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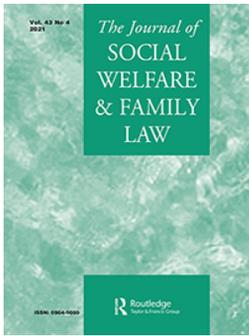
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Can the discrimination and hardship imposed by immigration control be litigated away?

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Can the discrimination and hardship imposed by immigration control be litigated away?

Sheona York

Kent Law Clinic, University of Kent, Canterbury, UK

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The case of *ST (a child, by his litigation friend VW) and VW v SSHD* [2021] EWHC 1085 (Admin) represents another valiant attempt to impugn repugnant aspects of UK immigration control through legal action: and, as with previous such attempts, achieves some, but only limited, success. The application challenged the operation of the no recourse to public funds (NRPF) condition. The claimants argued firstly that the scheme failed to treat the best interests of the child as a primary consideration, as required by s55 Borders Citizenship and Immigration Act 2009, in particular as it operates to deprive British children of migrant parents access to benefits available to other British children. The scheme was also challenged as discriminatory, breaching the Equality Act 2010 and the ECHR's provisions against discrimination. Finally, the scheme was challenged as likely to lead to breaches of art 3 and of the 'common law of humanity' in failing to ensure that the condition was not imposed, or not lifted quickly enough, in cases of imminent hardship.

This NRPF test has a provenance stretching back to at least the 1980s. New immigration rules introduced under the Thatcher government imposed NRPF conditions on migrant workers and students, and 'persons from abroad' were generally excluded from mainstream benefits. However, important categories of migrants still retained access to social assistance under large-scale discretionary policies. The big change, which underlies the challenge brought by *ST*, was made in the 'new rules' introduced in July 2012. Besides significantly tightening the residence requirements for regularisation, these imposed onerous 'routes to settlement' for such applicants, requiring expensive repeat applications over 10 years and the presumption that leave would be granted 'without recourse to public funds' for all applicants unless an individual could satisfy the Home Office that they and their family would be 'destitute', or that 'there are particularly compelling reasons relating to the welfare of a child' if excluded from access to social assistance (Immigration Rules Appendix FM GEN 1.11). This was catastrophic for many individuals and families, many having been granted regularisation after long periods of twilight existence without access to legal work or mainstream benefits, leaving them in poor health, lacking work experience or qualifications, in debt and subject to exploitation.

CONTACT Sheona York  s.f.york@kent.ac.uk

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Eventually, after a series of conceded applications for judicial review, the Home Office was obliged to introduce a procedure allowing such individuals and families to apply to lift the NRFP condition – it is the application of this procedure which concerns the claimants’ grounds of challenge in *ST*.

Before dealing with these grounds of challenge in turn, the Court set out the facts and the procedural history. In its setting out the statutory framework, there are three aspects of the judgement worth noting. First, in relation to s55 BCIA 2009 (the ‘best interests’ duty), Lady Justice Laing remarks that *‘it might be thought that this is a high-level organisational duty. The Secretary of State appears, nevertheless, to have conceded, in ZH (Tanzania) . . . that this duty binds every decision-maker when making a decision in an individual case . . . We do not consider that it is open to us to depart from that approach’*. The judge then discussed how, in *MM (Lebanon) v SSHDS [2017] UKSC 10*, the Supreme Court held that, unlike Convention rights, the ‘best interests’ duty had to be set out in the Rules themselves.

Secondly, in setting out the relevant provisions of the Equality Act, the Court carefully steps round the elephant in the room, namely the exclusion of ‘functions exercisable by virtue of the Immigration Acts’ from the s29 prohibition on discrimination [54] and from the s149 requirements to make reasonable inquiry into, and to ‘understand’ the ‘obvious equality impacts’ of a decision [56]. Because it is these exclusions, surely, which undercut any legal claim against an immigration measure which relies on claiming discrimination: and we see here that the parties had to agree that for the purposes of this section, ‘race’ meant ‘colour’ only.

Thirdly, in discussing the relevant Guidance on the ‘best interests’ duty, Lady Justice Laing arguably glosses over its misrepresentation of *ZH (Tanzania)* in relation to whether the ‘best interests’ of a child can be outweighed by other considerations such as the public interest. Lady Hale did indeed say that nationality of a child would not be a ‘trump card’, and that the best interests of a child requiring the presence of both parents may well be outweighed in a particular case by other interests, for example in cases of criminality. But that could not be authority for deciding that the best interests of any given child could be outweighed just by *general* public interest considerations. Similarly, her exposition of the Guidance requirement not to blame a child for their parents’ failure to comply with immigration control overlooks how that has been significantly weakened in recent cases, including where it has not been considered unreasonable for a British citizen child to be expected to leave the UK.

The Court took time to discuss the two Policy Equality Statements (PESs) on the NRPF condition, issued in 2015 and 2020. The 2015 PES asserted that ‘All those subject to NRPF conditions have the right to work’, and ‘the NRPF scheme was applied to everybody equally, so there was no direct discrimination’. For the PES, there appeared to be no reason why people from different parts of the world had different rates of access to public funds. Following a review carried out in 2019, a new PES was issued. Once more the Court’s review of this shows but does not comment on the skewed and illogical way the various equality duties have to be considered in the immigration law context. First, the duty not to discriminate in relation to the protected characteristics simply does not apply to the passing of primary legislation, or indeed to the carrying out of immigration control functions. Discrimination on grounds of ‘colour’ could not be considered since no statistics were collected on ‘colour’. It would be considered ‘unfair’ for some migrants

and not others to have access to public funds without restriction, but those who need such access may apply to have the condition lifted. Finally, the scheme is considered to be justified even though it clearly discriminates between sets of children on the basis of the immigration status of the parent, since it ‘is pursuing a legitimate aim in a reasonable, proportionate and objective way’. ‘Most British children will have a non-migrant parent who may access public funds’ – and where that parent did not provide for the child, the NRPF condition could be lifted. There was ‘no evidence’ that the policy disproportionately affected black single women with children.

The discrimination claims are briskly dealt with, and fall precisely because immigration control, a deliberately discriminatory construction, is considered outwith the application of the 2010 Act. The claimants are criticised for constructing a comparison pool which attempts to eliminate the effects of immigration control, and for using a characteristic (‘colour’) simply because it is the only protected characteristic which could be relied on. The Court’s answer is that exclusion from social assistance (in this case Universal Credit) is a consequence of immigration status, as provided for in primary legislation, and the NRPF scheme is a legitimate scheme designed to balance the art 8 rights of people to remain in the UK even though they do not meet the requirements of the Rules, against the public interest that people who wish to remain in the UK should be financially independent.

The ‘systemic’ ground was dismissed equally briskly. There was no evidence that met the test imposed by Hickinbottom LJ in *R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2020] EWCA Civ 542, that the scheme was ‘incapable of being operated in a proportionate way in all or nearly all cases’. Finally, the Court found no evidence of any intentional breaches of art 3; no ‘culpable and discreditable conduct to expose to public view’, no covert processes to be discovered or rectified’.

The Court gave judgement to the claimants on one ground only, that the scheme does not ensure that the ‘best interests’ duty imposed by s55 is complied with. This is because para GEN.1.11A imposes a different, more stringent test than that required by *ZH (Tanzania)* and *FZ (Congo)*, which is not rectified by the Guidance, which, *in relation to whether to impose the NRPF condition*, simply repeats that more stringent test. However, as with *MM (Lebanon)*, this is likely to be a Pyrrhic victory at best: likely to result only in more convoluted, multi-layered requirements to ‘already long, defensive and repetitive’ Guidance or to the already contorted GEN.3 paragraphs of Appendix FM of the Immigration Rules. The bigger problem is the uncritical application of the ‘public interest’ financial independence criteria to individuals and families who are already in the UK, where true integration is more likely to be achieved by ensuring family unity and family stability. What we need are shorter, cheaper routes to settlement, and full access to social entitlements for those accepted on them – and we cannot achieve this by litigation.

Disclosure statement

No potential conflict of interest was reported by the author(s).