Neutral Citation Number: 2019 EWHC 3569 (Admin)

Case No: CO/5077/2018

IN THE HIGH COURT OF JUSTICE
COURT
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/12/2019

Before:

MRS JUSTICE FOSTER

- -

Between:

The Queen (on the application of) **1.SHU** **2.E**	**Claimants**
- and - **1. THE SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE** **2.SECRETARY OF STATE FOR THE HOME DEPARTMENT**	**Defendants**

- -

- -

Samantha Broadfoot QC and Admas Habteslasie (instructed by **Deighton Pierce Glynn Law**) for the **Claimant**
Alan Payne QC, Robert Harland and Joseph Barrett (instructed by **The Government Legal Department**) for the **Defendant**

Hearing dates: 16 October 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MRS JUSTICE FOSTER:

INTRODUCTION

1. SHU is the mother of E, a (now) 12-year-old child. SHU says she entered the United Kingdom in 2004 without entry clearance; there is no Home Office evidence of her arrival. E, who was born in August 2007, acquired British citizenship in 2018. In 2014 E received a life-saving liver transplant at Kings Collage Hospital, London ("KCH"). Before that time, SHU had received maternity services at Homerton Hospital, London in respect of the birth of her three children including for E. Pursuant to Regulations made by the First Defendant, charges have been raised in respect of treatment received by SHU and by E in the NHS hospitals.

2. The charging regime for NHS treatment for those who are not British citizens was at the relevant time contained in the National Health Service (Charges to Overseas Visitors) Regulations 2011, ("the 2011 Regulations"), made by the First Defendant, the Secretary of State for Health and Social Care ("the SSHSC"). The 2011 Regulations under which the debt in respect of E's treatment was incurred were preserved in similarly named regulations in 2015: SI 2015/238 (referred to here as "the Regulations"). The Regulations have since been amended by the National Health Service (Charges to Overseas Visitors) (Amendment) Regulations 2017.

3. In respect of the treatment at Homerton Hospital, a total debt of £10,436 is shown to be owing by SHU ("the Homerton debt"), and regarding the liver treatment for E, a debt of about £100,000 ("the KCH debt"). SHU is responsible for the debts in respect of E under the Regulations, since E was a minor at the time of the treatment.

4. It is agreed between the parties that were E currently to require treatment, no charge could be levied for it because her status as a British citizen ordinarily resident in the UK entitles her to receive NHS treatment of this nature for free. Under section 39(1) of the Immigration Act 2014 ordinary residence, the statutory qualifying status, requires indefinite leave to remain. Status as a British citizen obviously shows that this criterion is fulfilled in the case of E.

5. The issue in this case is whether the charging regime, which fails to provide a retrospective exemption in respect of the KCH debt, (in fact only the KCH debt is challenged), represents unlawful discrimination against E. It is further argued that a provision of the Immigration Rules is *ultra vires* and/or irrational in taking into account the existence of an NHS debt when considering leave to remain.

6. It is recognised by both Defendants that SHU is currently destitute and unable to pay the debts. The NHS foundation trust responsible for the debt in question has a discretion to write off the debts, and has done so. It has no power to extinguish them. This also applies to those aspects of the Homerton debt that relate to E.

7. SHU attacks both the Regulations which give effect to the charging regime, and paragraph 322(12) (governing leave to enter and leave to remain) of the Immigration Rules. This paragraph provides that in circumstances where debts are unpaid, the Secretary of State for the Home Department ("SSHD") who is the Second Defendant,

"should normally" refuse any future applications made by SHU regarding her own leave to remain.

8. In this case, the SSHSC takes issue with all stages of the analysis concerning the Claimant's case of alleged discrimination including the preliminary question as to whether this case comes within the ambit of Article 8 or not. Mr Alan Payne QC also on behalf of the SSHD contends that the provisions of IR 322 (12) are well within the compass of the Padfield purpose of the Immigration Act 1971 ("IA 1971"), and in the light of policy, wholly rational.

9. The Secretaries of State also take a number of procedural points. They argue that the claims are both of them premature, alternatively, out of time.

BACKGROUND

10. SHU, a national of Ghana, was born in 1976. In 2004 she married another national of Ghana by proxy, who was present in the United Kingdom, at that time unlawfully. She later entered herself, again unlawfully, in the course of that year. There is a history of unsuccessful applications to remain in the United Kingdom from, SHU says, 2008, although the first for which records exist is 2013. These applications were repeatedly refused, including in April 2015, by service on SHU and her husband of IS. 151A notices "to a person liable to removal". Between 2005 and 2011 four children had been born to SHU and her husband and as described above, medical treatment was afforded to SHU in the context of her confinements, and then on 7 September 2014 E received a liver transplant after a short period of acute illness.

11. On 26 May 2015 SHU was granted limited leave to remain by reason of the presence of her children and their best interests. There is no dispute that until 2015 SHU was accommodated and supported by the local authority under Section 17 of the Children Act 1989 on the basis that the family was destitute and ineligible for housing or welfare assistance.

12. On 12 November 2014 SHU's husband, Alex applied on behalf of the family for leave to remain after ten years' residence, on the basis of family life. Following an initial refusal on 26 May 2015 the family was granted limited leave to remain for thirty months subject to a condition they have no recourse to public funds, a condition which was later lifted. Means-tested social security was provided for subsistence and the family has been housed by the local authority on the basis they are statutorily homeless.

13. Sadly, and suddenly, on 26 June 2015, Alex suffered a serious stroke and died the next day. SHU says that her husband had been solely responsible for dealings in respect of the family's affairs and it is SHU's evidence that he had not informed her of the KCH debt of approaching £100,000, nor of the £10,000 Homerton debt.

14. Fairly shortly after SHU's husband's death, Homerton Hospital contacted SHU by telephone about the Homerton debt. The communication apparently contained no details in relation to the treatment. SHU's evidence suggests that it was at about the time of the renewed application for permission for this claim that she acquired that underlying material and further information.

15. On 25 August 2016, the eldest child of the family was granted British citizenship. And on 22 November 2017 a further application for an extension of leave to remain on behalf of the family was submitted. The family was in severe financial hardship; the money to make the application had been borrowed.

16. Limited leave to remain for a period of thirty months was granted to SHU on 12 April 2018. She will be eligible to apply for settlement on completing ten years, on what is known as the "parent route"; to achieve this she must make three more applications to the SSHD for periods of thirty months leave each. This is relevant to the Claimant's case concerning the impact upon SHU's immigration status of the existence of the debt in respect of E's treatment.

17. The 12 April 2018 limited leave decision reflected that there was a debt owed for medical treatment. It said:

> "Please note that a level of discretion has been applied regarding the grant of leave to remain as from consultation with the NHS, it is confirmed that you currently still hold debts of £10,436 from their services under invoice ref 158809. It is accepted that in your current financial situation to pay off this full amount is not practical or reasonable however contact should be re-established at the NHS and a management instalment plan set out e.g. £20 a month.
>
> Evidence of re-payment will be assessed in any subsequent grant of leave."

18. It is to be noted only the smaller debt, was mentioned although the hospital to which the debt was owed was not set out.

19. SHU's evidence is that it was only on 3 October 2018, following receipt of the April 2018 decision and consultation with the Islington Law Centre, that she became aware that the KCH debt existed in a much larger sum. She was told that her husband had in fact previously written to KCH with the help of Islington Law Centre asking for the charges in respect of E's treatment to be waived. Apparently, a social worker at KCH had found out the information about the debt but had determined not to tell SHU about the approximately £100,000 debt at the time because she judged it would be too distressing for her, describing her as "extremely vulnerable and … just about managing". She says she has suffered significant stress due to the knowledge of the debt, heightened by her impoverished circumstances. It has affected her and E's psychological well-being, including SHU's ability to care for the family. E feels the burden of these circumstances and feels guilty.

20. These details are relevant because the Claimant relies in this case upon the significant distress caused to SHU by the knowledge of this obligation, and also the distress and impact upon E, to bring the circumstances within the ambit of Article 8 for the purposes of an Article 14 claim to the effect that the charging regime under the Regulations is discriminatory and cannot lawfully be applied to SHU and E's case, but rather must be read so as to treat the debts in respect of E as extinguished.

21. Ms Broadfoot QC for the Claimants puts the case in essentially 3 ways:

    21.1. The SSHSC acted incompatibly with the first and second Claimants' rights arising in the ambit of Article 8 of the ECHR read with Article 14, in failing to provide for the extinguishing of any liability to charge where a treated child subsequently falls outside the charging regime in section 175 of the National Health Service Act 2006 ("the NHS Act"); further,

    21.2. Paragraph 322 (12) of the Immigration Rules is *ultra vires* section 3 (2) of the IA 1971 as being outwith the Padfield purpose of the Act because in truth it was only a debt-collecting provision, and

    21.3. Paragraph 322 (12) of the Immigration Rules is irrational insofar as it requires the SSHD to take into account in respect of SHU's applications for indefinite leave to remain, an NHS debt that has been written off by the SSHSC.

THE STATUTORY FRAMEWORK

22. There is no dispute between the parties as to the applicable statutory framework.

The Charging Regime

23. The primary duties of the Secretary of State are contained in section 1 of the the NHS Act which describes the Secretary of State's target duty:

> "Secretary of State's duty to promote comprehensive health service"
>
> "(1) The Secretary of State must continue the promotion in England of a comprehensive health service designed to secure improvement— (a) in the physical and mental health of the people of England, and (b) in the prevention, diagnosis and treatment of physical and mental illness."
>
> "(2) For that purpose, the Secretary of State must exercise the functions conferred by this Act so as to secure that services are provided in accordance with this Act."
>
> "(3) The Secretary of State retains ministerial responsibility to Parliament for the provision of the health service in England."
>
> "(4) The services provided as part of the health service in England must be free of charge except in so far as the making and recovery of charges is expressly provided for by or under any enactment, whenever passed."

24. A scheme for charging for NHS services to persons without a permanent tie to the United Kingdom has been in place for many years. The details of its operation have changed from time to time as circumstances and evidence have changed. Broadly, it operates as follows.

25. The NHS Act provides that services from the NHS are free except where express power is given to charge, and under section 175 of the NHS Act, (previously, under section 121 of the NHS Act 1977) regulations have been made governing charging for services provided to those not ordinarily resident in the UK.

26. Section 175 of the NHS Act provides as follows:

> "(1) Regulations may provide for the making and recovery, in such manner as may be prescribed, of such charges as the Secretary of State may determine in respect of the services mentioned in subsection (2).
>
> (2) The services are such services as may be prescribed which are –
>
> (a) provided under this Act, and
>
> (b) provided in respect of such persons not ordinarily resident in Great Britain as may be prescribed."

27. The National Health Services (Charges to Overseas Visitors) Regulations 1989 are of relevance to the Homerton debt; the similarly named 2011 and 2015 Regulations (respectively "the 2011 Regulations" and "the 2015 Regulations" together "the Regulations") are relevant to the KCH debt. As stated, from 6 April 2015 section 39(1) of the IA 2014 contains a statutory definition of "not ordinarily resident" for the purposes of section 175 NHSA. No issue turns on that in this application.

28. Under the 2015 Regulations an Immigration Health Surcharge was introduced. Pursuant to the NHS (Charges to Overseas Visitors) (Amendment) Regulations 2017, unless the treatment is urgent, payment for treatment is collected by the NHS body before providing the NHS services.

29. There are no differences between the scope of the 2011 and the 2015 Regulations relevant for the purposes of this case, and the 2015 Regulations preserve by Regulation 27 (1) and schedule 4, the debt imposed by the 2011 Charging Regulations for treatment commenced before 6 April 2015. In describing the effect of the Regulations below, the 2015 version is referred to.

30. Under Regulations 3 (1) and (2) NHS bodies must impose and recover charges for the provision of certain "relevant services" to overseas visitors who are not exempt. Such services are all those provided under the NHS Act 2006, save for primary medical, dental, ophthalmic and equivalent services. There have been changes over the years, as immigration policy has changed. For example, the list of exempted services has been expanded and the categories of exempt persons has changed. Victims of modern slavery and asylum seekers are among the exempted persons under the 2015 Regulations.

31. The policy justification for the scope of the charging system emerges from extracts from the consultation processes preceding the enactment of the Regulations, including

one initiated in February 2010 and also from the ministerial responses to it. The Health Minister at the relevant time in a consultation response of March 2011 stated as follows:

> "The NHS is built on the principle that it provides a comprehensive service, based on clinical need, not the ability to pay. However, it is not free of charge to all comers. Legislation dating back to 1977 permits persons who are not ordinarily resident in the United Kingdom to be charged for NHS services and subsequent regulations, 1st introduced in 1982, impose a charging regime in respect of hospital treatment.
>
> "The charging regime provides for some categories of non-residents to be exempt from charges, and international agreements provide reciprocal healthcare that benefits visitors from and to participate countries. It also takes full account of humanitarian obligations in the provision of healthcare, in particular ensuring that the emergency medical needs of any person treated irrespective of their status or ability to pay.
>
> "However it is increasingly clear that the overall charging regime is neither balanced nor efficient. Overall entitlement to free health care, through residency or other qualified exemptions, is often more generous to visitors and short-term residents than is reciprocated for UK citizens seeking treatment in many other countries. Charging regulations only cover hospital treatment, so visitors may receive free primary care and other non-hospital-based healthcare services. Although hospitals have a statutory duty to enforce the regulations, effective enforcement by hospitals appears to vary considerably.
>
> "For these reasons we believe that a further fundamental review of the current policy is needed. The review will include:
>
> qualifying residency criteria for free treatment;
>
> the full range of other current criteria that exempt particular services or visitors from charges for the treatment;
>
> whether visitors should be charged to GP services and other NHS services outside of hospitals;
>
> establishing more effective and efficient processes across the NHS to screen for eligibility and to make and recover charges; and
>
> whether to introduce a requirement for health insurance tied to visas."

32. On 6 April 2015, again following consultation, the 2015 Regulations came into force and replaced the 2011 instrument. Changes in the 2015 Regulations reflected a tightening policy in respect of charges levied upon those with certain kinds of immigration status.

33. The background to the changing policy was recognition of the significant pressure on the NHS and research showing the costs of medical treatment provided to illegal immigrants, failed asylum seekers and other migrants without a permanent relationship with the UK. It was recognised that a large proportion of those who would be charged under the old rules would not have the resources to pay, but it was thought that the changes promoted a more robust system of identifying those who should pay, and of recovering the money. It was considered that access to public services ought to be afforded to those subject to immigration control in a manner that was commensurate with their immigration status.

34. It is clear from the evidence filed by the SSHD and the SSHSC that the specific position of children was considered, and that the interests of various groups had been promoted in discussion. In a response entitled "Sustaining services, ensuring fairness", dated December 2013, to a July 2013 consultation, the Ministers said as follows:

> "The most strongly supported requests included:
>
> **Pregnant women**
>
> This is a complex and sensitive area where the risks to the health of both the mother and baby if refused or deterred by the need to pay are significant. A small number of countries already exempt this group. However, our independent research confirms that deliberate maternity health tourism through the short-term visit entry is a problem, and this could only increase, potentially significantly, if services were provided free of charge. We therefore shall not be introducing any new exemptions from charging for maternity services.
>
> **Other vulnerable groups**
>
> These include victims of domestic and other violence as well as victims of human trafficking (of whom only those who have been given formal recognition as a victim, or suspected victim, are currently exempt). We are persuaded by the moral and humanitarian case, but there are practical difficulties in how NHS staff can determine objectively who this exemption might apply to. We will therefore give further thought to this area, seeking the views of relevant agencies and advisors as appropriate.

> We do not intend to establish an exemption for children as we believe this poses a significant risk of abuse by visitors seeking treatment for children with existing serious illness, and may act as a draw to illegal migrant families. Vulnerable children, such as victims of trafficking, those seeking asylum, and migrant children in local authority care currently receive free healthcare and will continue to do so. We will listen to arguments about how best to cover other vulnerable children who might otherwise be denied treatment."

35. In the event, it became settled policy to charge those without a lawful basis for residing in the UK except where they were in particularly vulnerable circumstances thought to justify an entitlement to free NHS care.

36. The categories of vulnerability, which were eventually reflected in the Regulations, included asylum seekers, refugees, looked after children, and victims of trafficking. Particular consideration was given to the position of children under section 17 of the Children Act 1989 as may be seen from the above, but in the event, special provision was not made for this cohort.

37. Regulations 6, 6A and 15 – 17 set out the categories of exemption from the general rule, including those who were subject to humanitarian protection. Treatment categories also attracted exemption from the payment provisions, such as services provided for the treatment of conditions caused by torture, FGM, domestic violence or sexual violence. Thus, Regulation 6 provides relevantly:

> "6. Provision relating to recovery of charges in respect of refugees and victims of modern slavery
>
> (1) This paragraph applies to an overseas visitor who –
>
> (a) received relevant services from a relevant body;
>
> (b) subsequent to receiving the relevant services, has become an overseas visitor who was exempt from charges under –
>
> (i). regulation 15 (a) (refugees, asylum seekers, supported individuals and looked after children); or
>
> (ii). regulation 16 (victims of modern slavery); and
>
> (c) at the time that the overseas visitor received the relevant services –
>
> (i). where paragraph (1) (b) (i) applies, was in the United Kingdom for the purpose of making an application to be granted temporary

> protection, asylum or humanitarian protection under the immigration rules, but had not made that application …
>
> (2) an overseas visitor to whom paragraph (1) applies is to be treated for the purposes of these regulations as if, at the time that relevant services were provided, the overseas visitor was an overseas visitor in respect of whom no charge may be made or recovered for the relevant services.
>
> (3) relevant body which, in respect of an overseas visitor to whom paragraph (1) applies, has –
>
> (a) yet to make charges under regulation three (obligation to make and recover charges), must not make the charges;
>
> (b) made charges under regulation 3 but has yet to recover the charges, must not recover the charges; or
>
> (c) made charges under regulation 3 and received payment in respect of the charges, must repay any sum paid in respect of the charges in accordance with regulation 5…"

38. The NHS (Charges to Overseas Visitors) (Amendment) Regulations 2017 made certain further changes not relevant to these proceedings. It is fair to say the general trend of policy has been to tighten rather than relax the regime for the payment of charges.

39. The general principle was maintained that entitlement was on the basis of ordinary residence. Thus, those who are ordinarily resident in the UK are not subject to charging for NHS services, and those who acquire ordinary residence are in the same position with effect from the date when they acquire ordinary residence. The policy basis underpinning the charging regime is expressed as recognising that those people with a lasting connection to the United Kingdom are likeliest to make a fair and reasonable contribution to the NHS, thus ensuring the viability of a continuing service.

40. The policy is informed by reference to the cost of providing NHS care. For example, the Explanatory Memorandum to the 2015 Regulations recites the cost to the NHS of treating all overseas visitors and migrants in 2013 as around £1.8 billion per annum. In a nutshell, the Regulations are described as "playing a role in protecting finite NHS resources against "health tourism", whereby people come to the UK to access free NHS services to which they are not entitled."

41. The SSHSC has promulgated guidance with respect to the Charging Regulations. The "Guidance on Implementing the Overseas Visitor Charging Regulations, May 2018" was, at the time of the issue of this claim, the most recent iteration of this document, ("the Guidance"). It contains a discretion to write off a debt in respect of charges. It states materially:

> "7.66 …relevant bodies…have the option to write off debts and not pursue them when the person is genuinely without funds."
>
> "13.57 Providers and commissioners are also encouraged to agree early on the appetite for risk of chargeable patient debt. However, providers will wish to discuss decisions involving large amounts of debt and where they have established that the cost of pursuing debt is not worth the investment."
>
> "The organisation holding the debt is the only one legally allowed to decide when and if to write off any outstanding debt."
>
> "13.76. The relevant body may want to write off a debt for accounting purposes where:
>
> • the NHS chargeable patient has subsequently died and recovery from their estate is impossible; or
>
> • given the NHS chargeable patient's financial circumstances, it would not be cost effective to pursue it (e.g. they are a destitute illegal migrant or are genuinely without access to any funds or other resources to pay their debt); or
>
> • all reasonable steps have failed to recover the debt (e.g. the NHS chargeable patient is untraceable or there are no further practical means of pursuing debt recovery).
>
> 13.77. However, writing off the debt for accounting purposes may not necessarily mean that the debt is extinguished and relevant bodies are still able to recover it. Debts can be cancelled entirely if the charges they relate to are found not to have applied in the first place."

The Immigration Act 1971 ("The IA 1971")

42. The IA 1971 Section 1 (1) permits those with the right of abode generally to come and go from the United Kingdom and to live there. Section 1 (2) provides that those without a right of abode may be permitted to work and settle in the United Kingdom subject to regulation under the Act.

43. A prominent aspect of the statutory regime is the SSHD's power to grant leave. The way in which the SSHD regulates and controls those subject to immigration control is by the imposition of conditions tied to the leave granted. Further, when indefinite leave is granted the power to grant conditions no longer exists.

44. Section 3 (2) gives the power to make or amend rules...

> "…as to the practice to be followed in administration of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter, including any rules as to the period for which leave is to be given and the conditions to be attached in different circumstances"

45. The relevant part of Paragraph 322 (12) provides as follows:

> "Grounds on which leave to remain and variation of leave to enter or remain in the United Kingdom should normally be refused...
>
> ...
>
> (12) where one or more relevant NHS body has notified the Secretary of State that the person seeking leave to remain or a variation of leave to enter or remain has failed to pay a charge or charges with a total value of at least £500 in accordance with the relevant NHS regulations on charges to overseas visitors."

46. The Explanatory Note to the Statement of Changes to the Immigration Rules (IR) HC 1511 describes the purpose of IR 322(12) as being to:

> - "Deter overseas visitors from misusing the NHS by making it clear that the UK health services are not an intentional free for all;
>
> - encourage overseas visitors to meet their obligations to pay for the NHS services they use;
>
> - enable the UK Border Agency to identify more effectively and take action against migrants with significant unpaid NHS charges; and
>
> - reassure the public that we are determined to operate fair and robust controls on migrants' access to public benefits and services."

47. The claim in this case involves the submission that the SSHSC has acted incompatibility with the human rights of SHU and E.

48. Section 6(1) of the Human Rights Act 1998 provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention Right, defined in turn as the rights and fundamental freedoms set out in (inter alia) Articles 2 to 12 and 14 of the ECHR: section 1(1).

49. Article 8 of the ECHR states:

> "Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

and Article 14 of the ECHR provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

CASE LAW

50. There has been a large number of cases on the interaction between Article 14 and other articles of the Convention, including Article 8. It is fair to say that analysis of issues arising under Article 14 in connection with other Convention rights can become complex, and the simplicity of the words of Lord Hoffmann, speaking generally of Article 14 discrimination, in R (on the application of Carson) v Secretary of State for Work and Pensions [2005] UKHL 37; [2006] 1 A.C. 173 at paragraphs 14 – 15 has resonance:

> "14. … There is discrimination only if the cases are not sufficiently different to justify the difference in treatment. The Strasbourg court sometimes expresses this by saying that the two cases must be in an "analogous situation ..."
>
> 15. Whether cases are sufficiently different is partly a matter of values and partly a question of rationality."

51. To like effect, Lord Nicholls in the same case:

> "3. For my part, in company with your Lordships, I prefer to keep formulation of the relevant issues in these cases as simple and non-technical as possible … The essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to this question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that the situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact."

52. These are words to which I shall return later in this judgment.

53. Whilst accepting that the analysis at one stage may overlap with that at the next, and also that a court is required in the case of alleged discrimination to look at the facts as

a whole, it is generally considered useful to address a discrimination issue in a framework of questions such as:

53.1. Do the circumstances under consideration "fall within the ambit" of the Convention right at issue?

53.2. Has there been a difference of treatment between two persons who are in an analogous situation?

53.3. Is that difference of treatment on the ground of one of the characteristics listed, or on the ground of some "other status"?

53.4. Is there an objective justification for that difference in treatment?

54. The SSHSC represented, as was the SSHD, by Mr Alan Payne QC, takes issue with every stage of the analysis relied upon by the Claimant, and I shall adopt that framework in considering the effect of the authorities and the submissions. The Defendants do not accept the facts come within the ambit of Article 8, nor, if they do, that the group chosen to contrast them is, truly, in an analogous situation to the Claimants. They further contend that in any event there is clear, reasonable and proportionate policy justification for any difference in treatment the Claimants may identify as between themselves and any other group.

Generally

55. The general operation of Article 14 was dealt with succinctly in the case of Bah v the United Kingdom (Application No: 56328/07) 27 September 2011 where each of the stages set out above was covered:

> "….
>
> (a) General Principles
>
> 35. The court recalls that Article 14 complements the other substantive provisions of the Convention and Protocols but has no independent existence since it applies solely in relation to the "enjoyment of the rights and freedoms" safeguarded by those provisions. The application of Article 14 does not necessarily presuppose the violation of one of the substantive Convention rights. It is sufficient – and also necessary – for the facts of the case to fall "within the ambit" of one or more of the convention Articles (see *Burden v the United Kingdom* GC, No: 13378/05 paragraph 58 ECHR 2008 -). The prohibition of discrimination in art.14 thus extends beyond the enjoyment of the rights and freedoms which the Convention and Protocols require each State to guarantee. It applies also to those additional rights, falling within the general scope of any convention article, for which the contracting state has voluntarily decided to provide. This principle is well entrenched in the court's case-law. It was expressed for the first time in the case "relating to certain aspects of the laws on the use of languages in education in Belgium" v

> Belgium (Merits) (judgment of 23 July 1968, series A No 6 paragraph 9).
>
> 36. The court has also established in its case-law that only differences in treatment based on an identifiable characteristic, or "status", are capable of amounting to discrimination within the meaning of Article 14 (*Kjeldsen, Busk Madsen and Pedersen v Denmark* 7 December 1976 paragraph 56, series A No 23). Moreover, in order for an issue to arise under Article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations (*DH and Others v the Czech Republic* GC, No: 57325/00, paragraph 175, ECHR 2007; *Burden v the United Kingdom* GC cited above, paragraph 60). Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship proportionality between the means employed and the aims sought to be realised. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent different in otherwise similar situations justify a difference treatment (*Burden v the United Kingdom* GC, cited above paragraph 60)."

56. As it is further expressed in the case law: where there exists a difference in treatment between relevantly similar groups that does not pursue a legitimate aim or for which there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised, there will be a violation of Article 14: *Stec v United Kingdom* (2006) 43 EHRR 1017 at 51.

57. Further, where a public authority without objective and reasonable justification fails to treat differently persons whose situations are significantly different, it is well established (see *Thlimmenos v Greece* (2001) 31 EHRR 15) that discrimination, usually referred to as "*Thlimmenos* discrimination", will occur for the purposes of Article 14. Ms Broadfoot QC for the Claimants put her case on this alternative ground as well.

58. Turning to the framework of the questions.

Question 1: Do the circumstances under consideration "fall within the ambit" of the Convention right at issue?

59. The Claimants place reliance on Mathieson v Secretary of State for Work and Pensions [2015] 1WLR 3250, [2015] UKSC 47 where the court had occasion to consider Article 14 read with Article 8 in the context of disability living allowance and alleged discrimination including the concept of "within the ambit of" an article of the

Convention where the State had chosen to act, absent an obligation to act. At paragraph 17 the following was said:

> "17. In his invocation of Article 14, Mr Mathieson therefore needs first to establish a link with one or more of the Conventions or their articles. He alleges a link with either or both of Cameron's rights to "the peaceful enjoyment of his possessions" and Article 1 of Protocol 1 ("A1P1") and to "respect for his … family life" under Article 8. For the purposes of Article 14, Mr Mathieson does not need to establish that the suspension of DLA amounted to a violation of Cameron's rights under either of those Articles: otherwise Article 14 would be redundant. He does not even need to establish that it amounted to an interference with his rights under either of them. He needs to establish only that the suspension is linked to, or (as it is usually described) within the scope or ambit of, one or other of them. How can a public authority's action be within the scope of an Article without amounting to an interference with rights under it? *Carson v The United Kingdom* 2010 51 EHRR 369 provides an example. There the Grand Chamber of the European Court of Human Rights explained at paragraphs 63-65 that A1P1 did not require a contracting state to establish a retirement pension scheme but that, if it did so, the scheme fell within the scope of A1P1 and so had to be administered without discrimination on any of the grounds identified in Article 14. *Hode and Abdi v the United Kingdom* 2012] 56 EHRR 960 provides another example. There the Court of Human Rights explained at paragraph 43 that Article 8 did not require the state to grant admission to a refugee's non-national spouse but that, if it introduced a scheme doing so, it fell within the scope of Article 8 and so had to be administered without discrimination on any of the identified grounds."

60. The Claimants rely upon the fact that on the authorities, they need only show a link between the failure to abrogate charges for E's treatment and matters within the scope of Article 8. They express the Article 8 connection as affecting family life in terms of the existence of the debt, pressure to attempt to repay, and the likelihood that further leave to remain will be refused directly affecting the stability of SHU and E's home life. They also pray in aid the disturbance and disruption to stable home life produced by worry, which is shared both by SHU and E.

61. The SSHCS by contrast submits there is no obligation to provide free medical treatment, and the case law does not support the proposition that the present circumstances would be within its ambit.

62. The Claimants also suggested it might be possible to look at the case in terms of the Secretary of State making provision for a number of exceptions, including refugees and people, and yet failing to include people in the position of the Claimants within those exceptions. This makes the claim appear similar to those cases in which, there being no

obligation to make provision, the Secretary of State nonetheless chooses to do so. The defendant Secretary of State points to particular justifications for those acknowledged exceptions which derive from non-domestic law.

63. The Claimants rely on Pentiacova v Moldova (Application Number 14462/03), an admissibility decision of 2005, in which the ECtHR considered an application concerning insufficient State financing of haemodialysis equipment and drugs. The application in that case was declared inadmissible. The case is of value however in exposing the ECtHR's thinking about Article 8 in the context of medical treatment. The Court was clear it wished to deal with the argument under Article 8 (see page 12) although strictly it may not have needed to. The relevant paragraphs are on pages 12 and 13:

> "Although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference since it may also give rise to positive obligations inherent in effective "respect" for private and family life. While the boundaries between the State's positive and negative obligations under this provision do not always lend themselves to precise definition, the applicable principles are similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and the community as a whole, and in both contexts the State enjoys a certain margin of appreciation in Zehnalovà and Zehnal v. the Czech Republic (dec.), v the Czech Republic (dec.) no. 38621/97, ECHR 2002-V).
>
> "The Court has previously held that private life includes a person's physical and psychological integrity (Niemietz v. Germany, judgment of 16 December 1992, Series A no. 251-B, § 29). While the Convention does not guarantee as such a right to free medical care, in a number of cases the Court has held that Article 8 is relevant to complaints about public funding to facilitate the mobility and quality of life of disabled applicants (see, Zehnalova and Zehnal, cited above, and Sentges v. the Netherlands (dec.) no. 27677/02, 8 July 2003). The Court is therefore prepared to assume for the purposes of this application that Article 8 is applicable to the applicants' complaints about insufficient funding of their treatment.
>
> (…)
>
> In the present case the Court notes that the applicants had access to the standard of health care offered to the general public both before and after the implementation of the medical care system reform. It thus appears that they were provided with basic medical care and basic medication before 1 January 2004 and have been provided with almost full medical care after that date. The Court by no means wishes to minimise the difficulties apparently encountered by the applicants and appreciates the

> very real improvement which a total haemodialysis coverage would entail for their private and family lives. Nevertheless, the Court is of the opinion that in the circumstances of the present case it cannot be said that the respondent State failed to strike a fair balance between the competing interests of the applicants and the community as a whole."

64. The Court disposed of the Article 8 point in Pentiacova by saying:

> "Bearing in mind the medical treatment and the facilities provided to the applicant and the fact that the applicants' situation has considerably improved… The Court considers that the respondent State cannot be said, in the special circumstances of the present case, to have failed to discharge its positive obligations under Article 8 of the Convention.… It follows that the complaint under Article 8 of the Convention is manifestly ill-founded…" (Page 14).

65. The Claimant argues that this discussion shows that matters of health provision may be considered to be within the ambit of Article 8, even if strictly, such provision is not subject to a positive duty under the Convention.

66. As the Secretaries of State submit, it is not every engagement of aspects of private life that resonates for Article 8. In Sentges v Netherlands Application No. 27677/02, decided in 2003, also considered in Pentiacova, the scope of Article 8 in a medical services context, was described as follows (pages 6 –7)

> "The Court has previously held that private life includes a person's physical and psychological integrity; the guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings (see, mutatis mutandis, Niemietz v. Germany, cited above, § 29).
>
> The Court has also held that Article 8 cannot be considered applicable each time an individual's everyday life is disrupted, but only in the exceptional cases where the State's failure to adopt measures interferes with that individual's right to personal development and his or her right to establish and maintain relations with other human beings and the outside world. It is incumbent on the individual concerned to demonstrate the existence of a special link between the situation complained of and the particular needs of his or her private life (see Zehnalovà and Zehnal v. the Czech Republic (dec.), no. 38621/97, ECHR 2002-V)."

67. It is the Secretary of State's submission in effect, that the disturbance to the Claimants' life is only that sort of disruption to everyday life that cannot bring them within the ambit of Article 8. Further, that there is an emphasis in case law upon the core values of Article 8 in the ambit of which central aspects the circumstances of a case must fall. In other words, these facts of the alleged discrimination must have a meaningful connection with something intrinsic to the interests lying at the heart of Article 8; a 'tenuous link' is insufficient.

68. That approach may be seen in of M v Secretary of State for Work and Pensions [2006] 2 AC 91 where Lord Bingham said the following:

> "3 Ms M does not complain that her rights under article 8 of, or article 1 of the First Protocol 2, the European Convention are or have been violated. She claims that her situation falls within the ambit or scope of these provisions and that she is accordingly entitled to complain that her enjoyment of these rights has been the subject of adverse discrimination on the grounds of sex, in violation of article 14 in conjunction with either the article or the protocol or both.
>
> "4 it is not difficult when considering any provision of the Convention, including article 8 … to identify the core values which the provision is intended to protect. But the further a situation is removed from one infringing those core values, the weaker the connection becomes, until a point is reached when there is no meaningful connection at all. Like my noble and learned friend in paragraph 60 of his opinion, I cannot accept that even a tenuous link is enough. That would be a recipe for artificiality and legalistic ingenuity of an unacceptable kind."

69. The Claimants rely particularly upon a recent decision of the Supreme Court in R (DA and Others) v Secretary of State for Work and Pensions [2019] UKSC 21. In this case a challenge arose to the revised benefit cap on grounds of discrimination contrary to Article 14 taken with Articles 8 and A1P1 with a particular issue concerning the ambit of Article 8. Lord Wilson with whom Lord Hodge agreed said as follows:

> "35. In M v Secretary of State for Work and Pensions [2006] 2 AC 91 [2002]SC 91, Lord Nichols observed in paragraph 14 that:
>
> "the more seriously and direct discriminatory provision or conduct impinges upon values underlying the particular substantive Article, the more readily would it be regarded as within the ambit of that Article ..."
>
> It cannot seriously be disputed that the values underline the right of all the appellants to respect for their family life include those of a home life underpinned by a degree of stability, practical as well as emotional, and as by financial resources adequate to meet

> basic needs, in particular accommodation, warmth, food and clothing.""

70. It is Ms Broadfoot QC's case that the degree of stability, practical as well as emotional, that is referred to in DA is analogous with her case and that the circumstances are within the ambit of Article 8. It is that stability that is impacted by the effect of the Regulations in their present form, on her case.

71. The ambit of Article 8 has been referred to as "a modality of the exercise of the [Article 8] right" - see the line of cases beginning with Petrovic v Austria (1998) 33 EHHR 33, at paragraph 28.

72. This modality has been interpreted as requiring more than just the existence of a measure under which, for example, a family receives less money than others do. Rather, it only includes cases where such monies can be said to be "intended to promote family life" (in Petrovic the money enabled a parent to stay home to look after children), that the measure will be considered to come "within the ambit of" Article 8. That is to say, the purpose of a particular payment or benefit, and its nature, could be seen as a means by which the State showed its support for family life.

73. Thus, in McLaughlan [2018] UK 48 [2018] 1 WLR 4250 (another benefits case), it was not the impact of the absence of the money that was relevant, but rather that the measure was the manner in which the State showed respect for children and the life of the family, securing the family life of children being among the principal values protected by Article 8 (see paragraphs 17 to 19, 22, 66 to 70).

74. Likewise, in R(SC) v Secretary of State for Work and Pensions [2019] EWCA 615 giving a judgement with which the other members of the court agreed, Leggatt LJ said of child tax credit:

> "58. Indeed, as a means tested benefit, it has a more important role and a closer connection with the value of securing the life of children within their families than the widowed parents' allowance [dealt with in the McLaughlan case]. As noted earlier, in families with no income from work, the individual element of the benefit is intended to meet the subsistence needs (other than housing) of the child in respect of whom it is payable…"

75. For these reasons, the Court of Appeal held that although the imposition of a two-child limit on the child tax credit did not amount to interference with the right to respect for family life protected by Article 8, it did fall "within the ambit" of Article 8 for the purpose of Article 14.

76. The SSHSC argues that it cannot be said the failure to provide free healthcare engages Article 8, and further, the 2011 and 2015 Regulations, being Regulations designed to

discourage health tourism, cannot be described as the State choosing to act in order to improve the quality of family life, or to recognise and support it.

77. It is helpful to take the next two questions together.

Question 2: Has there been a difference of treatment between two persons who are in an analogous situation?

Question 3: Is that difference of treatment on the ground of one of the characteristics listed, or on the ground of some "other status"?

78. For the one part, Ms Broadfoot QC postulates the case of a parent where the child acquires status as an ordinarily resident British citizen before receiving treatment and for the other part (into which group her clients fall), a parent with a child who acquires that status after receiving the treatment. The second parent has a significant debt and a more precarious position because of the implications of an NHS debt under paragraph 322(12).

79. The SSHSC argues, by the same token, that the difference in immigration status of the two groups postulated, namely of a recipient of NHS care with ordinary residence at the time care is received, and no ordinary residence at the time care is received, is the very reason underpinning his policy, together with the desire of the SSHD, to discourage travel to the UK in order to receive free NHS care.

80. At paragraphs [61]-[62] of R(SC), Leggatt LJ explained that the formulation of Article 14 is not straightforward, because it gives, as examples of "status", a series of characteristics without any obvious common factor so the formulation of a clear test of what constitutes "status" in this context is just not possible.

81. Leggatt LJ gave guidance on the approach that has been taken to this issue referring at paragraph 64 to "a rare recent example of a case where the applicant was held not to have a status covered by Article 14…" (namely Minter v United Kingdom (2017) 65 EHRR SE6). He continued:

> "65. The same tendency to take an increasingly generous view of what is capable of amounting to a relevant status has been followed by the U.K.'s highest court. Characteristics which had been accepted by the Supreme Court as a status falling within the scope of article 14 include place of residence (R (Carson) v Secretary of State for Work and Pensions [2005] UK 37; [2006] 1 AC 173 (a)…. "

82. He referred among others to the cases of RGM, Tigere, and in re Brewster, (HC v Secretary of State for Work and Pensions [2017 UKSC 73] the "Zambrano" carer case), where in the last of these, a non-European citizen who was the primary carer of a European citizen was not a status covered by Article 14.

83. Leggatt LJ dealt also with the observation of Lady Black in R (Stott) v Secretary of State for Justice [2018] UK 59; [2018] 3 WLR 1831 in which she said it was not clear or easy to grasp whether a status must exist independently of the difference in treatment. At paragraph 231 Leggatt LJ concluded:

> "There is no reason why a person may not be identified as having a particular status when the or an aim is to discriminate against him in some respect on the ground of that status."

He indicated that the case of Mathieson v Secretary of State for Work and Pensions (above) was a domestic case illustrating this point.

84. In other words, there may be an element of circularity in seeking to identify status separately from the notion of discrimination, although the courts have accepted certain self-defining cases.

85. It is beyond contention however that, according to the case law, the concept of "other status" must be given a broad interpretation. The claimed status does not have to be innate or acquired, it may be imposed or (as described in paragraph 71 of SC) it may be "the upshot of circumstance, as with homelessness."

86. Further, it need not, in order to be "other status" for the purposes of Article 14, have any social or legal significance outside the context of the legislation in question and apart from the fact that it is the grounds on which the allegedly discriminatory treatment is based. (See SC paragraph 75, citing R v (Stott)).

87. However, an important limit was recognised by Leggatt LJ in SC. He rejected the notion that the status of "being a member of a household including more than two children" could be described as status in the sense of "what makes someone the person who she or he is". Rather, it was a:

> "relatively incidental feature of a person's situation and considerably less significant, than for example, the fact that a person is homeless… In terms of Lord Walker's model of concentric circles, this status lies on the outer periphery" (S C paragraph 78).

88. In Mathieson the asserted difference in status was, of course, between a child who was severely disabled and in need of lengthy in-patient hospital treatment, and a child who was similarly disabled but not in need of lengthy in-patient hospital treatment.

89. In that case the Secretary of State had disputed that any relevant status existed on which the decision had been based. Lord Wilson recalled at paragraph 21 that the prohibited grounds in Article 14 extended well beyond innate characteristics, or characteristics that the complainant did not choose, and cited the simile of a series of concentric circles offered by Lord Walker in the case of R (RJM) v the Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening) [2009] AC 311 at paragraph 5. Those circles, especially the wider ones, included matters such as *homelessness (RJM itself), or matters of choice such as a particular country of*

residence (see Carson) or previous employment, and included the claimant as having recognisable status. He continued:

> "the more peripheral or debatable any suggested personal characteristic was then the less likely it was to come within the most sensitive areas where discrimination is particularly difficult to justify."

90. In Tigere v the Secretary of State for Business Innovation and Skills [2015] UKSC 57, the Supreme Court considered a situation where immigration status precluded access to a student loan. In order to qualify, the complainant required ordinary residence in the United Kingdom for three years before the first day of the academic year and to be "settled" in the UK which meant effectively having indefinite leave to remain. The applicant had conditional leave to remain, which was expected to become indefinite leave to remain within a few years. The Supreme Court, holding that Article 2 of the First Protocol was engaged, accepted that immigration status could be a status for the purpose of Article 14.

91. SHU contends that the Regulations cannot be defended, given the objectives of the charging regime, because there is no rational basis for the 2015 Regulations to continue to impose such liability on parents when the child for whose care charges were made becomes ordinarily resident. The deterrence upon which the SSHSC relies is, she says, irrelevant to her, and a person in her position. She is not and was not ever in a position to be described as a health tourist and there is a class of people for whom this policy motive is irrelevant. As such, she says, the 2015 Regulations are manifestly without reasonable foundation.

92. SHU and E also claim that the Regulations as drafted unlawfully discriminate against children and/or, that the Secretary of State has not had regard to his obligations to consider particularly the position of children. They rely on the case of DA as authority for the proposition that, when relevant, the content of the UNCRC can inform enquiry into the alleged violation of Article 14 of the Convention when taken with one of its substantive rights.

Question 4: Is there an objective justification for that difference in treatment?

93. It is well established, and there was no dispute between the parties, that it is the difference in treatment that requires justification in these cases, it is not the measure itself: quite often the policy justification is plain.

94. In paragraph 53 of the recent case of DA, giving the majority judgment, Lord Wilson said the following:

> "… in A v Secretary of State for the Home Department [2005] 2 AC 68, Lord Bingham of Cornhill stated at paragraph 68:
>
> "What has to be justified is not the measure in issue but the difference in treatment between one person or group and another."

95. Lord Wilson then recalled the words of Baroness Hale in her dissent in the first Benefit Cap case (R (SG) v Secretary of State for Work and Pensions [2015] UKSC16; 1 WLR 1449):

> " … Lady Hale DPSC in para 188 of her dissenting judgment cited Lord Bingham's statement and concluded:
>
> "It is not enough for the Government to explain why they brought in a benefit cap scheme. That can readily be understood. They have to explain why they brought in a scheme in a way which has disproportionately adverse effects on women." "

Lord Wilson himself then said:

> "54. I conclude that what the Government has to justify in the present case is its failure to amend the 2006 Regulations so as to provide for exemption of the DA and DS cohorts from the revised Cap. The Secretary of State does not appear to challenge this conclusion."

96. Further, as encapsulated at paragraph 65 of DA also by Lord Wilson:

> "…at any rate in relation to the Government's need to justify what would otherwise be a discriminatory effect of a rule governing entitlement to welfare benefits, the sole question is whether it is manifestly without reasonable foundation. Let there be no future doubt about it."

and, in paragraph 66:

> "… But reference in this context to any burden, in particular to the burden of proof, is more theoretical than real. The court will proactively examine whether the foundation is reasonable; and it is fanciful to contemplate its concluding that, although the state had failed to persuade the courts it was reasonable, the claim failed because the complainant had failed to persuade the court that it was manifestly unreasonable."

97. At paragraph 48 Lord Wilson had also said this:

> "48. In *DH v Czech Republic* 200 47EHRR 3, the Grand Chamber of the ECtHR said in paragraph 175 that "discrimination means treating differently, without an objective and reasonable justification, person in relevantly similar situations". A recast to cover the type of discrimination recognised in the *Thlemmenos* case the proposition is that it

> means treating similarly without objective and reasonable justification, persons in relevantly different situations. In *Carson v the United Kingdom* 201 51EHRR 13 the Grand Chamber explained in paragraph 61 was meant by the absence of objective and reasonable justification: "in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised"".

98. The essence of the Claimants' argument on justification is that what she asserts is the difference in treatment, cannot be justified because the policy reasons underpinning the charging regime, namely deterrence of health tourism and deterrence of those with only a temporary or flimsy relationship with the United Kingdom just do not apply in the current case.

99. Ms Broadfoot QC refers to the fact that E arrived as a child and without any capacity to influence where she lived, it is therefore she argues not lawful to impose the significant dis-benefit upon her of the debt and then the resulting precarious nature of her mother's status here because of the debt. The fact that the Regulations do not provide for the debt to be extinguished in her case is evidence she suggests that the Secretary of State evaluated the impact upon the child wrongly.

100. By the same token it is argued there is an unlawful failure to treat different circumstances differently (under the *Thlimmenos* doctrine). The two groups of people who are not treated differently in this case are firstly, a parent with a child where that child does not acquire ordinary residence as a British citizen after receiving treatment and a parent with a child who does acquire ordinary residence as a British citizen: they are both treated the same under the regime. Essentially, this is just another way of saying the same thing as is put in the positive case.

GROUNDS 2 and 3 – THE IMMIGRATION RULES

101. Against this background, the second part of the challenge may be shortly expressed. The first of the challenges to the rules asserts that paragraph 322 (12) (HC 395) of the Immigration Rules is ultra vires the IA 1971 because it cannot be said to promote the object and policy of the statute but rather pursues a different and non-statutory objective, and to that extent it falls foul of Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997.

102. The statutory purpose of the IA 1971 is said by the Claimants to be confined to the regulation and control of entry into the UK, and removal from it of those subject to immigration control. The Claimants says that the *vires* do not extend beyond matters which are relevant to leave that is to be granted or refused under the 1971 Act. IR 322(12) however is not concerned with that, but rather is a debt-collecting mechanism, and as such *ultra vires* that statutory purpose.

103. Ms Broadfoot QC argues that making false statements, failing to comply with conditions, previous offending et cetera are matters to be taken into account elsewhere in the rules on questions of whether leave should be granted or not. It is quite wrong, she submits, to characterise protection of the NHS budget (which is in truth what is provided for here) as an immigration function.

104. As to the second part of the challenge to IR 322(12), based upon rationality, Ms Broadfoot QC says that the only possible relevance of the debt under the rules could be the attribution to SHU of bad character, which is, in the circumstances of the case, perverse.

105. Further, it is an anomalous scheme, because if E had passed her 16th birthday, she would have been responsible for the payment and it cannot rationally be suggested that non-payment of the monies at that point could possibly reflect bad character.

106. The Secretary of State denies that the taking into account of the debt must in all circumstances be referable to bad character and points to the operation of the rule flexibly in accordance with the facts of the case (as in the present case), and also the guidance indicating a discretion – which discretion has been to date exercised favourably in the present case.

107. The SSHD draws the court's attention also to the fact that there is nothing in the correspondence that suggests the next exercise of discretion regarding SHU's continuing status in the UK will be exercised in a different fashion from the favourable response of the April 2018 letter.

CONSIDERATION

ARTICLE 14 and ARTICLE 8

108. Seeking to apply those principles to the facts of the case, it is plain, as Ms Broadfoot QC argued, that the law involving Article 14 discrimination has developed a concept of the ambit of a Convention right, in particular of Article 8, that is broad enough to allow the courts to police a range of circumstances extending beyond the immediate scope of the right in issue and encompass a significant area of activity within the general area of the Convention right. Indeed, where the State voluntarily engages with the provision of additional rights an Article 14 argument may well apply to prohibit discrimination in the manner in which those voluntary conferred rights are afforded. (M v Secretary of State for Work Pensions [2006] UKHL 11; [2006] 2 AC 91.

109. The argument on both sides ranged far and wide, however put simply, the issue is in essence can the Defendants justify the fact that SHU has a debt in respect of her child E's NHS treatment, which has the potential, theoretically, to impact her own immigration status, whereas the children of others who were also once without ordinary residence status (although not at the time of treatment), do not have to pay, meaning their parents' equivalent position would not be so burdened?

110. In my judgement the answer is yes, they plainly can. This is so whether the challenge is regarded as being a comparison with those who have status as ordinary residents at the time of the treatment as against those who, like E, do not, and also regarding the failure to include those in the position of SHU and E in the list of exceptions that includes asylum seekers, victims of trafficking and so forth.

111. As to the first way in which the case is put, it is clear from the case of Pentiacova that aspects of the provision of healthcare come very close to Article 8 although there is no right to the provision of free healthcare. This is not a case about the provision of healthcare, however: it is about the effect of a national scheme that differentiates between those who are ordinarily resident, and those who are not, in requiring payment for treatment from the latter but not the former.

112. The Claimants in the first instance based their case on the ambit of Article 8 as including the intrusion into family life of the instability and anxiety caused by a large, unpayable debt to the NHS and fear of its possible repercussions for the long-term status of one of the Claimants. The words upon which they rely come from the recent case of DA in which Lord Wilson, after stating that the general rule based upon M v Secretary of State for Work and Pensions, speaks of emotional stability as one of the values underlying the rights to respect of family life thus:

> "35. In M v Secretary of State for Work and Pensions the more seriously and directly the discriminatory provision or conduct impinges upon values underlying the particular substantive Article, the more readily would it be regarded as within the ambit of that Article ….."
>
> It cannot seriously be disputed that the values underline the right of all the appellants to respect for their family life include those of a home life underpinned by a degree of stability, practical as well as emotional, and as by financial resources adequate to meet basic needs, in particular accommodation, warmth, food and clothing."

113. The SSHSC says it is not possible to describe the factors in the present case as coming within the ambit of Article 8. I agree. Without seeking to minimise the evidence put in by and on behalf of SHU and E it cannot, in my judgement be regarded as other than an indirect connection. The notion of emotional upset in this context does not have the required quality of seriously and directly impinging such that it requires to be included within the ambit of Article 8.

114. It is clear that the law requires a significant link between the fact of the claim and the subject matter of Article 8. In my judgement there might be, on different facts, a case in which the intrusion by anxiety, producing a lack of stability could invoke the protection of the ambit of Article 8 but these facts are, in my judgement, nowhere near that level.

115. The relevant circumstances in the present case include the fact that the debt has been written off, although not extinguished lest circumstances change in the future. Whilst

an element of anxiety is natural in such circumstances, in truth, there is no real intrusion into the core of the matters that go to make up family life. It is clear from the case of Sentges (above) that it is accepted that private life includes a person's psychological integrity (pages 6 to 7), but this did not mean it extended to "every time an individual's everyday life is disrupted". Further, this notion of family life includes the ideas of personal development and of relationships with other human beings, and there is here no real evidence that these have been damaged.

116. This approach has been followed recently by the Court of Appeal domestically in R(SC) where the heart of the matter is the acknowledgement that a particular benefit impinges upon central and underlying Article 8 values, in that case, securing the presence of children within their families.

117. Accordingly, in my judgement, the Claimant does not pass the first hurdle of establishing her case is within the ambit of Article 8. For the avoidance of doubt, the facts before me are very different from those that were in issue in the Supreme Court in the case of DA.

118. Logically one then passes to the questions of other status, and of justification.

119. It is appropriate to indicate at this point that it was a matter of agreement at the time of the hearing as to the test to be applied when considering the question of justification in areas of social policy. The justification of the adverse effects of the relevant regulations and rules is by reference to whether or not they could properly be described as manifestly without reasonable foundation. In so far as domestic law is concerned that approach has been put beyond doubt by Lord Wilson in DA (see the passages beginning at paragraph 55 and culminating at paragraph 59) where Lord Wilson stated:

> "I now accept that the weight of authority in our court mandates enquiry to the justification of the adverse effects of rules for entitlement to welfare benefits by reference to whether they are manifestly without reasonable foundation. "

120. Following the hearing in this matter the case of JD and A v UK (Application no's 32949/17 and 34614/17) (24 October 2019) was decided by the ECtHR. Further submissions have been addressed to me since then. JD and A was a case about discrimination on the grounds of the, "suspect" characteristics under Article 14 of sex and disability, and dealt within a challenge to be "bedroom tax " introduced by the Housing Benefit (Amendment) Regulations 2012. The case was heard before the Supreme Court here as R(MA) v Secretary of State for Work and Pensions [2016] 1 WLR 4550. I pause only to note this case. In so far as it appears to be propounding a different approach to the manifestly without reasonable foundation test when a court is required to examine social policy choices made by the legislature, it cannot affect the decision in this court. As was acknowledged in the new submissions, the doctrine of precedent applies and I am bound by DA. The matter cannot be resolved below the Supreme Court. See Lord Bingham at paragraph 43 of K v Lambeth LBC [2006] 2 AC 465.

121. Accordingly, the law is taken as declared by the majority in DA, as encapsulated in the dictum of Lord Wilson set out above.

122. For the purposes of assessing the Claimants' case, it is however, in my judgement helpful to consider the position in the round, and to recall the words of Lord Nicholl in Carson where he said (see above) that:

> "The essential question for the Court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny."

This focuses on the difference in treatment alleged, and the analogy made as between the Claimant and those in respect of whom she claims, or they claim, to have been discriminated against.

123. As Lord Nicholls went on to say, sometimes the answer to this question will be plain.

124. In my judgement there is in this case such an obvious, and relevant difference between the Claimant and E on the one hand, and those with whom they seek to compare themselves that the situations just cannot be regarded as relevantly analogous.

125. It cannot properly be said that a person who received treatment whilst here without the status of ordinary residence (or indeed their mother, whatever her status), is in an analogous position to a person who receives treatment here after the acquisition of ordinary residence. The very reason for the differential treatment is that difference in immigration position.

126. This conclusion is reached by reasoning not wholly different from that in HC v Secretary of State for Work and Pensions [2017] UKSC 73 (the "Zambrano carers" case). The basis of the difference of treatment was there, immigration status, and Lord Carnwath, giving the majority judgement of the court held at paragraph 31:

> "The "status" on which Mr Drabble relies, as I understand his submission, is either immigration status, or more narrowly, the status of Zambrano carer and child. I do not think that either can assist him under article 14. Discrimination on the basis of immigration status is of course a fundamental and accepted part of both EU and national law, but cannot in itself give rise to an issue under article 14. In so far as Mrs HC's differential treatment arises from her status as a third country national, she can have no complaint. So far as concerns her Zambrano status, that is the creation of European law, and such differences of treatment as there are, as compared to other categories of resident, do no more than reflect the law by which the status is created."

127. Further, even if it were possible for the status described by Ms Broadfoot QC to constitute "other status" for the purposes of an Article 14 analysis in this context, then

in my judgement and inevitably, any differential treatment is clearly justified by the reasons underlying the immigration policy which produced the charging regime.

128. The very difference upon which she relies is, as the SSHD submits, at the heart of the immigration policy underpinning the Regulations. I agree that policy does not, in the present context, do other than draw a wholly rational distinction between the two groups postulated. At the time of treatment, one group had an established, long-term relationship with the UK on the one hand, and, on the other, the group into which SHU and E fall, have yet to attain that status.

129. The policy objective of deterring those with a less strong connection to the UK from travelling to or remaining in the UK, and receiving free health treatment, is plainly rational and constitutes a legitimate aim. The aim of protecting a finite national service under financial and resource pressure from use by visitors and those who, in general, do not make a permanent contribution to paying for it, is in my judgement clear and proportionate.

130. Even to the extent there could be said to be status-based differential treatment, it is impossible to say that this different treatment is not justified by that very same difference in status – reflected in the tie to the UK at the time of treatment. Even if in this individual case SHU and E are not within the cohort who would be discouraged from travelling to the UK as health tourists, it is reasonable for the government to have drawn its policy lines where they did. In particular, where a scarce resource is significantly financially threatened, it is reasonable to restrict its availability to those who have demonstrably permanent connections with the UK.

131. In any general case, there will of course be exceptions: SHU (or Alex) as taxpayers, may be such. Generally, the policy means dividing those who make a contribution through their taxes from those who do not. It is not unlawful because it is a bright-line rule that may have exceptions. As to the lawfulness of a bright-line rule, assistance is gained from the observations in Mathieson at paragraph 27. The dicta of Lord Bingham and Lord Hoffmann have resonance in the present case:

> "27 One of the rule-makers' arguments in the Humphreys case, as in the present case, was that a bright-line rule has intrinsic merits in particular in the saving of administrative costs. In R (Animal Defenders International) v Secretary of State for Culture, Media and Sport [2008] AC 1312 Lord Bingham accepted at paragraph 33 that hard cases which fell on the wrong side of a general rule should not invalidate it provided that it was beneficial overall. In Secretary of State for Work and Pensions [2006] 1 AC 173, Lord Hoffmann had observed at paragraph 41 that a line had to be drawn somewhere. He had added: "all that is necessary is that it should reflect the difference between the substantial majority of the people on either side of the line."

132. Furthermore, as was advanced with vigour by the Secretary of State, the main rationale for the approach of the 2015 Regulations is that, from the point in time at which a person becomes ordinarily resident in the UK, they will have acquired a sufficient connection

so as to justify the provision of free NHS treatment. It is described as a "core principle" of the Regulations that entitlement begins at the stage when sufficient connection is shown.

133. Further, and in any event, an important aspect of this consideration is whether and to what extent any deleterious effect of the impugned measure or measures may have actually impacted or risked impacting upon someone, and whether the Secretary of State had available any measures to mitigate the effect upon victims. In R (on the application of DA and others) the defendant Secretary of State relied on the power which local authorities had under the Child Support Pensions and Social Security Act 2000 to award a Discretionary Housing Payment ("DHP") to those who might otherwise suffer hardship as a result of benefit cuts.

134. The protections available to someone in the position of these Claimants includes a discretion to write off debts incurred that would otherwise be payable. It does not detract from this provision that the debts themselves are not extinguished: if the financial hardship, underpinning the discretionary write-off were to end, recovery of the debt would be appropriate.

135. It cannot be said that the purposes of protecting the NHS, overburdened on the evidence before the court by considerable costs incurred by treating those without ordinary residence in the UK, is an illegitimate aim. Nor are the means employed to achieve this aim, namely the 2011 and 2015 Regulations in any way disproportionate. This is not using a sledgehammer to crack a nut, and in any event the force and effect of the Regulations must be judged in the context of mitigating measures such as are seen in the present case.

136. Such exceptions as have been made namely for refugees and for trafficked persons and certain classes of others, are impelled by EC law and international law.

137. One other analysis might also be (and part of Ms Broadfoot QC's case advanced an argument of this type), that if the Secretary of State decided to give effect to a series of exceptions to the obligation upon non-UK citizens to pay them, he must then do so without discrimination. On this analysis, the real vice in this case is a failure to add to the list of exceptions a family in the position of SHU and E, where a parent without ordinary residence incurs significant costs in respect of treatment for a child who did not have at the material time, but later acquires, ordinary residence. This analysis also must fail.

138. The case of Mathieson v Secretary of State for Work and Pensions [2015] UKSC 41 2015 1WLR 3250 at 17 amongst other authorities establishes the proposition that although Article 8 does not require the SSHSC to provide a scheme for support of Article 8 values by payments to families, insofar as the scheme is established, Article 14 read together with Article 8 requires such scheme to be administered without discrimination.

139. This would approximate in this case to an argument that although the Secretary of State is not required to give effect to a scheme that benefits certain migrant persons, with free healthcare, if he does do so, that scheme must not discriminate unlawfully. SHU and E submit that the Regulations should be regarded in the same way as a measure that seeks to recognise rights arising under Article 8 centring on family life.

The Secretary of State denies the provision can possibly be described other than as an immigration measure regulating entry.

140. It is inescapable, in my judgement, that the Regulations and, of course the IR, cannot be described as a recognition and promotion of family life by the State. The exceptions within the Regulations for asylum seekers etc are, even considered in isolation, not capable of being so described.

141. To the extent it is necessary to examine the rationale behind the inclusion in the lists of exceptions of the asylum seekers and others under the Regulation, the SSHSC's justification for the difference in treatment as between those in the position of the Claimant and for example the vulnerable groups identified is encapsulated in the consultation from 2013 at paragraph 97:

> "Vulnerable groups such as asylum seekers, refugees, humanitarian protection cases and victims of human trafficking will also continue to have free access to the NHS in line with our international commitments, and will not be subject to the surcharge. Certain vulnerable groups, including children in local authority care, will not be required to pay a surcharge, and will continue to have free access to the NHS."

142. The Secretary of State has determined to make exceptions of those in particular positions of vulnerability, and, as set out in his guidance, and consultation notes above, gave specific thought to the position of children. In my judgement there is no argument that this is discriminatory because without reasonable foundation. Again, there is no comparable analogy: the beneficiaries of the exceptions are not useful comparators, being as they are, in a different position from E. Those, together with others protected under international law are obviously materially different from E.

143. Whether the case is framed as a discrimination matter as between those who at the time of treatment had the appropriate status, and those who acquired it only later, and whether in regard to SHU herself or E, or indeed whether it is looked at as a failure to include in the list of exceptions, it is clear to me that there is a rational policy basis for the differential treatment. Necessarily, a policy of that nature is outward facing: it must discourage travel by those who have no right to enter and the justification for maintaining a deterrent is an obvious policy choice, particularly in circumstances where the evidence clearly shows the NHS is in any event overburdened on account of provision.

144. Since it is the difference in treatment that requires justification, the reliance upon a connection with the UK at the time of treatment is a proportionate and rational approach. It is clearly impossible to apply the description manifestly without reasonable foundation to the failure to treat the Claimant's as if their status were entirely different.

145. The Court should, the Claimants say, particularly scrutinise any justification in the present case because of the effect on E or children in her position. It is relevant that

the current case concerns an NHS debt attaching to SHU by virtue of treatment given to her child, and that child is aware and concerned about the debt for which she is responsible therefore, say the Claimants, particular weight must be added to the interests of children when conducting a proportionality/justification analysis. The Secretary of State's own guidance reflects that Arts.3.1 and also 24 of the UNCRC bear on the weight to be attached to the interests of children in the position of E when undertaking the proportionality analysis. The best interests of E, and children in a similar position to her, are to be a primary consideration.

146. The Claimants referred to the Court of Appeal decision in DA where Sir Patrick Elias dealt with a point arising under Article 3 UNCRC, indicating it remained relevant when considering justification, and saying that if it has not been complied with, that fact is likely to weigh heavily in the justification assessment. A similar approach was adopted by the majority in the Supreme Court, see Lord Wilson (paragraph 78) and, Lord Carnwath (paragraph 122). The Claimants observed that Article 3.1 of the UNCRC imports a higher procedural standard in respect of justification for the difference in treatment.

147. It is the SSHSC's case, by reference to the copious consultation and explanatory materials and the analysis underpinning the enactment of the Regulations, that the position of children was carefully considered and a judgement made on the basis of policy as set out. I accept on the evidence that careful thought was given in particular to the position of children. The Secretary of State made a judgement which was reasoned and rational and strikes a fair balance between their interest and the interest of the State. The policy choice made was open to him concerning those who would be exempted from the general rule. There is no discrimination resulting from the legislative choices made.

148. In terms of the SSHSC's justification for the design of the charging regime, as has been argued on his behalf, the theme has been consistent both under the 2011 Charging Regulations and the 2015 Charging Regulations. It is to the effect that we cannot afford to become an 'international health service', providing free treatment for all. It clearly underlines the admonitory nature of the policy: it operates in futuro, not merely in respect of the person who may feel the effect of it at any one time. It is designed to discourage those who might otherwise seek out free healthcare and travel for that reason ("this would also risk encouraging people to enter, or remain, in the country solely to access treatment." 2010 DH Consultation (p.1)). The policy lawfully operates as a deterrent to others who might otherwise come, as the evidence shows many do, unlawfully, and/or remain without permission.

149. Accordingly, I reject the challenge as brought under Article 14 and Article 8.

IMMIGRATION RULES

150. Given the policy justification explained above and the rationale for the Regulations, there is nothing in the point that the Immigration Rules are outwith the powers of the 1971 Act. A clear statutory purpose of the 1971 Act and the rules made thereunder is to support the policy of lawful entry to the UK by means of the rules and other mechanisms for regulating entry and to discourage abuse of the system. For the same reason as it was no good ground of challenge to assert that SHU and E could not

themselves be described as health tourists, the argument based on improper purpose and rationality must fail.

151. Part of the policy advanced on behalf of the SSHD was the desirability of encouraging those who "kept their social compact": in other words paid their dues and obeyed the rules. That was not an irrational policy aim. Accordingly, in my judgement it is wrong to describe, as Ms Broadfoot QC did on behalf of the Claimants, the immigration rule as "no more than a debt collecting mechanism". There is a prospective deterrent contained in the rule, which is in policy terms lawful, and well within the powers of the 1971 Act. The Rule in question is part and parcel of a general policy safeguarding NHS resources on the basis of rational choice but, necessarily, seeking to deter others from incurring unpaid health debts by making them relevant to future grants of permission to remain.

152. Similarly, it cannot properly be said that the only reason for taking into account the debt was assigning bad character to the migrant. The encouragement of would-be settlers, generally, to abide by their bargains, and pay their dues, is rational and, in order to cater for those cases like the present one, where compassionate circumstances mean payment is unlikely or undesirable, a system exists for mitigating the burden, indeed for writing off the debt. The system, therefore, operates flexibly and fairly.

153. As has been said previously, it is important to note that in the present case the SSHSC has not demanded that the debt be paid. The Claimants are not the subject of an adverse decision by the SSHD: on the contrary, there is a clear compassionate discretion which had been exercised in favour of the Claimants in this case. It is not the case, indeed the contrary is indicated, insofar as possible, that the rule will likely be exercised so as to spare persons in the same situation as SHU and E, who are unable to pay. This application insofar as it concerned any decision as to SHU's future immigration status, anticipates rather than challenges a material decision. The Secretaries of State do not accept that the Claimants have brought their claim under either head of challenge in time, whether because too early or too late. This is dealt with below.

154. Cogently and vigorously as all the points were argued before me, nonetheless, for the substantive reasons given I reject the challenges to the IRs as well as to the Regulations. Although the Claimants has lost on all points raised, the case was well argued before me.

PROCEDURAL MATTERS

155. This matter was granted permission for full argument and set down for a two-day hearing before me. The issues as to time limits, have not however been decided or conceded. In the event, it is not strictly necessary for me to decide the submission of the Secretary of State that this matter is brought either too late or, on another analysis is premature. However, since the point was argued on paper I deal briefly with the contentions here.

156. The Claimants argue their case is not hypothetical since to be truly hypothetical or academic the issues must make no difference to a Claimant's position and that is not this case. This submission is based on the Claimant's request for an indication from the SSHD that when she next comes to make a decision as to the immigration status of SHU, she will not give effect to the strict wording of the IR which allow, on their face,

for a person in the position of SHU to be “normally" refused an extension of leave to remain where a debt remains unpaid.

157. In my judgement it is wholly unrealistic to ask for, indeed the SSHD could not properly give, an undertaking as to how she will decide an issue in the future, Ms Broadfoot QC did not press this issue. The SSHD is obliged to retain an open mind as to how she will exercise her discretion until the time for decision making arrives. It is unavoidable in my judgement that in truth, the Claimants are too late for the decision of 18 April 2018 (which in any event, was favourable so is unchallengeable), and too early for any future decision.

158. On behalf of the SSHSC, Mr Payne QC correctly points out that the substance of the rule changes from 2011 that are the focus of the Claimants’ application are now long out of time to challenge. The case of Anufrijeva which suggests that a personal adverse decision takes effect only upon its communication, could not assist, in my judgement, to challenge to the general lawfulness of Immigration Rules.

159. Were I minded to grant an extension of time on the basis that, in the extreme circumstances of this case, the evidence showed that SHU only became aware of the second debt on 3 October 2018, it would nonetheless amount to in effect a three-year extension to challenge Regulations and/or Rules with significant third-party impact, if the Claimants’ arguments were correct. Given the circumstances of the decision that has been made, namely in her favour, the case law, and the administrative inconvenience that might logically result in such a case, it would not in my judgement have been appropriate to grant permission to extend time.