

# How has Coronavirus changed the Hostile Environment policy in the UK?

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# The Genesis of Hostility

- ▶ Under section 24 Immigration Act 1971 being knowingly unlawfully present in the UK, illegal entry or breaching conditions of a visa were already criminal offences
- ▶ In addition to this, then Home Sec Theresa May declared that she wanted to create a 'really hostile environment' for irregular migrants in 2012 to solve the '**problem of illegal immigration.**'
- ▶ Hostile Environment Working Group set up in 2012. Group colluded to create a set of legislative and policy measures designed to make remaining in the UK without leave **as intolerable as possible** in order to force people to 'voluntarily' leave the UK. Was hoped to deter irregular migration flows into the UK. It has not. Voluntary departures have decreased in number since 2012.
- ▶ From 2017 SSHD has reframed this the '**compliant environment**', still defined by hostility and includes measures to limit access to labour market, to housing, the opening of bank accounts and access to health care
- ▶ Immigration Act 2014 brought in significant first wave of hostile environment measures, which were then bolstered and expanded upon by Immigration Act 2016.

# Overt Forms of Hostility

- ▶ Two forms of measures – overt and covert. All aimed to be punitive and painful - further criminalising and isolating migrants
- ▶ Overt Hostility through **primary legislation**: Method of social policing where State enforcement has effectively been devolved to individuals. Employers, landlords, education providers, bank managers, healthcare workers are new guard of immigration enforcement
- ▶ E.g. Access to housing
  - ▶ **2014 Act** introduced 'Right to Rent check' imposing civil sanctions on landlords who failed to check the immigration status of potential tenants.
  - ▶ **2016 Act** went further to **criminalise landlords and agents** for renting property to a person without leave, or **having reasonable cause to believe** that the person has no leave
  - ▶ **2016 Act** also introduces **accelerated eviction process** permitting landlords to evict without a court order leaving vulnerable migrants (incl families and children) destitute
  - ▶ Encourages landlords to be overly-cautious in renting to those perceived not to have the right to rent. Implications for discrimination on grounds of colour? Forces people into overpriced, unsafe and unsuitable accommodation.
  - ▶ Independent Chief Inspector of Borders and Immigration in 2018 report to Parliament said the scheme is 'yet to demonstrate its worth as a tool to encourage immigration compliance (the number of voluntary returns has fallen). Internally, the Home Office has failed to coordinate, maximise or even measure effectively its use.

# Covert forms of hostility

- ▶ Covert hostility through **institutional arrangements**
  - ▶ **Operation Nexus** - institutional arrangement between SSHD and police
  - ▶ 'suspected' immigration offenders referred by police to SSHD on-site rather than being arrested and prosecuted
  - ▶ Standard of proof to remove being lower than standard of proof to convict so enables cheaper, faster removals
- ▶ Covert hostility through **policies** and **bilateral MoU**:
  - ▶ Policy of information sharing between SSHD and **homelessness charities** like St Mungo's
  - ▶ Information sharing by way of formal [Memorandum of Understanding](#) between **NHS** and SSHD (began Jan 2017). Although MoU now withdrawn, data sharing continues through NHS charging programme (reporting patients with debt of £500+ to HO) and a new MoU is being drafted
  - ▶ Coronavirus Act 2020 makes it free for migrants to have a COVID test and treatment but hospitals remain places of enforcement – data sharing not stopped during pandemic

# No Recourse to Public Funds (NRPF)

- ▶ The NRPF condition denies those who are on grants of limited leave to enter or remain access to certain defined public funds including social housing, income-based job seekers allowance, carers allowance, disability living allowance, Universal credit, child tax credits and child benefit, as well as support that is tied to benefits, such as free school meals. Anyone who claims public funds despite such a condition is committing a **criminal offence**.
- ▶ Section 3 of the Immigration Act 1971 gives SSHD **discretionary** power to impose conditions where there is limited leave. Among the impossible conditions, section 3(c)(ii) requires the individual to 'maintain and accommodate himself, and any dependants of his, without recourse to public funds.'
- ▶ In 2012 the SSHD began to automatically apply the discretionary NRPF condition of 3(c)(ii) of the Immigration Act 1971 to **almost everyone granted limited leave to enter or remain**.
- ▶ The automatism of the NRPF condition is now set out in primary legislation as per section 117B(3) of the Nationality, Immigration and Asylum 2002 Act (inserted by section 19 of the Immigration Act 2014):

*'It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—*

- a) are not a burden on taxpayers, and*
- b) are better able to integrate into society.'*

# Exceptions to NRPF imposition

- ▶ Paragraph GEN.1.11A of Appendix FM when NRPF will not be imposed or may be lifted:

*Where entry clearance or leave to remain as a partner, child or parent is granted under paragraph D-ECP.1.2., D-LTRP.1.2., D-ECC.1.1., D-LTRC.1.1., D-ECPT.1.2. or D-LTRPT.1.2., 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** relating to the welfare of a child of a parent in receipt of a very low income.*

# How has NRPF been amended during the pandemic?

- ▶ The Government issued guidance on **23rd April 2020** (one month into lockdown) which introduced some support to migrants subject to an NRPF condition. Includes:
  - ▶ Access to Coronavirus testing and treatment free of charge
  - ▶ Some access to deliveries of food and medicine if 'shielding' as a vulnerable person
  - ▶ Statutory sick pay
  - ▶ Contributory Employment and Support Allowance
  - ▶ The Coronavirus Job Retention Scheme and Coronavirus Self-Employment Income Support Scheme
- ▶ Government announced an NRPF fact sheet which stated that these concessions should **not** be read as a '*blanket policy to change NRPF restrictions*'; those subject to NRPF still have to apply to have the condition lifted in order to access the wider welfare state.



# What is NRPF...?

- ▶ Boris Johnson before the Parliamentary Liaison Committee last week Weds 27<sup>th</sup> May 2020
- ▶ “Er, hang on, Stephen (Timms, Labour MP)... Why don't they, why aren't they eligible for universal credit...?”
- ▶ PM didn't know people are forced to work for less than minimum wage, at maximum risk in the informal economy because of NRPF condition





# Three Significant Challenges to NRPF

- ▶ Six years ago in R (Khadija BA Fakh) v Secretary of State for the Home Department [JR [2014] UKUT 513 (IAC)] the Claimant argued that the introduction of the NRPF policy was procedurally flawed - it brought in test for NRPF imposition through guidance, not the rules. Whilst the Claimant succeeded on the JR, the Home Office simply reintroduced the policy in the correct legal manner – amendment to Appendix FM of Immigration Rules
- ▶ A second challenge was brought in 2019 (M & A v Secretary of State for the Home Department) on substantive legality of the policy – breach s.149 Equality Act 2010. This was due to be heard by the High Court on 19th March 2019 but was conceded with SSHD accepting that the policy should be reviewed in compliance with the Public Sector Equality Duty. SSHD offered compensation to the Claimants for the suffering caused by the policy.
- ▶ In response to the review, a report was published by the Unity Project in June 2019 which highlights the **discriminatory** impact and suffering caused by the policy.

# R (W, a child) v SSHD [2020] EWHC 1299 (Admin)

- ▶ In this JR, the Claimant, a British child, with Project 17 as intervenor, argued that the imposition of an NRPF condition is discriminatory and incompatible with his Article 3 ECHR because it has forced him and other migrants into destitution. Whilst individuals can apply to have the condition lifted ('A Change in Condition' application), it was argued that this was inadequate.
- ▶ Previous slide explored policy where NRPF can be lifted. Most cases require that a migrant **become destitute** before they are entitled to have condition lifted. Argued that this mechanism is insufficient to protect against Article 3 breaches. Also argued that complexity of application form and lack of legal aid to complete Change of Conditions application prolong destitution.
- ▶ Lord Justice Bean and Mr Justice Chamberlain on 21<sup>st</sup> May 2020 held NRPF policy as currently stands is unlawful under Article 3 :

*'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'*

# Current Fee Waiver Policy

- ▶ Current version is from January 2019 -- it is still in force and live on the Home Office website
- ▶ It provides for fee exemptions in three circumstances (p. 13)
  - ▶ Where the applicant is destitute
  - ▶ Where paying the fee would cause the application to become destitute
  - ▶ Where there are "exceptional circumstances"
- ▶ It says in the introduction that the decision-maker should "have regard to" whether the applicant can afford the fee
- ▶ The third category is poorly explained (*Dzineku-Liggison* §51):
  - ▶ P. 16: applies where A is destitute or would become destitute by paying the fees
  - ▶ P. 21: reference made to being unable to afford the fee "because, in relation to their income, they incur significant additional expenditure to provide for a child's well-being needs" and then to outlays for illness and special needs

# R (Dzineku-Liggison) v SSHD JR/2249/2019 (unreported as yet)

- ▶ Facts:
  - ▶ Family of 5 Ghanaian nationals; parents overstayers; children born in UK (§2-4)
  - ▶ No right to work, no recourse to public funds; accommodated and supported by friends, made use of food bank, lawyers acting pro bono (§6)
  - ▶ Not destitute but in no way able to raise the funds (£7665) for the applications
  - ▶ Made HR claim and applied for fee waiver (§7-18, cover letter at §9, evidence §18)
- ▶ Refusal letter:
  - ▶ Refused fee waiver on grounds they were not destitute and there were no “exceptional circumstances” (§19)
  - ▶ Advised they were liable to removal and to exposure to “hostile environment”

# Fee Waiver Policy

*If you stay in the UK without leave*

- ▶ You can be detained
- ▶ You can be prosecuted, fined and imprisoned
- ▶ You can be removed and banned from returning to the UK
- ▶ You will not be allowed to work
- ▶ You will not be able to rent a home
- ▶ You will not be able to claim any benefits and can be prosecuted if you try to
- ▶ You can be charged by the NHS for medical treatment
- ▶ You can be denied access to a bank account
- ▶ DVLA can prevent you from driving by taking away your driving license

# When is a fee incompatible with human rights?

Osman Omar [2012] EWHC 3348 (Admin)

- ▶ C resisting deportation. Granted 6 months LTR in wrong ID. Almost expired when time for renewal. Argued unable to pay the fee. In receipt of NASS support so had been assessed as destitute. Fee was barrier to human rights application and hence unlawful.
- ▶ HO refused to grant waiver intimating she was unable to do so under the relevant regulations.
- ▶ Refusal and lack of provision for waiver found *ultra vires* a predecessor provision to s. 68 of the 2014 Act. Found that fee waivers must be granted where imposing a fee would be “*incompatible with convention rights.*”

## But when is a fee incompatible with human rights?

- ▶ Destitution (and/or exceptional circumstances)
- ▶ Affordability
- ▶ Irrelevant: No fee payable (or application form necessary) in HR cases

# Eligibility: Destitution

- ▶ 2013 policy: confined the exemption to facts mirroring Omar, in which the C was destitute or there are “exceptional circumstances”
- ▶ Refusal letter in *Dzineku-Liggison* – focussed solely on whether family destitute
- ▶ 2019 policy: also focuses on destitution and never explicitly says that the test is affordability



# Eligibility: Affordability

- ▶ *Carter* [2014]: A lived with his grandmother, who gave him £20 a week, so not destitute:
  - ▶ Held: the existing fee waiver policy did not reflect Omar and eligibility should not be restricted to “destitution”
  - ▶ The key question is whether the A can “get his hands on” the application fee
  - ▶ If not, it is a barrier to the application and hence incompatible with ECHR (§42)
  - ▶ SSHD’s argument that it was not a breach of ECHR to refuse a fee waiver because of “residual discretion” to grant leave rejected – would leave C in an administrative grey hole
    - SSHD granted PTA to CA but did not pursue
- ▶ Home Office’s position (concession) in *Dzineku-Liggison*: those who would be destitute from a subset of those who cannot afford the fee
- ▶ HO argued (unsuccessfully) that the January 2019 fee waiver policy reflected this position

# Eligibility: are a fee and application necessary?

- ▶ *Ahsan* [2017] EWCA Civ 2009: No. Any HR application has to be considered, regardless of fee, timing, or format
- ▶ *Shrestha* [2018] EWCA Civ 2810 – However: not arguable that HRs raised in a s. 120 notice constitute HR claim
- ▶ *Balajigari* [2019] EWCA Civ 673 – No; an HR claim may be raised in a covering letter (§99)
- ▶ *MY Pakistan* [2020] UKUT 00089 (IAC) – Yes: SSHD may require fees + forms in HR cases and ignore claims made in “wrong” format (however SSHD conceded HR claim made in this case)
- ▶ Home Office’s position/concession in *Dzineku-Liggison*:
  - ▶ Fee not necessary, so fee waiver not necessary
  - ▶ **HOWEVER**, SSHD entitled to prioritise claims made with proper form + fee

# R (Dzineku-Liggison) v SSHD

## JR/2249/2019: the decision

Issue	Refusal letter	Cs' position	HO position at JR	UT decision
<b>What is the test?</b>	Destitution or exceptional circumstances	Affordability – destitution is a sub-set (§62, §82)	Affordability – destitution is a sub-set (§82)	Conceded by HO
<b>Did decision rely on policy?</b>	Relies on predecessor to 2019 policy	Policy unlawful (§64)	Policy consistent with Carter (§68)	Unlawful (§72-89); unduly circumscribes eligibility (§89)
<b>Is policy lawful?</b>	As not eligible because not destitute	RFRL applies unlawful policy and test of destitution (§66)	R applied lawful policy (§69)	
<b>Is decision lawful on the facts?</b>	Cs evidence insufficient to show destitution	Clear evidence that Cs could not afford the fee	R reached lawful decision in light of evidence (§69)	Holistic approach needed §94 Even if applied, "affordability" test was not rationally applied §97
<b>Is it an answer to say Cs did not need to pay a fee at all?</b>	Cs' application for fee waiver rejected Cs liable to be removed and to "hostile environment"	These cases are not an answer to the case and the position is inconsistent with the RFRL (§67)	Fee not necessary, so fee waiver not necessary; SSHD can de-prioritise claims w/o fee + form (§71)	No as it confines them to a "half-world" of immigration status (§114-126) Espec cf. s. 55 (§119)

## Fee Waiver – Position now?

- ▶ Dzineku-Liggison not reported yet
- ▶ SSHD has obtained PTA to Court of Appeal and so decision is stayed (§136)
  - ▶ Given confusion over forms + fees, seems ripe for review
- ▶ Fee waiver guidance still in force
- ▶ But **NB** there is Court of Appeal authority (*Carter*) that the test is affordability
- ▶ HO should take holistic view of evidence submitted

**Thank you for joining us!**

## **Any questions...?**

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