Neutral Citation Number: [2024] EWCA Civ 369

Case No: CA-2023-000587

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
Mrs. Justice Lieven
JR/1072/2022

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 April 2024

Before :

THE LADY CARR OF WALTON-ON-THE HILL,
THE LADY CHIEF JUSTICE OF ENGLAND AND WALES
LORD JUSTICE PETER JACKSON
and
LADY JUSTICE WHIPPLE

- -

Between :

THE KING **(on the application of AB)**	**Appellant**
- and -	
SECRETARY OF STATE **FOR THE HOME DEPARTMENT**	**Respondent**

- -
- -

Sonali Naik KC, Grainne Mellon, Maha Sardar, and **David Sellwood** (instructed by **Wilson Solicitors LLP**) for the **Appellant**
Samantha Broadfoot KC and **Jack Anderson** (instructed by **Treasury Solicitor**) for the **Respondent**
Stephen Cragg KC and **David Lemer** (instructed by the **Special Advocates Support Office**)
Hearing date : 31 January 2024

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Approved Open Judgment

This judgment was handed down remotely at 10.30am on 18 April 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Lady Carr of Walton-on-the-Hill, LCJ:

1. This is the OPEN judgment of the court on an appeal by AB (to whom anonymity has been granted) from the dismissal of her claim for judicial review by Mrs Justice Lieven ('the judge') on 10 February 2023.

2. We heard the appeal in OPEN court on 31 January 2024. For the reasons given below we dismiss the appeal and affirm the judge's order.

3. On 5 January 2024, the Secretary of State for the Home Department ('SSHD') applied for a declaration pursuant to Section 6 of the Justice and Security Act 2013 that the proceedings are proceedings in which a closed material application may be made and an order under Section 8 of that Act for permission not to disclose sensitive material otherwise than to the court and to Special Advocates appointed for AB. Since the OPEN hearing, which took place before the court read any CLOSED material, there has therefore been a CLOSED material procedure in which Special Advocates were appointed for AB. We received CLOSED written submissions in respect of the material from the Special Advocates and from the SSHD. We also received written submissions from AB's counsel, in which they make some general observations about the CLOSED procedure without, of course, being able to address the material itself. In the light of all the submissions, we grant a declaration under Section 6 and make an order under Section 8. Our consideration of the CLOSED material is contained in a CLOSED judgment that will be handed down alongside this OPEN judgment.

Overview

4. AB, an Afghan national who worked as a prosecutor until the fall of Kabul in August 2021, wants to relocate to the United Kingdom. She has two adult siblings who are British citizens, resident in the UK. She applied for entry clearance and asked for her application to be determined without the provision of biometric data (facial image and fingerprints) that would normally be required before her application would be considered. She claims that she and other similarly placed Afghan nationals were discriminated against when viewed against a relevantly analogous group of Ukrainian nationals, for whom a policy existed between March 2022 and December 2023 allowing for the deferral of the provision of biometric data until the applicant was inside the UK ('biometric deferral'). She asserts that the difference in treatment is unlawful discrimination on the grounds of nationality contrary to Article 14 European Convention on Human Rights ('ECHR') as it applies to her rights to family life under Article 8 ECHR. In her judicial review claim form she sought "a declaration that the SSHD's decision to afford lesser or no protection to the family life of Afghan individuals at risk of harm with family members in the UK than to Ukrainians in analogous positions constituted unlawful discrimination contrary to Article 8/14 ECHR."

5. This appeal is therefore not concerned with the merits of AB's individual case, as to which we say nothing, but with a wider systemic claim of discrimination. AB had in fact made three claims for judicial review (and a fourth has been filed since the hearing before us). The single issue with which we are concerned formed just one ground of her first claim. Three other grounds were withdrawn following discussions at the start of the hearing before the judge. The main reason for that was that the SSHD agreed to consider biometric deferral in AB's case and was in the process of making a decision.

A second judicial review claim was made in April 2023 and withdrawn by consent the following month on agreed terms. On 23 June 2023, biometric deferral was refused. This led to a third claim, made in September 2023, that was again settled by consent in December 2023 on the basis that the refusal would be reconsidered. On 8 January 2024, the SSHD again refused biometric deferral, giving OPEN reasons and referring to the existence of CLOSED material in the event of a further application for judicial review, such as that which has now been filed.

6. However, in the meantime permission to appeal from the judge's decision on discrimination had been granted by Males LJ on 27 July 2023. Since then there have been these developments:

    (1) The respondents at the time of the hearing before the judge were the SSHD, the Secretary of State for Foreign, Commonwealth and Development Affairs, and the Secretary of State for Defence. As a result of a case management order made by this court on 8 November 2023 the SSHD is now the only respondent.

    (2) On 7 December 2023, the position in respect of Ukraine changed. Policies were updated to remove automatic biometrics deferral for applicants from Ukraine. This led AB to request information about the reasons for the change and this was provided on 15 January 2024, along with an explanatory statement from a senior official.

    (3) On 8 January 2024, the SSHD provided a number of documents concerning the implementation of the Ukraine scheme. AB complains that the documents should have been disclosed at the outset of the proceedings and has applied for them to be admitted on the appeal. We indicated to the parties that we would consider whether formally to admit them and the material about the ending of the Ukraine scheme after hearing their submissions.

    (4) As referred to above, an application for a CLOSED procedure under the Justice and Security Act 2013 was filed on 5 January 2024.

AB's claim

7. On 15 August 2021, Kabul was captured by the Taliban after an offensive that began in May 2021. AB had for a number of years been a prosecutor involved in narcotics, corruption and terrorism prosecutions, including of Taliban members. Since then, she and her mother and a number of her siblings have been living in hiding. The judge said that there were strong reasons to believe that she is known to the Taliban regime and that she may be at very serious risk from it.

8. There are three schemes under which AB has sought leave to enter the UK, namely:

    (1) The Afghan Relocations and Assistance Policy ('ARAP'). This was set up in April 2021 for Afghan nationals who worked for or alongside the UK military or a UK Government department in Afghanistan and who contributed to the UK's military or national security objectives, and their family members. Successful applicants are granted immediate indefinite leave (settlement) with access to work, study and benefits. All applications must be supported by the provision of biometric information, except in exceptional circumstances. ARAP

was incorporated into the Immigration Rules at the outset in April 2021 and the specific rules have been updated from time to time.

(2) Leave pursuant to Article 8 ECHR.

(3) Leave outside the Rules ('LOTR').

9. On 1 November 2021, AB submitted an application under ARAP. The application was supplemented on 17 December 2021 by written representations requesting, in the event that support was not granted under ARAP, a grant of leave to reflect the Claimant's rights under Article 8 ECHR, given her relationship with her two siblings in the UK, or under the SSHD's policy on exceptional circumstances justifying LOTR.

10. On 24 December 2021, the SSHD informed AB that a grant of entry clearance would not be considered without a completed immigration application form. This form required AB to state a location in which she would provide biometric data. As there are no Visa Application Centres ('VACs') for the collection of biometric data in Afghanistan, this was a significant hurdle for AB, given the concerns for her safety and limitations on her ability to travel.

11. After pre-action correspondence, the claim for judicial review was filed on 24 March 2022. It was heard by the judge on 6 December 2022 and her judgment was handed down on 10 February 2023.

Ukraine

12. On 24 February 2022, Russia invaded Ukraine. On 4 March 2022, the Ukraine Family Scheme ('UFS') opened for Ukrainian nationals seeking to join family members in the UK. Successful applicants were granted temporary leave for 36 months with access to work, study and benefits. Entry under the Scheme does not create a route to settlement. All applications must be supported by the provision of biometric information, which may be given in the UK if not provided overseas during the application process. Later in March 2022, the Government launched the Homes for Ukraine scheme, which allowed households to provide accommodation for Ukrainian refugees. We need not make further reference to that scheme, which closed on 19 February 2024.

Biometric enrolment

13. Legislation providing for the taking of biometric information in the context of immigration has been in place since the Immigration Act 1971. The current regulations, made under the UK Borders Act 2007, are the Immigration (Biometric Registration) Regulations 2008. They have the effect that a person subject to immigration control who makes an application for entry clearance is required to apply for a biometric immigration document (regulation 3A). Regulations 5, 8 and 23 provide for discretion as to whether biometric information is required, the manner of its enrolment and the consequences of failure to comply.

14. The purpose of biometric enrolment is stated in the Introduction to the Guidance to Home Office staff (version published on 3 May 2023):

> "Biometrics, in the form of fingerprints and facial images, underpin the current UK immigration system to support identity

> assurance and suitability checks on foreign nationals who are subject to immigration control. They enable comprehensive checks to be made against immigration and criminality records to identify those who pose a threat to our national security, public safety, immigration controls or are likely to breach our laws if they are allowed to come to the UK."

15. Under the UFS, Ukrainians holding biometric passports were entitled to defer the provision of biometric data until after their arrival in the UK from 15 March 2022 onwards, and those holding non-biometric passports were entitled to do so from 15 May 2022 onwards. On 16 May 2022, the Minister for Safe and Legal Migration signed an authorisation under paragraph 1(1)(d) of Schedule 23 to the Equality Act 2010 authorising direct discrimination in respect of the need to enrol biometric information. The covering letter to the Chair of the Home Affairs Committee of the House of Commons stated:

> "This decision has been made exceptionally to ensure Visa Application Centres across Europe can focus their efforts on helping Ukrainians without passports and ensure these individuals do not face long waits for appointments. It will be kept under review if the security situation changes and if it becomes necessary to make further changes to protect our domestic homeland security."

As the judge observed, it is this accommodation for Ukrainians but not for Afghans that is central to the complaint of differential treatment.

The Respondents' evidence

16. The ARAP and UFS schemes were described in a statement of Oliver Carlisle, Deputy Director of the Human Rights and Family Unit of the Home Office. It included these passages:

> "2. … I emphasise that these are bespoke policies that stand alongside the normal routes of entry to the UK including, for example, applications for refugee family reunion under Part 11 of the Immigration Rules and/or under Appendix FM to the Immigration Rules. The fact that these schemes exist reflects that in the circumstances of Afghanistan and Ukraine, the Government has considered that there should be certain exceptions to the normal operation of the immigration system; the fact that they are different to each other reflects that the respective circumstances are different, and so different policy and operational responses are considered appropriate."

> "11. The Ukraine Family Scheme was established at pace following the Russian invasion of Ukraine and reflects the unique and specific nature of that crisis. A submission of 11 February 2022 set out the proposed contingency policies in the event that the Foreign, Commonwealth, and Development Office travel advice on Ukraine changed to Red. This included

concessions for family members of British citizens resident in Ukraine who may not have time to show that they meet the requirements laid out by Appendix FM to the Immigration Rules. This Concession for family members of British nationals resident in Ukraine was launched on 24 February 2022.

12. Options for further support to Ukraine were provided to the Home Secretary on 27 February. This include extending the concessions above to Ukrainians with eligible family members resident in the UK. Following further discussions with Ministers and Number 10 on 28 March, as well as cross government agreement, on 1 March the Home Secretary announced the Ukraine Family Scheme, a bespoke new [scheme] which replaced the previously agreed concessions.

13. A submission of 2 March set out the proposed rules for the Ukraine Family Scheme, a revised Equality Impact Assessment, and sought Ministerial Authorisation for direct discrimination. The Ukraine Family Scheme as a concession to the Immigration Rules was launched on 4 March and the Home Secretary agreed to expand the definition of extended family members within the Ukraine Family scheme (to include nephews, nieces, uncles, aunts, cousins and in-laws) by correspondence on 8 March. The Immigration Rules for the Ukraine Scheme were laid before Parliament on 29 March and formally came into effect the following day."

"19. The policies set out for Ukraine are based on a specific range of circumstances related to the Russian incursion in Ukraine. The proximity of Ukraine in Europe, and the UK's diplomatic links and foreign policy objectives mean the interests of the UK are more directly and specifically impacted than in other conflicts in other parts of the world. The role of the UK and our NATO partners, including the stance taken on the right for Ukraine to choose to pursue joining NATO, and the practical support provided for defensive preparations, were key factors in our assessment of a suitable immigration policy response. The particular risks posed by Russia, including state threats, were also considered. We therefore tailored specific concessions to meet the needs of particular cohorts requiring support, focussing on those with family members here who could accommodate new arrivals without recourse to local authority housing."

"21. In addition, I would emphasise that the Ukraine Family Scheme is a temporary route providing leave for up to three years and is not a route to settlement. This makes it possible to be more generous at the initial eligibility stage, as the UK is accepting only a time-limited responsibility for those arriving under this route - as the impacts are short term and accommodation is expected to be provided, in the main, by family members or the wider Ukrainian diaspora in the UK, greater numbers can be

> accommodated. As there appears to be no prospect of Afghan nationals who flee the Taliban returning to Afghanistan, such grants would necessitate a grant of settlement (aligned to the ARAP and ACRS) and therefore stricter eligibility criteria is necessary given the costs to the public purse of such long-term migration in potentially very large numbers."

17. In relation to biometric deferral, the Respondents' position appeared in a statement of Kevin Burt, Deputy Policy Lead on Biometric Policy for the Border Security and Identity Policy Unit of the Home Office:

> "17. In the case of the Ukraine Family Scheme, Ministers agreed to the submission dated 10 March 2022 that eligible Ukrainians with valid biometric international Ukrainian passports who apply do not currently need to go to a VAC to give their biometrics before they come to the UK. This was extended to non-biometric passports following the submission to Ministers dated 23 March 2022 to enable more Ukrainians to apply to one of the Ukraine Schemes using the fully digital application route when applying from overseas (a Ministerial Authorisation for direct discrimination on grounds of nationality was signed on 16 May 2022). This was because only around 5 million Ukrainian nationals (out of a population of around 43m) hold biometric passports and without making this change many Ukrainians would not have been able to benefit from the improved application process.
>
> 18. We introduced these provisions for Ukrainians on a temporary basis, to ease the pressure on our VAC network and facilitate early travel, but not for Afghans (or any other nationality), because the security assessment of those coming from Ukraine permitted a temporary lifting of the requirement and is very different to the overall security assessment in relation to Afghanistan. We are able to approach the Ukraine Government to verify that a passport issued by them is genuine, which is not an available option with regard to Afghanistan passports and the Taliban.
>
> 19. The risks posed from Ukraine were primarily around immigration control, with some security risks associated with the proximity to Russia. The poisoning of Alexander Litvinenko, Sergei and Yulia Skripal have been alleged publicly to have been linked with the Russian administration. By contrast, Afghanistan poses both immigration and security risks, which are of a very different potential to Ukraine, and this has been the case for a long time. There are several terrorist organisations which have operated from Afghanistan and continue to remain there, such as ISIS and Al Qaida, who are committed to harming the interests of Western countries, including the UK.

> 20. In addition, there are not the same pressures on VACs outside of Europe in terms of volume of applicants and capacity to process applications. As explained above, the decision to allow Ukrainians with valid international passports to come to the UK without going to a VAC to give their biometrics was taken as a temporary measure to ease the pressure on the VAC network in Europe."

The judge's decision

18. Having described the claim and its background, the judge reviewed the evidence. She summarised Mr Burt's evidence in this way:

> "34. Mr Burt explains that there were two key differences between the situation of Ukrainians and Afghans in the decision to allow the former but not the latter to enter the UK before biometric data had been submitted. Firstly, the pressure that would have been placed on the VAC network in Europe if Ukrainians seeking entry to the UK had to go to a VAC first to enrol their data. Secondly, there is a different overall security assessment between Ukraine and Afghanistan. He says that whereas the risks posed from Ukrainian refugees were primarily around immigration control, with some security risks associated with the proximity to Russia; the risks associated with Afghanistan are different. Mr Burt refers to the fact that terrorist organisations have operated from Afghanistan in recent times and the potential for harm to the interests of the UK that that brings."

19. The judge then directed herself in relation to the law concerning Article 14. She found that (as the respondents accepted) the case fell within the ambit of Article 8 as there was an obvious and direct impact on AB's right to family life. She then considered whether the differential treatment was on the grounds of national origin or some "other status", noting that the relevance of this related to the standard of review. Having considered the respondents' submission that there would be Ukrainians who were not eligible for the UFS because they were not resident in Ukraine in January 2022, she held that the differential treatment was principally (although not solely) on the basis of nationality and that, "applying the ECHR in a way that is practical and not theoretical", the Court should look for very weighty reasons for the difference in treatment. Next, the judge considered whether AB and the person she wishes to be compared with under the UFS were in analogous situations. Both groups were fleeing persecution in their home countries and would be at great risk (albeit for different reasons) if they were to remain in those countries. They were in sufficiently similar situations for the question of justification to arise.

20. With regard to justification, the judge considered that the respondents had discharged the burden of justifying the differential treatment. She considered that very weighty reasons had been given but she also observed that the nature of the reasons put forward, which went to both diplomatic and foreign policy considerations and to national security, were such that the Court should give very significant weight, or a wide margin

of appreciation, to the assessment of the SSHD. It was not for the Court, save in the clearest of cases, to go behind considerations of this type. She continued:

> "40. I accept that there are very significant differences between the position of those in the situation of the Claimant and Ukrainians under the UFS. Some of those differences might be said to point in the direction of more favourable treatment of the Claimant. She spent 20 years assisting the UK in their mission in Afghanistan, and her and her family's lives are now at risk in large part because of that work. However, the weight to give to that issue and the policy responses are matters for the Government and not the Court.
>
> 41. In terms of the specific justification for not treating Afghans in the position of the Claimants and Ukrainians in the same way in respect of biometric data, that is as I have said primarily one for the Defendant. I accept that the reasons given by the Defendant have a rational connection to the aims to be achieved, namely immigration control and national security.
>
> 42. The matters set out by Mr Burt in his witness statement, both as to the strain on the VAC network and the national security issues raised more strongly by Afghan refugees than by Ukrainians, are matters which are for the Secretary of State. Those matters are rationally connected to the policy complained of, namely ensuring that Afghans seeking entry to the UK are properly identified before being allowed such entry."

21. Dismissing AB's claim, the judge concluded:

> "45. There would have been a stronger argument about justification if the Defendant had continued to refuse to even consider the possibility of deferring biometric tests until an in-principle decision had been made. This is because people, particularly women, in the position of the Claimant may have to take a great risk in travelling to Pakistan and be placed at even greater risk if they are then refused entry to the UK. However, the Defendant is now considering deferring the biometric testing until the in-principle decision is made, so that issue is not at the present time live."

22. As noted above, the SSHD refused to agree to biometric deferral on 23 June 2023 and (on reconsideration) on 8 January 2024. The position nonetheless remains that the only issue before this court is the correctness of the judge's decision on discrimination. In determining that issue, we are bound to observe that the issue has, so far as AB is concerned, become somewhat historic. The only remedy available to her would be a declaration in respect of a concession (biometric deferral under the UFS) that no longer applies. Her ongoing complaint mainly relates to the latest refusal of biometric deferral in her own case. However, neither party asserted that the appeal should be dismissed on the basis that it had become academic, and we therefore determine it on its merits.

The grounds of appeal

23. AB appeals from the judge's decision on two grounds:

> "(1) Failure to consider specifics of the Appellant's case on justification
>
> The court was required to address with a greater degree of specificity the Appellant's central submission that the discrimination was not justified on the facts of her case as an Afghan national seeking to apply for entry to the UK outside the immigration rules, given that it could be rectified by the Respondent simply offering her the flexibility of deferral of biometrics until a decision in-principle was made.
>
> (2) Failure to undertake an individualised assessment for the purposes of justification
>
> The learned Judge failed to properly address the issues in the individual case before her and failed to engage in an individualised and nuanced assessment as to whether discrimination was justified on the facts of this case. In the circumstances of this case the Court was wrong to attach such a high degree of deference to every case brought on grounds of nationality discrimination relying on a high degree of generality. Each case should be examined on its own merits to determine whether such approach is justified."

24. Despite the explanatory efforts of Ms Naik KC, representing AB, these grounds do not neatly map onto AB's core proposition as understood by the judge (see paragraphs 12 and 20) that it was unjustified and therefore unlawful not to offer her the same or similar treatment as that given to a Ukrainian applicant in respect of biometric deferral. In her submissions, Ms Naik settled on the ministerial authorisation of 16 May 2022 as the focus for her claim, contending that the authorisation was unlawful and that the suggested justification for it was inadequately scrutinised by the judge.

25. Ms Naik would not be drawn on how the claimed unlawfulness could have been avoided. As Whipple LJ observed in argument, it could only be by 'levelling down' the Ukraine scheme or 'levelling up' the treatment of Afghan applicants and applicants from other nations where similar threats exist. Not surprisingly, Ms Naik disavowed any suggestion of 'levelling down', but at the same time she said that it was not part of AB's case that the SSHD was required to implement a scheme for Afghan nationals that was equivalent to the UFS; rather she argued that a clear scheme for the deferral of biometrics for Afghan nationals until AB's application had been determined in principle would be sufficient to meet the test of justification here.

Respondent's Notice

26. By way of Respondent's Notice, the SSHD asserts two additional grounds on which to uphold the judge's order:

> "1. The differences identified in the situation of Afghans leaving Afghanistan for the UK as compared to Ukrainians leaving Ukraine for the UK were such that the Judge should have accepted that the Appellant was not in a relevantly analogous position such that justification was not required.
>
> 2. The Judge concluded at [38] that "very weighty reasons" were needed for the difference in treatment, and then concluded that such weighty reasons were present. Whilst the Respondent does not disagree that such reasons were present, she submits that "very weighty reasons" are not required where nationality is not the exclusive basis for the difference in treatment as it was not in this case and in fact a lower standard applies."

Disclosure

27. We return to the question of disclosure by the SSHD.

28. On 7 September 2022, following receipt of the SSHD's evidence, which included the statements of Mr Carlisle and Mr Burt, AB made a very wide-ranging Part 18 request, which was responded to on 18 October 2022. Two of the questions and answers were these:

> "8. At §13 Mr Carlisle speaks of a "submission of 2 March set out the proposed rules for the Ukraine Family Scheme, a revised Equality Impact Assessment, and sought Ministerial Authorisation for direct discrimination."
>
> (i) Can you provide a copy of both the Equality Impact Assessment and Ministerial Authorisation for direct discrimination?
>
> *Enclosed with this Part 18 Response, are copies of:*
>
> *(a) Equality Impact Assessment dated 2 March 2022.*
>
> *(b) Ministerial Authorisation dated 16 May 2022.*
>
> *(c) Equality Impact Assessment: Ukraine Illegal or Irregular Migrants, dated 8 April 2022.*
>
> *(d) Equality Impact Assessment: Ukraine Biometric Deferral, dated 8 April 2022*."
>
> "11. At §19 the UFS is said to be "tailored specific concessions to meet the needs of particular cohorts requiring support, focussing on those with family members here who could accommodate new arrivals without recourse to local authority housing."
>
> (i) Are there any documents/minutes of meetings where consideration was given to whether this relaxation of family

> criteria for relocation was considered for any other cohorts/nationalities?
>
> *We attach Ministerial Submission dated 11 February 2022.*"

Although the first question refers to the ministerial submission dated 2 March 2022, it was not requested or provided.

29. There matters stood when the claim came before the judge.

30. On 14 December 2023, AB wrote to the SSHD noting that on 7 December 2023 the policies in respect of Ukraine had changed. She asked when the decision to make this policy change was taken, the reasons for the change, and information about the number of Ukrainian nationals who had benefited from deferral before the policy change.

31. On 15 January 2024, the SSHD responded to the letter of 14 December 2023 by serving a witness statement from Kristian Armstrong, Director of the Asylum, Protection & Enforcement Directorate, Migration and Borders Group of the Home Office. This addressed the policy decision to cease operating the biometric concession for new applicants to the Ukraine schemes on 7 December 2023. A ministerial submission dated 12 September 2023, titled 'Application processes for the Ukraine schemes' with a number of Annexes was also disclosed.

32. In the meantime, on 8 January 2024, three earlier ministerial submissions had been disclosed to AB:

    (1) 'Defer biometrics and allow travel without an entry clearance for Ukrainian passport holders' (10 March 2022)

    (2) 'Ukraine schemes: simplifying and digitising the application process' (23 March 2022)

    (3) 'Ukraine Family Scheme and Homes for Ukraine scheme ministerial authorisation – direct discrimination on the basis of nationality' (8 April 2022)

    These documents contained submissions to the relevant ministers seeking authorisations about the treatment of Ukrainian visa applicants. They comment on the comparison to be drawn with the position of Afghan nationals and on the ground of discrimination (nationality).

33. Ms Broadfoot KC, for the SSHD, explained to us that these ministerial submissions had not been disclosed in 2022 as a result of an error within GLD. Counsel then acting had advised that they should be disclosed and had assumed that this had happened. The Part 18 disclosure had been given fully and in good faith. However, when Ms Broadfoot was instructed on the appeal she noted the reference in paragraph 17 of Mr Burt's statement to the ministerial submissions of 10 March 2022 and 23 March 2022 and, seeing that they and the submission of 8 April 2022 were not in the court's papers, advised that this should be rectified. She accepted that the failure of disclosure, though inadvertent, was very unfortunate and apologised to AB and the court.

34. We agree that the non-disclosure of these ministerial submissions was unfortunate. Apart from the obligation to respond to proper questions from an applicant, a public

authority owes a duty to the court to cooperate and to make candid disclosure, by way of witness statement, of the relevant facts and (so far as they are not apparent from contemporaneous documents which have been disclosed) the reasoning behind the decision challenged in the judicial review proceedings: *Belize Alliance Conservation of Non-governmental Organisations v Department of the Environment* [2004] UKPC 6, [2004] Env LR 38 per Lord Walker of Gestingthorpe at [85].

35. Having said that, we accept that the non-disclosure was not deliberate in this instance and we accept the apology offered to the court by the SSHD. Two of the three ministerial submissions were clearly flagged up in the evidence of Mr Burt, but neither party appears to have noticed that the documents themselves were not before the court. The third submission (8 April 2022) was not referenced in the witness evidence but its omission from the documents disclosed in 2022 must be seen in a context where two detailed equality impact assessments of the same date had been disclosed. Ms Naik invited us to make a declaration in relation to a breach of the duty of candour, but in the circumstances that would be unnecessary and disproportionate.

36. We heard argument from both parties about the content of the three ministerial submissions and, as there was a failure of disclosure, we will admit them in evidence. Ms Naik argued that the documents show that the judge 'did not have the full picture'. Ms Broadfoot responded that they were consistent with the witness evidence seen by the judge, and that they should be read in the context of the need to respond rapidly to the acute situation that existed in Ukraine at the time. We have considered the ministerial submissions with these arguments in mind and we can at once say that we do not accept that they have any significant bearing on the outcome. Put another way, they would have come as no surprise to the judge.

37. We have read the statement of Mr Armstrong and accompanying material, as it sets out the factual and policy context for the withdrawal of the Ukraine biometric concession, but neither party suggested that it could have any influence on the outcome of the appeal, and we will not formally admit it.

Discrimination

38. Article 14 ECHR provides:

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

39. In broad terms, the question of whether differential treatment is contrary to Article 14 involves a consideration of the following questions:

    (1) Does the subject matter of the complaint fall within the ambit of one of the substantive Convention rights?

    (2) Does the ground upon which the complainant has been treated differently from others constitute a "status"?

(3) Has the complainant been treated differently from other people not sharing that status who are similarly situated or, alternatively, have they been treated in the same way as other people not sharing that status whose situation is relevantly different from theirs?

(4) Does that difference or similarity in treatment have an objective and reasonable justification, in other words, does it pursue a legitimate aim and do the means employed bear a reasonable relationship of proportionality to the aims sought to be realised?

R (DA) v Secretary of State for Work and Pensions (Shelter Children's Legal Services intervening) [2019] UKSC 21; [2019] 1 WLR 3289 at [136].

40. In the present case, there is no issue about the first question. As the SSHD accepts and the judge found, the case falls within the ambit of Article 8 as there is an obvious and direct impact on AB's right to family life. The judge decided the second question (status) in favour of AB. Her reasoning, which led her to require 'very weighty reasons' to establish justification, is challenged by the second ground of the Respondent's Notice. The judge decided the third question (relevant similarity) in favour of AB, and this is challenged by the first ground of the Respondent's Notice. The final question (justification) is the object of AB's appeal.

41. It is often said that over-analysis in discrimination claims is to be avoided. In the familiar words of Lord Nicholls of Birkenhead in *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37; [2006] AC 173, at [3]:

> "… I prefer to keep formulation of the relevant issues in these cases as simple and non-technical as possible. Article 14 does not apply unless the alleged discrimination is in connection with a Convention right and on a ground stated in article 14. If this prerequisite is satisfied, the essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to this question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact."

Lord Carswell made similar observations at [97].

42. In the same way, in *AL (Serbia) v Secretary of State for the Home Department* [2008] UKHL 42, [2008] 1 WLR 1434, Baroness Hale said this of comparators at [25]:

> "… unless there are very obvious relevant differences between the two situations, it is better to concentrate on the reasons for

> the difference in treatment and whether they amount to an objective and reasonable justification."

Likewise, in *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, [2022] AC 223, Lord Reed suggested at [71] (in a passage quoted by the judge) that the issue of status is not necessarily a separate stage in the analysis, and he noted at [99] there are a range of factors that tend to heighten or lower the intensity of review: see the discussion at [100-106]. To similar effect, Singh LJ in *R (SWP) v Secretary of State for the Home Department* [2023] EWCA Civ 439, [2023] 4 WLR 37 referred at [59-61] to *Carson* and doubted the value in many cases of drawing a sharp distinction between the issue of whether there is an analogous situation and the issue of justification.

43. These authoritative statements confirm that the framework of four questions is a useful guide when considering a claim of discrimination, but that it is not a series of self-contained tests. Depending on the facts of the case, more or less attention may need to be paid to one or more of the first three questions, and there may be an inter-relationship between them and the last question. At all events, except in cases that can be clearly seen to fall outside the scope of Article 14, all roads will lead to Lord Nicholls' "essential question" of justification and it will usually be convenient to arrive there by the shortest route. We will therefore deal relatively briefly with the arguments raised by the Respondent's Notice before addressing the issue of justification.

Status

44. There was no doubt that AB satisfied the 'status' requirement: the only question was whether she did so, in the words of Article 14, on the ground of 'national origin' or of 'other status'. As the judge noted, this only mattered because the court will apply a higher degree of scrutiny to differential treatment based on the grounds of nationality alone, where 'very weighty reasons' for discrimination are required, as opposed to immigration status, where the state has a wider margin of appreciation: compare *Gaygusuz v Austria* [1996] 23 EHRR 364 and *Bah v UK* [2012] 54 EHRR 21.

45. The judge accepted at paragraph 26 that the differential treatment of AB applying for LOTR and someone applying under the UFS was not solely the result of a difference in nationality, because Ukrainians not resident in Ukraine in January 2022 would not qualify under the UFS. However:

> "… the reality is that the vast majority of people applying in the Claimant's situation will be Afghans and all those under the UFS, Ukrainians. Therefore, applying the ECHR in a way that is practical and not theoretical, the difference in treatment here is principally because of nationality. The different treatment of those nationalities may be justified, but that arises at the later stage of the analysis."

46. Ms Broadfoot argued that nothing short of a difference in treatment based exclusively on the ground of nationality would engage a requirement for very weighty reasons. She referred to *Gaygusuz* at [42]; *Andrejeva v Latvia* (2010) 51 E.H.R.R. 28 at [187]; *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, [2022] AC 223 at [103]; and *Savickis v Latvia* (2022) 75 E.H.R.R. 21 at [193]. In the last of these the

Grand Chamber of the Strasbourg court reaffirmed its approach where nationality was the sole criterion for the distinction complained of, but it added this:

> "Nonetheless, the specific circumstances of the case are to be taken into account in determining the scope of the respondent State's margin of appreciation."

47. In the present case, the judge took a practical and in our view sensible approach by focusing on the final stage of the analysis. We do not consider it necessary to reach a conclusion about the SSHD's submission that it was an error of law because the UFS was not open to all Ukrainians, for these reasons:

(1) At the hearing before the judge, the argument did not matter: her approach to the standard of review did not affect her decision, in that she found that the SSHD had shown very weighty reasons for the different treatment; moreover, she subsequently widened the margin of appreciation considerably because the measure complained of engaged considerations of geopolitics and national security.

(2) Nor, on this appeal, does it matter whether the argument is correct or not. As we consider that the judge was correct in relation to justification, anything we say about status would be by the by (*obiter dicta*). If a definitive answer is needed, it had better be given in the rare case in which the issue might affect the outcome.

(3) To develop the argument further in the present case would be to make the sort of analytical detour that we have cautioned against.

48. On that basis, we pass on to the other ground in the Respondent's Notice.

Relevant similarity

49. In *R (SC) v SSWP* at [59] it was said that:

> "59. It is also necessary to bear in mind that not all differences in treatment are relevant for the purposes of article 14. The difference is only relevant, for the purpose of assessing whether there has been discrimination, if the claimant is comparing himself with others who are in a relevantly similar situation. An assessment of whether situations are "relevantly" similar generally depends on whether there is a material difference between them as regards the aims of the measure in question."

50. The judge noted at paragraph 27 that the extent to which AB was or was not in an analogous position to a Ukrainian under the UFS went directly to the question of whether the differential treatment is justified. She therefore folded her consideration of that issue into her consideration of justification:

> "38. … The question of whether the Ukrainian proposed entrant and the Afghan proposed entrant are in sufficiently similar situations goes directly to the issue of justification and therefore should be considered at that stage of the analysis. I accept that

> their situations are analogous in the sense that both groups are fleeing persecution in their home countries and would be at great risk (albeit for different reasons) if they were to remain in those countries."

51. The SSHD submits that AB was not in a relevantly analogous position to a Ukrainian comparator because of differences in the aims of the measure in question and because of the differing contexts of the Ukraine and Afghan policies. Firstly, because of the different national security considerations between the two countries, as recognised in *KA v SSHD* [2022] EWHC 2473 (Admin) at [77]. Secondly, UFS facilitates a temporary stay in the UK and the primary aim of the Ukrainian Policy was to ease pressure on VACs in Europe, while ARAP, on the other hand, is about facilitating permanent settlement in the UK. Accordingly, the differences between the two situations were sufficiently clear that the case fell to be analysed (and dismissed) at that stage without going on to consider justification. In support of this submission, Ms Broadfoot went so far as to suggest that an acceptance that the two situations were relevantly similar may act as a brake on humanitarian action in future cases.

52. In our view there is nothing in this argument. The test is whether the situations of AB and a Ukrainian comparator were analogous or relevantly similar (*Hode v United Kingdom* [2013] 56 EHRR 27 at [45]) having regard to the aims of the measure in question (*R (SC) v SSWP* at [59] (above)). It is not whether the two situations were identical, something that would not be expected in the real world of measures on this scale. The broad aim of the UFS was clearly relevantly similar to measures available to Afghans in AB's position, namely the protection of lives that were under acute threat from hostile state actors. The SSHD's submission seeks to subdivide the broad aim by pointing to differences in the way it came to be achieved. That approach, which would pre-emptively reduce the protective scope of Article 14, is unconvincing in the present case. We note that the ministerial submissions themselves drew an analogy between Ukraine and Afghanistan, but that did not deter the humanitarian initiative towards Ukraine: instead the submissions asserted that different treatment was justified. The judge's approach to this issue was correct and we reject this limb of the Respondent's Notice.

Justification

53. In *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167 and *Bank Mellat v Her Majesty's Treasury (No. 2)* [2013] UKSC 39, [2014] AC 700 at [74] it was confirmed that the question of justification will depend on:

    (1) Whether the objective of the measure is sufficiently important to justify the limitation of a protected right.

    (2) Whether the measure is rationally connected to the objective.

    (3) Whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective.

    (4) Whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent

that the measure will contribute to its achievement, the former outweighs the latter.

54. The judge rightly directed herself with reference to *R (SC) v SSWP* at [115], where a number of general points were identified concerning the complex issue of justification and the width of the margin of appreciation arising from the particular circumstances of an individual case.

55. On behalf of the SSHD, Ms Broadfoot also took us through the ministerial submissions and the equality impact assessments in some detail, illustrating how they coordinated with the witness evidence. She queried the relevance to this appeal of the circumstances in which the Ukraine concession ended, bearing in mind that it was 18 months after judicial review was sought. In any event, the concession was withdrawn because the circumstances and the security risk had changed, as reflected in the ministerial submission of 12 September 2023.

56. We will take AB's arguments in turn. Ms Naik accepted that the judge had correctly summarised Mr Burt's evidence at paragraph 34, in which he referred to two key differences between Ukraine and Afghanistan: the pressure on VACs and the different overall security assessment. She did not dispute that the judge was entitled to afford a wide margin of appreciation to a decision based on geopolitical and national security considerations: see *R (Al Rawi) v Secretary of State for Foreign & Commonwealth Affairs* [2006] EWCA Civ 1279, [2008] QB 289 and *Secretary of State for the Home Department v Rehman* [2003] 1 A.C. 153. However, she argued that the security considerations relied on by the SSHD, whilst relevant to a decision on entry into the UK, were not relevant to a decision as to whether to defer biometrics until an 'in-principle' decision had been made, since that decision did not involve entry into the UK. We do not accept this argument. Biometric deferral was inextricably linked to the implementation of the UFS and, as Ms Broadfoot submitted, it would have been impossible to implement the UFS without it or, put another way, to separate the issue of biometric deferral from the issue of entry.

57. It was then argued that insufficient regard was paid by the judge to AB's individual position in circumstances where the SSHD was in fact satisfied about her identity. That argument runs into immediate difficulties. Article 14 challenges are about differences in treatment between cohorts in relevantly similar situations. They do not involve individualised assessments. An argument of this kind may assist AB beyond the limited context of this appeal but it cannot sustain a challenge to the policy.

58. Next, Ms Naik argued that, although the judge had directed herself correctly in law, her approach to justification was too broad and general and did not look in appropriate detail at the justifications advanced at the time the biometric deferral policy was embarked upon. Had she done so, she would have seen that they did not stand up to scrutiny at the time of the scheme's inception and that they became even less cogent as time passed. Focusing on the ministerial submissions, Ms Naik responded to these assertions of justification:

    (1) The intended short duration of the scheme: it went on for nearly two years.

(2) The anticipated unprecedented volume of migration expected from Ukraine that would overwhelm VACs: the biometric deferral continued long after the first wave had passed.

(3) Many Afghans, unlike Ukrainians, did not hold valid passports: this said nothing about Afghans with valid passports.

(4) The particular need for a rapid reaction in the unprecedented circumstances in Ukraine: no evidence was provided to show that the threats posed to Ukrainians were uniquely severe in comparison with the threat posed to Afghan nationals seeking relocation to the UK.

(5) The absence of a direct comparison between the situation in Ukraine and the response in Afghanistan through Operation Pitting, the airlift carried out in August 2021: it is not apparent why the comparison is inappropriate and the court should have required reasoned explanation.

(6) The risks arising from extending the scheme to non-chipped Ukrainian passports could be mitigated: but no explanation was given for why the same mitigations could not be applied to Afghan passport-holders (beyond the fact that passports cannot be checked with the Taliban).

59. Finally, Ms Naik took us to a number of passages in the ministerial submissions where references were made to the litigation risk from persons in AB's position. She submitted that the relatively guarded tone of the passages did not smack of the very weighty reasons that would be necessary for discrimination.

60. It is unnecessary to respond to these further submissions in detail. Arguments of this kind were, as the judge found, objectively overborne by high-level considerations of foreign policy and national security and the need to take effective steps to put them into practice at pace. The potential consequences of the biometric deferral policy were thought through at an appropriately high level of generality. In our assessment, the contemporaneous ministerial submissions were fully reflected in the witness evidence that was before the judge and, far from lending support to the appeal, they tend to strengthen the SSHD's case on justification. Considering the pressurised circumstances, the fast-moving context, and the many uncertainties that existed at the time when they were drafted, they provide a coherent and convincing account of the reasons underlying the ministerial authorisation. We can find no basis on which the authorisation could be considered to be unlawful. The fact that the decision was made with an awareness of litigation risk from nationals of other counties might be considered a strength and not a weakness, and the terms in which that risk was conveyed were appropriate for submissions of that kind. Whether or not the UFS biometric deferral policy went on for longer than had at first been expected, it is not tenable to suppose that it changed from being lawful to unlawful after an unspecified period of time.

Conclusion

61. The judge was entitled to conclude that the differential treatment complained of struck a fair balance between the rights of the individual and the interests of the community, and that no less intrusive measure has been plausibly identified. Her decision was

sound, both in its conclusions and in the level of detail to which she descended. The appeal is dismissed.

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