Neutral Citation Number: [2017] EWCA Civ 433

Case No: C1/2016/4367

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

Mr Justice Flaux

[2016] EWHC 2639 (Admin)

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 22/06/2017

**Before :**

LADY JUSTICE HALLETT

LORD JUSTICE GROSS
and

LORD JUSTICE IRWIN

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**Between :**

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| --- | --- | --- |
|  | **The Queen on the application of JK** | Appellant |
|  | **- and -** |  |
|  | **Secretary of State for the Home Department** | Respondent |

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**Stephen Knafler QC and Zoe Leventhal** (instructed by **Birmingham Community Law Centre**) for the **Appellant**

**Clive Sheldon QC and James Cornwell** (instructed by **Government Legal Department**) for the **Respondent**

Hearing dates : 22 March, 2017

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Judgment Approved

**Lord Justice Gross :**

INTRODUCTION

1. The immediate issue on this hearing involves a challenge to a decision by the Secretary of State for the Home Department (“the Respondent”) as to the weekly rate of asylum support paid for child dependants of asylum seekers. Underlying the challenge, however, are questions as to the proper province of the Judiciary and that of the Executive in matters such as this. Still further, the facts of the present case highlight, disconcertingly, the time taken to dispose of asylum applications.
2. On the 17th January, 2017, the Applicant was granted an extension of time and her application for permission to appeal from the judgment of Flaux J (as he then was), dated 24th October, 2016 (“the judgment”), was adjourned into court, to be considered by way of a rolled-up hearing.
3. The Applicant is a single parent with three dependent children aged, 2, 4 and 10. She is a national of Burundi, who first entered the United Kingdom under a false identity in 2004. In 2006, an asylum claim (in her correct identity) was refused. In 2009, the Applicant was removed from the United Kingdom but, on account of her own disruptive behaviour, was taken off a transit flight at Nairobi and returned to the United Kingdom. Later in 2009, further asylum submissions were refused. There is some controversy as to the detail of the Applicant’s criminal convictions, which need not be elaborated upon here. In 2010, the Respondent agreed to reconsider her further asylum submissions. Sundry communications followed over the ensuing years between the Respondent’s officials and the Applicant concerning the Applicant’s children, their fathers and her family or private life. A decision to deport was made in 2016 but, by letter dated 1st February, 2017, the Applicant was informed that deportation would not be pursued and that she would be granted discretionary leave to remain. It can thus be seen that the Applicant’s fresh claim for asylum, made in 2010, was not determined for over six years. We were told at the hearing that the Applicant had been in receipt of asylum support since November 2011.
4. On the 16th July, 2015, the Respondent decided (“the decision”) to reduce the weekly rate of asylum support paid for child dependants of asylum seekers from £52.96 to £36.95 per week, amounting to a 30% reduction. The decision was made pursuant to the *Asylum Support (Amendment No. 3) Regulations 2015* (“the 2015 Regulations”). On the same day, the Respondent explained, in a letter to the National Asylum Stakeholder Forum (“NASF”), that the payment levels then in place for families had exceeded the amount required for them to meet essential living needs. It was further stated that there would still be sufficient funds for parents to care for their children safely and effectively.
5. By way of a claim for judicial review, the Applicant challenged the decision on a variety of grounds. That challenge was dismissed by Flaux J, for the reasons set out in the judgment.
6. Ultimately, at the commencement of the hearing, the Applicant’s grounds were helpfully narrowed to two:
	1. First, the Respondent had carried out a flawed assessment by failing to treat the best interests of children as a primary consideration; the Respondent had wrongly focused on *subsistence* rather than the *welfare* of children (“Best Interests”).
	2. Secondly, the Respondent had discriminated against the child dependants of asylum seekers compared with the children of settled residents in receipt of welfare benefits (“Discrimination”).
7. In the course of the hearing, Mr Knafler QC for the Applicant, correctly in our view, abandoned the Discrimination ground. If the Applicant succeeded on the Best Interests ground, then she did not need the Discrimination ground; if, on the other hand, she failed on the Best Interests ground, then she was bound to fail on the Discrimination ground – the justification for any “discrimination” would answer itself. Accordingly, the appeal and this judgment are solely concerned with the Best Interests ground.

THE LEGAL FRAMEWORK

1. *(1) Domestic Law:* To my mind, the starting point must be the domestic statutory provision for support to asylum seekers, pursuant to Part VI of the *Immigration and Asylum Act 1999* (“the IAA 1999”) and Regulations made thereunder.
2. S.95 of the IAA 1999 provides as follows:

“ (1) The Secretary of State may provide, or arrange for the provision of, support for –

(a) asylum-seekers, or

(b) dependants of asylum-seekers,

who appear to the Secretary of State to be destitute or to be likely to become destitute within such period as may be prescribed.

(3) For the purposes of this section, a person is destitute if –

(a) he does not have adequate accommodation or any means of obtaining it (whether or not his other essential living needs are met); or

(b) he has adequate accommodation or the means of obtaining it, but cannot meet his other essential living needs.

(4) If a person has dependants, subsection (3) is to be read as if the references to him were references to him and his dependants taken together.

(8) The Secretary of State may by regulations provide that items or expenses of such a description as may be prescribed are, or are not, to be treated as being an essential living need of a person for the purposes of this Part.”

1. S.96 of the IAA 1999 makes provision for the various ways in which support may be provided. Thus, s.96(1)(a) deals with the provision of accommodation. S.96(1)(b) is in these terms:

“(1) Support may be provided under section 95 –

(b) by providing what appear to the Secretary of State to be essential living needs of the supported person and his dependants (if any);”

S.96(2) goes on to permit the Secretary of State to provide support under s.95 in such other ways as he considers necessary if he “considers that the circumstances of a particular case are exceptional”.

1. In respect of child dependants, the power to provide support pursuant to s.95 is, in effect, converted into a duty by s.122 of the IAA 1999. S.122(4) provides that if it appears to the Secretary of State that essential living needs of the child are not being met, “he must” exercise his powers under s.95 of providing or arranging for the provision thereof.
2. Turning to the Regulations, the reduction in the weekly rate of asylum support paid “as a general rule” to child dependants of asylum seekers in respect of their essential living needs, from £52.96 to £36.95, was introduced by the 2015 Regulations amending reg. 10(2) of *The Asylum Support Regulations 2000* (“the 2000 Regulations”), with effect from 10th August, 2015.
3. It may be noted:
	1. Reg. 10A(1) of the 2000 Regulations makes provision for the payment of additional support in respect of pregnant women and children under the age of three.
	2. Reg. 9(3) of the 2000 Regulations provides that none of the “items and expenses mentioned in paragraph (4)” is to be treated as “being an essential living need”. As set out in para. 4, those items and expenses are as follows:

“ (a) the cost of faxes;

(b) computers and the cost of computer facilities;

(c) the cost or photocopying;

(d) travel expenses, except the expense mentioned in paragraph (5);

(e) toys and other recreational items;

(f) entertainment expenses. ”

1. *(2) European Law: Council Directive 2003/9/EC* (“the RCD”) lays down “minimum standards for the reception of asylum seekers”. As provided in para. (5) of the Preamble to the RCD:

“ This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for human dignity and to promote the application of Articles 1 and 18 of the said Charter.”

Para. (7) of the Preamble provides as follows:

“ Minimum standards for the reception of asylum seekers that will normally suffice to ensure them a dignified standard of living and comparable living conditions in all Member States should be laid down.”

1. Art. 1 states that the purpose of the RCD is to lay down “minimum standards” for the reception of asylum seekers in Member States.
2. Art. 13 of the RCD furnishes general rules on material reception conditions and health care. Art. 13.2 requires Member States to make provisions:

“ …on material reception conditions to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence. Member States shall ensure that that standard of living is met in the specific situation of persons who have special needs, in accordance with Art. 17….”

1. Chapter IV of the RCD, beginning at Art. 17 deals with provisions for persons with special needs, including minors. Art. 18.1 is in these terms:

“ The best interests of the child shall be a primary consideration for Member States when implementing the provisions of this Directive that involve minors.”

1. Art. 24.2 of the RCD provides that it is incumbent on Member States to “allocate the necessary resources” for its implementation.
2. As already observed, the RCD seeks to give effect to the *Charter of Fundamental Rights of the European Union (2012/C 326/02)* (“the CFR”), esp. Arts. 1 and 18 thereof. Art. 1 of the CFR provides that human dignity is “inviolable” and must be respected and protected. Art. 18 guarantees the right to asylum in the terms there set out. Art. 24 deals with the rights of the child and provides, so far as material, as follows:

“ 1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

2. In all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration. ”

1. *(3) Domestic provisions – the best interests of the child:* The *Borders, Citizenship and Immigration Act 2009* (“the 2009 Act”) provides as follows:

“ 55. Duty regarding the welfare of children

(1) The Secretary of State must make arrangements for ensuring that –

(a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom….

(2) The functions referred to in subsection (1) are –

(a) any function of the Secretary of State in relation to immigration, asylum or nationality;

(3) A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (1).”

1. The lengthy statutory guidance issued under s.55 of the 2009 Act is *Every Child Matters* (“ECM”). The guidance is aimed at staff of the UK Borders Agency and contractors when carrying out Borders Agency functions. At para. 1.3, ECM underlines that the duty (under s.55) does not “give the UK Borders Agency any new functions, nor does it override its existing functions.” However, it does require the Borders Agency “to carry out its existing functions in a way that takes into account the need to safeguard and promote the welfare of children”. Amongst the matters falling within the definition of safeguarding and promoting the welfare of children found in s.11 of the *Children Act 2004* are these:

“ preventing impairment of children’s health or development (where health means ‘physical or mental health’ and development means ‘physical, intellectual, emotional, social or behavioural development’)”

 and

“undertaking the role so as to enable those children to have optimum life chances and to enter adulthood successfully.”

As explained at para. 1.6, the arrangements provided by ECM “will help agencies to create and maintain an organisational culture and ethos that reflects the importance of safeguarding and promoting the welfare of children.”

1. ECM furnishes principles (at paras. 1.15 and following) underpinning work with children and their families to safeguard and promote the welfare of children. As the guidance itself acknowledges, their relevance varies according to the circumstances. The principles stipulate, *inter alia* (at para. 1.16), that work should be child centred; supporting the achievement of the best possible outcomes for children and improving their wellbeing; holistic in approach and ensuring equality of opportunity.
2. ECM, paras. 2.6 – 2.8 deal with making arrangements in the work of the UK Borders Agency to safeguard and promote welfare. Para. 2.7 requires the UK Borders Agency to act in accordance with the principles, first, that every child matters “even if they are someone subject to immigration control”; secondly, in accordance with the UN Convention on the Rights of the Child, that “the best interests of the child will be a primary consideration (although not necessarily the only consideration) when making decisions affecting children”.
3. *(4) The United Nations Convention on the Rights of the Child 1989* (“the UNCRC”): As was undisputed, the UNCRC is incorporated into domestic law only to a limited extent by s.55 of the 2009 Act – namely only Art. 3.1 is incorporated and then in the manner to which I shall come in a moment.
4. Art. 3.1 of the UNCRC provides as follows:

“ In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

As observed by Baroness Hale of Richmond JSC (as she then was) in *ZH (Tanzania) v Home Secretary* [2011] UKSC 4; [2011] 2 AC 166, at [23], “the spirit, if not the precise language, has …been translated into our national law”, in the present context by way of s.55 of the 2009 Act. Save for Art. 3.1, the UNCRC is an unincorporated international treaty and not part of the law of the United Kingdom: *per* Lord Reed JSC, *R (JS) v Secretary of State for Work and Pensions* [2015] UKSC 16; [2015] 1 WLR 1449, at [82].

THE BENTLEY REVIEW

1. The judgment of Popplewell J in *R (Refugee Action) v Secretary of State for the Home Department* [2014] EWHC 1033 (Admin) (“*Refugee Action*”) forms an important part of the background to the present litigation. *Refugee Action* concerned a challenge to a decision by the Respondent to maintain a freeze on the level of asylum support payable to *adult* asylum seekers. The challenge was successful and Popplewell J quashed the Respondent’s decision. Thereafter, the Respondent reviewed the support rate for single, adult asylum seekers and adopted a new methodology to assess the essential living needs of such asylum seekers. Ultimately, from 6th April, 2015, the rate for single, adult asylum seekers came to be fixed at £36.95 per week. As will be apparent, prior to the 10th August, 2015, when the decision came into effect, the weekly rate of asylum support payable in respect of a child dependant of an asylum seeker under the age of 16 was *higher* than that payable in respect of a single adult. The effect of the decision was to equate the two.
2. Following the change of methodology adopted by the Respondent and prompted by *Refugee Action*, a team led by a Mr Bentley, an official at the Home Office, conducted a review of the payments made to the child dependants of asylum seekers (“the Bentley review”). In the event, the Bentley review was key to the (Respondent’s) decision (to reduce the weekly rate of asylum support paid for child dependants of asylum seekers); as will also be seen, it informed the judgment of Flaux J.
3. As Flaux J observed (at [72]), the “most significant aspect” of the Bentley review “concerned the assessment of economies of scale on rates for households of more than one” and the extent to which it was assessed that the rates hitherto paid for child dependants were excessive. In particular, the Bentley review was of the view that economies of scale were available to households with children in relation to food spending. As became apparent, those economies were such as to absorb the particular needs of children in respect of other areas of expenditure.
4. The Bentley review had regard to the approach in other EU Member States supporting large numbers of destitute asylum seekers. Many of those States provided support in different ways – for example, accommodation and other assistance (including food) was often supplied in kind. Despite the difficulties in direct comparison, Mr Bentley’s Third Witness Statement, dated 25th April, 2016, (“Bentley 3”) said this:

“ Nevertheless, it was clear that the payment systems in Germany, Sweden and France (three of the countries with the largest intakes of asylum seekers that provide some support through cash) are based in part on the principle that less money per person is needed to cover the needs of multi-person households. ”

1. The Bentley Review specifically recognised that the needs of children were not always identical to those of adults; in some circumstances (for example, clothing when children are growing) the particular needs of children might exceed those of adults. But, in other instances, either the particular needs of adults would not arise at all for children or would not require any additional financial expenditure (for instance, keeping contact with legal advisers). It may be noted that the Bentley review carefully analysed different categories of items including food and non-alcoholic drinks, clothing and footwear, toiletries, household cleaning items and non-prescription medicines, the special needs of babies and infants, travel, and communications.
2. Bentley 3 expressed the conclusions of the Bentley review as follows:

“ 89. In most respects, the Home Office considers that the essential needs of children are the same or similar to the essential living needs of adults. We also consider that, in respect to (*sic*) the costs of purchasing the various items relevant to meeting some of those needs, the amount necessary per person will be less in multi-person households (where there are adults and children) than is the case in a single adult household. We consider this is clearly the case in respect to the costs of purchasing sufficient food…but also believe that economies of scale are likely to bring down the costs of covering toiletries and household cleaning items.

90. Economies of scale are less likely to be available in respect to meeting the costs of other essential items and needs……. However, the only clear identified need where the costs are likely to be materially higher for a child than an adult (and even then only in respect to teenagers), is in respect to clothing needs and the difference is only marginal….. The extra £2.31 that would typically be needed by a family to adequately clothe any teenagers in their household would in practice be available from the total cash amount paid to the family, given that their food bill per head will be less than it would be for a single adult.

91. In other respects, the cost of meeting the various needs of a child that are identified as essential are generally the same as the cost to an adult of meeting the same need, or marginally lower. ”

1. The Bentley review took account of the best interests of the child, having specific regard to s.55 of the 2009 Act, together with ECM: see, Bentley 3, at para. 128. Bentley 3 goes on to include the following:

“ 129. In carrying out the 2015 review, the objective was to ensure that sufficient cash was provided to the household as a whole, taking account of the assessed essential needs of the parents and their children (which differ from their parents to some degree…) and the costs of meeting those needs. In general terms, the review found some needs easier to define and easier to cost than others (for example, those relating to maintaining a healthy diet and an adequate wardrobe of clothes). The package of support available, both before and after the changes to the payment rates, ensures that the children of destitute asylum seekers are provided with stable and safe accommodation and with adequate provision for their ordinary everyday essential needs. I do not consider that the reduction in the amount of cash provided to the parents has an adverse effect on their safety or the quality of the care they receive from their parents or their general health.

130. The team conducting the 2015 review found it more difficult to identify needs relating (in the broadest sense) to the intellectual, emotional, social and behavioural development for children and to put a cash value on the cost of meeting such need ……

131. In respect to the ….[UNCRC]…, the review was conducted on the basis of the need to provide levels of support adequate to cover ‘essential living needs’ (the test in domestic legislation) and the minimum standards provided for in the EU Reception Directive, supplemented by the valuable guidance provided by the Court’s judgment in the *Refugee Action* case. It was considered that applying that guidance would ensure that the approach would be compatible with the UNCRC. ”

THE JUDGMENT UNDER APPEAL

1. On any view, the judgment is powerful and comprehensive. Mr Knafler very fairly acknowledged that it was “an impressive work”. It is unnecessary to do more here than outline, briefly, a number of salient features of the judgment.
2. First, it may be noted that in coming to his decision in *Refugee Action*, Popplewell J considered the respective roles of the *Executive* and the *Judiciary* in determining the essential living needs of asylum seekers – a matter of particular importance to the present proceedings. Popplewell J said this:

“90. ….Subject to the minimum required by the Directive [i.e., the RCD], it is a matter for her [i.e., the SSHD’s] decision what needs are properly to be regarded as essential living needs. She may decide that some particular needs are essential living needs although they would not be necessary to ensure a dignified standard of living or meet subsistence needs. What is ‘essential’ is a criterion on which views may differ widely. The concept of ‘needs’ is also inherently imprecise…..As Lord Hoffmann observed in *Westminster v NASS* at [20]: ‘Need is relative, not absolute. Benefits which in prosperous Britain are regarded as sufficient only to sustain the bare necessities of life would provide many migrants with a standard of living enjoyed by few in the misery of their home countries.’

91. An assessment of what is essential and the extent to which something is a need involves a value judgment. The function of making that value judgment is conferred by Parliament on the elected government, in the person of the Secretary of State. Subject to compliance with the minimum content required by the Directive, her judgment on whether goods or facilities constitute a need which is essential is only open to review on the high threshold of *Wednesbury* unreasonableness or other established public law grounds.”

In the judgment, Flaux J followed the approach adopted by Popplewell J, both in this connection (as will be seen) and generally (see, at [34]).

1. Secondly, Flaux J underlined that the weekly cash payment was not the only means by which the United Kingdom supported asylum seekers. At [140] of the judgment, he said this:

“ ….In making that assessment as to whether the system of asylum support achieves that minimum objective standard, it seems to me important to look at the system as a whole, not at the weekly payments ….in isolation. The weekly payments are only one part of the overall support provided to asylum seekers, which …..includes free accommodation with furniture and household equipment and utility bills and council tax paid for, free access to the NHS, free prescriptions, eye tests, glasses and dental care and free state education for those aged between 5 and 18. Any assessment of whether the system of support is ensuring a dignified standard of living and an adequate standard of health has to take those matters into account.”

1. Thirdly, in dealing with the Applicant’s argument that the Respondent had been in breach of statutory duty in assessing the essential needs of children, Flaux J was of the view that it contained two significant fallacies. The first (see, at [246]), which overlapped with the Discrimination issue was the suggestion that there was some “requirement of equivalence or equal treatment” between asylum seeker children and the children of those on Income support; there was no such requirement.
2. Flaux J addressed what he termed the second fallacy, at [249] *et seq.*  This was the suggestion that s.55 of the 2009 Act, ECM and the UNCRC “…somehow require a higher standard of asylum support in respect of children than (i) the minimum standards under the …[RCD]… that ensures a dignified standard of living, maintains an adequate standard of health and meets subsistence needs or (ii) the provision for ‘essential living needs’ under section 96(1)(b) of the 1999 Act.” Flaux J rejected that suggestion.
3. Moreover, Flaux J did not accept the submission that the reduction in the rate of support paid to children could not possibly be in the best interests of children. For this, he gave two reasons. First (at [250]), “on the basis that the original rate was in fact in excess of what was required to comply with the minimum under the ….[RCD]…. and to meet what the Secretary of State reasonably assessed were essential living needs, there is nothing inherently wrong or unfair in the Secretary of State reducing the rate…..”. Secondly (at [251]), provided that the rate set in respect of children in the 2015 Regulations:

“ …(i) was set after appropriate consideration of what was in the best interests of the children in accordance with section 55 of the 2009 Act and …[ECM]… (ii) met the minimum standard required by the …[RCD]…and (iii) constituted an assessment of the essential living needs of the general cohort of asylum seeker children which was not irrational or *Wednesbury* unreasonable, the fact that the rate was set at a level below what it had been in previous years does not mean that it is open to challenge.”

1. As Flaux J saw it (at [252]), the following questions arose:

“ (i) was the original rate in respect of children in 2013 of £52.96 per week in excess of what was required to comply with the minimum under the Reception Directive and to meet what the Secretary of State reasonably assessed were essential living needs; (ii) if it was, was the reduced rate set after appropriate consideration of what was in the best interests of the children in accordance with section 55 of the 2009 Act and Every Child Matters; (iii) did it meet the minimum standard required by the Reception Directive and (iv) was it an assessment of the essential living needs of the general cohort of asylum seeker children which was not irrational or *Wednesbury* unreasonable?”

1. Flaux J then addressed those questions in considerable detail, relying heavily on the work of the Bentley review.
2. The first question was whether the original rate of £52.96 per week for dependent children was in excess of that required to comply with the minimum standard under the RCD and to meet what the Respondent reasonably assessed were essential living needs under the IAA 1999. Flaux J answered this question at [258] of the judgment: in the light of the Bentley review’s analysis of economies of scale, it was reasonable for the SSHD to conclude that it was. Whether it was irrational or *Wednesbury* unreasonable would depend on the answer to the remaining questions.
3. The second question was whether the reduction in rate was set after appropriate consideration of what was in the best interests of children in accordance with s.55 and ECM. Following a detailed study of the Bentley review (judgment at [259] – [278]), Flaux J saw no reason not to accept Mr Bentley’s evidence that there had been such consideration.
4. The essence of Flaux J’s conclusion on the second question was expressed as follows:

“ 279. ….in relation to those items which Popplewell J identified in *Refugee Action* as items which should be included in essential living needs, the Secretary of State followed the guidance which the learned judge gave and did properly consider how the needs of the general cohort of asylum seeker dependent children could be met from cash support under section 96(1)(b) of the 1999 Act, together with and in the light of the free universal services available to children by way of education, healthcare, libraries, playgrounds parks and other recreational facilities…..

280. Once it is recognised that section 55 of the 2009 Act and Every Child Matters do not require some higher minimum standard under the Reception Directive or some broader definition of essential living needs in the case of children than in the case of adults, then it seems to me that the Secretary of State’s approach to the needs of children was sufficiently child-centric and holistic.

281. In my judgment….in setting the reduced asylum support rate for dependent children, the Secretary of State may have had regard to socio-political issues such as (i) the need to discourage economic migration and (ii) the fact that there are finite financial resources available to the Government, does not mean that she was in breach of her section 55 duty. Whilst, as Article 24 of the Reception Directive makes clear, it is incumbent upon member states to put in place sufficient resources to meet the minimum standard under the Directive, provided that the minimum standard is met, nothing in the Directive or in the 1999 Act, or …in the 2009 Act, precludes the Secretary of State from having regard to those sort of socio-political issues in setting the rate, provided that proper consideration has been given to the needs of the general cohort of asylum seeker dependent children as I have found was the case.”

1. Flaux J addressed his third question at [282] – [289] of the judgment. It concerned whether the reduced rate met the minimum standard required by the RCD. As to the parameters of the debate here, Flaux J said this (at [282]):

“ Once it is recognised that the Secretary of State was not required to ensure equivalence between asylum seeker children and the children of those on Income Support, that she followed the guidance provided by Popplewell J and, as I have held, that she did give appropriate consideration to what was in the best interests of children, then the scope for any argument…..that she failed to achieve the minimum standard (or for that matter, failed properly to assess essential living needs), is strictly limited. ”

1. Essentially, this question concerned the submission that the Respondent had failed to achieve the minimum RCD standard in respect of *recreation* and *toys*.
2. In *Refugee Action*, at [102], Popplewell held as follows:

“ Children have access to local authority education, and school transport (except for 16 and 17 year olds whose position I address as a separate category below). All three and four year olds, and from 1 September 2013 two year olds, receive early education arranged by local authorities, usually comprising 15 hours a week for 38 weeks a year. Children have access to parks, playgrounds, libraries and other services offered by local authorities….. So far as books, toys and games are concerned I detect no error in the approach of the Secretary of State, who not only takes account of the provision of full time education for those aged 5 and above and early education for 2-4 year olds, and access to libraries and other services offered by local authorities, but also includes within her definition of needs of children ‘a contribution to wider socialisation costs to promote their development’…… The exclusion of toys by Regulation 9 of the AS Regulations 2000 is not incompatible with the minimum content required by the Reception Directive. ”

1. Flaux J dismissed criticism of Popplewell J’s reasoning, holding that he had had the duty contained in s.55 of the 2009 Act well in mind. Flaux J thus agreed that specific provision did not need to be made for books, toys and games for children within the s.96(1)(b) cash payment and that the exclusion of toys and other recreational items by Reg. 9(3) of the 2000 Regulations was not incompatible with the minimum standards required by the RCD. Flaux J further held that the exclusion of computers by Reg. 9(3) of the 2000 Regulations was likewise not incompatible with RCD minimum standards. In any event, internet access was furnished by other means and through public libraries. Still further, the absence of any specific figure in the weekly payment under s.96(1)(b) for “wider socialisation costs” did not give rise to a valid complaint; the minimum required was “access to free recreation, not payment for it” and “in the UK such free access is provided as part of the universal services, including free school trips”.
2. Accordingly, Flaux J concluded that there was “no question” of the Respondent not having complied with that objective minimum standard.
3. Flaux J dealt with the fourth question very shortly (at [289] of the judgment). In a nutshell, he held that the assessment of essential living needs in respect of asylum seeker children under s.96(1)(b) of the IAA 1999 was neither irrational nor *Wednesbury* unreasonable.
4. Ultimately, Flaux J dismissed the Applicant’s challenge to the decision, saying this (at [290]):

“In the light of the sustained criticisms of the Secretary of State’s approach by the claimants and their experts, it is important to emphasise that, provided that the Secretary of State achieved the minimum standard required by the Reception Directive and did not act irrationally or in a manner which was *Wednesbury* unreasonable, the setting of asylum support rates, including in relation to children, is a matter for the discretion of the Secretary of State, not the court. As Popplewell J rightly concluded, within those parameters, it is for the Secretary of State to set the rate, not the court and, *a fortiori*, not the experts for the claimants. To the extent that the claimants ….have concerns about the setting of asylum support rates, save to the limited extent that the court can interfere if the objective minimum standard is not met or the assessment of essential living needs is irrational or *Wednesbury* unreasonable, it is for Parliament to address those concerns, not unelected Judges. ”

SUBSISTENCE OR WELFARE?

1. *(1) The rival cases:* We were most grateful to both Mr Knafler QC, representing the Applicant and Mr Sheldon QC, representing the Respondent, for their assistance.
2. Mr Knafler’s essential submission for the Applicant was that both the Respondent in making the decision and Flaux J in the judgment, had proceeded on a fundamentally flawed premise. In setting the level of support for child dependants of asylum seekers they had been *subsistence* driven, rather than *welfare* driven. Although Mr Knafler accepted that the natural meaning of the language used in the IAA 1999 and the RCD pointed to a subsistence based approach, he contended that “fundamental legislation”, in particular Art. 24 of the CFR and Art. 3 of the UNCRC, impinged on their proper construction. As to the RCD and the CFR, secondary legislation (the RCD) should be construed in the light of treaties (the CFR), rather than *vice versa*. So too, the provisions of s.55 of the 2009 Act, read with the high level principles in the ECM guidance, pointed towards something more than minimum subsistence provision in the case of children.
3. Mr Knafler advocated a two-stage process. First, the Respondent’s starting point ought to have been the best interests of the child, as a primary consideration. If approached that way, an assessment of what was needed for the child’s welfare was required, yielding a free-standing, irreducible minimum. Secondly, in the light of this welfare assessment, it was then for the Respondent to determine the level of provision. While the Respondent was entitled to take into account the resources available, any lesser provision than that suggested by the welfare assessment, required justification. The Bentley review and the Respondent had started at the wrong place and neither had stood back to consider the matter holistically.
4. Art. 8, ECHR was relevant and emphasised the same matters. Asylum support engaged Art. 8, both because it assisted in keeping families together and because it promoted a child’s private life. It too required the IAA 1999 and the RCD to be read in the manner for which Mr Knafler contended.
5. Mr Sheldon, for the Respondent, took issue root and branch with Mr Knafler’s analysis. It was a fundamental misconception to suggest that Art. 24 of the CFR provided a free-standing right. Art. 24 was to be construed in the context of the RCD. That context involved setting a minimum standard for reception conditions for children, consistent with ensuring a dignified standard of living and meeting health and subsistence needs. It concerned the provision of the basic necessities of life and no more; there was no heightened standard. Not least, there was no requirement of equivalence with social security rates; one of the purposes of the RCD was to provide comparable reception conditions in Member States, so as to limit secondary movement of asylum seekers. That purpose would be thwarted if the minimum conditions under the RCD in a particular Member State were determined by social security rates (set nationally and which differed from Member State to Member State). The IAA 1999 was to like effect; the duty was to meet essential living needs. In that regard, Mr Sheldon underlined that asylum support payments formed a part only of the assistance made available by the United Kingdom to asylum seekers and their dependants; for example, housing and heating were also provided. S.55 of the 2009 Act was likewise not free-standing; it did not give rise to any duty to achieve a particular outcome and created no new functions for the Respondent; the minimum standards remained those upon which the RCD focused. The guidance in ECM contained high level principles; much of ECM was only relevant in particular circumstances (for example, asylum decisions) and was not relevant here; but, insofar as the principles were here relevant, they had been taken into account by the Bentley review. The application did not get off the ground as to substance; permission to appeal should be refused or the appeal dismissed.
6. As to procedure, no proper criticism could be made. Mr Sheldon submitted that Mr Knafler’s proposed “two-stage” approach was wrong in principle; what was required instead was that the matter should be considered in overall terms and in context. However, even if a two-stage approach was required, it mattered not to the outcome. The Bentley review had proper regard to the best interests of children as a primary consideration; the order in which matters were considered was neither here nor there. Nothing more had been required.
7. As to the Art. 8, ECHR challenge, it was new and permission to raise it should be refused. It was in any event misconceived. There was no arguable interference with the Applicant’s Art. 8 rights; it would only be very rare cases where Art. 8 imposed a positive duty on the State to provide welfare support. This was not such a case.
8. *(2) Discussion: (i) Language:*  As Mr Knafler realistically acknowledged, the natural meaning of the language used in both the IAA 1999 and the RCD points to a *subsistence* level of support – rather than any heightened standard.
9. Thus, the aim of s.95, IAA 1999 is averting destitution. So too, all of ss. 95, 96 and 122 speak of the provision of “essential living needs”. The language of the RCD is likewise plain: it is to ensure “minimum standards” for the reception of asylum seekers that will “normally suffice to ensure them a dignified standard of living” and “adequate for the health of applicants and capable of ensuring their subsistence”: para. (7) of the Preamble, Art. 1, Art. 13.2. It is further clear that the subsistence standard of living applies to children as well as adults: the wording of Arts 13.2 and 17 cannot be construed together in any other way. Read in combination, the duty imposed by the IAA 1999 (s.122) and the RCD on the Respondent is to make provision for essential living needs – meeting minimum standards at a level to ensure a dignified standard of living, adequate for the health and ensuring the subsistence of children dependants of asylum seekers. Accordingly, at least as a matter of language, the standard set is one of subsistence rather than anything more.
10. Further, there is no suggestion whatever in the language of equivalence between asylum support rates and social security payments for those already lawfully entitled to remain in this country or other Member States. To the contrary, s.115 of the IAA 1999 specifically provides that the Respondent is not required to pay asylum seekers Income Support. Moreover, para. (7) of the Preamble to the RCD points against it, by referring to “comparable living conditions” in all Member States; such comparability is achievable in terms of minimum standards but not if regard is had to social security payments which vary as between Member States.
11. *(ii) “Best interests”:* Accordingly, for Mr Knafler to succeed, he needs to spell out of the references to the “best interests” of the child in the legislative and treaty framework a basis for a fundamentally different construction of the IAA 1999 and the RCD than that suggested by the language used. For this, I can see no warrant. My reasons follow.
12. First, Mr Knafler is clearly right that the RCD (the delegated legislation) must be read in light of the CFR (the treaty) and compatibly with it. I am, however, unable to accept that the CFR assists his argument. Thus, references to human dignity (Art. 1, CFR) are mirrored by those in the RCD. The right to asylum (Art. 18, CFR) is of course given effect to by the RCD. The prohibition on discrimination (Art. 21, CFR) cannot advance the matter, unless it is to be said that there *must* be equivalence between payments to asylum seekers (or their dependants) and those already lawfully resident or remaining in a Member State – for the reasons already given, an impossible contention. Mr. Knafler placed most weight on Art. 24, CFR (set out above). However, the language of Art. 24.1 is singularly inapposite to assist in setting the standard or level for asylum support payments; its focus is very different. Art. 24.2 provides that the child’s best interests must be a primary consideration – but so does Art. 18 of the RCD, so that the mere existence of Art. 24.2 can take the matter no further. Art. 24.2 in any event seems to me a wholly inadequate foundation for an argument that the RCD, despite the combination of Arts. 13.2, 17 and 18, had somehow overlooked a primary consideration of the best interests of the child in setting a subsistence level for reception conditions, including support payments.
13. Secondly, it is not in dispute that the provisions of the UNCRC - other than Art. 3 – are not part of the law of the United Kingdom. *A fortiori*, *General Comment No.14 (2013)* of the Committee on the Rights of Children (“General Comment No. 14” and “the UN Committee” respectively) on the best interests of a child, upon which Mr Knafler sought to place some reliance, is not part of this country’s law. I accept that unincorporated international treaties are capable of serving as an aid to interpretation, certainly of ECHR rights. Equally, I intend no disparagement of the UN Committee or the aspirations which it seeks to advance. That said, I am wholly unable to accept that either the UNCRC or General Comment No. 14 require the re-writing of the IAA 1999 or the RCD in the manner contended for by the Applicant.
14. As to the UNCRC, I have had specific regard to Arts. 22, 24, 26, 27 and 31 to which we were referred and which need not be set out here. Even taking the potential interpretative assistance of the UNCRC (as an unincorporated international treaty) at its highest:
	1. These provisions go no further than those of the CFR, with which I have already dealt;
	2. The IAA 1999 and the RCD are compatible with these provisions, assuming (without in any way deciding) that there is any requirement of compatibility. Thus, for example, considerations of the health of a child in Art. 24 are in any event catered for by free access to the NHS.
	3. Beyond that, these provisions operate at too high a level of generality to impact on the true construction of the IAA 1999 and the RCD. Consider, for instance, the wording of Art. 27:

“ State Parties recognise the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development.”

If or insofar as it is suggested that this wording requires something other than a minimum subsistence level, I cannot agree. The wording is open-ended (what line, if any, is to be drawn?), aspirational only (there is no reference whatever to the resources of the State) and, hence, of no assistance in defining any standard in the present context.

1. As to the UN Committee, it is not a judicial body and has no authority beyond examining the progress made by State Parties in giving effect to the obligations undertaken by them under the UNCRC and making suggestions and general recommendations: see, Arts. 43 and 45 of the UNCRC. For convenience, I deal below with the UN Committee’s treatment of the child’s best interests as a “threefold concept”.
2. Thirdly, neither s.55 of the 2009 Act nor the guidance contained in the ECM begin to cast doubt on the construction of the IAA 1999 and the RCD suggested above. Put shortly, the statute read with the guidance does not give the Respondent any new functions or override her existing functions. On any view, the guidance in ECM cannot give rise to obligations going beyond those contained in the statute itself. Further, the language of s.55(1) and (3) simply does not generate an obligation to achieve particular results – as distinct from a more general duty to safeguard and promote the welfare of children. Still further, the guidance contained in ECM is of considerable width – much of it inapplicable to setting the standard for asylum support payments; as already noted (and as acknowledged in the guidance itself), the relevance varies according to the circumstances. Finally, as is common ground, the 2009 Act and ECM serve to incorporate the spirit if not the precise wording of Art. 3.1, UNCRC into our national law. But this does no more than require the best interests of the child to be a primary consideration in fulfilling the SSHD’s obligation under the IAA 1999 and the RCD – a requirement forming part of the RCD itself, as already discussed.
3. My conclusions so far are sufficient to dispose of the principal question in the case. The language of the statutory and other provisions in question provide for a *subsistence* rather than a *welfare* standard. Proper consideration of the “best interests” of the child neither requires nor permits the rewriting of either the IAA 1999 or the RCD to provide some different and welfare driven standard. There remains the question of whether, applying a subsistence standard, the judgment and the Bentley review had proper regard to the best interests of the child as a primary consideration.
4. *(iii) The judgment and the Bentley review:* As will be recollected and as set out above, Flaux J in the judgment (at [252]) posed four questions.
5. *The first question:* No proper criticism can be advanced in respect of Flaux J’s answer to the first question: based on the Bentley review’s reasoning as to “economies of scale”, it was reasonable for the Respondent to conclude that the original and higher rate for dependent children of asylum seekers was in excess of that required to comply with minimum RCD standards and to meet what the Respondent reasonably assessed were essential living needs under the IAA 1999. As explained by Flaux J, such a conclusion was in no way incompatible with the best interests of the child.
6. *The second question:* Flaux J saw no reason not to accept Mr Bentley’s evidence that the reduced rate was set after appropriate consideration of the best interests of the child. I entirely agree.
7. As already set out, the Bentley review had specific regard to the provisions of s.55 of the 2009 Act, ECM and the UNCRC – and the importance there placed on the best interests of the child: see paras. 127 and following of Bentley 3. Moreover and throughout, the Bentley review recognised that the needs of children are not always identical to those of adults. With these considerations in mind, the review (Bentley 3, at paras. 28 and following) worked through the different categories of items, addressing differences of need between children and adults and relying on the margins built into its assessment by economies of scale. Unless it is to be said that this is all no more than lip service or window dressing, it seems impossible to contend that the Bentley review failed to have regard to the best interests of the child as a primary consideration. I did not understand Mr Knafler to advance any such submission but, if he did, I would reject it.
8. Three matters remain to be dealt with before leaving Flaux J’s treatment of the second question. First and in the light of the diligence with which (as it seems to me) the Bentley review approached its task, I cannot say that the *order* in which it dealt with the issues under consideration disclosed any or any material error. In *H (H) v Deputy Prosecutor of the Italian Republic* [2012] UKSC 25; [2013] 1 AC 338, in the context of extradition, Lord Mance JSC said this (at [98]):

“ Both the UN Convention on the Rights of the Child…and the Charter of Fundamental Rights….make the child’s best interests ‘a primary consideration’ in all actions concerning children. This means, in my view, that such interests must always be at the forefront of any decision-maker’s mind, rather than that they need to be mentioned first in any formal chain of reasoning or that they rank higher than any other considerations. A child’s best interests must themselves be evaluated. They may in some cases point only marginally in one, rather than another, direction. They may be outweighed by other considerations pointing more strongly in another direction.”

See too, Lord Judge CJ, at [125].

1. In *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74; [2013] 1 WLR 3690, an immigration and asylum case, Lord Hodge JSC, handing down the judgment of the Court, summarised the principles derived from previous authorities, amongst them *H(H)* and including the following:

“ (4) while different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play…”

While, with respect, Lord Hodge’s valuable statement of principles underlines the importance of a carefully structured approach, it does not, to my mind, go so far as to cast doubt on Lord Mance’s observations in *H (H).* It follows that the Bentley review cannot properly be criticised for the order in which it approached the best interests of the child.

1. Secondly, I am wholly unable to accept Mr Knafler’s submission that Flaux J, the Respondent, or the Bentley review fell into error in not adopting the two stage approach he advocated. My own preference would be to consider the matter as a single whole and in context. Be that as it may, for my part, I can see no requirement to adopt any particular approach (whether single stage or two stage), *provided* that the right matters are taken into account – here treating the best interests of the child as a primary consideration. Moreover, whichever approach is adopted, the decision-maker ought to reach the same conclusion, provided, again, that the right matters have been taken into account.
2. Thirdly, I have not lost sight of the fact that the UN Committee analysed a child’s best interests in terms of a threefold concept and that this analysis was referred to with approval both by Lord Wilson JSC in *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47; [2015] 1 WLR 3250, at [39] and in the earlier authority there cited. As summarised by Lord Wilson (*ibid*), the concept is as follows:

“ The first aspect of the concept is the child‘s substantive right to have his best interests assessed as a primary consideration whenever a decision is made concerning him. The second is an interpretative principle that, where a legal provision is open to more than one interpretation, that which more effectively serves his best interests should be adopted. The third is a ‘rule of procedure’, described as follows:

‘Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include *an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned*…. Furthermore, the justification of a decision must show that the right has been explicitly taken into account.’ ”

Suffice to say, I am amply satisfied that this threefold concept has been complied with here. No more need be said as to the first and third aspects. As to the second aspect and for reasons already given, the foundation is simply lacking to warrant a rewriting of both the IAA 1999 and the RCD from a *subsistence* to a *welfare* basis, on the ground only of an interpretative principle. Put another way, having regard to all the relevant considerations in context, a welfare driven approach would not be an interpretation properly open to the decision-maker.

1. *The third question:* The question here relates to the Respondent meeting the minimum RCD standard and properly assessing essential living needs, especially in respect of *recreation* and *toys*.
2. Although already alluded to and addressed by Flaux J (judgment, at [140]), it is important to begin by underlining the assistance provided by the United Kingdom to asylum seekers and their dependants *apart from and in addition to* the asylum support payments. By way of summary:
	1. Fully furnished accommodation, with kitchen utensils, bedding and other specified items – all provided free;
	2. Utilities (gas, water, electricity) for such accommodation, provided free of charge;
	3. Costs of travel to immigration appointments;
	4. Further payments under s.96(2), IAA 1999, if the SSHD considers the circumstances of the particular case to be exceptional;
	5. Free health care from the NHS;
	6. Free prescriptions, dental care, eye examinations and glasses;
	7. Access to public libraries;
	8. Some free childcare, for children aged between 2 and 5;
	9. Free state education for those aged between 5 and 18;
	10. Free school meals during term time;
	11. In certain circumstances, free transport to and from school for those aged up to 16;
	12. Where discretionary schemes run by local authorities are in place, dependent children of asylum seekers may be able to obtain: (a) free or concessionary travel on public transport, if under the age of 16; (b) free or concessionary transport to school or sixth form college for 16 or 17 year olds; (c) grants towards the purchase of school uniforms.
3. Against this background, I turn to Mr Knafler’s contention that Flaux J erred in his answer to the third question and, in particular, that the “blanket exclusions” in Reg. 9(3) of the 2000 Regulations, especially those contained in Reg. 9(3)(e) and (f), were *ultra vires* and incompatible with the best interests principle. I cannot agree.
4. First, the test, as already decided, is one of subsistence. Many things might be *desirable* if resources were unlimited and in the absence of contrary policy considerations; cosmetics for teenage girls and smart phones were referred to in argument and come readily to mind as examples. Indeed, once embarked on a consideration of what might be desirable, it is difficult to know where to stop. Importantly, however, such items are not required to ensure the requisite minimum standards or essential living needs – or, to be more precise, their exclusion is not irrational, *Wednesbury* unreasonable or otherwise *ultra vires*.
5. Secondly and significantly, given the range of support available to asylum seekers and their dependent children (emphasised above), the fact that no specific provision was made in the weekly asylum support payments for the items in question does not come close to making good Mr Knafler’s submission. Other means were available for access to computers, the internet and entertainment and recreation via schools, libraries and other community centres.
6. Thirdly, for my own part, I rather regret the exclusion of “toys”, contained in Reg. 9(3)(e). As it seems to me a subsistence approach would not have precluded or been undermined by some – very limited – allowance for toys; the Respondent is not confined within a straitjacket. Certainly to my mind, the impression given by Reg. 9(3) would have been improved had toys not been excluded. That said, I note that toys may be available outside the home in nurseries, schools and libraries and I am quite unable to conclude that Reg. 9(3)(e) must be quashed, still less the weekly rate as set by the decision. While there may be much to be said for the Respondent reflecting further upon this exclusion, the matter falls squarely within the Respondent’s province (not the Court’s) - and it cannot be said that Reg. 9(3)(e) is incompatible with RCD minimum standards or that a decision to exclude toys is irrational or *Wednesbury* unreasonable. As to the weekly rate, any specific change in this regard would have been *de minimis*, at most.
7. Accordingly, I agree with Flaux J’s answer to the third question and the reasoning of Popplewell J in *Refugee Action* (especially at [102]) which underpinned it.
8. *The fourth question:*  For reasons, *mutatis mutandis* the same as those given in respect of the third question, I agree with Flaux J’s answer to the fourth question.
9. *(iv) Art.* *8:* I can deal summarily with this new point. Assuming (without deciding) that it was open to the Applicant to advance it before us, I agree with Mr Sheldon’s response on the merits. The Art. 8 point adds nothing and the decision does not, even arguably, interfere with the Applicant’s Art. 8 rights. No more need be said of this point.

THE JUDICIARY AND THE EXECUTIVE

1. Standing back from the individual topics just discussed, as it seems to me, this is one of those cases exemplifying the importance of judicial reserve or restraint and calling for a proper appreciation of the different provinces of the Executive and the Judiciary.
2. Treating the best interests of the child as a primary consideration, the Respondent is duty-bound to fix the weekly rate of asylum support paid for child dependants of asylum seekers at a level which complies with the minimum standard required by the RCD. In doing so, the Respondent must decide upon what are essential living needs in a manner which is neither irrational nor *Wednesbury* unreasonable. Should the Respondent fail to meet the RCD minimum standard or act irrationally or *Wednesbury* unreasonably as to what constitutes essential living needs, then the Court may properly intervene; the question of whether she has done so is a matter upon which the Court is entitled and, if asked, obliged to rule.
3. Provided, however, that the Respondent has complied with the RCD minimum standard and assessed essential living needs rationally and reasonably, then the value judgment of what does and does not comprise an essential living need is for her and not for the Court. Within the boundary thus demarcated, the inclusion or exclusion of any particular item belongs within the Respondent’s sphere rather than that of the Court. Policy choices in such areas, concerning resource allocation and implications for the public purse, fall properly to the Respondent for decision. In this way, while the Court retains the power and the duty to adjudicate upon threshold questions, the “judicialisation” of public administration, very much including the provision of welfare services, can beneficially be avoided; so too, the realities of public sector finances can be taken into account: see, *Mathieson v Secretary of State for Work and Pensions (supra)*, at [25] – [27], Lord Wilson JSC and at [51], Lord Mance JSC; *Poshteh v Kensington and Chelsea RLBC* [2017] UKSC 36; [2017] 2 WLR 1417, at [22], Lord Carnwath JSC.
4. Accordingly, I agree with the approach adopted by both Popplewell J (in *Refugee Action*, at [90] – [91]) and Flaux J (in the judgment, at [290]) – and I have followed the same approach in this judgment.

OVERALL CONCLUSIONS

1. It may be helpful here to draw together my overall conclusions:
	1. The language of the IAA 1999 and the RCD provide for a *subsistence* rather than a *welfare* standard.
	2. Proper consideration of the “best interests” of the child neither requires nor permits the rewriting of either the IAA 1999 or the RCD to provide some different and welfare driven standard.
	3. Applying the subsistence standard, both the judgment and the Bentley review had proper regard to the best interests of the child as a primary consideration.
	4. Even assuming that the new Art. 8 point is open to the Applicant, it adds nothing.
	5. As already explained, I agree with the approach adopted by Popplewell J in *Refugee Action* and Flaux J in the judgment, as to the boundaries between the Judicial and Executive spheres in this area.
2. For the reasons given, I would refuse permission to appeal. As has been seen, the application required detailed consideration. But, once worked through, it is apparent that the application had no real prospect of success. However, given the detail with which the application has been considered, this judgment may be cited.

POSTSCRIPT

1. I have recounted, much earlier, the Applicant’s immigration and asylum history. Given the Court’s concerns as to delay, we asked for an explanation from the Respondent and in due course received and considered Notes from both leading counsel, for which we were grateful. It is a sorry story, notwithstanding the explanation given and regardless of where responsibility truly lies. Plainly, the public, the Respondent and individual applicants would benefit from an improved system; the time taken to deal with cases such as the present is deeply unsatisfactory and of real concern.

**Lord Justice Irwin :**

1. I agree.

**Lady Justice Hallett :**

1. I also agree.