FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2019] CSIH 29
P1418/15 and P1391/15

Lord President
Lord Menzies
Lord Brodie

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the Reclaiming Motions by

(FIRST) NATASHA TARIRO NYAMAYARO and
(SECOND) OLAYINKA OLUREMI OKOLO

Petitioners and Reclaimers

against

THE ADVOCATE GENERAL, representing THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

and

THE COMMISSION FOR EQUALITY AND HUMAN RIGHTS

Interveners

Petitioners and Reclaimers: McBrearty QC, Irvine; Balfour & Manson LLP
Respondent: Johnston QC, Gill; Office of the Advocate General
Interveners: C O'Neill (sol adv); The Commission for Equality and Human Rights

7 May 2019

Conventions, Legislation and Guidance

International Instruments

United Nations Convention on the Rights of the Child

[1] The UNCRC provides:

> "Article 3:
>
> 1. In all actions concerning children ... the best interests of the child shall be a primary consideration.
>
> 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents ... and, to this end, shall take all appropriate legislative and administrative measures.
>
> ...
>
> Article 26:
>
> 1. States Parties shall recognize for every child the right to benefit from social security ... and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.
>
> ...
>
> Article 28:
>
> 1. States Parties recognize the right of the child to education ...
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> ...
>
> Article 31:
>
> 1. States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.
>
> 2. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity."

[2] General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3.1), which was adopted by the UN Committee on the Rights of the Children, includes the following:

> "I.A.4. The concept of the child's best interests is aimed at ensuring both the full and effective enjoyment of all the rights recognized in the Convention and the holistic development of the child".

A footnote reads that the Committee expects States to interpret development as a "holistic concept, embracing the child's physical, mental, spiritual, moral, psychological and social development".

[3] General comment No. 17 (2013) on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts (art 31) included the following:

> "VI.B. Growing role of electronic media ... Today, children move seamlessly between offline and online environments. These offer huge benefits – educationally, socially and culturally – and States are encouraged to take all necessary measures to ensure equality of opportunity for all children to experience those benefits. Access to the Internet and social media is central to the realisation of article 31 rights in the globalized environment".

European Instruments

European Convention on Human Rights

[4] The European Convention provides:

> "Article 3
>
> Prohibition of Torture
>
> No one shall be subjected to ... inhuman or degrading treatment ...
>
> Article 8
>
> Right to respect for private and family life
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of ... 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.
>
> Article 14
>
> Prohibition of discrimination
>
> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex ..... or other status.
>
> Protocol

Article 1

Protection of Property

Every ... person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law ...

The preceding provisions shall not ... impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest ...".

Charter of Fundamental Rights of the European Union

[5] The CFR provides:

"Article 1

Human dignity

Human dignity is inviolable. It must be accepted and protected.

...

Article 18

Right to asylum

The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 ...

Article 21

Non-discrimination

1. Any discrimination based on any ground such as sex ... shall be prohibited.

2. Within the scope of application of the Treaties ... any discrimination on grounds of nationality shall be prohibited.

Article 24

The rights of the child

1. Children shall have the right to such protection and care as is necessary for their well-being. ...

2. In all actions relating to children, whether taken by public authorities ... institutions, the child's best interests must be a primary consideration.

...".

Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers

[6] The preamble of Reception Directive states:

> "...
>
> (5) This Directive respects the fundamental rights and observes the principles recognised ... by the [CFR] ...
>
> …
>
> (7) Minimum standards for the reception of asylum seekers that will normally suffice to ensure them a dignified standard of living and comparable living conditions in all Member States should be laid down.
>
> …
>
> (15) It is in the very nature of minimum standards that Member States have the power to introduce or maintain more favourable provisions for third-country nationals and stateless persons who ask for international protection from a Member State."

[7] The Directive continues:

> "Article 1
>
> Purpose
>
> The purpose of this Directive is to lay down minimum standards for the reception of asylum seekers in Member States.
>
> ...
>
> Article 13
>
> General rules on material reception conditions and health care
>
> ...
>
> 2. Member States shall make provisions on material reception conditions to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence. Member States shall ensure that that standard of living is met in the specific situation of persons who have special needs, in accordance with Article 17 ...
>
> 3. Member States may make the provision of all or some of the material reception conditions and health care subject to the condition that applicants do not have sufficient means to have a standard of living adequate for their health and to enable their subsistence.
>
> ...
>
> 5. Material reception conditions may be provided in kind, or in the form of financial allowances ... Where Member States provide material reception conditions

in the form of financial allowances ... the amount thereof shall be determined in accordance with the principles set out in this Article.

...

Article 17

General principle

1. Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors ... single parents with minor children ... in the national legislation implementing the provisions of Chapter II relating to material reception conditions and health care.

...

Article 18

Minors

1. The best interests of the child shall be a primary consideration for Member States when implementing the provisions of this Directive that involve minors."

Legislation

Primary

The Immigration and Asylum Act 1999

[8] The 1999 Act provides:

"95(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) ... a person is destitute if—

...

(b) he has adequate accommodation ... but cannot meet his other essential living needs.

(4) If a person has dependants, subsection (3) is to be read as if the references to him were references to him and his dependants taken together.

...

(7) In determining ... whether a person's other essential living needs are met, the Secretary of State—

(a) must have regard to such matters as may be ...; but

(b) may not have regard to such matters as may be prescribed ...

(8) The Secretary of State may by regulations provide that items or expenses of such a description as may be prescribed are, or are not, to be treated as being an essential living need of a person ...

96(1) Support may be provided under section 95—

...

(b) by providing what appear to the Secretary of State to be essential living needs of the supported person and his dependants ...;

...

(2) If the Secretary of State considers that the circumstances of a particular case are exceptional, he may provide support under section 95 in such other ways as he considers necessary to enable the supported person and his dependants (if any) to be supported."

The Borders, Citizenship and Immigration Act 2009

[9] The 2009 Act states:

"55 Duty regarding the welfare of children

(1) The Secretary of State must make arrangements for ensuring that –

(a) [any function of the Secretary of State in relation to immigration, asylum or nationality is] discharged having regard to the need to safeguard and promote the welfare of children ...

...

(3) A person exercising any of those functions must ... have regard to any guidance given by the Secretary of State ..."

The Equality Act 2010

[10] The 2010 Act establishes a public sector equality duty as follows:

"149(1) A public authority must, in the exercise of its functions, have due regard to the need to—

(a) eliminate discrimination ...;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

…

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

…

(6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.

(7) The relevant protected characteristics are—

...

sex;

…".

Secondary

Asylum Support Regulations 2000

[11] The AS Regulations 2000 provide:

"9.– Essential living needs

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

(4) Those items and expenses are–

...

(b) computers and the cost of computer facilities;

...

(e) toys and other recreational items;

(f) entertainment expenses."

[12] 10. – Kind and levels of support for essential living needs

"...

(2) As a general rule, asylum support in respect of the essential living needs of that person may be expected to be provided weekly in the form of a cash payment of £37.75.

10A. – Additional support for pregnant women and children under 3

(1) In addition to the cash support ... described in regulation 10(2), in the case of any pregnant woman or child aged under 3 ... there shall ... be added to the cash support ... the amount shown ...

TABLE

Pregnant Woman	£3.00
Child aged under 1	£5.00
Child aged at least 1 and under 3	£3.00".

Asylum Seekers (Reception Conditions) Regulations 2005

[13] The AS Regulations 2005 provide:

"5.– Asylum support under section 95 ... of the 1999 Act

(1) If an asylum seeker ... applies for support under section 95 of the 1999 Act and the Secretary of State thinks that the asylum seeker ... is eligible for support under that section he must offer the provision of support ...".

The Asylum Support (Amendment No. 3) Regulations 2015

[14] The AS Regulations 2015 altered the rates in the AS Regulations 2000 by substituting a uniform rate of £36.95 (now £37.75, see *supra*) for adults and children when previously the rates had been respectively £36.95 and £52.96. The Explanatory Notes to the 2015 Regulations referred to the review (see *infra*) which had been carried out to identify "all essential needs (for example the need to eat healthily)". It had concluded that families had been receiving significantly more cash than was necessary to meet their essential needs. The previous methodology had not taken "economics of scale" into account, to which other EU countries had regard. The memorandum states:

"7.8 In taking this decision full consideration has been given to the legal duty to have regard to the need to safeguard and promote the welfare of children. The

changes involve reductions in cash payments to families, but ensure that sufficient funds continue to be available to enable parents to care for their children safely and effectively and provide for their health and development."

Guidance

Every Child Matters: Change for Children (November 2009)

[15] The ECM guidance was issued under section 55 of the 2009 Act. It states:

"Introduction

1. Improving the way key people and bodies safeguard and promote the welfare of children is crucial to improving outcomes for children.

2. Section 55 ... places a duty on the Secretary of State to make arrangements for ensuring that immigration [and] asylum ... functions are discharged having regard to the need to safeguard and promote the welfare of children ...

...

Part 1 Understanding the Duty ...

...

1.3 The duty ... does require the [UK Border] Agency to carry out its existing functions in a way that takes into account the need to safeguard and promote the welfare of children.

1.4 Safeguarding and promoting the welfare of children is defined ... as:

...

preventing impairment of children's health or development (where health means 'physical or mental health' and development means 'physical, intellectual, emotional, social or behavioural development'; ...

...

1.9 At an organisational or strategic level ... key features for safeguarding and promoting the welfare of children are [senior management commitment; clear statements; clear lines of accountability, staff training, information sharing etc].

Part 2 The Role of the UK Border Agency ...

...

2.6 The UK Border Agency acknowledges the status and importance of the ... European Convention ... and the [UNCRC]. The UK Border Agency must fulfil the requirements of these instruments in relation to children whilst exercising its functions as expressed in UK domestic legislation and policies".

The Challenge

[16] The petitioners are both single parent asylum seekers with one or more dependent children. They seek review of the interlocutors of the Lord Ordinary dated 21 February 2018 which refused their petitions for judicial review of the level of asylum support payable under section 95 of the Immigration and Asylum Act 1999. Asylum seekers are not eligible for mainstream benefits. Rather, under section 95 and the terms of regulation 5 of the AS Regulations 2005, the Secretary of State must offer to provide support to those who appear "destitute". A person is destitute if he has adequate accommodation (this being provided to each petitioner), but cannot meet his other "essential living needs". The petitioners fall within this provision.

[17] Section 96 sets out the ways in which support under section 95 may be provided. They include the provision of "what appear to the Secretary of State to be essential living needs of the supported person and his dependants" (s 96(1)(b)). The Secretary of State must have regard to certain prescribed matters, but is precluded from having regard to others (s 95(7)). The excluded matters are set out in regulation 9 of the AS Regulations 2000. They include, *inter alia*, toys and other recreational items, expenses incurred in relation to entertainment, the cost of computer facilities and defined travel costs.

[18] The support takes the form of a weekly cash payment (reg 10(2)). Following upon a Government review in 2015, which was a consequence of the successful challenge in *R (Refugee Action)* v *Secretary of State for the Home Department* [2014] EWHC 1033 (Admin), the Asylum Support (Amendment No. 3) Regulations 2015 reduced the amount of cash payable. The amount fell from £52.96 per week in respect of each child, to a flat rate of £36.95 (now £37.75) per week per person.

[19] The new rate was explained in a Policy Equality Statement. The PES noted that a revised methodology had been developed to assess "essential" items and their cost. The most relevant material had come from survey data published by the Office of National Statistics on household expenditure in the lowest 10% (decile) income group, supplemented by verifications from other sources and adjustments to reflect the particular needs and typical circumstances of asylum seekers. Consideration had been given to support levels in other EU countries. The review concluded that any extra needs associated with children were offset by the economies of scale applicable to a larger household. An analysis of the ONS data showed that expenditure on essential items by family groups (of all sizes) was considerably lower than the cash payments then made to asylum seeking families. For these reasons it had been determined that the then current rates exceeded what was necessary to meet the essential living needs of asylum seekers with children. It was decided that these needs would be unlikely to vary significantly for reasons related to gender. A "sign off" by the Head of Asylum and Family Policy unit recorded that the PES complied with section 149 of the 2010 Act and that due regard had been had to the need to: "eliminate unlawful discrimination; advance equality of opportunity; and foster good relations".

> In a letter from the Head of the Unit, dated 16 July 2015, it was recorded that:
>
> "we have fully considered our legal duty to have regard to the need to safeguard and promote the welfare of children. The changes involve reductions in cash payments to families, but still ensure that sufficient funds are available to enable parents to care for their children safely and effectively and provide for their development".

The breakdown of the figure of £36.95 per week included £24.96 for food and drink, £2.51 for clothing and footwear, £1.23 for toiletries and two sums of £3.00 for travel and for communications. The new payments would, for example, total between £73.90 and £147.80 for a single parent with one child to a couple with two children. A letter from the

responsible minister in the House of Lords dated 22 October 2015 offered further explanations of the figures selected.

[20] Two affidavits, spanning 97 pages, from Simon Bentley, the official with lead responsibility for policy in relation to asylum support, were produced by the respondent. This described the history of asylum support. It was being provided, in 2015, to about 38,000 asylum seekers (about 3,200 in Scotland) at a cost, including accommodation, of £166m for section 95 claims support. Mr Bentley covered the purpose of the review. He described its methodology in relation to setting the rate for a single adult and the use of the ONS data and other research. He did the same in relation to families, remarking that the previous figures had not taken account of economies of scale. Specific account was said to have been taken of children's needs. An EU comparison, involving Sweden, Germany and France, had been carried out. Reasons for not using mainstream benefits as a comparator were given. Specific issues in relation to the petitioners' particular situations were canvassed.

[21] Mr Bentley dealt specifically with the duty to take into account the need to safeguard and promote the welfare of children under section 55 of the 2009 Act, the ECM guidance and elsewhere. He reported that the review took careful account of the factors mentioned in the ECM. It has not affected the:

> "188 ... core support framework relating to asylum seekers with children, in particular the availability of accommodation, access to free healthcare and free schooling. The review was solely concerned with the level of cash needed to cover the ordinary everyday essential living needs of children (and their parents) that were not covered through other aspects of the support framework (and excluding any additional assistance that might need to be provided exceptionally because of the particular circumstances of the individual).
>
> 189 ... the objective was to ensure that sufficient cash was provided to the household as a whole, taking account of the assessed essential needs of parents and their children ... and the costs of meeting those needs ...

> 191 In respect to the ... (UNCRC), the review was conducted on the basis of the need to provide levels of support adequate to cover 'essential living needs' ... and the minimum standards provided for in the ... Reception Directive, supplemented by the valuable guidance ... in [*R (Refugee Action)*] ... [A]pplying that guidance would ensure that the approach would be compatible with the UNCRC."

[22] Reference was made to the PES, which had been seen by the Minister when making the decision on the cash payment rate. The fact that most (90%) single parent households were headed by a woman was considered, as were the comparative needs of the genders. A small difference in calorific intake and a material difference in clothing were identified, but the conclusion remained that the Government were paying multi-person households more than was necessary to meet their essential living needs.

[23] The petitioners challenge the changes on the grounds that the Secretary of State acted in breach of: (i) the Reception Directive, which lays down minimum standards for asylum seekers; (ii) articles 21 and 24 of the CFR; (iii) article 14, when read with article 8, of the European Convention; and (iv) section 55 of the Borders, Citizenship and Immigration Act 2009. It is also argued that the Secretary of State acted in breach of the public sector equality duty in section 149 of the 2010 Act, in so far as she failed to have regard to the protected characteristic of sex/gender in respect of single parent households; the majority of which are headed by women. The petitioners challenge the lawfulness of regulation 9(4) insofar as it excludes certain items from the definition of the "essential living needs" of children.

England and Wales

[24] The issues which this court was invited to revisit have already been addressed in great detail in the High Court of Justice and the Court of Appeal in England and Wales in: *R (Refugee Action)* v *Secretary of State for the Home Department* (*supra*); *R (SG and others)* v

Secretary of State for the Home Department [2016] EWHC 2639 (Admin); and *R (JK (Burundi))* v *Secretary of State for the Home Department* [2017] 1 WLR 4567.

[25] In *R (Refugee Action)*, Popplewell J, when faced with a "compendium of arguments", observed (para 36) that the asylum support to be provided under sections 95 and 96 of the 1999 Act was such as would meet essential living needs "as a general rule" and excluding any sums to be given in exceptional circumstances. The support was to meet such needs as were "normal for the cohort as a whole" (para 37). It was not to cover items provided by other public institutions, notably local authorities, such as education and health care. The duty to provide support was one designed to "avoid destitution" as a "last resort" (para 39). Popplewell J reasoned that, since legislation required to be interpreted in a manner which was consistent with EU Directives, the minimum standard stipulated in the Reception Directive required to be achieved. This involved the court applying an objective test which did not permit any subjective judgment.

[26] Accordingly (para 87), asylum support had to be "set at a level which promotes, protects and ensures full respect for human dignity" (CFR, art 1) and promotes the right to asylum (*ibid*, art 18). It had to be adequate to maintain an "adequate standard of health and meet ... subsistence needs" (Reception Directive, art 13). The length of time which asylum seekers spent on asylum support, which could be years, was potentially relevant. Subject to the minimum, it was a matter for the Secretary of State to decide what were to be regarded as essential living needs. This was a value judgment which was open to review only on the high threshold of "unreasonableness or other established public law grounds" (para 91).

[27] Popplewell J conducted an in-depth review of the many different items which were taken into, and left out of, account in assessing essential living needs and the fact (para 102) that children had access to education, parks, playgrounds and libraries. The exclusion of

toys by regulation 9 of the AS Regulations 2000 was not incompatible with the minimum content required by the Reception Directive. However, he found in favour of the claimants in connection with the Secretary of State's application of certain rates and in failing to take reasonable steps to gather sufficient information to enable her to make a rational judgment in setting the asylum support rates. The Secretary of State's decision in 2013 to freeze the rates at 2011 levels was quashed.

[28] In *R (SG and others)*, Flaux J examined the aftermath of *R (Refugee Action)*, notably the "thorough going review" followed by the AS (Amendment No. 3) Regulations 2015. He took note (para 6) of the general framework whereby asylum seekers were provided with accommodation, with the landlord paying utility bills and council tax and supplying basic furniture and household equipment, including cookers, fridges, washing machines, cooking utensils and crockery. Apart from the cash sum to meet essential living needs, there was free health, dental and eye care and free access to libraries. Children were given free education, free school meals in term time and free transport to and from school.

[29] Flaux J agreed (para 34) with Popplewell J on the determination of the essential issues in *R (SG and others)*, notably the objective test for the minimum standard and the discretionary element thereafter when deciding what constituted essential living needs. The assessment of these needs could be the subject of successful review only on conventional public law grounds. The level of asylum support was for the normal cohort of asylum seekers and their dependents. As in *R (SG and others)*, an extremely detailed examination of the facts and figures used in the Government's review, as described by Mr Bentley, was carried out. This included the Secretary of State's use of the data from the ONS, the items extracted from it and the work carried out by the Secretary of State's own researchers. A

report produced by Ms Charlesworth for the claimants was considered but dismissed. partly because she was not an expert on child development and health.

[30] Ultimately, Flaux J decided (para 145) that the "overall system of support (that is the weekly payments taken with the other support provided ... and further provision for exceptional needs ... where appropriate" did ensure "a dignified standard under the Reception Directive". He was satisfied (para 151) that the rates set for 2014 and 2015 were "arrived at after careful consideration ...". The fact that the rate was the same, or less in real terms, than the rate in previous years did not mean that the decisions under challenge were unreasonable.

[31] Flaux J addressed the discrimination issues (para 235 *et seq*). There was no analogy to be drawn between asylum seekers and those who had a right to reside in the United Kingdom. Any entitlement to asylum support for dependents, as with adults, derived from the Regulations passed to comply with the Reception Directive. This was a separate statutory regime (*Blakesley* v *Secretary of State for Work and Pensions* [2015] 1 WLR 3150). The right to the relevant benefit was that of the parent and not the child, so that the issue of discrimination could only arise in relation to any difference in treatment between adult asylum seekers and adults on mainstream benefits. Issues of justification and proportionality did not arise but, if they did, the "manifestly without foundation test" ought to apply, as it would be by both the European Court of Human Rights and the UK Supreme Court. There was a legitimate purpose in discouraging economic migration and ensuring that limited financial resources were not expended on providing support in excess of that required by the Directive.

[32] Although the Reception Directive provided for equivalence, between the children of asylum seekers and those in the country generally, in relation to education, no such

equivalence was required in relation to other matters (cf CFR, art 24.1). Neither section 55 of the 2009 Act, nor the ECM guidance nor the UNCRC required a higher level of support than that set in the Directive or section 96 of the 1999 Act. The Secretary of State's assessment, that there were economics of scale in relation to households with children, accorded with "common sense" (para 254). The Secretary of State's approach to the needs of children was "sufficiently child-centric and holistic" (para 280). The exclusion of toys and computers did not render the regulations incompatible with the minimum standard required by the Directive. It was for Parliament, and not the courts, to address the claimants' concerns about the rates.

[33] The public sector equality duty in section 149 of the 2010 Act was an important part of the mechanism for ensuring the fulfilment of the aims of anti-discrimination legislation. In terms of *R (Hurley & Moore)* v *Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin) (at paras 77-78), provided that there had been a rigorous consideration of the duty, so that there had been a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, it was for the decision maker to decide how much weight should be given to the various factors. The Secretary of State had looked at the needs of children carefully and had determined that the support rate was sufficient to meet the needs of the general cohort. Lone parents, whatever their sex, did not need more. "Due regard" under section 149 did not require more detailed consideration of a problem which had not been demonstrated to exist.

[34] The issue of the reductions promulgated by the AS Regulations 2015 came to be considered by the Court of Appeal, on an application for permission to appeal *R (SG and others)*, in *R (JK (Burundi))* v *Secretary of State for the Home Department* (*supra*). The claimant's grounds had been narrowed down to two points, *viz.* that the Secretary of State had: carried

out a flawed assessment by wrongly focusing on a subsistence rather than welfare standard of asylum support; and discriminated against the children of asylum seekers when compared to those whose parents were in receipt of mainstream benefits.

[35] Gross LJ, who delivered the substantive judgment, took as his starting point sections 95 and 96 of the 1999 Act and the AS Regulations 2000 before noting the terms of the Reception Directive, which had given effect to certain articles of the CFR. He returned to section 55 of the 2009 Act and the relative ECM guidance, before ending with the UNCRC. Gross LJ outlined the salient features in *R (SG and others)*. First, it recognised the respective roles of the executive and the judiciary in the setting of the level of asylum support. Secondly, it noted the means of support beyond the cash element under review. Thirdly, it rejected the argument that there was a requirement of equivalence between the children of asylum seekers and those on income support and the notion that section 55 of the 2009 Act, the ECM or the UNCRC required a higher standard of support than that required by the Reception Directive and section 96 of the 1999 Act.

[36] On the subsistence or welfare debate, Gross LJ observed (para 58) that the natural meaning of the language used in both the 1999 Act and the Reception Directive pointed to a subsistence level of support, rather than any heightened standard. The aim of sections 95 and 96 of the 1999 Act was that of "averting destitution". The language of the Directive was to ensure "minimum standards" to ensure a "dignified standard of living" which was adequate for the purposes of "health" and "subsistence". The duty was to make provision for essential living needs.

[37] There was no warrant for holding that the references to the "best interests" of the child called for a different construction of the 1999 Act or the Reception Directive. The latter mirrored the CFR (respectively arts 18 and 24). Apart from article 3, the UNCRC did not

form part of the law in the United Kingdom. It could not re-write either the 1999 Act or the Directive. Even if it could be used as an interpretative aid, its provisions went no further than the Directive and, in any event, operated at "too high a level of generality to impact" on the construction of the 1999 Act or the Directive (para 64). Neither section 55 of the 2009 Act nor the ECM guidance cast doubt upon the construction applied in the High Court. Section 55 did not generate an obligation to achieve particular results. The ECM guidance was of considerable width. In short (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 [1999 Act] or the [Directive] to provide some different and welfare driven standard".

[38] Based upon the Bentley review, it had been reasonable for the Secretary of State to conclude that, having regard to economies of scale, the original, higher rate for children had been in excess of the required Reception Directive minimum standard and that of essential living needs under the 1999 Act. There was no reason to doubt Mr Bentley's view that the new rate had been set after appropriate consideration of the best interests of the child. On toys and computers, having regard to the forms of assistance given beyond the cash payments, it could not be argued that the exclusions were unreasonable, *ultra vires* or incompatible with the best interests principle. Although the exclusion of toys was regrettable (para 81) it was not unreasonable.

[39] This was a case for the exercise of judicial restraint, calling for "a proper appreciation of the different provinces of the executive and the judiciary" (para 85). Gross LJ continued:

> "86 Treating the best interests of the child as a primary consideration, the Secretary of State is duty-bound to fix the weekly rate of asylum support paid for child dependants of asylum seekers at a level which complies with the minimum standard required by the [Directive]. In doing so, the Secretary of State must decide upon what are essential living needs in a manner which is neither irrational nor

> *Wednesbury* unreasonable. Should the Secretary of State fail to meet the [Directive] minimum standard or act irrationally or *Wednesbury* unreasonably as to what constitutes essential living needs, then the court may properly intervene; the question of whether she has done so is a matter upon which the court is entitled and, if asked, obliged to rule.
>
> 87 Provided, however, that the Secretary of State has complied with the [Directive] minimum standard and assessed essential living needs rationally and reasonably, then the value judgment of what does and does not comprise an essential living need is for her and not for the court. Within the boundary thus demarcated, the inclusion or exclusion of any particular item belongs within the Secretary of State's sphere rather than that of the court. Policy choices in such areas, concerning resource allocation and implications for the public purse, fall properly to the Secretary of State for decision. In this way, while the court retains the power and the duty to adjudicate upon threshold questions, the 'judicialisation' of public administration, very much including the provision of welfare services, can beneficially be avoided; so too, the realities of public sector finances can be taken into account: ...".

Permission to appeal was refused as having "no real prospect of success"

Lord Ordinary's Opinion

[40] The petitions called before the Lord Ordinary for a substantive hearing on 7 February 2017. The reclaiming motions are directed against the interlocutors of 21 February 2018, which followed the Lord Ordinary's Opinion.

[41] The Lord Ordinary divided the petitioners' challenge into three categories: (i) an unlawfulness challenge; (ii) a methodological challenge; and (iii) the discrimination arguments. On the unlawfulness case, the Lord Ordinary adopted the reasoning in *R (SG and others).* She agreed with both *R (Refugee Action)* and *R (SG and others)* that the question of whether the Secretary of State had complied with the minimum standard involved an objective test. What were to be regarded as essential living needs was a matter for the Secretary of State, provided the minimum was achieved. Such needs involved a low threshold, in effect subsistence. The petitioners' argument that essential living needs ought

to be given a different content, when applied to the children of asylum seekers, was not open on the basis of the words used.

[42] The Reception Directive required member states to have regard to the best interests of the child as a primary consideration. The best interests duty was not an external factor impacting on, or augmenting, the Directive. It was already "woven into [its] very fabric". The petitioners were not assisted by the CFR because, as with the UNCRC, the matters raised in the CFR had already been taken into account in the Directive. References to human dignity in article 1 were reflected in the Directive. Article 24 of the CFR may require that the best interests of the child be treated as a primary consideration, but so too did article 18 of the Directive. The petitioners had no legal basis for invoking the UNCRC as an international treaty, to the extent that it has not been incorporated into domestic law (*R (JS)* v *Secretary of State for Work and Pensions* [2015] 1 WLR 1449, at paras 82 and 90).

[43] The ECM Guidance did not call for any heightened standard to that required by the Reception Directive or in terms of essential living needs in the 1999 Act. It could not create obligations in excess of those contained in statute. Section 55 of the 2009 Act set out a general duty to safeguard and promote the welfare of children, but it did not impose a duty to achieve a specific result. The spirit of article 3 of the UNCRC did not go beyond a requirement to consider best interests as a primary consideration. That was already set out in the Directive. The Secretary of State had "demonstrably" done that (*R (SG and others),* at paras 251 to 259).

[44] The unlawfulness of regulation 9(4), had been canvassed in both *R (Refugee Action)* and *R (SG and others)*. The excluded items had been found to be compatible with the objective minimum standard set out in the Reception Directive. The Affidavits of Mr Bentley had referred to the package of support which ensured that the children of

destitute asylum seekers were provided with stable and safe accommodation and adequate provision for their everyday essential needs. The reduction in the amount of cash had not had an adverse effect on their safety, the quality of their parental care or their general health. There was no reason to doubt Mr Bentley's statement. It was supported by his explanations about how the everyday essential needs of the children of asylum seekers had been addressed. The material before the Lord Ordinary was the same as had been presented in *R (SG and others)*. The Secretary of State had given appropriate consideration to the best interests of children when setting the rate of asylum support and in her determination of the excluded items. Neither the reduction of the rates, nor the equalisation of the rates as between adults and children, was unlawful.

[45] On the methodological challenge, the petitioners had founded upon a report of a Ms Charlesworth. There was no evidence to support her contention that the lowest decile of the population, as described in the ONS data, was insufficient as a marker of what would be required to meet essential living needs. The Home Office's own data had identified a discretionary element of expenditure within the lowest decile. The Secretary of State had not premised her entire methodology on the assumption that the lowest decile expenditure was sufficient. The Bentley Affidavits disclosed that the Secretary of State had had regard to information regarding the nutritional and calorific needs of children of different ages. As the criticism was one of a failure to have regard to information, rather than one of the irrationality of the consideration, this ground failed. The Lord Ordinary agreed with the conclusions concerning economies of scale in *R (SG and others)*. It did not involve any unreasonableness. The material disclosed a careful and detailed consideration of the essential living needs of asylum seekers in the context of the different categories of expenditure.

[46] On discrimination, the Lord Ordinary followed *Blakesley* v *Secretary of State for Work and Pensions* (*supra*, at para 65) that there was no analogy between the children of asylum seekers and those of settled adults. Any entitlement to support derived from legislation passed to ensure compliance with the Reception Directive. Settled adults who required social assistance received mainstream UK benefits under a different statutory regime. Where general measures of economic or social policy were involved, the test was that of "manifestly without reasonable foundation". There was no obligation on the state to provide a level of support equivalent to mainstream benefits. The European Court of Human Rights had consistently applied the "manifestly without reasonable foundation" test in cases involving social or economic policy. There was no reason to dilute that test or to apply a more stringent one based on the UNCRC. Any discrimination was justified by the "legitimate" purpose advanced on behalf of the Secretary of State; *viz.* to discourage economic migration and to ensure that limited financial resources were not expended on asylum support in excess of those required by the Directive.

[47] Mr Bentley had said that the PES on the Review of Asylum Support Rules 2015 had been prepared for the purpose of compliance with the PSED. The Secretary of State had complied with the duty, with due regard having been given to the need to eliminate unlawful discrimination and to advance equality. The Secretary of State had been satisfied that there would be no disproportionate or unique impact solely on the grounds of sex/gender insofar as lone parents tended to be women. The PES was adequate in that "the Secretary of State had engaged in a 'proper and conscientious focus on the statutory criteria'" (*Hotak* v *Southwark LBC* [2016] AC 811). The petitioners' complaint that lone parents needed more money for their children was not well founded. Section 149 did not

require a more detailed consideration of a problem which had not been demonstrated to exist (*R (SG and others)*, at para 333).

[48] The interveners had raised two points relating to article 3 of the European Convention (inhuman or degrading treatment), and article 1 of the Protocol (peaceful enjoyment of property). Any concern regarding a breach was unwarranted, given the standard required by the Reception Directive and section 95 of the 1999 Act. There was no basis for saying that the overall package of support resulted in inhuman or degrading treatment (cf *R (Limbuela)* v *Secretary of State for the Home Department* [2006] 1 AC 396). Although asylum support could be a possession for the purposes of A1P1, this ground failed for the same reasons as the claim under articles 8 and 14. There was no unlawful discrimination in relation to the rights of the petitioners under A1P1 arising from the rates reductions.

Submissions

Petitioners and Reclaimers

Ground 1

[49] The first ground of appeal was that the Lord Ordinary erred in finding that the Reception Directive required only a subsistence level of support for children. The reference in the Directive to "subsistence"(articles 13.2 and 13.3) required to be read purposively and consistently with the remainder of the "scheme", including article 24 of the CFR, to which the Directive was subject, and to the UNCRC. Article 24.1 established the right of the child to such protection and care as was necessary for his or her well-being (cf UNCRC, article 3.2). The UNCRC and the General Comments upon it were justiciable because they were put forward by way of EU (and thus domestic) law. General Comment No. 14 was "the

most authoritative guidance now available" on the meaning of "best interests" for the purposes of article 3 of the UNCRC (*R (SG and others)* v *Secretary of State for Work and Pensions* (*supra*), at para [105]). The failure by the Lord Ordinary to have regard to article 24 of the CFR and article 3 of the UNCRC were material errors of law. The UNCRC particularised the rights of the child (eg article 26) thus giving content to article 24 of the CFR.

[50] The proper approach to interpreting the Reception Directive was to treat it as equivalent to secondary legislation. It should be interpreted in light of the "primary" legislation, ie the CFR, which must, in turn, be considered and interpreted in light of those international Conventions which informed its content, such as the UNCRC. The question was whether the content of the substantive rights in the Directive harmonise with the international conventions (*Mathieson* v *Secretary of State for Work and Pensions* [2015] 1WLR 3250, at paras [38]-[44]). Taking that approach, the Directive should be interpreted as requiring a welfare-based level of asylum support for children, and not bare subsistence, even if the latter standard may be appropriate for adults.

[51] The standard in article 13 of the Reception Directive must go beyond mere basic subsistence in respect of children. A child's subsistence, must be understood as having regard to the child's wider, holistic well-being as opposed to what was necessary for a child to survive. Interpreting article 13 of the Directive in that way recognised the substantive right in article 24.1 of the CFR. Such an interpretation recognised (as the CFR and UNCRC did) that very different considerations applied to children, not least when they were asylum seekers. The Secretary of State had to start from the correct objective standard of welfare and not bare subsistence. Whether or not a different result would be reached was irrelevant; the issue was whether the Secretary of State had started from the correct standpoint.

[52] The second ground was that the Lord Ordinary erred in finding that section 95 of the 1999 Act imposed a subsistence, rather than a welfare, level of support. "Essential living needs" ought to be construed in a manner consistent with the obligations under the UNCRC. Section 95 was the means by which Parliament had given effect to the terms of the Reception Directive. The best interests principle required an interpretation which most effectively served the child's best interests. That interpretation was not only mandated by EU law (article 24 of the CFR), and the UNCRC, but also, as a matter of domestic statutory interpretation, by the presumption that Parliament does not normally legislate in breach of international law (*Bennion on Statutory Interpretation* (7th ed) at pp 710-712).

[53] The Secretary of State's approach to the determination of essential living needs recognised that what was essential for one group may be different to that for another. The effect of her decision was that the payment was the same, whether that person was an adult or a child. Yet regulation 10A of the AS Regulations 2000 provided for additional payments for pregnant women and children under 3. Essential living needs was accordingly interpreted as something different when applied to those categories. There was no difficulty in interpreting essential living needs as something different in relation to children.

[54] The third ground was that the Lord Ordinary erred in holding that regulation 9 lawfully excluded certain items for children, including computers, toys and other recreational items and entertainment expenses. The objective minimum standard had to have regard to the need for cultural, artistic, recreational and leisure activities (UNCRC, art 31) and the importance of children's play and recreation as essential to health, well-being and development, as well as the "huge benefit" of electronic media (General Comment No. 17). It was unlawful to impose this blanket exception. It was incompatible with the minimum content of the Reception Directive and section 55 of the 2009 Act.

[55] The fourth ground was that the Lord Ordinary erred in holding that section 55 of the 2009 Act did not extend beyond recognising best interests as a primary consideration. Section 55 required the Secretary of State to ensure that her functions were exercised "having regard to the need to safeguard and promote the welfare of children" including "preventing impairment of children's health or development" and enabling "children to have optimum life chances and to enter adulthood successfully" (see the ECM Guidance). The "need" was analogous to the "holistic development" of the child (UNCRC, art 3 and General Comment No. 14). Although it was uncontroversial that section 55 of the 2009 Act gave effect to article 3.1 of the UNCRC (*ZH (Tanzania)* v *Secretary of State for the Home Department* [2011] 2 AC 166, at para 23), it did not impose a bare procedural duty any more than article 3.1 itself. The Lord Ordinary had restricted section 55 to reflect only the procedural aspect of the best interests principle. The right protected by section 55 was both procedural and substantive.

[56] The fifth ground was that the Lord Ordinary erred in finding that the best interests duty had been satisfied by relying on assertions to that effect. The explanations provided by Mr Bentley had been based on a subsistence, as opposed to a welfare, based approach. There was no evidential basis on which the court could consider whether the Secretary of State had asked herself the right question or taken reasonable steps to acquaint herself with the relevant information. If the petitioners were correct, the court could only assume that the wrong question had been asked and accordingly that no such steps had been taken. Mere assertion that the duty had been fulfilled was not enough, without evidence of: when matters had been considered and by whom; and the nature and extent of any consideration (*R (Equality and Human Rights Commission)* v *Secretary of State for Justice* [2010] EWHC 147 (Admin), at paras 49 – 53). Any equality impact assessment which had been undertaken

required to identify "with some particularity" how the duty had been discharged (*R (Hurley and Moore)* v *Secretary of State for Business Innovation & Skills* (*supra*), at para 75). Without that information, the court could not know whether an authority's statutory obligations had been fulfilled (*Nzolameso* v *Westminster City Council* [2015] PTSR 549, at para 32).

Interveners

[57] The interveners maintained that: (1) the Lord Ordinary's treatment of the PSED had been unduly narrow; (2) the Secretary of State had been required to act compatibly with the articles 3, 14 and A1P1 European Convention rights of those affected by the reduction in asylum support; (3) in reducing the level of asylum support the Secretary of State had been acting within the scope of EU law and had been bound to act compatibly with article 24 of the CFR; and (4) the Secretary of State should have had regard to the importance of meeting the requirements of articles 3, 28 and 31 of the UNCRC.

[58] It was accepted that the petitioners' grounds of appeal did not address the Lord Ordinary's treatment of the PSED and that it was not an issue upon which the court was being asked to adjudicate. The interveners nevertheless invited the court to give guidance on the proper approach to the PSED. Equalities duties were "an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation". The interveners were required to encourage good practice in relation to equality and diversity. The courts had been asked to consider the PSED in relatively few cases.

[59] The Lord Ordinary's approach to the PSED had been unduly narrow because it failed to do justice to the factors relevant to whether the PSED had been properly discharged (*Hotak* v *Southwark LBC supra*). The Lord Ordinary had reduced the test for compliance with the PSED to one factor only; ie that of a proper and conscientious focus on the statutory

criteria. That did not exhaust the test. The notion, that the court could intervene only where the approach of the decision maker had been unreasonable, was not an accurate reflection of the law. The PES did not demonstrate that due regard had been paid to the PSED. The Lord Ordinary had not addressed the material to which the Secretary of State had had regard, nor the omission from the PES of the potential impact on women lone parent families.

[60] The question was whether a breach of article 3 of the European Convention had occurred as a result of the reduction of asylum support. The Lord Ordinary had failed to acknowledge that the setting of a rate on a rationale of "economies of scale" was capable of constituting discrimination on grounds of sex in respect of female lone parents. In making the 2015 Regulations, the Secretary of State had been bound to act compatibly with article 24 of the CFR. The Reception Directive was secondary legislation, as subordinate to the requirements of the CFR. It had to be given effect to in a manner compatible with it. A conflict between domestic law and the CFR had to be resolved in favour of the latter (*Benkharbouche* v *Secretary of State for Foreign and Commonwealth Affairs* [2017] HRLR 15, at para 78).

[61] The Lord Ordinary failed to have proper regard to the substantive right conferred by article 24.1 of the CFR. The petitioner and her children had to have the opportunity to "maintain interpersonal relationships and a minimum level of participation in social, cultural and religious life" *R* (*Refugee Action),* at paras 113-117). In failing to apply the correct approach to the CFR, the Lord Ordinary failed to address whether the reductions in asylum support breached article 24.

[62] The European Court of Human Rights took account of international instruments including the UNCRC in assessing the parameters of the European Convention. EU law

instruments were to be interpreted and applied in light of international instruments binding on member states, including the UNCRC.

Respondent

[63] The respondent submitted that the Secretary of State had acted lawfully in making regulations 10(2) and 9(4)(b), (e) and (f), which had been upheld in *R (SG and others)* v *Secretary of State for the Home Department* (*supra*) and *R (JK (Burundi))* v *Secretary of State for the Home Department* (*supra*). *R (JK (Burundi))* had addressed the same issues. The court gave permission for its judgment on permission to appeal to be cited, from which it could be inferred that it established a new principle (*Practice Direction (Citation of Authorities)* [2001] 1 WLR 1001, at para 6.1).

[64] On the first ground of appeal, the purpose of the Reception Directive was to ensure a minimum or subsistence level of support, and nothing more (recital 7, Arts 1 and 13.2; Case C-79/13, *Federaal agentschap voor de opvang van asielzoekers* v *Saciri* (2014), at paras 40 and 46; and *R (JK (Burundi))*, at para 9). The subsistence standard applied to children as well as adults. Articles 13.2 and 17 could not be construed together in any other way (*R (JK (Burundi))*, at para 59). The reliance on article 24 of the CFR was unfounded. The substantive right of children in article 24.1 was not relevant in the context of setting the level for asylum support. The language of article 24.1 was singularly inapposite to assist, because "its focus is very different" (*R (JK (Burundi))*, at para 62). Secondly, the requirement under article 24.2 was that the child's best interests must be a primary consideration, but article 18 of the Directive made the same provision.

[65] Reliance on the UNCRC and General Comments was unwarranted. The UNCRC and, *a fortiori*, the General Comments were not part of United Kingdom law. Whether a

domestic legal provision was vitiated by an erroneous interpretation of the UNCRC was not justiciable (*R (JS)* v *Secretary of State for Work and Pensions* (*supra*), at paras 82 and 90; *JH Rayner (Mincing Lane) Ltd* v *Department of Trade and Industry* [1990] 2 AC 418, at 483). That was not altered by the fact that the spirit of article 3.1 of the UNCRC had been incorporated into domestic law (*R (SG and others)*, at paras 82 and 90). In any event, the Lord Ordinary had had regard to the UNCRC, as a fall-back, concluding that it was expressed at such a level of generality as to provide no assistance. The UNCRC was open-ended and aspirational. It did not define any standard.

[66] On the second ground, the words "essential living needs" in section 95 of the 1999 Act imposed a subsistence standard. They were not to be given a different meaning in the context of children. The natural meaning of the language pointed to a subsistence level; the aim of the provision being to avert destitution (*R (JK (Burundi))*, at paras [58] and [59]). Reliance on the obligations under the CFR and the UNCRC was a restatement of Ground 1 and was unfounded for the same reasons.

[67] On the third ground, the challenge, to the exclusion of certain items from "essential living needs" by regulation 9(4), was unfounded. As the test was one of subsistence, items which may be desirable were not required (*R (JK (Burundi))*, at para 79). The value judgment made by the Secretary of State was open to review only on the high threshold of unreasonableness (*R (JK (Burundi))*, at para 34 endorsing *R (Refugee Action)*, at para 91). The exclusions had to be seen in the context of the broad range of support available to asylum seekers and their children, apart from, and in addition to, cash payments. There were other means of accessing computers, the internet, entertainment and recreation, *via* schools, libraries and other community centres (*R (JK (Burundi))*, at para 80). The exclusion of toys was not unreasonable.

[68] On the fourth ground, the Lord Ordinary did not err. The language of section 55 did not generate an obligation to achieve particular results, as distinct from a more general duty to safeguard and promote the welfare of children (*R (JK (Burundi))*, at para 66). Although that section incorporated the spirit of article 3.1 of the UNCRC into domestic law, it did no more than require that the best interests of the child be a primary consideration in fulfilling the obligations under the 1999 Act and the Reception Directive; a requirement which already existed by virtue of article 18 of the Directive itself.

[69] On the fifth ground, the Lord Ordinary had not simply relied on assertions that the best interests duty had been carried out. She held that there was no reason to doubt the statements in the Explanatory Memorandum to the AS Regulations 2015 and Mr Bentley's affidavits that full consideration had been given to the need to safeguard and promote the welfare of children. She had been entitled to give consideration to those matters in addressing the contention that the 2015 Regulations had been promulgated without regard to the best interests duty. She agreed with the detailed consideration given to each categories of expenditure in *R (SG and others)* (at paras 246-291). The court should follow the observations on the importance of judicial reserve or restraint and calls for a proper appreciation of the different provinces of the executive and the judiciary (*R (JK (Burundi))*, at paras 85-87).

[70] With reference to the interveners' submissions, the article 3 and A1P1 rights of the petitioners and their children did not arise in these reclaiming motions. The court should decline the invitation to give guidance that would necessarily be obiter. The giving of any guidance on those questions should await a suitable case. The Lord Ordinary's treatment of the PSED had not been "unduly narrow". The Lord Ordinary had held that: (i) the PSED was not a duty to achieve a result but only to have regard to the need to achieve the goals

identified in section 149 of the 2010 Act (*Hotak* v *Southwark LBC* (*supra*), at para 74); (ii) the PSED was concerned with process, not outcome. The court should interfere only in circumstances where the approach adopted by the public authority had been unreasonable; and (iii) what was required was a realistic and proportionate approach to the evidence of compliance, not micro-management or a detailed forensic analysis (*R (SG and others),* at para 329). It was not possible to be precise or prescriptive as to the requirements of the duty in any case, "given that the weight and extent of the duty are highly fact-sensitive and dependent on individual judgment" (*Hotak* (*supra*) at para 74). The Lord Ordinary was correct to conclude that what must be demonstrated was "a proper and conscientious focus on the statutory criteria" (*R (Hurley)* v *Secretary of State for Business, Innovation and Skills* [2012] HRLR 13, at para 78; approved in *Hotak* (at para 75)).

[71] At its core, the petitioners' argument was that lone parents needed more money for their children. The issue concerned the needs of children and not the sex/gender of the parent. In the PES, the respondent had looked at the needs of children carefully. Lone parents, whatever their sex/gender, did not need more. The Lord Ordinary was correct to conclude that the PSED "did not require more detailed consideration of a problem which had not been demonstrated to exist" (*R (SG and others),* at para 333).

[72] The Lord Ordinary did not err in her approach to article 3. She accepted that the test to be applied was "whether the treatment to which the asylum-seeker is being subjected ... is so severe that it can properly be described as inhuman or degrading" (*Limbuela*, (*supra*), at para 58). The Lord Ordinary's conclusion followed from her view that there had been no breach of the minimum standard required by the Reception Directive. In relation to the claim of article 8 discrimination, the Lord Ordinary was correct that there was no analogy between asylum seekers and settled adults: "[T]he two positions simply [were] not

comparable" (*Blakesley* v *Secretary of State for Work and Pensions* (*supra*), at para 65). She was correct to conclude that, even if there had been article 8 discrimination, it was justified on the bases put forward by the Secretary of State; *viz.* discouraging economic migration and ensuring that limited financial resources in excess of the United Kingdom's obligations were not expended. The A1P1 discrimination claim should fail because the Lord Ordinary accepted that "[t]here was no discrimination between the two categories of parents and, even if there were discrimination, this was justified".

[73] The interveners' position on A1P1 was unclear. The propositions advanced related solely to discrimination and simply disagreed with the conclusion in *R (SG and others)* that the complaint of discrimination in relation to sex/gender amounted to no more than a claim that lone parents, whatever their sex/gender, needed more and with the conclusion that asylum seekers and settled adults in need of social assistance were not comparable. No position in relation to justification had even been suggested.

Decision

[74] The court agrees with the careful and detailed analyses and reasoning of Popplewell J in *R (Refugee Action)* v *Secretary of State for the Home Department* [2014] EWHC 1033 (Admin) as developed by Flaux J in *R (SG and others)* v *Secretary of State for the Home Department* [2016] EWHC 2639 (Admin). It adopts the conclusions of the review of these decisions by Gross LJ in *R (JK (Burundi))* v *Secretary of State for the Home Department* [2017] 1 WLR 4567, in which Hallett and Irwin LJJ concurred. If any difference arises it is only that a more structured approach, which does not require a direct comparison of the AS Regulations 2000 with the Reception Directive or the CFR, might be seen as more appropriate in the Scottish context.

[75] The issue of compatibility is best considered in accordance with the hierarchy of domestic and European provisions. The relatively precise language of the secondary legislation (AS Regulations 2000 (as amended)) can be examined to see whether it accords with the primary legislation (the 1999 and, to a degree, the 2009 Acts) which authorises the Regulations. In turn, the primary enactments can be analysed to ensure that they are not in conflict with the more general terms of any EU Directive (the Reception Directive) which they are intended to implement. The Directive may be looked at to determine whether its terms may appear to differ from the even wider language of any governing EU treaties (the CFR) which have effect in the law of the constituent parts of the United Kingdom. This exercise could be carried out by looking first at the CFR's relationship with the Directive and working downwards. The result ought to be the same. If either approach is followed in this structured manner, the question of whether the outcomes of the secondary legislation are compatible with the CFR will be answered without the need for a direct comparative analysis, even if that might provide a cross check of the result.

[76] The exercise of interpreting the relatively precise language of secondary legislation is generally concerned with ascertaining its ordinary meaning, in its context. It is normally only if an ambiguity arises, or there appears to be a conflict between that language and that of the primary instrument which authorises the secondary measure, that there will be a need for a more extensive analysis in order to see if the language needs to be read down in order to achieve compatibility. What is seldom legitimate is an attempt to use the relatively wider language of an instrument, which is higher in the hierarchy, to change the effect of the secondary legislation in a particular situation when that legislation is neither ambiguous nor in conflict with its authorising measure. Such an attempt becomes even less acceptable where the norm selected to effect such a change is a step, or more than a step, removed in

the hierarchy and still no ambiguity or conflict is found between the norms in a direct relationship with one another in the hierarchy.

[77] Looking then at the AS Regulations 2000, there appears to be no dispute that they are at least intended to provide a level of support which meets "essential living needs" in terms of section 96(1) of the 1999 Act. Whether they achieve that aim, in terms of the rates and excluded items will be considered shortly, but they are expressly stated to do so (AS Regulations 2000, regs 9, 10 and 10A). The general terms of the 2000 Regulations mirror the provisions of the 1999 Act. The fundamental question is whether, having provided free accommodation, heat and light, and assuming that other matters, including free health care and education, are also available, setting the level at "essential living needs" is compatible with the Reception Directive. The Directive requires (art 13.2) Member States to provide "conditions to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence". There is, for the reasons given in *R (Refugee Action)*, *R (SG and others)* and *R (JK (Burundi))*, no inconsistency between the use of the phrase "essential living needs" in the 1999 Act and the conditions described in the Directive.

[78] There is, again for the reasons given in the cases from England and Wales, no conflict between "essential living needs" and the requirement to consider or promote the best interests of the child, which occurs in both the Directive (art 18.1) and the domestic legislation (2009 Act, s 55(1)) with its related guidance (ECM Intro, para 2). Put in general terms, the provision of free accommodation, heat, light, health care and education, coupled with cash to meet "essential living needs" complies with a requirement to take into account the best interests of the child as a primary consideration. This conclusion has regard to the need for the Secretary of State to provide further support in exceptional circumstances (1999 Act, s 96(2)).

[79] The CFR does not add a new dimension to the equation. The Reception Directive's requirement is, in turn, compatible with the CFR's stipulation (art 24) in relation to best interests and the child's right to "such protection and care as is necessary for their well being". This neither runs contrary to the European Convention (art 8.1) nor, even if they were part of the law in the United Kingdom (which they are not), articles 26, 28 or 31 of the UNCRC. Article 3.1 of the UNCRC is already part of the domestic legislative regime.

[80] Whether it is correct to describe essential living needs, in the manner in which the 2015 review analyses what is required to provide for them, as "bare subsistence" may be doubted. Provision for such needs is different from what would normally be understood by a provision which is designed to secure only "bare subsistence". Just what a welfare standard involves, over and above essential living needs, is not at all clear. What is evident is that the test in the 1999 Act is compatible with that in the Directive which in turn complies with the CFR. On that reasoning the first, second and fourth grounds of appeal fall to be rejected.

[81] On the basis that the terms of the secondary legislation comply with those of the Act which, if complied with, will provide the support required by the Directive, the next appropriate question is whether the actual rates and items included achieve the objective of meeting "essential living needs". Accepting, for the reasons already given, that that phrase, which appears in both the primary and secondary legislation, is Directive compliant, it is for the Secretary of State to decide what items and amounts are required to satisfy these needs. Her decision is only reviewable upon conventional grounds (ie those in *Wordie Property Co* v *Secretary of State for Scotland* 1984 SLT 345, LP (Emslie) at 347-8). Due heed has to be paid to the fact that "certain matters are by their nature more suitable for determination by Government or Parliament than by the courts" (*R (JS)* v *Secretary of State for Work and*

Pensions [2015] 1 WLR 1449, Lord Reed at para 92). "The determination of [controversial issues of social and economic policy, with major implications for public expenditure] is pre-eminently the function of democratically elected institutions" (*ibid* at para 93).

[82] Seen in this way, no error of law appears from the manner in which the rates and items in the secondary legislation were determined. The material founded upon by Mr Bentley is not mere assertion. In so far as conclusions were drawn, they were based upon ONS data and other research carried out by the Home Office. It was analysed, not on the basis of bare subsistence or welfare but in light of the statutory term "essential living needs". In the context of judicial review, it is not for the court to engage in a process of testing the accuracy of the information, at least in the absence of some obvious readily identifiable error, by hearing counter evidence and determining fact as if it had heard testimony on the issues at a proof. The material was demonstrated to have existed and to have an evidential basis. The correctness of that material is not capable of analysis in this type of process. If it is thought to be in error, the correct course is to make representations to the Secretary of State or to Parliament.

[83] Section 149 of the 2010 Act, which contains the PSED, is relatively precise in describing what is required of a public authority. It is to have "due regard" to certain specified matters. Having "due regard" is explained in the section itself. The duty has been analysed in a number of cases in England and Wales, culminating in *Hotak* v *Southwark LBC* [2016] AC 811. In distilling these cases, Lord Neuberger said (at para 75) that the duty:

> "'must be exercised in "substance, with rigour, and with an open mind"' ... [It] is for the decision-maker to determine how much weight to give to the duty: the court simply has to be satisfied that 'there has been a rigorous consideration of the duty'. Provided that there has been 'a proper and conscientious focus on the statutory criteria' ... '[T]he court cannot interfere ... simply because it would have given greater weight to the equality implications of the decision'".

In the context of the issues in dispute, the court is unable to improve upon this succinct formula.

[84] In this case, the matters which were taken into account are clear from the descriptions of the review and the content of the Explanatory Memorandum to the AS Regulations 2015. The persons who considered the material are readily identifiable. The nature and extent of that consideration is manifest in that it is referred to in the documents lodged. In particular, the PES adequately addressed the issue of compliance with section 149 of the 2010 Act. The letter of 16 July 2015 describes how the best interests principle was taken into account and addressed. On this basis the fifth ground must be rejected.

[85] Based on the material presented to her in the review, the Secretary of State was entitled to reduce the rates payable to children. There was also material which merited the exclusion of certain items in relation to children, notably computers, toys and entertainment. This was not done on the basis that children were to be deprived of these. Rather, the free provision of these items, at least at certain times, in libraries, schools, nurseries and elsewhere met the need. The casual observer may regard the reduction in the level of child support, and the exclusion of items which give pleasure to children, as somewhat mean spirited, but that will not suffice to justify a successful review of governmental action which has followed an in-depth review of what was required to meet the statutory test, itself deemed to be Directive compliant. If any criticism were to be made of the analyses in *R (Refugee Action)* and *R (SG and others)* on this aspect of the case in the context of a judicial review in the Court of Session, it would simply be one of questioning whether such detailed examinations, of what may be seen in the overall context of asylum support as minutiae, are really an appropriate function for the courts to perform (cf *RSPB* v *Scottish Ministers* 2017 SC

552, LP (Carloway) delivering the opinion of the court, at paras [204-208]). The third ground of appeal fails.

[86] On the discrimination issues, the reasoning in *R (SG and others),* as endorsed in *R (JK (Burundi))* is sound. As was said in *Blakesley* v *Secretary of State for Work and Pensions* [2015] 1 WLR 3150 (Jackson LJ at paras 65 and 66) no analogy or equivalence can be drawn between asylum seekers and those already having a right to be, or leave to remain, in the United Kingdom. In any event, there was legitimate purpose to having two different regimes, notably ensuring that public expenditure did not exceed that required to meet international obligations. Following *R (Hurley & Moore)* v *Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin) (Elias LJ at paras 77-78), the Secretary of State had, as reported by Mr Bentley, looked carefully at the needs of children and determined that the rates met them, as seen as a general cohort. As a matter of fact, and based on the research material, lone parents, of whatever gender, did not require more.

[87] Having regard to the levels of support available in terms of accommodation, furnishings, heat and light, health care, education and other free services together with the cash provided to meet essential living needs, there could be no breach of articles 3 and 8 of the European Convention. For the reasons given in relation to the 2010 Act, there is no breach of article 14. A1P1 does not arise directly in the case.

[88] The reclaiming motions must be refused.