeportable foreign criminal even though it left him only with Home Office support as a failed asylum seeker under s.4 IAA (by the terms in *R(BCD*) in Category 5). Lord Sales said at [59(4)]:

> "There is no right under article 8 for anyone to be provided with a minimum standard of living by way of provision of social welfare: see *R (SC) v Secretary of State for Work and Pensions* [2022] AC 223 (SC), para 25, citing *Petrovic v Austria* (1998) 33 EHRR 14, para 26; see also *Chapman v United Kingdom* (2001) 33 EHRR 18, para 99 (article 8 does not impose an obligation on the state to provide a person with a home….). In the present case the state has met AM's most pressing needs by provision of support through NASS, so that he is neither destitute nor subject to violation of his rights under article 3 of the Convention: cf *R(Limbuela)*…"

68. Of course, *R(AM Belarus)* is far removed on the facts and indeed from the issue in the present case, which doubtless explains why I was not referred to it. In any event, *R(AM Belarus)* was a '*private* life' case, not a '*family* life' case. By contrast, in *R(Bernard)* a breach of the positive obligation to provide support for 'family life' was upheld in similar circumstances to *R(TMX)* discussed above for Art.3, where degrading living conditions for a disabled person forced to defecate on the floor of their family home meant 'it was impossible to have any meaningful family life'. *R(Bernard)* was approved in *R(Anufrieva) v Southwark LBC* [2004] QB 1124. Having heard submissions from Mr Philip Sales as he then was, the Court of Appeal in *R(Anufrijeva)* poured cold water on the suggestion that Art.8 '*private* life' positive obligations of welfare support added anything much to Art.3 in the context of welfare support, in terms similar to those Lord Sales himself stated 20 years later in *R(AM Belarus*). (Therefore, the equivalent of Asylum Support is likely to avoid not just breach of Art.3 but also Art.8 '*private* life'). However, the Court of Appeal in *R(Anufrievja)* emphasised that Art.8 '*family* life' was rather different at [43]:

> "Neither Mr Sales nor Mr Swirsky, who appeared for the defendant in *Anufrijeva* [and if I may interrupt, the defendant in *R(BCD)*] challenged the decision of Sullivan J in *Bernard's* case, either in principle or on the facts. Our conclusion is that Sullivan J was correct to accept that article 8 is capable of imposing on a state a positive obligation to provide support. We find it hard to conceive, however, of a situation in which the predicament of an individual will be such that article 8 requires him to be provided with welfare support, where his predicament is not sufficiently severe to engage article 3. Article 8 may more readily be engaged where a family unit is involved. Where the welfare of children is at stake, article 8 may require the provision of welfare support in a manner which enables family life to continue. Thus, in *R (J) v Enfield LBC* [2002] EWHC 735, where the claimant was homeless and faced separation from her child, it was common ground that, if this occurred, article 8(1) would be infringed. Family life was seriously inhibited by the hideous conditions prevailing in the claimants' home in *Bernard* and we consider that it was open to Sullivan J to find that article 8 was infringed on the facts of that case."

69. *R(Anuifrieva)* was followed in *R(TG) v Lambeth LBC* [2012] PTSR 364 (CA) another 'private life' case involving a single adult former relevant child under s.23C ChA, from which the Supreme Court refused permission to appeal. *R(Anufrievja)* and *R(Bernard)* were both approved by the Supreme Court in another 'private life' case, *R(McDonald) v Kensington & Chelsea LBC* [2011] PTSR 1266. Although *R(McDonald)* was described as a 'positive obligation' case, the Supreme Court held that there was no 'interference with private life' under Art.8(1) when a local authority *withdrew* night care to a disabled person to help them to the toilet and replaced that with incontinence pads. Lord Brown at [19] also said that provided it was 'in accordance with the law', it would have been 'proportionate' under Art.8(2) anyway as necessary to give greater independence and for public resource reasons.

70. However, as discussed in *R(Anufrijeva)*, failure to make welfare support to a family may be more likely to interfere with 'family life' under Art.8(1). In the lead case of *R(Anufrijeva)* itself, an asylum-seeking family including a disabled person argued an authority violated Art.8 in failing to provide them with suitable accommodation. The Court of Appeal rejected that (see [85]-[115]) on the basis that not only was the accommodation less than ideal but not so bad as to interfere with family life, but also that the local authority had acted in good faith and reasonably diligently. This was itself inconsistent with breach of Art.8, since as the Court said:

> "45 In so far as article 8 imposes positive obligations, these are not absolute. Before inaction can amount to a lack of respect for private and family life, there must be some ground for criticising the failure to act. There must be an element of culpability. At the very least there must be knowledge that the claimant's private and family life were at risk [B]reach of…. positive obligations of domestic law [to provide support] may suffice to provide the element of culpability necessary to establish a breach..provided that the impact on private or family life is sufficiently serious and was foreseeable.
>
> 46….Where the complaint is….culpable delay…in administrative processes..the approach of..Strasbourg has been not to find an infringement of article 8 unless substantial prejudice has been caused to the applicant….
>
> 47 We consider that there is sound sense in this approach at Strasbourg, particularly in cases where what is in issue is the grant of some form of welfare support. The Strasbourg Court has rightly emphasised the need to have regard to resources when considering the obligations imposed on a state by Art.8. The demands on resources would be significantly increased if states were to be faced with claims for breaches of Art.8 simply on the ground of administrative delays. Maladministration of the type that we are considering will only infringe article 8 where the consequence is serious.
>
> 48 Newman J [at first instance] suggested in *Anufrijeva* it is likely that acts of a public authority will have to have so far departed from the performance of its duty as to amount to a denial or contradiction of that duty before article 8 will be infringed. We think that this puts the position somewhat too high, for in considering whether the threshold of Art.8 has been reached it is necessary to have regard both to the extent of the culpability of the failure to act and to the severity of the consequence. Clearly, where one is considering whether there has been a lack of respect for Art.8 rights, the more glaring the deficiency in the behaviour of the public authority, the easier it will be to establish the necessary

want of respect. Isolated acts of even significant carelessness are unlikely to suffice."

71. In *R(TMX)* Mr Bates DHCJ held that Art.8(1) was 'engaged' by squalid conditions which undermined family life to a level of severity comparable to Art.3, which was 'interference' under Art.8(1) by the authority as it was a deliberate failure to act, since it (unlawfully in domestic law) decided it was the Home Office's responsibility; therefore it was also 'unjustified' under Art.8(2) as disproportionate. By contrast, in *R(MIV) v Newham LBC* [2018] EWHC 3298, whilst historic failings in provision were relevant to culpability, they were outweighed by prompt and reasonable all-round provision even if accommodation was not suitable long-term. Steyn J (as she now is) found there was no 'interference' under Art.8(1) ECHR. That approach to the second and third stages of 'culpable interference' under Art.8(1) and 'absence of justification' under Art.8(2) seems reasonably clear, especially if there is violation of domestic law which will prove both 'culpability' under Art.8(1) and also 'not in accordance with the law' under Art.8(2).(But that requires breach of domestic law, not just a vague policy which is not 'law': see *R(A) v SSHD* [2021] 1 WLR 3953 (SC) [49]-[53]). However, the claimant must first prove Art.8 is even 'engaged' at all. I first consider cases about Sch.3 para.3 on when and for how long Art.8 requires support *at all*, starting with *R(M)* and *R(Clue)*:

    a. In *R(M)* at [46], Buxton LJ (the majority agreeing here) held Art.8 was engaged where the authority limited support to 10 days' accommodation and flights to the mother's origin country which if she did not take would risk care proceedings. Threat of removal of children solely due to family poverty plainly engages Art.8, as held in *R(J)* cited in *R(Anufrievja)*. (Indeed, Strasbourg found a breach of Art.8 when children were removed simply for poverty in *Melo v Portugal* (2016) 72850/14). In this jurisdiction, that may well be culpable interference not in accordance with the law as paras.7 and 10 Sch.2 ChA require authorities to take reasonable steps (including s.17 support) to keep children with their families if consistent with their welfare. Therefore, if the assessment raises a risk of removal of the children due to poverty, it should also consider whether it is necessary to provide support.

    b. In *R(Clue)*, there was no threat of removal of children, but as discussed, it was held an authority was not entitled under para.3 Sch.3 NIAA to refuse to support a family if that would cause them to forfeit an arguable Art.8 application for leave. So, the Defendant's policy rightly describes such an application as a 'legal barrier' to the family returning, justifying support. Provided that is not obviously hopeless or abusive, the authority should provide support sufficient to enable the family to live in the UK pending the resolution of their Art.8 application (and can provide accommodation anyway until removal directions expire: *R(M)*). However, as noted, *R(Clue)* is silent on the *level* of support necessary. In some cases, accommodation and other support sufficient to avoid destitution may be enough to avoid breach of Arts.3 and 8, but in others Art.8 may require more support.

72. There may be a very loose analogy with the distribution of asylum-seekers with care needs arising solely from destitution to the Home Office or from heightened needs to local authorities (see s.21 Care Act 2014 and *R(TMX)* [56]-[66]). It is no coincidence *R(Bernard)* and *R(TMX)* both involved not just poor living conditions but disabled members of a family whose unmet needs and their consequences affected the others' Art.8 family life. As Mr Bates DHCJ said in *R(TMX)* at [161], the test is not simply

whether the situation is as bad as it was in *R(Bernard)* (which as Lord Brown pointed out in *McDonald* at [17] was 'not finely balanced'). So, if a child has heightened unmet needs (such as but not limited to disability) which already compromise or imminently risk their own and the rest of their family life, it is more likely to be 'necessary' to provide support above Asylum Support rates. Of course, the answer may be direct services or care to the child under para.2(1)(b), but if provision to the family is necessary (e.g. additional disability-related living expenses) then that may be a clear case for Art.8 support under para.3 Sch.3 NIAA.

73. However, in cases where there are no such 'heightened needs' other than the usual ones stemming from family life in poverty, the Courts will be more cautious whether Art.8 as opposed to Art.3 is truly engaged. So, for example in *R(C)* (where there does not seem to have been any 'heightened needs' (indeed assessments found children were 'thriving'), Sir Ernest Ryder SPT gave Art.8 short shrift at [31]-[32]

> "…I question whether art.8 imposes a positive obligation on the state in the factual circumstances complained of. I accept that if a local authority fails to provide services in accordance with an assessment of need, then it is arguable that an immediate and direct link is capable of being established between the measures requested and the appellant's private life. Even then, 'regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the state enjoys a certain margin of appreciation' (per Lord Brown in R*(McDonald)*…at [15]). Given this Court in *Anufrijeva*…held a factual situation that did not cross the necessary threshold of severity to engage art.3 would not give rise to a positive obligation to provide welfare support under art.8, unless welfare support was necessary to allow family life to continue, the decisions of this … authority were well within the margin of appreciation the state enjoys."

On the other hand, in *R(DA) v DWP* [2019] 1 WLR 3316 (SC), Lord Wilson found reducing benefits 'well below the poverty line strikes at family life' at [35]-[37]:

> "[T]he values underlying the right….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… One of the mothers has to cease buying meat for the children; or…has to go without food herself in order to feed the children or has to turn off the heating. Whatever their individual effect, provisions for a reduction of benefits to well below the poverty line will strike at family life."

That said, in *R(DA)*, Lord Wilson was discussing the 'ambit' of Art.8 for Art.14 ECHR, which he said at [36], was different from 'interference' under Art.8(1). On the other hand, Lord Wilson plainly thought the sort of privations he discussed *would* undermine Art.8 family life. As Mr Howell QC put it in *R(PO)* at [47], it would hardly respect children's Art.8 right to family life to provide for them but leave their parents to starve. So, whether or not the sort of predicament Lord Wilson was discussing breaches Art.3, I accept it 'engages' Art.8 (but breach also requires 'culpable interference' under Art.8(1) and 'lack of justification' under Art.8(2)).

74. I summarise my view of the ECHR position by revising paragraph [60(e)] above:

"In relation to assessed needs which can only be met through non-accommodation provision to the family engaging para.3 Sch.3 (e.g. cash to the parent for family living expenses), the authority should also assess (which may be part of the needs assessment) what extent of support (if any) is necessary to avoid ECHR breach ('a human rights assessment'). Whilst there is no requirement to do so, it may be helpful to consider:

(i) Whether there is a pending and arguable application for leave to remain on human rights grounds and whether refusal of support would force the family to leave the UK and forfeit that application: *R(Clue)*. If so, support should enable them to stay; and in any event, accommodation can be provided until removal directions: *R(M)*.

(ii) Support enabling the family to stay in the UK should at least avoid breach of Art.3 ECHR. Support avoiding destitution does: *R(W)*. So, depending on whether the family has alternative sources of support, it may be helpful to 'cross-check' provision to see whether it is at least that for Asylum Support: as a 'subsistence baseline'.

(iii) However, *additional* support above that may be necessary to meet children's assessed needs (a 'welfare top-up'). So far as practicable, that should be done by accommodation or direct provision. But if it requires non-accommodation provision to the family, the authority should consider whether it is necessary to avoid breach of Art.8 *family life*. That will be more likely if such support is necessary to address unmet assessed heightened need (like disability: *R(Bernard)*). Or it may also be necessary for family life to continue, e.g. to avoid compulsory removal of children due to poverty or its consequences: *R(M),* or if family life is significantly undermined by the poverty in a way comparable to *R(DA)*. However, there will only be a breach of Art.8 by refusal of support if it was both 'culpable' and 'unjustified'. It would be such if refusal breaches domestic law, but that is not the only form of breach: *R(McDonald)*.

Is further support necessary to avoid breach of Art.8 ECHR in this case ?

75. It is important to differentiate, as the case-law does, between the Claimant's Art.8 'private life' and her (and her family's) 'family life'. On 'private life', I readily accept the Claimant's poverty relative to her friends grinds her down and affects her sense of self – and of self-worth. I quoted above her vivid accounts, both in late 2023 and in February 2024, of how it made her feel when her friends (with the best of intentions) had to buy her food because she had no money, when they stopped inviting her to activities that cost money and when she realised on Valentine's Day that she could not afford to join in their joint activities. No-one could fail to be moved by her articulate and powerful descriptions – and indeed the other evidence in the case of the impact on her (and the private lives of the rest of the family, although they are not claimants and it is most acute for her). But as stressed in *R(Anufrievja)* and other cases up to *R(AM Belarus),* Art.8 'private life' is unlikely to require welfare provision beyond that necessary to avoid breach of Art.3. However difficult the Claimant's sense of shame (which I would reassure her is not at all her fault), or effect on mental health (of which there is no medical evidence). It does not cross the high threshold of Art.3, nor indeed Art.8 'private life'.

76. 'Family life' under Art.8 is different, as emphasised in *R(Anufrievja)* and the cases since. However, there is still a difference in this case between the effect on the Claimant and her family's Art.8 family life when surviving on £135 or even £117 a week in late 2023 and early 2024; and their family receiving £196.72 per week - over 150% of £117 – since June 2024, which is the period under challenge. I accept that during the period when the family received £135, still more when it was £117 per week, they were living well below the subsistence levels represented by Asylum Support, which according to the 2022 research of the Joseph Rowntree Foundation was already well below the 'destitution threshold'. The family's position even on £135 per week was described by the Claimant's mother in her first statement:

> "It was very difficult to survive on £135 per week..Most weeks we did not have enough money to buy enough food for all of us. My children always come first and I made sacrifices to make sure that they had enough food. I think I managed that. However, it meant that I didn't eat very much. Eating breakfast was a luxury for me and something that barely happened. I usually ate cereal around lunchtime before the children came from school and then whatever we had in the house after they came back. I rarely ate proper hot dinners because I had to prioritise my children. Not eating enough meant that I could not always take iron tablets prescribed by my GP."

This is similar to the position in *R(DA*) and it got worse still in January-February – the depths of winter – on £117 per week. Therefore, had the period when the family was receiving financial support of only £117 or even £135 per week formed part of this challenge, there is every chance that I would have found breach of Art.3 in creating imminent prospect of failing to cover the family's basic necessities of life – and indeed breach of Art.8 family life for similar reasons – especially as it was far below the level to avoid destitution in Asylum Support. It still has not been explained in the evidence from the Defendant how this happened, but the effects on the Claimant's family were severe as described in their statements. However, as Mr Khubber rightly accepted, the Claimant's challenge relates to the position since the family have consistently received £196.72 per week since roughly June 2024.

77. By contrast, the Claimant's mother's statement describes the impact of that in a way which illustrates even that modest increase has eased some pressure:

> "The increase in financial support has made a big difference. I am able to buy more food and more variety. I am able to buy protein more often like meat and chicken. I am also able to buy some small treats for my children every now and then which is very nice and make sure they get enough vegetables and fruit. 1 try my very best to save a little bit every week to be able to do something nice at the end of the month, such as a small meal outside. This is very rarely possible because of the limited amount of money we receive. It is also very dependent on other expenses…I am now also able to eat breakfast and I eat two meals per day. I still have to eat in moderation to make sure the children get enough because they are always my priority."

78. By the time this claim was issued and still at present, the Claimant's family are no longer at risk of destitution, as they are in receipt of the Asylum Support rate calibrated to avoid it – so it follows from *R(W)* that further provision is not necessary to avoid breach of Art.3 ECHR and that is not argued. Of course, that does not in itself mean that further support is unnecessary to avoid breach of Art.8 ECHR. It is clear from the statements of

the Claimant and her mother that the family still has huge challenges and frustrations about the restrictions and privations their poverty brings. I will return in Grounds 3 and 2 to whether the assessment properly considered what the Claimant and her mother said about English lessons and singing lessons, but neither these, nor other activities for the children (including swimming classes and Rock and Roll club for LG), are 'necessary' to avoid interference or breach with Art.8 family life. From their statements and the assessment the family have remained commendably strong. There is no suggestion the Claimant's family is fragmenting or that she wants to leave, or even of truly serious conflict within the family, beyond the typical friction caused in families when money is very tight (although of course it is much worse for this family than most). Therefore, without minimising how hard it is for the Claimant and her family even now, additional financial support is not necessary for family life to continue or even to continue in a reasonable state: far from falling apart, this family is holding together through everything. Despite my sympathy for the family, I cannot find Art.8 is engaged.

79. Accordingly, it does not matter for the Art.8 ground whether the current provision breaches domestic law, so I prefer to consider that below. Even if it does, that does not itself engage Art.8(1) (as opposed to show interference and lack of justification). However, if there is no breach of domestic law, I would also find that following *R(McDonald)* and *R(C)*, the Defendant would be justified in not paying more with its wide margin of appreciation under Art.8(2), given the demands on its budget (which do not justify refusal of all support: *R(Clue)* but are relevant to limiting it). However, whilst the sorts of social activities sought by the Claimant and her family here do not engage Art.8, I will consider below whether their refusal was lawful in domestic law. Even if I am wrong and there has been a breach of Art.8, it would add little to any domestic law breach, since it only affects damages. As discussed in *R(Anufrievja)*, under s.8(3) HRA, damages are only awarded to give 'just satisfaction' for any breach and are modest. If I had found breach of Art.8 in this case, I probably would have awarded less per week than the difference between £135 and £196.72. But that is academic, since I am driven to dismiss Ground 1B.

Ground 4: Defendant's NRPF Policy is itself unlawful

80. I turn next to Ground 4: the Claimant's challenge to the Defendant's NRPF policy (although one of the unusual features of this case it that there is an important debate what that policy actually encompasses). I will first consider the principles of policy challenges in the light of the leading case: *R(A) v SSHD* [2021] 1 WLR 3931 (SC). Then, I will discuss what domestic law requires from NRPF policies for families entitled to 'Category 3' support, analysing *R(C)* and cases it considered in detail. Finally, I will decide whether the Defendant's policy was unlawful as alleged.

Policy Challenges

81. In *R(A)*, Lords Sales and Burnett explained the rationale of policies at [2]-[3]:

> "It is a familiar feature of public law that..public authorities often have wide discretionary powers to exercise. Usually these are conferred by statute….. Where public authorities have wide discretionary powers, they may find it helpful to promulgate policy documents to give guidance about how they may use those powers in practice. Policies may promote a number of objectives. In particular, where a number of officials all have to exercise the same discretionary powers in a stream of individual cases which come before them, a policy may provide them

> with guidance so that they apply the powers in similar ways and the risk of arbitrary or capricious differences of outcomes is reduced. If placed in the public domain, policies can help individuals to understand how discretionary powers are likely to be exercised in their situations and can provide standards against which public authorities can be held to account. In all these ways, policies can be an important tool in promoting good administration."

82. However, as Lords Sales and Burnett went on to discuss in *R(A)* in [3] and [4], policies are not law and do not create legal rights as such. However, the courts have developed several principles which regulate the lawfulness of policies and decisions made relating to them, such as 'the rule against fettering discretion', 'legitimate expectations', 'non-departure from even unpublished policies without good reason' and in certain circumstances even the duty to formulate and publish a policy. *R(A)* itself was concerned with a different principle again: that policies should not misstate the law. I will differentiate these in a moment, but it is important to bear in mind the difference between a challenge *to a policy itself* and a challenge to *a decision made under a policy*. As Lords Sales and Burnett said in *R(A)* at [63] this distinction is 'fundamental for the purposes of analysis', for example on fairness:

> "[I]f established that there has in fact been a breach of the duty of fairness in an individual's case, he is of course entitled to redress for the wrong done to him. It does not matter whether the unfairness was produced by application of a policy or occurred for other reasons. But where the question is whether a policy is unlawful, that issue must be addressed looking at whether the policy can be operated in a lawful way or whether it imposes requirements which mean that it can be seen at the outset that a material and identifiable number of cases will be dealt with in an unlawful way."

This distinction also has the important practical dimension that whilst a successful challenge to a decision typically only directly impacts the claimant's position, a successful challenge to a policy directly impacts all those affected by that policy.

83. Even though that distinction is fundamental, it can be obscured if a 'policy challenge' is not clearly articulated. For example, simply saying 'the policy and decision were inflexible' could either mean the decision itself fettered a statutory discretion by applying a flexible policy rigidly, or it could mean the policy itself was so rigid that it fettered a statutory discretion, or even be a loose complaint of irrationality, or some or all of those. However, the principles applied vary widely between them. Indeed, the 'no fettering' principle is often seen as theoretically inconsistent with the legitimate expectations principle: the former criticises authorities for not departing from policies, whilst the latter criticises them for doing so: see the interesting article by Professor Chng: "Reconsidering the legal regulation of the usage of administrative policies" by Wei Yao, Kenny CHNG. There is much to be said for Professor Chng's view that those two principles could be best reconciled by recognition of their mutual underpinning by the Rule of Law and the need for rational justification for policies and decisions under policies: both following or departing from them in a given case. But, that is 'above my judicial pay-grade' and I shall simply set out my understanding of the relevant principles.

84. That is particularly important in this case as there are several 'policy challenges' in a loose sense. One consequence of the highly porous practical (as opposed to principled) boundaries between different 'challenges about policies' is that they can sometimes morph during a case. The original Ground 4 in the Statement of Facts and Grounds was a

short complaint that the Defendant's NRPF policy was unlawful for fixing rates of s.17 support by reference to Asylum Support rates (i.e. a 'fettering' challenge). The Defendant's short answer in the Summary Grounds of Defence was that its 2024 NRPF Policy, including the 'Support Rates Page' as I am calling it, had rates *above* those of Asylum Support. In granting permission, I drew attention to *R(A)* and the tension between the main NRPF policy focusing on 'flexibility' and the Support Rates Page that was arguably inflexible. Mr Heeley responded in his first statement by saying whilst the key principle of the NRPF policy is to meet critical needs, social work managers have discretion to go beyond essential needs and the 'minimum base rate of support' if necessary to safeguard and promote children's welfare. He also said: "….The support provided is intended to prevent destitution and ensure that children within NRPF families are not at risk." In response, Mr Khubber and Ms Sekhon's Skeleton suggested that approach was inconsistent with the purpose of s.17 ChA. As it was fully argued at the hearing as such, I will deal with that as part of Ground 4 (I will call it the 'unlawful purpose' challenge). In oral argument, I asked Mr Khubber to pin down Ground 4 and in a post-hearing note (CPHN) para.5, he identified three 'policy challenges'. In Para 5(ii) CPHN, he contended that to the extent that the Support Rates Page itself was a free-standing policy, it was unlawfully inflexible (I call this the 'Support Rates Page inflexibility' challenge). At Para 5(iii) CPHN, he contended that even if the Support Rates Page was read with the main NRPF policy, it contained legally-misleading statements or omissions (which I call the '*R(A)* misstatement' challenge). Alternatively, at para 5(i) CPHN, Mr Khubber argued that even if the NRPF and Support Rates Page were one flexible and lawful policy, it was applied rigidly in the actual assessment and provision in this case. However, that is not a challenge to the *policy* itself affecting others, but to how the policy was applied in *the particular decision*, only affecting the Claimant's family. I will call that 'inflexible decision' challenge, but as it is inextricably linked with the allegation of legal misdirection in Ground 3 and formed part of how I understood that in granting permission, I will consider it there.

85. Unpacking those different points, whilst Prof Chng explains the clear doctrinal tension between a challenge to a decision for not following a policy and one to a decision for not departing from a policy, it is (usually) easy to tell the difference. Unsurprisingly, there is no complaint here of a breach of legitimate expectation, nor the related concept of failing to follow even an unpublished policy without good reason discussed in *Mandalia v SSHD* [2015] 1 WLR 4546 (SC) (or indeed of not publishing it as in *R(WL Congo) v SSHD* [2012] 1 AC 245 (SC)), which Lords Sales and Burnett mention in *R(A)* at [3]. Instead, here the policy-related complaint about *the decision* is on the ground they summarise in that same paragraph of *R(A)*:

> "In the case of policies in relation to the exercise of statutory discretionary powers, it is unlawful for a public authority to fetter the discretion conferred on it by statute by applying a policy rigidly and without being willing to consider whether it should not be followed in the particular case."

That is the basis of the 'inflexible decision' challenge I consider with Ground 3.

86. However, a complaint about an inflexible application of a flexible policy is different from but related to a complaint of inflexibility in the policy itself. The latter is also part of the 'no fettering rule', but not mentioned in *R(A)*, although it was again discussed in both *Mandalia* and *R(WL Congo)*, where Lord Dyson said at [21] that 'a policy should not be so rigid as to amount to a fetter on the discretion of decision-makers'. As discussed in

argument, the relevant principles were set out by Lord Reid in *British Oxygen Co Ltd v Board of Trade* [1971] AC 610 (HL) at pg.625:

> "The general rule is that anyone who has to exercise a statutory discretion must not 'shut his ears to an application'… I do not think there is any great difference between a policy and a rule. There may be cases where an authority ought to listen to a substantial argument reasonably presented urging a change of policy. What the authority must not do is to refuse to listen at all. But a large authority may have had to deal already with a multitude of similar applications and then they will almost certainly have evolved a policy so precise that it could well be called a rule. There can be no objection to that, provided the authority is always willing to listen to anyone with something new to say."

More recently, in *R(Sandiford) v Foreign Office* [2014] 1 WLR 2697 (SC), Lord Sumption explained the justification of the 'no fettering' principle with a policy (which he held did not apply to common law powers like the Prerogative) at [81]:

> "The basis of the rule against the fettering of discretions, as…Lord Reid pointed out, is that a discretion conferred on a decision-maker is to be exercised. Within the limits of that discretion, which will normally be derived from terms in which it was conferred, members of the class of potential beneficiaries have a right to be considered, even if they have no right to any particular outcome. The effect of the decision-maker adopting a self-imposed rule that he will exercise his discretion in only some of the ways permitted by the terms in which it was conferred, is to deny that right to those who are thereby excluded. It also leads to the arbitrary exclusion of information relevant to the discretion conferred, and thereby to inconsistent, capricious and potentially irrational decisions."

That is the basis of the 'Support Rates Page Inflexibility' challenge.

87. However, the 'Support Rates Page Inflexibility' challenge also presupposes it was a free-standing policy separate from the main NRPF policy. That gives rise to an issue of the interpretation of 'policies'. With policies just as with statutes, interpretation is an objective matter of law for the Court: *Mandalia*. In a similar vein, Lords Sales and Burnett said in *R(A)* at [34] that a policy is to be read objectively, having regard to the intended audience. Moreover, the Divisional Court in *R(W) v SSHD* [2020] 1 WLR 4420 noted at [43] and [62]-[63] that both Immigration Rules (a form of legislation) and more presently relevantly, internal Home Office 'Instructions' (i.e. policies) had to be 'read sensibly, according to the natural and ordinary meaning of the words used'. The Court added at [66]:

> "We recognise that we have subjected [the Immigration Rule] and the Instruction to a detailed logical and linguistic analysis. This is not because we expect the authors of instruments intended to be applied by non-lawyers to apply the same linguistic precision, or the same conventions, as statutory draftsmen. It is because any exercise whose aim is to discern the 'ordinary and natural' meaning of a text must start with a careful reading of the language used. That is true of a contract written by and for non-lawyers and it is no less true of the instruments we are considering here. We have, however, also tried to stand back, read the document as a whole and consider…what message caseworkers would draw from it."

I will adopt the same approach to interpretating the policy(-ies) in this case.

88. However, even though the interpretation of a policy is for the Court not for the authority itself, the latter's own interpretation can be relevant to a different form of 'policy challenge'. Here, Mr Heeley has set out the way in which the NRPF policy, which he says includes the Support Rates Page, is intended to work. However, Mr Khubber and Ms Sekhon contend even if they are one policy that way, that approach is unlawfully inconsistent with s.17 ChA's purpose: the 'unlawful purpose' challenge. Whilst Mr Khubber did not refer to *Padfield v Minister of Agriculture* [1968] AC 997 (HL), in that case, Lord Reid (once again) famously said at pg.1030:

> "Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act [which] must be determined by construing the Act as a whole . . . if the Minister . . . so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court."

Whilst *Padfield* itself was a challenge to such a *decision*, a policy on the exercise of a statutory discretion which runs counter to its purpose is similarly unlawful: *R(PSC) v DHCLG* [2020] 1 WLR 1774 (SC). I shall apply those principles to the 'unlawful purpose' challenge to Mr Heeley's stated general approach to the policy.

89. However, the '*R(A)* misstatement' challenge has a different legal basis again. It is not that the policy is *inevitably* unlawful like the 'Support Rates Page Inflexibility' or 'unlawful purpose' challenges, which I would emphasise arise under principles not in play in *R(A)* and are not foreclosed by it. It is rather that the Support Rates Page, even if read as a part of the NRPF policy, 'authorises or approves unlawful decisions' applying the test in *Gillick v West Norfolk AHA* [1986] AC 112 (HL), as explained by Lords Sales and Burnett in *R(A)* at [38] and [41], although the particular challenge here is one within their 'Type-(iii)' in *R(A)* at [46]-[47]:

> "38 [D]oes the policy in question authorise or approve unlawful conduct by those to whom it is directed ?...[I]t is not a matter of rationality, but rather that the court will intervene when a public authority has, by issuing a policy, positively authorised or approved unlawful conduct by others. In that sort of case, it can be said that the public authority has acted unlawfully by undermining the rule of law in a direct and unjustified way….
>
> 41. The test…is straightforward to apply. It calls for a comparison of what the relevant law requires and what a policy statement says regarding what a person should do. If the policy directs them to act in a way which contradicts the law it is unlawful. The courts are well placed to make a comparison of normative statements in the law and in the policy, as objectively construed. The test does not depend on a statistical analysis of the extent to which relevant actors might or might not fail to comply…
>
> 46 In broad terms, there are three types of case where a policy may be found to be unlawful by reason of what it says or omits to say about the law when giving guidance for others: (i) where the policy includes a positive statement of law which is wrong and which will induce a person who follows the policy to breach their legal duty in some way (ie the type of case under consideration in *Gillick*); (ii) where the authority which promulgates the policy does so pursuant to a duty to provide accurate advice about the law but fails to do so, either because of a misstatement of law or because of an omission to explain the legal position; and

> (iii) where the authority, even though not under a duty to issue a policy, decides to promulgate one and in doing so purports in the policy to provide a full account of the legal position but fails to achieve that, either because of a specific misstatement of the law or because of an omission which has the effect that, read as a whole, the policy presents a misleading picture of the true legal position... [W]here a Secretary of State issues guidance to his or her own staff explaining the legal framework in which they perform their functions, the context is likely to be such as to bring it within category (iii). The audience for the policy would be expected to take direction about the performance of their functions on behalf of their department from the….head of the department, rather than seeking independent advice of their own. So, read objectively, and depending on the content and form of the policy, it may more readily be interpreted as a comprehensive statement of the relevant legal position and its lawfulness will be assessed on that basis…..
>
> 47 In a category (iii) case, it will not usually be incumbent on the person promulgating the policy to go into full detail about how exactly a discretion should be exercised in every case. That would tend to make a policy unwieldy and difficult to follow, thereby undermining its utility as a reasonably clear working tool or set of signposts for caseworkers or officials. Much will depend on the particular context in which it is to be used. A policy may be sufficiently congruent with the law if it identifies broad categories of case which potentially call for more detailed consideration, without particularising precisely how that should be done…"

Mr Khubber and Ms Sekhon say it is a *R(A)* 'type-(iii)' challenge because even if the NRPF main policy and Support Rates page are read together, they still misstate the law (hence I call it the '*R(A)* misstatement' challenge).

90. It may be helpful to consider briefly a 'worked example' of a '*R(A)* misstatement' challenge and how it differs from the 'unacceptable risk of unlawfulness' challenge approach which was over-ruled in *R(A)*. Good related examples, from the NRPF field, are *R(W)*, more recently *R(ST) v SSHD* [2021] 1 WLR 6047 (DC) and then finally *R(AB) v SSHD* [2022] 1 WLR 5341 (HC). In *R(W)*, Bean LJ and Chamberlain J in *R(W)* at [60-61] had set out the principles on when the Home Office had a duty to lift a NRPF condition, namely when there was an 'imminent prospect' of someone being in a situation breaching Art.3 on the *R(Limbuela)* test. As noted above, they then at [62]-[65] interpreted the Immigration Rules and policy, which they found were intended to operate as a complete set of instructions to Home Office caseworkers. They found those required caseworkers to maintain the NRPF condition in cases where it would be unlawful (i.e. an imminent prospect' of Art.3 breach, but no breach yet). However, the test Bean LJ and Chamberlain J applied in *R(W)* at [59] and [66] was whether that created a real risk of unlawfulness in a significant number of cases, the then-current 'unacceptable risk of unlawfulness' test in various Court of Appeal cases. The Supreme Court in *R(A)* at [74] disapproved of that *test*, but found that the *underlying approach* of the Divisional Court in *R(W)* was consistent with [46(iii)] in *R(A)* itself and the legally-appropriate conclusion that the Rules and policy had 'authorised unlawfulness'. Then in *R(ST)* at [157]-[161, whilst upholding the lawfulness of the NRPF system generally and rejecting many other specific challenges to it, the Divisional Court (shortly before *R(A)* presciently eschewed the 'unacceptable risk of unlawfulness' approach and simply held that a Home Office policy was inconsistent with the duty to have regard to the best interests of the child under the

immigration equivalent of s.11 CA 2004 because it simply did not refer to it but imposed a much narrower test. That would probably now be seen as an instance of a '*R(A)* type-(i)' approach. Finally, in *R(AB)*, Lane J (who had sat with Laing LJ in *R(ST)*), applied the Supreme Court's new analysis in *R(A)* of a 'type (iii)' case to hold the revised version of the provision in *R(ST)* still got the 'best interests' principle wrong so 'authorised unlawful conduct'.

R(C) and related cases on 'starting-points' and 'cross-checks' for s.17 ChA support

91. As *R(W)* shows, with the '*R(A)* misstatement' challenge, it is necessary to compare the law to the challenged policy to see if it authorises or approves unlawful decisions. Similarly, with the 'unlawful purpose' challenge, the meaning of the policy on the statutory discretion is compared with the meaning of that statutory discretion itself to decide whether the former is unlawfully inconsistent with the latter. Even the 'Support Rates Page inflexibility' challenge also depends on whether it fetters the statutory discretion. Therefore, in each of these policy challenges, it is necessary to consider the legal purpose and effect of the statutory discretion in s.17 ChA, as modified by para.3 Sch.3 NIAA in cases of *R(BCD)* 'Category 3' support (not to be confused with 'type (iii)' errors in *R(A)*). This raises the issue of what was decided in *R(C) v Southwark LBC* [2016] HLR 36 (CA) and two cases it considered: *R(PO) v Newham LBC* [2014] EWHC 2561 and then *R(Mensah) v Salford CC* [2015] PTSR 157 (HC), as well as the Supreme Court case which mentioned *R(C)*, *R(HC) v SSWP* [2019] AC 845.

92. I have already set out s.17 ChA and its broad legal effect discussed in *R(C)*, but for convenience I will repeat the key parts of s.17 ChA and also include two paragraphs of Lady Hale's judgment in *R(HC)* (one of which I have already quoted above):

> "(1) It shall be the general duty of every local authority…(a) to safeguard and promote the welfare of children within their area who are in need; and (b) so far as is consistent with that duty, to promote the upbringing of such children by their families, by providing a range and level of services appropriate to those children's needs…
>
> (3) Any service provided by an authority in the exercise of functions conferred on them by this section may be provided for the family of a particular child in need or for any member of his family, if it is provided with a view to safeguarding or promoting the child's welfare.
>
> (6) The services provided by a local authority in the exercise of functions conferred on them by this section may include providing accommodation and giving assistance in kind or in cash….
>
> "Sch.2 ChA 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."

93. I discussed *R(HC)* at greater length in *R(BCD)* as it was a similar case of a foreign-national carer with EU Law '*Zambrano* rights' caring for British children. However, one

particular passage is relevant, Lady Hale's discussion of s.17 at [43] and [46]:

> "43 Section 17 services have the great merit of flexibility. They can be adjusted to the needs of the particular child or family….But they have several disadvantages when compared with the benefits and services from which [NRPF] children and their carers are excluded. First, they depend upon the local authority considering that the child is 'in need' as defined... subject only to judicial review on the usual principles. Second, they are discretionary and not as of right to those who qualify. Indeed, it has been held…..the s.17 duty is a 'target duty' rather than a duty owed to any individual child. Third, there are no standard rates for assistance in cash, as there are with state benefits generally, with the consequent risk of inconsistency between authorities. Fourth, providing assistance in cash does not automatically bring with it entitlement to other assistance, such as free school meals, to which receipt of certain benefits is a passport. Fifth, the only way in which a family can seek to challenge the local authority's decision is through judicial review[:] far more limited in scope and accessibility than an appeal to the…First-tier Tribunal….
>
> 46 In carrying out [a] review, the local authority will no doubt bear in mind, not only their duties under s.17, but also their duty under s.11 of the Children Act 2004, to discharge all their functions having regard to the need to safeguard and promote the welfare of children, and their duty, under s.75 of the 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."

94. Lord Carnwath in *R(HC)* at [35] also approved Sir Ernest Ryder SPT's summary of the effect of s.17 ChA in *R(C)* at [12] quoted above and at [14] where he had said:

> "A local authority that provides support for children in need…is acting under its powers as a children's services authority…not as a local social services authority performing functions relating to homelessness and its prevention, 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 Dobbs J] in *R. (Blackburn Smith) v Lambeth LBC* [2007] EWHC 767 (Admin) at [36] "... [T]he defendant's powers [under s.17] were never intended to enable it to act as an alternative welfare agency in circumstances where Parliament had determined that the claimant should be excluded from mainstream benefits".

Nevertheless, Lord Carnwath himself added in *R(HC)* at [37]:

> "…[T]he primary objective is to promote the welfare of the children concerned, including the upbringing of such children by their families."

95. Turning to the cases on 'starting-points' and 'cross-checks' considered in *R(C)*, *R(PO) v Newham LBC* [2014] EWHC 2561 concerned a local authority NRPF policy which set standard rates for s.17 ChA support to cover subsistence needs as a 'starting point' with provision to increase provision in exceptional circumstances, that Mr John Howell QC found was legitimate in principle, as he said at [43]-[44]:

> *"*A local authority making payments in respect of the subsistence needs of child, who is in need simply because his family is destitute, and those of his family must inevitably have some conception of how much is normally 'appropriate to those children's needs' in order 'to safeguard and promote their welfare'. As

> Popplewell J stated in *R (Refugee Action) v SSHD* [2014] EWHC 1033 at [38], 'normal needs of children...will not be exceptional'. It would be administratively absurd (if not impossible), and productive of unnecessary expense, if the amount required had to be assessed in each individual case without any guidance as to what is normally appropriate. Moreover, in practice, such an approach devoid of any general guidance would inevitably lead to unjustifiable and unfair differences in the amounts paid to different families in a similar position depending on the views of the individual or individuals making, or approving, such assessments. It is a common feature of welfare legislation that it provides for certain specified amounts to be payable to meet an individual's basic needs, as is the case, for example, with income support and payments to meet the essential living needs of those having asylum support. In my judgment, therefore, there was nothing unlawful as such in the Council prescribing various standard rates of payment to meet the subsistence needs of the families to whom the NRPF Policy applied provided the policy allowed for exceptions from it in exceptional circumstances: *In re Findlay* [1985] AC 318 at p336… Nonetheless 'the starting point in the policy against which any exceptional circumstances have to be rated must be properly evaluated' as Auld LJ put it in *R v North West Lancashire Health Authority* [2000] 1 WLR 977, 992g.

But Mr Howell QC found that 'starting-point' was unlawful as it had adopted the rate of child benefit that was not even a subsistence benefit, contained no element for an adult and was far lower even than Asylum Support.

96. By contrast, in *R(Mensah) v Salford CC* [2015] PTSR 157, Lewis J (as he then was) distinguished *R(PO)* in respect of an authority's NRPF policy which provided accommodation and paid as a 'base-line' subsistence rate the amount the Home Office then paid to failed asylum-seekers under s.4 Immigration Asylum Act 1999 ('IAA') 'with the flexibility for assistance in excess of this if it is needed'. It is important to note that whilst the rates have changed for 'failed asylum seeker' support under s.4 IAA and full Asylum Support under s.95 IAA, then as now, s.4 IAA is only intended to cover accommodation-related expenses (as well as food and toiletries), not all 'essential living needs' as with Asylum Support under s.95 which is significantly higher. Nevertheless, Lewis J upheld this policy as lawful and said:

> "48 In my judgment, that is, prima facie, a rational approach for the council to take. It is for the local authority, not the courts, to determine what is the appropriate amount in cash that should be paid to alleviate destitution and meet the subsistence needs of a destitute family which includes children in need for whom the authority determines to provide assistance. The local authority has the expertise, and the awareness of the claims on its resources, to make the necessary judgments. The function of the court is to review the lawfulness of the local authority's decision not to substitute its view for that of the local authority as to the appropriate level of assistance to be provided. The decision of the local authority may only be challenged if the authority breached one of the well-established principles of public law….
>
> 49 First, there is nothing inherently unlawful in one public body having regard to the level of subsistence payments fixed by another public body as being necessary to avoid or alleviate destitution.

> 50 Secondly, such an approach does not involve a failure to exercise the power conferred by section 17 of the 1989 Act to promote or safeguard the welfare of children. The council has not confused the statutory purpose underlying the 1989 Act with the different purpose of providing facilities for the accommodation of failed asylum seekers under section 4 of the 1999 Act. Rather, the council is dealing with children who are in need because they face destitution. Given the pressures on their budget, the council has to assess the amount they consider appropriate to avoid the risk of destitution. In that respect, the council has had regard to the amounts that other public bodies consider necessary, as a minimum, to avoid destitution. That is, in principle, a lawful approach."

97. That brings me back to *R(C)*, where Sir Ernest Ryder SPT discussed both *R(PO)* and *R(Mensah)*. However, as clear from his judgment at [3]-[7] and [24]-[27], *R(C)* was not a 'policy challenge' like those. Other than Art.8 breach already discussed, the claimant's case in *R(C)* before the Court of Appeal had narrowed to allegations that the authority had in that case 'started from the view that support equivalent to child benefit, s.4 or s.95 IAA rates was lawful but then irrationally set support significantly below'. The Court found the judge was entitled to find there was no undisclosed policy to fix support rates at the equivalent of those other schemes and any similarity was accidental and that support had been calibrated to comprehensive assessments, taking into account other sources of charitable support and what the mother had actually asked for. Therefore, the whole factual premise of the appeal was incorrect. Unsurprisingly, the appeal was dismissed and tellingly, the Court of Appeal *did not* over-rule *R(Mensah)*, as Moore-Bick V-P said at [39] and [44]:

> "39…[T]he only question for us is whether the local authority arbitrarily fixed the rate of financial support it was willing to provide by reference to other statutory benefits instead of the assessed needs of the family….
>
> 40. I am not persuaded it did. Financial and other support provided to the family was based on frequent assessments….[and whilst they] had an eye to the amounts payable by way of other benefits, but I am not persuaded that they treated them as in any sense a starting point or benchmark for determining the amount of support this family needed.
>
> 44….[T]he intervener submitted that *Mensah* had been wrongly decided. It is unnecessary for the purposes of this appeal to reach any final conclusion on that question. Much might depend on the approach that the local authority adopted in practice and whether the local authority's consideration of the base figure for failed asylum seekers effectively restricted its ability to make a proper assessment of the needs of the children in question. It does seem to me, however, that 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."

[44] is relied on by Mr Khubber here. It was plainly *obiter*, like the passages he relies on from the judgment of Sir Ernest Ryder SPT, since the Court of Appeal did not have to make a finding that fixing s.17 ChA support at Asylum Support levels was unlawful, as that had not happened on the facts. Vos LJ (as he then was) agreed with the observations of Moore-Bick V-P and those of Sir Ernest Ryder SPT.

98. All that is context in to understand the *obiter* guidance of Sir Ernest Ryder SPT in *R(C)*. For example, having noted the comments in *R(PO)* at [43] quoted above about administrative impracticability of social workers assessing provision without internal guidance, Sir Ernest Ryder SPT said at [20], [21], and [27]-[29] (my italics):

> "20 That is simply to re-state in practical terms the need for a rational and hence consistent approach to decision making. It permits of appropriately phrased internal guidance or cross-checking that is consistent with the Secretary of State's statutory guidance but does not suggest, let alone approve of a policy or practice of *fixing* financial support by reference to the support available under other statutory schemes and for other purposes. In this case the questions…were answered by repeated assessments the contents of which are not challenged. The issue that remains is whether the local authority fettered its discretion in an inappropriate way…
>
> 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 analysis of information derived from an assessment…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...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.
>
> 27…*There is a difference of substance between an appropriate and lawful cross-check and inflexible fixing of rates whether by…an extraneous and inappropriate rate as a starting point or an inflexible policy or practice*.
>
> 28…[T]here was no practice or policy in this case which establishes a basis for the claim nor which is comparable to the process of set rates *fixation* which was criticised in *R(PO)*…
>
> 29…[If] the local authority should have 'benchmarked' its support payments to the IAA 1999 support levels or indeed to any other fixed rate would be likely to be an irrational fetter on the local authority's discretion *if it were not done in the context of an appropriate evidential exercise*…….. I should not, however, be taken as endorsing *Mensah',* insofar as Lewis J gave the impression in [47]—[50] that the local authority's *starting point* should ever be amounts fixed under other statutory schemes."

99. In my judgment, the combined effect of *R(C), R(PO)* and *R(Mensah)* is as follows:

a. Whilst both Sir Ernest Ryder SPT and Moore-Bick V-P in *R(C)* disapproved *obiter* of using Asylum Support as a 'starting-point' to s.17 ChA support, both said it was legitimate as a 'cross-check'. However, neither define or differentiate what they meant by either term. Therefore, it is also important to consider their statements of principle underlying that distinction.

b. This is particularly true because in *R(PO)*, the 'starting-point' was child benefit rates subject to 'exceptional circumstances' but in *R(Mensah)* the 'starting-point' was quite different: s.4 IAA support to failed asylum-seekers subject to increase 'if needed'. Sir Ernest Ryder SPT disapproved of the reasoning in *R(Mensah)* but did not over-rule it. Moore-Bick V-P did not even go that far and simply said it was unnecessary to decide whether it was correct. Neither queried *R(PO),* indeed Sir Ernest Ryder SPT endorsed it as reflecting the need for rational and consistent decision-making.

c. In my view, the underlying principles Sir Ernest Ryder SPT discussed in *R(C)* were threefold. Firstly, the differences in statutory purpose and effect between s.17 ChA and Child Benefit and the support schemes under s.4 and 95 IAA. Secondly, the true 'starting-point' for s.17 ChA was a full needs assessment focusing on safeguarding and promoting welfare for the particular children in the particular case (see [21]). Thirdly, s.17 support should not be 'fixed' ([20], [27] and [28]) or 'limited' ([22]) by reference to those other statutory support rates, in other words, by the authority fettering its discretion (see [20]). Moore-Bick V- encapsulated the key point at [44]:

> "Much might depend on the approach that the local authority adopted in practice and whether the local authority's consideration of the base figure for failed asylum seekers effectively restricted its ability to make a proper assessment of the needs of the children in question…. Ultimately what matters is whether the assessment when completed adequately recognises the needs of the particular child."

100. However, in a *R(BCD)* 'Category 3' case with a 'restricted' family, Sch.3 NIAA is also relevant. As noted there, this was not discussed in *R(C)* (save in passing by Sir Ernest Ryder SPT at [13] who also framed the Art.8 ECHR appeal at [3(iii)] as whether it was breached by financial support 'at a level less than it knew was necessary to prevent breach'). As discussed under Ground 1A, Sch.3 differentiates between accommodation under para.10 and support direct to children under para.2(1)(b) and s.17 ChA which is unrestricted; and (typically financial) support to the family restricted by para.3 to that necessary to avoid ECHR breach. As explained under Ground 1B above, provision of the full Asylum Support rate in financial support to a restricted family may well avoid breach of Art.3 ECHR (provided it is updated and checked against local living costs as discussed in the NRPF Network guidance quoted above at [9]). As I said, that may be called the 'subsistence baseline': a 'floor beneath which support must not fall', as I put it in *R(BCD)*). However, it is not truly a 'starting-point' at least in the sense criticised in *R(C)*, as it does not cover 'welfare needs' as required by s.17 ChA (unless there are *lawfully* not assessed to be any that are necessary to meet with provision – see *R(BCD)* at [101]). Typically, there must also be a 'welfare top-up'. The two are different elements to the same package of support, which is soundly based on a full needs assessment. As discussed above at [59] and [73], so far as practicable, that 'welfare top-up' should be met through accommodation under para.10 or direct provision to the child under para.2(1)(b) Sch.3. However, the package of support overall must avoid ECHR breach (e.g. Art.8

and/or Art.2 Prt.1), otherwise it must be increased to the extent necessary to do so. As part of the process described above at [59] and [73], that is a lawful 'subsistence baseline, welfare top-up' approach.

Lawfulness of the Defendant's Policy(-ies)

101. I turn to the three actual challenges to the policy itself. With the 'unlawful purpose' challenge, Mr Khubber and Ms Sekhon's criticism is focussed not so much on the wording of the NRPF policy or Support Rates Page, but the approach to their operation described by Mr Heeley, which I will repeat:

> "9.…The support provided is intended to prevent destitution and ensure that children within NRPF families are not at risk…
>
> 10. The s.17 budget is allocated based on the specific needs of the child and their family, not on their wants or preferences. This means that funding decisions are made with the primary goal of addressing the essential needs that are necessary to safeguard and promote the child's welfare….
>
> 13. Coventry Children Services assess the circumstances of each child and family to determine what support is required to ensure the child's safety, health, and well-being. This typically includes providing financial assistance for necessities such as food, clothing, and shelter, or funding services that help maintain a stable home environment.
>
> 14.The key principle is that the s.17 budget is used to meet critical needs, particularly when failing to do so could lead to more severe outcomes, such as the need for the child to be taken into care. It is not intended to cover non-essential items or services that, while desirable, are not necessary for the child's welfare.
>
> 15. [In the s.17] budget, social worker managers do have the discretion to go beyond a minimum base rate of support, depending on the specific circumstances and needs of the child and family. While the primary focus is meeting essential needs, there is flexibility to provide additional support if it is deemed necessary to safeguard and promote the child's welfare.
>
> 16. For example, if a family is facing unique challenges that require more than just basic support, such as needing specialised services, emergency housing, or additional financial assistance to prevent a crisis. This discretionary support is assessed on a case-by-case basis, ensuring that the level of assistance provided is proportionate to the child's needs and the potential risks involved.
>
> 17.This discretion allows social workers…to respond to the specific situations they encounter, going beyond a one-size-fits-all approach and ensuring each child receives the level of support they need to thrive…
>
> 18. Whilst an assessment of a child and family's needs are being assessed Coventry Children Services will financially support a family applying a baseline amount. This is equivalent to the national rates… for those seeking asylum, under s.95 Immigration and Asylum Act 1999. The rates are reviewed annually and increased in line with inflation. Coventry adopts this approach to ensure consistency across our social work teams and to ensure that families receive support pending their needs being assessed."

102. In their Skeleton Argument at para.4.2.3, Mr Khubber and Ms Sekhon's criticism was primarily focused on para.9 of Mr Heeley's statement, as stated at p.4.2.3:

> "[Para 9 of] the statement….explicitly states by way of explanation of the policy that 'the support provided is intended to prevent destitution and ensure that children within NRPF families are not at risk'. It is submitted that preventing destitution and ensuring that children are not 'at risk' is clearly not the proper purpose of s.17 support. If the level of support an authority provides is intended only to prevent destitution, this is 'unlikely to be sufficient' (per Moore-Bick V-P in *C*) to satisfy the s.17 duty or achieve the aims and objectives that underpin that duty."

In my judgment, this is not a fair reading of Mr Heeley's statement which takes para.9 out of context of the rest of the passage I have quoted. To start with, whilst Mr Heeley said at para.9 that s.17 support was intended to avoid destitution and ensure children were not at risk, which is poorly expressed, he went on in the very next paragraph to say 'the primary goal of addressing the essential needs that are necessary to safeguard and promote the child's welfare' which was clearly what he meant. This is also clear from paras.13 and 14 where he differentiated 'essential' or 'critical' needs from 'non-essential needs'. Moreover, at para.15 he emphasised the 'flexibility to provide additional support if it is deemed necessary to safeguard and promote the child's welfare'. Read in that context, para.9 of Mr Heeley's statement in isolation is not expressive of the true approach that he is describing.

103. The more important question is whether the approach Mr Heeley was describing at para.15 of his statement is consistent with the statutory purpose and effect of s.17 ChA (and Sch.3 NIAA in a 'Category 3' case). Mr Khubber and Ms Sekhon did not criticise para.15 in the Skeleton, but in oral argument he suggested it was inconsistent with *R(C)*. I disagree. The model Mr Heeley describes at paras.15-17 of his statement does not amount to using Asylum Support as a 'one-size fits all' 'starting-point' for s.17 support instead of an assessment, it presupposes a full needs assessment first before a 'subsistence baseline' of 'financial assistance' at s.95 IAA Asylum Support level (itself significantly higher than Child Benefit quashed in *R(PO)* or s.4 IAA upheld in *R(Mensah)* not overruled in *R(C)*). However, the system Mr Heeley describes has the flexibility to increase support through emergency housing, specialised services (neither of which are in any way 'limited') or financial assistance to prevent a crisis (which if understood as Mr Heeley plainly meant as a crisis to the family, is likely to avoid a breach of Art.8 ECHR as well). However, as Mr Heeley expressly said, those are just examples of cases for additional support. This is essentially a 'subsistence baseline, welfare top-up' approach which I consider lawful and an appropriate model for 'Category 3' support for restricted families within Sch.3 NIAA (but not for unrestricted families with Category 1 support, for the reasons discussed in *R(BCD)*). Given that Mr Heeley's approach correctly balances the overlapping statutory purposes of s.17 ChA and Sch.3 NIAA, I dismiss the 'unlawful purpose' challenge (which I would observe was not mentioned in the Claimant's post-hearing note 'CPHN').

104. I turn next to the 'Support Rates Page inflexibility' challenge, which appeared for for the first time in that CPHN. I set out the key parts of the NRPF policy first before the Support Rates Page in full:

> "Providing Support

The local authority has a power to provide a wide range of services in order to meet assessed needs under section 17 Children Act 1989. The local authority is not under a duty to meet all formally assessed needs; section 17 is a target duty and may take into account its resources in determining which needs are to be met, but such a decision must be reached rationally and the local authority must act reasonably.

The Court in *R (C, T, M & U)* [aks. R(C)]...set out the following principles:

- An assessment must be carried out to determine the needs of a particular child, in line with statutory guidance and with proper consideration of the best interests of the child;
- Support for families with NRPF should not be fixed to set rates or other forms of statutory support without any scope for flexibility to ensure the needs of an individual child are met;
- Local authorities must undertake a rational and consistent approach to decision making, which may involve cross-checking with internal guidance or other statutory support schemes, so long as this does not constrain the local authority's obligation to have regard to the impact of any decision on a child's welfare.

The Asylum Support webpage (GOV.UK) sets out the basis for housing, financial support, access to NHS healthcare and schools which may be available for an asylum seeker and their family while waiting to find out if they will be given asylum…

Excluded Groups

When a family with NRPF requests support, the local authority must establish whether the parent is in an excluded group, and therefore the family can only be provided with the support or assistance that is necessary to prevent a breach of their human rights– a 'human rights assessment'….

Schedule 3 does not mean that assistance can automatically be refused to a family when the parent is in an excluded group, because support must be provided where this is necessary to avoid a breach of the family's human rights. The purpose of Schedule 3 is to restrict access to support for a family where the parent is in an excluded group because they either have no permission to remain in the UK, or can no longer self-support, and when returning to country of origin (where they may be able to access employment and receive services), would avoid a breach of human rights which may occur if they remain destitute in the UK. This means that, along with establishing whether there is a child in need, local authorities must identify whether there are any legal or practice barriers preventing the family's return to the parent's country of origin, as return cannot be considered unless these are cleared…by….a human rights assessment."

I set out the Support Rates Page in full, but annotate it for convenience:

"**2024/2025 NRPF Support Rates per Week**

£49.18 per person [i.e. the full s.95 Asylum Support rate]
£9.50 Child under 1 year
£5.25 Child aged 1-3 years
£5.25 Pregnant mother [all of which track the Asylum Support scheme]
Gas £24.10
Electricity £24.10

> Water £8.40 [which do not arise if there is free accommodation, as here and typically is the case with full Asylum Support)
> Maternity grant, one off payment £300 if not supported by DWP. [Again, similar to Asylum Support but are not relevant in this case]
> Bus passes/School Uniform can also be provided as required. [The key respect in which the 'Support Rates Page' is higher than Asylum Support]."

105. There is little doubt that *if* the Support Rates Page is a free-standing policy as submitted by Mr Khubber and Ms Sekhon in the CPHN, it is unlawful. It would unlawfully fetter the discretion the Defendant has within s.17 ChA even in a Sch.3 case involving a 'restricted family' (who the main NRPF call an 'excluded group') to provide accommodation, unrestricted support to a child and other support to the family to avoid ECHR breach (even if the Support Rates Page rates avoided 'destitution' and breach of Art.3, it does not contain sufficient flexibility for Art.8). Indeed, the Support Rates Page in isolation would not only be an unlawfully inflexible policy, it would be inconsistent with the statutory purpose of s.17 ChA. But in my judgment the Support Rates Page inflexibility' challenge does not assist the Claimant (which is I suspect why in their reply to Mr Alomo's post-hearing note, the goalposts shifted again to the Support Rates Page rendering inflexible the flexible main body of the NRPF policy, which in fairness had been the way Mr Khubber expressed it in oral argument). Either way, I reject the Support Rates Page inflexibility challenge:

    a. Firstly, insofar as the argument is that the Support Rates Page is a free-standing policy, that is simply not open to the Claimant. It was not pleaded, referred to in the Skeleton Argument or as far as I recall, mentioned in argument. It appeared for the first time in the CPHN, so the Defendant had no fair opportunity to put in evidence (as opposed to submissions) on it.

    b. Secondly, treating the Support Rates Page as a free-standing policy would be inconsistent with Mr Heeley's unchallenged (indeed, relied-on) evidence of how the policy operates. But even ignoring that evidence, the challenge is inconsistent with the existence of the NRPF Policy itself, as Mr Alomo argued. It would be unrealistic to ignore the main policy as it is obvious the Support Rates Page is in effect an appendix to it, even if not expressly described as such. As stated in *R(A)* at [34] a policy is to be read objectively having regard to the intended audience. Here whilst I understand the NRPF policy and Support Rates Page were published, the people actually using them on a daily basis and their main intended audience were social workers and other staff of the Defendant. Moreover, as stated in *R(W)* at [43], [62]-[63] and [66], a policy (including, I would add, what is included in the 'policy') has to be read 'sensibly, according to the natural and ordinary meaning of the words used', which may start with detailed linguistic analysis but also involves 'standing back and reading the document as a whole to see what message caseworkers would draw from it'. The Support Rates Page does not even define what 'NRPF' means, which naturally leads one to look for another or wider policy alongside which it must be read.

    c. Thirdly, taking into account both documents as part of the same policy, the Support Rates Page does not render the NRPF policy inflexible providing that both are read together properly in that way as intended. For the purposes of the main NRPF policy, the Support Rates Page is simply 'internal guidance' related to 'another statutory scheme', but the support can and should, as the main policy says, be flexed so it does not constrain the authority's obligation to have regard to

the children's welfare and ensures that assessed needs of individual children are met, consistent with s.17 ChA.

For those reasons, I also reject the 'Support Rates Page inflexibility' challenge.

106. I turn finally under Ground 4 to the '*R(A)* misstatement' challenge. I admit I have found this rather more finely-balanced. For the Claimant, the main point, skilfully made by Mr Khubber in oral argument and in the post-hearing note, is that even if the Support Rates Page is read with the NRPF policy, it might *appear* to cut down its flexibility almost to the point of apparent mutual inconsistency. As I have said, properly read together and applied in the way Mr Heeley describes, there is no difficulty, since the main NRFP policy makes the cardinal point that support should not be fixed to set rates, but flexible to meet individual children's needs. Yet, on the face of it, if not read properly e.g. in isolation, the Support Rates Page risks giving a misleading instruction of how the policy as a whole works. It just sets out the Asylum Support rates and adds 'Bus Passes / School Uniform can be provided as required'. However, what about any other services or support to a child (even if, as I have found provision in a 'Category 3' case is 'restricted' to the family) ? On a casual reading, a social worker may wrongly assume support is limited to the Support Rates Page. In short, this risk was why I referred to *R(A)* and granted permission on Ground 4. Nevertheless, Mr Alomo persuaded me it is not made out:

a. Firstly, I accept that the NRPF policy read along with the Support Rates Page falls within the scope of a *R(A)* type (iii) policy where the Defendant, although not under a duty, has issued a policy purporting to give a full account of the law to its staff applying it, as it is effectively internal guidance to staff as to how they should carry out their functions. Moreover, the main NRPF policy is comprehensive and specifically legal, referring to case-law like *R(C)*. However, there is no complaint of any actual *R(A)* 'type (i)' 'specific misstatement of law' in the main NRPF policy; and as Mr Alomo points out, there is no statement *of the law* at all in the Support Rates Page.

b. Secondly therefore, the Claimant must show that between the two documents, there was an 'omission having the effect when the policy is read as a whole that it presents a misleading picture of the true legal position'. (Whilst I accept the point that Lords Sales and Burnett at in *R(A)* referred to 'broad types', that is unquestionably an essential element of (iii)). But again, there is no complaint of omission in the main NRPF policy, the attack purely relates to the terms of the Support Rates Page.

c. Thirdly, I accept that the Support Rates Page has 'omissions' in the sense that it would have been much better if it had said words to the effect of 'minimum baseline for NRPF families in excluded groups under the NRPF policy subject to welfare flexibility as necessary' as described by Mr Heeley; or even just 'Bus passes, school uniform *and other support* can also be provided as required'. It is badly-drafted. However, that is only unlawful if the omissions have the effect that the policy read as a whole presents a misleading picture of the true legal position (which would mean it authorises or approves unlawful conduct, which is the underlying test set out in *R(A)*).

d. Fourthly, I am persuaded by Mr Alomo that the Support Rates Page read together with the NRPF policy does not have a legally-misleading effect. The Support Rates Page is best seen as 'internal guidance' which cross-checks with the Asylum

Support scheme, contemplated as legitimate in *R(C)*, as rightly summarised in the policy itself. After all, it also states in terms that 'Support for families with NRPF should not be fixed to set rates or other forms of statutory support without any scope for flexibility to ensure the needs of an individual child are met'. Whilst interpretation of a policy is a matter objectively for the Court not the authority, since it must also be read as a whole, read in the light of the main NRPF policy, all the Support Rates Page itself does is just set the 'subsistence baseline' as Mr Heeley describes.

e. Finally, I consider this is a good example of the real difference between the approach in *R(A)* and the approach it disapproved. As Lord Sales and Burnett stressed in *R(A)* at [48], there is no requirement to eliminate uncertainty in drafting a policy and as they added at [65], the issue is not whether there is an 'unacceptable risk of unlawfulness'. I accept that if the Support Rates Page were read in isolation, it would be legally misleading, but if it is read properly alongside the main NRPF policy, it is not. The risk that the Support Rates Page could wrongly be read in isolation in a particular case does not render the whole policy unlawful. As put in *R(A)*, it can be operated in a lawful way and does not authorise or approve unlawful conduct

Accordingly, I dismiss the '*R(A)* misstatement' challenge and indeed Ground 4. However, I come back to this 'misinterpretation risk' now under Ground 3.

Ground 3: Legal Misdirection

The challenges to and conclusions of the assessment

107. Ground 3 has a 'narrow' and a 'wide' version. The 'narrow' version, pleaded as the original Ground 3 itself, primarily focusses on this passage in the assessment:

> "[T]he children do not get to routinely engage in lots of wider activities which appears to be the family's main worry. Children's Services provide the *statutory support rates* and whilst it would be lovely to be in a position where this could be increased so the family could have more day trips out, electronic devices etc, *this is not possible*." (my italics)

In their post-hearing note, Mr Khubber and Ms Sekhon summarised this challenge

> "Under Ground 3 C submits that the current decision as to financial provision by D is unlawful by way of a misdirection in law i.e. by a) reference and reliance on current financial provision being in line with 'statutory support rates' and 'the updated Asylum support amount'."

In the Statement of Facts and Grounds, this part of the challenge was put this way:

> "D has erred and misdirected itself in law by concluding that it is prevented from providing additional support to C on the basis that it provides support in line with the 'statutory support rates'…..There are no 'statutory support rates' for the purposes of s.17 and D errs in law by claiming that the[y] prevent it from providing additional support. D has a duty to provide additional support because it has identified needs...currently not being met."

This is a straightforward 'legal misdirection' argument relying on *R(C)* to contend it was an error of law in the assessment to consider either that there were 'statutory

support rates' for s.17 ChA, or that it was 'not possible' to provide further support as the Claimant's family received financial provision at Asylum Support rates.

108. However, as I noted at the start of this judgment, there is a also 'wide' version of Ground 3, which incorporates aspects of other grounds which I had understood were included in Ground 3 when granting permission for it. This alleges:

    a. Firstly, even if the NRPF policy included the Support Rates Page and was lawful (as I found), the assessment applied the policy unlawfully rigidly and inconsistently with s.17 ChA's focus on welfare. In granting permission on Ground 3, I suggested that overlapped with Ground 4, but in the Claimant's post-hearing note (CPHN) it was argued as part of Ground 4 at para 5(i);

    b. Secondly, even if support for the Claimant's family were 'restricted' (as I have now found in Ground 1A), assessing financial assistance essentially at Asylum Support rates was unlawful as it only met 'subsistence needs' rather than 'welfare needs' (argued as part of Ground 1 in CPHN at para 4(iii));

    c. Thirdly, the other part of the original Ground 3 alleges a separate legal misdirection in the assessment by focussing on whether the family's finances gave rise to 'safeguarding issues' rather than focussing on welfare.

    This 'wide' version of Ground 3 is a rather different challenge combining (a) a 'no-fettering' argument; (b) an 'inconsistency with statutory purpose' argument; and (c) a legal misdirection argument. But all focus on s.17 welfare.

109. Both versions of Ground 3 concern the interpretation of the assessment (as opposed to the policy). Lord Dyson discussed the proper approach to this in *R(McDonald) v Kensington and Chelsea LBC* [2011] PTSR 1266 (SC) at [53]:

> "In construing assessments and care plan reviews, it should not be overlooked that these are documents that are usually drafted by social workers. They are not drafted by lawyers, nor should they be. They should be construed in a practical way against the factual background in which they are written and with the aim of seeking to discover the substance of their true meaning."

    I also bear in mind that in *R(Ireneschild) v Lambeth LBC* [2007] HLR 34 (CA) Hallett LJ (with whom Dyson LJ, as he then was, agreed) observed at [71]-[72] that a social work assessment is an iterative document to which the individual can respond and which can be amended (the April 2024 assessment here was added as an 'update' to the August 2023 initial assessment and should be read as such).

110. In the field of s.17 ChA needs assessment in NRPF cases, Munby LJ (as he then was) in *R(VC) v Newcastle CC* [2012] PTSR 546 summarised the case-law:

> "34 In the first place the authorities…emphasise the need for the assessment to embody 'a realistic plan of action'. That is an aspect of the duty to assess and indeed, a critical factor in determining whether that duty has been properly performed. But the authorities [do not] qualify what was said by the House in *R(G) v Barnet LBC* [2004] 2 AC 208 …. that there is, as such, no duty to provide the assessed services.
>
> 35 The second point appears from R *(K) v Manchester CC (2007)* 10 CCLR 87, para 39 that the assessment must address not only the child's immediate, current circumstances but also any imminent changes in [them].

> 36 The third point emerges from *R(B) v Barnet LBC (2009)* 12 CCLR 679 …. The assessment was struck down [as] it provided no realistic plan of action for meeting the child's assessed needs, one of the reasons being, at para 34, that [a third party provide under the plan] was not yet open. Though this was treated as a reason why the assessment itself was unlawful, it seems to me to illustrate a wider point. If a local authority is to say that a child who would otherwise be, in the statutory sense, a child in need is not, because his relevant needs are being met by some third party, then the authority must demonstrate that the third party is actually able and willing (or if not willing can be compelled) to provide the relevant services."

It is also helpful to consider what Munby LJ said about 'in need' at [28]-[29]:

> "28 Section 17(10) provides: "[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…
> 29 The final words in sections 17(a)…are important. The duties of a local authority do not extend to all children who might be said to be 'in need'. Apart from a child who is 'disabled' in the statutory sense, they apply only to a child who 'without the provision for him of services by [the] local authority will fall within one or other of the statutory criteria…."

111. In *R(C)*, Sir Ernest Ryder SPT explained the statutory guidance had changed in 2015 (and it changed again in 2023, although it is not suggested that makes any difference to what he said). It is worth repeating once more [12] and [22]:

> "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, for example *R(G) v LBC* [2004] 2 A.C. 208 at [113] and [118]). 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….
>
> 22 There is no necessary link between s.17 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…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 [and] those who have just arrived seeking asylum…are sufficiently different that it is likely to be irrational to limit s.17 support to that…in a different statutory scheme."

Whilst I found under Ground 4 that the Defendant's policy did not unlawfully 'fix' or 'limit' provision at Asylum Support levels, it is alleged in Ground 3 that the assessment itself was a 'rigid application' of the policy. The 'no fettering' principle relating to decisions rather than policies was explained in *R(A)* at [3]:

> "In the case of policies in relation to the exercise of statutory discretionary powers, it is unlawful for a public authority to fetter the discretion conferred on it by statute by applying a policy rigidly and without being willing to consider whether it should not be followed in the particular case."

112. I have already quoted the assessment in detail above. To save lengthening this already over-long judgment, here I will simply set out the final conclusions of the social worker and of his manager in the assessment. I then quote other parts of as relevant to the criticisms in the 'narrow' and wide' versions of Ground 3. This may appear at first sight like 'cherry-picking', but I emphasise that I have re-read and bear fully in mind the whole assessment and its wider context as suggested in *R(McDonald)*. Indeed, those parts I do not repeat are not criticised.

113. The social worker's final analysis concluded (my italics):

> "Since the [Initial Assessment] in August 2023, Children's Services have supported [LC] and children to obtain suitable temporary accommodation and provided financial support. This is ongoing whilst the[ir] immigration application sits with the Home Office….[U]ntil then, [LC] is completely dependent on Children's Service for accommodation and finances…..*[LC] and the children experienced instability with their hotel accommodation and lower weekly sustenance payments*. The family are now living in a house…which is more suitable for the family and caters to all of the children's basic care needs. Whilst not ideal as it is still temporary accommodation, [LC] has stated that the family are managing okay living there. *[LC] is now all receiving the updated Asylum Support amount, which is £192 every week [sic]. [LC] has said that she successfully budgets this money to ensure that the children's basic care needs are met. [LC] also receives bus tickets every week to ensure she can get the children to their schools. I can appreciate that this tight budget does not always allow the children to engage in wider activities outside of the family home however it is not presenting as a safeguarding issue*. The children all appear happy and healthy and have been seen at home and school. *I have spoken with [LA] and [LR] about their position, and how this differs from their peers, and they appear understanding and hopeful that in time, this may change*.
>
> It is really positive to see the school supporting [LC] and the children through a variety of ways. All school trips have been fully funded by the school for the children and therefore they have not had to miss out on fun and educational experiences. [LG] receives free school dinners and the schools have also accessed their boot funds to provide some essential items. Both pastoral teams are aware of the children's current lived experience and therefore can observe and notify LC/services if they are worried about the children. Both schools have said how

> polite, friendly, hard-working and lovely LG, LA and LR are. LC should be very proud that despite the difficulties she has faced, and continues to face, all three children have great school feedback and are polite and friendly…..
>
> *Throughout this updated assessment, there has been no safeguarding concerns raised or highlighted*. The children are well cared for, [LC] manages her finances well and the children all attend school daily. *The family are living to their current means, which does mean that the children do not get to routinely engage in lots of wider activities which appears to be the family's main worry. Children's Services provide the statutory support rates and whilst it would be lovely to be in a position where this could be increased so the family could have more day trips out, electronic devices etc, this is not possible*.
>
> I have visited the family many times over the past year, as have other colleagues, and they are always welcoming, warm and friendly. [LC] and the children have a good relationship with Children's Services and communicate very well. As there are no ongoing safeguarding concerns, and an updated Children and Families Assessment has been completed, it is possible that the family will be transferred over to the NRPF team….[LC] will continue to receive the same level of financial and housing support."

114. In the pro forma, the social worker said the children were 'not in need' but added:

> "As the family continue to require financial and accommodation support to ensure [LC] can meet their basic care needs, alongside the ongoing Human Rights Assessment, I recommend that the children continue to be supported under the remit of s.17 Child In Need- Support the family into more appropriate accommodation.- Provide financial support for the family whist they do not have access to public funds. - Continue to link in with the Law Centre on the progress of the Human Rights application."

115. The social worker's manager summarised her conclusion (my italics):

> "….This assessment reflects the current needs of the family and reaffirms that [LC] is doing incredibly well to ensure that the children's needs continue to be met despite the challenges they face in a temporary home. *[LC] is in receipt of the updated Asylum support amount, which is £192 [sic] every week, alongside travel vouchers which enable the family to continue accessing the same schools and the community on a weekly basis.* There is an absence of safeguarding concerns which has been the case since the referral where [LC] demonstrated her ability to protect and prioritise the safety and needs of the children despite concerns relating to her status. Until the outcome of the Home Office application, [LC] and the children will continue to be supported…Ongoing efforts will be made to find them accommodation that is more attuned to the needs of the family and regular updates will be sought in respect of the outstanding immigration status."

The 'narrow' Ground 3

116. The focus of the 'narrow' Ground 3 is the comment in the assessment that:

> "The children do not get to routinely engage in lots of wider activities which appears to be the family's main worry. Children's Services provide the *statutory*

> *support rates* and whilst it would be lovely to be in a position where this could be increased so the family could have more day trips out, electronic devices etc, *this is not possible*." (my italics)

Mr Khubber and Ms Sekhon's argument is simple. There are no 'statutory support rates' for s.17 ChA and the statement that 'it is not possible' to increase support as the family already received financial provision at Asylum Support rates constituted a legal misdirection as it was inconsistent with s.17 ChA and *R(C)*. I initially focus on this 'narrow' Ground 3, because it has been the core of Ground 3 from the start and does not depend on any widening of, or change in, Ground 3.

117. Mr Alomo skilfully developed several arguments against the 'narrow' Ground 3:

a. Firstly, that this passage was just loose language to be read fairly in the context of the rest of the assessment and its background (*R(McDonald)*) as not referring to law at all, but simply to the Defendant's Support Rates Page and the truism it would be 'lovely' but not 'possible' to have all we want.

b. Secondly, that if the social worker *did* mean the family were receiving all the law required, that was legally correct as it was indeed 'not possible' to increase financial support for additional activities or provision because they were not 'needs' it was necessary to meet under s.17 ChA (see *R(VC)*).

c. Thirdly, if the passage simply meant the family were receiving all the social worker *thought* the law *required*, he also *knew* provision *could* go beyond the Support Rates Page level, as there had been additional provision before.

d. Fourthly, if the passage meant the family could legally receive no more than listed on the Support Rates Page, that was actually higher than Asylum Support as including bus passes for the family, so was consistent with *R(C)*.

e. Finally, in fairness to the Defendant, I have also borne in mind another argument relying on Mr Alomo's submissions on Ground 1A and 1B which I have already accepted. As I found that *financial* support to the Claimant's family was limited to what was necessary to avoid ECHR breach and that no further financial support is 'necessary' to do so, the assessment may actually have been *right* to conclude further support was 'not possible'.

118. The difficulty with Mr Alomo's first point is if one looks at the rest of the assessment and indeed the background to it in accordance with *R(McDonald)*, it is entirely consistent with the social worker falling into precisely the *legal* error the Claimant alleges. For example, earlier in the assessment, he said:

> "[T]he family's financial difficulties…weighs upon [the Claimant] and [LA]. Both have spoken to me about wishing they had more money to engage in more activities with their friends outside of school, however are understanding that there are limitations to what they can do, which is through no fault of their mother. I have explained that the family are completely reliant on Children's Services for finances and that this has been assessed to ensure *they are receiving the legal requirement*. [LC] has been given extra payments on an irregular basis so she can take the children to activities such as the cinema, fast food restaurants etc." (My italics)

I return to those irregular payments, but 'ensuring the family receive the legal requirement' is if anything even more indicative of the social worker considering there

was a 'legal requirement' for support under s.17 ChA and equating that later with what he called the 'statutory support rates': an intrinsically *legal* term. Indeed, elsewhere in the assessment the social worker referred to (incorrect) Asylum Support rates as did his manager. The social worker *was* clearly talking about what *the law* 'required' or rendered 'possible'. In my judgment, the natural reading of the passage in the context of the rest of the assessment is that the family were receiving all the law 'required' and it was 'not possible' to increase support.

119. That interpretation is entirely consistent and indeed fortified by the background to the assessment. Factually, the social worker knew there had been an under-payment and 'instability with lower weekly subsistence payments' but were not 'receiving the updated Asylum Support amount of £192 every week'. He believed that under-payment had been corrected so the family got what the law 'required'. If he had read the Support Rates Page in isolation, other than a slight arithmetical error, he can be forgiven for thinking just that as it simply sets out a list of rates equivalent to Asylum Support, plus bus passes (which the family received) and school uniform (which they did not and which he did not consider). In Ground 4 I found the Support Rates Page should legally be read as part of the main body of the NRPF policy. But I also said in practice if read in isolation it appeared to limit provision: consistent with the apparent approach in the assessment. That does not make the *policy* unlawful, but it is clearly relevant to interpreting the *assessment*.

120. Secondly though, Mr Alomo adeptly switched tack to argue that even if the social worker had concluded in the assessment that the family were receiving all the law required, that was legally correct as it was indeed 'not possible' to increase financial support for additional activities or provision because they were not 'needs' it was necessary to meet under s.17 ChA. It is certainly true that in *R(VC)* at [28]-[29], Munby LJ said a child was only 'in need' under s.17(10) ChA if unlikely to achieve or maintain a reasonable standard of health or development if the authority provided services to them. In short, as Mr Alomo put it in Ground 2 (which overlaps on this point) a statutory '*need*' is different than a 'desire'. Increased provision to enable days out or electronic devices is what the family 'wish for' and would be 'lovely' (not a statutory term) but are not s.17 'needs'. Mr Alomo also pointed to the word 'wish' stated in the assessment:

> "[T]he family's financial difficulties…weighs upon [the Claimant] and [LA]. Both have spoken…*wishing* they had more money to engage in more activities with their friends outside of school… I have explained...[support] has been assessed to ensure they are receiving the legal requirement…."

(I also analyse this argument again under Ground 2, since Mr Khubber and Ms Sekhon submit there that whether or not the assessment contained a legal misdirection as pleaded in (the narrow) Ground 3, it was 'irrational' given the assessment to set support at the level it was, given 'unmet needs' under s.17 CA).

121. However, Mr Alomo's difficulty with this point in Ground 3 is that the assessment did *not* say that the additional provision which was 'not possible' is 'a wish not a need'. Curiously, the social worker did say the children were *not* 'in need' but then 'recommended they continue to be supported under the remit of 's.17 Child In Need' including 'support into more appropriate accommodation' and 'financial support whilst not having access to public funds'. As Mr Khubber pointed out, far from a finding the children were *not* 'in need', the assessment plainly found they *were* 'in need'.

However, whilst of course that muddle would not by itself vitiate the assessment, it hardly supports Mr Alomo's retrospective rationalisation of the assessment as saying additional provision was not a 's.17 need'. The reference to a 'wish' must be read in context. This is not just the children's 'wish' in the sense of a 'pleasant fancy'. As the social worker said, financial difficulty 'weighs on' them. He repeatedly recognised this negative impact on the children:

> "The children do not get to routinely engage in lots of wider activities which appears to be the family's *main worry"* and:
>
> "*It is clear that the family's lack of finances does impact on their quality of life* however this is not to a level that is of a safeguarding concern."

I return to these observations on Ground 2 (and the 'safeguarding' point on the 'wide' Ground 3), but for the moment, the key point is that the social worker actually *accepted* tightness of finances was affecting the children's welfare (even if not a safeguarding concern), indeed their 'quality of life'. In law, this is indisputably a 'welfare need' under s.17(10) ChA, or at least as explained in *R(C)*, s.17 ChA and s.11 CA 2004 is the assessment must have due regard to the need to promote welfare. Yet, the apparent reason for not increasing support to do so was it was 'not possible' as the family were receiving their 'legal requirement', which was legally incorrect (since even if it was not 'necessary' to provide financial assistance to avoid an ECHR breach, direct provision could still be made).

122. Accordingly, without a conclusion in the assessment that additional provision was not required to meet a 'need' under s.17 ChA, I turn to Mr Alomo's next submission that even if the social worker thought the family were receiving 'their legal *requirement*', it was unnecessary to increase the weekly support as he knew that additional support could actually be provided as needed from time to time as had happened previously. In fact, it is common ground that the Defendant *did* make extra payments to the family of £35 during May 2023 half-term, £30 during the October 2023 half-term, £20 during Christmas 2023 and £30 during Easter 2024. (The mobile phone and payment in June 2024 is not agreed or evidenced, but I assume it is correct). Mr Alomo focussed on this, since (as noted) it was specifically mentioned in the assessment after 'legal requirement':

> "I have explained [to the older children] the family are completely reliant on Children's Services for finances and that this has been assessed to ensure they are receiving the legal requirement. *[LC] has been given extra payments on an irregular basis so she can take the children to activities such as the cinema, fast food restaurants etc*." [i.e. the £40 at Easter 2024]

123. However, there are several difficulties with this argument and I reject it as well:

    a. Firstly, the suggestion the social worker thought it was unnecessary to increase weekly support as he knew it could be supplemented on occasion is inconsistent with him saying that increased provision beyond what he called 'statutory support rates' was 'not possible' as opposed to saying that it would only be 'necessary on occasion' etc. 'Not possible' is consistent with him believing the family were already receiving all the law required, as would have been the impression from the Support Rates Page in isolation.

    b. Secondly, whilst the additional payments were mentioned elsewhere in the assessment, there was no reference to them at all in the social worker's concluding

analysis (whether as qualifying 'not possible' or otherwise) or in the manager's approval. Nor is there any reference to them in the future as part of a 'realistic plan' for support as required by s.17 ChA (*R(VC)*).

c. Thirdly, that is explained by the background to the April 2024 assessment (*R(McDonald)*). It is true it noted the family had received extra money during holidays. However, the 2023 supplements were when the family were receiving £135 per week, but when the Asylum Support Rate was £40.85 rather than £49.18 (see Reg.10 Asylum Support Regulations 2000). So those supplements did not top up to anywhere near Asylum Support level. By Easter 2024, the family were regularly receiving £192 - £194 per week, which the social worker and his manager thought was the 2024 Asylum Support rate for the family (in fact it was £196.72). However, the social worker knew the Easter top-up was against the background of recent serious under-payment down to £117 as recently as January 2024. The assessment came before any (disputed) payment in June 2024. Additional payments had been done in the past, there was no plan for them in the future.

In short, I find the assessment proceeded on the basis that it was 'not possible' to increase financial support to provide for more children's activities, as the family were receiving their 'legal requirement' of Asylum Support rates as set in the Support Rates Page. That is a misdirection of law given *R(C)* in precisely the way Ground 3 contends, subject to two further points I deal with now.

124. Mr Alomo's fall-back submission was effectively that *R(C)* was distinguishable, as here s.17 ChA support was not 'fixed' at Asylum Support level: the Claimant's family also received bus passes, not included in Asylum Support. (Mr Alomo also pointed out that made no provision for utilities, but that did not arise on the facts here any more than the extra sums for children under 3 or maternity, also in the Asylum Support scheme). Of course, the first problem with that is at the time of the assessment in April 2024, the Claimant's family was not receiving Asylum Support levels, wrongly stated by the social worker as £192.72 and by his manager as £192, when in fact the correct figure was £196.92 as the Defendant had admitted in January 2024. Therefore, at the time of the assessment, the Claimant's family was getting *less* than the Support Rates Page said they should. £4 a week was not 'de minimis' to this family: a few pounds made a difference. But even if the support was still above Asylum Support rates because of the bus passes, (subject to the last point below), the assessment still contained a legal misdirection in stating it was 'not possible' to increase financial support when it is plain from the social worker's own opinion that activities would promote their welfare, or improve their 'quality of life' to use his own expression. As I explained at [99(c)] above, *R(C)* makes clear that s.17 support should not be limited by reference to Asylum Support rates, not just by 'fixing' it at that level, but by 'fettering the s.17 discretion' to meet needs and whether the authority's consideration of Asylum Support rates 'effectively restricted its ability to make a proper assessment of the needs of the children' as Moore-Bick V-P put it at [44]. Subject to one last point, I am driven to the conclusion that is precisely the legal error into which the assessment fell in finding it was not possible to increase 'statutory support rates' for additional activities or resources for the children.

125. As I noted at [117(e)] above, the last point is not strictly a submission Mr Alomo made in relation to Ground 3, but it does flow from his submissions on Grounds 1A and 1B

which I accepted. After all, I found financial support to the Claimant's family was limited to what was necessary to avoid ECHR breach and that no further financial support was 'necessary' to do that. So, I have considered carefully whether that conclusion in effect means that the assessment was strictly legally correct to conclude that further support was 'not possible' for the family. However, having reflected upon it, I cannot accept that either, for three reasons:

a. Firstly, that is not what the social worker said in the assessment. He did not *consider* at all whether any further support was necessary to prevent breach of Art.8 still less *conclude* that it was not. *I* concluded it was not on evidence.

b. Secondly, were I to conclude the social worker was 'accidentally right', that would effectively be saying his legal misdirection made no substantial difference under s.31(2A) Senior Courts Act 1981, a point not raised by the Defendant and on which I have heard no submissions at all by the parties.

c. Thirdly, in any event, I am not satisfied the social worker was 'accidentally right', at least in saying the family had received the 'legal requirement' (not limited to *financial* support). Even if it was entirely lawful not to increase *financial* support given para.3 Sch.3 NIAA, it was entirely possible under para 2(1)(b) for the children to receive direct support, e.g. English lessons or singing lessons for the Claimant, or other funded activities. Whilst not necessary to avoid ECHR breach, they were perfectly 'possible', but were not considered due to legal misdirection. I uphold the 'narrow' Ground 3.

The 'wide' Ground 3

126. If I am wrong about my conclusion on the 'narrow' Ground 3, I would also uphold the 'wide' Ground 3 I have explained at [107] above, which I repeat for ease:

a. Firstly, even if the NRPF policy included the Support Rates Page and was lawful (as I found), the assessment applied the policy unlawfully rigidly and inconsistently with s.17 ChA's focus on welfare. In granting permission on Ground 3, I suggested that overlapped with Ground 4, but in the Claimant's post-hearing note (CPHN) it was argued as part of Ground 4 at para 5(i);

b. Secondly, even if support for the Claimant's family were 'restricted' (as I have now found in Ground 1A), assessing financial assistance essentially at Asylum Support rates was unlawful as it only met 'subsistence needs' rather than 'welfare needs' (argued as part of Ground 1 in CPHN at para 4(iii));

c. Thirdly, the other part of the original Ground 3 alleges a separate legal misdirection in the assessment by focussing on whether the family's finances gave rise to 'safeguarding issues' rather than focussing on welfare.

I am satisfied the Defendant and Mr Alomo himself had a fair opportunity to address all these points, even if advanced under different 'headings'.

127. Firstly, even if I am wrong on the 'narrow' Ground 3 and there was no legal misdirection in the assessment that it was 'not possible' to increase 'statutory support rates' for children's activities, then the practical upshot of the assessment was that support *was* limited to Asylum Support rates and bus passes – i.e. limited to that specified in the Support Rates Page, without any specific consideration of whether any direct welfare support to the children could be provided by para.2(1)(b) Sch.3 NIAA

(e.g. English or singing lessons or funding of activities) even though the family's tight finances affected the children's welfare: their 'quality of life'. So, the social worker and their manager 'fettered their discretion' as criticised in *R(C)* by 'restricting their ability to make a proper assessment of the needs of the children'. Certainly, the assessment did not use Asylum Support as a 'cross-check' or even a 'subsistence baseline with a welfare top-up' like Mr Heeley's suggested approach to the policy I have accepted was lawful. That involves first considering whether any direct provision can be made. Even if there was no legal misdirection as such, there was no such consideration. Moreover, whilst Mr Heeley suggests it is up to a social worker's manager to exercise their discretion to increase support if a child's welfare requires it, the manager did not recognise any power to do so, still less explain why she did not exercise it:

> "[LC] is in receipt of the updated Asylum support amount, which is £192 [sic] every week, alongside travel vouchers which enable the family to continue accessing the same schools and the community on a weekly basis."

(As I have already said, it also did not help that the social worker and manager had the Asylum Support rate slightly wrong). Accordingly, even if I am wrong that there was a *legal misdirection* on raising financial support as alleged in the original Ground 3 itself, I would accept that the approach taken on assessment practically and *unlawfully fettered the Defendant's statutory discretion under s.17 ChA* to provide support direct to the children under para 2(1)(b) Sch.3 NIAA. That is unaffected by rejection of Grounds 1A, 1B and 4. Indeed, it is consistent in 4 with why I rejected the challenge to the *policy* as opposed to the *decision*.

128. Secondly, even if I am wrong about that as well and there was no legal misdirection or fettering of discretion limiting support, as it was limited to Asylum Support, bus passes (and possibly a phone) that meant there was effectively no support relating to the children's '*welfare* needs' as required in s.17 ChA as Sir Ernest Ryder SPT said in *R(C)* at [12] and [22]. I respectfully elaborated on the distinction with 'subsistence needs' in *R(BCD)* at [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 section 95–96/122 IAA and Regs 9 and 10 [Asylum Support Regulations or 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 Burundi) v SSHD* [2017] 1 WLR 4567 (CA), para 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….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)* by Sir Ernest Ryder SPT, but also by Moore-Bick

> LJ at para 44…Therefore, I agree …that the focus of section 17 CA on 'welfare' on one hand and of asylum support on 'essential living needs' or 'subsistence' on the other is entirely different."

In short, as Sir Ernest Ryder SPT said in *R(C)* at [22]-[24], Asylum Support is specifically calibrated to meet only 'essential living needs', which is why at earlier in this judgment, I suggested s.17 provision equivalent to Asylum Support would likely avoid breach of Art.3 ECHR, but not necessarily Art.8 ECHR (or indeed Art.2 Prt.1 ECHR). But I also maintain my view at *R(BCD)* at [101]:

> "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 playgroup, counselling etc). But that depends on this being the conclusion of *the specific child's assessment*, as Sir Ernest Ryder SPT said in *R (C)*."

129. In this case, provision of the equivalent of Asylum Support and bus passes effectively met almost entirely 'subsistence needs' because Asylum Support is limited to those (*R(JK Burundi)*, bus passes were provided primarily as an alternative to school transport primarily a way of getting children to school and elsewhere and a phone for safeguarding LA. There is a welfare benefit in those things, but they are only consistent with a conclusion that there were no other welfare needs which required provision (as in the scenario I discussed in *R(BCD)* at [101]). However, that is inconsistent with the contents of the assessment itself:

> **"**[LC] is now all receiving the updated Asylum Support amount, which is £192 every week [sic]. [LC] has said that she successfully budgets this money to ensure that the children's basic care needs are met."
>
> "It is clear that the family's lack of finances does impact on their quality of life however this is not to a level that is of a safeguarding concern."

The first quote shows that even the £192 pw is enough to cover *basic care needs* (which after all is exactly what Asylum Support is calibrated to do), but still leaves a shortage of money affecting the children's quality of life. So, I find support has not been provided to promote welfare, inconsistently with s.17 ChA.

130. Thirdly, even if I am wrong about that as well, alternatively the social worker misdirected himself in law by focussing only on such 'safeguarding needs' e.g:

> "I can appreciate that this tight budget does not always allow the children to engage in wider activities outside of the family home however it is not presenting as a safeguarding issue."

The social worker made such observations on five occasions. Mr Khubber and Ms Sekhon point out in *R(HC)* at [46] Lady Hale said of s.17 ChA: *'safeguarding is not enough, [children's] welfare has to be actively promoted'.* The same welfare-orientated point is made in *R(C)*. Absence of safeguarding issues does not mean absence of need for support to promote welfare under s.17 ChA. In fairness, as I pointed out when granting permission, the fact a social worker repeatedly states in a s.17 needs assessment that a particular issue does not give rise to a safeguarding concern does not in itself prove they have limited the scope of 's.17 needs' to ones giving rise to safeguarding issues rather than welfare. It is also true, as Mr Alomo pointed out, that

the assessment is full of positive 'welfare references' e.g. good health and how well the children are doing at school. But as Mr Khubber replied, when the social worker acknowledged a problem (e.g. the frustrations of the children and their mother on their finances, clearly 'weighing on' the two older children), he consistently said 'it was not a safeguarding need' without expressly considering whether it was a 'welfare need' even when he had effectively concluded as such himself e.g. the 'impact on quality of life' '*however this is not to a level that is of a safeguarding concern'*. Yet the social worker did not recommend any additional support as he was wrongly focussing on monitoring safeguarding rather than improving the children's welfare.

131. I bear fully in mind the guidance in *McDonald* and *Ireneschild* that assessments are not written by lawyers and should be read practically against their context to consider their true meaning; and that they are iterative documents that can and here did change. I bear fully in mind that there is no duty to meet an 'assessed need' and the Court must not substitute its own judgment for the local authority nor dictate how it conducts its assessments, especially as a local authority under s.17 is entitled to take into account its own resources: *R(VC)* and *R(C)*. The Defendant's resources here are overstretched: with a NRPF budget of £289,0000 but overspend of £200,000, with the number of NRPF families trebling in the last two years. Above all, I bear fully in mind that in very many respects this was a thorough and fair assessment where the children were putting on a brave face and there were lots of positives, not least no safeguarding concerns. Nevertheless, in the respects I have detailed, I have found the Defendant fell into legal error and accordingly both on the 'narrow' and 'wide' bases for Ground 3, I uphold it.

Ground 2: Irrationality

132. In the light of my conclusions on Ground 3, I can take this ground briefly. If I am wrong about Ground 3 (either that there was a misdirection of law on either of the bases posited, a fettering of discretion, or failure to provide support for welfare needs; and even if the social worker did conclude it was unnecessary to make any additional provision for welfare needs), the conclusion of the assessment not to make any additional provision was irrational on two different bases. I so decide even reminding myself of the very high bar for irrationality challenges and the relevance of: the Defendant's position (and overspend) it is entitled to take into account; its constitutional and institutional competence and expertise in such assessments; and the limitations on the Court's role set out by Sir Ernest Ryder SPT in *R(C)* at [21], but also these observations at [21]-[22]:

> "The court should focus on whether…the local authority can demonstrate that due regard has been had to the dimensions of a child's best interests for …..s. 17 CA 1989 in the context of the duty in s. 11 ChA 2004 to have regard to the need to safeguard and promote the welfare of children….
>
> [T]he circumstances of those who qualify for s.17 support [and] those…. seeking asylum…are sufficiently different that it is likely to be irrational to limit s.17 support to that…in a different statutory scheme."

133. Firstly, if right to dismiss Grounds 1A, 1B and 4, even if wrong to uphold Ground 3, I accept Mr Alomo's point that provision was slightly higher than Asylum Support due to the bus passes, but that limited difference still invites real scrutiny of whether the assessment had 'due regard' for the children's welfare and the need not just to safeguard them but promote their welfare under s.17 and s.11. Of course, by analogy

with the cases on the similar 'due regard' provision of the Public Sector Equality Duty in s.149 Equality Act 2010, there can be compliance even if the duty was not expressly mentioned (and it was not in this assessment). But it is also clear that the issue is not whether that made any difference to the result – as I say no submissions have been made under s.31(2A) SCA. However, as Mr Khubber and Ms Sekhon submitted at p.4.4.2 of their Skeleton Argument, the assessment itself highlights that the state of the family's finances has an effect on the children's 'quality of life' and the absence of wider activities 'is the family's main worry', but then does not consider how that should be addressed, beyond saying 'it is not possible to raise statutory support rates'. There is 'due regard' for the welfare impact on the children, but not on *promoting* their welfare.

134. Mr Alomo argues the assessment was entitled to conclude either there were no 'unmet needs' or those there were did not require any further provision from the Defendant (*R(VC)*). He says the assessment was fair and reached unchallenged conclusions the children: have no health concerns and are happy and healthy, are doing well at school, are well-behaved and positively interact with their mother and are safe and well. None of that is in dispute. But the finding that 'the children's emotional health is not significantly impacted by their lack of access to materials, finances and experiences that some of their peers may have' is irrationally inconsistent with its other findings that: "The children do not get to routinely engage in lots of wider activities which appears to be the family's *main worry"* and: "It is clear that the family's lack of finances does impact on their *quality of life* however this is not to a level that is of a safeguarding concern." Nor can this inconsistency be dismissed by suggesting these were just 'wishes and feelings' rather than 'needs' within s.17 ChA. On the social worker's own findings, the childrens' development, even their 'quality of life', was likely to continue to be impaired without provision. An assessment must have 'due regard' under s.11 CA 2004 to the need to safeguard and *actively promote* welfare of children 'in need' under s.17 ChA. The current assessment in this respect has not done so. Even if it was not 'necessary' to increase *financial* assistance under para.3 Sch.3, there was no consideration of necessary additional *direct provision* to the children, for example the Claimant's English lessons (clearly more than a 'wish' in the context of a child studying GCSEs, especially given it was only £5 an hour; or singing lessons). Whilst I accept the support here is not (quite) limited to Asylum Support, given the social worker's own conclusions about the negative impact of poverty on the children (however well they are 'holding up' as their mother put it), such additional support was so modest that the assessment failed to have 'due regard' for promoting welfare with it. Therefore, I uphold Ground 2.

135. Alternatively, if I am wrong about Grounds 1A and/or 1B and additional *financial* assistance was 'necessary' or appropriate under s.17 ChA (which I accept as Mr Khubber and Ms Sekhon said in their post-hearing reply was the main focus of Ground 2 as originally pleaded, if not how it was addressed in argument), then whilst there is no duty to meet assessed needs, the Court will scrutinise whether failure to increase support was rationally consistent with the duties in s.17 ChA and s.22 ChA 200*4 (R(VC)* at [25]-[26]). For the reasons just stated at [132]-[134] of this judgment above, but all the more clearly in this scenario, as financial support was limited to Asylum Support despite its impact on the children's quality of life, not increasing support was

irrational (as Sir Ernest Ryder came close to saying in *R(C)* at [22] and which is in any event a conclusion merited here).

Result and Consequential Orders

136. Accordingly, whether on Grounds 2, 3 or both, the challenged assessment must be quashed and undertaken again by the Defendant. I emphasise that nothing I say should influence the outcome, only the process to ensure it is lawful. It will not necessarily be unlawful for the Defendant to reach the conclusion that the current level of provision is lawful, but in doing so, it will need to explain why the children do not have any unmet welfare needs given the updated evidence, or why it is unnecessary to meet them through additional direct provision; and either why that is consistent with its duties to have due regard to the need not just to ensure safeguarding but to promote welfare under s.17 ChA and s.11 ChA 2004. (There is no reasons challenge in this case but could be if that is not done).

137. In any event, since the April assessment is now seven months old, given what the Claimant has described in her evidence, a rather different picture has emerged from the one she gave in her interview in April. I have not taken that into account at all in upholding Grounds 2 and 3, because the challenged assessment must be evaluated on the information at the time. However, even if I had dismissed the claim, I would in any event have been strongly encouraging the Defendant to update the assessment anyway, not least given the Claimant is now undertaking her GCSE year and she has expressed concerns about the standard of her English and her mother has specifically asked for English tuition to be funded.

138. I am conscious the social worker may feel rather bruised by my conclusions on Grounds 2 and 3. He will notice I have not named him – there was no need to do so. I entirely accept that he undertook an otherwise detailed, thoughtful and humane assessment where he was clearly impressed by the family's fortitude through adversity, as am I. However, I find he fell into (doubtless inadvertent) legal error in the ways described. Moreover, the social worker should also take some comfort from the fact that in my view, he was probably led astray by the poor drafting of the Defendant's Support Rates Page. Indeed, I have considerable sympathy with the social worker as his legal error was entirely predictable if the Support Rates Page was read in isolation. Whilst I have found it formed a part of a lawful NRPF policy, that was only when read alongside the main body which made clear the flexibility it lacked. The Defendant should urgently review its NRPF policy, as there may be other decision-makers led astray by it. It should also reflect on making clearer the different 'statutory categories' of NRPF families as discussed in *R(BCD)* which the Defendant itself successfully defended in this claim.

139. When I circulated this draft judgment, I invited the parties to submit an agreed draft order and I am happy to approve their draft in the agreed terms of: (i) allowing the claim for judicial review and (ii) quashing the assessment of 24th April 2024. There is also no debate that (iii) there should be detailed public funding assessment of the Claimant's costs. However, issues remain as to (iv) whether the Claimant should have permission to appeal my dismissal of Grounds 1A and 1B; and (vi) whether the Defendant should pay any of the Claimant's costs and if so, to what extent. Helpfully, the parties have made written submissions on that point and have invited me to deal

with those outstanding issues without a hearing to save time and costs, which I am happy to do.

140. On the question of granting the Claimant permission to appeal, I am not convinced it is open to me to do so. It is axiomatic that an appeal is against an order, not the reasoning in the judgment leading to it: *Lake v Lake* [1955] P 336 (CA). *The Claimant* cannot appeal my *order* because her claim succeeded in quashing the challenged assessment. If *the Defendant* were to appeal, the Claimant could certainly cross-appeal my dismissal of Grounds 1A and 1B (or potentially simply file a Respondent's Notice under CPR 52.13 not requiring permission to appeal - see *Braceurself v NHS England* [2024] 1 WLR 669 (CA)). However, if the Defendant does not appeal, I do not believe I can give permission to appeal to the Claimant. In any event, if I am wrong about that, the Court of Appeal can certainly do so.

141. In any event, I am not satisfied the test for permission to appeal under CPR 52.6 is met in this case. My decision on Ground 1B is fact-sensitive and even if I was unduly strict about the scope of Art.8 'private life', as stressed in *Anufrievja*, it would be very unlikely for 'Art.8 'private life' to be engaged unless Art.3 is (which is not arguable here). I also do not consider it is arguable that I took an unduly restrictive view of 'interference' with Art.8 family life either, at least once the payment from the Defendant was increased to the current level, because the Claimant's own evidence is that family life has got significantly easier as a result. I apprehend that the Claimant's greater concern is the implications of my statutory interpretation in Ground 1A, in particular my decision that 'overstayers' are in a different 'statutory category' of support than NRPF families lawfully in the UK. I recognise at once that this decision has potentially wider implications, that issues of statutory interpretation are more apt for permission to appeal and there are only first instance decisions on the issue (e.g. my own in *R(BCD)* and the present case). However, those are arguments which can be made to the Court of Appeal, which will certainly be in a better position than me to judge whether 'there is some other compelling reason' for the appeal under CPR 52.6. I would only observe that I do not consider an appeal on Ground 1A to be 'arguable' anyway. In my view, as I have tried to explain in this judgment, Parliament plainly intended to treat those unlawfully in the UK differently than those lawfully in the UK. If that creates practical complexities or a 'convoluted exercise' for local authorities, I see no reason why Parliament would not have intended for there to be more 'hurdles' to support for families unlawfully here. To the extent that such deterrence is unevidenced, that is true of many aspects of what has been called 'the hostile environment' successive Parliaments have created for migrants unlawfully in the UK. It is open to the Claimant (subject to the *Lake v Lake* point) to apply to the Court of Appeal for permission to appeal. However, I would also emphasise that my decisions in *R(BCD)* and the present case on the 'statutory categories' are only first instance decisions not binding in other judicial review cases where other judges may take a different view.

142. Moreover, as Mr Alomo submits, my dismissal of Grounds 1A and 1B (and indeed Ground 4, for which permission to appeal is not sought) is relevant to costs because of CPR 44.2, which provides so far as material:

> "(1) The court has discretion as to (a) whether costs are payable by one party to another; (b) the amount of those costs, and (c) when they are paid.
> (2) If the court decides to make an order about costs: (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful

> party, but (b) the court may make a different order…
> (4) In deciding what cost order…to make, the court will have regard to: (a) the conduct of all the parties; (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful….
> (5) The conduct of the parties includes…(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue; (c) the manner in which a party has pursued or defended its case or a particular allegation or issue…"

As Mr Alomo points out, on the five arguments the Claimant pursued, she was successful on Grounds 2 and 3 but unsuccessful on Grounds 1A, 1B and 4. As he fairly says, those grounds on which the Claimant lost have taken up much more analysis by Counsel and myself than the grounds on which she won. Moreover, the grounds on which the Claimant lost are also sufficiently important to her to pursue permission to appeal on Grounds 1A and 1B even though she succeeded in quashing the challenged assessment (subject to the *Lake* point). Mr Alomo even questioned whether the Claimant was the successful party under CPR 44.2. However, as Mr Khubber and Ms Sekhon point out, the 'target' of the claim was the challenged assessment and the Claimant has succeeded in quashing that. As Singh LJ said in *ZH (Afghanistan) v SSHD* [2018] 3 Costs LO 357 (CA) at [67], the underlying rationale for the rule that costs follow the event in CPR 44.2 is that a party has had to spend those costs in coming to court to vindicate their rights which if the other party had not violated it would not have had to pay. Likewise, as Lord Toulson explained in *Hunt v Somerset Council* [2015] 1 WLR 3575 (SC) at [16], where a claimant succeeds in a judicial review claim in establishing the defendant acted unlawfully, unless there was a good reason, they should recover reasonable costs. I have found the assessment was unlawful and the Claimant was entitled to come to come to Court to have it quashed. She is undoubtedly the successful party and the Defendant should pay (at least some) of her costs.

143. Mr Alomo's stronger point was the Claimant was only partially successful and so should only recover a proportion of her costs from the Defendant - Mr Alomo suggests 50%. However, as Mr Khubber and Ms Sekhon point out, even on two of the three grounds on which the Claimant lost, I went some way with their submissions: on Ground 1A, I did clarify the 'statutory categories' from *R(BCD)*, in particular to correct my inapt expression of a 'cap'; and on Ground 4 I criticised the Defendant's NRPF policy quite heavily and indeed have called for it to be amended, albeit did not in the end find it unlawful. Moreover, as Mr Khubber and Ms Sekhon also noted, it has been observed in many cases that it is a fortunate litigant who wins on every point. This is also true in public law cases, where there is also a public interest dimension as Lord Toulson also said in *Hunt* at [16]. Public bodies should not be immune from ordinary costs consequences and paying the costs of successful claimants in judicial review may also encourage better public decision-making, as Lady Rose observed in *CMA v Flyn Pharma* [2022] 1 WLR 2972 (SC) at [97] and [133]. Moreover, as Singh LJ also emphasised in *R(ZN Afghanistan)* at [71]-[94], whilst the viability of Legal Aid solicitors is not in itself a principled basis to order the other party to pay the claimant's 'between parties' costs, where the claimant is the successful party, the fact their solicitors acted under Legal Aid can be a relevant consideration in the Court's discretion on costs. In my judgment, that is the position here, where the Claimant is entitled to her costs and the real issue is what proportion of those costs is appropriate.

144. Ultimately, I cannot go so far with Mr Khubber and Ms Sekhon as to conclude the 'public interest' and 'Legal Aid' factors justify 100% costs recovery when the Claimant did not succeed on some of her 'big ticket' arguments which took up much of the argument and analysis. However, I do accept that to award only 50% as Mr Alomo suggests would depart too far from the principle explained in *Hunt* that having established illegality, the Claimant should recover their reasonable costs unless there is a good reason. Indeed, in *Hunt* itself, the Supreme Court awarded the successful appellant 66% of their costs because they had succeeded on the costs appeal but not on the appeal to make a declaration, which had taken up some considerable time in the argument. For similar reasons, an order that the Defendant should pay 66% of the Claimant's costs in the present case seems to me to strike an appropriate balance between the considerations that (i) the Claimant did not succeed on some of her key arguments which took up a lot of analysis, time and costs; and (ii) that I went some way with the Claimant even on those unsuccessful grounds which had a public interest dimension to them (particularly Ground 1A) and in respecting the importance of Legally-Aided solicitors recovering 'between parties' costs where appropriate because of the public interest in maintaining their viability given their important work. The Defendant will pay 66% of the Claimant's costs, to be assessed if not agreed.

145. Finally, let me pay tribute to advocacy of the highest quality from Mr Khubber (ably assisted by Ms Sekhon); and from Mr Alomo, as well as the skill and dedication of those instructing them, including the social worker. Once again, my understanding of this complex field has been hugely assisted by people who have chosen to make their career working with some of the most vulnerable people in society. I commend them all.
