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Briefing note

Secretary of State for Education extends eligibility for free nursery places for 2 year olds in No Recourse to Public Funds ('NRPF') households following successful judicial review challenge

Background

In 2014 the government introduced an entitlement to free early education places for two years olds from low-income households. The objective of the scheme was to provide free nursery care to the 40% most disadvantaged two-year olds in British society. The aim of the scheme was to improve outcomes and narrowing the gap in educational achievement between children from deprived backgrounds and their more affluent peers.

However, the trigger for qualifying for free nursery care was a parent's entitlement to social security benefits, or the child's membership of particular identified groups. It therefore excluded children whose parents have NRPF, despite the fact that these are some of the poorest households in the UK.

The judicial review challenge

Matthew Gold and Company were instructed to challenge the definition of "*eligible child*" in regulation 1(2) of the Local Authority (Duty to Secure Early Years Provision Free of Charge) Regulations 2014 and proceedings were issued in April 2019.

The claimants were a British 2-year-old and her vulnerable mother. The claimant mother met the conditions of being a '*Zambrano carer*' i.e. as the sole-carer of a British child she had a directly effective right of residence in the UK under Article 20 of the Treaty on the Functioning of the European Union, pursuant to the principle in Case C-34/09 *Zambrano* [2012] QB 265. However, she had not applied to have this right recognised by the Home Office, nor applied for leave to remain on any other basis.

The claimant mother's immigration status prevented her from claiming mainstream benefits and the family were in receipt of support from the local authority pursuant to s.17 Children Act 1989. The claimants' household income was significantly lower than it would have been if they had been entitled to claim welfare benefits.

The claim challenged the exclusion of children in the same position as the claimant from free nursery places alleging that the eligibility criteria in the 2014 Regulations was unlawful on the basis that the criteria was:

- (a) Inconsistent with the statutory purpose of providing free nursery care to the most economically disadvantaged children;



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- (b) Discriminatory on the grounds of immigration status and nationality under Article 14 read with Article 8 of the European Convention on Human Rights and under the Equality Act 2010 on the grounds of race;
- (c) Was in breach of the Public Sector Equality Duties in section 149 of the Equality Act 2019;
- (d) Irrational;
- (e) Failed to have regard to material considerations and considered immaterial matters.

Outcome

Shortly before the Court granted the application permission, the Secretary of State for Education conceded the claim. The SSE agreed that following consultation, the Regulations would be amended to extend eligibility to 2-year olds from low-income households whose parents could not claim public funds due to their immigration status, and who possessed one of the following immigration status:

1. They satisfy the criteria for a derivative right to reside under regulation 16(5) of the Immigration (European Economic Area) Regulations 2016. This includes (a) those who have had an EU derivative right recognised by the Home Office and (b) those who satisfy the Zambrano principles but who have not yet made any applications to the Home Office, or have an outstanding application with the Home Office either for recognition of their EU derivative right or on some other basis.
2. Leave to remain had been granted on Article 8 family or private life grounds either within the rules (Appendix FM or 276E(2)) or outside the rules but were subject to a NRPF condition.

Significantly, the SSE also agreed as part of the order settling the proceedings that 2-year-olds who fall into one of these groups would be treated as eligible prior to the Regulations being amended and that this would be communicated to local authorities. Therefore, two-years from such households should be able to immediately take advantage of this change in eligibility and claim their free nursery place.

A copy of the consent order settling the claim is available [here](#).

Practical implications

The eligibility criteria has been immediately expanded to include the families above. Therefore, local authorities should apply this amended criteria when considering whether a child is entitled to the free nursery hours.

The Department for Education has published [guidance](#) setting out in full the eligibility criteria and it is hoped that this will have been communicated to all local authorities. This is temporary guidance and will be replaced on 30 November. Feedback is sought by the DfE on its operation.



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Further information

For further information about the claim or if you encounter any difficulties with families accessing a free 2-year-old nursery place, please do not hesitate to contact Clare Jennings (clare@matthewgold.co.uk), Rachel Etheridge (rachel@matthewgold.co.uk) and William Flack (william@matthewgold.co.uk)