IN THE UPPER TRIBUNAL

R (on the application of Khadija BA Fakih) v Secretary of State for the Home Department IJR [2014] UKUT 00513(IAC)

Field House,

Breams Buildings

London

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

KHADIJA BA FAKIH

Applicant

-and-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Applicant: Mr M. Henderson, instructed by Deighton Pierce Glynn
For the Respondent: Mr Z. Malik, instructed by the Treasury Solicitor

JUDGMENT

Handed down on 5 November 2014

Judge O'Connor:

Introduction

1. On 8 October 2013 the Respondent granted the Applicant leave to remain for a period of 30 months. It is not in dispute that such leave was granted outside of the Immigration Rules. The Respondent imposed a condition on this leave prohibiting the Applicant from having recourse to public funds ("NRPF condition"). The Respondent agreed to reconsider her decision to impose such a condition, upon receipt of a pre-action protocol letter dated 19 December 2013 threatening judicial review proceedings. However, on 28 February 2014 the Respondent maintained her earlier decision. It is the lawfulness of the

imposition of the NRPF condition on the Applicant's leave that is at the centre of these judicial review proceedings.

2. By way of background, the Applicant is a national of Yemen born in 1945. She arrived in the United Kingdom on 18 September 2011 with entry clearance as a visitor conferring leave to enter until 10 March 2012. She has resided with her British citizen daughter, Ms Al-Albeed, since that time.

3. On 10 March 2012 the Applicant made an application to the Respondent for leave to remain outside of the Immigration Rules. It was broadly submitted in this application that the Applicant's health had deteriorated significantly in the period shortly after her arrival in the United Kingdom and that she was dependent upon her daughter for financial and emotional support, as well as for day-to-day care. Her daughter was not at that time, and is still not, in employment and she receives Employment Support Allowance.

4. The Respondent refused this application by way of a decision of the 28 June 2012 and the First-tier Tribunal dismissed an appeal brought against it for reasons given in a determination of the 19 October 2012. Thereafter, both the First-tier, and Upper, Tribunals refused the Applicant permission to appeal. Undeterred by this the Applicant brought an application for judicial review before the Administrative Court challenging the decision of the Upper Tribunal refusing to grant her permission to appeal.

5. Whilst these judicial review proceedings were ongoing the Respondent gave further consideration to the Applicant's case and made the decision of 8 October 2013 referred to in paragraph 1 above.

Decisions under challenge

6. The Respondent's decision of 8 October 2013 states, insofar as is relevant to these proceedings, as follows:

> "**Conditions attached to your stay in the United Kingdom**
>
> The conditions attached to this period of stay in the United Kingdom permit you to work… However, access to public funds is not permitted as explained below…

Public Funds

Under the Immigration Rules you are not entitled to receive public funds to help meet your living and accommodation costs (or those of any dependents). In addition your sponsor is not entitled to claim or receive public funds on your behalf. The term "public funds" is defined in paragraph 6 of the Immigration Rules…"

7. On 3 January 2014, after having received the pre-action protocol letter of 19 December 2013 and further correspondence from the Applicant of 2 January 2014, the Respondent agreed to reconsider whether a NRPF condition should be imposed on the Applicant's leave.

8. As identified above, in a decision of 28 February 2014 the Respondent decided not to *"change* [the Applicant's] *condition codes so as to allow access to public funds"* stating when doing so:

> "Those seeking to establish their family life in the United Kingdom must do so on a basis that prevents burdens on the taxpayer. The changes to the Immigration Rules implemented on 9 July 2012 are predicated in part on safeguarding the economic well-being of the UK, which is a legitimate aim under Article 8 of the ECHR (the right to respect for private and family life) for which necessary and proportionate interference in the Article 8 rights can be justified.
>
> Under Appendix FM, limited leave:
>
> - Under the 5 year partner and parent routes;
> - As a bereaved partner;
> - As a fiancé(e) or proposed civil partner.
>
> will be granted subject to a condition of no recourse to public funds.
>
> In
>
> - All other cases I *(sic)* which limited leave is granted as a partner or a parent under Appendix FM;
> - All cases in which leave on the grounds of private life is granted under paragraph 276BE or paragraph 276DG; and

- All cases in which limited leave is granted outside the rules on the grounds of family or private life,

leave will be granted subject to a condition of no recourse to public funds, unless there are exceptional circumstances set out in the application which require recourse to public funds to be granted. Exceptional circumstances which require recourse to public funds will exist where the applicant is destitute, or where there are particularly compelling reasons relating to the welfare of a child of a parent in receipt of very low income.

Consistent with the provision of support for asylum seekers and their dependents under section 95 of the Immigration and Asylum Act 1999, a person is destitute if:

a. They do not have adequate accommodation or any means of obtaining it (whether or not their other essential living needs are met); or

b. They have adequate accommodation or the means of obtaining it, but cannot meet their essential living needs.

The onus is on the applicant to evidence their destitution on the basis of the information set out in their application and any supplementary information about their circumstances which they provide in support of their application.

It is stated that she lives with her daughter who is reliant on benefits. They are finding it difficult to cope as she is *(sic)* this has had a bad impact on the quality of their lives.

She lives with her daughter and cannot show she does not have adequate accommodation. She has also failed to show that she cannot meet the cost of her essential living needs.

Your client does not meet the destitution threshold and we are not able to change her condition codes to allow access to public funds"

9. With the permission of Upper Tribunal Judge Gleeson, granted on 29 May 2014, the Applicant challenges both the Respondent's initial decision of 8 October 2013 to impose the NRPF condition on her leave and the decision of 28 February 2014 refusing to remove such condition. The Respondent has not raised any issues as to the timeliness

of the challenge brought to the former decision, and neither did Upper Tribunal Judge Gleeson identify such issue in her grant of permission. If necessary I extend the time for bringing challenge to the decision of 8 October 2013 until 23 May 2014 – this being the date upon which the application for permission to bring judicial review proceedings was lodged. The Applicant sent pre-action correspondence to the Respondent after the decision of 8 October, and the Respondent agreed to reconsider her decision as a consequence. Given the terms of the Respondent's letter of 3 January agreeing to undertake a reconsideration, it was perfectly reasonable, and prudent, for the Applicant to await the outcome of such reconsideration prior to bringing these proceedings. Had she not done so she would, I have no doubt, been met with the submission that the proceedings were both premature and academic.

Grounds of Challenge

10. The Applicant submits that the Respondent has acted unlawfully in imposing the NRPF condition in that:

A. It was made pursuant to a 'rule' that was unlawful by reason of not having been laid before Parliament.

B. When formulating this 'rule' the Respondent did not comply with her duties under s.149 of the Equality Act 2010. She did not adopt a substantial, open-minded and rigourous approach to her public sector equality duties ("PSED"), nor was she clear precisely what the equality implications were when she put them in the balance, nor did she recognise the desirability of achieving them.

C. The Respondent's approach to the assessment of whether the Applicant was destitute was unlawful on the facts of this case.

The Respondent's Policy

11. The relevant guidance relating to the imposition of a NRPF condition on grants of limited leave is, in its October 2013 version, to be found in Part 8 of the chapter on Appendix FM of the Immigration Directorate Instructions ("the Respondent's policy") which reads:

> "Those seeking to establish their family life in the United Kingdom must do so on a basis that prevents burdens on the taxpayer. The changes to the Immigration Rules implemented on 9 July 2012 are

predicated in part on safeguarding the economic well-being of the UK, which is a legitimate aim under Article 8 of the ECHR (the right to respect for private and family life) for which necessary and proportionate interference in the Article 8 rights can be justified.

Under Appendix FM, limited leave:

- Under the 5 year partner and parent routes;
- As a bereaved partner;
- As a fiancé(e) or proposed civil partner.

will be granted subject to a condition of no recourse to public funds.

In

- All other cases in which limited leave is granted as a partner or a parent under Appendix FM;
- All cases in which leave on the grounds of private life is granted under paragraph 276BE or paragraph 276DG; and
- All cases in which limited leave is granted outside the rules on the grounds of family or private life

leave will be granted subject to a condition of no recourse to public funds, unless there are exceptional circumstances set out in the application which require recourse to public funds to be granted. Exceptional circumstances which require recourse to public funds will exist where the applicant is destitute, or where there are particularly compelling reasons relating to the welfare of a child of a parent in receipt of very low income.

Whether to grant recourse to public funds as a condition of leave under the Immigration Rules is a decision for the Home Office caseworker to make on the basis of this guidance.

Consistent with the provision of support for asylum seekers and their dependents under section 95 of the Immigration and Asylum Act 1999, a person is destitute if:

a. They do not have adequate accommodation or any means of obtaining it (whether or not their other essential living needs are met); or

b. They have adequate accommodation or the means of obtaining it, but cannot meet their essential living needs.

…

The onus is on the applicant to evidence their destitution, or that there are particularly compelling child welfare considerations, on the basis of the information set out in their application and any supplementary information or evidence about their circumstances which they provide in support of their application.

In considering the applicant's financial circumstances, the case worker should have in mind that:

…

- Where the applicant is granted limited leave to remain on the grounds of private life, they will generally have lived in the UK for a significant period. Where the applicant has been granted limited leave as a parent, they will also have lived in the UK for a period before applying for leave under these Rules. To show they are destitute the applicant will have to demonstrate good reasons why their previous means of support are no longer available to them.

The applicant will need to provide evidence, including of their financial position, demonstrating that, on an on-going basis, they do not have access to adequate accommodation or any means of obtaining it, they cannot meet their other essential living needs, or there are particularly compelling child welfare considerations.

Where the caseworker accepts that, even though they have the right to work if they did not before, the applicant is destitute (including accepting any previous means of support are no longer available), or that there are particularly compelling circumstances relating to the welfare of the child of a parent in receipt of a very low income, the case worker should grant recourse to public funds.

When an applicant who was granted recourse to public funds at the initial grant of leave applies for further leave to remain, they will be re-assessed and only granted further leave with recourse to

public funds if they continue to be destitute, or where their continue to be particularly compelling reasons relating to the welfare of a child of a parent in receipt of a very low income."

Requirement to lay the Respondent's policy before Parliament

Summary of submissions

12. Mr Henderson submits that the requirement to impose a condition prohibiting recourse to public funds on a grant of limited leave to remain is a rule falling within the ambit of s. 3(2) of the 1971 Act as to the conditions to be attached to the grant of leave and, consequently, that there is a requirement to lay it before Parliament.

13. The requirement has, he submits, all the features of a rule - applying the test identified by the Supreme Court in *R (Alvi) v Secretary of State for the Home Department* [2012] 1 WLR 2208, and *R (Munir) v Secretary of State for the Home Department* [2012] 1 WLR 2192.

14. The Respondent also relies on the decisions of the Supreme Court in *Alvi* and *Munir*, as well as the judgment of Sedley LJ in *ZH Bangladesh v Secretary of State for the Home Department* [2009] Imm AR 450, in support of a submission that *"the fact that the Immigration Directorate Instructions do not have, and cannot be treated as if they possessed, the force of law, mean that they cannot be categorised as a rule"* and, consequently, anything contained therein is not required to be laid before Parliament. It is said that this provides *"a complete answer to the Claimant's contentions under Ground (1)."*

15. Mr Malik broadly submits, in the alternative, that:

    a. Parliament has given scrutiny to the issue of the granting leave to remain on Article 8 grounds with a NRPF condition – this having been undertaken in relation to the requirements of Appendix FM and Paragraphs 276ADE to 276DH of the Immigration Rules, which provide for a NRPF condition to be imposed on a grant of leave made pursuant to the Rules;

    b. A grant of leave outside the Rules on Article 8 grounds is made pursuant to the Secretary of State's *"published policy on exceptional circumstances"* (See *R (Nagre) v Secretary of State for the Home Department* [2013] EWHC 720 (Admin) at paragraph 13). It cannot be sensibly

be argued that the Immigration Rules should include stipulations in relation to those who are given leave to remain outside of the Rules; and

c. The stipulation of "exceptional circumstances" in the Respondent's policy is amply flexible and therefore the Policy is not in the nature of a rule and their is no requirement for it to be laid before Parliament.

Legal Framework

16. Part 1 of the Immigration Act 1971 ("1971 Act") is concerned with the regulation of entry into and stay in the United Kingdom. Section 1(2) provides that those not having a right of abode in the United Kingdom may live, work and settle here by permission and:

> "…subject to such regulation and control of their entry into, stay in and departure from the United Kingdom as is imposed by this Act…"

17. By section 3(1)(c) of the 1971 Act:

> "Except as otherwise provided by or under this Act where a person is not a
> British citizen…
> …
> c) If he is given limited leave to enter or remain in the United Kingdom, it
> may be given subject to all or any of the following conditions, namely
> …
> ii) A condition requiring him to maintain and accommodate himself, and any dependants of his, without recourse to public funds…."

18. Section 3(2) of the 1971 Act provides that:

> "The Secretary of State shall from time to time (and as soon as may be) lay before Parliament statements of the rules, or of any changes in the rules, laid down by him as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter, <u>including any rules as to</u> the period for which leave is to be given and <u>the conditions to be attached</u> in different circumstances…; (emphasis added)
>
> If a statement laid before either House of Parliament under this subsection is disapproved by a resolution of that House passed within the period of forty days

> beginning with the date of laying (and exclusive of any period during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than four days), then the Secretary of State shall as soon as may be make such changes or further changes in the rules as appear to him to be required in the circumstances, so that the statement of those changes be laid before Parliament at latest by the end of the period of forty days beginning with the date of the resolution (but exclusive as aforesaid)"

19. In *Alvi* the Supreme Court gave detailed consideration to the issue of what constitutes a rule for the purposes of section 3(2) of the 1971 Act in the context of a decision of the Respondent refusing to grant leave to remain - Lord Hope of Craighead and Lord Dyson giving the principle judgments.

20. Lord Hope concluded, at [41]:

> "The content of the rules is prescribed by sections 1(4) and 3(2) of the 1971 Act in a way that leaves matters other than those to which they refer to her discretion. The scope of the duty that then follows depends on the meaning that is to be given to the provisions of the statute. What section 3(2) requires is that there must be laid before Parliament statements of the rules, and of any changes to the rules, as to the practice to be followed in the administration of the Act for regulating the control of entry into and stay in the United Kingdom of persons who require leave to enter. The Secretary of State's duty is expressed in the broadest terms. A contrast may be drawn between the rules and the instructions (not inconsistent with the rules) which the Secretary may give to immigration officers under paragraph 1(3) of Schedule 2 to the 1971 Act. As Sedley LJ said in *ZH (Bangladesh) v Secretary of State for the Home Department* [2009] Imm AR 450 para 32, the instructions do not have, and cannot be treated as if they possessed, the force of law. The Act does not require those instructions or documents which give guidance of various kinds to caseworkers, of which there are very many, to be laid before Parliament. But the rules must be. So everything which is in the nature of a rule as to the practice to be followed in the administration of the Act is subject to this requirement…"

21. He further considered the Secretary of State's duty at [54], where he said:

> "…I think therefore that it would be right to approach the question as to scope of the Secretary of State's duty under section 3(2) on the basis that it was not

> Parliament's intention that the procedure which it laid down should impede the administration of the system."

22. Lord Dyson's conclusion at [94] was expressly agreed with by Lord Hope:

> "In my view, the solution which best achieves these objects is that a rule is any requirement which a migrant must satisfy as a condition of being given leave to enter or leave to remain, as well as any provision "as to the period for which leave is to be given and the conditions to be attached in different circumstances" (there can be no doubt about the latter since it is expressly provided for in section 3(2)). I would exclude from the definition any procedural requirements which do not have to be satisfied as a condition of the grant of leave to enter or remain. But it seems to me that any requirement which, if not satisfied by the migrant, will lead to an application for leave to enter or remain being refused is a rule within the meaning of section 3(2). That is what Parliament was interested in when it enacted section 3(2). It wanted to have a say in the rules which set out the basis on which these applications were to be determined." (emphasis added)

23. At [97] Lord Dyson continued:

> "The key requirement is that the immigration rules should include all those provisions which set out criteria which are or may be determinative of an application for leave to enter or remain." (emphasis added)

24. Lord Walker of Gestingthorpe, Lord Clarke of Some-cum-Ebony and Lord Wilson concurred, agreeing with Lord Hope and Lord Dyson on the points upon which they agreed. Lord Clarke summarised the features which distinguish a rule from guidance at [120]:

> "Guidance is advisory in character; it assists the decision maker but does not compel a particular outcome. By contrast a rule is mandatory in nature, compels a decision maker to reach a particular result."

25. The Supreme Court heard the case of *Munir* at the same time as that of *Alvi*; and in doing so gave consideration to whether Deportation Policy 5/96 should have been laid before Parliament. Lord Dyson, giving the judgment of the Court, said at [45] and [46]:

> "…If a concessionary policy statement says that the applicable rule will always be relaxed in specified circumstances, it may be difficult to avoid the

> conclusion that the statement is itself a rule "as to the practice to be followed" within the meaning of section 3(2) which should be laid before parliament. But if the statement says that the rule may be relaxed if certain conditions are satisfied, but that whether it will be relaxed depends on all the circumstances of the case, then in my view it does not fall with the scope of section 3(2)…
>
> …The less flexibility inherent in the concessionary policy, the more likely it is to be a statement "as to the practice to be followed" within the meaning of section 3(2) and therefore an immigration rule. But DP5/96 was amply flexible and was therefore not an immigration rule and did not have to be laid before Parliament."

26. To set the instant application in its full context it is also prudent at this stage to observe that on 9 July 2012 the Secretary of State for the Home Department introduced (by HC 194) a large number of new Immigration Rules, including those relating to the grant of leave on private life (paragraph 276ADE) and family life (Appendix FM) grounds. Amongst the rules introduced by HC 194 was Paragraph 276BE:

> **"Leave to remain on the grounds of private life in the UK**
>
> 276BE. Limited leave to remain on the grounds of private life in the UK may be granted for a period not exceeding 30 months provided that the Secretary of State is satisfied that the requirements in paragraph 276ADE are met. Such leave shall be given subject to such conditions as the Secretary of State deems appropriate."

27. For completeness sake it is to be noted that the Rules were amended on 28 July 2014 by HC 532 so as to read:

> "276BE(1) - Limited leave to remain on the grounds of private life in the UK may be granted for a period not exceeding 30 months provided that the Secretary of State is satisfied that the requirements in paragraph 276ADE are met, or, in respect of the requirement in paragraph 276ADE(vi) and (v), were met in the previous application which led to a grant of leave to remain under this sub-paragraph.
>
> Such leave shall be given subject to a condition of no recourse to public funds unless the Secretary of State considers that such a person should not be subject to such a condition.

> 276BE(2) - Where an applicant does not meet the requirements of paragraph 276ADE(1) but the Secretary of State grants leave to remain outside the rules on Article 8 grounds, the applicant will normally be granted leave for a period not exceeding 30 months and subject to a condition of no recourse to public funds unless the Secretary of State considers that the person should not be subject to such a condition"

Discussion and conclusions

28. This is not a case about whether the Applicant should be granted leave to enter or remain, but about the conditions to be attached to the leave to remain that she has been granted. The Applicant's leave was granted outside of the Immigration Rules and as a consequence paragraph 276BE of the Rules (set out above) played no part in the consideration of whether such grant should be made subject to a NRPF condition. Neither did paragraph 276BE(2) – this provision not being introduced into the Rules until a date after the decisions under challenge in this application.

29. That rules relating to the imposition of conditions on grants of leave (as opposed to rules relating to the pre-conditions to a grant of leave) fall within the ambit of section 3(2) of the 1971 Act is not a matter in issue before me and, in any event, that they do so is, in my view, an inescapable conclusion from a plain and literal reading of section 3(2) itself, as well as from paragraph 94 of Lord Dyson's judgment in *Alvi* (as identified in emphasis above).

30. I turn first to consider Mr Malik's *"basic contention"* that *"the Immigration Directorate Instructions fall outside the ambit of section 3(2) of the 1971 Act"* and consequently that there is no requirement to lay anything contained therein before Parliament. This, it is said, provides a *"complete answer"* to the Applicant's first ground and relieves the Tribunal of the need to undertake a detailed analysis of whether the Respondent's policy is objectively a rule by reference to the principles identified in *Alvi* and *Munir*.

31. Mr Malik's submission is underpinned by reliance upon paragraph 32 of Sedley LJ's judgement in *ZH (Bangladesh)* in which his lordship concluded that the IDI's do not have, and cannot be treated as if they possessed, the force of law. This much though is uncontroversial.

32. In my view nothing in Sedley LJ's judgment supports Mr Malik's contention that the Immigration Directorate Instructions fall outside the ambit of section 3(2), if they otherwise incorporate a 'rule' of a type identified in *Alvi* and *Munir*. Neither, in my judgment, is this contention supported by anything said by their lordships in *Alvi* or *Munir*. If there is any doubt about this, and in my conclusion there is not, such doubt is laid to rest by Lord Sumption in his judgment in *R (New London College) v SSHD* [2013] 1 WLR 2358 – a further case in which the Supreme Court gave consideration to the ambit of section 3(2) of the 1971 Act, this time in the context of challenges brought to guidance relating to licenses for educational establishments - where at [7] he observed that:

> "…Section 3(2) [of the Immigration Act 1971] is not confined to the Immigration Rules formally so called. It extends to any instrument, direction or practice laid down by the Secretary of State which (i) contains or constitutes 'a rule', and (ii) deals with the practice to be followed in the administration of the Act for regulating 'the entry into or stay in the United Kingdom of persons required by this Act to have leave to enter' or the period or conditions attaching to them." (emphasis added)

33. The fact that the IDIs do not have the force of law says nothing about whether any particular provision or requirement therein is, objectively, a rule and consequently whether it must be laid before Parliament. So much is made clear by Lord Hope's judgment in *Alvi* [41] in which, after having first referred to the above-cited passage in Sedley LJ's judgment in *ZH (Bangladesh)*, his Lordship concludes that everything that is in the nature of a rule as to the practice to be followed in the administration of the 1971 Act must be laid before Parliament.

34. It is also pertinent to observe that the requirements in issue in *Alvi*, whilst not found in the IDI's, were to be found in guidance issued by the Secretary of State (the Occupation Codes of Practice). It cannot be said that these Codes of Practice of themselves had the force of law, yet the Court concluded that the requirements set out therein were in the nature of a rule and ought to have been laid before Parliament.

35. Mr Malik, as I understand his submissions, also asserts that the Applicant's first ground is defeated by the fact that Parliament has approved the imposition of the NRPF condition on to grants of leave made pursuant to the

Immigration Rules – as to which see, *inter alia*, paragraphs 276BE and 276BE(2) of the Rules, set out above[1]. He reasons that had the policy relating to the imposition of a NRPF condition on grants of leave made outside of the Rules been placed before Parliament, it would undoubtedly have been approved.

36. I find this submission to be misconceived. It is not for this Tribunal to determine whether Parliament would, or would not, have approved a rule had it been laid before it. In judicial review proceedings the Tribunal is confined to determining the legality of a public authority's actions, save only that it has discretion whether to grant relief even if such actions are found to be unlawful. I must consider whether there was a legal obligation on the Respondent to lay her policy before Parliament and, if so, whether she lawfully did so. Speculation as to what Parliament would have done had the Respondent's Policy been placed before it forms no part of such a consideration.

37. As to Mr Malik's submission that *"it cannot sensibly be argued that the Immigration Rules should include stipulations in relation to those who are granted leave outside of the Rules"*, again I see no force in this. Section 3(2) of the 1971 Act does not distinguish between the requirement to lay before Parliament those rules relating to the imposition of conditions attached to leave granted pursuant to the Immigration Rules and those rules relating to the imposition of conditions attached to leave granted outside of the Immigration Rules. The source of the Respondent's power to grant leave is, in both scenarios, the 1971 Act (Lord Dyson in *Munir* at [44]).

38. It is not being said by the Applicant that the Respondent's policy ought to form a part of the Immigration Rules, but rather that it is in the nature of a rule and therefore should be laid before Parliament. Whether the Policy thereafter should be included within the Immigration Rules is a matter for the Respondent. This, though, is an entirely different issue to whether the Policy is a rule laying down a practice to be followed in the administration of the 1971 Act for regulating the stay in the United Kingdom of persons required under that Act to have leave.

[1] There are further such provisions contained within Appendix FM to the Rules – see for example paragraphs D-LTRP.1.2, D-LTRPT.1.1 and D-LTRPT.1.2

39. Moving on then to what is the core of the Applicant's first ground, the application of the principles identified in *Alvi* and *Munir* to the Respondent's policy.

40. It is Mr Henderson's case that the Respondent's policy is neither explanatory nor advisory in nature, in that it requires the imposition of a NRPF condition save in exceptional circumstances that, in the absence of child welfare considerations, can only exist where an applicant is destitute. There is, he says, no discretion afforded to a caseworker in the application of the terms of the Policy.

41. Mr Malik responds to this by focusing on the term *"exceptional circumstances"* which, he submits, admits of a wide range of considerations and is not, as the Applicant asserts, limited to an assessment of whether an applicant has demonstrated that they are destitute. In the alternative he points to the inherent flexibility in a consideration of whether an applicant is *"destitute"* and, in particular, whether such applicant can meet their *"essential living needs".*

42. In so submitting, Mr Malik draws support from two witness statements authored by a Ms Donna Kajita, a Grade 7 officer in the Family Policy Team in the Immigration and Border Policy Directorate of the Home Office, *"responsible for policy in respect of immigration cases engaging the ECHR Article 8…"* The former of these two statements is dated 3 February 2014 and was drawn for the purposes of the hearing of a different matter before the Administrative Court, with the latter of these statements being drawn on 25 September 2014 for the purposes of the instant case.

43. The Respondent recognises, says Ms Kajita in her first statement, that some applicants might be destitute and that some are likely to have children. As a consequence it was decided that it would be appropriate to allow departure from the normal position of attaching a NRPF condition to a grant of leave in certain circumstances where such leave is granted under a ten-year settlement route. A policy was developed in this regard that *"allowed recourse to public funds where the applicant was destitute or (later) [5 March 2013] where there were particularly compelling reasons relating to the welfare of a child of a parent in receipt of very low income."*

44. In her statement of 25 September 2014 Ms Kajita added:

> "[7]…The SSHD also retains discretion to grant leave to remain without the 'no recourse to public funds' condition if the particular facts of a case are sufficiently compelling, notwithstanding that the applicant does not meet the terms of the policy." (emphasis added)

45. On my reading of Ms Kajita's evidence, the Respondent's policy is operated much as Mr Henderson submits it should be read. If an applicant is granted leave to remain outside the Rules on Article 8 ECHR grounds then a NRPF condition will be attached to that leave unless it is established by such person that either (i) they are destitute or (ii) there are particularly compelling reasons not to impose such a condition relating to the welfare of a child of a parent in receipt of very low income. There remains a residual discretion outside of the terms of the Policy not to impose a NRPF condition if the particular facts of the case are "*sufficiently compelling*".

46. The proper approach to be taken by the courts to the meaning of policies and guidance was considered most recently in a planning context by the Supreme Court in *Tesco Stores Limited v Dundee City Council* [2012] UKSC 13 in which Lord Reed JSC (with whom all other members of the Supreme Court agreed) said:

> "[18]… As in other areas of administrative law, the policies which it sets out are designed to secure consistency and direction in the exercise of discretionary powers, while allowing a measure of flexibility to be retained. Those considerations point away from the view that the meaning of the plan is in principle a matter which each planning authority is entitled to determine from time to time as it pleases, within the limits of rationality. On the contrary, these considerations suggest that in principle, in this area of public administration as in others (as discussed, for example, in *R (Raissi) v Secretary of State for the Home Department)*, policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context.
>
> [19] That is not to say that such statements should be construed as if they were statutory or contractual provisions. Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the

> provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse (*Tesco Stores Ltd v Secretary of State for the Environment and ors,* per Lord Hoffmann, p 780). Nevertheless, planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean." (emphasis added)

47. Returning to the Respondent's policy, in her February 2014 statement Ms Kajita identifies, with a degree of particularity, that the package of reforms in July 2012, which included an earlier version of the Respondent's policy, was aimed at reducing burdens on the taxpayer, promoting integration and tackling abuse. The reforms were preceded, it is said, by a major public consultation and they were debated at length in Parliament. Previously, applicants who did not qualify for leave under the Immigration Rules but who could establish an Article 8 right to remain in the UK, were granted discretionary leave outside of the Rules and were permitted recourse to public funds.

48. After 9 July 2012 those granted leave under Appendix FM (family life) on a five-year route to settlement were required to meet a minimum income threshold, which was designed to prevent the burden on the taxpayer. Appendix FM and paragraph 276ADE (private life) also provide a ten-year route to settlement. The Respondent did not consider it appropriate to allow recourse to public funds for those granted leave on the ten-year route. To do so, it is said, would undermine the policy intention behind setting a minimum income requirement under the five-year route. This is also consistent with the need to reduce the burden on the taxpayer. I agree with the decision of Kenneth Parker J in *NS v Secretary of State for the Home Department* [2014] EWHC 1971 (Admin) at [59] that these constitute powerful reasons of public policy for prohibiting recourse to public funds in the circumstances identified.

49. It is clear that the 'package of reforms' referred to above intended to make reliance on public funds by persons granted leave to remain on family or private life grounds an exception to the default position precluding such reliance. Reading the policy in this context supports the restrictive interpretation of the phrase *"exceptional circumstances"* favoured by Mr Henderson.

50. This is also the case if the Respondent's policy is considered in the context of other relevant policies and guidance relating to the imposition of the NRPF condition.

51. In January 2014 the Respondent introduced guidance titled *"Request for a change of conditions of leave granted on the basis of family or private life"* (the "2014 Guidance"). This guidance identifies circumstances in which a request can be made for the removal of a NRPF condition previously imposed on a grant of leave. The 2014 Guidance reproduces parts of the Respondent's policy and states that a request to remove a NRPF condition may be made if:

> "1. Since being granted leave to remain your financial circumstances have changed and you have become destitute or there are now particularly compelling reasons relating to the welfare of your child; or
>
> 2. You were destitute, or there were particularly compelling reasons relating to the welfare of your child, at the time of your application was being considered but you failed to provide evidence of this and you now wish to send in this evidence"

52. It is to be observed that the January 2014 policy does not refer to the need to demonstrate exceptional circumstances in order for a previously imposed NRPF condition to be removed but, relevantly, only that an applicant has become destitute, or was destitute at the time the condition was imposed but failed to provide sufficient evidence to demonstrate this.

53. I can see no justification, and none is offered by the Respondent, for a more restrictive consideration to be applied to a decision as to whether to remove a previously imposed NRPF condition (i.e. destitution or compelling reasons relating to the welfare of a child) than would be applied to a decision as to whether to impose such a condition in the first place; which on the Respondent's case is not restricted in its consideration to the issues of destitution and the welfare of the child.

54. The terms of the January 2014 policy clearly, in my view, provide support for a restrictive reading of the *"exceptional circumstances"* criteria in the Respondent's policy.

55. In addition, reading the phrase *"exceptional circumstances"* in the context of the Respondent's policy

as a whole also leads me to the conclusion that Mr Henderson is correct in his submissions.

56. First, whilst detailed guidance is provided in the Respondent's policy as to how to determine whether an applicant is destitute, there is no guidance relating to the consideration of any other potential exceptional circumstances - save for those involving the welfare of a child.

57. Second, the final paragraph of the Respondent's policy relates to circumstances in which an applicant has already been granted recourse to public funds as a condition of an earlier grant of leave and has, thereafter, applied for and been granted further leave to remain. This paragraph requires a caseworker to re-assess whether to impose a NRPF condition in such circumstances and mandates that recourse to public funds should only be granted *"if they* [the applicant] *continue to be destitute, or where there continue to be particularly compelling reasons relating to the welfare of a child of a parent in receipt of a very low income."* (emphasis added)

58. The consideration under the Respondent's policy as to whether an applicant has demonstrated exceptional circumstances is not restricted in its application to those who have been granted leave to remain for the first time (initial grant of leave). This being so, if Mr Malik is right in his interpretation of the policy it would contain an obvious internal inconsistency in relation to the approach to be taken to those who have been granted further leave. The earlier paragraphs would allow recourse to public funds to be permitted in circumstances other than where destitution or particularly compelling reasons relating to the welfare of a child have been demonstrated, whereas the final paragraph of the policy would allow for recourse to public funds to be permitted only where destitution or particularly compelling reasons relating to the welfare of a child have been demonstrated.

59. In further support of his interpretation of the Policy Mr Malik directs attention to the fact that it has been amended from its original version, issued on 9 July 2012, so as to omit the word *only* from the following sentence: *"Exceptional circumstances which require access to public funds to be granted will exist only where the applicant is destitute."* (emphasis added) – a fact that can be identified from paragraph 44 of Ms Kajita's first statement but which passes without comment therein or in her later statement.

60. Whilst one explanation for this amendment to the policy is that it was intended to remove a restriction as to the type of circumstances that could be considered when determining whether to impose a NRPF condition, it is certainly not the only possible explanation. It could be, for example, that the use of the word *only* was deemed superfluous and it was therefore removed because it was thought to be obvious to any reader of the policy that the exceptional circumstances that could be relied upon by an applicant were limited to the two identified therein. As observed above, despite Ms Kajita being in a position to set out why such an amendment was made she says nothing in relation to this matter in either of her statements.

61. Finally, although Mr Malik submitted "on instructions" that in practice caseworkers take into account a wide range of factors in determining whether there are exceptional circumstances in any given case, and do not restrict themselves to the considerations of destitution and child welfare referred to within the Policy, he did not draw attention to any evidence supporting such assertion.

62. Insofar as there is evidence before me relating to this issue, I find that it supports the contrary conclusion i.e. that the Policy is operated restrictively in practice. First, in the instant case it is plain that in her February 2014 decision the Respondent did restrict herself to a consideration of whether the Applicant met the *"destitution threshold".* In addition, in her evidence of February 2014 Ms Kajita states, *inter alia*, that:

> "[53] Caseworkers must now assess each case on the basis of the information and evidence provided, including any evidence of support from a Local Authority, to see whether the applicant meets the terms of the policy in that they are destitute, or that there are particularly compelling reasons relating to the welfare of the child of a parent in receipt of a very low income so as to warrant a grant of recourse to public funds…
>
> [84] …if the information and evidence provided by the applicant is insufficient to show she is destitute or that there are particularly compelling child welfare considerations, the caseworker will not normally make further enquiries to establish whether more information or better evidence can be provided.
>
> [87] …since the new rules were implemented on 9 July 2012, 398 applicants have shown, in their application or subsequently, that they are destitute, or that there are particularly compelling reasons relating to the

> welfare of a child of a parent in receipt of a very low income, and have therefore been granted leave to remain without a condition of no recourse to public funds."

63. Ms Kajita also gave evidence to the Administrative Court in *NS* and, in his summary of that evidence, Kenneth Parker J said of it at [58]:

> "…The policy developed by the government (as set out in the RPF Guidance) therefore required caseworkers to grant recourse in cases where the applicant was destitute, or where there were particularly compelling reasons relating to the welfare of a child of a parent in receipt of a very low income"

64. For all the reasons set out above, I find that a consideration under the Respondent's Policy of whether *"exceptional circumstances"* exist does not admit of any other consideration other than whether an applicant is destitute or whether there are particularly compelling reasons for allowing recourse to public funds relating to the welfare of a child of a parent in receipt of a very low income.

65. As to the phrase *"essential living needs"*, I agree with Mr Malik that the circumstances relevant to a consideration of this issue under the Policy are not limited. Nevertheless, this does not assist the Respondent in demonstrating that the policy is flexible because it does no more than require a caseworker to assess the factual constituents of destitution in a particular case i.e. (i) what a particular applicant's essential living needs are and (ii) whether these can be met by that applicant absent recourse to public funds. Such a consideration says nothing about the circumstances in which a NRPF condition would not be imposed, absent an applicant's destitution or particularly compelling child welfare considerations.

66. If exceptional circumstances are not found to exist a caseworker is required, under the policy, to impose a NRPF condition on an applicant's leave. Whilst Mr Malik submits that a caseworker does have discretion not to impose an NRPF condition on an applicant's leave in such circumstances, he identifies this as being as a result of the exercise of the caseworker's residual discretion outside of the Rules and Policy – as does Ms Kajita[2].

67. The existence of such residual discretion, asserts Mr Malik, also provides a complete answer to the Applicant's first ground. I cannot accept that this is so. The

[2] Paragraph 7 of her witness statement of 25 September 2014

Respondent always has a residual discretion to act to the benefit of an applicant in matters relating to the administration of the 1971 Act for regulating the stay of persons who require leave; this being irrespective of the requirements of the Immigration Rules and the terms of any guidance or policy that may be relevant in any given case. If the existence of such a residual discretion were to provide an answer to whether the Respondent was required to lay the instant policy before Parliament it would, in my conclusion, deprive section 3(2) of the 1971 Act of any meaningful effect. It would also, but did not, provide the answer in *Alvi* - in that it would have been open to the Respondent, in exercise of her residual discretion, to have granted Mr Alvi leave outside of the Immigration Rules despite the fact that he did not meet the requirements laid down in the Occupation Codes of Practice. The Supreme Court nevertheless concluded that the Occupation Codes of Practice were in the nature of rule and that the Respondent was thereby required to lay them before Parliament.

68. Summing up my conclusions above, the Respondent's policy cannot be said to be advisory in character, assisting the decision maker but not compelling a particular outcome. I find the contrary to be the case - it lacks any flexibility and constrains a decision-maker to imposing a NRPF condition if an applicant has not met identifiable and specific criteria. It is, therefore, in the nature of a rule as to the practice to be followed in the administration of the 1971 Act for regulating the stay in the United Kingdom of persons required to have leave to enter, in that it is a rule relating to the conditions to be attached to such leave. For that reason, in my conclusion it should have been laid before Parliament pursuant to section 3(2) of the 1971 Act.

69. The fact that (i) the Respondent's policy, insofar as it relates to a consideration of whether to impose an NRPF condition on persons granted leave as a consequence of the Respondent having exercised her residual discretion outside of the Immigration Rules, was not laid before Parliament when it ought to have been, and (ii) that the Respondent relied upon it when imposing a NRPF condition of the Applicant's leave, in my conclusion renders both the Respondent's decision of 8 October 2013 to impose a NRPF condition on the Applicant's leave and her decision of 28 January 2014 not to remove this condition from such leave, unlawful.

70. Mr Malik submits that despite the aforementioned conclusion, the Applicant should not be granted the relief

she seeks, given that the regime under which the Respondent considers the imposition of an NRPF in cases where leave is granted outside of the Rules changed on 28 July 2014, with the introduction of both paragraph 276BE(2) into the Immigration Rules and a new Policy[3]. He maintains that in such circumstances to grant the Applicant relief *"would be meaningless."*

71. Insofar as this submission relates to the quashing of the Respondent's policy, I agree with Mr Malik. The Respondent's policy is no longer relied upon in determining whether to impose a NRPF condition on leave granted outside of the Rules. There is no purpose in quashing a policy that is no longer of application; it is sufficient to conclude that the Respondent's policy of October 2013, insofar as it applies to applicants granted leave outside the Rules, was unlawful.

72. As to the Respondent's decisions on the Applicant's case, if the Respondent were to undertake a further consideration of whether to impose a NRPF condition, and I have no evidence before me that she would, this would require up-to-date evidence as to the Applicant's circumstances. That evidence is not before me, and neither would I expect it to be. I am not prepared to find that the Respondent is bound to impose a NRPF condition upon any further consideration and, consequently, in my conclusion the fact any further consideration would take place in the context of a new regime in which the Rules provide for the imposition of a NRPF condition, should not deny the Applicant the relief she seeks.

Duties under the Equality Act 2010

73. Whilst this ground was not pleaded with particularity, and Mr Malik says not pleaded at all, prior to its inclusion in Mr Henderson's skeleton argument of the 1 September 2014, who was not instructed at earlier stages, I gave the Applicant permission to rely on it at the hearing of 9 September. As a consequence, the second day of the hearing was adjourned to a date that Mr Malik indicated would enable the Respondent to identify and file any evidence she wished to rely upon which, at the hearing of 29 September, Mr Malik confirmed had been done.

Summary of submissions

74. It is the Applicant's case that the Respondent has acted unlawfully by failing to comply with her public sector

[3] Statement of Ms Kajita of 25 September 2014

equality duties ("PSED") as set out in s.149 of the Equality Act 2010 ("2010 Act"), in both (i) the formulation of the criteria in her policy and (ii) the application of such criteria to the facts of her case – it being said that the Applicant is a disabled person for the purposes of the 2010 Act.

75. The Respondent submits that there has been full compliance with her PSED both in relation to (i) the formulation of the Policy - as confirmed by the Home Office Policy Equality Statement relating to the Family Migration Policy ("PES"), and (ii) the application of the Policy to the Applicant's case – in particular for the reasons identified in the Respondent's decision letters, as elucidated in the evidence given by Ms Kajita.

Legal Framework

76. By section 149 of Equality Act 2010:

> "(1) A public authority must, in the exercise of its functions, have due regard to the need to -
>
> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act ;
>
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
>
> (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
>
> …
>
> (3) Having due regard to the need to advance equality of opportunity 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.

(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled person's disabilities…"

77. Disability is a protected characteristic by virtue of s.149 (7) of the 2010 Act.

78. The relevant principles relating to the application of the PSED were set out at some length by McCombe LJ (with the agreement of Kitchin and Elias LJJ) in *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 (at [26]). I do not propose to rehearse the entirety of this paragraph in McCombe LJ's judgment, but the principal points therein can be summarised as follows:

(1) Equality duties are an integral and important part of the mechanisms for ensuring the fulfillment of the aims of anti-discrimination legislation;

(2) An important evidential element in the discharge of the duty is the recording of the steps taken by the decision maker in seeking to meet the statutory requirements;

(3) The relevant duty is on the Minister or other decision maker personally. What matters is what he or she personally took into account and what he or she personally knew;

(4) A Minister must assess the risk and extent of any adverse impact and the ways in which such a risk may be eliminated before the adoption of a proposed policy and not merely as a rearguard action following a concluded decision;

(5) The duty to have due regard to the relevant matters must be fulfilled before and at the time when a particular policy is being considered and is a non-delegable and continuing one. The duty must be exercised in substance, with rigour, and with an open mind – it is not a tick-box exercise. While there is no duty to make express reference to the regard paid to the relevant duty, reference to it and to the relevant criteria reduces the scope for argument;

(6) It is not for the court to determine whether appropriate weight has been given to the PSED. Provided the court is satisfied that there has been a

rigorous consideration of the duty and a proper appreciation of the potential impact of the decision on equality objectives, it is for the decision maker to decide how much weight should be given to the various factors informing the decision;

(7) The concept of 'due regard' requires the court to ensure there has been a proper and conscientious focus on the statutory criteria;

(8) Public authorities must be properly informed before taking a decision. If the relevant material is not available, there will be a duty to acquire it and this will frequently mean that some further consultation with appropriate groups is required.

79. In paragraphs 60 to 62 of his judgment McCombe LJ concludes (with the agreement of Kitchin LJ):

> [60] …the 2010 Act imposes a heavy burden upon public authorities in discharging the PSED and in ensuring that there is evidence available, if necessary, to demonstrate that discharge. It seems to have been the intention of Parliament that these considerations of equality of opportunity (where they arise) are now to be placed at the centre of formulation of policy by all public authorities, side by side with all other pressing circumstances of whatever magnitude.
>
> [61] It is for this reason that advance consideration has to be given to these issues and they have to be an integral part of the mechanisms of government…
>
> [62] In this case, I have come to the conclusion (admittedly with some reluctance) that too much of the Respondent's case depends upon the inferences that Ms Busch invites us to draw from the facts as a whole rather than upon hard evidence. In my view, there is simply not the evidence, merely in the circumstance of the Minister's position as a Minister *for Disabled People* and the sketchy references to the impact on ILF fund users by way of possible cuts in the care packages in some cases, to demonstrate to the court that a focused regard was had to the potentially very grave impact upon individuals in this group of disabled persons, within the context of a consideration of the statutory requirements for disabled people as a whole.".

Discussion and conclusions

80. In support of the submission that the Respondent has complied fully with her PSED Mr Malik directs particular

attention to the following passages in the two witness statements drawn by Ms Kajita:

Statement of 3 February 2014 at [5]:

> "The Home Office designed the new policies in detail and drafted a new set of family Immigration Rules, taking into account the overall policy aims referred to above, the comments received during the consultation and the expert advice of the Migration Advisory Committee (MAC). We carefully considered the economic impact of the changes and their impact on relevant characteristics such as age, disability, race, gender and sexual orientation. A Policy Equality Statement on the new policies was published on 13 June 2012.

Statement of 25 September 2014 at [7]:

> "Disability is a factor that can be taken into account in deciding whether or not the applicant meets the terms of the policy such as to warrant a grant of leave without the no recourse to public funds condition. The existence of a disability may be material in deciding whether or not an applicant meets the definition of destitute. For example, the current version of the policy instructs the caseworker to "consider any information provided by the applicant about their current or prospective employment and/or that of their partner. The SSHD also retains discretion to grant leave to remain without the no recourse to public funds condition if the particular facts of a case are sufficiently compelling, notwithstanding that the applicant does not meet the terms of the policy."

81. The PES of 13 June 2012 identifies itself as relating to the *"Family Migration"* policy and was *"prepared to accompany the new Immigration Rules laid before Parliament on 13 June 2012"*. On this date the Director of Migration Policy, Glyn Williams, certified that having read the available evidence he was satisfied that it *"demonstrates compliance, where relevant, with section 149 of the Equality Act 2010 and that due regard has been made to the need to: eliminate unlawful discrimination; advance equality of opportunity; and foster good relations."*

82. Where there is a relevant PES, as here, one would expect it to indicate with some particularity how the PSED were discharged: per Elias LJ in (*R (Hurley) v Secretary of State for Business* [2012] H.R.L.R. 13 at [75]).

83. The assertion by Ms Kajita that the Immigration and Border Policy Directorate was fully aware of the potential impact

of the changes brought in by the new Immigration Rules on persons with relevant characteristics - such as a disability - is no substitute for positive evidence to that effect: (*R (Equality and Human Rights Commission) v Secretary of State for Justice* [2010] EWHC 147 (Admin) at [53]). It is notable that in neither of her two statements does Ms Kajita particularise that due regard was had to the potential impact of the removal of recourse to public funds for disabled persons who have been granted leave to remain on Article 8 ECHR grounds outside of the Immigration Rules.

84. Turning to a consideration of the PES, examination therein of the *"Equality Issues"* is separated in to six categories of *"change"* to be made to the *"family route"* and *"family visitor appeals"* by the *"Family Migration"* policy, these being: (i) Partners, (ii) Settlement (iii) Adult dependent relatives, (iv) Private life (v) ECHR Article 8 and criminality and (vi) Family visits.

85. Page two of the PES sets out a *"Summary of the evidence considered in demonstrating due regard to the Public Sector Equality Duty".* None of the evidence referred to in that section of the PES has been produced before me and neither party has made reference to anything in it.

86. Thereafter, under the heading *"ECHR Article 8"* in the *"Introduction"* to the PES it is stated that: *"If an applicant fails to meet the requirements of the new Immigration Rules, it should only be in genuinely exceptional circumstances that refusing them leave and removing them from the UK would breach Article 8."*[4]

87. In his submissions Mr Malik focused attention on pages 25 and 26 of the PES, under the heading *"Indirect Discrimination – ECHR Article 8 right to respect for private life".* The *"Proposed policy"* under consideration at this section of the PES is described therein by reference to the Immigration Rules relating to private life, which came into force on 9 July 2012.

88. The *"Policy aim"* is stated to be: *"Reflecting clearly in the immigration rules the requirements to be met to remain in the UK on the basis of the ECHR Article 8 right to respect for private life, and not rewarding those who have not complied with the immigration laws."*

[4] Page four of the PES

89. Identification of the policy aim is immediately followed by the heading; *"What outcomes will it achieve";* under which it is said:

> "The changes will:
>
> - Set clear requirements for who can qualify to remain in the UK on the basis of private life.
>
> - Replace the 14-year long residence route to settlement under which illegal migrants could qualify for settlement if they evaded detection for 14 years.
>
> - Reduce burdens on the taxpayer as the 10-year route to settlement on the basis of private life will not offer automatic access to public funds. Applicants granted leave on a 10-year route will be able to work and contribute to the UK economy."

90. There then follows a chart identifying the characteristics protected by s.149 of the 2010 Act. In relation to the protected characteristic of *"Disability"*, it is said in a column headed, *"Are people with this protected characteristic particularly likely to be affected?"*

> "No. There is no data currently available on how many disabled people currently benefit from the 14-year long residence rule or are granted discretionary leave on the basis of private life. There is no reason to suppose people with this protected characteristic are particularly likely to be affected."

91. Contrary to Mr Malik's submission, it is not at all obvious that leave granted exceptionally outside of the Immigration Rules is, for the purposes of the Family Migration policy, treated as leave granted under *"the 10-year route"* to settlement. Indeed I draw the contrary conclusion from paragraphs 37 to 44 of Ms Kajita's February 2014 statement, in which she, *inter alia*, states at [44]:

> "Guidance to accompany the new Rules was published on 9 July 2012 … setting out the policy on when recourse to public funds would be granted in 10 year route cases. It <u>also</u> covered those cases in which there were exceptional circumstances that warranted a grant of leave outside of the rules on Article 8 grounds." (emphasis added)

92. If there is any doubt about whether a particular statutory duty imposed by s.149 of the 2010 Act is engaged, the issue needs to be explored before any conclusion can

safely be reached that it is not: *R (Hurley)*. It is not the Respondent's case before me that it is beyond doubt that there would be no impact on issues falling within the ambit on s.149 in relation to the withdrawal of recourse to public funds to persons with a disability granted leave exceptionally outside of the Immigration Rules on private or family life grounds; rather, the Respondent submits that due regard was had, in relation to this category of persons, to the 'needs' identified within s.149 of the 2010 Act.

93. In my conclusion, on the very limited evidence placed before me, I find that Respondent has not demonstrated that this is so.

94. As in *Bracking,* the Respondent's case before me depends upon inferences and not evidence. In this case I am, *inter alia*, being asked to infer that the consideration identified in pages 25 and 26 of the PES relates both to leave granted pursuant to the Immigration Rules and to that granted exceptionally outside the Rules on Article 8 ECHR grounds – despite this not directly being stated to be so either on the face of the PES or in the witness statements drawn by Ms Kajita. This is an inference I am not prepared to draw in circumstances where it is reasonable to expect the Respondent to have produced clear evidence to this effect.

95. I remind myself that the PES places a heavy burden upon public authorities in discharging the PSED and in ensuring evidence is available to demonstrate that discharge. Although the PES recognises that leave to remain can be granted outside of the Immigration Rules in exceptional circumstances, the evidence that has been provided to the Tribunal does not in my view demonstrate that there has been a rigorous consideration by the Respondent of her public sector equality duty to have due regard to the potential impact of the change in policy in relation to the imposition of a NRPF condition on those persons with a disability who have been granted leave to remain outside of the Immigration Rules.

96. Mr Malik submits that the decisions under challenge in the instant application should not be quashed because the Applicant is not disabled and consequently the failure of the Respondent to abide by her PSED in relation to the formulation of the Policy could have had no impact on her. This submission is somewhat academic given my conclusion above that the decisions under challenge should be quashed as a consequence of the fact that the Respondent's policy, insofar as it relates to those granted leave outside of

the Immigration Rules, should have been, but was not, laid before Parliament.

97. However, if I am not correct in my conclusions on the first ground, I find the Respondent's decisions fall to be quashed in any event. I have found the Respondent's policy, insofar as it is applied to those granted leave outside o the Rules, to be unlawful. Although judicial review is a discretionary remedy, absent speculating that the same decision would have been reached by the Respondent had she been considering a lawful policy, something I am not prepared to do, I can see no good reason why the Respondent's decisions should not fall to be quashed.

Consideration of the Applicant's case by the Respondent

98. I have no doubt that both Mr Malik and Ms Kajita are correct when stating that an individual's physical and mental heath (whether or not they have a disability) are factors to be taken into account when the issue of an applicant's destitution is being considered under the Respondent's policy – for example in relation to an assessment of (i) the likelihood of an applicant obtaining employment and (ii) the level of an applicant's essential living needs.

99. Unsurprisingly, the Applicant supplied little evidence to the Respondent with her original application of 10 March 2012 of either her inability to meet her essential living needs or the impact of her claimed disability on those needs. At this time it was the Respondent's policy to permit those granted leave on Article 8 ECHR grounds outside of the Rules recourse to public funds. The policy changed whilst the Applicant's application was under consideration.

100. When making the first of her decisions the Respondent had before her, *inter alia*:

(i) A letter from Dr T Rana GP dated 21 November 2011 stating that the Applicant *"needs help with her washing and feeding… has problems with hearing and is often unaware of danger around her…needs a wheelchair to walk as she has problems with mobility."*

(ii) A determination of the First-tier Tribunal of 19 October 2012 relating to the Applicant, in which the Tribunal accepted that the Applicant had *"medical issues"*, but not that she was *"suffering from any*

kind of terminal or severely disabling medical condition". The determination also records the Applicant's evidence that there *"has been a deterioration in her health, particularly since she has come to the United Kingdom"* and that her daughter *"provides personal care for her including walking, feeding, showering and giving her medication."* At [32] the Tribunal found that the Applicant was dependent on her daughter for *"emotional and day-to-day care"* and it thereafter at [48] stated that it was *"prepared to look at the Article 8 issues on the basis of the picture painted by Ms Albeed"*

101. By the time the Respondent made her February 2014 decision the Applicant had also placed before her:

(i) An undated statement drawn in her name asserting that she cannot cook for herself, wash her own clothes, bath herself and that she is *"not able to walk around"* by herself;

(ii) Two statements from the Applicant's daughter to the same effect as the evidence given by the Applicant, and further identifying that the Applicant is reliant on a wheelchair.

102. Neither the Respondent's decision of 8 October 2013 nor that of 28 February 2014 refer to or engage with the health conditions the Applicant claimed to be suffering from. In my conclusion the Applicant is unable to understand from the terms of these decision letters what conclusions the Respondent reached in relation to the credibility of the evidence given in this regard; neither is she informed what relevance the Respondent attached to such health conditions when considering the issue of destitution.

103. Whilst it cannot be said that the Respondent's decision to impose a NRPF condition on the Applicant's leave was not one that was open to her on all of the available evidence, and whilst a decision maker does not have to refer to each and every piece of evidence when making a decision, there is a requirement to provide sufficient reasons on the core issues so as to enable an applicant to know why a particular decision was reached. A failure to do so renders a decision unlawful. In this case I find both the decision of 8 October 2013 and that of 28 February 2014 to be devoid of a lawful adequacy of reasoning such as to render them unlawful.

104. Mr Malik belatedly sought to rely upon Ms Kajita's evidence of 25 September 2014 as remedying any error there may have been in the reasoning in the Respondent's earlier decision letters thus negating, he submits, the need to grant the Applicant the relief she seeks.

105. In her evidence Ms Kajita states that the Respondent took into account the Applicant's claimed medical conditions when considering all the circumstances of her case prior to imposing the NRPF condition; particular reliance having been placed by the decision-makers, it was said, on (i) the Respondent's conclusion of 28 June 2012 that she *"was not satisfied that there [was] evidence of a serious health condition"* and (ii) the First-tier Tribunal's conclusions that the Applicant does not have *"any kind of terminal or severely disabling medical condition."*

106. However, Ms Kajita's evidence only goes to highlight a further difficulty with the Respondent's approach to the consideration of whether to impose a NRPF condition on the Applicant's leave. In both her decision of June 2012 and the Tribunal's determination of October 2012 it was concluded that refusing to grant the Applicant leave to remain would not breach her Article 8 ECHR rights. However, the assessment of whether to impose a NRPF condition was undertaken in the context of the Respondent having accepted that there were exceptional circumstances in the Applicant's case requiring leave to remain to be granted – a core feature of the Applicant's case in this regard having been the severity of her health condition. In my conclusion in this context reliance by the Respondent on her earlier conclusions, and the conclusions of the First-tier Tribunal, of itself required some reasoned analysis, and the absence of such reasoning also renders the decisions unlawful.

107. Additionally, I agree with Mr Henderson that the Respondent has also failed to comply with her PSED when giving consideration to the particular facts of the Applicant's case.

108. Section 6 of the 2010 Act provides that a person has a disability if they have a physical or mental impairment and the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities. Section 212 of the 2010 Act provides that *"substantial means more than minor or trivial*.

109. The PSED can extend to the duty to make further inquiry into some feature of the evidence presented to the decision-maker that raises a real possibility that an

Applicant has a relevant characteristic: *Pieretti v Enfield LBC* [2011] 2 ALL ER 642; Aikens LJ (with the agreement of Longmore and Mummery LLJ) at [35 & 36]. In my conclusion the evidence before the Respondent was sufficient to raise a real possibility that the Applicant was disabled in a sense relevant to the assessment of whether she was destitute. There is no indication in either of the Respondent's decision letters (i) as to whether the Respondent treated the Applicant as a disabled person and, if not, (ii) why this was so and whether she considered making further enquiries regarding this issue.

110. The law required the Respondent to take steps to take account of the Applicant's disability, at least to the extent that she was required to make further enquiries into whether it existed and if so whether it was relevant to the decision to impose a NRPF condition on her leave. She failed to make such further enquiries and was, therefore, in my conclusion in breach of her duties under s.149(3)(b) and (4) of the 2010 Act, rendering her decisions unlawful.

111. Ms Kajita's evidence does not lead me to an alternative conclusion given that she fails to (i) refer to the statutory definition of disability set out in the 2010 Act (ii) identify whether it was the Respondent's position that the Applicant was not 'disabled' for the purposes of the Act and, if so, why such a conclusion was reached and, (iii) provide evidence in relation to whether the Respondent considered making further enquiries of the Applicant in order to determine if she had a relevant disability.

112. For all the reasons given above, I find the Respondent's decisions of 8 October 2013 and 28 February 2014, imposing a NRPF condition on the Applicant's leave, to be unlawful and I consequently quash those decisions.