dpg

deighton pierce glynn

Briefing Note on High Court judgment in AB v SSHD [2022] EWHC 1524 (Admin)

Although 'no recourse to public funds' ('NRPF') has been an element of the immigration system for some time, the policy of imposing the NRPF condition on grants of limited leave to remain granted on the 10 year family route to settlement was introduced in 2012 as part of the 'hostile environment' programme, and has led to thousands of children growing up in abject poverty, because their non-British parents are denied the same state support that other low-income families can claim.

The policy has now been found to be unlawful five times:

- In 2014 it was declared unlawful because it was not authorised by the Immigration Rules and did not comply with the Public Sector Equality Duty In response Immigration Rule GEN1.11A was introduced, as well as the Change of Conditions application process, under which applicants could seek to have the NRPF condition lifted.
- In 2018, shortly before trial in another case, the Home Office conceded as part of the settlement that a Public Sector Equality Duty compliant review of the policy needed to be undertaken.
- In May 2020 the Divisional Court declared the policy unlawful because, in breach of Article 3 ECHR and the common law of humanity it required people to become destitute before they could apply to have recourse to public funds.
- In April 2021 the Divisional Court declared Immigration Rule GEN 1.11A and the associated guidance unlawful because it failed to comply with the duty under section 55 Borders, Citizenship & Immigration Act 2009 to safeguard and promote the welfare of children.
- And today, on 20 June 2022 in *R (AB) v SSHD* [2022] EWHC 1524, Lane J held that the guidance revised following the judgment of the Divisional Court contained in "Family Policy Version 16.0" was unlawful in failing to reflect the duty under section 55 under section 55 Borders, Citizenship & Immigration Act 2009 to safeguard and promote the welfare of children.

The Home Office changed the policy in response to the 2021 judgment, and the Immigration Rule was not changed until 20 June 2022. However, in a further challenge our clients argued that the Home Office's decisions and amended guidance still failed to comply with the section 55 duty, in imposing a narrower and more restrictive approach which sanctioned unlawful decisions on individual cases to refuse recourse to public funds. In a judgment handed down on 20 June 2022 Mr Justice Lane agreed with the Claimants, most notably at paragraph 54:

54. Where the application to lift the NRPF condition involves a child, the case law is clear that an examination of that child's position is necessary. It is here that the significance of paragraph 10 of Zoumbas becomes manifest. The caseworker needs, first, to consider what the effects on the child are likely to be of (here) maintaining the NRPF condition. That will generate an answer to the question of whether maintaining the condition would be in the best interests of the child. Although, as Mr Holborn points out, in the present context the answer to that question is almost always likely to be "yes", in the sense that it would generally be in the best interests of the child for there to be access, if necessary, to public funds, what the caseworker needs to know is whether and, if so, to what extent, maintaining the condition would affect the welfare of the child.

We will have to see how the Home Office approaches such applications, and experience suggests that further challenges may be necessary to ensure it is implemented lawfully, but for now what this means for applicants is that if they can show that having recourse to public funds will have a positive (or prevent a negative) impact on a child then it is difficult to see how the Home Office will be able to avoid granting recourse lawfully.

Those assisting applicants with Change of Conditions applications should therefore focus on getting evidence of the impact of lack of recourse to public funds (or of the positive impact granting recourse could have) on the child(ren), eg letters from teachers/support workers/social workers or other health or childcare professionals. If gathering evidence of destitution will delay submission of the Change of Conditions application, then it may be in the applicant's interests to submit it without that evidence of destitution, because following this judgment the child(ren)'s interests should be enough for the application to succeed.

A big thank you is due to Alex Goodman of Landmark Chambers and Ben Amunwa of the 36 Group, and to Caz, Alice, Tina, Rahath, Sonia and many others at The Unity Project for their brilliant work on this and other cases that have contributed to it. The judgment can be accessed here.