

**Note regarding R (Refugee Action) v Secretary of State for the Home Department**  
**CO/8523/2013**

The legal challenge

Refugee Action has challenged the level of cash support provided by the Secretary of State under s95 of the Immigration and Asylum Act 1999 to meet the essential living needs of asylum seekers. Asylum support rates have not been increased since April 2011 and since 2007 they have decreased in real terms by between 7.3% and 26.6%.

Refugee Action's position is that in order to meet essential living needs and ensure a dignified standard of living asylum support rates must be sufficient, as a minimum, to meet asylum seekers' needs for: (i) enough food, including fresh fruit & vegetables, (ii) clothing, including shoes, warm clothing during winter months & school uniform for children (iii) essential household goods such as washing powder, cleaning materials and disinfectant (iv) essential toiletries and sanitary items including sanitary protection for women (v) nappies, formula milk and other special requirements of babies and children (vi) sufficient books, games & toys to promote the development and welfare of children (vii) non-prescription medication such as painkillers, cold and flu remedies, plasters (viii) essential travel including to attend medical & counselling appointments not covered by NHS travel scheme & to attend appointments with legal advisors where not covered by legal aid (ix) telephone calls to maintain contact with families and legal representatives & for necessary communication to progress their asylum claims (x) writing materials where necessary for communication & for the education of children (xi) childcare facilities to enable parents to attend essential appointments (particularly for lone parents) (xii) the opportunity to maintain interpersonal relationships and a minimum level of participation in education, social, cultural, religious & political life, including by means of transportation to activities of this type.

Refugee Action has challenged two decisions:

- (1) The Secretary of State's failure to increase asylum support rates for 2013-14 financial year from 5 April 2013; and
- (2) The Secretary of State's decision to maintain rates at their current level as set out in a statement made to Parliament on 6 June 2013.

The grounds of challenge

It has been argued on behalf of Refugee Action that:

- (a) The Secretary of State's decision to freeze the rates for 2013/14 is irrational and in breach of European Union law because:
  - There is no evidence that she has ever carried out any adequate investigation into or assessment of the amounts which are actually necessary to meet the essential living needs of asylum seekers and it is not rational for her to simply rely on a belief that that the current rates are sufficient;

- The Secretary of State has not considered whether the rates are sufficient to ensure a dignified<sup>1</sup> standard of living or to take account of the specific needs of vulnerable people as required by the Reception Directive;
  - In addition to the evidence<sup>2</sup> that was before the Secretary of State, Refugee Action's position is that the rates for asylum support are now so low that the Secretary of State has to justify them as being sufficient to meet asylum seekers' essential living needs.
- (b) The Secretary of State is in breach of her public sector equality duty (PSED) because:
- The decision not to increase asylum support rates in the current financial year was taken following a review which, it was submitted on behalf of Refugee Action, did not meet the policy objectives set out in the Equality Act 2010 nor did the review consider the effect of a decision not to increase asylum support rate on the realisation of those objectives in relation to persons with protected characteristics (disability, pregnancy & maternity, and sex);
  - Work on the 'Policy Equality Statement' (PES) started after the review had been completed; and
  - There was no evidence to demonstrate that the Home Secretary herself had read the PES or considered the equality impacts of her decision not to increase the rates.
- (c) The Secretary of State failed to comply with her duty (under s55 of the Borders, Citizenship and Immigration Act 2009) to have regard to the need to safeguard and promote the welfare of children because:
- The Secretary of State had not given any proper consideration to the question whether the current rates of asylum support meet her duty under s55 and in particular she has failed to ensure that asylum seeking children are afforded 'fair treatment which meets the same standard a British child would receive'
  - The fact that, according to the Secretary of State, asylum support is paid for a short time does not mean that children's needs are different;
  - The issue is particularly acute for 16-17 year olds because they now receive only just over 60% of what children of that age group would receive on income support, and just over £13 less (per week) than children aged under 16. The Home Secretary's justification for paying a lower rate to this group is that (i) they have lower growth rates meaning lower clothing costs and (ii) education is not compulsory for post-16 year olds so there would be reduced costs of transport, stationery and possibly uniforms. Refugee Action argued that the justification is not rational because attendance at school for all 16 year old and many 17 year old children is now compulsory and even if (which was not accepted) there are lower clothing costs, that did not take account of the need for money to buy food and pay transport costs.

### The Secretary of State's position

The Secretary of State's defence evolved during the course of the hearing. Her principled position is that the decision as to whether to increase the rates of asylum support involves

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<sup>1</sup> Refugee Action relied on the [judgment](#) of the German Constitutional Court to support its position that ability to maintain interpersonal relationships and a minimum degree of participation in social, cultural and political life is an essential living need and asylum support rates have to be sufficient to ensure that this need is met.

<sup>2</sup> The evidence included briefings and reports from NGOs such as Refugee Action, Still Human Still Here, and Maternity Action; report by the British Medical Association, and the report of the Parliamentary Inquiry into Asylum Support for Children and Young People.

an exercise of judgment by her and with which the Court ought not to interfere unless there is an obvious public law error.

It is also her position that the s.95 scheme to provide asylum support is to do so for able-bodied destitute asylum seekers.

### Rationality/EU law

#### EU law

The Secretary of State argued that under the reception directive there is no separate duty to provide cash support and that it is the adequacy of the entirety of the support package (accommodation and cash support, as well as other in-kind benefits such as healthcare) which should be considered in deciding whether there is a breach of the Reception Directive. So far as vulnerable asylum seekers are concerned, her position is that the 'national legislative scheme as a whole' makes proper provision. On the German case, the Secretary of State's position is that it is not binding or even persuasive in the English courts. She argues the right to dignity set out in article 1 of the Charter of Fundamental Rights (CFR) does not add anything further to the right not to be subjected to inhuman and degrading treatment (article 4 of the CFR) and the rates of asylum of support are not so low as to breach article 4 of the CFR.

#### Rationality

It was argued on behalf of the Secretary of State that she made her decision not to increase the asylum support rates following a 'careful' review and that she had considered whether she should (i) make no change to rates; (ii) increase support rates by 1% (the rate at which mainstream welfare benefits had been increased in 2013) and/or (iii) link all rates explicitly to Income Support levels.

On her behalf it was said that the Secretary of State:

- undertook a detailed analysis comparing support received by those on 'mainstream' benefits with the support made available under section 95;
- took account of average UK household spending per person and that the latest ONS data (going back to 2011) showed that the poorest 10% of the UK population spend only around £37 per week per household (of 1.3 persons) on food and non-alcoholic drink and clothing;
- considered the support rates paid by other EU states but that these were not directly comparable due to wide variation in practice;
- took into account inflation but that measures of inflation do not reflect economies that households are able to achieve by reducing spending on non-essential items or by selecting lower cost alternatives;
- had considered the position of 16-17 year olds but maintained that education was not compulsory (leading to lower transport costs) and they will have lower clothing costs due to reduced rates of growth;
- considered the 'British Red Cross food parcel' (distributed by its destitution projects) worth around £10 as '..an indication of what the cost of lifting someone out of destitution could be.'
- rejected the option of increasing rates by 1% as well as the option of linking rates to Income Support because she did not consider it necessary to do so in order to meet her legal obligations.

The Secretary of State does not consider that Refugee Action's evidence<sup>3</sup> is sufficiently 'clear and cogent' to establish that the system of cash support overall is not capable of meeting asylum seekers' essential living needs<sup>4</sup>.

Her position is that the issue of whether the level of asylum support rates are sufficient to meet essential living needs has to be considered on the basis that the support is temporary and for people subject to immigration control who '...may be here for only a limited period of time..' The provision of asylum support, it was argued on the Secretary of State's behalf, is not intended to assist a person to become established, settled and to lead a fully integrated life in the UK.

#### Public Sector Equality Duty

The Secretary of State maintained that she has complied with her duty to have 'due regard' to the need to eliminate discrimination.

So far as disabled adults and children are concerned, she said that those with 'acute' needs are able to access 'mainstream' support (from Local Authorities under s21(1)(a) of the National Assistance Act). For those with additional needs which are less acute and who continue to be supported under s95, she said that '...arrangements are in place to enable access to the appropriate medical care and treatment.'

She maintained that the level of support for pregnant women and new mothers was sufficient to meet her legal obligations and that there is no discrimination on the basis of sex in the provision of asylum support.

#### S55 duty to have due regard to the need to safeguard and promote the welfare of children

It was argued on her behalf that she has complied with her duty because:

- asylum seekers with dependent children continue to receive s.95 support even after the claim for asylum has been finally decided negatively;
- her published policies take account of her obligations and there is a division of responsibilities between asylum support, local authority and NHS regimes
- she provides for a higher level of support for children than for adults in recognition of the greater needs of children
- so far as 16/17 year old children are concerned she repeated her position that children of that age are 'transitioning into adulthood' and their needs fall below the needs of children aged 15 and under.

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<sup>3</sup> In addition to the evidence that was already before the Secretary of State when she made her decision, for the legal challenge Refugee Action also produced further material in the form of the results of its own research, witness statements from British Red Cross, the Children's Society, Freedom from Torture, Helen Bamber Foundation, Still Human Still Here, director of research in Social Policy at Loughborough University and from individual refugees.

<sup>4</sup> In her defence and in a statement made by a Home Office official, the Secretary of State said that her obligation to meet essential living needs is discharged as long as she provides (i) safe, furnished accommodation (ii) sufficient food to keep those on support in health and to avoid illness or malnourishment (iii) essential toiletries (or means to pay for them) (iv) access to Primary Healthcare and immediately necessary or urgent secondary treatment; (v) the means to travel to appointments where they are out of reach (vi) some means of communication with emergency services (vii) access to education for children as well as a contribution to wider socialisation costs to promote their development and (viii) for those in receipt of asylum support for any length of time, the provision of suitable clothing to avoid any danger of illness.

### The hearing

There were 3 specific issues relating to which the Secretary of State either made concessions or raised matters not explicitly set out in her defence, skeleton argument or evidence.

### 16-17 year old children

It was conceded on the Secretary of State's behalf that she should have had in mind that education was going to be compulsory for the majority of this group from September 2013 when she was considering the rate at which asylum support would be paid to them during the 2013-14 financial year.

On behalf of Refugee Action, it was also pointed out that even if the Secretary of State is right that children in this age group have a slower growth rate, they still eat a huge amount and that this is not something that the Secretary of State had considered.

### Essential living needs

The Secretary of State accepted that some of the items set out in Refugee Action's list of what constitute essential living needs are essential living needs (e.g. cleaning materials, non-prescription medication) but contended that these are "marginal" costs and even taking account of their cost, and the increase in the cost of living as measured by the CPI since 2011, the current rates of asylum support are sufficient to meet them.

It remained the Secretary of State's position that transport costs to go to see legal advisors (where these are not covered by the Legal Aid Agency), costs of communicating with legal advisors, costs of transport to travel for example to therapy and counselling appointments where people are in Greater London are not part of essential living needs. She also maintained that costs of transport to enable participation in social, cultural, religious and political life are not part of essential living needs and people can walk to places of worship, shops and GP surgeries.

### People with additional needs

The Secretary of State made clear for the first time at the hearing her case that s. 95 support is only meant to meet the needs of an "ordinary" asylum seeker, and that other additional needs are met by local authorities (even for asylum seekers who would not qualify for s. 21 National Assistance Act support). Therefore:

- adults with additional needs (e.g. those with less serious disabilities, or due to age) who do not meet the criteria to qualify for support and accommodation under s21(1)(a) of the National Assistance Act will have other special needs met by other local authority provision under s.29 of the National Assistance Act and s.2 of the Chronically Sick and Disabled Persons Act, or by the exercise of local authorities' powers under the Localism Act 2011;
- Children who are disabled or otherwise "in need" can be provided with additional services to meet their needs by local authorities under s. 17 of the Children Act 1989, while being accommodated with their families by the Home Office under s.95;
- Parents can obtain grants from local authorities to pay for school uniforms;
- Local authorities provide free child care for pre-school age children

The hearing of Refugee Action's claim took place before Popplewell J over the course of 3 days from 11-13 February 2014. He has reserved judgment.

Refugee Action is represented by the Migrants' Law Project (solicitors) and by Dinah Rose QC, Alison Pickup and Ben Silverstone (counsel)

20 February 2014