



Neutral Citation Number: [2024] EWHC 2984 (Admin)

Case Nos: AC-2024-LON-001478, AC-2024-LON-001496, AC-2024-003277

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 November 2024

Before :

MR JUSTICE JOHNSON

Between :

Case 1478:

(1) SAG
(2) MA
(3) HF
(4) NF

Case 1496:

(5) LG
(6) KG

Case 3277:

(7) BPB
(8) APB

Claimants

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT **Defendant**

Ben Amunwa and Donnchadh Greene (instructed by Deighton Pierce Glynn) for the claimants
Michael Biggs (instructed by the Government Legal Department) for the defendant

Hearing dates: 13-14 November 2024

Approved Judgment

This judgment was handed down by release to The National Archives on 21 November 2024

Mr Justice Johnson:

1. In each of these three cases (the SAG case, the LG case and the BPB case), each claimant is a foreign national, or a child of a foreign national, who has leave to remain in the United Kingdom. In each case, the Secretary of State imposed a condition on their leave to remain that they may not have recourse to public funds (“a NRPF condition”). Each claimant says that they are at imminent risk of destitution, and that:
 - (1) the NRPF condition is unlawful on common law grounds (ground 1);
 - (2) the Secretary of State has breached the obligation to have regard to the need to safeguard and promote the welfare of children in the United Kingdom, in breach of section 55 of the Borders, Citizenship and Immigration Act 2009 (ground 2);
 - (3) the Secretary of State has not acted compatibly with the Claimants’ Convention rights under the Human Rights Act 1998 read with the European Convention on Human Rights (“ECHR”) (ground 3).
2. The cases were listed together, on an expedited basis. Permission to claim judicial review has been granted in the SAG case and the LG case. In the BPB case a direction was given for the question of permission to claim judicial review to be determined at the same time as (if permission is granted) the substantive claim, a “rolled-up” hearing.
3. The issues are:
 - (1) Whether the parties should be permitted to rely on late amended statements of case and late evidence; 11 separate applications have been made in this respect, albeit they are, for the most part, now unopposed.
 - (2) Whether the Secretary of State’s approach to applications to lift a NRPF condition is unlawful on the grounds that it (a) takes account of irrelevant considerations, (b) makes irrational presumptions, and/or (iii) unlawfully departs from the Immigration Rules and applicable guidance and/or the Immigration Act 1971.
 - (3) Whether the Secretary of State’s approach to applications to lift a NRPF condition breaches her statutory duty under section 55 of the 2009 Act to have regard to the need to safeguard and promote the welfare of children in the United Kingdom.
 - (4) Whether the Secretary of State has breached her duty to ensure an adequate administrative system for determining requests to lift a NRPF condition.
 - (5) Whether, in SAG’s case, a quashing order (or declaration) should be made in respect of a decision not to lift a NRPF condition which, it is now conceded, was unlawful.
 - (6) Whether BPB should be granted permission to claim judicial review.
 - (7) What, if any, relief should be granted to the claimants.
 - (8) What further directions should be made for the determination of aspects of the claims which the parties agreed were not suitable for resolution on an expedited basis.

The facts

SAG, MA, HF and NF

4. FT was born in Uganda and is a national of Eritrea. He arrived in the United Kingdom in April 2017. SAG is a national of Eritrea. She married FT in 2019 in Uganda. They have 3 children, NF (born in 2016), HF (born in 2020) and MA (born in 2023).
5. In February 2021, SAG, NF and HF were granted a visa to enter the United Kingdom, subject to a NRPF condition. They arrived in the United Kingdom in March 2021. In June 2022, SAG applied for the NRPF condition to be lifted. That was granted in August 2022. The family received welfare benefits, including universal credit. In September 2022, FT became a citizen of the United Kingdom.
6. In November 2023, SAG applied to extend her leave to remain. That was granted on 5 February 2024. However, a NRPF condition was (re-)imposed. That was a mistake. It was rectified on 13 May 2024 when the NRPF condition was removed. As it happens, welfare benefits were paid throughout the period from February 2024 to 13 May 2024 (and continue to be paid), so the family has not suffered any financial loss.
7. On 13 June 2024, Mould J granted permission to claim judicial review. On 16 July 2024, the hearing was listed for 13 November 2024.

LG and KG

8. Immigration history: LG is a national of Nepal. She is the mother and primary carer of KG who was born in the United Kingdom in 2019 and who is stateless.
9. On 7 May 2011 LG was granted leave to enter the United Kingdom as a student. Her leave to stay in the United Kingdom was curtailed on 5 February 2015.
10. On the same date, LG applied for leave to remain relying on her right to respect for family life under article 8 ECHR. The application was refused and was certified as being clearly unfounded. LG overstayed. On 11 January 2018, LG applied for asylum. That claim was refused on 27 September 2019, and by 17 March 2020 LG had exhausted her appeal rights.
11. Between April 2018 and February 2020, LG and KG were living with her cousin's sister, BT, BT's partner, and their child. On 5 November 2019 LG completed a form seeking accommodation under section 95 of the Immigration and Asylum Act 1999 on the grounds that she needed to move out of her current accommodation on 5 November 2019 and she would then be destitute. On 20 January 2020 the Secretary of State agreed to provide accommodation under section 95. LG and KG moved out of BT's home and into the section 95 accommodation on 20 February 2020.
12. LG made an application for leave to remain as a stateless person. That application was refused on 5 March 2021.
13. On 5 September 2021, LG and KG moved out of the section 95 accommodation and back into BT's home. LG had not been happy in the section 95 accommodation. They only had 1 room, and she had no family or friends which made her feel lonely.

14. On 26 August 2022, LG again applied for leave to remain on article 8 grounds. She relied on a letter from BT, who said that she was LG’s sister-in-law (and “cousin sister”), and that “[s]he and her daughter are living in my house since September 2021 for free. We are supporting her.” On 24 March 2023, LG was granted leave to remain in the United Kingdom until 24 September 2025 “as a Family Member under the Immigration Rules on the parent 10-year route to settlement.” A NRPF condition was imposed.
15. Request to lift NRPF condition: On 4 December 2023 LG applied for the NRPF condition to be lifted. She said “I am currently residing with my sister who has asked me to leave as soon as possible. I have just started working my income [of £855.73pm] is clearly insufficient for me to meet rent of adequate accommodation as well as all other essential needs for myself and my daughter.” She said that the accommodation in which she was living had 3 bedrooms and that it was not inadequate. She added:

“I started employment a month ago and I am working part-time because I do not have appropriate childcare. I am therefore unable to increase my working hours and my income further. As a result I am not able to afford all of the living costs and fulfil mine and my daughter’s needs and I need to rely on food banks. At the moment I am residing with my sister who has asked me to vacate the house as soon as possible as she has her own household to support. Please note that in the last 6 months I made two cash deposits, these were loans from my sister in order to pay for my debts. My sister has asked me to pay her back as soon as possible.

...

My sister should not be expected to provide any documentation in her name. She has stated that she is no longer able to support me. This is sufficient evidence of my destitution and as a private citizen, her finances are irrelevant to my destitution. Her reasons are irrelevant; as a private citizen, the state cannot ask or derogate responsibility to her or any other persons.”
16. BT wrote a letter in support of LG’s application. She said that the house had 3 bedrooms and 1 living room, and was occupied by 5 people (LG, KG, BT, BT’s partner, and BT’s child). She said “I feel that my property is overcrowded... I am not obliged to support the Applicant and my reasons for limiting or withdrawing my support of the Applicant as outlined above are private and confidential, as are my personal circumstances and financial documents. I do not wish to disclose these, and they do not change the fact that I cannot support the Applicant to avoid destitution.”
17. On 15 January 2024, the Secretary of State asked LG for further information. This was because the Secretary of State was undertaking an assessment of the best interests of KG and wanted evidence of LG’s financial circumstances to assess the impact of the NRPF condition on KG’s welfare. The documentation requested included six months of bank statements for all household accounts, including BT’s bank statements. The letter also said:

“Please provide evidence about your current accommodation, such as an original tenancy agreement for formal arrangements. For more informal arrangements, please provide a letter from the house owner outlining the current circumstances along with any other relevant information...

We note that you have stated your household is overcrowded. Please provide evidence of this, such as a report from the local authority.”

18. LG did not provide the further information that was sought. A letter sent on her behalf said:

“The Applicant already provided a letter from the person providing her with accommodation. The fact that the house is overcrowded is confirmed in the letter. Furthermore, it is irrelevant as it is a temporary accommodation and the Appellant and her daughter are expected to vacate it imminently therefore it is inadequate regardless of the overcrowding.”

19. The Secretary of State then again asked for further information, including evidence of where LG was currently staying and the date on which BT had stopped providing accommodation. In response, a further letter from BT, dated 26 January 2024, was provided to the Secretary of State. In that letter she said that she did not want “to house others” and wanted “to recover our home and stop sharing it with my sister and her daughter.” She said that it was not necessary to give any reason for that, but that she felt her home was overcrowded and she needed more space. She said that she had not been able to make LG and KG street homeless but had made it clear that she needed to move out immediately.

20. On 7 February 2024, the Secretary of State refused to lift the NRPF condition. On 28 February 2024, that decision was maintained following an administrative review. On 22 August 2024 (following the grant of permission to claim judicial review) the Secretary of State withdrew the decisions of 7 and 28 February 2024 and offered to make a fresh decision within three months.

21. Decision under challenge: On 3 October 2024, the Secretary of State made a new decision to refuse to remove the NRPF condition. The following reasons were given:

“You have stated that the accommodation provided by your family members is no longer available due to overcrowding and you and your child have been asked to find alternative accommodation...

...The [letters from BT state] that [she] “feels” that the property is overcrowded, and that although you and your daughter live in “the box room” you sometimes sleep in the sitting room... [and] that [BT] “cannot support” to “avoid destitution” but that [BT] is unwilling to explain her reasons or to disclose her financial documents/ position.

... the letter from [BT] dated 26 January 2024 [states] “we feel” that the accommodation is overcrowded and that you and your child have been requested to move out immediately and to find alternative accommodation. It is not clear in this letter why [BT] has stated that she wants you and your daughter to leave the accommodation as soon as possible. [BT] appears to be unwilling to explain her reasons. Although she says she and her family “feel” that the property is overcrowded, no independent evidence has been provided to support this, for example from a health visitor, social worker or other health and social care professional. That [BT] would like more space for her immediate family does not mean that the property does not amount to adequate accommodation for her immediate family and yourself and your daughter. It is also noted that you have not been given a date by which you should leave the property or provided any independent documentary evidence to demonstrate the claimed overcrowding of the accommodation.

It is accepted that [BT] and her family have expressed the preference that you and your daughter should leave the property as soon as possible.

In addition, our records show that you and your child have been provided accommodation by your family members from September 2018 to February 2020 and again from 05 September 2021 to present. Therefore, your claim that your current accommodation arrangement is only temporary is not accepted. You have been provided with accommodation for a considerable period to date.

While you and [BT] and her family have stated that they prefer that you and your daughter move out, having carefully considered [BT]’s letters and the other documents provided, including your witness statement submitted in the proceedings for judicial review, it is considered likely the accommodation will continue to be made available to you for the foreseeable future. Indeed, [BT] has clearly indicated that she is not prepared to make you and your daughter street homeless...

...on the basis of the evidence you have provided and given the history of being supported, along with the fact that you are now in employment and have adequate accommodation for the foreseeable future as explained above, I am not satisfied that there is a real risk that your needs and those of your child are not being met given the support of your family. You provided evidence demonstrating your sister and her family have been supporting you since 2021. We previously requested formal documentation relating to [BT]’s and your accommodation, such as a tenancy agreement/ details of ownership, a breakdown of household income and expenditure, current household financial

circumstances, such as six months of bank statements for all accounts belonging to your sister and other members of your household, to support your claim of destitution. This is relevant as it goes to whether [BT] and her family can afford to support you as they have been.

I acknowledge the bank statements provided for the account ending *268. However, in order to assess whether you are able to meet your essential living needs, you need to provide bank statements for all your accounts and statements for accounts held by all other members of your household covering a period of six months, with all major and regular incoming and outgoing payments explained. On 15 January 2024 and again on 22 January 2024 you were asked to provide this evidence.

You have not provided bank statements for other members of your household to demonstrate that they are unable to continue to support you and your child as they have done from September 2018 to February 2020 and from September 2021 to present.

It is acknowledged that [BT] has refused to provide disclosure of her financial position and documents, or to explain her position clearly, in the circumstances discussed above, and noting that she has made clear that she will not make you street homeless (which implies she is able to incur the cost of not doing so). I am satisfied [BT] and your relatives are able and willing continue to provide the level of support you and your daughter need for the foreseeable future.

...For the reasons above it is considered that the evidence that you have provided does not show that you are destitute or at imminent risk of destitution.

...In line with section 55 of the Borders, Citizenship and Immigration Act 2009 (duty regarding the welfare of children), we have considered the best interests of your child. You have claimed that you are unable to meet the needs of your child without access to public funds. In line with the case of *R (AB & Ors) v SSHD* [2022] EWHC 1524 (Admin), evidence of your financial circumstances must be provided in order to assess the impact of the 'no recourse to public funds' condition on your child's welfare. It is your responsibility to provide sufficient evidence to support your application. You have failed to provide sufficient evidence relating to your current accommodation arrangements, your current monthly household income and expenditure and bank statements for all accounts held by all members of your household to demonstrate why the support you have been receiving is no longer available to you and your child. As explained above, I am satisfied that you will continue to be accommodated and to receive adequate funds to support yourself

and your child on the basis of the evidence and representations that have been provided.

While it might be preferable, in contrast to the current arrangements, for your child to live in state funded accommodation with you, I am not satisfied on the basis of the information available to me that this is the case.

On the evidence and information provided it is considered that your child's welfare is not being adversely affected to a significant degree by your current accommodation and financial situation. I am satisfied that you have been given ample opportunity to provide evidence about your child's welfare.

It is not considered that the welfare of your child, even though this is treated as a primary consideration, requires that the no recourse to public funds condition is lifted. Given that I must balance this primary consideration against the totality of the circumstances, including that there are no significant child welfare concerns, the public interest in the economic welfare of the UK and my findings above that you and your child are not destitute and are not imminently destitute."

[Underlining added for emphasis]

22. Litigation history: LG issued proceedings for judicial review on 30 April 2024, challenging the decisions made in February 2024. Permission to claim judicial review was granted by Linden J on 16 July 2024 (by reference to the decisions in February 2024 that have now been withdrawn), and a direction was made that the case be heard at the same time as the hearing in *SAG*.
23. Following the Secretary of State's withdrawal of the decisions that were originally under challenge, and the fresh decision of 3 October 2024, LG filed an application to amend her claim and to file reply evidence. On 1 November 2024, the Secretary of State filed proposed amended detailed grounds of defence.

BPB and APB

24. LPB is a national of Ghana. She has two children, BPB who was born in 2014 and APB who was born in October 2022.
25. LPB entered the United Kingdom with leave to enter as a visitor in June 2012. She originally came for a holiday, and she stayed with her uncle. She overstayed her leave. Applications for leave to remain were refused.
26. On 8 June 2022, LPB was granted leave to remain on family life grounds. A NRPF condition was imposed. LPB has lived with her sister, AB, and AB's partner, since December 2023. BPB lives with LPB. APB lives in Ghana with her grandmother, having moved back to Ghana in November 2023.

27. On 8 March 2024 LPB applied to lift the NRPF condition. She said she would shortly become homeless because her sister and partner were accommodating her and her children on a temporary basis for 4 months, and they needed to find accommodation before April. She said that they were living in a property with 2 bedrooms and 1 living room. She said the accommodation was not “poor quality (inadequate)”. LPB also said, in her covering letter, that due to BPB turning 10, it would be more appropriate for the family to be accommodated in (their own) 2-bedroom property.
28. LPB relied on a letter provided by AB dated 15 February 2024. That letter said:
- “Unfortunately we are unable to accommodate them after some time.
- We agreed to allow [LPB] and her children to stay on an emergency temporary basis. We were clear we could not support accommodation beyond 4 months. [LPB] will need to make alternative accommodation arrangements by April 24.
- [The property has] 2 bedrooms with 1 living room... [LPB, BPB and APB] have use of one bedroom.”
29. LPB also provided a photograph of a small bedroom in which she said she was staying. She also provided documents from BPB’s school. These stated that BPB would benefit from a quiet, separate space, to complete his homework and that in the light of his difficulties, his progress at school was, in part, dependent on this.
30. The application was refused on 3 July 2024. That refusal was maintained following on administrative review on 3 September 2024.
31. BPB and APB applied for judicial review and expedition on 2 October 2024. On 15 October 2024, directions were made for anonymity and expedition and for a hearing to be listed to determine both permission to claim judicial review and, if appropriate, the substantive claim.
32. On 22 October 2024 directions were made that the hearing of the claim should be listed together with the hearings in SAG’s claim and LG’s claim.
33. The Secretary of State withdrew the 3 July 2024 and 3 September 2024 decisions and, on 1 November 2024, made a fresh decision refusing to lift the NRPF condition. The following reasons were given:
- “You have stated that you and your dependants are living in a small, confined space that you believe is inadequate. However, no tenancy agreement or relevant documentation has been provided to substantiate the conditions of your accommodation. Those photographs and your stated explanation are insufficient, as they do not clearly identify the location and are not from an independent source.

In response to our request for documentation regarding the finances of those supporting you, your legal representative provided the following statement:

“As part of the application, the Applicant has provided a letter from her sister, asking her to move out as soon as possible. The Applicant’s sister should not be expected to provide any additional personal documentation. She has stated that she is no longer able to support the Applicant and, as a private citizen, further details and documents relating to her finances are private and confidential and irrelevant to the Applicant’s situation. Her reasons for not being able to support the Applicant are also irrelevant. As a private citizen, the state cannot shift responsibility for preventing destitution or a breach of the Applicant’s rights under Article 3 ECHR to her or to any other person or non-state organisation.”

Without sufficient documentary evidence to demonstrate your current living conditions, we are unable to verify your claim that your accommodation is overcrowded and inadequate for your family’s needs. You are required to provide independent documentary evidence to confirm the number of bedrooms and living areas at the property, as well as evidence of the number of inhabitants to assess the adequacy of your living arrangement. Suitable documentation may include electoral roll records, letters from official sources addressed to other occupants, or statements from schools or GPs confirming the addresses of any children. It is your responsibility to supply independent evidence of your living conditions and such documentary evidence is easy to obtain.

We acknowledge your sister’s statement that her reasons for withdrawing or limiting support are private and confidential. However, given that your sister is a close family member who has supported you for the last 11 months, it is reasonable for us to request evidence regarding her financial support and an explanation of why she wishes to withdraw that support. We do not find the reasons provided for failing to provide the requested evidence sufficient to justify exercising flexibility in evidential requirements.

If you believe you are living in overcrowded or inadequate conditions and have sought help from a local authority or charity, you must provide evidence of this as part of your application for a change of conditions.

Without such evidence, we are unable to fully assess your living arrangements or verify the circumstances described in your application regarding your accommodation being inadequate and the letter provided by your sister.

As result, I am therefore not satisfied that your accommodation is inadequate and that you have provided independent documentary evidence of such.

...For the reasons outlined above, it is considered that the evidence you have provided does not demonstrate that you are destitute or at imminent risk of destitution. We do not find the reasons provided sufficient to justify exercising flexibility in evidential requirements and accepting your claim without independent evidence corroborating your circumstances.

...In line with section 55 of the Borders, Citizenship and Immigration Act 2009 (duty regarding the welfare of children), I have considered the best interests of your children. You have claimed that [BPB] receives SEN support for cognitive and learning difficulties and needs a suitable space for development, which is not available at your sister's home. ...I do not consider that the reasons provided relating to the children outweigh the reasons for maintaining the NRPF condition because, as stated above, you have failed to provide evidence that your accommodation is inadequate and that you are unable to meet your family's essential living needs. I acknowledge [a letter from [BPB's school], which indicates that he is receiving SEND support. The documents demonstrate that the schools have implemented the necessary arrangements to assist [BPB] with his learning needs. The letter... states:

“At home, as [BPB] is easily distracted, he would benefit from a quiet, separate space to complete his homework. When he transitions to secondary school in September 2025, his homework load will increase, and this setup will become even more important. Given [BPB's] difficulties, his progress at school is, in part, dependent upon him having access to a quiet space and an enriched environment which will support him to make better progress academically”.

...the report specifies that no formal diagnoses have been made. Moreover, the evidence provided does not indicate that [BPB's] current living conditions are inadequate and affecting his progress at school, and no independent evidence has been provided to show that [BPB's] current accommodation is unsuitable for him.

Upon reviewing the evidence in its entirety, it is noted that, despite our written requests on two occasions, you have not provided any further documentary evidence or updates on [BPB's] condition.”

[Underlining added for emphasis]

34. On 4 November 2024, BPB and APB applied to amend the claim to challenge the decision of 1 November 2024. That application is opposed by the Secretary of State.

Home Office system for dealing with applications to remove a NRPF condition

35. David Ramsbotham works in the Human Rights and Family Unit of the Home Office. In his witness statement, he addresses the Home Office's approach to applications to remove a NRPF condition, and prioritisation of such applications:

“The waiting times for change of conditions applications for those who have permission to stay on the basis of their family or private life to be assigned to a caseworker, is currently approximately 10 weeks. Decision times may vary dependent on whether further information is required from the customer to establish their circumstances. Resource of this work stream is regularly reviewed to ensure waiting times are minimised where possible, given the often-vulnerable nature of this cohort of customers. The team engage with the ‘No Recourse to Public Funds Team’ and the ‘Homelessness Team’ who work collaboratively with local authorities (LAs) to ensure that access to public funds is not accessible to migrants who are not entitled to it, provide immigration status information and answer follow up queries from LAs, to ensure any referrals from local authorities relating to particularly vulnerable customers are prioritised appropriately. Any representations made from other sources relating to particularly vulnerable customers are carefully reviewed and cases expedited where appropriate.”

36. Mr Ramsbotham's statement was served on 30 August 2024. On 9 September 2024, the claimants' solicitors sought further information as to the system for expedition, including what system was in place to ensure expedition where that was necessary, and in what circumstances cases were expedited. The response was that cases are not routinely monitored for expedition, but monitoring does take place on a case-by-case basis depending on the nature of the reasons that might justify expedition, and that requests for expedition are dealt with on a case by case basis, and there is no list of criteria for deciding when expedition is appropriate.
37. Sarah Fairbrother has been employed as a G6 Operational Leader in the Home Office since 2021. She says that requests to expedite applications to remove a NRPF condition are considered on a case-by-case basis, but there are no specific guidelines or policy for consideration of such requests.
38. Ian Martin is a senior civil servant deputy director. He was, until recently, responsible for the “service line” that deals with applications to lift NRPF conditions. He says, “[t]he change of conditions service line does not currently have a public service standard”. I take this to mean that there are no performance requirements, such as the times within which applications must be read, the times within which decisions as to expedition should be made, and the times within which applications should be determined. He also addresses questions of planning and resourcing. Nothing in his statement suggests that there has been any form of unexpected spike in applications, or

any increased workload, which might explain what appears to have been a steady increase in the average time it takes to determine applications. He says that the budget is “finite”, but also says that procedures are in place for seeking additional resources if that becomes necessary. He does not say whether that has become necessary.

Legal framework

Leave to remain without recourse to public funds

39. Except as is otherwise provided under the Immigration Act 1971, a person who is in the United Kingdom and is not a British citizen may be given leave to remain in the United Kingdom for a limited (or indefinite) period: section 3(1)(b).
40. Where a person is given limited leave to remain in the United Kingdom, that may be made subject to a condition requiring the person to maintain and accommodate themselves, and any of their dependents, without recourse to public funds: section 3(1)(c)(ii). Where such a condition is imposed, the person is (subject to prescribed exceptions) excluded from a range of welfare benefits: section 115 of the 1999 Act. They are also (subject to prescribed exceptions) excluded from homeless advice under part VII of the Housing Act 1996: section 185 of the 1996 Act. They are also excluded from housing allocation under that Act: section 160ZA.

Destitution

41. Section 95(3) of the 1999 Act provides that a person is to be treated as being destitute for the purpose of that section if they do not have adequate accommodation or any means of obtaining it, or they cannot meet their other essential living needs. For these purposes, if the person has dependants then they and their dependants are to be taken together: section 95(4).

Immigration rules

42. The exercise of the discretionary powers to grant leave to remain, and to impose a NRPF condition, is regulated by the Immigration Rules. Appendix FM (“FM” for “family members”) of the Immigration Rules makes provision for those who seek to remain in the United Kingdom on the basis of their family life with a person who is a national of the United Kingdom. It is intended to give effect to the right to respect for family life under article 8 ECHR. It provides for grants of leave to remain in the context of two potential routes to settlement as a United Kingdom national. One is a 5-year route, meaning that an application can be made for indefinite leave to remain after five years. That applies, broadly, where the individual is financially independent, lawfully in the United Kingdom, and able to speak English. The other is a 10-year route. That applies, broadly, where the applicant does not meet the requirements for the 5-year route, but where a grant of leave to remain is necessary to comply with article 8 ECHR.
43. Where leave to remain is granted under the 5-year route, it is made subject to a NRPF condition: rule D-LTRPT.1.1.
44. Where leave to remain is granted under the 10-year route, it is made subject to a NRPF condition, unless, having regard to rule GEN.1.11A, such a requirement should not be imposed: rule D-LTRPT.1.2.

45. Rule GEN.1.11A states:

“Where... leave to remain... is granted..., if the decision maker is satisfied that:

(a) the applicant is destitute as defined in section 95 of the Immigration and Asylum Act 1999, or is at risk of imminent destitution; or

(b) there are reasons relating to the welfare of a relevant child which outweigh the considerations for imposing or maintaining the condition (treating the best interests of a relevant child as a primary consideration); or

(c) the applicant is facing exceptional circumstances affecting their income or expenditure

then the applicant will not be subject to a condition of no access to public funds. If the decision maker is not so satisfied, the applicant will be subject to a condition of no access to public funds.”

Guidance

46. The Secretary of State has promulgated non-statutory published guidance, “Permitting access to public funds.” This sets out a procedure whereby a person who is subject to a NRPF condition can seek to have that condition lifted if their circumstances have changed. It states:

“applicants who have been granted permission with the NRPF condition... can ask for it to be lifted via a Change of Conditions application.

Evidence

In all cases the applicant must provide relevant documents to evidence their financial circumstances and need for public funds. Where they claim that there are reasons relating to the welfare of a child which outweigh the considerations for imposing the condition or that they are facing exceptional circumstances affecting their income or expenditure, they must also provide documentary evidence to support this.

Evidential flexibility may apply in situations where certain pieces of evidence cannot be obtained.

Evidential flexibility

Evidential flexibility is a principle which allows you to decide a case without requiring every piece of evidence or information set out in the application form.

This is only likely to be applicable in exceptional circumstances where either:

- the additional missing evidence is unnecessary because the other evidence provided is clear and compelling
- there is a compelling reason why the evidence cannot be provided

The onus is on the applicant to provide sufficient evidence to satisfy you that they meet the criteria for being granted access to public funds, but there will be some cases where providing evidence is more difficult than others.

If you are satisfied that the applicant has provided clear and compelling evidence of their financial circumstances and this demonstrates that they meet the relevant criteria, then evidential flexibility can be applied. **If you are unsure, refer to a senior caseworker before applying evidential flexibility.**

Each case must still be considered on its own individual merits in line with the current guidance. If further evidence is required, you may make further enquiries, but it remains the responsibility of the applicant to sufficiently evidence their claimed financial circumstances, or to provide a credible explanation of why such evidence is not available.

If you believe the applicant may qualify for access to public funds in circumstances where all requested documentary evidence has not been provided but remain unsure, refer to a senior caseworker before applying evidential flexibility.

...

A person is at imminent risk of destitution if at the time the application is received, they have accommodation and can meet their essential living needs, but there are reasons why this is unlikely to continue beyond 3 months from the date of application.

...

In all cases you must consider an applicant's financial circumstances, based on the information and evidence they have provided, to determine whether they meet the criteria for being allowed access to public funds. ”

Section 55 of the Borders, Citizenship and Immigration Act 2009

47. Section 55 of the 2009 Act states:

“Duty regarding the welfare of children

- (1) The Secretary of State must make arrangements for ensuring that—
 - (a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and
 - (b) any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need.
- (2) The functions referred to in subsection (1) are—
 - (a) any function of the Secretary of State in relation to immigration...;
 - (b) any function conferred by or by virtue of the Immigration Acts on an immigration officer;...
- (3) A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (1).
...”

48. Decisions on whether to lift a NRPF condition fall within the scope of section 55(2). The Secretary of State must identify and consider the best interests of the child and must weigh those interests against countervailing considerations: *R (PRCBC) v Secretary of State for the Home Department* [2021] EWCA Civ 193 [2021] 1 WLR 3049 *per* David Richards LJ at [70]. This is reflected in the current version of rule GEN.1.11A(b) which requires the decision maker to decide if “there are reasons relating to the welfare of a relevant child which outweigh the considerations for imposing or maintaining the condition (treating the best interests of a relevant child as a primary consideration).”

Human Rights Act 1998

49. Article 3 ECHR provides that “[n]o one shall be subjected to... inhuman or degrading treatment...”. Article 3 is a “Convention right”: section 1(1)(a) of the 1998 Act. The Secretary of State must act compatibly with article 3: section 6(1). A refusal to permit access to public funds is “treatment” within the meaning of article 3 ECHR. Such treatment is inhuman or degrading if “to a seriously detrimental extent, it denies the most basic needs of any human being.” That is a high minimum standard of severity, but it is met if the state deliberately denies “shelter, food or the most basic necessities of life”: *R (Limbuella) v Secretary of State for the Home Department* [2005] UKHL 66 [2006] 1 AC 396 *per* Lord Bingham at [6].

50. As well as imposing a duty not to subject anyone to inhuman or degrading treatment, article 3 also imposes a “systems duty”. The systems duty requires that the state has in place a system to safeguard against inhuman and degrading treatment: *MC v Bulgaria* (2005) 40 EHRR 20 at [149]. That includes, at a “high level”, ensuring that there are effective criminal law provisions to deter offences against the person, a police force to investigate such offences, and a court and a judicial system to enforce those criminal law provisions: *Osman v United Kingdom* (1998) 29 EHRR 245 at [115]. In certain cases, there is also a “low level” duty to adopt administrative measures to safeguard against inhuman and degrading treatment: *Smith v Ministry of Defence* [2013] UKSC 41 [2014] AC 52 *per* Lord Hope at [68] (*Smith* was an article 2 case, but the principles read across to article 3). In *R(MG) v Secretary of State for the Home Department* [2022] EWHC 1847 (Admin) [2023] 1 WLR 284 I summarised the content of this duty at [6(9)-(10)]:

“Where the lower level system obligation arises, the public authority must implement measures to reduce the risk to a reasonable minimum: *Stoyanovi v Bulgaria* (Application No 42980/04) (unreported) 9 November 2010 at para 61. The content of this duty depends on the particular context and what is required adequately to protect life [or prevent inhuman or degrading treatment]. It may involve ensuring that competent staff are recruited, that they are appropriately trained, that suitable systems of working are in place, that sufficient resources are available and that high professional standards are maintained. It may also involve regulatory measures to govern the licensing, setting up, operation, security and supervision of the activity in question, together with procedures (depending on the technical aspects of the activity) for identifying shortcomings in the processes concerned and any human error: *Öneryildiz* (2004) 41 EHRR 20, paras 89 - 90.

In interpreting and applying the systems obligation, the court must not impose an impossible or disproportionate burden on public authorities and must have regard to the operational choices made by public authorities in terms of priorities and resources: [*Osman v United Kingdom* (1998) 29 EHRR 245] at para 116.”

51. A low level systems duty arises when the Secretary of State determines an application to lift a NRPF condition: *ASY v Secretary of State for the Home Department* [2024] EWCA Civ 373 *per* Fraser LJ at [88].

Submissions

52. I am grateful to Ben Amunwa and Donnchadh Greene, who appeared for the claimants, and Michael Biggs, who appeared for the defendant, for their excellent and focussed written and oral submissions.

Procedural applications

53. The parties prepared for the hearing on an expedited and compressed timetable, and it is unsurprising that there is a plethora of applications to address proposed amended statements of case and late evidence. In most cases, the applications are unopposed. I grant each of the unopposed applications.
54. The principal issue concerns the claimants' applications to amend their grounds of claim in the LG and BPB cases, to challenge new decisions in each of those cases, and their applications to rely on reply evidence in each of those cases.
55. In respect of that issue the claimants say that the proposed amendments were made very quickly after the new decisions, that it is in the interests of justice for the amendments to be permitted and the reply evidence to be adduced, and that no prejudice would be caused to the Secretary of State. The Secretary of State says that the challenges in LG and BPB are now largely academic, that the court should not permit a "rolling review" of fresh decisions, and that the reply evidence is detailed, has been provided too late, and that it would be unfair to permit the claimants to rely on it.

Approach to NRPF condition

56. The claimants submit that where applications to lift a NRPF condition are premised on the withdrawal of third-party support, the Secretary of State wrongly insists on evidence of the third-party's finances and the accommodation that is being provided. Such evidence is irrelevant. The third-party has an absolute right to withdraw their support, and evidence as to their ability to provide support is irrelevant. Further, the Secretary of State irrationally operates presumptions that third party support will continue indefinitely, irrespective of whether they have communicated that they are unwilling for it to continue, and that accommodation or support is adequate unless the applicant has been rendered street homeless. The effect is that an applicant must prove that they are destitute, but that fails to recognise that a NRPF condition must be lifted not only if the applicant is destitute but also if there is a risk of imminent destitution. The Secretary of State also wrongly applies an inflexible practice of requiring specified, independent and objective documentary evidence to support an application to lift a NRPF condition. There is no support for such a practice in the legislation or guidance. The practice amounts, in substance, to an immigration rule, but it has not been laid before Parliament as is required by section 3(2) of the 1971 Act.
57. The Secretary of State denies that she takes account of irrelevant factors or applies irrational presumptions. She says she is not required to accept, at face value, a claim by a third-party that the support they are providing will not continue. Instead, she is entitled (subject to the bounds of rationality) to decide for herself whether the accommodation will continue to be provided. The question of whether the third-party can continue to provide support, and the nature and quality of that support, are relevant to that assessment. She does not operate the alleged presumptions, and the decision-making in these cases is not based on the alleged presumptions. She is, however, entitled to take account of the fact that third-party support has been provided for some time when deciding whether it will continue. The decision makers have not applied an inflexible requirement to require independent, objective documentary evidence. No such general

requirement is in place, and there is therefore no question of there being a practice that ought to be the subject of an immigration rule.

Section 55 of the Borders, Citizenship and Immigration Act 2009

58. The claimants submit that the Secretary of State has failed to comply with her duty under section 55 of the 2009 Act. Specifically, she has failed to identify the best interests of the relevant children. She has wrongly, in each case, proceeded on the basis that specific evidence is needed before the child's best interests can be assessed. As a result of the failure to identify the children's best interests, she has failed to weigh the children's interests against countervailing considerations. Further, the delay in the decision-making has caused prolonged uncertainty for the children, and this is contrary to their best interests.
59. The Secretary of State submits that the decisions in these cases show that there was compliance with section 55 of the 2009 Act. In each case, the decision maker addressed the best interests of the child and permissibly concluded that, on the evidence, lifting the NRPF condition was not in the child's best interests. The decision not to lift the condition in each case was entirely consistent with the child's best interests.

Article 3 ECHR systems duty

60. The claimants say that the low-level systems duty requires the Secretary of State to implement administrative measures to reduce the risk of inhuman and degrading treatment to a reasonable minimum. In breach of that duty, she is failing to determine applications to remove NRPF conditions with sufficient urgency, proportionate to the "immediacy of the situation": *ASY per Fraser LJ* at [86], [88] and [92].
61. The Secretary of State accepts that the article 3 ECHR systems duty applies to applications for a NRPF condition to be lifted. She says that the published guidance, and the statements of Mr Ramsbotham and Mr Martin, show that the relevant systems are in place. In contrast to the position at the time of the decision in *ASY*, the Secretary of State's published policy recognises that there is a duty to remove a NRPF condition if that is necessary to avoid inhuman or degrading treatment. If there were flaws in the decision-making in any of these individual cases then those flaws arose despite, rather than because of, the system that was in place. A flawed decision does not demonstrate that the underlying system is deficient. The claimants have not brought claims for breaches of the operational duty that arises under article 3 ECHR to take reasonable steps, in individual cases, to protect a person from a known real and immediate risk of inhuman and degrading treatment.

Should the unlawful decision in SAG's case be quashed?

62. SAG recognises that the earlier decisions to maintain the NRPF condition have been overtaken by the new decision to lift that condition. She also accepts that she has received public funds (by way of housing and welfare benefits) throughout). Nevertheless, she says that because she was in receipt of public funds in breach of a NRPF condition, she is at risk of criminal proceedings, recoupment of the public funds paid, and an adverse future decision on leave to remain. She seeks a quashing order of the decision of 5 February 2024 and/or a declaration that the decision was unlawful. She points out that in *R (ST) v Secretary of State for the Home Department* [2021]

EWHC 1085 (Admin) [2021] 1 WLR 6047 the Divisional Court made a quashing order in not dissimilar circumstances.

63. The Secretary of State accepts that the decision in February 2024 was unlawful on the grounds of a procedural irregularity. She accepts that SAG should have been invited to vary her application to seek leave on the 10-year (rather than 5-year) route to settlement. That would have enabled leave to remain to be granted without the prohibition on access to public funds. The Secretary of State does not positively oppose a quashing order but submits that it is unnecessary.

Resolution of the issues

(1) Applications to challenge new decisions and rely on reply evidence

64. The decisions that were initially under challenge in the LG case were made on 7 and 28 February 2024. Permission to claim judicial review was granted in July 2024 and, at the same time, the hearing was listed for 13 November 2024 and directions were set to ensure that the case was properly prepared for the hearing. The defendant made the new decision on 3 October 2024, 8 months after the initial decision, and only just over a month before the hearing.
65. The decision that was initially under challenge in the BPB case was made on 3 July 2024 (and confirmed on 3 September 2024). In her Acknowledgement of Service, filed on 11 October 2024, the Secretary of State agreed to withdraw those decisions and to make a new decision. The direction for a rolled up hearing was made on 15 October 2024, less than a month before the hearing date. The Secretary of State made a fresh decision on 1 November 2024, less than 2 weeks before the hearing. Within 3 days, BPB filed an application to amend the grounds of claim to challenge the fresh decision.
66. Where a defendant makes a new decision that supersedes the decision that is challenged and the claimant wishes to challenge the new decision, it is open to the parties to end the claim by way of a consent order on the basis that the claimant will then bring a fresh claim. That is usually the more appropriate course. It avoids “rolling” judicial review proceedings, which can give rise to unnecessary procedural complexity. The Court of Appeal has deprecated the trend towards such rolling proceedings, but there is no “hard and fast rule”: *R (Spahiu) v Secretary of State for the Home Department* [2018] EWCA Civ 2604 [2019] 1 WLR 1297 *per* Coulson LJ at [63], *R (Dolan) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605 [2021] 1 WLR 2326 *per* Singh LJ at 118, Administrative Court Judicial Review Guide at 7.11.4.
67. In these cases, there has been no relevant change to the underlying statutory and policy framework since the original decisions were made. There is a degree of urgency, because the claimants say that they are at imminent risk of destitution, and the cases have been expedited. If the claimants are not permitted to challenge the new decisions within these proceedings, then it would be open to them to issue new claims. That would involve considerable further delay before they could be resolved. It would also mean that the costs of preparing for this hearing would be wasted. The basic grounds on which the new decisions are challenged reflect the grounds on which the original decisions were challenged. There is no unfairness to the Secretary of State in permitting the amendments, which arise out of the Secretary of State’s conduct in making fresh decisions well after these claims were brought, and shortly before the hearing. It was

not suggested by the Secretary of State that allowing the amendments would deprive her of a meritorious argument that permission to claim judicial review should not be granted. In the BPB case, the question of permission has yet to be decided. In the LG case, permission has already been granted, but it is not suggested by the Secretary of State that the fresh claim has no arguable merit and, in any event, one of the grounds on which permission has already been given (the article 3 ECHR ground) applies to the new decision in exactly the same way as it did to the old decision.

68. In *R (AB) v Secretary of State for the Home Department* [2022] EWHC 1524 (Admin) [2022] 1 WLR 534, Lane J (at [14] – [16]) granted permission to amend the grounds of claim to challenge a fresh decision to refuse to lift a NRPF condition in circumstances which closely reflect the circumstances of the present cases. I, likewise, grant permission to amend on the particular facts of the present cases.
69. The “reply” evidence is a different matter. It includes case studies which seek to make good the claimants’ case as to a practice of applying irrational presumptions and making irrelevant demands for evidence. Most of this is not reply evidence at all but is evidence that could and should have been served at the same time as the claims: CPR 8.5(1), CPR PD 54A para 4.4(1)(a). Insofar as the evidence does, in part, reply to evidence that was served by the Secretary of State, that evidence was served on 30 August 2024. The reply evidence was not served until 23 October 2024. No good explanation has been given for the delay. It left the Secretary of State with insufficient time to research the case histories for the different case studies that are relied on by the claimants.
70. I indicated at the start of the hearing that I would reserve a decision on whether to permit reliance on the reply evidence until after the hearing, but that each party could make such reference to the evidence as they considered necessary. That approach has enabled a more informed view to be taken as to the impact of the reply evidence than would have been possible in advance of hearing oral argument. In the event, neither party made significance reference to the reply evidence. It does not seem to me to go to the heart of any of the grounds of challenge. It does not relate to the particular facts of either of the cases. Although each of the grounds is pitched at the level of the Secretary of State’s systems and practices, it is still necessary (at least as far as grounds 1 and 2 are concerned) for the claimants to show that the decisions on their individual cases were unlawful. I do not consider that the reply evidence can make a critical difference on either of those grounds. Nor would the reply evidence make a difference in respect of ground 3, in the light of the decision that I have reached on that ground without reference to the reply evidence.
71. The claimants say that the defendant had agreed to the provision of reply evidence by way of a consent order dated 22 October 2024. That is not quite correct. That consent order made provision for the claimants to apply to rely on any evidence in reply by 23 October 2024. It did not give the claimants a blank cheque to rely on such evidence, because an application was required.
72. For all these reasons, I refuse permission to rely on the reply evidence. This does not extend to the Secretary of State’s published statistics which the claimants also sought to rely on, without objection from the Secretary of State.

(2) Whether the Secretary of State's approach to the NRPF condition is unlawful

73. The claimants do not challenge the Secretary of State's published policy. Their case is that the policy is being operated in an unlawful manner in cases where the applicant is reliant on third-party support, and the third-party is unwilling to continue to provide that support.
74. The issue for the decision maker in such cases is encapsulated in rule GEN.1.11A(a). It is whether the decision maker is satisfied that the applicant is destitute or at risk of imminent destitution. The structure of the rule is that, by default, an applicant is treated as not being destitute or at risk of imminent destitution. It is only if the decision maker is positively satisfied that the applicant is destitute or at risk of imminent destitution that the NRPF condition falls to be lifted under the rule.
75. This involves a fact-specific assessment, some of the contours of which can be illustrated by 4 hypothetical examples:
- (1) Where a third-party is providing an applicant with adequate support, and will continue doing so, the applicant is not destitute or at risk of imminent destitution. That is so even though the third-party is not under any obligation to provide the support, and even though the third-party would be entitled to withdraw the support at any time.
 - (2) Where a third-party has provided the applicant with support, but will, imminently, stop doing so because they are not able to continue to provide support (for example, because their tenancy has come to an end, or there is a change in their financial circumstances), and the applicant has no other means of support, then the applicant is at risk of imminent destitution.
 - (3) Where a third-party has provided the applicant with support but has decided to end that support (and may imminently do so), and the applicant has no other means of support, then, again, the applicant is at risk of imminent destitution. That is so even if the third-party would be able to continue to provide the support.
 - (4) Where a third-party has provided the applicant with adequate support, but would prefer support to be provided at public expense, and encourages the applicant to apply to the Secretary of State to lift a NRPF requirement on the basis that if that happens the third-party will withdraw the support (but that otherwise the third-party will continue to provide the support), the applicant is not destitute or at risk of imminent destitution.
76. It may be that some individual cases will clearly and neatly fall into one or other of the four categories above, but the practical reality is that most cases are unlikely to be so clear cut. A third-party may express themselves as being "unable" to continue to provide support, but they may mean that they are "unwilling" to do so, rather than that it is impossible for them to do so. A third-party who expresses themselves as "unwilling" to provide support may mean that they would prefer that support was available at public expense but that they will, otherwise, continue to provide support. For these reasons, the assessment that must be formed by the decision maker involves a considerable degree of judgement.

77. The Secretary of State is not entitled to adopt a “who blinks first” or “wait and see” approach, that is to refuse to remove a NRPF condition unless or until the applicant is rendered street homeless. That is because there is an obligation to remove a NRPF condition if there is an imminent risk of destitution, not just where the applicant is destitute: *R (DMA) v Secretary of State for the Home Department* [2020] EWHC 3416 (Admin) [2021] 1 WLR 2374 *per* Knowles J at [200], *ASY per* Fraser LJ at [41], [44] and [89].
78. On the other hand, the Secretary of State is entitled to seek evidence in support of the application to determine whether the applicant really is at imminent risk of destitution. The mere fact that a third-party says that they are unwilling to continue to provide support does not necessarily mean that there is a risk they will withdraw support in the absence of an alternative source of support. It is for the Secretary of State to determine whether there is an imminent risk of destitution, based on all the evidence (including any evidence provided in response to requests for further information). The court will only intervene if the Secretary of State’s decision is irrational or otherwise unlawful.
79. There is not therefore anything unlawful or irrational or irrelevant in asking for further evidence from the third-party supporter, albeit they cannot be forced to provide evidence. If they choose not to provide evidence then a decision must be made on such evidence as is available, as the guidance makes clear. That may mean that there is a less compelling case that the applicant is at imminent risk of destitution than would be the case if there were positive evidence that the third-party was unable to continue providing support.
80. In LG’s case, BT had supported LG’s application for leave to remain, saying that LG and KG were living in her house and that BT was supporting her. In the light of BT’s support, leave to remain was granted with a NRPF condition. Then, a year later, BT said she was not willing to support LG. No reason for the change was given, other than that she felt that her house was overcrowded (but there was no suggestion that there had been a change in the living arrangements since LG and KG had moved in). BT is, of course, entitled to withdraw support. But that does not necessarily mean that she will do so. That is for the decision maker to assess. The decision maker was not, in the light of all the circumstances (which included BT, on one view, indicating that she would not make LG street homeless) obliged to treat BT’s expressed unwillingness to continue to provide support as determinative of the question of whether BT would, in fact, continue to provide support if there was no alternative means of support.
81. It was lawful for the Secretary of State to seek further information, such as a tenancy agreement or a letter from the homeowner or a report from the local authority. Such material might be relevant to the questions of (a) whether BT really would withdraw support (or whether there was a real risk that she would do so), and (b) whether, in any event, the housing was inadequate. The fact that there were informal arrangements between BT and LG did not disentitle the Secretary of State from seeking evidence. There might come a point where it is irrational to insist on evidence that is not practically available, but nothing in the Secretary of State’s decision suggests that the refusal to lift the NRPF condition was made simply because LG had not provided the evidence that had been requested.

82. Nor was it irrational for the decision maker to conclude that it was likely that the accommodation would continue to be made available for LG and KG for the foreseeable future. By that point, the accommodation had been made available since September 2018 (aside from a break between February 2020 and September 2021). BT had not given any date for LG and KG to move out and had not intimated any definite decision to require them to leave irrespective of whether alternative support was available.
83. Mr Amunwa points out that the Secretary of State did not explicitly address the fact that between February 2020 and September 2021, LG and KG had been living in accommodation provided by the Secretary of State. I do not, however, consider that this undermines the Secretary of State's conclusion. If anything, the fact that BT was willing to accept LG and KG back into her property in September 2021 (and that LG preferred to move back in with BT rather than to stay in accommodation provided by the Secretary of State) supports the decision maker's conclusion that the accommodation was not inadequate.
84. None of this involves the Secretary of State operating an irrational presumption or placing weight on an irrelevant consideration. It was a decision that was open to the decision maker on the evidence.
85. Much of the same applies in BPB's case. AB had been willing to accommodate LPB and BPB for a considerable period. There was no evidence of any significant change in circumstances other than AB's assertion that she was "unable" to continue with the arrangements. It was reasonable for the Secretary of State to seek further evidence, and the evidence that was sought was potentially relevant.
86. The difference in BPB's case is that the decision maker did not determine whether AB was able to continue with the arrangements, or (irrespective of whether she was able to do so) whether she would (or might) withdraw support. The focus of the decision was on the adequacy of the accommodation. It was reasonable for the Secretary of State to address that issue, and to seek evidence about it, because it is inherent in the statutory definition of destitution: section 95 of the 1999 Act. But the primary basis on which the application had been made was that AB was unable to continue to provide support, and that required a decision irrespective of the adequacy of the accommodation. It was not sufficient simply to say that further evidence had not been provided, particularly where that may have been outside LPB's control (if and to the extent that AB was refusing to provide further evidence). It was still necessary to assess the case based on such evidence as was available. Nothing within the guidance or the statutory framework permits the decision maker not to decide the critical issue just because evidence that has been requested has not been provided. The decision in BPB's case was flawed on this basis. This is not quite how the claimants put the case, but it is sufficiently closely related to the ground that has been argued that there is no unfairness to the Secretary of State in upholding the claimant's challenge.

(3) Is there a breach of section 55 of the 2009 Act?

87. In both the LG and BPB cases, the decision maker expressly addressed the question of the child's best interests. In each case, the decision maker concluded that it was not in the child's interests to lift the NRPf condition (or at least that it had not been shown that this would be in the child's best interests). If that conclusion is permissible, then

there is nothing in the complaint that the decision maker failed to weigh the child's best interests against countervailing considerations, because the decision that was made was in line with what had permissibly been determined to be in the child's best interests. Nor is there anything in the delay point. There was no evidence before the decision maker that the children were aware of the applications and that they were unsettled or otherwise disadvantaged by delay and uncertainty.

88. The real issue, therefore, is whether, in each case, the decision maker was entitled to conclude that it would not be in the child's best interests to remove the NRPF condition.
89. There is a superficial attraction in the view that it will always be in a child's best interests that their parent is able, if necessary, to access public funds. That provides a degree of stability, safety and security that may not otherwise be available. That, however, is too general an approach. What is required, in each case, is a factual assessment of the circumstances, and the evidence, as to where the child's best interests lie. It is necessary to have a clear idea of the particular child's circumstances and of what is in the particular child's best interests. That requires the Secretary of State to secure relevant evidence and to conduct a careful examination of all relevant factors in order to determine whether (and to what extent) maintaining the NRPF condition would affect the welfare of the child: *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74 [2013] 1 WLR 3690 *per* Lord Hodge at [10], *AB per* Lane J at [54].
90. The Secretary of State cannot therefore be criticised for seeking evidence on which to make a decision. The position would be different if a decision maker adopted a dogmatic refusal to consider a child's best interests unless a particular piece of evidence were provided, particularly if it is unreasonable to expect that piece of evidence to be provided. There are some aspects of the reasoning in the decisions which can, in isolation, be read as imposing unrealistic evidential expectations. However, when the decisions are read fairly, and as a whole, in each case the decision maker considered the child's best interests with some care and did not simply refuse to engage in the process because of a missing piece of evidence.
91. For the purposes of this issue, it can be assumed that the child is not at imminent risk of destitution (otherwise the NRPF condition would fall to be lifted under GEN1.11A(a)). For the same reason, in the circumstances of these cases, it can be assumed that the child would remain living in the same household unless the NRPF condition is lifted. Accordingly, the best interests of the child test requires a comparison between the maintenance of the status quo, and the difference that would be made if the NRPF condition were lifted.
92. In LG's case, the decision maker was entitled to conclude that it had not been shown that KG would be in a significantly better position if the NRPF condition were lifted. Although BT felt that the household was overcrowded, there was precious little evidence as to the detailed arrangements, and why they were any worse for KG than would pertain if public sector housing were made available. That is not to say it was necessary to provide a surveyor's report or anything of that nature: that would be unrealistic. But it was necessary to explain why the maintenance of the status quo was not in KG's best interests. That was not done. Instead, in her application form, LG had said that the accommodation was adequate, and did not say anything to suggest that (so

long as BT did not terminate the arrangements) KG's interests would be better served if LG had access to public funds.

93. In BPB's case, there was evidence that LPB and her 10-year old son were sharing a small bedroom. That was what both LPB and AB said, and there was no evidence to contradict their account. It is not clear whether the decision maker accepted this account as true, or not:
- (1) If it was accepted as true, then the evidence from the school indicated that BPB's best interests required that he have some private space to himself. The decision maker did not suggest that if the NRPF condition were lifted, LPB and BPB would continue to stay in one small bedroom, with no private space for BPB. In the absence of such a finding, it was not reasonable to conclude that it was in BPB's best interests to maintain the NRPF condition.
 - (2) If it was not accepted as true, then the decision was flawed for failing to specify that critical finding or to give any reasons in support. In the absence of any reasoning, the conclusion that LPB and AB had lied about the living arrangements was not rationally open to the decision maker.
94. In the absence of a specific finding that LPB and AB had lied about the living arrangements, it can be assumed that the decision maker was prepared to proceed on the basis that they were telling the truth (at least for the purpose of the consideration of section 55, because any failure to adduce further evidence on the point is not the responsibility of BPB). There was therefore a breach of section 55 in BPB's case by failing to recognise that it was not in BPB's best interests to maintain the NRPF condition.
95. APB is not in the United Kingdom. The section 55 obligation does not therefore apply to APB (see section 55(1)(a)). Mr Amunwa argues that statutory guidance issued under section 55 requires that the section 55 duty extends to children abroad: Every Child Matters: Change for Children at sections 2.34-2.36. I do not agree that the guidance has the effect that Mr Amunwa suggests. It applies to UK Border Agency staff who are working overseas when dealing with children abroad and requires that the "spirit" of the duty be applied in those circumstances. It does not require a decision maker in the United Kingdom to take account of the best interests of a child abroad when determining an application to lift a NRPF condition. In any event, the application was not put forward on the basis that it would make any difference to APB. It was not suggested that if the NRPF condition is lifted that APB will then return to the United Kingdom to live with LPB and BPB.

(4) Has the Secretary of State breached the article 3 ECHR systems duty?

96. A "low-level systems duty" applies to applications to remove a NRPF condition: *ASY* at [95] *per* Fraser LJ. This means that there must be suitable systems of work in place, sufficiently resourced, to reduce the risk of inhuman and degrading treatment to a reasonable minimum, without imposing an impossible or disproportionate burden on the Secretary of State, and having regard to the operational choices made by her in terms of priorities and resources (see paragraph 50 above). This was pithily expressed by Fraser LJ in *ASY* at [92]: "The administrative arrangements must be proportionate, but the immediacy of the situation must be taken into account".

97. In *ST* the Divisional Court rejected a claim that the guidance was incompatible with the systems duty: *per* Elisabeth Laing LJ at [177]. That is not, however, determinative of the current challenge which is not based on the guidance but instead on the time taken to resolve applications.
98. As *ASY* shows, the systems duty includes a requirement to deal with requests to lift a NRPF condition timeously, to minimise the risk of inhuman and degrading treatment. In *ASY*, Fraser LJ said that time scales of 2 months or 4 months did not “sit properly with dealing with an application from someone who is at immediate risk of falling into such a state of extreme destitution that their rights under article 3 are about to be breached”: at [99].
99. Mr Ramsbotham’s evidence is that the average time taken to determine a request to lift a NRPF condition is 70 days. Because this is an average, some cases take longer, some not as long. A 70-day wait for a decision might not create an unjustified risk of exposure to inhuman or degrading treatment in some cases. But in other cases, where there is an immediate risk of inhuman and degrading treatment, 70-days is far too long to wait. The fact that the average is longer than could be justified in some individual cases does not demonstrate a breach of the systems duty. What it does show is the need for a sufficient system to prioritise cases or otherwise ensure that applications are expedited where that is necessary. Mr Ramsbotham says that resourcing is reviewed to minimise waiting times “where possible” and that cases are expedited “where appropriate”, but that evidence (and the evidence of Mr Martin) is far too vague to show that, in practice, the risk is reduced to a reasonable minimum. Mr Ramsbotham also points to the possibility of bringing a complaint, or writing a pre-action protocol letter in advance of a claim for judicial review. There is no evidence that either of these routes provides a practical and effective means of prioritising cases.
100. The decisions that gave rise to the claims in *ASY* were taken in 2018/19. Nothing in the evidence served by the Secretary of State shows that decision-making is quicker now than it was then, or that a better system of prioritisation or expedition is in place. On the contrary, the published statistical evidence indicates that the average number of days to determine an application has increased from 18 in the last quarter of 2019, to 70 now. That is not due to a sudden unexpected spike in applications. There has been a broadly linear increase in the average time taken in the last 6 years, even though the number of applications is no greater now than it was in 2018. There was a short-term spike in applications by a factor of 6 during the first stage of the covid pandemic, but the average time taken to determine applications now is even greater than it was during that spike.
101. I accept Mr Biggs’ submission that flawed (or delayed) decisions in individual cases do not show a systemic failure. It is the system that is important, for these purposes, and a failure by an individual caseworker to act in accordance with the system does not show that the system is at fault. I would not find against the Secretary of State on this ground of challenge merely because a decision in one or other of the cases that are before the court took too long (and I deliberately make no finding about that). The average figure is representative of the system that is in place rather than a reflection of an individual long-delayed decision. It is entirely fair to evaluate the system by reference to that average figure, together with such evidence as the Secretary of State has chosen to make available as to mechanisms for prioritisation and expedition.

102. I also accept the submission of Mr Biggs that a court should be cautious before ruling as to the resources that a public authority ought to deploy to address any particular issue. It is important not to impose a disproportionate or unrealistic burden on the Home Office. The courts have been careful not to require that decisions be made within any specific inflexible deadline. What is, however, required is a sufficient system that reduces the risk as far as practically and proportionately possible. Simply having a system of case-by-case review and expedition where that is thought necessary does not achieve that end. At the very least, if the average time to determine an application is as long as 70-days, the system needs to ensure that applications are considered, on a triage basis, sufficiently swiftly to enable case-by-case review and expedition to be effective in reducing the risk. So far as appears from the evidence that has been adduced by the Secretary of State (who has had every opportunity to deal with this point) the system that is in place does not do that bare minimum. To reach that conclusion, I have not taken account of the case studies that have been presented on behalf of the claimants.
103. Accordingly, the system that is in place does not sufficiently reduce the risk of inhuman and degrading treatment. There is thus a breach of the low-level systems duty.

(5) Should the unlawful decision in SAG’s case be quashed?

104. The Secretary of State accepts that the decisions in SAG’s case in February 2024 were unlawful.
105. Ordinarily, if it is established that a decision is unlawful on public law grounds (as is here conceded), a remedy will be granted. But judicial review is a discretionary remedy and there are circumstances in which it is appropriate to withhold the grant of any remedy. They include where the claim has become academic, or where a remedy would have no practical utility (*Baker v Police Appeals Tribunal* [2013] EWHC 718 (Admin) *per* Leggatt J at [32]), or where the claimant has suffered no harm or prejudice, or the grant of a remedy would be contrary to good public administration (*Bahamas Hotel Maintenance & Allied Workers v Bahamas Hotel Catering & Allied Workers* [2011] UKPC 4 *per* Lord Walker at [40]).
106. If it could be shown that the Secretary of State’s unlawful decision in February 2024 exposes SAG to a real risk of criminal proceedings or a requirement to repay benefits or an adverse future decision, then it would be appropriate to quash that decision to remove that risk.
107. As far as criminal proceedings are concerned, Mr Amunwa drew attention to section 24(1)(b) of the Immigration Act 1971. That states:
- “A person who is not a British citizen shall be guilty of an offence punishable on summary conviction with a fine of not more than level 5 on the standard scale or with imprisonment for not more than six months, or with both... if, having only a limited leave to enter or remain in the United Kingdom, he knowingly fails to observe a condition of the leave.”
108. He submitted that in the light of this “black letter law” SAG is at risk of criminal proceedings and a remedy is necessary to address that risk. I disagree. Section 24(1)(b) creates a summary offence. Any prosecution must be brought within 6 months: section

127 of the Magistrates' Courts Act 1980. Even if SAG received public funds right up to and including 12 May 2024, and even if that was capable of amounting to an offence under section 24(1)(b), the time limit for bringing a prosecution has expired. For that reason alone, there is no real risk of a prosecution. Even if the time limit had not expired it is difficult to conceive that a prosecution would be brought in these circumstances. There is no evidence of any suggestion by anybody that it would be appropriate to investigate or prosecute SAG for a criminal offence.

109. So far as a requirement to repay benefits is concerned, or the risk that SAG would be subject to an adverse future decision in respect of leave to remain, Mr Amunwa did not identify any statutory provision, policy guidance or anything else which puts SAG at risk of her benefits being recouped or an adverse future decision. Again, there is no evidence of any suggestion by anybody that it would be lawful to require SAG to repay her benefits or to refuse her leave to remain, because of the Secretary of State's unlawful decision in February 2024.
110. Mr Amunwa is right that a quashing order was made in *ST*, in not dissimilar circumstances. However, in that case the Secretary of State had opposed the granting of any relief on the basis of reasoning that was flawed, and which might conceivably have influenced further decision making (see at [20]). It was primarily for that reason that the court invited counsel to take instructions which, in effect, resulted in agreement that the decision could be subject to a quashing order.
111. In the present case, the Secretary of State has directly accepted that the decisions in February 2024 were unlawful and has given a reasoned explanation for how the mistake happened. There is no real risk that the error will influence future decision making.
112. There are broader reasons why I do not think it is appropriate to grant a remedy in this case. The Secretary of State herself corrected the February 2024 decision by reversing it in May 2024. That gave SAG what she wanted and what she needed. For the reasons I have already given, she had not, in the meantime, been subject to any financial prejudice. At that point, the parties could have filed a consent order with a draft statement of reasons which explained the position. Instead, SAG continued with the proceedings, on an expedited basis, resulting in significant and unnecessary further public resources being incurred. Both sides pay the costs of the proceedings from public funds. Extensive evidence has been obtained and put before the court. Satellite litigation has been triggered by way of procedural applications.
113. It is no doubt possible that the Secretary of State will, in future, make similar mistakes when imposing NRPF conditions. It is in the interests of good administration that where such mistakes are made they are corrected quickly without recourse (or continuing recourse) to resource intensive, time consuming and public fund draining litigation. The fact that a quashing order was made in a previous case was used in this case as a reason to continue with the litigation and seek a quashing order. If a quashing order in this case were granted it would simply encourage further such litigation without any practical purpose. The better course, in the circumstances of the present case, is to record the position in this judgment (which I understood Mr Amunwa to recognise as a reasonable resolution) and by way of appropriate recitals to the order.

(6) Whether BPB should be granted permission to claim judicial review

114. The defendant has not identified any good reason why permission should be refused in BPB's case. For the reasons given above, I consider not only is BPB's claim arguable but that the decision in BPB's case was unlawful both at common law and under section 55 of the 2009 Act. I would therefore allow the claim in BPB's case (but not APB's case).

(7) What, if any, relief should be granted to the claimants

115. In the case of SAG, for the reasons given at paragraphs 104 – 113 above, no quashing order or declaration should be made. The concession as to the illegality of the earlier decision can be recorded in a recital to the order.

116. In the case of LG, for the reasons given at paragraphs 80 – 84 and 92 above, the challenge to the refusal to lift the NRPF condition will be dismissed..

117. In the case of BPB, for the reasons given at paragraphs 85 – 86 and 93 – 95 above, the operative decision is flawed on common law grounds and because it breaches section 55 of the 2009 Act. I grant permission to claim judicial review and quash the decision.

118. For the reasons given at paragraphs 96 – 103 above, the Secretary of State does not have an adequate system in place to reduce, to a reasonable and proportionate minimum, the risk of inhuman and degrading treatment. A declaration will be granted accordingly.

(8) Further directions

119. There are outstanding claims under the 1998 Act for alleged breaches of operational duties arising under article 8 ECHR, and for breach in the individual cases of the systems duty. The parties agreed that it was not in the interests of justice for those claims to proceed to determination on an expedited basis. There was no oral argument as to the directions (if any) that should be made in respect of those claims, the parties wishing to reserve their position until judgment had been given on the balance of the issues. I will therefore make directions for the claimants to identify whether they wish to proceed with these claims and, if so, for the parties to make written representations as to how they should be case managed. I will then make case management directions without a further hearing.

Outcome

120. In the case of SAG, MA, HF and NF, the NRPF condition has now been lifted. It is common ground that the earlier decision was unlawful. That will be recorded as a recital to any order in this case. It is unnecessary to make a quashing order or a declaration.

121. In the case of LG and KG, the challenge to the decision not to lift the NRPF condition is dismissed.

122. In the case of BPB and APB, the decision not to lift the NRPF condition was flawed at common law and breached section 55 of the 2009 Act. It will therefore be quashed.

123. The Secretary of State has failed to implement a system that ensures sufficiently timeous decisions on application to lift NRPF conditions to minimise, in a proportionate way, the risk of inhuman and degrading treatment. She has therefore breached the “low level systems duty” that arises under article 3 ECHR. A declaration will be made to that effect.
124. If necessary, case management directions will be made in respect of outstanding claims under the Human Rights Act 1998.