



Neutral Citation Number: [2024] EWHC 2577 (Admin)

Case Nos: AC-2023-LDS-000259
AC-2023-LDS-000260

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
SITTING IN LEEDS

Thursday, 10th October 2024

Before:
FORDHAM J

Between:
THE KING
(on the applications of LMN and EFG)
- and -
SECRETARY OF STATE
FOR WORK AND PENSIONS

Claimants

Defendant

Karon Monaghan KC and Tom Royston
(instructed by Child Poverty Action Group) for the **Claimants**
Galina Ward KC and Yaaser Vanderman
(instructed by Government Legal Department) for the **Defendant**

Hearing date: 10.10.24

Judgment as delivered in open court at the hearing

Approved Judgment

FORDHAM J

Note: This judgment was produced and approved by the Judge.

FORDHAM J:

Anonymity

1. This universal credit case is a sequel to SC v SSWP [2021] UKSC 26 [2022] AC 223. The issues have, at least to some extent, been canvassed in the Upper Tribunal. An anonymity order was in place in the form of a “withholding order”, which I have reinforced by adding a “reporting restrictions order”. Each order is necessary and proportionate for the protection of the Claimants who are victims of sexual offences or domestic abuse and their children. The criteria for, and nature of, these orders are set out in the online Administrative Court Judicial Review Guide (2024) at §7.12.

Viability

2. With the assistance of all Counsel, I have arrived at the conclusion that the issues in this case warrant ventilation and authoritative resolution at a substantive hearing. The SSWP has amply demonstrated arguable lines of defence. But the threshold of viability is a modest one. The claims are properly arguable with a realistic prospect of success. There is no knockout blow. No discretionary bar can properly stand as an impediment.

Academic?

3. As to whether LMN’s claim is academic, it was properly and candidly disclosed that LMN’s youngest child has now been recognised by the SSWP to fall within the “non-consensual conception” (NCC) exception to the two-child provision (2CP). But benefits have not been backdated. On that basis, Ms Ward KC and Mr Vanderman do not rely on prematurity as a discretionary bar. I add these points. The impugned provision was applicable to LMN. So far as concerns what have been described as LMN’s “informed choices” about her “family size”, the impugned provision still bites. EFG’s claim is not academic on any view. They are represented by the same solicitors and Counsel. Both claims will proceed together.

Delay

4. As to delay, until the end of June 2023 LMN was reasonably pursuing her appeal rights through the tribunals, arising out of an operative decision in her case in January 2021. She currently has a stayed appeal to the Court of Appeal. EFG’s operative decision was not until 8 July 2023. There are witness statements in both claims. These give detailed explanations of what happened after June and July 2023, and describing the relevant practical realities for the Claimants. EFG’s letter before claim was written on 26 September 2023 and LMN’s on 9 October 2023. Correspondence ensued, as did the preparations for the claims. Proceedings were commenced on 16 November 2023. The impugned provision has continued to bite, on an ongoing basis, as a continuing state of affairs. The issues in the case are important. If these claims are to fail, it should be because – and only because – the impugned provision is lawful. As an exercise of judgment and discretion, I extend time for these claims.

What the Cases are About

5. When this case has its substantive hearing, its full nature will be identified and analysed. At the risk of simplification, I will provide here a brief outline of what the cases are about and why they matter.
6. When the 2CP was designed in the 2016 primary legislation and the 2017 regulations, there were aims which were authoritatively recognised in SC. These were concerned with reducing public expenditure and leaving to individuals informed choices about family size. But there were four “latest-child” exceptions in the 2017 regulations. These exceptions concerned: (i) multiple births; (ii) adoptions; (iii) non-parental caring arrangements (NPCA); and (iv) NCC. Ms Ward KC and Mr Vanderman emphasise that all of this was ventilated and fully debated. I have referred to these as “latest-child” exceptions. That is because the regulations drew lines, in each of the four exceptions, which focused on the latest-child being added to the family size to decide whether any of the four exceptions was applicable.
7. The 2CP was upheld by the Supreme Court as ECHR-compatible, substantively and in terms of justified differentiation (or non-differentiation). That decision upheld the outcomes in the lower courts on those issues. But two of the claimants in the test cases in SC (they were anonymised as “CC” and “CD”) had a grandson. He was part of their family under an NPCA. But he was not the latest-child. He was a previous-child. Mr Drabble KC and Mr Royston persuaded Ouseley J in the High Court – against SSWP arguments about the nature of the “choice” and the importance of not somehow attributing a “lesser value” to a previous-child looked after under an NPCA – that the latest-child restriction in the NPCA exception to the 2CP had no reasonable justification at common law: see C v SSWP [2018] EWHC 864 (Admin) [2018] 1 WLR 5425 (20 April 2018) at §§215-217. The dominant ideas in that judicial reasoning were concerned, in particular, with (a) the nature of the choice which the parent was making about family size and (b) the logic so far as concerned public expenditure (with an alternative to an NPCA being a child in local authority care).
8. Following that High Court judgment, the 2CP exceptions regulations were redesigned. Ms Ward KC and Mr Vanderman emphasise, by reference to materials that are before this Court, that this was a redesign which was already under consideration (at least as a possibility). The redesign, from November 2018, replaced the latest-child aspect for the NPCA exception with an “open” exception. The open exception included a previous-child as well as a latest-child. The redesign also opened up to a previous-child the adoptions exception. The scope of the adoptions exception had not been the subject of challenge before Ouseley J. The redesign decision however did not open up to previous-children the multiple births exception; nor the NCC exception.
9. In these judicial review claims, LMN and EFG have what are accepted to be NCC previous-children but to whom the 2CP has been applied. That is because of the NCC exception’s retained latest-child restriction (the impugned provision). They raise questions of ECHR-compatibility, substantively and in terms of justified differentiation or non-differentiation – and questions of reasonable justification at common law. Their arguments, advanced by Ms Monaghan KC and Mr Royston, to a large extent proceed against the backcloth of the November 2018 redesign of the regulations. One of the features of the case is that (at least as a secondary argument), the SSWP is advancing points about the nature of the “choice” and the importance of not somehow attributing a

“lesser value” to a previous-child from NCC, which were points unsuccessfully advanced before Ouseley J in the context of NPCA previous-children.

10. All of that is by way of an outline of the context in which the legal arguments in these cases are advanced on both sides. There are, as it seems to me, a number of significant and important questions which populate the space in which legal standards come to be applied. I will illustrate the point.
11. One question is about the true nature of the “choice” about family size, of a woman who has a child – or who has had a child or children – in circumstances of rape and/or controlling or coercive behaviour. Another set of questions is about the position and the logic regarding “public expenditure”, including the wider position of the state and the relationship between the state and that parent. That includes, as it seems to me, questions of public and state responsibility. These may possibly be brought into sharp focus by reference to the ideas relied on by the SSWP. They included a recognition of “the immense value of the care provided” by the parent for the previous-child. That is a phrase which was used in the course of the redesign decision. It was a phrase said to be referable to the position of NPCA previous-children and adoption previous-children, from which NCC previous-children were then distinguished. These are all questions which, as I have said, arise against the backcloth where there was already an NCC exception; and where two other exceptions (NPCAs and adoptions) have been opened up to include previous-children and not just a latest-child.
12. Next, there is a question about whether there is traction for the idea relied on by the SSWP about avoiding treating an NCC previous-child as being of any “less value” than a “natural child” of the family. This resonates with the contention that was made but rejected in the context of NPCA: see the judgment of Ouseley J at §215. There are questions about rationales and justifications which had been relied on throughout in the context of all four exceptions. These included the idea that opening up an exception would “go against” the rationale of informed “choice” in the design of the overall 2CP. I say this, bearing in mind that those points were not ultimately relied on, when the 2018 redesign decision was made, at least so far as NPCAs and adoptions were concerned.
13. All of these questions arise in a context which can be said to be concerned with a rule-maker addressing – in the design of the NCC exception – what is, essentially, sex-based violence against women. It is a context where there is an idea – to be found reflected in international law (Article 16 of the United Nations Convention on the Elimination of All Forms of Discrimination against Women) – which emphasises the right to decide “freely and responsibly” the number and spacing of children. It is also a context where there are accepted by the SSWP – at least in the background history of the birth of children from NCC – considerations of inhuman and degrading treatment; and where, on the argument of Ms Monaghan KC and Mr Royston, those considerations follow through into the analysis of the maintained design of the NCC exception. All of these questions arise in the context of a regulation – making provision for the NCC exception – which, on the face of it, is relatively narrow and self-contained. It may prove to be the case that there is a legal standard (cf. SC at §208), which may be able to answer in the Claimants’ favour a question of law, as to whether this NCC exception can justifiably be confined to the latest-child so as not to cover previous-children.

14. All of that – no doubt oversimplified – is a description of the context and nature of the claims that are advanced. As I have already explained, notwithstanding the plainly arguable lines of defence advanced on all grounds on behalf of the SSWP, the claims made on behalf of the Claimants, by reference to human rights compatibility and common law reasonableness, cross the viability threshold of arguability. They will need to be ventilated, considered and adjudicated upon at a substantive hearing. I will therefore make directions for the pursuit of these claims through to that hearing.

Costs

15. Having made directions, with the assistance of all Counsel, I now have to decide what the appropriate order is as to costs. Ms Ward KC and Mr Vanderman say it should simply be “costs in the case”. But I agree with Ms Monaghan KC and Mr Royston, who have asked for the order “Claimants’ costs in the case”. This hearing has been the direct consequence of the fact that the SSWP chose to resist permission rather than to accept the case should go through to serve a substantive hearing. It is true that the SSWP persuaded a judge to refuse permission on the papers. But we nevertheless ended up with a permission renewal hearing which was avoidable and which I have decided issues against SSWP and in favour of the claimant. I would not, in those circumstances and for that reason, be prepared to award the Claimants their costs of today, although there is something to be said – perhaps for future consideration – as to whether that might in an appropriate case be an appropriate order. It would certainly be what would be expected in other areas of the law, where there are hearings at a preliminary stage in proceedings, and where those hearings would have been unnecessary had a position been accepted by the party who has chosen unsuccessfully to contest it. But I do think, in all the circumstances of the present cases, that it would be quite wrong for the Claimants to be at any risk of having to pay costs of today’s hearing even if they are unsuccessful overall, having squarely succeeded on all of the points that were the subject of today’s hearing. I will, for those reasons, say “Claimants’ costs in the case”.

10.10.24