Neutral Citation Number: [2024] EWCA Civ 373

Case No: CA-2023-000383

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM MRS JUSTICE MAY
IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
IN APPEAL NO. QA2022BRS001

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 April 2024

Before :

LORD JUSTICE BEAN

LORD JUSTICE FRASER
and

SIR NICHOLAS PATTEN

- -

Between :

ASY & Ors	**Appellants**
- and -	
	Respondent
HOME OFFICE	

- -

Mr Alex Goodman KC and Mr Ben Amunwa (instructed by **Deighton Pierce Glynn Solicitors**) for the **Appellants**
Mr Colin Thomann KC and Mr Tom Tabori (instructed by **Government Legal Department**) for the **Respondent**

Hearing dates: 21 and 22 February 2024

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JUDGMENT

Lord Justice Fraser:

1. This judgment is in the following parts:
   A. Introduction and Anonymity
   B. Factual Background
   C. Legal Framework
   D. The judgment at first instance
   E. The judgment under appeal
   F. Grounds of Appeal and Discussion
   G. Respondent's Notice
   H. Conclusions

A. Introduction and anonymity

2. This case concerns four individual cases of people, resident in England. They are each present in the jurisdiction having been granted limited leave to remain ("LLTR") by the Secretary of State with what is called a no recourse to public funds condition ("NRPF"). LLTR is often granted for a certain number of months at a time, usually 30 months, but can be, and often is, renewed. The effect of the NRPF condition is to make the person upon whom it is imposed ineligible for almost all benefits that would otherwise (absent the condition) be paid to the person from public funds. Given such applicants for leave to remain are entitled to work, the expectation is that they will support themselves financially. Although they are entitled to remain in the jurisdiction, this is permitted on the express basis that they are not eligible for state benefits, including benefits intended to maintain the basic welfare of children. The four people in these proceedings are the appellants in this appeal, and the claimants in the action. For convenience, I shall refer to them as the claimants throughout.

3. The NRPF condition can be lifted upon application by an individual in any particular case, by making what is called a change of condition application ("CoC application") to the Secretary of State. In ***R (W by his litigation friend J) v Secretary of State for the Home Department*** [2020] EWHC 1299 (Admin); [2020] 1 W.L.R. 4420 the Divisional Court (Bean LJ, Chamberlain J) held that the policy under which such applications were determined at that time was unlawful. It was held unlawful because the guidance under which caseworkers at the Home Office considered CoC applications, against the policy that was then in force, failed properly to reflect that the Secretary of State is under a duty to prevent infringement of a person's rights under Article 3 of the European Convention of Human Rights ("ECHR") and thereby the policy and guidance was contrary to section 6 of the Human Rights Act 1998 ("HRA 1998").

4. That guidance has subsequently been changed by the Home Office, following the decision in the case of ***W***. I shall call the regime prior to it being changed "the old NRPF regime". Each of these cases concern an NRPF condition that was imposed upon each claimant under the old NRPF regime. In each case there are claims for damages made by these claimants for breaches of their rights under Article 3 of ECHR whilst the old NRPF regime was in force. In each case the NRPF condition was lifted after a time, when the Home Office by the Secretary of State (in reality, their designated officer dealing with each CoC application) recognised that each claimant had fallen into a state of destitution.

That recognition is contained in the contemporaneous documents created by the Home Office and is not therefore factually controversial.

5. In each of these cases, a common issue arises which is whether each of the claimants is entitled to damages for what the claimants in their common claim described as breaches of their "procedural rights" under Article 3 of ECHR. Their claims were therefore all brought together. The four claimants in this case are each non-British nationals. Three are Ghanaian nationals and one is from Sierra Leone. They each have at least one dependent child who is a British national. The facts of each of their cases are different, but they all have central similarities, namely they were all granted LLTR subject to a NRPF condition; they each made a CoC application; this was successful after a period of time (but not immediately) and in some cases more than one CoC application was required; and this was granted because it was recognised by the Home Office that they were destitute.

6. A preliminary issue was ordered on 30 June 2021 by HHJ Cotter QC (as he then was) in the following terms:
"Whether or not the Claimants have a right to damages for breach of their procedural rights under Article 3 ECHR in light of the Defendant's imposition of NRPF conditions on them pursuant to the application to them of the NRPF scheme found by the Divisional Court in ***W*** to breach the procedural right under Article 3 of the ECHR."

7. By his judgment dated 28 October 2021 and order dated 28 January 2022, HHJ Ralton sitting at Bristol County Court found in favour of the claimants on the preliminary issue. In the course of his judgment at [8], the judge stated that:
"The essential question in this case is whether the Home Office can be made liable in damages under section 8 of the Human Rights Act 1998 for applying an unlawful scheme to the claimants which could have resulted in a breach of their Article 3 right not to be subjected to degrading or inhuman treatment in the form of extreme destitution."
That issue was answered in the claimants' favour in his judgment.

8. In his subsequent judgment of 19 January 2022, HHJ Ralton awarded the claimants sums by way of damages, both non-pecuniary and pecuniary. The pecuniary damages were assessed as being the benefits that would have been payable to each claimant for the period from the date of their individual CoC applications until the NRPF condition was lifted in each case. The non-pecuniary damages were assessed by the judge in the sum of £2,000 for each adult claimant, and £500 for each child. Permission to appeal against the judgment on the preliminary issue was initially refused, but was granted by Foxton J in an order of 6 April 2022, and in his order doing so he also stayed the payment of damages. May J heard that appeal and found in favour of the Home Office in her judgment at [2023] EWHC 196 (KB), reflecting that in her order of 2 February 2023. Whipple LJ granted the claimants permission to appeal that decision to this Court by her order of 7 August 2023.

9. I have the following preliminary observations, which may assist in putting this appeal into context. Firstly, the quantum of damages is not an issue on this

appeal. Quantum formed no part of the preliminary issue, and May J expressly stated at [87] of her judgment determining the appeal that she would not have interfered with HHJ Ralton's assessment of damages, had her decision on the appeal on the preliminary issue been different. To be fair to Mr Thomann KC for the Home Office, he did not seek to challenge the quantum of damages per se. This case concerns a more fundamental point, namely whether damages are recoverable at all by a claimant in the situation of each of these, for breaches of what the claimants describe as their procedural rights under Article 3.

10. My other observation is that it is problematic that this matter has proceeded by way of a preliminary issue, a point also recognised by Whipple LJ when she granted permission to appeal. Lord Scarman stated over forty years ago in ***Tilling v Whiteman*** [1980] AC 1 that preliminary issues "are too often treacherous short cuts". Lord Hope expressly agreed with this in ***SCA Packaging Ltd v Boyle*** [2009] UKHL 37; [2009] 4 All ER 1181 at [9]. He said that statement by Lord Scarman applied "even more so where the points to be decided are a mixture of fact and law". Claims for damages for breaches of duty in the public law sphere are heavily fact dependent. Proceeding in the way adopted in this case is a striking example of the validity of the concerns of Lords Scarman and Hope in practice.

11. Article 3 of the ECHR states that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment." Torture does not apply here, and the state of affairs which is said to found the claim for damages by each claimant is a breach, or breaches, by the Home Office of the claimants' rights under Article 3 ECHR and thereby section 6 of the HRA 1998. However, the preliminary issue is framed as considering what are called their "procedural rights" under Article 3, rather than their substantive rights. A state of destitution can be sufficiently extreme that it amounts to inhuman or degrading treatment, which in the skeleton arguments and oral submissions was given the initialism IDT as shorthand. That is not a shorthand which I intend to adopt in this judgment. However, whether any state of destitution does or did, in any individual case, reach such an extreme that it amounts to inhuman or degrading treatment in any individual case must, by definition, depend on the facts. There is more to inhuman or degrading treatment for the purposes of Article 3 of ECHR than destitution, as will be seen below. The NRPF condition was lifted by the Home Office because each claimant was in a state of destitution, not because they were suffering inhuman or degrading treatment. There has, as of yet, not been any determination whether any of the claimants were in fact suffering inhuman or degrading treatment.

12. The genesis of proceeding in the way ordered by the preliminary issue was explored with counsel at the hearing of this appeal, and Mr Goodman KC for the claimants explained that the intention was to deal with the issue as a matter of principle, without any determination of whether any claimant did in fact suffer inhuman and degrading treatment contrary to Article 3. This way of proceeding was adopted in order to streamline what may be a large number of cases for different claimants, but whose claims would each be very modest in financial terms. Success for the claimants, who at one point he referred to as lead or test claimants, by bringing the question of principle by way of a

preliminary issue in the way framed at [6] above, could lead to a saving in court time and legal costs for the parties. That may very well be the case, but as my Lord, Bean LJ observed, framing a way forward as though it were a legal question for a moot is not necessarily very helpful. Nor would a simple answer to the preliminary issue of "yes" or "no" or even "not necessarily, it depends" provide any guidance for other cases that may arise. If a trial of liability had been held, absent determinations of quantum, on all or even any of the four claimants, then the principles could have been addressed and explained by reference to actual facts that had been found by the court, or agreed by the parties. Here, there was no schedule of agreed facts, and although HHJ Ralton reached conclusions on the facts based on the contents of the Home Office's own documents in determining the CoC applications, none of these contained any acceptance that any of the claimants had suffered breaches of any of their Article 3 rights.

13. The preliminary issue at [6] may have been framed without a full understanding by the parties of how the ratio in ***W*** would, or could, be applied to the claimants in this case. The Divisional Court in ***W*** held that the scheme then being operated, by way of the guidance to caseworkers, was unlawful because it failed to direct them in accordance with the preventative duty in law imposed upon the Secretary of State to *avoid* a claimant becoming subject to inhuman or degrading treatment. That guidance had framed the approach to be taken by caseworkers as an exercise of their discretion, whereas there is in law a positive duty upon the Secretary of State.

14. Finally by way of introduction, I turn to anonymity. Although the matter was not anonymised in the County Court, judgments in that jurisdiction are not those of a court of record, nor are they held or published on the National Archive. May J heard an application for anonymity, which was unopposed, and applying CPR rule 39.2(4), she granted it, on the basis that some of the claimants were minors and identifying their mothers would identify them. The appeal before her was conducted in open court, as was the appeal before us, and there have been no applications from the press or other third parties to lift the anonymity order. In the practice guidance on anonymity in the Court of Appeal issued by the Master of the Rolls and Underhill LJ and dated 22 March 2022, it is made clear that naming parties in appeals is an important part of the principle of open justice, and departures from that must be justified. Paragraph 4 of that practice guidance makes clear that the interests of children and the effect of them being identified should be considered. As was decided at the hearing of the appeal itself before us, the anonymity order imposed by May J below continues and also applies to this judgment.

B. Factual background

15. In view of the issues on this appeal, the facts can be summarised briefly. They are set out in the judgment at first instance and were adopted by May J at [7] in the judgment under appeal. The claimants were all assisted in their CoC applications, and also materially, by a charity called the Unity Project, which provides assistance by way of material relief to people in the position of these claimants. The charity also assists them in navigating their way through the applications process. This includes providing them with the necessary

information to support their CoC applications, and the provision of help and guidance in compiling the necessary documents required by the Home Office to consider such applications. By their Particulars of Claim which were issued on 17 December 2020, the claimants sought damages from the Home Office under section 8 HRA 1998 for breach of their rights arising under Article 3 ECHR, consequent upon the application by the Home Office of the old NRPF regime to their cases. They relied, inter alia, upon the findings of the Divisional Court in ***W*** that the scheme was unlawful for the period of time during which they were applying for the NRPF condition to be lifted.

16. ASY is a Ghanaian national who entered the United Kingdom on 23 September 2008 with a 6-month visitor's visa. On 9 October 2010 and 6 October 2012, she gave birth to two children who acquired British citizenship at birth. On 17 February 2014, she applied for LTR on the basis of her relationship with a British partner and her two British children. In April 2014, the application was successful and she was granted LLTR, and subsequently extended on what is called the 10-year settlement route, but subject to the NRPF condition to which I have already referred. In early June 2019, she applied for the NRPF condition to be lifted by way of CoC application. There is disagreement between the parties about whether it was received by the Home Office on 17 or 19 June 2019 but for presents purposes that difference is immaterial. Her application was advanced on the basis that she was pregnant, she had limited or no support from her former partner and her child was due to be born on 19 September 2019. She was said to meet the requirements for lifting the condition of NRPF because she "is or, at least, will be rendered destitute without recourse to public funds". On 30 July 2019, she was asked to provide further information. It was not provided, so on 28 August 2019 the application was refused. On 12 September 2019, she re-applied, enclosing further financial evidence. On 14 September 2019, she gave birth to a third child who also acquired British citizenship at birth. On 21 October 2019, the NRPF condition was lifted.

17. DWB is a Sierra Leonian national, who arrived in the UK in October 2017 with a visit visa valid until 28 February 2018. On 11 December 2017, she gave birth to a child, who acquired British citizenship by birth. On 5 April 2018, she applied for LTR on the basis of the family and private life route, which she justified upon the basis of a parental relationship with a British child. On 17 July 2018, she was granted LLTR for 30 months, on the basis of her relationship with a British child, and this was granted subject to the NRPF condition. On 11 October 2018, she applied for this condition to be lifted but on 25 October 2018, the application was refused for lack of evidence. On 23 August 2019, she reapplied for the NRPF condition to be lifted, and provided further evidence. On 1 October 2019, the NRPF condition was lifted on the grounds that she had been assessed as being destitute.

18. BTB is a Ghanaian national who claims to have arrived in the UK in 2003; she did not have leave to enter. She gave birth on 5 July 2004 and the child acquired British citizenship by birth. On 14 May 2015, she was granted LLTR for 30 months on the basis of her sole parental responsibility for a British citizen child, but subject to the NRPF condition. On 21 November 2017, she applied for further LLTR under the 10-year settlement route. On 25 March 2018, she was

granted LLTR, valid until 29 September 2020, again subject to the NRPF condition. In July 2019, she applied for the NRPF condition to be lifted on the basis, stated in her evidence supporting the application, that she was facing what was described as "imminent destitution". She advanced her application on the basis that she either was destitute, or "will be rendered destitute without access to public funds", and she therefore met the conditions for lifting NRPF. On 9 September 2019, the NRPF condition was lifted, on the basis that her and her daughter's accommodation was unsuitable: they were forced to share a bed, and the spatial confines were affecting her daughter's studies.

19. Finally, CVD is a Ghanaian national who claims to have entered the UK on 29 December 2002. On 24 April 2010, she gave birth to a child who acquired British citizenship by birth. In October 2011, she submitted an application for LTR based on her parental relationship with a British citizen. She was granted LLTR subject to the NRPF condition on 23 October 2012. She successfully applied for further periods of LLTR on the same basis twice, one in April 2015 and again in October 2017, each grant being made subject to an NRPF condition. On 24 July 2019, she applied for the NRPF condition to be lifted on the basis of destitution and/or the basis of the welfare of her child and/or exceptional circumstances. Again, this application was advanced on the basis that she either was destitute or "at least, will be rendered destitute without access to public funds". On 20 September 2019, she supplied further information in response to requests for this by the Home Office, and the condition was lifted on 24 September 2019 on the grounds of her destitution.

20. Destitution must be a wretched state of affairs, and none of what is discussed or decided in this judgment should be taken as a failure to appreciate the impact upon a person, or a child or a family, of living in such a condition, or close to such a condition – "on the brink of destitution", as Mr Goodman put it in his submissions. However, as the authorities further considered in Section C make clear, something more than destitution is required in order for a person's Article 3 rights to be infringed. The full title of the ECHR is the Convention for the Protection of Human Rights and Fundamental Freedoms, and its purpose is to enshrine certain basic minimum standards in terms of the fundamental rights that any person – whether citizen, or one with LLTR with a NRPF condition, or otherwise – possesses in law. Any person may be rendered destitute through any combination of circumstances, and they may also be rendered destitute without their Article 3 rights being breached. This case does not concern a claim for damages for being destitute.

21. There is a statutory definition of destitution which is contained in section 95 of the Immigration and Asylum Act 1999 ("the 1999 Act"). That definition provides that a person is destitute where they do not have adequate accommodation or any means of obtaining it (regardless of whether their essential living needs are met), *or* if they have adequate accommodation or the means of obtaining it but cannot meet their essential living needs. That statutory definition of destitution must not be confused, however, with a person's rights under Article 3; in other words, a person could be destitute within that definition under the 1999 Act, yet not have their rights under Article 3 breached. Destitution *may* be of such a condition or depth that it also amounts to inhuman

or degrading treatment; but a person may be destitute within the meaning of section 95 of the 1999 Act without Article 3 becoming engaged.

22. Once the NRPF condition has been lifted, as happened in each of these four cases, upon either an application, or a renewed or supplemented application (as documentation and evidence must be provided by an applicant submitting a CoC application), such a claimant then becomes entitled to apply for public funds, including benefits, Universal Credit and so on. However, those benefits cannot be backdated to cover the period earlier than the date upon which the NRPF condition is lifted. Lifting the condition gives the person in question the right from that date to apply for support from public funds by way of benefits and other financial support, to which they are not entitled whilst under the NRPF condition.

C. Legal Framework

23. The imposition of the NRPF condition in itself is not in issue on this appeal. That such a condition might be imposed is expressly contemplated by primary legislation. Section 3 of the Immigration Act 1971 provides as follows:
"(1) Except as otherwise provided by or under this Act, where a person is not a British citizen
…(b) he may be given leave to enter the United Kingdom (or, when already there, leave to remain in the United Kingdom) either for a limited or for an indefinite period;
(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".

24. The imposition of a NRPF condition is, therefore, expressly contemplated by the 1971 Act. The policy and evolution of this is explained between [10] and [16] in the judgment of the Divisional Court in ***W***, and it is not necessary to repeat that here. At [14] in that judgment the background is explained to the position being adopted, from 2012 onwards, that the condition of NRPF would normally be imposed in all cases for applications for LTR. The clear rationale for this is to reduce the burden on the taxpayers of funding such applicants, and to make it clear that immigration to the UK should ordinarily be on a self-sufficient basis. The effects of a NRPF condition being imposed on a person is that only some very limited assistance would be available to them if they have dependent children, namely support under section 17 of the Children Act 1989, which would be provided by the relevant local authority. But the vast majority of other benefits, including those related to pregnancy and children such as health in pregnancy grants, and child benefit, are prohibited.

25. The criteria for deciding whether to impose, or to lift, the NRPF condition were included in the Immigration Rules. That was done by amending Appendix FM to the Immigration Rules, with that appendix providing a number of bases upon which a person may be granted LTR with a view to eventual settlement by virtue of a connection with a family member who is a British citizen, settled in the UK or a refugee or person entitled to humanitarian protection. The rules for those applying as partners and parents stipulate that entry clearance or LTR, if

granted, will be subject to a condition of NRPF "unless the decision-maker considers, with reference to paragraph GEN 1.11A, that the applicant should not be subject to such a condition". The rules for those applying as children provide that the child will be subject to the same condition as the parent.

26. The relevant formulation of GEN 1.11A of Appendix FM that was under consideration by the Divisional Court in ***W*** was brought into force in December 2019 and stated the following.
"GEN.1.11A. Where entry clearance or leave to remain as a partner, child or parent is granted… it will normally be granted subject to a condition of no recourse to public funds, unless the applicant has provided the decision-maker with:
(a) satisfactory evidence that the applicant is destitute as defined in section 95 of the Immigration and Asylum Act 1999; or
(b) satisfactory evidence that there are particularly compelling reasons relation to the welfare of a child of a parent in receipt of a very low income."

27. The guidance to case workers at the Home Office which accompanied this, which was to be applied when considering CoC applications of the type made in this case, stated:
"You can exercise discretion not to impose, or to lift, the no recourse to public funds condition code only where the applicant meets the requirements of paragraph GEN.1.11A of Appendix FM or paragraph 276A02 of the Immigration Rules on the basis of the applicant:
- having provided satisfactory evidence that they are destitute or there is satisfactory evidence that they would be rendered destitute without recourse to public funds
- having provided satisfactory evidence that there are particularly compelling reasons relating to the welfare of a child on account of the child's parent's very low income
- having established exceptional circumstances in their case relating to their financial circumstances which, in your view, require the no recourse to public funds condition code not to be imposed or to be lifted.

You must consider all relevant personal and financial circumstances raised by the applicant, and any evidence of these which they have provided. In cases where the circumstances suggest that further evidence is available but has not been provided, you should be prepared to write out and seek that additional evidence.
Whether to grant leave subject to a condition of no recourse to public funds, or whether to lift that condition where it has been imposed, is a decision for the Home Office decision maker to make on the basis of this guidance."
(emphasis added)

28. The wording of the December 2019 version of the Instruction differed from that which had previously been in place, in that instead of the language that had been previously included, which was framed in mandatory terms, it instructed caseworkers that they "can exercise discretion" not to impose, or to lift, the NRPF condition. This is in the emphasised words above. Further, the first bullet point indicated that the discretion could be exercised for applicants where either *"they are destitute"* or *"they would be rendered destitute".* There was

nothing that gave any indication of what was meant by "would be rendered destitute", nor did this version say anything about what should be done where the applicant would imminently become destitute, or was at risk of immediate destitution.

29. The Divisional Court in ***W*** found that the guidance failed properly to direct decisions makers in accordance with the duty upon the Secretary of State, but instead expressed it to the decision makers as an exercise of their discretion where an applicant was at imminent risk of destitution. The court found that there was a significant risk of unlawful decisions being made in more than a minimal number of cases. It was this replacement of what had been a duty upon the Secretary of State, with consideration of the matter as an exercise of discretion, that led the court in that case to the conclusion that the policy was unlawful. The court (Bean LJ, Chamberlain J) stated at [73]:

"The NRPF regime, comprising paragraph GEN 1.11A and the Instruction read together, do not adequately recognise, reflect or give effect to the Secretary of State's obligation not to impose, or to lift, the condition of NRPF in cases where the applicant is not yet, but will imminently suffer inhuman or degrading treatment without recourse to public funds. In its current form the NRPF regime is apt to mislead caseworkers in this critical respect and gives rise to a real risk of unlawful decisions in a significant number of cases. To that extent it is unlawful." (emphasis added)

30. Subsequently, the decision in ***W*** came to be considered by the Supreme Court in ***R (on the application of A) v Secretary of State for the Home Department*** [2021] UKSC 37; [2021] 1 WLR 3931. In the case the Supreme Court was considering the test to be applied by courts when asked to conduct judicial review of the contents of a policy document or statement of practice issued by the Government. The precise policy under consideration in that case was the Child Sex Offender Disclosure Scheme Guidance, but the decision clearly states that it considers the standards to be applied in all cases, regardless of the policy in question. In the course of considering that issue, the Supreme Court disapproved the particular test applied by the court in ***W***. Lord Sales and Lord Burnett, with whom the others agreed, said at [74] that:

"this way of formulating the test involves significant movement from the proper approach to be derived from *Gillick*. However, the way in which the court decided the case is consistent with the approach in *Gillick*. Having identified at paras 60-61 what would be unlawful conduct in an individual case, at paras 62-66 the court construed the relevant rules and the policy as a complete set of instructions to officials of the Secretary of State (of the kind referred to by Rose LJ in *Bayer* at para 214: see para 45 above) which required them to impose or maintain the no recourse to public funds condition in cases where that would be unlawful."

31. The case referred to in that passage is ***Gillick v West Norfolk & Wisbech Area Health Authority*** [1985] UKHL 7; [1986] AC 112. In that case, the House of Lords had applied a test where the court was to consider whether the guidance in question sanctioned or encouraged unlawful behaviour. As set out by Lord

Sales and Lord Burnett, that was not the test that had been applied by the court in ***W.*** Therefore, after this decision of the Supreme Court, the decision of the Divisional Court in ***W*** that the guidance was unlawful remains good law, even though the route by which that decision was reached had applied the wrong test.

32. Following the judgment in ***W*** and pursuant to the court's order in that case, but after the time material to this appeal in the instant case, the Guidance to caseworkers was amended. It now provides that *"It is mandatory not to impose, or to lift if already imposed, the condition of no recourse to public funds if an applicant is destitute or at imminent risk of destitution without recourse to public funds*" (emphasis added). This is why the NRPF condition at the time material to these cases – the old NRPF regime – no longer applies.

33. The ratio of ***W*** was founded upon the determination of the scope of the duty which was owed by the Secretary of State, based upon the decision of the House of Lords in ***R (ex parte Limbuela) v Secretary of State for the Home Department*** [2005] UKHL 66; [2006] 1 AC 396.

34. That case dealt with the issue of the circumstances in which the Secretary of State "becomes entitled and obliged, pursuant to section 55(5)(a) of the Nationality, Immigration and Asylum Act 2002, to provide or arrange for the provision of support to an applicant for asylum where the Secretary of State is not satisfied that the claim for asylum was made as soon as reasonably practicable after the applicant's arrival in the United Kingdom" per Lord Bingham at [1]. One of the features of the legislation under consideration in ***Limbuela*** was dealing with people seeking asylum, but who were arguably economic migrants. The solution adopted was to require asylum seekers to claim asylum immediately; those who did not do so were categorised as "late asylum claimants". The legislation restricted the access of such people to public funds. Particularly given that those seeking asylum have no right to work, their economic conditions and potential destitution were an integral part of the consideration by the House of Lords in that case.

35. Under section 55 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), Parliament had placed constraints on the Secretary of State's ability to provide or arrange support for late asylum claimants under section 95 of the 1999 Act. In general, by section 55(1) of the 2002 Act, such support could not be provided to an asylum seeker unless the Secretary of State was satisfied that the claim for asylum had been made as soon as reasonably practicable after the person's arrival in the United Kingdom. That was subject to an exception in section 55(5)(a), which made clear that the section did not prevent "the exercise of the power by the Secretary of State to the extent necessary for the purpose of avoiding the breach of a person's Convention rights (within the meaning of the Human Rights Act 1998)".

36. As Lord Bingham expressed it at [5]:

"Thus section 55(5)(a) authorised the Secretary of State to provide or arrange for the provision of support to a late applicant for asylum to the extent necessary for the purpose of avoiding a breach of that person's Convention rights. But the

Secretary of State's freedom of action is closely confined. He may only exercise his power to provide or arrange support where it is necessary to do so to avoid a breach and to the extent necessary for that purpose. He may not exercise his power where it is not necessary to do so to avoid a breach or to an extent greater than necessary for that purpose. Where (and to the extent) that exercise of the power is necessary, the Secretary of State is subject to a duty, and has no choice, since it is unlawful for him under section 6 of the 1998 Act to act incompatibly with a Convention right. Where (and to the extent) that exercise of the power is not necessary, the Secretary of State is subject to a statutory prohibition, and again has no choice. Thus the Secretary of State (in practice, of course, officials acting on his behalf) must make a judgment on the situation of the individual applicant matched against what the Convention requires or proscribes, but he has, in the strict sense, no discretion."

37. The case therefore involved detailed consideration of the nature of a claimant's rights under Article 3. Lord Bingham said:

"[7] As in all article 3 cases, the treatment, to be proscribed, must achieve a minimum standard of severity, and I would accept that in a context such as this, not involving the deliberate infliction of pain or suffering, the threshold is a high one. A general public duty to house the homeless or provide for the destitute cannot be spelled out of article 3. But I have no doubt that the threshold may be crossed if a late applicant with no means and no alternative sources of support, unable to support himself, is, by the deliberate action of the state, denied shelter, food or the most basic necessities of life. It is not necessary that treatment, to engage article 3, should merit the description used, in an immigration context, by Shakespeare and others in *Sir Thomas More* when they referred to "your mountainish inhumanity".

[8] When does the Secretary of State's duty under section 55(5)(a) arise? The answer must in my opinion be: when it appears on a fair and objective assessment of all relevant facts and circumstances that an individual applicant faces an imminent prospect of serious suffering caused or materially aggravated by denial of shelter, food or the most basic necessities of life. Many factors may affect that judgment, including age, gender, mental and physical health and condition, any facilities or sources of support available to the applicant, the weather and time of year and the period for which the applicant has already suffered or is likely to continue to suffer privation.

[9] It is not in my opinion possible to formulate any simple test applicable in all cases."

38. Lord Hope at [53] expressed what he called "a feeling of unease" about the analysis undertaken in the Court of Appeal below, which had drawn a distinction between breaches of Article 3 which consisted of violence by state servants, and breaches which consisted of acts or omissions by the state which exposed claimants to suffering by third parties or by circumstances, and had approached the matter using what had been called in the Court of Appeal a

"spectrum analysis". Lord Hope observed that this distinction had no foundation in any of the judgments delivered by the European Court, and there was no sound basis for it in the wording of the article itself. He also observed that:

"Where the inhuman or degrading treatment or punishment results from acts or omissions for which the state is directly responsible there is no escape from the negative obligation on states to refrain from such conduct, which is absolute. In most cases, of course, it will be quite unnecessary to consider whether the obligation is positive or negative."

39. He also identified at [54]:

"that the European Court has all along recognised that ill-treatment must attain a minimum level of severity if it is to fall within the scope of the expression "inhuman or degrading treatment or punishment …… the assessment of this minimum is relative, as it depends on all the circumstances of the case such as the nature and context of the treatment or punishment that is in issue. The fact is that it is impossible by a simple definition to embrace all human conditions that will engage article 3." (emphasis added)

40. Given that destitution does not, of itself and without more, amount to a breach of a person's article 3 rights, it is important to consider that latter question. He stated at [58]:

"[58]……..I think that it is necessary therefore to stick to the adjectives used by article 3, and to ask whether the treatment to which the asylum-seeker is being subjected by the entire package of restrictions and deprivations that surround him is so severe that it can properly be described as inhuman or degrading treatment within the meaning of the article.

[59] It is possible to derive from the cases which are before us some idea of the various factors that will come into play in this assessment: whether the asylum-seeker is male or female, for example, or is elderly or in poor health, the extent to which he or she has explored all avenues of assistance that might be expected to be available and the length of time that has been spent and is likely to be spent without the required means of support. The exposure to the elements that results from rough-sleeping, the risks to health and safety that it gives rise to, the effects of lack of access to toilet and washing facilities and the humiliation and sense of despair that attaches to those who suffer from deprivations of that kind are all relevant."

41. Finally, and this is the central point of ***Limbuela*** as it impacts upon the instant case, at [62] he stated:

"It may be, of course, that the degree of severity which amounts to a breach of article 3 has already been reached by the time the condition of the asylum-seeker has been drawn to his attention. But it is not necessary for the condition to have reached that stage before the power in section 55(5)(a) is capable of being exercised. It is not just a question of "wait and see". The power has been given to enable the Secretary of State to avoid the breach. A state of destitution that

qualifies the asylum-seeker for support under section 95 of the 1999 Act will not be enough. But as soon as the asylum-seeker makes it clear that there is an imminent prospect that a breach of the article will occur because the conditions which he or she is having to endure are on the verge of reaching the necessary degree of severity the Secretary of State has the power under section 55(5)(a), and the duty under section 6(1) of the Human Rights Act 1998, to act to avoid it." (emphasis added)

42. Baroness Hale said this:

"[78] The only question, therefore, is whether the degree of suffering endured or imminently to be endured by these people reaches the degree of severity prohibited by article 3. It is well known that a high threshold is set but it will vary with the context and the particular facts of the case. There are many factors to be taken into account."

43. Finally for the purposes of this appeal, at [92] Lord Brown said:

"I repeat, it seems to me generally unhelpful to attempt to analyse obligations arising under article 3 as negative or positive, and the state's conduct as active or passive. Time and again these are shown to be false dichotomies. The real issue in all these cases is whether the state is properly to be regarded as responsible for the harm inflicted (or threatened) upon the victim."

44. This approach to breach – the important principle that, as Lord Hope put it, "it is not just a question of "wait and see" – is in my judgment central to the issues that arise on this appeal. The House of Lords made clear in ***Limbuela*** that there is a duty upon the Secretary of State to act "as soon as the asylum-seeker makes it clear that there is an imminent prospect that a breach of the article will occur because the conditions which he or she is having to endure are on the verge of reaching the necessary degree of severity." The fact that this was expressed by reference to asylum-seekers (in that case) rather than those with LLTR with a NRPF condition (as in this case) does not, in my judgment, matter. There is a duty if the claimant shows there is an "imminent prospect" that their Article 3 rights will be breached. To adapt the passage of Lord Hope [62] in ***Limbuela*** quoted above, with the necessary amendment for this case:

"as soon as the [claimant with LLTR with a NRPF condition] makes it clear that there is an imminent prospect that a breach of the article will occur because the conditions which he or she is having to endure are on the verge of reaching the necessary degree of severity the Secretary of State has…. the duty under section 6(1) of the Human Rights Act 1998, to act to avoid it."

45. Yet this is not a case only about breach of duty. It is about whether damages can be recovered for any such breach or breaches. Damages can, in some circumstances, be awarded for breaches of public law duties. They can also, again in some circumstances, be awarded for breaches of duty under the Human Rights Act 1998. Section 8 of that statute states:

"Judicial remedies.

(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.
(2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.
(3) No award of damages is to be made unless, taking account of all the circumstances of the case, including—
(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and
(b) the consequences of any decision (of that or any other court) in respect of that act,
the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made."

46. Section 8(3) is framed in mandatory terms. "No award of damages is to be made unless, taking account of all the circumstances of the case ….. the award is necessary to afford just satisfaction to the person" (emphasis added). In my judgment, this means that any court considering an award of damages in respect of breach of a public duty must be satisfied of two things. Firstly, that account has been taken of all the circumstances of the case. Secondly, that damages are necessary to afford just satisfaction to the claiming party. It is not possible – however attractive it might be as a short cut – to jump forward to the second step of that test, and find that damages are necessary to afford just satisfaction to any particular claimant, without considering the first step.

47. The importance of this was emphasised by Lord Bingham's summary of the requirements for an award of damages under section 8 of HRA 1998 at [6] in ***R (Greenfield) v Secretary of State for the Home Department*** [2005] UKHL 14; [2005] 1 WLR 673 when after considering Article 41 of the ECHR (which is not one of the articles scheduled to the HRA 1998 but which is reflected in section 8), he stated the following:

"There are also preconditions to an award of damages by a domestic court under section 8: (1) that a finding of unlawfulness or prospective unlawfulness should be made based on breach or prospective breach by a public authority of a Convention right; (2) that the court should have power to award damages, or order the payment of compensation, in civil proceedings; (3) that the court should be satisfied, taking account of all the circumstances of the particular case, that an award of damages is necessary to afford just satisfaction to the person in whose favour it is made; and (4) that the court should consider an award of damages to be just and appropriate. It would seem to be clear that a domestic court may not award damages unless satisfied that it is necessary to do so, but if satisfied that it is necessary to do so it is hard to see how the court could consider it other than just and appropriate to do so."

48. It is necessary, I consider, to set out that framework first, in order to place what follows in its relevant context. Mr Goodman approached the matter as one almost of convenience, in the sense that if one saw a person's rights under Article 3 as comprising what he called "procedural rights" and "substantive rights" separately, and came to a favourable conclusion to the claimants on the

former, one need not go on to consider the latter. I find that distinction unhelpful, and I do not consider it to be justified either by the wording of the article itself, or the more modern approach to framing the duty upon the Secretary of State (to which I return below at [81]). Mr Thomann sought to rely upon the fact that in ***Limbuela*** the claimants were asylum seekers with no right to work, whereas in the instant case, the claimants were in a different position and could support themselves (or were not positively prevented from supporting themselves). I do not find those points helpful either. Article 3 rights are available to all, and as Baroness Hale said at [76] of ***Limbuela,*** "along with article 2, the right to life, this is the most important of the Convention rights. It reflects the fundamental values of a decent society, which respects the dignity of each individual human being, no matter how unpopular or unworthy she may be."

49. What in reality this case concerns is the question of whether a claimant who is subject to a NRPF condition and in imminent danger of falling into a state of destitution sufficiently severe to breach their Article 3 rights – "on the verge of reaching the necessary degree of severity" – can be awarded damages without the court having to consider whether what *in fact* transpired in their individual case amounted toan actual breach of their Article 3 rights.

50. The case of ***W*** decided that the old NRPF regime was unlawful because of the guidance in relation to whether not to impose, or to lift, the NRPF condition in cases where an applicant was not yet destitute but would imminently suffer inhuman or degrading treatment without recourse to public funds. However, simply because those conditions were unlawful (or could be applied unlawfully) does not, without more, entitle a claimant to damages. At [60] in ***W*** the following is stated:

"[60] The analysis begins with three propositions of law, which, as we understand it, are not in dispute in these proceedings:
(a) There are some cases in which the Secretary of State is not only entitled, but legally obliged, not to impose a condition of NRPF or to lift such a condition.
(b) These include cases where the applicant is suffering inhuman and degrading treatment by reason of lack of resources.
(c) They also include cases where the applicant is not yet suffering, but will imminently suffer, such ill-treatment without recourse to public funds."

51. It is that third proposition at [60](c) of ***W*** that is the relevant one here. Are damages recoverable by such an applicant without considering whether that imminent risk did in fact result in inhuman and degrading treatment being experienced?

D. The judgment at first instance

52. The judge in the County Court set out the background and the relevant legal and policy framework which applied to the claimants, and proceeded to consider destitution and Article 3 ECHR. He correctly noted that destitution is not, in itself, sufficient to constitute inhuman and degrading treatment and that in order to fall within the scope of Article 3 ECHR, the "treatment" must reach a minimum level of severity, citing from European decisions such as ***Pretty v UK***

35 EHRR 1; [2002] ECHR 427, at [52]; and also from the case of ***R (Limbuela) v Secretary of State for the Home Department*** [2005] UKHL 66; [2006] 1 AC 396, at [7] and [78].

53. He made observations on the particular factual circumstances of each of the claimants in the following terms, emphasising that he was taking this from the factual summary provided by the claimants which was not agreed. I have provided a summary at [16] to [19] above. All of the claimants were very low-earning single parents with minor dependent children. In each case they were granted LLTR with a NRPF condition. Their financial circumstances had deteriorated; they were unable to meet their basic costs of living and fell into arrears of rent/utility bills and so on. One of them had been dissuaded from even making a CoC application under the old NRPF regime (which it should be remembered, included the discretion as to whether to lift the condition, even if imminent destitution was present).

54. Other features of some of the claimants' cases were imminent eviction, substantial arrears of utility bills and rent, pending or imminent childbirth and a general situation that they, and their dependent children, were "at real risk of losing the rooves over their heads and being homeless" as HHJ Ralton put it. He went on to say "There was no evidence of financial support being available from any of the fathers of the children. Mr Tabori [counsel for the Home Office] tells me that some local authority funded financial assistance may have been available under section 17 of the Children Act 1989 but I am left with the clear impression (as was the Defendant) that without access to public funds the Claimants were at risk of being left so destitute that their Article 3 rights could have been breached. To adopt the words of Baroness Hale, the Claimants (who are female) and their children were at sufficient risk of 'rooflessness' and 'cashlessness' by being deprived of state benefits until the state deemed them to be actually destitute (as opposed to imminently destitute which is the new test after ***W***)."

55. Additionally, the judgment stated that the claimants "all speak of their states of anguish, worry and desperation which would be consistent with the financial straits the Claimants were in." It must not be controversial to observe that a single mother, caring for small children – and further in one case, about to give birth to another child – must experience and suffer a considerable degree of mental strain due to the effect upon their dependent children of their straightened circumstances.

56. The judge considered the ratios of the House of Lords judgment in ***Limbuela*** and the Divisional Court in ***W***. He concluded, in respect of the latter, that:

"[42]. There is nothing in the judgment which I consider can be taken as authority for the propositions that:
(a) There were relevant procedural rights;
(b) Which had been breached;
(c) Which gave the victims a right to damages.

I do not consider that I can place any weight at all on the subsequent agreement reached on damages in that case which were made expressly with no admission of liability on the part of the Defendant."

57. I agree with that analysis of ***W***. Insofar as that case is relied upon by the claimants as authority of each or any of (a), (b) or (c) as listed by the judge in [42] of his judgment listed in the preceding paragraph, it does not do so.

58. The judge stated that the issue was whether the Home Office was liable for failing to act prospectively to avoid potential breaches of the claimants' Article 3 rights, and that the claimants had presented sufficient evidence before him to show that there was a real risk of breach. For that reason, those cases in which claims under Article 3 were refused on the basis that the level of destitution was insufficient to amount to inhuman and degrading treatment, such as ***AO v Home Office*** [2021] EWHC 1043 (QB) were not of assistance to him.

59. He derived from ***Beganovic v Croatia*** [2009] ECHR 991 the proposition that "the court did not require the applicant to prove breach of Article 3 in order for the state's obligation to protect to be engaged". That is correct, but all I would add is that the same proposition can be derived directly from ***Limbuela*** and ***W***, which both deal with the situation where there is the imminent prospect of breach of Article 3 rights. As Lord Hope said in the former, it is not a question of wait and see. HHJ Ralton cited from ***R (Gentle and Another) v Prime Minister & Others*** [2008] UKHL 20; [2008] 2 WLR 879 (HL) before stating at [52]:

"… It is common ground between Mr Goodman and Mr Tabori that an investigative duty is parasitic on the duty to protect but it cannot be said that the investigative duty arose only once the substantive duty has been breached; there needed to be an arguable case that the substantive right arose on the facts of their cases. I do not take *Gentle* as authority for the proposition that a claim for breach of procedural rights cannot succeed absent a breach of the relevant substantive right."

60. He observed that in ***O v Commissioner of Police for the Metropolis*** [2011] EWHC 1246 (QB); [2011] HRLR 29, it was held that the police were under a duty to investigate once a credible account of an alleged infringement had been brought to their attention, before stating: "I see nothing in this authority to support the proposition that no duty would have arisen notwithstanding a credible account of a risk that their rights had been infringed".

61. He also considered the more recent case of ***R (DMA and others) v Secretary of State for the Home Department*** [2020] EWHC 3416 (Admin); [2020] 1 WLR 4420. In that case, the Secretary of State had accepted a duty to provide accommodation to five destitute failed asylum seekers in order to avoid a breach of their Article 3 rights. There was a delay to the provision of accommodation. Knowles J noted that by accepting a duty to accommodate the claimants, the Secretary of State accepted that they appeared to be destitute and facing an imminent prospect of serious suffering caused or materially aggravated by denial of shelter, food or the most basic necessities of life. The judge observed that the claimants did not claim that the delay caused actual breach of their

Article 3 rights, rather the claim was founded on breach of a duty to prevent destitution. Knowles J had found that the Secretary of State breached her duty to provide accommodation within a reasonable time and was in breach of duty for failing to monitor the provision of accommodation. The Court awarded damages to the claimants for just satisfaction pursuant to section 8 HRA 1998.

62. Finally, the judge dealing with this case at first instance addressed the post-***W*** judgment of ***R (ST and VW) v SSHD*** [2021] EWHC 1085 (Admin); [2021] 1 WLR 6047, in which the Divisional Court (Elisabeth Laing LJ, Lane J) held that the unlawful NRPF policy had not given rise to an investigative duty concerning the working of the scheme. He stated, however, that he did "not read the judgment as any authority for the proposition that the Secretary of State cannot be liable for an unlawful regime, which, on the evidence, could push a claimant into such destitution as to breach their Article 3 rights". However, it should be noted that the case of ***ST*** concerned a finding that there was no investigative duty. The Divisional Court in that case, although quashing the decision on other grounds, had observed in this respect at [178]:

"[178]….We do not consider it arguable that a section 3 investigative duty has been triggered by the fact that the policy has been operated for several years in a way which may well have led to breaches of article 3 because applicants have had to wait longer than they should have had to in order to be given recourse to public funds. The policy has been found to have been unlawful, and that has been corrected. That means that the purposes which, it is said, would be served by an article 3 investigation, could not be usefully served in this case. There is no 'culpable and discreditable conduct to expose to public view', for example; there are no covert 'processes to be discovered or rectified', and there are now no relevant lessons to be learnt. We dismiss this ground of challenge."

63. Following consideration of the cases set out above, HHJ Ralton concluded that "the Claimants, on the evidence in their cases, have a right to claim damages for breach of their procedural rights under Article 3 ECHR in light of the Defendant's imposition of NRPF conditions on them pursuant to the application to them of the NRPF scheme found by the Divisional Court in ***W*** to breach the procedural right under Article 3 of the ECHR. In particular I reject the contention that the Claimants must prove actual breach of Article 3."

64. He went on to consider damages at a subsequent hearing, refusing the Home Office permission to appeal. However, as I have explained, Foxton J granted permission to appeal and that was heard by May J.

E. The judgment under appeal

65. There were four grounds of appeal that were advanced by the Home Office in the appeal to the High Court heard by May J. They were as follows:
1. Ground 1: The judge had failed to identify the nature and scope of the Article 3 violation justifying an award in damages.
2. Ground 2: The judge had misconstrued the decision in ***W***.
3. Ground 3: The judge had misunderstood the conditions and scope of Article 3's procedural duty.
4. Ground 4: The judge had erred in law in his analysis of causation.

66. May J produced a careful, thorough and well-reasoned judgment, in which she allowed the appeal on the first two grounds and set aside the decision of HHJ Ralton on the preliminary issue. No alternative answer to the preliminary issue was included in the order of 2 February 2023 consequent upon her judgment. Her judgment itself is at [2023] EWHC 196 (KB). She accepted the judge's summary of the facts. She considered what she called the "old NRPF scheme" and the Divisional Court's decision in ***W,*** noting that the Supreme Court in ***R (A) v Secretary of State for the Home Department*** [2021] UKSC 37; [2021] 1 WLR 3931 had disapproved the test applied in ***W*** for determining the lawfulness of a policy but had in any event considered that ***W*** was, even applying the proper approach, correctly decided. At [21], she recorded that following the judgment in ***W*** and pursuant to the court's order, but after the time material to the claimants in the present appeal, the Guidance to case workers concerning the NRPF condition had been amended.

67. She cited at [25] from the Practice Direction pertaining to the recovery of damages issued by the President of the ECtHR on 28th March 2007; Rule 60(1) of the ECtHR Rules of Court; and the case of ***A v UK*** (3455/05) (2009) 49 EHRR 29 at [249]. These state and demonstrate that a clear causal link must be established between the damage claimed and the violation of Article 3 alleged, a point which is made clear in the Strasbourg jurisprudence. At [26] she cited from Lord Bingham's summary of the requirements for an award of damages under section 8 of HRA 1998 in ***R (Greenfield) v Secretary of State for the Home Department*** [2005] UKHL 14; [2005] 1 WLR 673.

68. She set out the four grounds of appeal advanced by the Home Office and considered the parties' arguments on appeal. Her reasoning begins at [50], under the heading "Discussion and conclusions". Here, she adopted the three broad categories of duties as "systems", "operational" and "procedural/investigative", the approach used by Johnson J to describe the nature and scope of the obligations imposed on public authorities by Article 3 ECHR in the case of ***MG v SSHD*** [2022] EWHC 1847; [2023] 1 WLR 284 at [6]-[8]. She then said, from [53] onwards:

> "[53] Mr Goodman's case rests upon an argument that an Article 3 systems duty to protect against destitution arose at the time the NRPF condition was imposed as a condition of LLTR. This must be, in effect, what the judge below decided, since he awarded damages calculated from the date of the CoC applications, on the basis that each Claimant must have been imminently destitute at least by then.
>
> [54] As Mr Thomann pointed out, if such an obligation were found to exist it would represent a significant extension of the class of Article 3 systems duties. I do not believe that such an extension is justified in principle, or that ***W*** is authority for a duty arising at the point of imposition of the NRPF condition. Where an individual is not destitute/imminently destitute at the time of being granted LLTR it is not unlawful to impose a NRPF condition. Nor is it unlawful to require a person in respect of whom a NRPF condition subsists to make an application to have it lifted if their circumstances deteriorate. In ***ST*** the court rejected a submission to the effect that delays in dealing with CoC applications

gave rise to a systems breach (at [177]), it had not been suggested that the requirement to make such an application was itself unlawful.

[55] It follows that there could be no violation of any Article 3 duty before a CoC application has been made, bringing the circumstances of destitution/imminent destitution to the attention of the SSHD. There is then the question of whether a violation occurs only upon IDT being sustained, or whether it could arise earlier."

69. May J also considered the authorities relied upon by the claimants to support their case that awards under section 8 of HRA 1998 for a breach of Article 3 may be made in the absence of proof of inhuman and degrading treatment. She distinguished ***Beganovic v Croatia*** [2009] ECHR 992 at [57] and ***D v Commissioner of Police of the Metropolis*** [2014] EWHC 2493 (QB); [2015] 1 WLR 1833. That latter case concerned civil claims brought by victims of the notorious London rapist taxi driver, John Worboys. Green J (as he then was) made declarations and awarded damages to two of Worboys' victims who succeeded in their claims for breaches of their Article 3 rights. May J distinguished this case on the basis that it concerned a breach of the investigative duty in circumstances where the relevant inhuman and degrading treatment had already been established. The judge had found that the police were liable to subsequent victims of the rapist taxi driver for failing adequately to investigate his earlier offending. As she put it at [58] "there is no sense in which they had not sustained [inhuman and degrading treatment]". A different way of expressing the same point is that actual breach of those victims' Convention rights was not in issue in that case because of its particular facts.

70. She also distinguished another case relied upon by the claimants, namely ***R (CSM) v Secretary of State for the Home Department*** [2021] EWHC 2175 (Admin); [2021] 4 WLR 110, in which the claimant was a minor and an asylum-seeker who had been detained at an immigration detention centre. He had AIDS, for which he needed to take anti-retroviral drugs every day. The staff at the detention centre failed to take adequate steps to obtain those drugs for him, as a result of which he went for some days without them. On the medical evidence Bourne J was satisfied that there was a grave risk to the claimant's health without his anti-retroviral medication, and held that the SSHD was in the circumstances under an Article 3 duty to protect him from such a risk of ill-health by ensuring that he received the necessary drugs. May J identified this case as clearly an example of where it was not necessary for the claimant to have experienced inhuman and degrading treatment in order to find a breach of an Article 3 duty; the facts were distinguishable on the basis of the vulnerability of the claimant, the gravity and immediacy of the risk to his health, and his dependency as a detainee. She considered other cases argued before her, including European ones such as ***Ilias and Ahmed v Hungary*** (2020) 71 EHRR 6 which involved the removal of failed asylum seekers in Europe. That case provided her, entirely understandably, with little assistance. The claimants were Bangladeshi nationals seeking asylum in a transit zone in Hungary with possible refoulment issues arising in Serbia. I would add that such cases as that one cannot really advance the arguments in this case one way or the other.

71. May J identified the decision of Knowles J in ***DMA*** as the principal authority upon which the claimants relied. She rejected the submission that ***DMA*** was on all fours with the present case and held that "*DMA* is not authority for breach of a duty to prevent destitution absent an individual having first drawn the attention of the SSHD to their situation" at [54] of her judgment. She also stated that ***Limbuela*** was not authority that assisted the claimants either, explaining at [64]:

"I disagree with Mr Goodman's submission that the finding of a violation in *DMA* precisely matches his case for a violation here. *DMA* is not authority for breach of a duty to prevent destitution absent an individual having first drawn the attention of the SSHD to their situation. Nor is *Limbuela,* where Lord Hope referred to the duty on the SSHD arising "as soon as the asylum-seeker makes it clear that there is an imminent prospect that a breach of the article will occur…" (at [62]).

72. May J considered the nature and extent of any Article 3 duty arising in the case before her, from [65] onwards in her judgment, in a series of passages which merit reproduction verbatim:

"[65] Persons with LLTR subject to a NRPF condition are in a very different position to asylum-seeker claimants such as those in ***DMA*** and ***Limbuela***. Whilst it may properly be said of the latter that the restrictions imposed upon them have thrust them into destitution, the same is not true of the former class of persons. They are entitled to work and provide for themselves. Most persons with LLTR subject to a NRPF condition will work and will never need state support; that is the policy intention. But some may find themselves struggling, as these Claimants did. At that point, unlike asylum-seekers, they are able to make a CoC application to have the NRPF condition lifted.

[66] The ability to work and to apply, if necessary, to have the NRPF condition lifted are key when considering whether it is right to expand the class of low-level systems duties to encompass a duty to protect persons subject to a NRPF condition from destitution. In ***MG***, Johnson J declined to find an Article 3 systems duty owed by the SSHD to asylum-seekers living in a hostel to protect them from attack by fellow-inhabitants, reasoning as follows (at [59]):

> "Here, there was no relevant removal of the claimant's autonomy or that of [his attacker]. Neither of them was reliant on the defendant for their own wellbeing, save to the extent of avoiding destitution and providing access to medical care. Everybody is at residual risk from the violent and criminal actions of others. The risk that materialised in this case was no different in principle from the risk that might impact on anybody."

[67] Unlike asylum-seekers, the Claimants here were able to work and could make an application for lifting of the NRPF condition at any time. They were in no sense reliant on the SSHD for their own well-being. To adapt the above reasoning, losing employment or home, or otherwise facing destitution without state support, is a residual risk which everyone faces. Whilst the categories of Article 3 systems duties are never closed, in my view the Claimants'

circumstances were not such as to call for an extension of a systems duty owed to them at the point of imposition of the NRPF condition.

[68] Having said this, I cannot accept that there can be no violation of a systems duty owed to persons subject to an NRPF condition unless or until they can show that they have sustained IDT. The decision in ***W*** was based upon an obligation to lift the NRPF condition at the point where a person is imminently destitute, that is to say at a point before actual destitution. The SSHD is not entitled to wait for a person subject to a NRPF condition to sustain actual IDT before lifting the condition, her duty is to act to prevent that point being reached. It follows that I reject Mr Thomann's "higher line" argument to the effect that a violation can only be said to have occurred if a person subject to an NRPF condition can show that they have sustained IDT.

[69] I prefer Mr Thomann's alternative, "lower line" submission, as being more consistent with the reasoning of the court in ***W***, that a violation of an Article 3 duty owed to persons with LLTR subject to a NRPF condition will occur if, having made a CoC application, the SSHD either wrongly refuses it, or deals with it unreasonably. What is unreasonable will depend upon the circumstances of a particular case. This seems to me also in keeping with the decision in ***DMA***, where the systems duty held to have been breached concerned the regime applied to the provision of accommodation once the need for it had been identified and accepted.

….

[71] In my view the only right which persons subject to the NRPF scheme had was to have their applications, whether for a NRPF condition not to be imposed or an existing condition to be lifted, heard and decided in a reasonable time in such a way as to avoid their falling into destitution to the point of IDT. The unlawfulness identified in *W* went solely to the approach taken by the SSHD's caseworkers when deciding such applications.

[72] It follows, in my view, that if these Claimants are to identify a relevant violation of their Article 3 right then they must show that the SSHD wrongly decided their applications to have the NRPF condition lifted i.e. that in their case(s) the risk of an unlawful decision identified by the court in ***W*** actually materialised, either because their CoC application was wrongly refused, or because there was unreasonable delay in deciding it.

[73] Whether, in the case of a person who can show that their CoC application was not properly determined, either because it was refused or a decision was unreasonably delayed, that person will be entitled to an award of damages under section 8 of the 1998 Act will depend upon the particular circumstances of the case, applying the principles discussed by Green J in ***D***. It is impossible, and would be inappropriate, to lay down any hard or fast rule."

73. Having set out her reasoning, May J allowed the appeal. She accepted that the judge below had failed to identify the nature and scope of the Article 3 violation, and considered that he had misconstrued the decision in ***W***. She did not therefore

find it necessary to address Ground 3. She found that there was no causal link between the damages claimed and a violation of Article 3 rights (which had not been established): at no stage had the claimants suffered destitution to the point of inhuman and degrading treatment, and she noted that when they applied to have the condition lifted, their requests were granted. She found that a claimant may be able to recover damages for breach of an Article 3 systems duty if the SSHD, having been notified of circumstances amounting to destitution/imminent destitution, refused to lift or unreasonably delayed in lifting, the NRPF condition.

F. Grounds of Appeal and Discussion

74. The claimants sought and obtained permission to appeal from the Court of Appeal, as they were required to do given this was a second appeal, under CPR Part 52.7(1). Permission was granted by Whipple LJ on all three grounds. These are:
    1. Ground 1: The learned judge misdirected herself on the nature, scope and breach of the procedural right/duty in Article 3 ECHR (in the context of destitution risking inhuman or degrading treatment).
    2. Ground 2: The learned judge misunderstood the findings below and the claimants' case.
    3. Ground 3: The learned judge misapplied the "low-level" systems duty in Article 3 of the ECHR.

75. In granting permission, Whipple LJ said that she had "a concern…that this case has proceeded on a wrong footing from the outset, as a trial of a preliminary issue. In a damages claim, under the HRA or otherwise, it is often important to know the precise facts which give rise to that claim. Taken as a preliminary issue, this does rather look like a "class action" for all those who were subject to the old NRPF, as May J noted (at [70]) - a point which formed part of her reasoning for allowing the appeal and dismissing the claim." I echo those concerns, and indeed much of what has transpired has followed on from that "wrong approach" having been adopted.

76. The Home Office also lodged a Respondent's Notice seeking to uphold the decision of May J on the following two additional grounds:
    1. May J could (and should) have allowed the appeal on the additional basis that (save in cases of breach of the investigative duty) it was necessary to show actual IDT in order for a just satisfaction claim to be made.
    2. Mere demonstration of delay or unreasonable dealing with a NRPF application does not, without more, establish a claim to damages by way of just satisfaction under Article 3.

77. Leave was also given shortly before the hearing before us for the claimants to lodge a supplementary skeleton argument, to deal with the two additional grounds raised in the Respondent's Notice, dealt with at [96] in Section F below.

78. The arguments before us by both the claimants and for the Home Office were essentially those advanced before both HHJ Ralton and on the appeal before May J. The claimants sought to differentiate between what were described as "substantive rights" under Article 3, and "procedural rights". The former were

explained in the claimants' skeleton argument as the right not to be subjected to inhuman or degrading treatment; the factual issue of whether any claimant had been subjected to this had not been determined as part of the determination by HHJ Ralton of the preliminary issue. They also relied upon the fact that, "whilst the old NRPF regime was in force, the claimants had to prove that they had already become destitute before the defendant would lift the NRPF condition." That policy failed to anticipate and obviate inhuman or degrading treatment, and "was a breach of duty of a procedural and anticipatory character within Article 3." It was also observed that, for these claimants, the NPRF condition was lifted between 40 and 62 days after, even on the Home Office's own acceptance of the CoC application, the state of destitution had been reached. In the supplementary skeleton argument referred to at [77], the claimants argued that before May J the Home Office had developed an alternative submission that Article 3 would be breached only where the Secretary of State had wrongly or unreasonably delayed determining the claimants' CoC applications. It was said by the claimants that this conflicted with the Home Office's pleaded case in any event, and also conflicted with what was called "the root of the preliminary issue". It was, however, the contention preferred by May J at [69] in her judgment under appeal.

79. Technical pleading points are not always the most attractive argument to advance generally, but particularly not on a second appeal in any event. It may be, in any case, that logical consideration of points during submissions to the court will lead to an evolution, or development, of the principles being contended for by any particular party in any particular case. I would certainly not wish to determine this appeal by deciding a contentious pleading point. The arguments advanced by the Home Office before this court identified that the heart of the dispute was, essentially, whether the claimants could obtain damages for just satisfaction from the Home Office having applied a policy, found to be unlawful in ***W,*** without the need for any findings of fact to have been made in any of the individual claimants' cases that they did, in fact, suffer inhuman and degrading treatment. The Home Office explained that, by granting a foreign national LLTR, an overall positive benefit was conferred, namely permission to stay in the jurisdiction, and that ***W*** was not authority for the award of damages in the way contended for by the claimants. The need for a causative link between a breach by the Home Office of its duty, and damage of a form falling with the scope of Article 3, was emphasised. As further advanced in the two grounds contained in the Respondent's Notice (which are dealt with further below), the submissions before us for the Home Office were very much of a character that there was nothing on the facts here that would entitle any claimant to damages for breach of their rights under Article 3. However, in my judgment it is consideration of the scope of that duty that must come first; without defining the duty, it is potentially confusing to embark upon any analysis of breach of it.

80. The principles governing Article 3, including the positive obligations imposed on public authorities are usefully summarised in ***X v Bulgaria*** (2021) 50 BHRC 244 (Application no. 22457/16):

"177. The obligation of the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and

freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to ill-treatment, including ill-treatment administered by private individuals… Children and other vulnerable individuals, in particular, are entitled to effective protection …

178. It emerges from the Court's case-law as set forth in the ensuing paragraphs that the authorities' positive obligations under Article 3 of the Convention comprise, firstly, an obligation to put in place a legislative and regulatory framework of protection; secondly, in certain well-defined circumstances, an obligation to take operational measures to protect specific individuals against a risk of treatment contrary to that provision; and, thirdly, an obligation to carry out an effective investigation into arguable claims of infliction of such treatment. Generally speaking, the first two aspects of these positive obligations are classified as "substantive", while the third aspect corresponds to the State's positive "procedural" obligation."

81. Those paragraphs were recently endorsed by this Court in ***AB v Worcestershire CC*** [2023] EWCA Civ 529. Lewis LJ, with whom Dingemans and Baker LJJ agreed, having cited from ***X v Bulgaria*** at [13], reiterated at [14]:

"[14] Thus, Article 3 prohibits a state from inflicting inhuman or degrading treatment or punishment. It also imposes certain positive obligations on the state. These include putting in place a legislative and regulatory system for protection (often referred to as the "systems duty"). They also include an obligation to take operational measures to protect specific individuals from a risk of being subjected to treatment contrary to Article 3 (often referred to as "the operational duty"). They also include an obligation to carry out an effective investigation into arguable claims that treatment contrary to Article 3 has been inflicted (often referred to as the "investigative duty")."

82. A problem which has arisen in this case, in my judgment, is what might be described as the shifting or unclear terminology in some of the arguments, including in the first judgment in the County Court. Describing someone such as a claimant in this case as having "procedural rights" and "substantive rights" under Article 3 is, in my judgment, apt to confuse. That confusion can be compounded when one considers that the word procedural has been used in the European cases such as ***X v Bulgaria*** to describe what this court in ***AB v Worcestershire CC*** more correctly labelled as the investigative duty. As May J observed at [50] of her judgment:

"[50] Article 3 has been interpreted as charging public authorities with certain obligations. The nature and scope of these obligations is still developing and the manner of describing them has not always been consistent. However they fall into three broad categories of "systems", "operational" and "procedural/investigative", helpfully set out with reference to relevant authorities by Johnson J in the case of ***R (MG) v SSHD*** [2022] EWHC 1847 (Admin) at [6] to [8]."

83. ***MG*** concerned injuries suffered by an asylum seeker housed in a hotel. Another resident there ran amok, stabbed several people including the claimant, and was shot dead by police. The claimant sought an order that the defendant commission an independent investigation into the events which culminated in that attack which had caused his injuries. The judge adopted the descriptive terms of systems obligation; operational obligation and investigative obligation to describe the different types of positive obligations upon public authorities as a result of Article 3 (and Article 2, which arose in that case but does not arise in this one). That descriptive approach was gratefully adopted by May J at [50] in her judgment, and I adopt it too. The duties upon a public authority are three-fold, or best seen as falling into those three categories.

84. I consider the helpful descriptive terminology used by Johnson J, and already approved by the Court of Appeal in the judgment per Lewis LJ at [14] in ***AB v Worcestershire CC***, to be the correct one. In my judgment, the three groups of positive obligations upon public authorities that arise under Article 3 (namely the systems duty; the operational duty; and the investigative duty) are those that should be used. Notwithstanding the final sentence of [178] of ***X v Bulgaria*** quoted above, which seeks to further describe or group those three categories into "substantive" (the first two) and "procedural" (the last one), I would resist that. Describing, in the context of a claim for damages of Article 3 rights, one of those types of duty as procedural and another as substantive, introduces into the taxonomy an unnecessary and confusing gloss. Indeed, in this case it has led to the focus being upon what type of rights might, or might not, if breached, lead to a successful damages claim, at the expense of, and thereby diluting, consideration of the requirements of section 8 HRA 1998.

85. In her judgment, May J – having adopted the systems/operational/investigative terminology, went on to say:

> "[50] …. The "procedural" obligation contended for by the Claimants in the present case appears to me to fall into the "low-level systems" category identified by Johnson J in ***MG***…."

86. I agree with May J that the duty contended for by the claimants in this case is in reality (regardless of the claimants' disinterest in describing it as such themselves) a low-level systems duty. There is a difficulty here given the majority of the cases dealing with the three types of duty concern the right to life under Article 2, rather than the rights under Article 3. But there is sufficient to make clear that the same descriptions of the types of duties arise under both articles. Both ***Van Colle v Chief Constable of Herts Police*** [2008] UKHL 50; [2009] 1 AC 225; and ***Smith v Ministry of Defence*** [2013] UKSC 41; [2014] AC 52, are quoted and relied upon by Johnson J at [6] to [8] of his judgment in ***MG***. Lord Bingham at [28] to [30] in ***Van Colle*** considered the origins of the duty in the context of Article 2. Lord Hope at [68] in ***Smith*** explained the features of the duty in the context of the right to life. Applying the rights under Article 3 not to be subject to inhuman or degrading treatment by analogy to the Article 2 rights, any duty that were to be found to arise here would be a low-level systems duty to adopt administrative measures to prevent a person falling

into the severe state of destitution that would constitute inhuman and degrading treatment contrary to Article 3.

87. There are various situations in which such a systems duty has been held to arise. It does so whenever a public body undertakes, organises or authorises dangerous activities, but it has also been held to arise in the circumstances of health and social care, where a public body is responsible for welfare of those in its care and exclusive control, and also in hospitals, prisons, detention facilities, waste collection and building sites, on board a ship, derelict buildings, road safety and flooding reservoirs. These different factual situations are all helpfully listed at [6] of ***MG***, together with the references to the different European cases relevant to each. The descriptive summary I have provided here is sufficient to demonstrate the wide range of situations in which such a duty has been found.

88. May J held at [67] that "whilst the categories of Article 3 systems duties are never closed, in my view the Claimants' circumstances were not such as to call for an extension of a systems duty owed to them at the point of imposition of the NRPF condition." I accept the categories of systems duties are not closed; however, I do not accept, and disagree with her, that it would be to extend the systems duty upon the Home Office both to consider that the systems duty applied in this situation, and that the obligation that arose as a result of that duty was owed to the claimants. The Home Office had (and at this stage absent any findings on the facts and causative link, this can only be theoretical) by reason of the imposition of the NRPF condition, potentially put each claimant in the position whereby public funds were not available to prevent them falling into such severe destitution that this amounted to a breach of the rights that each had under Article 3 not to be subjected to inhuman or degrading treatment. Having done so, there must in my judgment be a low-level systems duty upon the Home Office.

89. May J rightly considered and rejected the argument for the Home Office that there was no such systems duty at all. She held – I consider correctly – the following at [68]: "I cannot accept that there can be no violation of a systems duty owed to persons subject to an NRPF condition unless or until they can show that they have sustained [inhuman and degrading treatment]. The decision in ***W*** was based upon an obligation to lift the NRPF condition at the point where a person is imminently destitute, that is to say at a point before actual destitution. The SSHD is not entitled to wait for a person subject to a NRPF condition to sustain actual [inhuman and degrading treatment] before lifting the condition, her duty is to act to prevent that point being reached."

90. I agree with the analysis of May J in the judgment under consideration up to this point. However, it is what then follows with which I disagree, and consider to be wrong in law. I do not agree that in the present context there is any proper distinction to be made between these specific claimants, and asylum seekers who are not permitted to work. That May J considered this to be an important differentiating factor can be seen in [65] and [66] of her judgment (set out at [72] above) including that she considered these claimants to be in a "very different position". In doing so, she fell into error. The scope of the Article 3 rights enjoyed by everyone – whether citizens, visitors, those waiting for their

applications to be dealt with, or otherwise – are the same. This is the very basic right not to be subjected to inhuman and degrading treatment. That fundamental right is not considered differently whether one has a right to work or not. I consider that the Home Office owed a low-level systems duty to these claimants.

91. Secondly, I disagree with her conclusion at [71] where she stated:
"In my view the only right which persons subject to the NRPF scheme had was to have their applications, whether for a NRPF condition not to be imposed or an existing condition to be lifted, heard and decided in a reasonable time in such a way as to avoid their falling into destitution to the point of [inhuman and degrading treatment]." (emphasis added)

92. I disagree with that conclusion for these reasons. The rights that everyone, including those subject to an NRPF condition under the old NRPF regime, has for these purposes are those enshrined under Article 3, namely the right not to be subjected to inhuman and degrading treatment. The claimants did not *only* have a right to have a CoC application heard and decided within a reasonable period of time, as found by the judge. Such an approach fails to follow or apply the explanation of the duty that arises once someone is in imminent prospect of becoming subject to inhuman and degrading treatment, a point decided in ***Limbuela***. Imminent means immediate, or about to happen. The administrative arrangements must be proportionate, but the immediacy of the situation must be taken into account.

93. The analysis of May J also fails to take into account the situation under the old NRPF regime, where an applicant was discouraged from even making a CoC application because, under that earlier regime, there was a discretion upon the decision maker whether to lift the condition or not. That has been found by the Divisional Court to have been unlawful in ***W***, a case which the Supreme Court in ***A*** held was correctly decided. It would be a causation question which would depend upon the evidence in any or each different case.

94. It follows, therefore, that I disagree in law with the ultimate conclusion of May J at [72] of her judgment that for any of these claimants to show a violation of their Article 3 rights, they would also have to show that the Home Office wrongly decided their application to have the NRPF condition lifted. If that were right, it would mean that a person prevented by a NRPF condition under the old NRPF regime from the benefit of the umbrella protection of the state to avoid extreme destitution (which constituted inhuman and degrading treatment) could fall into such a severe condition that their Article 3 rights were breached, and such an applicant might wait four months (for example) for the Home Office to lift that condition, but they would have no recourse unless the condition were not lifted. That is the logical consequence of what the judge found at [72] of her judgment. I do not consider that to be correct in law.

95. This fails to follow the ratio of ***Limbuela*** and would mean that there would be no systems duty upon the Home Office upon which a claimant could rely if she were at imminent risk of having her Article 3 rights breached by falling into extreme destitution. I consider that there is such a systems duty, and a claimant

at immediate or imminent risk of having her Article 3 rights breached is entitled to rely upon it.

F: Respondent's Notice

96. I turn to consider the two additional grounds advanced in the Respondent's Notice for upholding the judgment of May J on other grounds. These were:
    1. that May J could (and should) have allowed the appeal on the additional basis that (save in cases of breach of the investigative duty) it was necessary to show actual inhuman and degrading treatment in order for a just satisfaction claim to be made;
    2. that what is called "mere demonstration of delay or unreasonable dealing" by the Home Office with a NRPF application does not, without more, establish a claim to damages by way of just satisfaction under Article 3.

97. Turning to the substantive arguments raised by the Respondent's Notice, so far as the first of the two grounds is concerned, I consider that damages can only properly be awarded to a claimant for any breach of Article 3 rights by the court applying section 8 of the Human Rights Act. As set out at [46] and [47] above, this can only be done after taking account of <u>all</u> the circumstances of the case; and arriving at the conclusion that damages are necessary to afford just satisfaction to the claiming party. I agree that this requires any claimant to demonstrate to the court's satisfaction either that:
    (a) they have suffered inhuman and degrading treatment; or
    (b) they have been at immediate risk of inhuman and degrading treatment; have notified the Home Office of this by making a CoC claim; have not had a positive and prompt response to that claim; and have suffered severe distress during the period before the claim is resolved.
    A breach or prospective breach, in the phrase used by Lord Bingham in ***Greenfield***, is the pre-condition to an award of damages for breach of Convention rights.

98. I agree that simply having been made subject to a NRPF condition cannot be sufficient, alone and of itself. However, I do not consider that the first of two alternative grounds contained in the Respondent's Notice is consistent with the ratio of ***Limbuela***. It follows therefore that it does not assist the Home Office on this substantive appeal itself; rather, a claimant having suffered actual inhuman and degrading treatment is a significantly important factor that the court would take into account. The first ground in the Respondent's Notice also ignores the situation where any claimant subject to a NRPF condition was at imminent risk of suffering inhuman and degrading treatment, had notified the Home Office of this by making a CoC application, and that claim was not responded to positively and promptly.

99. Additionally, the second ground advanced in the Respondent's Notice is not one which is of any assistance to the Home Office and I reject that too. It amounts to the Home Office contending, admittedly on a hypothetical basis, that there could be "delay or unreasonable dealing" in assessing a CoC application made by someone at imminent risk of inhuman and degrading treatment, without creating any remedy. On the information before us, one of the claimants waited four months *after* submitting her CoC application before the NRPF condition

was lifted, and two others waited two months each. Those time scales do not seem to me to sit properly with dealing with an application from someone who is at immediate risk of falling into such a state of extreme destitution that their rights under Article 3 are about to be breached.

100. Turning to the second element of the issue on this appeal, namely recovery of damages, I have already explained that quantum of these is not in issue on this appeal. It may assist in other cases to record that the level of damages awarded here was modest, reasonable and subject to no separate challenge by the Home Office. May J expressed her view that, had her conclusion on the appeal before her been different, she would not have interfered with the award of damages. The non-pecuniary element of damages awarded for each adult claimant was £2,000, and for each child £500. The rationale for this differential was explained by HHJ Ralton as being caused by the different levels of anxiety and distress that a single parent would experience, compared to their child. I endorse and approve of that approach. I also accept that a sensible measure for calculating pecuniary damages would be the amount of state benefits that a claimant would be entitled to be paid, from the date of making a CoC application until the date the NRPF condition is lifted. That is a sensible and self-limiting approach; as Mr Goodman explained, it was a pragmatic approach that the claimants had voluntarily adopted, which was adopted and approved by the first-instance judge. It also seems to me to be entirely justifiable as a matter of principle, but on the assumption that each of the claimants can demonstrate that the conditions which they suffered amounted to inhuman and degrading treatment such that their Article 3 rights were breached, or that there was an imminent prospect of that state of affairs being reached. As explained above, inhuman and degrading treatment means a condition that is more severe than destitution. This method of calculation of damages, both pecuniary and non-pecuniary, also matches that adopted by Knowles J in ***DMA***, and has the benefit of being logical.

101. HHJ Ralton concluded on the facts at [68] of his judgment by stating that "Accordingly I cannot see how, on the facts of this case, just satisfaction can be achieved without an award of damages." In a case where there are factual findings of actual inhuman and degrading treatment in the claimants' favour, then it is hard to see that the judge would come to a different conclusion. Lord Bingham in ***Greenfield***, after setting out the pre-conditions at [6] of his speech to which I have referred, said "it would seem to be clear that a domestic court may not award damages unless satisfied that it is necessary to do so, but if satisfied that it is necessary to do so it is hard to see how the court could consider it other than just and appropriate to do so." That seems to me to match the approach adopted by the judge at first instance, admittedly using slightly different words.

102. But I repeat, damages under section 8 of the HRA can only be awarded if the conclusion, after considering the facts of each case, is reached by the judge hearing liability that just satisfaction requires it. In a case where there is no evidence of actual inhuman and degrading treatment, and less than convincing evidence of severe anxiety and distress at the imminent prospect of such treatment, a judge would be fully entitled to take the view that no award of damages was necessary. The judge correctly identified and agreed with the

submission made by the Home Office that there was no "strict liability" and that "there must be a causal link between the violation and damage which may be non-pecuniary such as for physical or mental suffering." That is not challenged on this appeal, and was not challenged before May J. I agree with the submissions below made by the Home Office on this point. A causal link must be established; nor can there be any "strict liability" approach.

103. I would therefore allow the claimants' appeal on Ground 3. In those circumstances, my view of the merits of each of Ground 1 and/or Ground 2 will make no difference to the outcome on appeal, which will, if my Lords agree, succeed. However, Ground 1 makes the mistake of adopting the confusing terminology of the preliminary issue itself, namely "procedural right/duty in Article 3" without defining what that is. Further, Ground 2 maintains that May J misunderstood both the findings below and the claimants' case. It does not appear to me that she misunderstood the claimants' case, and I would dismiss that ground of appeal.

104. After May J set aside the order of HHJ Ralton in the order of 2 February 2023, there is no answer to the preliminary issue. I would pose both the issue itself, and the answer, in the following terms:
"The Claimants have a right to damages for breach of their rights under Article 3 ECHR if, as a result of the conditions imposed upon them by the Home Office of having no recourse to public funds:
(a) they have suffered inhuman and degrading treatment; or
(b) they have been at immediate risk of inhuman and degrading treatment; have notified the Home Office of this by making a CoC claim; have not had a positive and prompt response to that claim; and have suffered severe distress during the period before the claim is resolved.
Such damages must be awarded by applying section 8 of the Human Rights Act 1998 in light of all the facts found to apply in each of their individual cases."

105. In summary therefore, the practical application of this to any individual claimant is as follows:
(1) if a claimant has in fact in their particular case experienced inhuman and degrading treatment contrary to Article 3, then she can be awarded damages by way of just satisfaction under section 8 of the Human Rights Act;
(2) if a claimant was subject to the NRPF condition under the old NRPF regime, then that of itself would not give rise to a right for damages;
(3) in between those two cases at (1) and (2), there is the possibility of a claimant subject to such a condition, who satisfies the conditions set out in the preceding paragraph. In this scenario, damages would potentially be available, on a fact-specific analysis.

106. In such a case, those damages are sensibly calculated in the way adopted by HHJ Ralton, namely pecuniary ones calculated by the benefits to which a claimant would have been entitled (absent the NRPF condition) from the date of her CoC application onwards until those benefits became available. Non-pecuniary damages would also be available in a modest amount, of the order of those awarded here by HHJ Ralton to the adult claimants, in any case where the

judge accepts on the evidence that a claimant has suffered distress that ought to be compensated by an award of damages.

107. The order of 2 February 2023 also transferred the case to Bristol District Registry. We are told by counsel that HHJ Ralton has the necessary authorisation under section 9(1) of the Senior Courts Act to sit as a judge of the High Court in any event. It is therefore of no practical impact whether it is transferred to the High Court or not. Certainly the sums are modest, and would justify it remaining in the County Court. Regardless of that, in my judgment, it would be preferable for this case to be remitted to him to deal with, as he has so much of the factual background in any event, and heard and considered the assessment of damages after his resolution of the preliminary issue. Although he made findings in his quantum judgment, these were based on his applying the "destitution" test, as set out, for example, at [15] in the transcript of that judgment. The individual cases of these claimants will need to be reconsidered applying the approach set out at [104] and [105] above.

108. All counsel appearing before us agreed that, depending upon the outcome of the appeal, remitting the matter to HHJ Ralton would be a sensible way for the matter to be progressed, and that there was no reason why he could not continue and deal with this case.

H. Conclusion

109. Therefore, the appeal succeeds on Ground 3.

Sir Nicholas Patten:

110. I agree.

Lord Justice Bean:

111. I also agree.