

**Judgment of R (PO), (KO) and (RO) v LB of Newham**  
**[2014] EWHC 2561 (Admin)**

*The Claimants were represented by Shu Shin Luh of Garden Court Chambers, instructed by Noel Arnold of Coram Children's Legal Centre*

On 28 July 2014 the High Court handed down judgment in the case of *PO, KO and RO v LB of Newham*, holding that the LB of Newham's "Policy and practice guidance in respect of those with no recourse to public funds" (the NRPF policy) for supporting migrant families under section 17, Children Act 1989 was unlawful because (i) it was an unpublished policy; (ii) it applied standard rates to meet the subsistence needs of families which were flawed (iii) the standard rates outlined in the policy do not reflect or explain how the subsistence needs of children and family members supported under the policy can be met; and (iv) the review process provided for under the policy was defective as it was a review set against the flawed standard rates of subsistence. The Court directed the Defendant to reconsider the policy.

***Background***

The claim originated in October 2013. The Claimants are three children, ages 12, 7 and 3, all Nigerian nationals. Their mother, also a Nigerian national, acted as their litigation friend. At the time of proceedings, the children and their mother were overstayers with an application for further leave to remain which was pending with the Home Office. They were faced with eviction from their rented room by a bailiff warrant. The Council provided the family with accommodation and following subsequent pre-action correspondence, provided the family with £50 per week to meet the whole family's subsistence needs. It was an agreed fact in these proceedings that the Council accepted that the children were 'in need' within the meaning of section 17, Children Act 1989 (judgment at [6] and [7]).

Coram Children's Legal Centre then initiated pre-action correspondence to inquire as to the basis upon which £50 per week was deemed sufficient to meet the needs of the 3 children and their mother. The pre-action correspondence detailed the difficulties the children and their mother faced in order to make ends meet on £50 per week. The Council's position pre-proceedings was that it was a 'set rate' decided by 'senior management'. No written policy was disclosed. The Council refused to increase the level of financial support (judgment at [8]).

Judicial review proceedings were started in October 2013, challenging the Council's failure to assess the children's and their mother's needs lawfully and to provide them with subsistence which meets their needs. The claim challenged the Council's undisclosed and unpublished policy setting the rate of support at £50 per week.

In reply, the Council disclosed an NRPF policy finalised on 31 October 2013 after proceedings were started, and asserted that the policy, applicable to the children and their mother, justified its decision to pay only £50 per week to the family. The children sought to challenge this NRPF policy in addition to the previous unwritten, unpublished (and never disclosed) policy. Permission to proceed with the claim was granted by the Court in December 2013 and the substantive hearing was listed to be heard on 10 July 2014.

In the interim, the Council carried out an assessment of needs of the children but maintained the decision to pay only £50 per week because the family's needs were no greater than other NRPF families (judgment at [52]); the Council's NRPF policy set rates which were linked to child benefit, sufficient to meet the children's needs. The Council suggested that the children's mother should seek charitable organisations for second-hand clothing.

In February 2014, the children and their mother obtained limited leave to remain with recourse to public funds. It took some time for the children's mother to obtain a National Insurance (NI) number so as to apply for mainstream benefits and then it took some time for the mainstream benefits to come through. This did not happen until 26 June 2014. On 30 June 2014 the Defendant terminated all support to the Claimants and their mother and they were asked to present as homeless to the homeless persons' unit.

The children and their mother invited the Council to review the manner in which they had been supported and to withdraw the NRPF policy on the basis that it did not set rates for support which reflected the needs of these particular children or children generally.

On the eve of trial, the Council offered to reconsider the adequacy of payments made to the children and whether to backdate any additional sum that they should have received. The Council proposed to do this in accordance with its NRPF policy. The children contended that any further or future decisions made in accordance with the NRPF policy would be unlawful.

Before John Howell Q.C., (the Judge) the issue was whether the Council's reconsideration of the adequacy of payments and whether backpayments should be provided to the children by reference to the NRPF policy would be lawful.

### *Findings of the Court*

The Judge held that:

- (1) The Council was in principle permitted to operate a policy seeking to set standard rates of payment to meet the subsistence needs of the families to whom the NRPF policy applied provided the policy

allowed for exception from it in exceptional circumstances, applying In re Findlay [1985] AC 318 (judgment at [43]).

- (2) The failure to publish a policy and/ or make it available to families who may be affected by its application is unlawful, applying the dicta of the Supreme Court in R (WL (Congo)) v Secretary of State for the Home Department [2011] UKSC 12; [2012] 1 AC 245 at [35] (judgment at [40]).
- (3) The starting point in a policy against which any exceptional circumstances have to be rated must be properly evaluated: R v North West Lancashire Health Authority [2000] 1 WLR 977 (judgment at [43]).
- (4) Child benefits are a non-means-tested benefit paid to those, normally their mother, who are or who are treated as being responsible for children or qualifying young persons. It is not a benefit designed to meet the subsistence needs of the children. This can be illustrated by the difference between the current rates of child benefit and the amount that the Secretary of State currently pays to meet the 'essential living needs' of those on asylum support. The sum payable by way of asylum support for a child aged between 3 and 16 is nearly 4 times the current weekly amount of child benefits for a second child. There may be some difference between a child's "essential living needs" and their "subsistence needs", this was not explained by the Council. Furthermore, faced with that "*sheer scale of difference*", no reasonable authority could have based its assessment of what was appropriate to meet the subsistence needs of a destitute child on the amounts payable in respect of child benefit (judgment at [45] and [46]).
- (5) If the Council are seeking to keep a family together when that is in the children's interests and to respect their Convention rights, it would make no sense to leave the adults to starve. The amounts payable would be additional to those which the Council considers are appropriate to meet the needs of the children involved. If the payment rates are derived from child benefit rates, it would be reasonable to expect that the standard rates of payments to meet the subsistence needs of the family would exceed the amounts which would have been payable by way of child benefits to take account of the subsistence needs of the adult members of their family (judgment at [47]).
- (6) The Council's NRPF policy does not do so. Once the rates in the policy are properly considered by reference to child benefits, it is apparent that there is no rational explanation of how the standard payments can be derived from the child benefit rates even if that standard could be reasonably regarded as a measure of what is normally required for that purpose (judgment at [47]).

- (7) Nor is there any rational way in which the rate of standard payments to meet an adult's subsistence needs could be derived from child benefit rates (judgment at [47]).
- (8) The Council's explanation of how the standard payments rates were derived provides no rational basis for the amounts chosen. The starting point for the policy is accordingly flawed (judgment at [48]).
- (9) The Council's submission that each family's needs are considered on a case by case basis. This submission fails to reflect the terms and structure of the policy which explicitly states that the standard payment rates would apply normally. The policy provides for an increase in 'exceptional circumstances' but that is only if they are 'exceptional circumstances' not the norm. Otherwise, it is hard to understand what the point of prescribing standard rates would be (judgment at [51]).
- (10) For a policy to be lawful where it provides for standard rates, it must provide for a mechanism by which these rates can be departed from 'in exceptional circumstances'. But for such an approach to be lawful in practice, it is necessary that the standard rates to meet normal subsistence needs are lawfully determined. The starting point from which any departure requires exceptional circumstances to be justified was not lawful in the Council's case (judgment at [53]).
- (11) The Council's submission that the policy in any event provided a review that "saved" the policy was rejected. It is not *"merely unrealistic to suppose that such an internal review will be conducted untrammelled by or without regard to any previously stated in the policy"*, it would also be contrary to the statement in the policy that the guidance which the standard rates provide as to what amount is appropriate to meet the normal subsistence needs of a destitute family "will be relied on". The review is in reality only limited to one to ascertain whether 'exceptional circumstances' arise in an individual case (judgment at [54]).
- (12) The Council's review mechanism is also fundamentally flawed because it is predicated on the person requesting a review and that requires someone knowing the existence of the policy, which is not possible in this case because the policy was not published (judgment at [55]).
- (13) Further and in any event, the requirement that a person requests a review in writing is an internally inconsistent and "paradoxical" given the local authority is under a duty to assess what level of services are appropriate to the subsistence needs of a family to whom the policy

applies under section 17, Children Act 1989. The onus is on the authority to assess. To rely on those affected to complain in order to rectify any failure to identify the normal level of services appropriate to such needs lawfully ignores the duty which the authority itself has to assess need for services (judgment at [56]).

- (14) The Court directed the Council to reconsider its policy before reconsidering the children's case if it wishes to rely on it. It would be unlawful for the Council to apply the NRPF policy as it stands or to treat the standard rates of payment which it contains as appropriate to meet the normal subsistence needs of a family (judgment at [58]).

**Dated 28 July 2014**

**SHU SHIN LUH**  
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