SOUTHWARK
LAW CENTRE

No Recourse to Public Funds

An Overview of Legal Challenges So Far

Table of Contents

1. The new Immigration Rules and the NRPF condition 1
2. Who is affected by the NRPF policy 4
3. Overview of legal challenges to the NRPF policy so far 7
4. Research and evidence gathering 8

1. The new Immigration Rules and the NRPF condition

Rules introduced into the Immigration Rules by HC 194 have been described as the product of work conducted by the Home Office to produce rules in a form which addresses more explicitly than the Immigration Rules did up until July 2012, the factors which, according to domestic and Strasbourg case-law, weigh in favour of or against a claim by a foreign national based on Article 8 of the ECHR to remain in the United Kingdom.

A consultation was conducted in relation to a proposed set of new rules designed to align more closely the Immigration Rules and the approach required under Article 8. On 13 June 2012, the Statement of Changes in Immigration Rules (HC 194) was laid before Parliament and the Impact Assessment, Policy Equality Statement and Statement of Compatibility with the ECHR relating to HC 194 were published.

On 19 June 2012 the House of Commons debated and unanimously agreed a Government motion on the overall approach to Article 8 reflected in the new rules. The new rules were also debated in the House of Lords on 23 October 2012. The rules were formally made under the negative resolution procedure prescribed in the Immigration Act 1971. They came into force on 9 July 2012.

In 276BE of the Immigration Rules the new rules provided for leave to remain to be granted on the grounds of private life, as now contained in paragraph 276ADE of the Immigration Rules, as follows

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

Settlement (indefinite leave to remain) could be achieved after the completion of continuous leave on the grounds of private life for a period of at least 120 months, ie 10 years (276DE(a)).

In D-LTRP and D-LTRPT in Appendix FM (Family Members) to the Immigration Rules the new rules provided for leave to remain to be granted on the grounds of family life as a partner and as a parent respectively as now contained in provisions contained in Sections E-LTRP (Eligibility for limited leave to remain as a partner), E-LTRPT (Eligibility for limited leave to remain as a parent) and EX.1 (Exception) of Appendix FM to the Immigration Rules, as follows

> D-LTRP.1.2. If the applicant meets the requirements in paragraph R-LTRP.1.1.(a), (b) and (d) for limited leave to remain as a partner they will be granted leave to remain for a period not exceeding 30 months, and will be eligible to apply for settlement after 120 months with such leave, or, if paragraph E-LTRP.1.11. applies, the applicant will be granted limited leave for a period not exceeding 6 months and subject to a condition of no recourse to public funds and a prohibition on employment.
>
> ...
>
> D-LTRPT.1.2. If the applicant meets the requirements in paragraph LTRPT.1.1. (a),

(b) and (d) for limited leave to remain as a parent they will be granted leave to remain for a period not exceeding 30 months, and will be eligible to apply for settlement after 120 months with such leave.

D-LTRPT.1.2 has however now been amended as follows in relation to the imposition of a public funds restriction on leave to remain granted as a parent (with additions in bold)

D-LTRPT.1.2. If the applicant meets the requirements in paragraph LTRPT.1.1. (a), (b) and (d) for limited leave to remain as a parent they will be granted leave to remain for a period not exceeding 30 months and **subject to a condition of no recourse to public funds unless the Secretary of State deems such recourse to be appropriate**, and they will be eligible to apply for settlement after a continuous period of at least 120 months with such leave, with limited leave as a parent under paragraph D-LTRPT.1.1., or in the UK with entry clearance as a parent under paragraph D-ECPT.1.1.

This amendment came into force on 10 December 2012 (HC 760), so prior to that date the rules were silent on whether a public funds restriction could be imposed on those that fell within this part of the new Rules.

Settlement (indefinite leave to remain) could be achieved after the completion of continuous leave on the grounds of family life as a partner or as a parent for a period of at least 120 months, ie 10 years (D-ILRP AND D-ILRPT respectively).

The UKBA policy governing the SSHD's consideration of the appropriateness of recourse to public funds by persons granted leave to remain under Appendix FM and in such exceptional cases is contained in the Immigration Directorate Instructions titled 'Family members under the immigration rules; Section FM 1.0; Partner & ECHR Article 8 guidance'[1] at 8.0, which has been amended several times.

[1] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/292096/Overarch_Family_1__1_.pdf

In cases where it has been decided to grant leave to remain outside the rules, but where the caseworkers are considering whether to grant leave subject to a condition of no recourse to public funds, they are referred by other policy documents to the policy in the Partner headed: Guidance - Long residence and private life'[2].

The definition of public funds is set out in paragraph 6 of the Immigration Rules.

2. Who is affected by the NRPF policy

The broad class of people caught by the new NRPF policy are those who are granted Leave to Remain on Article 8 ECHR grounds or otherwise outside of the Immigration Rules.

This does not include persons who are have a derivative right of residence under Regulation 15A(4A) of the Immigration (European Economic Area) Regulations 2006. This is the right to reside that was first recognised in the Court of Justice of the European Union judgment in the case of *Zambrano v ONEm* (Case C-34/0) and applies to third county national primary carers of British citizen in the UK, where requiring the carer to leave the UK would have the effect of forcing the child to leave the EU. However, social security regulations prevent persons with a recognised right of residence under Regulation 15A(4A) from accessing benefits which require a right to reside.

A potential anomaly in the new Rules is that, unless one parent is a UK citizen, settled in the UK, a person with refugee status or a person with humanitarian protection, then the parents of a child meeting the criteria contained in EX.1(a) may not be able to qualify for Leave to Remain under the Rules. This is because to apply under the Partner Route, the applicant's partner must be a British citizen, settled in the UK, or in the UK with refugee status or as a person with humanitarian protection (E-LTP.1.2). Where neither parent can meet that requirement, they have to qualify under the Parent Route. However, to fulfill the requirements of Leave to Remain under EX.1 through the Parent Route, the following requirement must be met:

> E-LTRPT.2.3. Either-
> (a) the applicant must have sole parental responsibility for the

[2] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/269834/longresidence-life.pdf

child or the child normally lives with the applicant and not their other parent (who is a British Citizen or settled in the UK);
or (b) the parent or carer with whom the child normally lives must be-
(i) a British Citizen in the UK or settled in the UK;
(ii) not the partner of the applicant (which here includes a person who has been in a relationship with the applicant for less than two years prior to the date of application); and
(iii) the applicant must not be eligible to apply for leave to remain as a partner under this Appendix.
E-LTRPT.2.4. (a) The applicant must provide evidence that they have either-
(i) sole parental responsibility for the child, or that the child normally lives with them; or (ii) access rights to the child; and
(b) The applicant must provide evidence that they are taking, and intend to continue to take, an active role in the child's upbringing.

This rule appears to exclude applications where, for cohabiting partners, one partner is neither British nor settled in the UK. The EX.1 guidance seems to contemplate applications where both parents are third-country nationals without a right to remain in the UK. For example, the guidance that where neither parent has a right to remain, it will generally not be unreasonable to expect a non-British child who has been in the UK for more than seven years to leave with their parents unless specific factors apply. However, for the purposes of E-LTRPT.2.3.(a), the requirements of the child “normally living” with each applicant and “not their other parent” might be applicable only where the criteria in the bracket is met, i.e. where one parent is British or settled. The wording of the guidance certainly lacks clarity, bearing in mind that the aim of the Rule was apparently to prevent partners from circumventing the maintenance requirements under the Partner Route.

Applications can, of course, be made outside the Rules, if this class of applicants do not come under Appendix FM. However, where such applications are successful, whether under the Rules or not, both parents may be ineligible for public funds and this could leave the family in a particularly precarious position.

The policy as to when access to public funds will need to be granted requires “exceptional

circumstances” to be set out in the application (or a Change of Circumstances application – see below). Such exceptional circumstances which require access to public funds to be granted will exist where the applicant is “destitute” or where there are particularly compelling reasons relating to the welfare of a child of a parent in receipt of a low income. It is arguable that these exceptions are unreasonably narrow.

In the case of families that include an adult who has been granted Leave as a partner and the settled partner needs to access public funds, the policy expressly states that the family is expected to live on the public funds to which the settled partner alone is entitled, but short of becoming destitute, which the policy claims will occur “extremely rarely.”

It is not difficult to foresee that many children of families caught up by the policy will end up surviving on their parents' low income in the long term (10 years) and/or supported by friends and family below Income Support and Housing Benefit levels. Other concerns relate to children being forced to enter employment rather than continue their education in order to support their poor families; parents working long hours to supplement low wages and living in substandard, overcrowded accommodation with no or inadequate child care for at least 10 years, which will undoubtedly put the children at a disadvantage for this long period of time, and potentially for life. These scenarios may well prove to be the norm rather than the exception, and are therefore arguably not adequately addressed by the NRPF policy, which requires exceptional circumstances and particularly compelling reasons where children are affected.

Freedom of Information requests to the Home Office asking how many people have been granted Leave to Enter or Remain on Article 8 grounds with the NRPF condition imposed have been refused on the grounds that this information is not recorded separately, so gathering it would exceed the stated cost threshold (£600). It is unclear, therefore, how many applicants have been affected by the policy. However, independent research suggests the problem is much bigger than previously thought. There have already been hundreds of referrals and Judicial Review (JR) applications around the country.

3. Remedies and overview of legal challenges to the NRPF policy so far

As part of its research project on NRPF, the Southwark Law Centre got in touch with many law firms and migrant support agencies around the country. Most of those who responded said they have had many NRPF cases (ranging between a few to 40 or more) and expect to see many more.

The most common challenges to the NRPF policy seem to be JRs (or threats of JR) revolving around destitution – clients who are currently destitute or who had been in receipt of NASS or Section 17 support when granted Leave, meaning they clearly meet the destitution threshold, so they should have been treated similarly and a NRPF condition should not have been imposed on them in the first place. In many of these cases the SSHD opted to settle, either before or after issuing the JR, and lifted the NRPF condition.

Moreover – and perhaps due to the sheer number of such cases – the Home Office has recently introduced a new application form allowing applicants to report a "change of conditions" and request access to public funds.[3] The application can be made where the applicant's circumstances have changed since the condition was imposed (i.e. they have become destitute or there are new particularly compelling reasons relating to the welfare of their children) but also if they were destitute or there were particularly compelling reasons relating to their children at the time of their application for Leave but they "failed to provide evidence of this and they now wish to send in this evidence." This possibility would presumably make redundant challenges on the grounds that the SSHD had failed to make sufficient enquiries or assessments (e.g. the application form did not ask if the applicant was destitute and so on).

It is also important to note the difference between grounds challenging the SSHD's failure to implement her own policy guidance or failure to exercise discretion and grounds challenging the policy itself. Common grounds that various practitioners have used which challenge the NRPF policy as a whole include:

- The policy is unlawful because it is irrational when read together with Section 3 of Immigration Act 1971;
- Where there is a dependant child involved, the policy – particularly the 'exceptional circumstances' test – is unlawful because it does not comply with the Secretary of

3 https://www.gov.uk/government/publications/application-for-change-of-conditions-of-leave-to-allow-access-to-public-funds-if-your-circumstances-change

State's duty under Section 55 of the Borders, Citizenship and Immigration Act 2009 (safeguarding and promoting the welfare of children) and/or Article 8 of the European Convention on Human Rights (ECHR);

- The policy is a disproportionate breach of Article 8/14 ECHR;
- Where there is a single parent or parents on very low income involved, the NRPF condition bars them from receiving Carers Allowance and other public funds, and/or forces them to work more hours, which are arguably not in the best interest of the child and place a heavier burden on the public purse if the clients needed support from the Social Services;
- Where there is a single mother or people with disabilities involved, the policy is arguably unlawful because it is indirectly discriminatory and in breach of the public sector equality duty.

4. Research and evidence gathering

Last year the Southwark Law Centre started a strategic litigation research project on the new NRPF condition, with the aim of assisting test cases seeking to challenge the policy. The project focuses in particular on Article 8 cases (Section EX.1, Appendix FM of the new Immigration Rules) and cases where children are affected (Paragraph 276ADE of the Rules). It does not include *Zambrano* cases and where the client does not have a Leave to Remain. It also does not include primary carers who are granted Leave under the Immigration (European Economic Area) Regulations 2006. Although these cases are not treated as having a right to reside in the UK for the purpose of the Habitual Residence test, meaning they cannot claim any benefits which require a right to reside, it is a different benefits restriction to the new NRPF policy.

A researcher was hired on a part-time basis to help with the project. One of the first things the researcher did was to contact various law firms and migrant support agencies around the country to assess where they are at with NRPF legal challenges, what grounds have been used, what works and what doesn't. This briefing is a result of this work. We are grateful to everyone who shared details of their cases.

Southwark Law Centre has gathered pre litigation objective evidence that could potentially be used in different types of NRPF cases. For instance, to argue discrimination or breach of S.55 duties, it may be necessary to demonstrate what the minimum thresholds of benefits and wages are; the government's rationale for setting these standards, what the government's commitments are in these respects and so on. If you would like help with this aspect of your case(s) – provided your case falls within the scope of our project and we have enough time and capacity to help – please get in touch.

Finally, a discussion group or mailing list will shortly be set up to facilitate future collaboration. The list will be closed to practitioners and agencies who actually have NRPF cases. It will be aimed at exchanging information between legal practitioners working on NRFP cases, referrals and legal advice. If you would like to be added to the list, please email Shiar.Youssef@southwarklawcentre.org.uk

Southwark Law Centre
London, May 2014