Neutral Citation Number: [2022] EWHC 2473 (Admin)

Case No: CO/4031/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/10/2022

Before :

MR JUSTICE JULIAN KNOWLES

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Between :

THE KING (ON THE APPLICATION OF) **(1) KA** **(2) AK** **(3) AA (A MINOR, BY HIS LITIGATION FRIEND KA)** **(4) BB (A MINOR, BY HER LITIGATION FRIEND, KA)** **(5) CC (A MINOR, BY HER LITIGATION FRIEND, KA** **(6) DD (A MINOR, BY HER LITIGATION FRIEND)** **(7) EE (A MINOR, BY HER LITIGATION FRIEND)**	**Claimants**
- and -	
(1) SECRETARY OF STATE FOR THE HOME DEPARTMENT **(2) SECRETARY OF STATE FOR FOREIGN, COMMONWEALTH AND DEVELOPMENT AFFAIRS** **(3) SECRETARY OF STATE FOR DEFENCE**	**Defendants**

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Chris Buttler KC and Zoe McCallum (instructed by **Duncan Lewis Solicitors**) for the **Claimants**
David Blundell KC, Nicholas Chapman and Natasha Jackson (instructed by **GLD**) for the **Defendants**

Hearing dates: 30 and 31 March 2022

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APPROVED JUDGMENT

Mr Justice Julian Knowles:

Introduction

1. This claim for judicial review arises out of events in Afghanistan and the evacuation from that country in August 2021 of British citizens, their dependants, and others, following the withdrawal of NATO forces, and the Taliban's subsequent takeover of the country. It concerns policies made by D1 relating to those, like the Claimants, who have entered or wish to enter the UK from Afghanistan.

2. An order protecting the anonymity of the Claimants has been made. The reasons why will become obvious.

3. The First Claimant (C1) is a British national who was in Afghanistan when NATO forces withdrew. He came back to the UK on or about 20 January 2022. C2 is his wife and an Afghan national. C3-C7 are their children. It asserted that C7 is a dual British-Afghani national; D1 does not accept this but nothing turns on it. C2-C7 remain in Afghanistan. C1 is worried for their safety.

4. There were three grounds of challenge in the original Statement of Facts and Grounds lodged in November 2021. Freedman J refused permission on Ground 1 but granted permission on Grounds 2 and 3.

5. Mr Buttler KC explained that there had been an application to renew on Ground 1, but that had been withdrawn, at which point the application in respect of D2 and D3 stood dismissed. Hence this claim is proceeding against D1 only.

6. As now presented by Mr Buttler, the case raises two main issues.

7. The first issue concerns the suggested insuperable barrier to C2 to C7 entering the UK. The Claimants say that D1 has decided that she will not consider an application for entry clearance from Afghanistan unless the applicant first enrols their biometrics (fingerprints and a facial photograph). Without biometrics, any application will be invalid under the relevant Regulations. That requirement is contained in [40] of a policy called the Afghanistan Resettlement and Immigration Policy Statement (ARIP), published in September 2021. They say the policy is confirmed by the evidence filed in this case.

8. However, as D1 recognises, it is impossible for C2-C7 to enrol their biometrics because there is no Visa Application Centre (VAC) in Afghanistan. Given the situation in Afghanistan, it is not practically possible for them to travel to a third country (such as Pakistan) where biometrics could be taken. The Claimants say that this means that D1's insistence on biometric enrolment presents a complete barrier to C2-C7 applying for entry clearance and, accordingly, a complete barrier to C1's family life with them and thus a disproportionate violation of his Article 8(1) rights.

9. As I shall explain, the claim as originally framed in November 2021 challenged this policy on common law grounds. At that stage, the Claimants were all

outside the UK, and so framing a challenge under the European Convention on Human Rights (ECHR/the Convention) would have faced difficulties, as Mr Buttler broadly accepted. However, C1 returned to the UK on or about 20 January 2022. At that point it became open to him to argue that the policy in question breached his Article 8(1) rights because it prevented his family from joining him. He therefore reframed his claim in Convention terms on 7 March 2022 and an Amended Statement of Facts and Grounds was filed and served. In due course leave to amend was granted by Lang J.

10. As originally cast, the claim was that D1's policy on biometrics disproportionately interfered with C1's Article 8(1) rights to private and family life by imposing a condition which it was impossible for C2 to C7 to comply with. In other words, it was a facial challenge to the policy (or at least that is how D1 perceived the argument was being put). This in broad terms was referred to as 'Issue 1' at the hearing.

11. However, the claim became more focussed thereafter, as I shall explain later. Issue 1 is not now so much a facial challenge to ARIP but an 'as applied' challenge in the specific case of C1. He says that by imposing a condition for his wife and children to make a valid application for entry clearance, ie, the requirement to supply biometrics, which they literally cannot comply with, D1 has disproportionately interfered with his rights under Article 8(1) on the facts of their case. Mr Buttler said that D1's impossible requirement was a 'colossal interference' in C1's Article 8(1) rights, and he relied as a parallel on part of Lord Wilson's judgment in *R (Aguilar Quila) v Secretary of State for the Home Department* [2012] 1 AC 621, [30]-[32]. I will return to *Quila* later.

12. Issue 2 concerns how those evacuated from Afghanistan – or who otherwise were or are able to leave - are treated under ARIP. I will set out the detail later, but in summary terms for now, one group is eligible for indefinite leave to remain (ILR) once they enter the UK, pursuant to [39] of ARIP, which carries a package of benefits including a quicker route to citizenship. In contrast, others, who may have left in a different way purely through chance (say the Claimants), are not so entitled, per [40] of ARIP. This distinction is said to be irrational.

13. Originally this policy was also challenged as being contrary to Article 14 of the ECHR but Mr Buttler did not pursue that argument, and so the policy is challenged purely on the grounds of common law irrationality. A prior question is whether C2-C7 fall within [39] or [40] of ARIP. Mr Buttler, on their behalf, argues that on a true construction of ARIP they fall within [39] and so should be eligible for ILR, etc, once they enter the UK.

14. The papers in this case are voluminous. There was a large main bundle, three further bundles, and at least two volumes of authorities, all running to thousands of pages. I had lengthy Skeleton Arguments, replies, replies to replies, further post-hearing notes and the like. A lot of material only arrived a day or so before the hearing, leaving little time for pre-reading. That meant there had to be quite a lot of post-reading. During the hearing a number of new points, not dealt with in the Skeleton Arguments, emerged for the first time in a further metamorphosis of how the Claimants put their case, which had already changed

significantly since the claim was lodged in November 2021. It changed again during Mr Buttler's reply. Some of the issues are inter-linked, and whether I need to, or what, I decide on some of them depends on what I decide on others. The issues are not straightforward.

15. Hence the case has taken some time to analyse and reach conclusions upon. In fact, some of the initial perceived urgency of this case (although it had taken well over four months to come to court after filing) dissipated during the hearing, for reasons which I will come to. I should add that as well as my notes, I have full audio files of the hearing which I have consulted whilst writing this judgment.

Background

16. C1 is a British citizen (born on 1 January 1990), who was granted ILR in 2010 and, thereafter, British citizenship. C2 is his Afghan wife (aged 37) and C3-C7 are their five dependent children (born between 2005 and 2014, and aged between seven and 17 at the time of the hearing). It is asserted (though not accepted by D1) that C7 is a dual Afghan and British citizen because, at the time of her birth, her father was a British citizen other than by descent (s 2 of the British Nationality Act 1981). The other children are not British nationals because they were born before C1 was granted citizenship.

17. C1 came to the UK in 2006. He took a job in a town in the Midlands and became assimilated into British society. Between then and March 2021 he regularly travelled between the UK and Afghanistan to see his family. He met and married C2 in 2014, ie, before he fled Afghanistan for the UK.

18. In February 2020 the Doha Agreement was concluded. This provided for the withdrawal of US and other troops from Afghanistan. Following a phased withdrawal, on 14 April 2021 President Biden stated that the final 2,500 US troops would be withdrawn by 11 September 2021. On 1 May 2021, Taliban forces mounted an offensive to retake the country. Over time, the Taliban gained territory and the situation in Afghanistan became increasingly dangerous.

19. The Foreign and Commonwealth Development Office (FCDO) is responsible for providing consular assistance to British nationals. As part of that function, it issues travel advice. Given the security concerns in light of the Taliban takeover of Afghanistan, the FCDO's published travel advice in March 2021 warned against all but essential travel to the Enhanced Security Zone in Kabul, Hamid Karzai International Airport, Panjshir province and the city of Bamian, and it advised against all travel to all other areas of Kabul and the rest of Afghanistan. The advice made clear that FCDO assistance to leave the country should not be assumed.

20. On 27 March 2021 C1 travelled from the UK to Afghanistan to visit his wife and children, intending his usual three month stay. In his witness statement of 22 November 2021 he says that he knew that the United States was preparing to leave Afghanistan, however the Taliban was not in control in Jalalabad, where

his family was. He said he was not then worried about his family's wellbeing. He travelled to spend time with them. He did not believe that the Taliban would regain control over the country as quickly as they did.

21. In April 2021, the FCDO 'recommended' British nationals should consider leaving the country. On 6 August 2021, the FCDO travel advice changed to 'advise' all British nationals in Afghanistan to leave immediately by commercial means. This advice was further strengthened on 12 August 2021 when the FCDO 'urged' all British nationals in Afghanistan to leave by commercial means in the face of the Taliban's advance.

22. Due to the increasingly dangerous situation, the British Embassy in Kabul was forced to close over the weekend of 13-16 August 2021, and the British Ambassador and a small core team of officials established an Evacuation Handling Centre (EHC) at the Baron Hotel, located near Hamid Karzai International Airport in Kabul. The EHC's role was, *inter alia*, to carry out security and eligibility checks on those potentially eligible for evacuation to the UK.

Operation Pitting

23. The British Government's (HMG's) operation to assist in the evacuation of eligible civilians from Afghanistan was named Operation Pitting. It began on 14 August 2021 and ended on 28 August 2021. The situation became increasingly difficult as time progressed, with gridlocked streets, Taliban checkpoints, an extremely perilous situation on the ground, and huge crowds attempting to flee Afghanistan, making access to the EHC effectively a lottery.

24. On 25 August 2021, the decision was taken by the FCDO no longer to encourage travel to the EHC. On the following day an ISKP suicide bomber (an Isis-affiliated terrorist group) killed a large number of civilians and US military personnel outside Kabul airport.

25. It is in this context, and after Operation Pitting had been running for nine days, that C1 first contacted the FCDO on 23 August 2021 by email to ask for help for him and his family.

26. D1 makes the point that Operation Pitting took place in uniquely challenging and uncertain circumstances. The Defendants had to make difficult decisions, at speed, about who to help and how to help them. Staff on the ground were themselves at considerable risk. I accept that the situation was unprecedently difficult. For her part, D1 accepts (as do I) that the Claimants were also in a very difficult and dangerous situation.

The three categories of person to whom HMG provided evacuation assistance

27. HMG decided to provide evacuation assistance returning to the UK to three groups:

a. British nationals and their non-British immediate dependants with whom they were travelling. C1 and his family fell into this group.

b. Beneficiaries of HMG's Afghan Relocations and Assistance Policy (ARAP – not to be confused with ARIP). In general terms these were Afghan nationals who had worked for HMG, or had materially contributed to its mission in Afghanistan, and so might well be a target for Taliban reprisals.

c. Other Afghan nationals in groups identified by ministers as priorities for evacuation because their profile might make them particular targets for the Taliban (for example certain Chevening scholars, journalists, women's rights activists and senior Afghan government officials).

28. I will refer to these three groups as Group 1, Group 2 and Group 3, respectively. Groups 2 and 3 are referred to in places in the evidence as the 'ARAP cohort' and 'the other Afghans cohort' respectively. There were other complexities to ARAP (as discussed in, eg, *JZ v Secretary of State for the Home Department* [2022] EWHC 2156 (Admin)) but for present purposes identification of these three groups will suffice.

29. The Defendants make the point in their Skeleton Argument that the provision of assistance to British nationals is a basic consular function of the FCDO. British nationals do not need any form of visa to enter the UK, and are not subject to security or eligibility checks to do so. In emergency situations – as this clearly was – the FCDO can also provide assistance to the non-British dependants of British nationals travelling together with the British national in order to assist in family unity. Non-British dependants of British nationals *do* generally require visas and to complete security and eligibility checks (including supplying biometrics) in order to enter the UK.

30. D1 says that in this case, and in view of the extraordinary situation that existed on the ground, it was decided that British nationals should be encouraged to travel to the EHC without delay, and that they should also be encouraged to bring any dependants with them. This meant that security and eligibility checks on their dependants would have to be completed at the EHC. The evidence is that that there was little practical alternative to this: pre-completion of checks prior to inviting British nationals to the EHC would have been liable to delay their evacuation and, in any event, the Defendants did not have complete lists of non-British dependants of British citizens in Afghanistan. The FCDO repeatedly noted in its Afghanistan travel advice that it did not register British nationals and their dependents in-country.

31. The position was different for the other two cohorts (ie, Groups 2 and 3). Individuals within those groups had been specifically identified on the basis of information already held by HMG, and so it *was* generally possible, and convenient, to undertake security and eligibility checks on them and their dependants before inviting them to the EHC. In these cases, the specific invitation to travel to the EHC, following checks, was referred to as a 'call forward'. I will need to return to the meaning of this phrase later in relation to Issue 2.

The evidence of Gerard McGurk

32. The preceding paragraphs are drawn mainly from the evidence of Gerard McGurk. He is a senior official in the FCDO. In August 2021 he worked in Afghanistan as Silver Consular Lead in the FCDO Crisis Centre working on HMG's Afghanistan crisis response, focusing on providing consular assistance to British nationals. He has made a witness statement dated 21 February 2022.

33. In that witness statement he dealt, firstly, with the FCDO's escalating advice during 2021, which I summarised earlier.

34. Next, he dealt with Operation Pitting, which he described as a 'large-scale and complex, coordinated multi-agency response, with different agencies leading on different policy areas'. Mr McGurk explained how the three groups identified earlier were assisted. At [16] he explained that in relation to Groups 2 and 3:

> "16. Before any individual was included within either the ARAP and other Afghan nationals cohorts, the Home Office undertook security and eligibility checks on them. Upon successful completion of those checks, the Home Office would inform the FCDO. The FCDO would then contact that individual by email, inviting them to travel to the EHC for the purpose of evacuation to the UK. The email invitation also provided confirmation of LOTR [leave to enter outside the Immigration Rules], thereby confirming entry clearance and immigration status in the UK. This form of emailed invitation was known as a 'call forward' (GM/22). 'Call forward' notifications were only issued once security and eligibility checks had been completed satisfactorily. In the event that an individual failed those checks, they would not be 'called forward'. The 'call forward' email represented a confirmation that the necessary security and eligibility checks prior to evacuation had been successfully completed, and started with the words 'You are being evacuated to the United Kingdom by the British Military'. Individuals within the ARAP and other Afghan nationals cohorts were not encouraged to attend the EHC without having been 'called forward' in this way, and were informed that they should arrive at the EHC within 12 hours of the time of the notification. Upon arrival in the EHC, the identity of these individuals was verified and their biometrics enrolled, before they were then placed on a UK military evacuation flight."

35. Mr McGurk pointed out at footnote 5 to this paragraph that as numbers increased, for a temporary period, biometrics were no longer processed in Afghanistan and only security checks were undertaken. All individuals had biometrics checks undertaken (although not necessarily enrolled) on arrival at

UK ports prior to the grant of leave to enter, subject to biometric eligibility/exemption requirements (eg, children under five years old are not required to provide biometric information, nor are those physically incapable of providing them).

36. There is an example of such an email in the Supplementary Bundle at p468 (ex GM/22). Mr Buttler made the point that the words 'called forward' did not appear in the actual email as sent, but is a label that was attached to such emails after the event (including in Mr McGurk's evidence):

> "You are being evacuated to the United Kingdom by the British Military.
>
> You must go to The Baron Hotel, Zohak Village, Kabul, today.
>
> You must bring all your passports
>
> Do not tell anyone else where you are going
>
> …
>
> Expect a long wait please bring water and food with you."

37. At [17], Mr McGurk dealt with how Group 1 were assisted. They received a different form of email:

> "17. A different system existed for British nationals and their non-British dependants. Consular assistance, including assistance to leave Afghanistan, was provided to British nationals purely by virtue of their nationality. For British nationals, and once their status as such had been confirmed, there were no separate eligibility criteria, assistance was not conditional upon security checks, nor did it depend on receipt of an invitation to come to the EHC. There was no need for British nationals to enrol their biometrics. In addition, and as stated above, the UK Government did not hold (and never held) a complete and accurate record of all British nationals (and/or their dependants) in Afghanistan. For these reasons, it was neither necessary nor appropriate to assist in the evacuation of British nationals using the same 'called forward' process as adopted in the case of the ARAP and other Afghan nationals cohorts. British nationals and their dependants were not 'called forward' in this way (or at all). Instead, they were the beneficiaries of a general encouragement between 19-25 August, communicated by phone and email by the FCDO (KA/2) is an example of the general encouragement emails sent out), to travel to the EHC for processing at any time."

38. In fact, those in Group 1 received two emails.

39. First, they received a 'general encouragement' email. The email received by C1 is at Core Bundle, p293. This began:

> "If you have contacted the UK Foreign, Commonwealth and Development Office to seek assistance to leave Afghanistan:
>
> "If you are a British national, we encourage you and any dependents (spouse or children under 18) that are travelling with you, to travel to the Baron Hotel in Kabul at H64C+MCQ, where we will seek to put you on the next available flight. Please ensure that this is only your immediate family – your spouse and children under 18 for British adults or parent and siblings under 18 for British children …"

40. They then received a second email, a 'facilitation email'. Mr McGurk explained at [21] of his statement:

> "21. During the evacuation process a number of British nationals in Afghanistan contacted the FCDO to say that they had been unable to get to the EHC. One of the many reasons given was that the dependants with whom they were travelling had not been able to pass Taliban checkpoints without a travel document. In response to this and in the heat of this crisis with the sole objective of trying to get as many British nationals and exceptionally their immediate family dependents, FCDO officials decided to send an email to those British nationals who contacted the FCDO. The email also referred to any immediate family dependants declared by the British national, encouraging them to travel to the EHC "For processing prior to evacuation". This is referred to as a 'facilitation email' (GM/23-25), as it was intended solely to facilitate travel through check points to the EHC itself. In order to fulfil this purpose, the 'facilitation email' was deliberately designed to resemble a 'called forward' email because this format was similar to those used by the ARAP and LOTR [ie, those given leave to enter outside the Immigration Rules] schemes and would be familiar to British soldiers who secured the perimeter and access to the EHC. It was not, however, a 'called forward' email and its recipients were not 'called forward'".

41. I should make clear the last sentence is in dispute. For reasons I will come to in relation to Issue 2, it is the Claimants' case that they *were* 'called forward', notwithstanding that they did not receive what is now referred to as a 'called

forward' email (because, they say, such emails were only sent to Groups 2 and 3). To foreshadow the point, the relevant paragraphs of ARIP grant ILR to those who were 'called forward' (the term used in ARIP), but not to those who were not. The Claimants say that on a proper reading of the policy they were called forward, and so will be entitled to ILR and other benefits should they be given leave to enter. The Defendants say that, on a proper reading of it, the Claimants were not called forward.

42. The facilitation email at Core Bundle, p295 stated:

> "You have requested evacuation to the United Kingdom by the Foreign, Commonwealth and Development Office (FCDO).
>
> For processing prior to evacuation, you must go to The Baron Hotel, Zohak Village, Kabul today. You must use the gate entrance on Abbey Road, also known as Airport Road. You must bring all your passports and documentation. Do not tell anyone else where you are going.
>
> Expect a long wait – please bring water and food with you.
>
> Go here - https://goo.gl/maps/UDtnYNpz1sLh9eMx8 / http://kabul.thebaronhotels.com
>
> Travel safely and carefully, use your own judgement, do not put yourself at unnecessary risk. Only your immediate family are allowed with you – spouse and children under 18. If the person travelling is eligible for British Nationality and is under 18 they may take an accompanying parent with them.
>
> You must bring any other important family documents, such as marriage and birth certificates. Each person may bring 1x 9kg bag only – do not bring more."

43. In his witness statement C1 said that he received a facilitation email, and that he and his family accordingly went to the EHC at the Baron Hotel, where they expected they would be evacuated. However, despite waiting for a number of days in extremely harsh conditions they were admitted to the EHC and not evacuated. Eventually, they left and went back to Jalalabad because they were worried for their safety, especially after a suicide bombing on 26 August 2021 near the hotel.

44. In his witness statement at [22] Mr McGurk dealt with what came to be known as the 'Bus List':

> "22 Separately, in light of the difficulties that some individuals within the three priority groups had faced in

> travelling to the EHC, MOD officials arranged for convoys of minibuses to bring people eligible for evacuation to the airport for processing. This was consistent with the strategic priority of maximising the number of British and Afghan nationals able to get to the EHC for processing before the end of the evacuation. These included both British nationals and their dependants and Afghan nationals and their family members forming part of the ARAP and other Afghan nationals cohorts. Some British nationals who had contacted the FCDO had volunteered that they or one or more of their dependants was vulnerable; the vulnerability of others was evident on the face of the information held, for example in the case of young children. FCDO officials collated a list and, between 23 and 25 August, consular officials contacted British nationals identified (or in respect of whom a dependant had been identified) as being vulnerable (e.g. by age or reported health condition) by telephone (where contact was possible) to confirm whether they still wished to be evacuated and, if they did, provided them with details of a time and place where they would be collected by bus and taken to Kabul airport. Only British nationals in respect of whom FCDO consular staff had telephone contact details at that time were contacted – where it was possible to successfully establish contact. These calls followed detailed scripts (GM/26). A record of the people offered places on these buses was retained, and referred to as the 'bus list'."

45. The Defendants' Skeleton Argument at [23] gives further information and accepts that C1 and his family were eligible to be on the Bus List (emphasis added):

> "Between 23 and 25 August 2021, FCDO officials contacted individuals identified as vulnerable (or travelling in a group with an individual identified as vulnerable) to offer them places on the buses. They continued to do so until capacity on the buses was reached [The Claimants' assertion at [23.4] of their Skeleton that this was due to the limited time of FCDO officials is accepted to be factually incorrect.] *The Claimants were, in principle, eligible for places on the buses (on the basis of the age of the children), but in the event were not offered places whether because the capacity of the buses had been reached before officials reached their names on the list, or because it was not possible to reach them by phone, or for some other logistical reason.* A list of individuals offered places on the buses was retained and is referred to as the "bus list". The offer of a place on the chartered buses was limited to just that: a place on the bus

> travelling to the airport. Specifically, it carried no guarantee at all of a place on an evacuation flight."

46. In fact, as Mr McGurk explained at [23]-[24], none of the mini-buses was able to get through Taliban checkpoints to reach the airport. However, some on the Bus List were able to do so later, through the efforts of local Afghani bus drivers:

> "23. Unlike the 'call forward' emails sent to the ARAP and other Afghan nationals cohorts, inclusion on the 'bus list' for British nationals and their immediate family dependants did not follow security and eligibility checks. Such invitations did not provide any confirmation that these checks had been satisfactorily completed. Regrettably, none of minibuses was permitted to pass Taliban checkpoints, and so none of the passengers was delivered to Kabul Airport, where those security and eligibility checks would have been conducted by British Government officials.
>
> 24. The heading of the 25 August 2021 call script (which was prepared at speed in the heat of this crisis) refers to a 'call forward' onto the minibuses. The use of the words 'call forward' in the script did not refer to the same process by which individuals who were either ARAP beneficiaries or within the other Afghan nationals cohort were 'called forward' to the EHC for processing. Drafted by FCDO consular staff the purpose of contacting the British nationals and their immediate family members on the bus list by telephone in this way was solely to facilitate the bus operation and thereby to help them travel to Kabul Airport where their eligibility for evacuation would be established by British Government officials. As explained below, the Home Office is currently considering whether, having regard to all the available information, those on the 'bus list' are properly to be regarded as having been 'called forward' for the purposes of paragraph 39 of the ARIP policy statement."

47. The reference to 'scripts' in [24] is to the script an example of which is in the Supplementary Bundle at p476. The flavour is given by the following (emphasis omitted):

> "I am calling from the Foreign Commonwealth and Development Office Crisis Centre.
>
> Can you confirm you are still in Kabul and still want to leave? [If no longer in Kabul, note on Crisis Hub and finish call].

> We are calling you because you or one of your family group is particularly vulnerable.
>
> Must stress that this is a message for you and your immediate family only. For safety and security reasons do not reveal the contents of this message to anyone else.
>
> We have made arrangements to take vulnerable British Nationals and their eligible dependents to the airport by bus.
>
> Would you be interested in taking this offer? This needs to be your choice.
>
> There is no other way of taking you to the airport. [If not interested, note on Crisis Hub and finish call].
>
> [If interested] Must stress again that this is a message for you and your immediate family only. For safety and security reasons do not reveal the contents of this message to anyone else."

48. The script of the second phone call which some people received (at p477) is headed 'BUS CALL FORWARD – BUS TWO: EVENING OF WEDNESDAY 25 AUGUST' and began:

> "I am calling from the Foreign Commonwealth and Development Office Crisis Centre.
>
> We spoke to you yesterday about a route to the airport for vulnerable British Nationals …"

49. In this judgment I will refer to the 'Bus List' as those people who were *actually* contacted and offered a place on the bus. I will also refer to the 'Bus Eligible List' as those who were *eligible* to be offered a place on the bus (because they or their dependents were vulnerable) but, for whatever reason (eg because capacity had been reached, or the phone call did not get through, or for some other reason), were not *actually* offered a place. As Mr McGurk's evidence makes clear, the Claimants fell into the 'Bus Eligible List'.

50. Unfortunately, following the evacuation and the end of Operation Pitting, Afghanistan has collapsed into a humanitarian crisis. D1's document. 'Country Policy and Information Note Afghanistan: Humanitarian situation' states:

> "4.1.1 Referring to findings in the October 2021 IPC report, the World Food Programme (WFP) viewed that 'Afghanistan is becoming the world's largest humanitarian crisis, with needs surpassing those in Ethiopia, South Sudan, Syria and Yemen…

> 4.1.2 UNICEF noted in November 2021, 'The humanitarian situation continues to deteriorate in Afghanistan, with alarming disruptions in health and nutrition services, a disastrous food crisis, drought, outbreaks of measles, acute watery diarrhoea, polio and other preventable diseases, as well as the crippling onset of winter."

ARIP

51. Next, I need to set out some paragraphs from ARIP. It is in the Core Bundle, p364. It is dated 13 September 2021, a little over two weeks from the end of Operation Pitting. It was therefore obviously drafted under pressure of time.

52. Paragraphs 1 – 8 say this:

> "1. The Home Office has been at the heart of the UK's response to the fast-moving and challenging events in Afghanistan. Op PITTING was the biggest UK military evacuation for over 70 years and enabled around 15,000 people to leave Afghanistan and get to safety. This is in addition to the families we had already welcomed under the Afghan Relocations and Assistance Policy (ARAP) for those who served alongside our armed forces and worked with the British government. It was established by the Home Secretary and Defence Secretary in April of this year and supplements the existing scheme which had operated since 2013.
>
> 2. Following rapid work by the Foreign, Commonwealth and Development Office (FCDO), Home Office and Ministry of Defence (MoD) during Op PITTING, we were able to 'call forward' a number of other people for evacuation, in addition to the ARAP contingent and British nationals. These people were identified as being particularly at risk. They included female politicians, members of the LGBT community, women's rights activists and judges. Those who were called forward will form part of the Afghan Citizens Resettlement Scheme (ACRS) cohort.
>
> 3. This unprecedented mission was supported by over 300 dedicated civil servants in the Home Office – from Border Force officers on the ground in Kabul supporting our military and diplomats in extremely challenging circumstances, to UK Visas and Immigration (UKVI) staff in Liverpool – working alongside colleagues from across government, the military, the police and our intelligence agencies. They conducted vital security checks, processed

> visa and passport applications and welcomed and supported people to begin their new lives in the UK.
>
> 4. The evacuation of eligible people from Afghanistan was a humanitarian effort, but at every step of the process the security and safety of the UK and its citizens was front of mind. Individuals evacuated were subject to rigorous security checks. We have world-class police and security and intelligence agencies who work around the clock to keep us safe. Where they identify a threat, it is rigorously investigated. We will not hesitate in taking robust action against anyone who poses a threat to our country.
>
> 5. This emergency evacuation is now over. UK military personnel left Afghanistan on 29 August. This policy statement sets out the Home Office's position on the immigration status of those evacuated, as well as providing detail on the UK's ACRS.
>
> 6. For those evacuated here, we are determined to ensure they have the best possible start to life in the UK. Given the difficult, exceptional and unique circumstances in which many arrived in the UK, we will be offering indefinite leave to remain to those Afghan nationals and their family members who were evacuated, called forward or specifically authorised for evacuation, by the government during Operation PITTING. This will apply to those who have already arrived in the UK or arrive after the evacuation. This will give them certainty about their status and the right to work and contribute to society.
>
> 7. Given the speed with which decisions were necessarily taken, we need to ensure everyone has the correct status and there may be a small number of groups who do not fit into the category set out above. We will work to ensure their situation is resolved quickly.
>
> 8. We are also setting out here the details of the ACRS and the position of those relocated under ARAP; and the position of other groups, for example how the Immigration Rules apply in terms of Family Reunion, the Points-Based System and Asylum."

53. Mr Blundell KC emphasised these paragraphs and, in particular, [7], which he said shows that D1 will apply the policy flexibly, and not rigidly.

54. Paragraphs [39] and [40] of ARIP are important for the purposes of this claim. These provide (with the original headings in italics):

"*Afghan family members of British nationals, settled persons and refugees already resident in the UK*

Close family members of British citizens (and settled persons) evacuated or called forward as part of Op PITTING

39. To facilitate the travel of family members of those who were evacuated as part of Op PITTING, the Home Office waived visas requirements and granted limited permission to stay outside of the Immigration Rules for six months. However, given the exceptional circumstances of their arrival and to ensure they have clarity on their immigration status, we will grant indefinite leave to remain to this group of evacuees. We will waive the settlement fees for this group and they will not be required to meet the usual requirements, such as English language skills or minimum income requirement. Where necessary, we will use the 'exceptional circumstances affecting a number of persons waiver' provided by the Immigration and Nationality (Fees) regulations and seek to make changes in regulations at the next opportunity. This is the same approach as those evacuated under the ARAP scheme and other priority groups relocated to the UK under Op PITTING and eligible for the ACRS [Afghan Citizens Resettlement Scheme]. We will also give indefinite leave to remain to those who were called forward by the UK government but were not able to be evacuated, or were evacuated to third countries.

Afghan family members of British citizens and settled persons who were not notified they were eligible for evacuation under Op PITTING

40. For other non-UK family members of British citizens and settled persons who were not called forward as part of Op PITTING, or who are not offered resettlement under the ACRS, they will need to apply to come to the UK under the existing economic or family migration rules. They will be expected to meet the eligibility requirements of their chosen route, which includes paying relevant fees and charges, and providing biometrics. There is currently no option to give biometrics in Afghanistan. The British Embassy in Kabul has suspended in-country operations and all UK diplomatic and consular staff have been temporarily withdrawn. The UK is working with international partners to secure safe routes out of Afghanistan as soon as they become available, but while the security situation remains extremely volatile, we

> recommend people in Afghanistan do not make applications and pay application fees at this time as they will not be considered until biometrics are provided. Those Afghans who are outside of Afghanistan and able to get to a Visa Application Centre (VAC) to provide their biometrics are able to make an application in the usual way."

55. Issue 1 arises out of the requirement in [40] and what the Claimants say is D1's inflexible policy to require biometrics to be provided outside of the UK and the impossibility of doing so in Afghanistan. C1 says, in summary, that the impossibility of C2-C7 doing so means that they cannot join him in the UK (because they would not obtain entry clearance and their application for such would be automatically rejected) and thus, in the circumstances of his case, this is a disproportionate interference with his Article 8(1) rights.

56. Issue 2 turns principally upon the meaning of the last sentence of [39]. Who is it that is being referred to in the phrase 'those who were called forward by the UK Government' ? The Claimants say it applies to them, because C1 received a general encouragement email and a facilitation email telling him and his family to go to the EHC at the Baron Hotel. They say that is the plain meaning of 'called forward' in this context.

57. They say it *cannot* mean those who received a 'called forward' email (see above), because this paragraph is dealing with Afghan family members of British citizens (ie, Group 1) who, by definition, did not receive a 'called forward' email (as it has now been termed). They say that such emails were only sent to Groups 2 and 3. The Claimants say their interpretation is reinforced by the heading to [40] and the first sentence, which demonstrates that 'not called forward' means 'not notified they were eligible for evacuation' and hence, that 'called forward' simply means 'notified they were eligible for evacuation' which they were because of the two emails which C1 received.

58. D1 on the other hand, says that 'called forward' here means 'received a call forward notification following security and eligibility checks' (Note of 1 April 2022, [2], [35]). D1 says that according to that definition, C2-C7 were not called forward (because no security or eligibility checks were ever carried out on them because they never got into the EHC). That said, D1 also says that the policy will be applied flexibly and in light of applicants' particular circumstances. D1 also takes a point of prematurity and standing, which I will address later.

Biometrics

59. Shortly before the hearing, D1 served a statement from John Allen, her policy lead on biometrics, dated 28 March 2022.

60. He explained that 'biometric information' is defined in s 15(1A) of the UK Borders Act 2007 (UKBA 2007), and means information about a person's external physical characteristics (including in particular fingerprints and

features of the iris), and any other information about a person's physical characteristics specified in an order made by the Secretary of State.

61. In fact, as explained in D1's guidance, 'Biometric Information: Introduction', Version 8, 24 February 2022, the only biometric data currently collected is a 'facial photograph and up to 10 fingerprints'. The April 2022 version of this guidance is to the same effect.

62. Under the heading 'Why we use biometrics', the April version of the guidance states this:

> "Biometrics play a significant role in delivering security and facilitation in the border and immigration system. The biometrics that we currently use (facial image and fingerprints) enable quick and robust identity assurance and suitability checks on foreign nationals' subject to immigration control, delivering 3 broad outcomes:
>
> • establishing an identity through fixing an individual's biographic details (for example, name, date of birth, nationality) to biometric data
>
> • verifying an individual accurately against an established identity
>
> • matching individuals to other datasets (for example, against watchlists or fingerprint collections) to establish their suitability for an immigration product
>
> Biometrics are required as part of an application for an immigration product, such as a visa, biometric immigration document or biometric residence card, from an individual subject to immigration control. They are also taken from individuals who claim asylum, are in the UK but require leave, are unlawfully in the UK, are arrested or detained under the Immigration Acts, are granted immigration bail, lacks adequate documentation to establish their identity and nationality and those subject to being deported from the UK."

63. As the Upper Tribunal (IAC) noted in *R (SGW) v Secretary of State* [2022] UKUT 15 (IAC), [50], and as the Claimants accept, in general terms, the requirement to enrol biometric information is a rational one.

64. Mr Allen said that legislation providing for the taking of biometric information in the context of immigration has been in place since the Immigration Act 1971, and has developed over the years for different purposes, including entry clearance.

65. The current legislative framework governing biometrics, and the context into which they fit, is helpfully set out in the Claimants' Skeleton Argument at [35] et seq, from which the following is taken.

66. International travel ordinarily requires a valid passport and a visa (ie, entry clearance) to enter the country of destination. A British national may travel from Afghanistan to the UK on a British passport (including via a third country such as Pakistan, Qatar or the UAE). An Afghan national requires entry clearance in the form of a visa: see rule 25 of the Immigration Rules, and Appendix Visitor: Visa national list.

67. The entry clearance rules applicable to C2-C7 are those relating to British citizens' spouses and children under 18, which are contained in Appendix FM to the Immigration Rules. I do not need to set out the requirements, save to say that in general they can be disapplied. If the requirements are not disapplied then in some circumstances there is a right of appeal to the First-tier Tribunal.

68. The requirement to provide biometric information goes to the validity of an entry clearance application. Where it is required, but not provided, then the application is invalid *ab initio*. There is no right of appeal to the First-tier Tribunal against a decision that an application is invalid.

69. Sections 5-7 of UKBA 2007 confer a power to make regulations specifying the circumstances in which a person subject to immigration control must apply for a biometric immigration document. The relevant regulations in this case are the Immigration (Biometric Registration) Regulations 2008 (SI 2008/30480) (the 2008 Biometric Regulations), as amended by the Immigration (Biometric Registration) (Amendment) Regulations 2015 (SI 2015/433).

70. Regulation 3A(2) of the 2008 Biometric Regulations requires a person applying for entry clearance under Appendix FM to apply for a biometric immigration document. This is defined in s 5(1)(a) of the UKBA 2007 as 'a document recording biometric information'.

71. A biometric immigration document can be issued whether or not biometric information is provided. Regulation 5 confers a *discretion* on immigration officers as to whether to require the provision of biometric data:

> "5.(1) Subject to regulation 7, where a person makes an application for the issue of a biometric immigration document in accordance with regulation 3, or regulation 3A an authorised person may require him to provide a record of his fingerprints and a photograph of his face.
>
> (2) Where an authorised person requires a person to provide biometric information in accordance with paragraph (1), the person must provide it.

72. Regulation 7 deals with children, who in general are not required to provide biometric data.

73. Where the reg 5 discretion has been exercised so as to require the provision of fingerprints and a photograph, reg 8 confers a further discretion on the authorised person to decide where, when and how the individual must provide that information. As the Upper Tribunal noted in *SGW*, [61], that permits the possibility of deferring biometric enrolment until physical arrival at a port in the UK, but before entry is granted.

74. Mr Allen's evidence at [5]-[6] is this:

> "5. Biometrics in this context consist of a facial image and up to ten finger-scans. These biometrics enable quick and robust identity assurance and suitability checks on foreign nationals subject to immigration control, allowing the Home Office to (a) establish an identity, through fixing an individual's changeable biographic details (for example, name, date of birth, nationality) to biometric data; (b) verify an individual accurately against an established identity; and (c) match individuals to other datasets (for example, against watchlists or fingerprint collections) to establish their suitability to be granted a visa or other immigration document.
>
> 6. Overseas, biometrics are generally taken at a Visa Application Centre (VAC). An individual has to give their biometrics in a controlled environment, and it is not possible for us to take biometrics from a wet fingerprint as the format is not compatible with our system for producing a biometric residence permit. Individuals who provided wet ink prints as part of the emergency evacuation of Afghanistan during Operation Pitting were required to re-enrol their biometrics electronically when they applied for a biometric immigration document. We are also currently unable to obtain biometrics through third parties such as the UNCHR, as we need to ensure the integrity of our biometric system. This is because the system is designed to only accept biometrics captured within the system and wet ink prints do not meet the requirements to produce a biometric immigration document."

75. If the requirement to enrol biometrics has not been waived (reg 5) or deferred (reg 8) and the applicant has not enrolled their biometric information, then reg 23(3)(b) provides that the Secretary of State 'must treat the person's application for … entry clearance as invalid'. In those circumstances, a failure to enrol biometrics, 'will result in a rejection of the application as invalid': *SGW*, [73].

76. In relation to the circumstances in which the Secretary of State has been willing to exercise her discretion under the 2008 Biometric Regulations to waive (reg 5)

or defer (reg 8) biometric enrolment, the Claimants rely on three points in particular (Skeleton Argument, [40]):

a. Firstly, D1 decided to defer the provision of biometric data for many of those evacuated during Operation Pitting until arrival in the UK. This was an exercise of the discretion conferred by reg 8 of the Biometric Regulations.

b. Second, in relation to Ukrainians fleeing the Russian invasion, D1 decided to defer the provision of biometric data until arrival in the UK: Part 18 Reply, [6] (Further Bundle, p37).

c. Third, the provision of biometric information for applications for entry clearance not covered by the 2008 Biometric Regulations are instead governed by the Immigration (Provision of Physical Data) Regulations 2006 (SI 2006/1743), made under s 126(1) of the Nationality, Immigration and Asylum Act 2002. These govern applications for leave to remain of less than six months. In the same way as the 2008 Biometric Regulations, the 2006 Regulations give the Secretary of State a discretion to require applicants to enrol biometric information. The Claimants say that what is significant is what D1 told Parliament about how this power would be exercised. Paragraph 7.1 of the Explanatory Memorandum stated:

> "… the Regulations will enable an authorised person to require an applicant to provide a record of his fingerprints and a photograph. In practice, authorised persons (including authorised entry clearance officers) will, of course, exercise their discretion reasonably and so will only impose such a requirement on applicants from those countries where suitable fingerprinting and digital photography technology has been installed with proper safeguards in place, and also subject to exceptions where this is appropriate in the particular case".

The Claimants say that this was no doubt because it would be manifestly unfair to impose a precondition to the making of a valid entry clearance application that it is impossible to satisfy.

77. In relation to the second of these, at several points in his submissions, Mr Buttler sought to draw a parallel between how those fleeing Ukraine had been treated by D1 (he would say leniently and flexibly), compared with how he says his clients are being treated (strictly and inflexibly). As I think I made clear during the hearing, I do not consider that such a parallel is helpful or realistic. Biometric policy is driven by security considerations, and the security considerations arising from Ukraine and Afghanistan are plainly different. As I said, Osama Bin-Laden did not hide out in Ukraine; there are no Taliban in Ukraine; and the 9/11 attacks were not planned from Ukraine. That is not to say there are no security considerations arising out of the Ukrainian situation, however D1 has the institutional competence to assess these, which I do not

possess. Overall, I agree with how Mr Blundell put it at the hearing: 'Ukraine and Afghanistan are both tragedies and crises but they raise different issues.'

The evidence about D1's policy on biometrics

78. Synthesising Mr Buttler's submissions on Issue 1 to its essentials, he says that the only obstacle in the way of C2-C7 obtaining entry clearance is their inability to comply with [40] (which D1 regards as covering them) and her policy of requiring biometrics even though it is impossible to provide them in Afghanistan.

79. He says that they would be able to comply with all the other requirements of the Immigration Rules. (Mr Blundell did not accept that). Mr Buttler therefore says that the policy, as applied, infringes C1's Article 8(1) rights in the particular circumstances of C1 and his family. His point is that no matter how meritorious his clients' case, and no matter how many good points they can put forward in support of their application that it was just sheer bad luck they were not evacuated when they could (and should) have been, none of that will matter because their application will fail *in limine* through the absence of biometrics.

80. In the refinement to his case I referred to earlier, the way Mr Buttler put it in the Claimants' 'Note on Issue 1' of 29 March 2022 (the day before the hearing) was as follows:

> "4. … Issue 1 is a claim that the Secretary of State's insistence that C2-C7 must enrol biometrics before her officials will consider an entry clearance application breaches C1's right to respect for family life. It is an important part of the analysis of justification that the only reason the Secretary of State has given for imposing the requirement on C2-C7 is that this accords with her general policy. But that does not turn issue 1 into a broader attack on the legality of the policy. It is an individual claim of breach of Article 8."

81. Mr Buttler was clear that C2-C7 had not, as at the date of the hearing, made an application for entry clearance because they believed that their inability to supply biometrics would mean that, without more, it would be bound to fail and there would be no merits consideration of their particular circumstances.

82. Tracing the evidence through chronologically about D1's approach to biometrics and Afghanistan, it is as follows.

83. In his statement of 21 February 2022 Mr McGurk said (emphasis added):

> "42. Having carefully considered the matter, the UK Government has decided to offer the assistance that it is in fact providing. It continues to keep this under review. The Home Secretary has, in particular, decided that she *will not* waive visa requirements or the general

> requirement to enrol biometrics, which are important measures for the purposes of national security and immigration control. She recognises that this adds to the real obstacles to travel to the UK faced by those in Afghanistan (as it does for people presently in other countries with no HMG presence, such as Syria and Yemen). *She weighed these considerations but decided that the interests of national security and of immigration control should prevail*."

84. His footnote 11 stated:

> "Where a person who is subject to immigration control makes certain types of application (as set out in regulations 3 and 3A of the Immigration (Biometric Registration) Regulations 2008) there is a statutory discretion under reg. 5 of the Regulations to require him to provide biometric information. The usual policy is that an application will not be complete, and will not be considered, until biometrics are provided at a Visa Application Centre ("VAC"). In the interests of protecting the UK and its residents, the Secretary of State applies a high threshold for exercising discretion to waive or defer biometrics. The Defendants note that on 15 December 2021 the Administrative Court (Kerr J) granted permission in the case of *JZ* (Afghanistan) (CO/4090/2021) on the ground that it may be irrational for the SSHD not to waive the requirement to enrol biometrics in circumstances where the individual is unable to travel to a VAC."

85. In response to a Part 18 request as to whether remote checks could be conducted on C2-C7 (with biometric data being provided on arrival in the UK), D1 stated on 21 March 2022 (Further Bundle, p31, [9]):

> "There is no practical barrier to conducting remote security checks on the Second to Seventh Claimants in the same way. However, the Secretary of State personally directed that remote security and eligibility checks should cease at the conclusion of Operation Pitting, in order to prioritise the safeguarding of the UK's border in the interests of national security and public safety."

86. Next was the evidence of Stacey Arndell. She is the Chief of Staff/Head of JACU (Joint Afghan Casework Unit) Secretariat for the Joint Afghan Casework Unit, Asylum & Protection. She made a witness statement dated 22 March 2022 (Further Bundle, p77). She said at [3]-[6]:

> "3. In order to obtain ILR under paragraph 39 of the ARIP policy, it is necessary for eligible individuals to make a valid application for ILR using the relevant application

> form. A valid application can only be made from within the UK: s.3(1)(b) Immigration Act 1971. In order to make a valid application, it is generally necessary (amongst other things) to enrol biometrics (subject to the Home Secretary's discretion to waive that requirement). The Home Secretary granted 6 months' leave outside the rules to non-British nationals evacuated as part of Operation Pitting. In practice, the Home Office is facilitating the ILR application process prior to the expiry of the 6 months' leave, by contacting individuals in the UK by phone to assist in completing the ILR application form for all eligible family members, with no application fees, and arranging transport within the UK for biometric enrolment.
>
> 5. As also explained in the statement of Gerard McGurk dated 21 February 2022, the First Defendant has decided not to waive the requirement to enrol biometrics for those outside the UK; and the Defendants are not in a position to assist individuals in Afghanistan to enrol their biometrics.
> 6. Individuals remaining in Afghanistan are therefore unable to make a valid application for ILR, and unless and until they do so are unable to benefit from paragraph 39 of the ARIP policy."

87. I turn back to the evidence of Mr Allen. In his statement of 28 March 2022, almost literally on the eve of the hearing, Mr Allen said:

> "8. In all cases, the Home Secretary has a statutory discretion to waive or defer the requirement to enrol biometrics, pursuant to regulation 5 of the Immigration (Biometric Registration) Regulations 2008 (which provides that an authorised person 'may', not 'must', require provision of biometrics upon an application under regulation 3 or 3A).
>
> 9. However, since the taking of and use of biometrics is essential to protecting the UK and its residents, a high threshold for waiving or deferring the requirement to provide biometrics is generally adopted, with the generally only exercised in the most exceptional circumstances. For example, the discretion to waive or defer would generally be exercised in cases where individuals are unable to provide biometrics because they are physically incapable of doing so. These would predominantly be people such as amputees without fingers or individuals who were incapacitated at the time they applied to come to the UK and are coming to the UK for emergency lifesaving medical treatment.

10. This is subject always to the duty to apply policies flexibly, having regard to relevant legal obligations (including s.6 of the Human Rights Act 1998), and taking into account all relevant factors including any submissions made on an applicant's behalf.

11. There are particular risks associated with waiving or deferring the requirement in the case of Afghanistan. One of those risks relates to the fact that Afghanistan's official documents do not contain biometric chips and are less reliable as proof of identity than those that do; another is that, since the Taliban takeover, the UK is generally unable to make enquiries with the Afghan authorities to confirm the validity of documents. However, as Operation Pitting drew to a close and the crisis in Afghanistan worsened, the decision was taken to exercise the discretion to defer the requirement to enrol biometrics in a number of cases.

12. Since the end of Operation Pitting:

a. For those who were called forward under the ARAP scheme but not evacuated, the Home Office has entered into an arrangement with Pakistan to enable those without suitable travel documentation, such as a passport, to travel to Pakistan to enrol their biometrics on the proviso the person is able to travel onwards to the UK regardless of the outcome of the biometric checks.

b. Those who were not called forward under the ARAP Scheme before the end of evacuation are normally required to attend a VAC and enrol their biometrics as part of an Entry Clearance application.

c. For people who are eligible under ARAP and the Afghan citizens resettlement scheme ("ACRS"), they will be referred to the relevant scheme but they will still generally need to enrol their biometrics. The pathway they use will impact on how their application is processed. Those identified by the UNHCR will be told they are eligible for resettlement subject to completing security checks. Otherwise, applicants from Afghanistan are required to enrol biometrics at a VAC before their applications will be considered, save in very exceptional circumstances.

13. I am aware that numerous Afghan nationals are unable to leave Afghanistan and travel to a VAC outside of Afghanistan to enrol their biometrics because of the costs, risk to personal safety or personal circumstances.

> However, the fact that a person is coming from a zone of conflict and cannot attend a VAC would not, in itself, generally be considered sufficient to justify a waiver or deferral of biometrics."

88. I think it is right to observe that, to my mind, Mr Allen's evidence marked a shift from the 'absolutist' stance in D1's earlier evidence from Mr McGurk and Ms Arndell. I can readily understand how that earlier evidence would have led the Claimants and those advising them to conclude that a rigid biometric rule admitting of no exceptions had been adopted by D1, meaning that it was not possible for C2-C7 to make a valid application for entry clearance.

89. However, as I read it, Mr Allen's evidence, for the first time, represented an evidential acknowledgment on behalf of D1 that discretion *could* be exercised to at least defer the biometric requirement until arrival in the UK, and therefore to allow a merits determination of an application for entry clearance. That was also the position in D1's Skeleton Argument, again dated shortly before the hearing (28 March 2022),

> "39. First, and *generally*, the Home Secretary is well aware of the need, pursuant to the non-fettering principle, to apply her policies flexibly, having regard to all relevant factors including any representations accompanying a relevant visa application; or, if necessary, and on the same basis, to disapply them by way of her residual discretion, if necessary. Strikingly, the evidence shows that the ordinary biometrics policy *is* applied flexibly – and *was* during the course of Operation Pitting, with operational case-working decisions resulting in deferral of the requirements in a number of cases. … Further:
>
> a. It is the Home Secretary's general policy that biometric registration is required as a pre-condition for a valid entry clearance application.
>
> b. Where this requirement is waived or deferred, this is because the Home Secretary has exercised her discretion to do so.
>
> c. Whether through the prism of the non-fettering principle, or residual discretion, or the duty to take into account relevant factors, or otherwise, it is very well established that policies are to be applied flexibly. They need not state on their face that exceptions to their ordinary application exist and will be considered: see, for example, *R (West Berkshire DC) v Secretary of State for Communities and Local Government* [2016] EWCA 441, [2016] 1 WLR 3923; and *British Oxygen Board Co Ltd v. Minister of Technology* [1971] AC 610, *per* Lord Reid at 625E."

90. During the hearing there was a further, and to my mind, crucially important development on this point. Mr Blundell expressly accepted on behalf of D1, that if C2-C7 made an application for entry clearance without biometrics, as of now, then it would not be rejected automatically, but would be considered on its merits (including whether to waive or defer the biometrics requirement).

91. I specifically enquired whether this undertaking was on instructions, because I wanted there to be a degree of formality about it, and no ambiguity. Mr Blundell confirmed that this was the case. He also made clear he was not saying any such application would succeed, but made clear that any application which C2-C7 might make would not automatically fail, as D1's evidence prior to that of Mr Allen suggested it might, notwithstanding public law rules from *British Oxygen Board Co Ltd* onwards, about not fettering discretion, etc.

92. My note of what Mr Blundell said was this (and I have checked it against the audio, and it is accurate):

> "No application for entry clearance has been made. If it is, it is abundantly clear from the evidence that it will be considered on its facts. They will not be prejudiced. That is their legal entitlement. The Secretary of State cannot refuse to consider the merits of the application albeit it still may be rejected on the merits. There is no barrier to making an application." '

93. Mr Blundell was thus clear that an entry clearance application would not be automatically rejected – ie, would not be 'spat out' (my words at the hearing) – because of an absence of biometrics, but would be considered on the merits. With all due respect to Mr Blundell, I do not think that D1's evidence can be called 'abundantly clear', as I have remarked. To my mind, D1's evidential position shifted over time. However, his statement on behalf of D1 before me certainly was unambiguous.

94. But, by way of absolute clarification, Mr Blundell said in a written note following receipt of the draft judgment that when he said this he was not saying that D1 *would* waive or defer the biometrics requirements, but that she would apply her biometric policy flexibly should C2-C7 make an entry clearance application and *would consider* waiver or deferral when she came to determine such an application. In other words, such an application would not 'automatically fail' (Mr Blundell's words in his note) for want of biometrics. For the avoidance of doubt, I had always understood this to be D1's position.

95. In his reply, Mr Buttler said that in light of Mr Blundell's assurance, C2-C7 would now be making an application for entry clearance relying upon all the merits of their cases. It was for this reason that I said at the beginning of this judgment that a lot of the urgency in this application dissipated during the hearing.

96. D1's stated position – at least as the Claimants understood it from [40] of ARIP and Mr McGurk's evidence and Ms Arndell's evidence - no longer presents the insuperable obstacle to entry clearance that the Claimants (understandably) thought that it did.

Discussion

Issue 1

97. Although both the Claimants' and D1's position on Issue 1 have evolved somewhat, I think it is useful to outline how the argument has developed, in part in deference to the detailed submissions which were made to me.

98. In their Skeleton Argument of 25 March 2022, the Claimants framed Issue 1 in the following way.

99. They argued that the Secretary of State has taken a 'blanket' decision, in the exercise of her discretion under regs 5 and 8 of the 2008 Biometric Regulations, that she will not consider any application for entry clearance from Afghanistan unless the applicant has enrolled biometric information before making the application, even though it is impossible for those in Afghanistan to enrol biometric information. In this way, [40] of ARIP imposes a Catch-22 on those who wish to apply for entry clearance from Afghanistan (Skeleton Argument, [42]). The evidence filed by D1 makes this clear.

100. They submitted that this represents an interference with C1's Article 8(1) rights which D1 cannot justify because: (a) she has a statutory discretion to waive the biometric requirement, (b) she would have waived the requirement had the Claimants been evacuated during Operation Pitting, (c) the only reason they were not evacuated during Operation Pitting was that there were not enough seats on the planes; (d) she has waived the requirement for all Ukrainian nationals, and (e) it is impossible for the Claimants to satisfy the biometric requirement, such that insistence on it constitutes a 'colossal' interference with C1's right to respect for family and private life.

101. Mr Buttler here relied in particular on *R (Mahabir) v Secretary of State for the Home Department* [2021] 1 WLR 5301; *R (Bibi) v Secretary of State for the Home Department* [2015] 1 WLR 5055; and *Quila,* (Skeleton, [47]).

102. *Quila* concerned an immigration rule restricting leave to enter the UK or remain as the spouse of person lawfully present and settled in UK, where either spouse was under the age of 21. It was a rule designed to deter forced marriages. Mr Buttler referred in particular to Lord Wilson's judgment at [30]-[32], and his reference to a 'colossal interference' in the claimants' Article 8(1) rights which the rule represented. Mr Buttler said that D1's insistence on biometrics in the present case – impossible though compliance was - represented a similarly 'colossal' interference:

> "30. In *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27, [2004] 2 AC 368, Lord

> Bingham suggested, at para 17, that the engagement of article 8 depended upon an affirmative answer to two questions, namely whether there had been or would be an interference by a public authority with the exercise of a person's right to respect for his private or family life and, if so, whether it had had, or would have, consequences of such gravity as potentially to engage the operation of the article. Having analysed the authority, namely *Costello-Roberts v United Kingdom* (1993) 19 EHRR 112, which, at para 18, Lord Bingham had cited by way of justification of the terms in which he had cast his second question, the Court of Appeal in *AG (Eritrea) v Secretary of State for the Home Department* [2007] EWCA Civ 801, [2008] 2 All ER 28, observed, at para 28, that the threshold requirement referable to the nature of the consequences was "not a specially high one".
>
> 31. Mr McCullough QC, on behalf of the Secretary of State, concedes that family life arose upon the marriage of each of the respondents to their sponsors notwithstanding that, at the date of the refusals of the marriage visas, it had scarcely been established in the case of the second respondent and was relatively undeveloped in the case of the first respondent. Counsel correctly suggests, however, that the more exiguous is the family life, the more substantial are the requisite consequences.
>
> 32. These were two British citizens who had lived throughout their lives in the UK and who, aged 17 and 18 respectively, had just embarked upon a consensual marriage. The refusal to grant marriage visas either condemned both sets of spouses to live separately for approximately three years or condemned the British citizens in each case to suspend plans for their continued life, education and work in the UK and to live with their spouses for those years in Chile and Pakistan respectively. Unconstrained by authority, one could not describe the subjection of the two sets of spouses to that choice as being other than a colossal interference with the rights of the respondents to respect for their family life, however exiguous the latter might be."

103. We spent some time on *Mahabir* at the hearing, but in the end I did not find it of much assistance. It concerned fees payable under the Windrush Scheme and whether their unaffordability in the claimant's case represented a violation of Article 8(1). The rules in question, and the facts, are very different from those I am concerned with.

104. A primary submission made by Mr Buttler was that the inflexible requirement for biometrics (as the Claimants then understood D1's position) was

disproportionate, applying the well-known test in *Bank Mellat v Her Majesty's Treasury (No 2)* [2014] AC 700, [20] per Lord Sumption:

> "… the question [of whether a measure is proportionate] depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them."

See also Lord Reed at [74], dissenting, but adopting an approach in substance the same as Lord Sumption's.

105. Mr Buttler's essential point was that the biometrics requirements represent a very substantial interference with C1's Article 8(1) rights, and that a less intrusive measure – deferring biometrics until arrival in the UK – would suffice. This had been done temporarily in August 2021 during Operation Pitting. On the fourth question (which Mr Buttler said was a question for the Court) he said a general reliance by D1 on the generic benefit of biometric enrolment cannot outweigh the 'grievous harm' to C1's Article 8(1) rights. Mr Buttler made the following points on this aspect of his clients' argument.

106. First, he said that the interference is much greater than the 'colossal interference' in *Quila*. There, travel abroad was possible for the spouse in the UK but here, for C1, it is not. Mr Buttler said the interference 'is as extreme as it gets'.

107. In terms of D1's justification for the measure, namely maintenance of national security, he said that Parliament had given D1 the *power* to require biometrics and also the power to defer taking them until arrival at a UK port. He said that Parliament had clearly thought a blanket requirement to take biometrics abroad in every case was unnecessary, otherwise it would have imposed a duty. Mr Buttler said that it followed that deferring in an individual case would not compromise national security.

108. Mr Buttler said that the decision whether or not to defer biometrics had to depend on the facts of the individual case. If this were like the *Begum* case (*R (Begum) v Special Immigration Appeals Commission* [2021] AC 765) and D1 had individually determined there was a risk to national security, then he accepted the situation would be different. However, there had been 'no breath of a suggestion' that C2-C7 pose a risk to anyone. Why, asked Mr Buttler rhetorically, cannot biometrics be waived for the seven year old ?

109. Mr Buttler said that the power to require biometrics had to be applied proportionately. And so in the 2006 Explanatory Memorandum (see above) he said that D1 had been right to recognise that it would be inappropriate to impose a biometric requirement if it was impossible to enrol for biometrics for entry clearance for less than six months (to which such applications those Regulations applied). Therefore, he said, how could it be proportionate to impose an impossible condition for such applications for more than six months ?

110. Mr Buttler went on to say that Mr McGurk's evidence showed that the Secretary of State had been willing to defer biometrics for Afghan wives and Afghan children during Operation Pitting, and therefore it cannot be said that Afghan dependents generally pose an unacceptable risk. It was only because of bad luck that C1-C7 did not get in to the EHC, so have their biometrics deferred So, said Mr Buttler, 'general considerations of immigration control and national security cannot operate as a trump card in a proportionality analysis.'

111. Mr Buttler then went on to draw a parallel with Ukraine, whereby biometrics for Ukrainian nationals seeking entry clearance to the UK have been waived. I dealt with this suggested parallel earlier, and explained why I am unpersuaded by it.

112. Finally, Mr Buttler said that upon arrival at port, a person does not enter the UK for immigration purposes until leave to enter is given at immigration control, following any necessary checks. Hence, he said, immigration control and national security benefits can still be maintained, because if there is a concern, then the person can be returned. However, when pressed, Mr Buttler acknowledged the matter might not be as straightforward as that, because once a person was physically on UK soil, the Convention would apply to them and Convention issues might arise if it were proposed they be returned to Afghanistan. However, he maintained in the case of C2-C7 that if biometrics were to be deferred and there were to be a problem, then there would be no obligation to admit them to the UK.

113. The Claimants said there was no record of any consideration by D1 as to whether she is justified in applying what they said was her blanket approach to the Claimants, having regard in particular to the rupture of the family life between C1 and his wife and children.

114. By applying this blanket approach to the Claimants, they said it is impossible for C2-C7 to make a valid entry clearance application and it is thereby impossible for them to travel from Afghanistan to the UK. The nearest VAC is in Islamabad, Pakistan, which would involve an impossibly dangerous 470km road journey with young children. They said this blanket restriction is impossible to justify (Skeleton Argument, [55], [56]).

115. The Claimants asserted at [62.4] of their Skeleton Argument:

> "Weighing (a) the absence of any adverse impact on national security and immigration control if biometric enrolment is deferred until C2-C7 arrive at port in the UK

> against (b) the colossal interference with the First Claimant's family life by insisting on a precondition to applying for entry clearance that it is impossible to meet, the Secretary of State has failed to strike a fair balance."

116. In their Reply Note of 29 March 2022, following service of D1's Skeleton Argument, the Claimants put their argument in the following way. They said that D1's position that she would consider applying her biometrics policy flexibly if C2-C7 applied for entry clearance did not 'bear analysis'. They denied that they were attacking a 'blanket policy' on the part of D1 to refuse or defer biometrics, but instead were making a more focussed attack:

> "3. It is important to understand what 'issue 1' is. The Defendants' concern appears to be that the Claimants now challenge "the Home Secretary [adopting] a 'blanket policy'" (Defendants' skeleton, §6). She contends that issue 1 'depends on the bald factual assertion that the Home Secretary has adopted a 'blanket policy' to refuse to waive or defer the requirement to enrol biometrics for anyone in Afghanistan' (§36). It is also said that the Claimants seek to argue that the Secretary of State is bound to "adopt a 'blanket policy' waiving the ordinary biometrics requirements for individuals within Afghanistan" (§41).
>
> 4. That is not the case the Claimants advance. Issue 1 is a claim that the Secretary of State's insistence that C2-C7 must enrol biometrics before her officials will consider an entry clearance application breaches C1's right to respect for family life. It is an important part of the analysis of justification that the only reason the Secretary of State has given for imposing the requirement on C2-C7 is that this accords with her general policy. But that does not turn issue 1 into a broader attack on the legality of the policy. It is an individual claim of breach of Article 8.
> …"
>
> 9. The Secretary of State's evidence and pleaded case in these proceedings is that she is unwilling to waive her policy to require biometrics in the cases of C2-C7 …"
>
> …
>
> 9.3. The Secretary of State's evidence in response to the Claimants' claim, set out in Mr McGurk's witness statement is that: 'The Home Secretary has, in particular, decided that she will not waive visa requirements or the general requirement to enrol biometrics' (§42 [CB/361]). Her position could not be clearer."

…

> 10. The Claimants have therefore been told in clear terms that it is futile for them to submit an entry clearance application unless they have enrolled biometric information (which, it is common ground, is impossible). The position is the same as in Mahabir, where the claimants did not submit an entry clearance application because they were told that it would not be considered without payment of a fee."

117. I do not agree with the Claimants' rejection of D1's 'flexible' posture. It seems to me that in light of the undertaking given by Mr Blundell on instructions, and in accordance with Mr Allen's evidence, Issue 1 has now largely, in not entirely, fallen away. The premise on which it was based, namely that D1 *will not even consider* an application for entry clearance without biometrics, is unsound. She will. I understand how and why the Claimants framed Issue 1 in the way they did in light of Mr McGurk's and Ms Arndell's evidence, and it would have been better if they had more accurately expressed D1's actual position, but that position has now been expressly clarified.

118. As I have said, following Mr Blundell's statement, Mr Buttler on behalf of the Claimants said that C2-C7 will make a merits-based entry clearance application; and D1 has said it will be considered on its merits and will not be automatically rejected (and that consideration will be given to waiving or deferring biometrics requirements). (I note the decision of Lieven J in *R (JZ) v Secretary of State for the Foreign, Commonwealth and Development Affairs* [2022] EWHC 771 (Admin) where an application without biometrics was considered on its merits and not automatically rejected. This shows that the Secretary of State can and does take a flexible approach, and does not rigidly insist upon biometrics, so that an application without them will fail *in limine*.)

119. If their application is rejected on its merits then it will be open to the Claimants to seek a judicial review of that decision on Article 8 grounds or any other grounds properly open to them. However, the current claim that C2-C7 are debarred from even applying because of the impossibility of supplying biometrics does not - or no longer - reflects D1's position.

120. In his reply, having acknowledged D1's position and said C2-C7 would now be making an entry clearance application without biometrics, Mr Buttler nonetheless pressed upon me the argument that I should make some sort of declaration that C1's Article 8 rights had been violated in the period from 20 January 2022 (when he returned to the UK) until 7 March 2022, when the amended claim raising Article 8 was filed.

121. In the exercise of my discretion, I decline to entertain this argument. That is for the following reasons. Firstly, it is not what Issue 1 of this claim is really about. At its heart is (or was) the supposed inability of C2-C7 to make a valid application for entry clearance and the supposed insuperable barrier to C1's family and private life *going forward* that that represents. As I have said, the

premise of that argument has now evaporated. Second, it seems to me little practical purpose would be served by entertaining such an argument. Mr Buttler made (if I may say so) a half-hearted effort to argue such a declaration might benefit others. However, in this case, I am only concerned with the Claimants before me, and not others. If other claimants want to raise such an argument in other proceedings, they can do so. Third, it was not clearly pleaded as a distinct argument. The argument struck me as yet another variation in the way the Claimants put their case, which had already undergone a number of changes, including during the hearing I was patient, and was prepared to tolerate those variations, but there has to be a limit to the number of permutations of their case that claimants should be permitted. Fourth, because it was only raised in reply, Mr Blundell did not have an opportunity to address me on it.

122. Overall, on Issue 1, it seems to me that Mr Buttler has now achieved all that he could have hoped to achieve, namely, a guarantee of a merits based determination of C2-C7's application for entry clearance (including any application to waive or defer the biometrics requirement).

123. For completeness, I should address Mr Buttler's submission that ARIP is unlawful because it does not spell out (for example) that [40] may be subject to exceptions. He relied on the Upper Tribunal decision in *SGW*, where the Tribunal held that the Secretary of State's current guidance on family reunion ('Family reunion: for refugees and those with humanitarian protection', version 5.0, published on 31 December 2020') was unlawful to the extent that it fails to confirm the existence of any discretion as to the provision of biometric information when a person makes an application for entry clearance, save in respect of children under five years of age.

124. I do not consider ARIP to be flawed in the same way. That is for the following reasons.

125. Firstly, [7] acknowledges that the policy will have been applied flexibly to cater for people who might not fit neatly into the categories in the policy. Second, and more broadly, I quoted [39] of D1's Skeleton Argument earlier, where she said that whether through the prism of the non-fettering principle, or residual discretion, or the duty to take into account relevant factors, or otherwise, it is well established that policies are to be applied flexibly. Exceptional circumstances have to be catered for. In order to be lawful, policies need not state on their face that exceptions to their ordinary application exist and will be considered: see, for example, *R (West Berkshire DC) v Secretary of State for Communities and Local Government* [2016] 1 WLR 3923; and *British Oxygen Board Co Ltd*, p625E (neither of which appear to have been cited in *SGW*; Mr Blundell therefore tentatively suggested the decision was *per incuriam*, albeit he also confirmed that D1 had not appealed it).

126. In the *West Berkshire* case, Laws and Treacy LLJ said at [16]-[17], [21]:

> **"**16. The submission is that the WMS is likewise to be condemned. We shall return to what Sullivan LJ said. It is important first to notice a distinction in this area of the law

which is at the core of the debate in this appeal. It is between these two principles. (1) The exercise of public discretionary power requires the decision-maker to bring his mind to bear on every case; he cannot blindly follow a pre-existing policy without considering anything said to persuade him that the case in hand is an exception. See *British Oxygen Co Ltd v Board of Trade* [1971] AC 610, in which Lord Reid and Viscount Dilhorne cited the classic authority of *R v Port of London Authority, Ex p Kynoch Ltd* [1919] 1 KB 176, 184, per Bankes LJ.

17. But (2): a policy-maker (notably central government) is entitled to express his policy in unqualified terms. He is not required to spell out the legal fact that the application of the policy must allow for the possibility of exceptions. As is stated in *De Smith's Judicial Review*, 7th ed (2013), para 9-013:

> 'a general rule or policy that does not on its face admit of exceptions will be permitted in most circumstances. There may be a number of circumstances where the authority will want to emphasise its policy … but the proof of the fettering will be in the willingness to entertain exceptions to the policy, rather than in the words of the policy itself.'

…

21. The second of our two principles is that a policy-maker is entitled to express his policy in unqualified terms. It would surely be idle, and most likely confusing, to require every policy statement to include a health warning in the shape of a reminder that the policy must be applied consistently with the rule against fettering discretion—or, in the planning context, consistently with section 38(6) of the 2004 Act or section 70(2) of the 1990 Act. A policy may include exceptions; indeed the WMS did so, allowing a five-unit threshold for certain designated areas in place of the ten-unit requirement. But the law by no means demands that a public policy should incorporate exceptions as part of itself. The rule against fettering and the provisions of sections 38(6) and 70(2) are not, of course, part of any administrative policy. They are requirements which the law imposes upon the *application* of policy. It follows that the articulation of planning policy in unqualified or absolute terms is by no means repugnant to the proper operation of those provisions."

Background

127. I set out [39] and [40] of ARIP earlier. For ease of reference, I will set out [39] again (Core Bundle, p375) (emphasis added):

> *Afghan family members of British nationals, settled persons and refugees already resident in the UK*
>
> *Close family members of British citizens (and settled persons) evacuated or called forward as part of Op PITTING*
>
> "To facilitate the travel of family members of those who were evacuated as part of Op PITTING, the Home Office waived visas requirements and granted limited permission to stay outside of the Immigration Rules for six months. However, given the exceptional circumstances of their arrival and to ensure they have clarity on their immigration status, we will grant indefinite leave to remain to this group of evacuees. We will waive the settlement fees for this group and they will not be required to meet the usual requirements, such as English language skills or minimum income requirement. Where necessary, we will use the 'exceptional circumstances affecting a number of persons waiver' provided by the Immigration and Nationality (Fees) regulations and seek to make changes in regulations at the next opportunity. This is the same approach as those evacuated under the ARAP scheme and other priority groups relocated to the UK under Op PITTING and eligible for the ACRS. *We will also give indefinite leave to remain to those who were called forward by the UK government but were not able to be evacuated, or were evacuated to third countries*."

128. Thus, all those who were 'called forward' (whatever that expression means), but not evacuated, will be eligible for ILR when they later arrive in the UK. In summary, those falling within [39] will receive ILR and the other specified benefits, However, those within [40] will not. Those within [39] will therefore be in a much more advantageous position (for example, they will have a much quicker route to citizenship). The more advantageous position of those within [39] of ARIP, compared with those in [40], was common ground before me.

129. The first part of this issue is the meaning of [39] and, in particular, the final sentence.

130. The Claimants submit that because C1 received, first, the encouragement email, and then the facilitation email, and they thus tried to get into the EHC (although they were unsuccessful), they were 'called forward' within the meaning of the

last sentence of [39] and so, should they be given leave to enter the UK, they will fall into [39] and so be entitled to ILR. They invite me to ignore the label 'called forward' which the Defendants attached to the email sent to Groups 2 and 3. I will call this their 'primary submission'. This was raised for the first time orally by Mr Buttler, it not having been foreshadowed in his Skeleton Argument. Mr Buttler candidly accepted that the argument had only occurred to him shortly before the hearing, after his Skeleton Argument had been drafted. I therefore asked for, and received, a number of post-hearing Notes from both sides setting out their respective positions on the proper construction of [39] of ARIP.

131. Alternatively, as a secondary submission (and the main submission in the Claimants' Skeleton Argument), if they do not fall within [39] as properly construed, but fall instead within [40], the Claimants say the distinction between the two groups is irrational. Hence, this secondary submission is a policy challenge on domestic public law grounds against the exclusion of dependants of British nationals remaining in Afghanistan, such as C2-C7, from the benefits of [39] of the ARIP policy if, on its proper construction, they do not fall within [39].

132. On behalf of the Defendants, Mr Blundell argued that this argument was premature and that the Claimants lacked standing to challenge ARIP. He submitted, in essence, that they need to come to the UK, apply for ILR and be refused, before they can challenge it.

133. The Defendants' position, as foreshadowed in Mr McGurk's evidence, is that read in the context of ARIP as a whole, a person was only 'called forward' within the meaning of [39] if they received an invitation to come to the EHC, containing an assurance of evacuation, following successful completion of security and eligibility checks (Note of 1 April 2022, [2], [35]).

134. The reasons why the Defendants advance this construction are, in summary (Note of 1 April 2022, [2]):

    a. the policy as a whole, and the expression 'called forward' within it, are to be construed in their context;

    b. the expression 'called forward' has no clear, objective and ordinary meaning in the English language. It is, and is used in the policy as, a term of art;

    c. it is therefore necessary to consider the way in which that term of art is and was used in the context to which the policy relates. The evidence on this is clear: it was used to refer to individuals who had received a 'call forward notification', following security and eligibility checks; and British citizens and their dependants were *not* 'called forward';

    d. nothing in the policy suggests 'called forward' should be given some other meaning.

135. The Defendants rely upon Mr McGurk's evidence at [13]-[18], [21], which is as follows:

> "13. The Home Office was responsible for immigration aspects of the evacuation. Recognising the enormity of the evacuation effort, and in particular the huge pressure to evacuate a very large number of eligible people in a very limited period during this immediate and unfolding crisis, the Home Secretary decided to put in place an extra-statutory visa waiver scheme limited in its duration from 14 to 28 August 2021 only – that is, while the evacuation was ongoing. Pursuant to that waiver scheme, the usual entry visa requirements were waived for dependants (satisfying security and eligibility checks, and providing proof of identity and relationship) travelling to the UK with a British national who was a 'linked person' (ie, a close family member in relation to whom they qualified as a dependant), and also for the ARAP and other Afghan nationals cohorts. Six months' leave to enter outside the Immigration Rules (LOTR) was granted in such cases. This was an extremely important step in the facilitation of the evacuation process; without it, it would not have been possible to evacuate people without immigration status in the UK on anything like the scale that was achieved.
>
> 14. The Home Office was also responsible for conducting security and eligibility checks on all non-British nationals seeking evacuation. This was an essential function. While it endeavoured to evacuate as many eligible people as possible in a limited window during an international crisis situation, the maintenance of security and immigration control in the UK remained the Government's overarching priority.
>
> 15. In this respect, there was an important distinction between the ARAP and other Afghan nationals cohorts, on the one hand, and non-Afghan dependants of British nationals, on the other. Those within the ARAP and other Afghan national cohorts [ie, what I have labelled as Groups 2 and 3] had been individually identified as falling within one of the groups prioritised for evacuation using information held by the UK Government. In particular, and as explained above, the members of the ARAP cohort had a sufficiently strong pre-existing relationship with the UK authorities in Afghanistan to meet the criteria for eligibility under the ARAP scheme; and the members of the other Afghan nationals cohort had been personally identified as priorities for evacuation. Conversely, HMG did not hold complete lists of British nationals or their non-British dependants in Afghanistan and, as explained

in FCDO travel advice, no registration system was ever in place prior to the end of Operation Pitting.

16. Before any individual was included within either the ARAP and other Afghan nationals cohorts, the Home Office undertook security and eligibility checks on them. Upon successful completion of those checks, the Home Office would inform the FCDO. The FCDO would then contact that individual by email, inviting them to travel to the EHC for the purpose of evacuation to the UK. The email invitation also provided confirmation of LOTR, thereby confirming entry clearance and immigration status in the UK. This form of emailed invitation was known as a 'call forward' (GM/22). 'Call forward' notifications were only issued once security and eligibility checks had been completed satisfactorily. In the event that an individual failed those checks, they would not be 'called forward'. The 'call forward' email represented a confirmation that the necessary security and eligibility checks prior to evacuation had been successfully completed, and started with the words 'You are being evacuated to the United Kingdom by the British Military'. Individuals within the ARAP and other Afghan nationals cohorts were not encouraged to attend the EHC without having been 'called forward' in this way, and were informed that they should arrive at the EHC within 12 hours of the time of the notification. Upon arrival in the EHC, the identity of these individuals was verified and their biometrics enrolled, before they were then placed on a UK military evacuation flight.

17. A different system existed for British nationals and their non-British dependants. Consular assistance, including assistance to leave Afghanistan, was provided to British nationals purely by virtue of their nationality. For British nationals, and once their status as such had been confirmed, there were no separate eligibility criteria, assistance was not conditional upon security checks, nor did it depend on receipt of an invitation to come to the EHC. There was no need for British nationals to enrol their biometrics. In addition, and as stated above, the UK Government did not hold (and never held) a complete and accurate record of all British nationals (and/or their dependants) in Afghanistan. For these reasons, it was neither necessary nor appropriate to assist in the evacuation of British nationals using the same 'called forward' process as adopted in the case of the ARAP and other Afghan nationals cohorts. British nationals and their dependants were not 'called forward' in this way (or at all). Instead, they were the beneficiaries of a general

encouragement between 19-25 August, communicated by phone and email by the FCDO (KA/2) is an example of the general encouragement emails sent out), to travel to the EHC for processing at any time.

18. As explained above, the assistance provided to non-British dependants was ancillary to the consular assistance provided to British nationals, and was available only where a British national was present in the EHC together with his or her dependants. Upon arrival at the EHC, officials on the ground would confirm the identity of the British national and that the non-British nationals with whom he or she had arrived at the EHC qualified as his or her 'dependant'. In respect of the non-British national dependants, they would then conduct security and eligibility checks, and until 28 August 2021 enrol biometrics, there and then. Upon satisfactory completion, the non-British dependants would be permitted to board an evacuation flight with the British nationals on whom they were dependent. UK officials did not routinely undertake security and eligibility checks on any such dependants prior to their being seen at the EHC. The priority throughout Op Pitting was to encourage all British nationals, their dependents and eligible Afghan nationals to make their way for processing at the EHC whilst the evacuation effort continued.

…

21. During the evacuation process a number of British nationals in Afghanistan contacted the FCDO to say that they had been unable to get to the EHC. One of the many reasons given was that the dependants with whom they were travelling had not been able to pass Taliban checkpoints without a travel document. In response to this and in the heat of this crisis with the sole objective of trying to get as many British nationals and exceptionally their immediate family dependents, FCDO officials decided to send an email to those British nationals who contacted the FCDO. The email also referred to any immediate family dependants declared by the British national, encouraging them to travel to the EHC "For processing prior to evacuation". This is referred to as a 'facilitation email' (GM/23-25), as it was intended solely to facilitate travel through check points to the EHC itself. In order to fulfil this purpose, the 'facilitation email' was deliberately designed to resemble a 'called forward' email because this format was similar to those used by the ARAP and LOTR schemes and would be familiar to British soldiers who secured the perimeter and access to

> the EHC. It was not, however, a 'called forward' email and its recipients were not 'called forward'."

136. As to this, the Claimants argue (Note of 4 April 2022) that the gloss which D1 seeks to add to the words 'called forward' so that they mean received notification of eligibility for evacuation 'following security and eligibility checks' has three key flaws.

137. Firstly, this is not what the policy says. Second, the effect of D1's 'contextual analysis' ([31] et seq. of her Note of 1 April 2022, summarising Mr McGurk's evidence) is that nobody in the 'British nationals and dependants' group was called forward, because; (a) nobody in this group received a 'called forward email' and (b) nobody in the Bus List group underwent security and eligibility checks. Thus, on the Secretary of State's approach, the last sentence of [39] has no purpose at all. 'It beats the air' (Claimants' Note of 4 April 2022, [2.2]). The Claimants submit that I should be very slow to construe the policy so that it has no effect. Third, there is no need to read in the words 'following security and eligibility checks' because ILR would never be granted to an individual unless and until security and eligibility checks had been conducted (including biometric checks on arrival at port).

138. The Claimants say that D1 accepts (or accepted) that those on the Bus List were 'called forward' within the meaning of [39] in that: (a) this was expressly accepted in the pre-action protocol reply, [20], and Summary Grounds of Defence, [13], [21]; (b) in his witness statement at [31] Mr McGurk stated that D1 was 'reviewing' whether to change her position that those on the Bus List were 'called forward' (on her definition of it) within the meaning of [39]:

> "31. Paragraph 39 also applies to dependants who were 'called forward'. At the time of formulating the policy, the Home Office believed that some such dependants may have been 'called forward'. As explained above, British nationals and their dependants generally did not receive 'call forward' emails and were not 'called forward'. In fact, a very small number of such dependants received 'called forward' emails on the basis that they also fell within the ARAP or other Afghan nationals cohorts. When formulating the ARIP policy, Home Office officials also understood that all of those on the 'bus list' (not only the members of the ARAP and other Afghan nationals cohorts on the 'bus list') had been 'called forward' for evacuation, on the basis that inclusion on the 'bus list' followed security and eligibility checks and followed a specific assurance of evacuation. The Home Secretary is now reviewing, in light of all of the available information, whether that understanding is correct and, correspondingly, whether those dependants on the 'bus list' are properly to be regarded as beneficiaries of paragraph 39 of her policy."

139. The Claimants say that, accordingly, by a Part 18 request dated 4 March 2022, they requested:

> 'please confirm that the Defendants agree that this claim can be determined on the basis that those on the 'bus list' were 'called forward' for the purposes of paragraph 39 of the Afghanistan Resettlement and Immigration Policy (ARIP). Alternatively, if the Defendants intend to alter their case, please identify a deadline by which the Defendants will file an application to rely on amended grounds and further evidence'.

140. By their Part 18 response dated 18 March 2022, the Defendants stated that they would set out their position in Amended Detailed Grounds of Defence (DGD) by 22 March 2022. However, the Claimants say that in her Amended DGD dated 22 March 2022, D1 did not seek to change her position that the Bus List group were 'called forward' within the meaning of [39] of ARIP.

141. Accordingly, the Claimants say that the effect of [39] of ARIP is that:

a. Those who were included on the Bus List will be eligible for ILR on arrival in the UK. Accordingly, they will, after three years, become eligible for citizenship (under ss 3(1), 6(2) and [3] of Sch 1 to the British Nationality Act 1981.)

b. Those individuals (like the Claimants) who were on the Bus List Eligible group but did not make it on to the Bus List, eg, because of capacity constraints, will not be eligible for ILR on arrival in the UK. Accordingly, it will take a minimum of eight years for this group to become eligible for citizenship (and more likely 13 years), during which time they will (subject to any waivers) be obliged to pay the NHS surcharge, meet the English language and minimum income requirements and pay considerable ILR and citizenship application fees. They will accordingly be at a substantial disadvantage.

142. The question under Issue 2 is whether this policy for the differential provision of ILR and benefits is lawful ? The Claimants submit that it is not because it is irrational. Stripped to its essentials, their argument is that who made it onto the Bus List was just a matter of luck, and for the lucky ones to get ILR and other benefits, whilst the unlucky ones (such as themselves) do not, is arbitrary and irrational.

143. The Claimants say that the only justification advanced for the discrimination in the Amended DGD is as follows [45], [49]:

> '45. … the different approach as between the two groups is … justified. The alleged discriminatory treatment in this case is the Home Secretary's decision to grant indefinite leave to remain, without the requirement to pay a fee, to dependants who have passed security and eligibility

> checks, and not to grant those same benefits to dependants who have not
>
> …
>
> 49. … the Home Secretary was reasonably entitled to operate a generous policy in recognition of the exceptional circumstances in which they had arrived and in the knowledge that the sudden influx into the UK of thousands of such individuals holding only limited LOTR presented enormous practical and humanitarian challenges. She was also reasonably entitled to extend this policy to dependants 'called forward' but not evacuated."

144. The Claimants say that this reasoning does not bear scrutiny because:

    a. The suggestion that the distinction was based on whether dependants had 'passed security and eligibility checks' is incorrect. Mr McGurk states in terms that the selection of the Bus List Group, 'did not follow security and eligibility checks. Such invitations did not provide any confirmation that these checks had been satisfactorily complete' ([23]);

    b. The 43 members of the Bus List Group who made it out of Afghanistan on 28 August 2021 had their biometrics enrolled on arrival in the UK.

145. Accordingly, the Claimants say that the decision to grant ILR to those on the Bus List group but not for the Bus List Eligible group had nothing to do with national security: neither group had been security checked.

146. They say this flaw in the Secretary of State's reasoning renders her policy decision irrational.

147. Further, the purpose of Operation Pitting was to evacuate as many eligible persons from Afghanistan as possible. The purpose of drafting the Bus List was to help persons who were eligible for evacuation and, as a result of a vulnerability such as having young children, would find it difficult to get into the EHC. Those in the Bus List Group and the Bus List Eligible Group were (*ex hypothesi*) equally vulnerable and equally deserving of help to escape Afghanistan and settle in the UK. There is no reasonable basis for treating the latter group far less favourably on arrival in the UK. The distinction is arbitrary and unsustainable.

Discussion

(i) Approach to construction of ARIP

148. There was not much between the parties on the proper approach to construing a policy such as ARIP. In *Mahad (Ethiopia) v Entry Clearance Officer* [2010] 1 WLR 48, Lord Brown said at [9] in relation to the Immigration Rules:

> "The Rules are not to be construed with all the strictness applicable to the construction of a statute or a statutory instrument but, instead, sensibly according to the natural and ordinary meaning of the words used, recognising that they are statements of the Secretary of State's administrative policy. The ECO's counsel readily accepted that what she meant in her written case by the proposition 'the question of interpretation is … what the Secretary of State intended his policy to be' was that the court's task is to discover from the words used in the Rules what the Secretary of State must be taken to have intended. After all, under section 3(2) of the Immigration Act 1971, the Secretary of State has to lay the Rules before Parliament which then has the opportunity to disapprove them. True, as I observed in the MO (Nigeria) case, at para 33: 'the question is what the Secretary of State intended. The rules are her rules.' But that intention is to be discerned objectively from the language used, not divined by reference to supposed policy considerations."

149. Reference was also made to *Raissi v Home Secretary* [2006] QB 836, the headnote of which states at p837 (approving *dicta* of Lawton LJ in *R v Criminal Injuries Compensation Board ex parte Webb* [1987] QB 74, 78):

> "… that the test to be applied in interpreting a ministerial policy statement was to ask what a reasonable and literate man's understanding of it would be, and not whether the meaning attributed by the minister to the words of the policy was a reasonable one; and that, accordingly, it was for the court to decide what the ex gratia scheme meant on the basis of what a reasonable and literate person would understand the circumstances to be in which he could be paid compensation under it"

150. I agree with the following general points on construction made by the Defendants in their post-hearing Note: (a) individual words and expressions must be not be construed artificially: the exercise is to discern objectively the true object and intent of the policy; (b) in addition, the principle that policy should be construed in its proper context means that, when seeking to construe particular words and expressions within policy, regard must be had to the policy *as a whole* and the context in which those words and expressions were chosen; (c) context is particularly important as an aid to interpretation where the words used are either ambiguous or a term of art: cf *Tesco Stores Ltd v Dundee City Council* [2012] PTSR 983, [21].

(ii) Standing and prematurity

151. Section 31(3) of the Senior Courts Act 198 provides:

> "(3) No application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with rules of court; and the court shall not grant leave to make such an application unless it considers that the applicant has a sufficient interest in the matter to which the application relates."

152. I reject the Defendants' argument that the Claimants lack standing to bring this part of their challenge, or that it is premature. One partial answer is that they have obtained permission, and so to that extent the standing issue can be taken as settled in their favour *per* 31(3). But more broadly, they are (as I said earlier) making applications for entry clearance, and if granted then ARIP will foreseeably apply to them, one way or another. Mr Buttler was right to say that standing is a very low threshold, and the rules are there to catch the busy-body or the troublemaker who lacks any genuine interest in the outcome of the case. They are plainly and obviously potentially affected by ARIP.

153. Following the decision of the House of Lords in *R v Inland Revenue Commissioners, ex parte National Federation of Self Employed* [1982] AC 617, Lord Donaldson MR in *R v Monopolies and Mergers Commission, ex parte Argyll Group plc* [1986] 1 WLR 763, 773, set out what has been consistently adopted as the proper practical test to apply:

> "The first stage test which is applied on the application for leave, will lead to a refusal if the applicant has no interest whatsoever and is, in truth, no more than a meddlesome busybody. If, however, the application appears to be otherwise arguable and there is no other discretionary bar, such as dilatoriness on the part of the applicant, the applicant may expect to get leave to apply, leaving the test of interest or standing to be reapplied as a matter of discretion on the hearing of the substantive application. At this second stage, the strength of the applicant's interest is one of the factors to be weighed in the balance."

154. I should also cite a passage from Sedley J's (as he then was) judgment in *R v Somerset County Council and another ex parte Dixon* [1998] Env LR 111, 121, which Mr Buttler particularly urged upon me:

> "Public law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs-that is to say misuses of public power; and the courts have always been alive to the fact that a person or organisation with no particular stake in the issue or the outcome may, without in any sense being a mere meddler, wish and be well placed to call the attention of the court to an apparent misuse of public power. If an arguable case of such misuse can be made out on an application for leave, the court's only concern is to ensure that it is not being done for an ill motive. It is if, on a substantive hearing, the abuse of power is made out that everything relevant to the

> applicant's standing will be weighed up, whether with regard to the grant or simply to the form of relief."

155. The Claimants are very far removed from being meddlesome busybodies, and plainly have standing. Indeed, it seems to me that if, say, an organisation like the JCWI had brought a policy challenge to ARIP (as they do on occasion to aspects of immigration policy: see eg *Secretary of State for the Home Department v Joint Council for the Welfare of Immigrants* [2020] EWCA Civ 542) they plainly would have standing, as I think Mr Blundell was driven to accept. If that is right, then this case is *a fortiori.*

156. I accept, as Mr Blundell told me, that D1 was in the process of re-considering ARIP, but that does not, in my judgment, make this challenge premature. I have to take the policy as I find it, and judge its effect and legality according to its current terms. If D1 wishes to change it, she is free to do so. Nor is it premature because C2-C7 have not yet entered the UK and been refused ILR in accordance with [39] of ARIP.

(iii) Merits

157. Moving to the merits, overall, I agree with the Defendants' position that the expression 'called forward', when read in context, must be construed to mean 'received a call forward notification following security and eligibility checks'. That is, in summary, because:

    a. ARIP as a whole, and the expression 'called forward' within it, are to be construed in their context;

    b. the expression 'called forward' has no clear, objective and ordinary meaning in the English language. It is used in ARIP as a term of art;

    c. it is therefore necessary to consider the way in which that term of art is and was used in the context to which the policy relates. Mr McGurk's evidence on this is clear: it was used to refer to individuals who had received a 'call forward notification', following successful security and eligibility checks;

    d. nothing in the policy suggests 'called forward' should be given some other meaning.

158. Turning to the analysis of the text of ARIP, 'called forward' is nowhere clearly defined, and I consider it could have different meanings. Both constructions advanced by the parties are potentially tenable. It is therefore important to look at the scheme and structure of ARIP and to consider the context as a whole.

159. Paragraph 2 explains that, in addition to the ARAP cohort and British nationals [ie, my Groups 2 and 1] who were evacuated, HMG was able to 'call forward' a number of other people for evacuation. The group here referred to is the other Afghan nationals group [ie, my Group 3]. This is the first use of the expression 'called forward' in the policy. I note that the words 'called forward' are in

quotation marks, suggesting to me that the expression is being used as a term of art carrying a particular meaning:

> "2. Following rapid work by the Foreign, Commonwealth and Development Office (FCDO), Home Office and Ministry of Defence (MoD) during Op PITTING, we were able to 'call forward' a number of other people for evacuation, in addition to the ARAP contingent and British nationals. These people were identified as being particularly at risk. They included female politicians, members of the LGBT community, women's rights activists and judges. Those who were called forward will form part of the Afghan Citizens Resettlement Scheme (ACRS) cohort."

160. Paragraph 3 refers to the 'vital security checks' that were undertaken:

> "2. This unprecedented mission was supported by over 300 dedicated civil servants in the Home Office – from Border Force officers on the ground in Kabul supporting our military and diplomats in extremely challenging circumstances, to UK Visas and Immigration (UKVI) staff in Liverpool – working alongside colleagues from across government, the military, the police and our intelligence agencies. They conducted vital security checks, processed visa and passport applications and welcomed and supported people to begin their new lives in the UK."

161. Paragraph 4 explains that, throughout Operation Pitting, the Home Secretary balanced humanitarian objectives with national security and immigration control imperatives.

162. Paragraph 5 explains that the focus of the ARIP policy is on 'the immigration status of those evacuated'. Paragraph 6 sets out the policy in overview. It states that ILR will be granted to 'Afghan nationals and their family members who were evacuated, called forward or specifically authorised for evacuation', whether already in the UK or arriving subsequently:

> "6. For those evacuated here, we are determined to ensure they have the best possible start to life in the UK. Given the difficult, exceptional and unique circumstances in which many arrived in the UK, we will be offering indefinite leave to remain to those Afghan nationals and their family members who were evacuated, called forward or specifically authorised for evacuation, by the government during Operation PITTING. This will apply to those who have already arrived in the UK or arrive after the evacuation. This will give them certainty about their status and the right to work and contribute to society."

163. Paragraph 7 recognises that some individuals will fall through the gaps of the policy, and indicates that the policy will be applied flexibly.

164. Paragraph 8 falls to be read with [5]-[7]. It states that the policy statement sets out the position of the Afghan Citizens Resettlement Scheme (ACRS) cohort (ie Group 3); of individuals who came to the UK under the ARAP scheme pre-Pitting; and of 'other groups'.

165. Paragraph 11 states that HMG is taking steps to bring more people to the UK who were 'called forward' but not evacuated, and that those 'called forward' would be granted ILR:

> "11. UKVI has established a dedicated case working team, which is working jointly with FCDO and the MoD, to take the necessary steps to bring more people to safety in the UK. This includes those who were called forward for evacuation but remain overseas. Given the difficult, exceptional and unique circumstances in which many arrived in the UK, the Home Office will grant those called forward immediate indefinite leave to remain. This will give them certainty about their status, entitlement and future in the UK to benefits and right to work."

166. Paragraph 20 states that all of the ARAP cohort in the UK will be granted ILR, regardless of when they arrived. There is no suggestion in this section that dependants will also be granted ILR. The Defendants point out in footnote 4 of their Note that dependents of members of the ARAP cohort are not themselves part of the ARAP cohort: see the ARAP policy and Immigration Rules r 276BE1-276BI1.

167. Paragraphs 21-33 set out details of the ACRS scheme. At [32], it is explained that those accepted on the scheme will be eligible for ILR. Paragraph 29 explains that dependants of individuals eligible for resettlement under the scheme will also be eligible under the scheme. Paragraph 31 provides for security checks, including biometrics.

168. Turning to the key paragraph, [39], it comes under the heading 'Afghan family members of British nationals, settled persons and refugees already resident in the UK' and the sub-heading "Close family members of British citizens (and settled persons) evacuated or called forward as part of Op PITTING". The Defendants say that the sub-heading is ambiguous. The words 'evacuated or called forward' *could* be read to refer either to the close family members or, alternatively, to the British nationals etc (or, conceivably, both). Breaking down [39]:

    a. The first sentence of [39] is a statement of fact: visa requirements were waived for family members of 'those who were evacuated as part of Op PITTING'. (In context, I agree the word 'those' must mean – by reference to the section heading – 'those British citizens, settled persons and refugees already resident in the UK'.)

b. The second sentence ('However, given the exceptional circumstances of their arrival …') and third sentence ('We will waive the settlement fees for this group …') explain the policy in relation to these family members *in fact evacuated*: the grant of ILR, waiver of fees and of the usual requirements under the family route under the Immigration Rules (for example, English language and minimum income). The fourth sentence ('Where necessary, we will use the 'exceptional circumstances affecting a number of persons waiver' …) explains the legal route by which these fees will be waived.

c. The fifth sentence ('This is the same approach as those evacuated under the ARAP scheme and other priority groups relocated to the UK under Op PITTING and eligible for the ACRS') explains that this places the *evacuated* family members of *evacuated* British nationals, settled persons and refugees already resident in the UK in the same position as evacuated members of the ARAP cohort and those evacuated members of the other Afghan nationals cohort eligible under the ACRS.

169. The final sentence states:

> "We will also give indefinite leave to remain to those who were called forward by the UK government but were not able to be evacuated, or were evacuated to third countries."

170. This is the only time the expression 'called forward' is used in [39]. I agree with the Defendants that the word 'those' in this final sentence can only relate to called forward but not evacuated family members of British nationals, settled persons and refugees already resident in the UK. The sentence plainly cannot purport to grant ILR to British nationals, settled persons (ie, people with ILR) and refugees: none of these groups need ILR. And so this settles the ambiguity in the sub-heading: 'called forward' refers to the family member and not to the British national etc. (It also resolves the same ambiguity in [40] and the heading above it: 'not called forward' or 'not notified they were eligible for evacuation' must also refer to the family member, and not to the British citizen or settled person etc.)

171. I also agree with this submission on behalf of the Defendants (Note, [30]):

> "The conclusions to be drawn are: first, the expression 'called forward' has no clear, objective and ordinary meaning in the English language; second, the policy makes clear that 'called forward' is used as a term of art; third, the policy itself provides no clue as to the meaning of 'called forward'; …"

172. It seems to me, therefore, that the true intent behind the choice of the expression 'called forward' must be discerned from the context in which it is used in the policy. This context is set out in the evidence of Gerard McGurk, which I set out earlier, namely essentially:

a. only those in the ARAP or other Afghan nationals cohorts (ie. Groups 2 and 3) were 'called forward' ([15]-[17]);

b. in order for individuals to be 'called forward', they first had to pass security and eligibility checks and also get a specific assurance of evacuation ([16]);

c. for ARAP and other Afghan Nationals, they were not eligible to attend the EHC without receiving a 'called forward notification' ([16]);

d. the facilitation e-mail was not a 'call forward', because it did not follow security and eligibility checks or give an assurance of evacuation, but was used 'in the heat of this crisis' to assist them to get to the EHC (para 21);

e. non-British national dependants of British nationals were not 'called forward'; their eligibility to be evacuated was not freestanding but depended upon their arrival at the EHC with their British citizen family member and satisfaction of security and eligibility checks at the EHC following their arrival ([11]-[13], [17]-[18]). This is subject to the point made in footnote 8 of the Defendants' Note, that this is subject to a small number of non-British national dependants of British citizens who were also members of the ARAP or other Afghan cohorts (see Mr McGurk at [31].

173. A further point in the Defendants' favour is the requirement in [40] that those within that paragraph must supply biometrics. There is, it seems to me, a symmetry between this requirement and the meaning of 'called forward' advanced by the Defendants. Those in [39] have been subject to security and eligibility checks (including biometrics) and so do not need to provide them again. Those in [40] have not, and so do need to provide them.

174. Another further point against the Claimants' construction that those who received a facilitation email were 'called forward' within [39] is this. (It is not one advanced by D1; it is a point that occurred to me). Given such persons have not, by the Claimants' definition, undergone security or eligibility checks, one would have expected the promise of ILR in [39] to be made expressly subject to such checks being successfully carried out, rather than being a bare unconditional guarantee of ILR.

175. I consider it to be most unlikely that D1 intended to make such a blanket promise to those whose security and eligibility status had not been ascertained. To have done so would have been to store up a whole host of legal problems in the event that such a person did not get ILR on security grounds, given the unconditional nature of the promise in the last sentence of [39]. Even allowing for the speed at which ARIP was drafted, such an omission would have been a glaring error and I reject it as a realistic possibility.

176. What, then, of the Claimants' point, that if the Defendants are correct, then the final sentence of [39] is meaningless because by definition non-British dependents of British nationals did not receive a 'called forward' email ?

177. The answer, I think, is to be found in [31] of Mr McGurk's witness statement, which I quoted earlier, in which he said that (a) some dependents of British nationals *had* been 'called forward' because they fell within the ARAP or other Afghan nationals cohorts (ie, Groups 2 and 3); and (b) when formulating the ARIP policy, Home Office officials also understood that all of those on the Bus List (not only the members of the ARAP and other Afghan nationals cohorts on the Bus List) had been 'called forward' for evacuation, on the basis that inclusion on the Bus List followed security and eligibility checks and followed a specific assurance of evacuation, but that was now being reviewed.

178. I therefore think that the Defendants are correct in the two points they make in [34] of their Note. First, 'called forward' is an undefined term of art in ARIP which has a particular meaning when read in this context, ie, 'received an invitation to come to the EHC, containing an assurance of evacuation, following successful completion of security and eligibility checks'. Second, the last sentence of [39] is not devoid of meaning, as the Claimants submitted, in other words, it does not 'beat the air'. There is a reasonable explanation for the inclusion of the final sentence of [39]: it was believed at the time that some Afghan dependants of British nationals *may* have been called forward. Whether or not that proved to be the case is irrelevant (although it appears on the evidence to have been the case).

179. For these reasons, whilst I acknowledge the point is not wholly free from difficulty, I have concluded that the expression 'called forward' in ARIP should be construed to mean 'received an invitation to come to the EHC, containing an assurance of evacuation, following successful completion of security and eligibility checks'.

180. I now turn to the Claimants' alternative construction, that 'called forward' means 'told they were eligible for evacuation and to come to the EHC' (Note of 31 March 2022, [1]). It seems to me that even on this approach the Claimants were not 'called forward'. The short point is that the facilitation email was not a notification of eligibility for evacuation. It did not relieve recipients or their dependents of the need to pass the relevant checks. Had the Claimants been able to make it into the EHC, there would have been further stages in the process for them to go through before they would have been evacuated.

181. As explained in Mr McGurk's statement, dependants of British citizens were *not* eligible for evacuation unless they: (a) attended the EHC together with the British national family member; and (b) satisfactorily passed security and eligibility checks conducted at the EHC itself.

182. For example, at [12] he said:

> "12. The FCDO does not ordinarily have any consular responsibility in relation to non-British nationals, including both non-British dependants of British nationals (whether or not travelling together) and those in the ARAP and other Afghan nationals cohorts. However, as set out in "Support for British Nationals Abroad" (GM/21), in exceptional circumstances, such as a crisis evacuation, the

> FCDO may endeavour to keep family groups together by also helping the spouse/partner and dependent children aged 18 years and under only, when they are travelling with the British national. It endeavoured to, and did, provide exceptional assistance of this type to British nationals and their dependants during the course of Operation Pitting, by encouraging them to travel together to the EHC with relevant documents demonstrating their eligibility for evacuation (such as travel documents, identity documents, birth certificates, other documents demonstrating the family relationship etc.). Upon their arrival in the EHC, UK government officials present on the ground conducted security and eligibility checks on non-British dependants, as explained below."

183. Looked at this way, it seems to me there is little between the parties as to what 'called forward' in [39] means in practice – because Afghan dependants of British nationals were never told they were 'eligible for evacuation prior to arrival at the EHC' etc, which is part of the Claimants' suggested definition. The dependents of someone like C1 who received a facilitation email could still have attended the EHC and failed the security and/or eligibility checks, meaning that they would not have been evacuated. The submission to the contrary in [11] of the Claimants' Note is wrong. A facilitation email was not a guarantee of evacuation.

184. I turn to the Claimants' submission that the distinction between the two groups in [39] and [40] of ARIP is irrational.

185. I am unable to accept this submission. I quite accept that irrationality is not a fixed and immutable standard, but is to be applied having regard to the appropriate context (*Kennedy v Charity Commission* [2015] QC 455, [51]; *R (Q) v Secretary of State for the Home Department* [2004] QB 36, [112]).

186. However, the decision about who to offer ILR to was one of immigration control having socio-economic impacts. It therefore seems to me, *per* the approach of Lord Reed in *R (SC) v Secretary of State for Work and Pensions* [2021] 3 WLR 428, [115], [157]-[162], that it is an area in which D1 is entitled to a wide margin of discretion, and that the court should not lightly intervene, on the grounds of institutional competence and democratic accountability.

187. At [158], Lord Reed stated as part of his concluding comments on the 'manifestly without reasonable foundation' approach:

> "[…] In the light of that jurisprudence as it currently stands, it remains the position that a low intensity of review is generally appropriate, other things being equal, in cases concerned with judgments of social and economic policy in the field of welfare benefits and pensions, so that the judgment of the executive or legislature will generally be respected unless it is manifestly without reasonable foundation. Nevertheless, the intensity of the court's

> scrutiny can be influenced by a wide range of factors, depending on the circumstances of the particular case, as indeed it would be if the court were applying the domestic test of reasonableness rather than the Convention test of proportionality. In particular, very weighty reasons will usually have to be shown, and the intensity of review will usually be correspondingly high, if a difference in treatment on a "suspect" ground is to be justified. […]"

188. 'Suspect grounds' in relation to differences in treatment include things such as race and gender. It is not suggested that the decision regarding who should receive benefits under [39] of ARIP is based on any such suspect grounds such as sex, religion or race. It involves only characteristics (or 'other status') peripheral to personal identity: *R (RJM) v Secretary of State for Work and Pensions* [2009] 1 AC 311, [5].

189. The rationale behind the courts' particular deference to the matters of social and economic policy lies in the separation of powers: see *SC*, *per* Lord Reed at [144]. He explained in *R (SG) v. Secretary of State for Work and Pensions* [2015] 1 WLR 1449:

> "92. … certain matters are by their nature more suitable for determination by Government or Parliament than by the courts. In so far as matters of that nature have to be considered by the courts when deciding whether executive action or legislation is compatible with Convention rights, that is something which the courts can and do properly take into account, by giving weight to the determination of those matters by the primary decision-maker.
>
> 93. That consideration is relevant to these appeals, since the question of proportionality involves controversial issues of social and economic policy, with major implications for public expenditure. The determination of those issues is pre-eminently the function of democratically elected institutions. It is therefore necessary for the court to give due weight to the considered assessment made by those institutions. Unless manifestly without reasonable foundation, their assessment should be respected."

190. In *R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2021] 1 WLR 1151, [140], Hickinbottom LJ said in a passage that was cited with approval by Lord Reed in *SC*, that the 'manifestly without reasonable foundation criterion' does not separate cases involving an element of social and economic policy with a bright line, but:

> "[…] simply recognises that, where there is a substantial degree of economic and/or social policy involved in a measure, the degree of deference to the assessment of the democratically-elected or -accountable body that enacts

> the measure must be accorded great weight because of the wide margin of judgment they have in such matters. The greater the element of economic and/or social policy involved, the greater the margin of judgment and the greater the deference that should be afforded. […]"

191. I accept the submission by the Defendants (Skeleton Argument, [75]) that the ARIP policy, and in particular the categories of individuals upon which the benefits of [39] should be conferred, was a matter of economic and social policy judgement, for which D1 is democratically accountable and in which she is expert.

192. I do not consider that her judgement about the contours of the ARIP policy as she fashioned them, namely including within the ILR policy those who had passed security and eligibility checks, and received assurances of evacuation, whilst excluding those who had not, can be said to be irrational, or manifestly without reasonable foundation.

193. Turning to the Claimants' argument about the Bus List and the Bus List Eligible – on which their irrationality challenge principally rested - it is right I think to observe that D1's position (as with Issue 1) has changed over time. In her Summary Grounds of Defence she said at [13]:

> "13. Throughout the evacuation process a number of British nationals in Afghanistan contacted HMG to say that they had been unable to get to the EHC. Some of these people volunteered that they or one or more of their dependants was vulnerable; the vulnerability of others was evident on the face of the information held, for example in the case of young children. FCDO officials collated a list as part of their endeavours to assist in the evacuation of as many eligible people as possible and MOD teams in Kabul made arrangements for minibuses to bring people eligible for evacuation to the airport for processing. Between 24 and 26 August, FCDO officials contacted British nationals identified (or in respect of whom a dependant had been identified) as being vulnerable (e.g. by age or reported health condition) to confirm whether they still wished to be evacuated and, if they did, provided them with details of a time and place where they would be collected by bus and taken to the airport. Only British nationals in respect of whom FCDO had telephone contact details at that time were contacted. These calls followed detailed scripts, as annexed hereto. A record of the people offered places on these buses was retained, and referred to as the 'bus list'. These people were considered to have been 'called forward' (see the heading of the 26 August script). Home Office officials and the First Defendant understood that, during the course of these calls, individuals were given a specific assurance that they and their dependants would be taken to the airport and evacuated. Regrettably many on

> the bus list were not successfully evacuated, mainly due to the security situation on the ground."

194. As I have already noted, it is right that the second call script, for example, GM/26, at Supplementary Bundle, p477, is headed 'BUS CALL FORWARD – BUS TWO: EVENING OF WEDNESDAY 25 AUGUST'.

195. Paragraph 21 of the Summary Grounds asserted:

> "21. A third category of individuals to whom the policy applies is those dependants who had been called forward for bus transport to the airport and onward evacuation (ie who were on the 'bus list'). The First Defendant wished to extend her policy to this cohort on the understanding that HMG had given them a specific commitment that they would be evacuated to the UK. The view of the First Defendant was that the failure to make good that specific commitment should be marked by bringing them within the ambit of paragraph 39."

196. It does therefore appear to be the case, as the Claimants said, that D1's initial position was that those on the Bus List had been 'called forward'.

197. That has now changed. As Mr McGurk explained in [31] of his witness statement (see above), D1 is now reviewing whether *all* those on the Bus List had in fact been called forward in the sense she now advances, as officials believed when ARIP was being formulated, or whether only some were because they were in the ARAP and Afghan nationals cohorts.

198. The response to the Claimants' argument about the Bus List is in D1's Note of 1 April 2022, [40]-[43], as follows (emphasis in original):

> "40. The Claimants' argument on the 'bus list' is a straw man. It goes nowhere.
>
> 41**.** **First**, the Defendants have never contended or accepted that British nationals or their dependants on the 'bus list' were as a matter of fact "called forward" as properly understood.
>
> 42. **Second**, it has been explained that the Home Secretary's position on this question – which is she reviewing – was based on her *understanding of the facts*, that is she understood that they had been given a specific assurance of evacuation following security and eligibility checks. Whether that is right or wrong, it has no relevance whatsoever to the true construction of the policy.
>
> 199. **Third**, there is no irrational differentiation between the 'Bus list cohort' and the 'Bus list-eligible cohort'. There are two logical alternatives in relation to 'Bus list

> cohort'. **Either** they *were* 'called forward' – i.e. they had passed security and eligibility checks etc – in which case they are not in an analogous position to the 'Bus-list eligible cohort'. **Or** they were *not* 'called forward', in which case paragraph 39 does not apply to them and so there is no differential treatment."

198. I do not agree with [41] in light of D1's initial position in her Summary Grounds of Defence. It also seems inconsistent with [68] of her Skeleton Argument:

> "68. First, it is not accepted that those who were in what the Claimants term the "Bus List-Eligible Group" are in a sufficiently analogous situation to the comparator group of those in the "Bus List Group". The Home Secretary's understanding was that individuals on the "bus list" had satisfactorily completed security and eligibility checks and had received a specific assurance of evacuation; and for that reason she considers them to have been "called forward" for the purposes of paragraph 39 of the policy[30]. By contrast, the "Bus-List Eligible Group" have <u>not</u> satisfactorily completed security and eligibility checks and have <u>not</u> received a specific assurance of evacuation."

200. I think the word 'considers' in line 10 should really have been 'considered': that would chime with Mr McGurk's evidence as to what officials thought *at the time*. Footnote 30 is: 'As explained, she is now considering the available evidence in order to review whether her understanding was correct.'

201. However, I think [42] and [43] are an answer to the Claimant's argument.

202. It seems to me that another difficulty in the way of the Claimants on this aspect of the case is the recent case law on the question of when a policy will be held to be unlawful.

203. The Supreme Court has recently considered the test for the legality of a policy in *R(A) v Secretary of State for the Home Department* [2021] 1 WLR 3931. The claimant, a convicted child sex offender, brought a claim for judicial review of the Child Sex Offender Disclosure Scheme Guidance ('the Guidance') which outlined a co-ordinated approach which police forces could adopt when members of the public requested information about whether persons who had contact with children had any convictions for sex offences involving children. The Guidance, which had been made by the Secretary of State pursuant to her common law powers, had no statutory force and police forces were free to decide whether to participate in the scheme set out in the Guidance, which the police force for the area in which the claimant lived had chosen to do. Among other things the Guidance provided that, in certain circumstances, the police should consider if representations should be sought from the subject of the request before they disclosed information about him. The claimant contended that the Guidance did not go far enough in giving guidance about the circumstances in which a police force was obliged to seek such representations

and that, consequently, the Guidance was unlawful because (i) it gave rise to an unacceptable risk of unfairness as a matter of common law and (ii) did not meet the standards of clarity, predictability and accessibility inherent in the requirement in Article 8(2) of the ECHR that an interference with the right to respect for private life was 'in accordance with the law'. The judge dismissed the claim and the Court of Appeal upheld his decision.

204. The Supreme Court dismissed the appeal holding, in summary, that in broad terms, there were three types of case where a policy might be found to be unlawful at common law by reason of what it said or omitted to say about the law when giving guidance for others, namely (i) where the policy included a positive statement of law which was wrong and which would induce a person who followed the policy to breach their legal duty in some way, (ii) where the authority which promulgated the policy did so pursuant to a duty to provide accurate advice about the law but failed to do so, either because of a misstatement of law or because of an omission to explain the legal position, and (iii) where the authority, even though not under a duty to issue a policy, decided to promulgate one and in doing so purported in the policy to provide a full account of the legal position but failed to achieve that, either because of a specific misstatement of the law or because of an omission which had the effect that, read as a whole, the policy presented a misleading picture of the true legal position

205. In the first type of case, the policy guidance would only be unlawful if it sanctioned, authorised or positively approved unlawful conduct by those to whom it was directed, there being no freestanding principle that policy guidance would be unlawful if it created an unacceptable risk that an individual would be treated unlawfully; and that, applying that approach, the guidance in the present case was clearly lawful, even though it did not spell out in fine detail how decision-makers should assess whether to seek representations in a particular case and did not eliminate every legal uncertainty which might arise in relation to decisions falling within its scope (see [38]-[42]; [46]-[48]; [54]; [63-[66]; [75]).

206. At [38], Lord Sales and Lord Burnett CJ held:

> "In our view, *Gillick* [*v West Norfolk and Wisbech Area Health* Authority [1986] AC 112] sets out the test to be applied. It is best encapsulated in the formulation by Lord Scarman at p181F (reading the word 'permits' in the proper way as 'sanction' or 'positively approve') and by adapting Lord Templeman's words: does the policy in question authorise or approve unlawful conduct by those to whom it is directed? So far as the basis for intervention by a court is concerned, we respectfully consider that Lord Bridge and Lord Templeman were correct in their analysis that it is not a matter of rationality, but rather that the court will intervene when a public authority has, by issuing a policy, positively authorised or approved unlawful conduct by others. In that sort of case, it can be said that the public authority has acted unlawfully by undermining the rule of law in a direct and

> unjustified way. In this limited but important sense, public authorities have a general duty not to induce violations of the law by others."

207. The passage from Lord Scarman's speech referred to in *Gillick* is where he said:

> "It is only if the guidance permits or encourages unlawful conduct in the provision of contraceptive services that it can be set aside as being the exercise of a statutory discretionary power in an unreasonable way."

208. The legal test is thus *not* that the guidance, if followed, must 'inevitably produce conduct on the part of doctors which would be lawful': [35]. Rather, the guidance was lawful because it *could* be followed without involving any unlawfulness on the part of doctors: *ibid*.

209. The Court in *A* went on to say, at [39]:

> "The approach to be derived from *Gillick* is further supported by consideration of the role which policies are intended to play in the law. They constitute guidance issued as a matter of discretion by a public authority to assist in the performance of public duties. They are issued to promote practical objectives thought appropriate by the public authority. They come in many forms and may be more or less detailed and directive depending on what a public authority is seeking to achieve by issuing one. There is often no obligation in public law for an authority to promulgate any policy and there is no obligation, when it does promulgate a policy, for it to take the form of a detailed and comprehensive statement of the law in a particular area, equivalent to a textbook or the judgment of a court. Since there is no such obligation, there is no basis on which a court can strike down a policy which fails to meet that standard. The principled basis for intervention by a court is much narrower, as we have set out above."

210. At [40], Lord Sales and Lord Burnett CJ warned against the test being more demanding. They wished to avoid a situation where 'public authorities might find themselves having to invest large sums on legal advice to produce textbook standard statements of the law which are not in fact required to achieve the practical objectives the authority might have in view'.

211. Their Lordships explained the court's role at [41]:

> "The test set out in *Gillick* is straightforward to apply. It calls for a comparison of what the relevant law requires and what a policy statement says regarding what a person should do. If the policy directs them to act in a way which contradicts the law it is unlawful."

212. It is not necessary for a lawful policy to 'spell out in fine detail' how decision-makers operating the policy are to comply with their legal obligations in every situation, or to issue written guidance which would 'eliminate every legal uncertainty which might arise in relation to decisions falling within its scope': [42].

213. The context in which the policy is to be used, including its intended audience, is important ([34]). Thus, in a case where the audience for a policy is officials within a government department ([47]):

> " … it will not usually be incumbent on the person promulgating the policy to go into full detail about how exactly a discretion should be exercised in every case. That would tend to make a policy unwieldy and difficult to follow, thereby undermining its utility as a reasonably clear working tool or set of signposts for caseworkers or officials. Much will depend on the particular context in which it is to be used. A policy may be sufficiently congruent with the law if it identifies broad categories of case which potentially call for more detailed consideration, without particularising precisely how that should be done …"

214. In the current case, the principal audience for the ARIP policy are Home Office officials, trained and experienced in the operation of the relevant immigration policies. But I equally accept Mr Buttler's point that the policy serves to inform those affected by it of their potential status.

215. Against that background, I conclude that the policy in question is not unlawful under *A* and *Gillick*. That is for the following reasons.

216. Firstly, I do not consider the Claimants have demonstrated that the ARIP policy authorises or approves unlawful conduct by those applying it.

217. As I have already said, it is well-established that a decision maker is entitled to adopt a policy to guide the exercise of their discretion, but must be prepared to listen to someone with 'something new to say': *British Oxygen Board Co Ltd,,* 625E. Further, policies have to be applied in accordance with any other relevant legal requirements, including the common law duty of fairness and the duty under s.6 of the Human Rights Act 1998: *R (Sainsbury's Supermarkets Lyd) v Secretary of State for Communities and Local Government* [2005] EWCA Civ 520, [16]; *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245 at [34]-[38]; *West Berkshire DC*, [16]-[17], [21].

218. The Immigration Rules also have human rights safeguards built into them, meaning that they, too, have to be applied in a way that is compatible with Convention rights: see, eg, Appendix FM :

> "GEN.3.2.(1) Subject to sub-paragraph (4), where an application for entry clearance or leave to enter or remain made under this Appendix, or an application for leave to

> remain which has otherwise been considered under this Appendix, does not otherwise meet the requirements of this Appendix or Part 9 of the Rules, the decision-maker must consider whether the circumstances in sub-paragraph (2) apply.
>
> (2) Where sub-paragraph (1) above applies, the decision-maker must consider, on the basis of the information provided by the applicant, whether there are exceptional circumstances which would render refusal of entry clearance, or leave to enter or remain, a breach of Article 8 of the European Convention on Human Rights, because such refusal would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member whose Article 8 rights it is evident from that information would be affected by a decision to refuse the application."

219. On the question of flexibility, as well as [7] of ARIP, which I set out earlier and which Mr Blundell emphasised on the question of its flexible application, [66(c)] of the Defendants' Skeleton Argument puts the matter this way:

> "If they were to travel to the UK and, once here, make an application for ILR, the Second to Seventh Claimants (and anyone in a similar position) would be entitled also to make submissions seeking to persuade the First Defendant to apply paragraph 39 of the policy flexibly. The decision maker would be required to make a case-specific decision on that application, taking any submissions and any other relevant factors into account. On no reasonable reading could paragraph 39 of the policy be taken to encourage caseworkers to think that they should apply the policy inflexibly and dogmatically, even where to do so would breach the applicant's Art.14 and/or Art.8 rights and thereby unlawfully breach s.6 of the Human Rights Act 1998: cf *A* at §34."

220. I do not consider that the Claimants' reliance on the test in *R (Bibi) v. Secretary of State for the Home Department* [2015] 1 WLR 5055 takes their case any further (Skeleton Argument, [75]). This was cited more in relation to Article 14 (which has now been abandoned), but I think it links with what I set out earlier on unlawful policies.

221. The Supreme Court in *A* at [76]-[77] et seq confirmed that it had applied the same test in *Bibi* as the House of Lords had done in *Gillick*:

> "76. Mr Southey also sought to rely on *Bibi* [2015] 1 WLR 5055.However, in our view, it does not support his submissions. On the contrary, this court applied what is in effect the same, narrower approach as was adopted in *Gillick*.

> 77. *Bibi* was concerned with a challenge to the lawfulness of an immigration rule promulgated by the Secretary of State which required a foreign spouse or partner of a British citizen to produce prior to entry a certificate of knowledge of English to a prescribed standard, subject to certain exemptions based on age, physical or mental condition and exceptional circumstances. The claimants were British citizens whose husbands were foreign nationals residing in Pakistan and Yemen, respectively. The husbands did not have access to English tuition at affordable cost. The Secretary of State also published a policy which stated that use of the 'exceptional circumstances' exemption would be rare and would not include failure to obtain tuition or take the test owing to financial hardship. The claimants' challenge to the rule included the ground that the requirement interfered with their right to respect for family life under article 8 of the ECHR. The challenge was dismissed. This court held that in order to be compatible with article 8, the interference with family life produced by the rule and policy had to be proportionate to a legitimate objective. As regards the rule, it was accepted that it might be applied in a way that was incompatible with the article 8rights of a British partner in an individual case, but in order to strike it down as unlawful it was held that it was necessary to show that it would be incapable of being operated in a proportionate way and so was inherently unjustified in all or nearly all cases: paras 2 and 60 per Baroness Hale of Richmond DPSC, with whom Lord Wilson JSC agreed, para 69 per Lord Hodge JSC, with whom Lord Hughes JSC agreed and para 100 per Lord Neuberger of Abbotsbury PSC. On the other hand, the court was of the view that the policy was unlawful and required amendment, because if it were followed it would inevitably result in some decisions which were unlawful in that they involved a disproportionate interference with article 8 rights: paras 53-55 per Baroness Hale DPSC, paras 73-74 per Lord Hodge JSC and paras 101-102 per Lord Neuberger PSC. The test of lawfulness applied in relation to the policy, therefore, was the same as in *Gillick*".

222. For the reasons already set out, there is no breach of that test. The Claimants have failed to demonstrate that the policy will lead to illegality in all or nearly all cases.

Conclusion

223. It follows that the Claimants have obtained a promise of a merits based review of their application for leave to enter (including whether to waive or defer the

biometric requirement) (Issue 1), and so have succeeded on that issue, but have failed on Issue 2.

224. I invite the parties to draw up an order reflecting the terms of this judgment.