Neutral Citation Number: [2023] EWCA Civ 439

Case No: CA-2022-001672

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
MR JUSTICE KERR
[2022] EWHC 2067 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 April 2023

Before :

LORD JUSTICE SINGH
LORD JUSTICE BAKER
and
LADY JUSTICE ELISABETH LAING

- -

Between :

R (ON THE APPLICATION OF SWP)	**Claimant/ Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant/ Respondent**

- -
- -

Eric Fripp and Sandra Akinbolu (instructed by **Duncan Lewis Solicitors**) for the **Appellant**
Jack Anderson (instructed by the **Treasury Solicitor**) for the **Respondent**

Hearing date: 30 March 2023

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Approved Judgment

This judgment was handed down remotely at 10 a.m. on Tuesday, 25th April 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Singh:

Introduction

1. The Appellant, SWP, appeals against the decision of Kerr J ("the Judge") dated 2 August 2022, refusing her claim for judicial review of the decision of the Respondent (the Secretary of State for the Home Department) dated 6 August 2021. By that decision the Respondent refused the Appellant's application for temporary leave outside the Immigration Rules, pursuant to a policy known as the Destitute Domestic Violence Concession ("DDVC").

2. In around 1999, the Secretary of State introduced by concession a provision for a victim of domestic violence with limited leave to remain ("LLR") in the United Kingdom ("UK") as the spouse or partner of a British citizen or a person present and settled in the UK to be granted indefinite leave to remain ("ILR"). I will refer to this as "DVILR". In 2002, the DVILR concession was formalised in para. 289A of the Immigration Rules. A new DVILR scheme was introduced in 2012, in Appendix FM to the Immigration Rules.

3. The DDVC was introduced in 2012. In essence it gives dependants of some visa holders three months to apply for leave to remain in the UK, in the meantime enabling access to certain public funds and support as well as the right to work. The DDVC therefore provided a "bridge" to DVILR.

4. Since DVILR was introduced, two exceptions have been introduced to the principle that the applicant's spouse must be a British citizen or present and settled in the UK. First, an exception was introduced in December 2018 for the partner of a person with LLR as a refugee. This was done so as to comply with the judgment of the Inner House of the Court of Session in *A v Secretary of State for the Home Department* [2016] CSIH 38; [2016] SC 776. Secondly, an exception for the partner of a European Economic Area ("EEA") national granted pre-settled status under the European Union Settlement Scheme ("EUSS") was introduced in December 2020 in response to the fact that the UK was leaving the European Union.

5. The key issue in this case is whether the Judge erred in concluding that the Appellant's exclusion from the DDVC is objectively justified, under Article 14 of the European Convention on Human Rights ("ECHR"), read with Article 8, both of which are Convention rights within the meaning of the Human Rights Act 1998 ("HRA").

Factual Background

6. The Appellant is an Indian citizen.

7. In India she was a qualified teacher employed in an international school, with BA and B.Ed degrees and a diploma in education. In India the Appellant, her husband, and their son lived with her husband's parents.

8. Her husband, WP, came to the UK from India with a "Tier 2" migrant visa around mid-2016. By 2020 he had leave to remain as a Tier 2 Migrant under the Points-based System.

9. SWP and their nine year old son, Z, joined WP in the UK in 2017 with leave to enter as his dependants.

10. On 1 May 2018 SWP's application for leave to remain as the spouse of a Tier 2 migrant worker was extended to expire on 29 July 2020.

11. On 21 July 2020, SWP applied for a further extension of her leave to remain. This was granted on 6 October 2020 up to 12 August 2021.

12. In the UK the Appellant took the steps necessary for her to gain professional status as a qualified teacher in England and Wales, by passing a GCSE qualification in English and successfully completing a Postgraduate Certificate in Education, anticipating eventual settlement in the UK and therefore laying the groundwork for a teaching career in England and Wales.

13. To gain experience and fund her studies, the Appellant worked full-time as a teaching assistant and part-time as a customer assistant at McDonald's. Her son settled in school in the UK.

14. I must now turn to the domestic abuse which the Appellant has suffered. Like the Judge, I must stress that these allegations have not been the subject of criminal proceedings, so this Court must proceed on the assumption that they are true but must not be taken to have found that they have been proved as a matter of fact. This is especially important as the Appellant's husband is not a party to these proceedings.

15. The Appellant's husband was a violent and abusive partner, both in India, where his parents supported and participated in abuse of the Appellant, and in the UK.

16. The Appellant had felt unable to seek assistance from the authorities in India. In the UK, her husband specifically threatened that if she left him, she would be deported from the UK because her immigration status was dependent upon his.

17. At one point, the Appellant told her doctor of the domestic abuse she suffered after seeking assistance and was offered advice but decided to remain in the relationship and held back from reporting abuse to the authorities.

18. In July 2021, the Appellant's husband attempted to suffocate her whilst sexually abusing her. She believed he intended to kill her. The incident was interrupted by their son who, alarmed by sounds of distress, rushed into the room.

19. Shortly thereafter the Appellant left the matrimonial home, along with her son, with assistance from a Women's Help Centre. She was accommodated, with her son, in an emergency shelter for victims of domestic violence. There, anticipating the need to address her immigration situation as the end of her leave to remain approached, she explored the possibility of work sponsorship as a primary school teacher but learned that primary school teachers had been taken off the shortage occupation list in 2020 and therefore she could not find a relevant sponsor. She was assisted to make an application under the DDVC on 21 July 2021.

20. The Respondent refused the Appellant's application, upon which her son was named as a dependant, on 6 August 2021, on the basis that her husband's leave to remain was not one of the types specified in the DDVC and DVILR.

21. On 5 November 2021 the claim for judicial review was lodged with the High Court. The substantive hearing took place before the Judge on 28 June 2022. He gave judgment, dismissing the claim, on 2 August 2022.

22. The Judge noted at paras. 30-31 that:

> "30. SWP is now living in difficult circumstances because she is neither able to work nor have recourse to public funds. She does receive minimal support of £77 for food and other basic necessities, despite her "nil recourse" status. That is all that stands between her and destitution at present, unless she were to leave this country. Z is being provided with education at school. SWP wishes to teach and is currently doing volunteer work full-time at Z's school
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> 31. She is very reluctant to return to WP but says she would consider this as a last resort, for her son's sake, rather than return to India where, she says, she would be unable to provide Z with a good education, as it is too expensive. She hopes that this judicial review will enable her to obtain access to state benefits and, eventually, that she will be able to settle here with Z independently of WP and work as a teacher."

The Judgment of the High Court

23. It was common ground between the parties that:

(1) The issue fell within the ambit of Article 8 of the ECHR so as to engage Article 14.

(2) The Appellant's immigration status was an "other status" for the purposes of Article 14. However, it is not a core or "suspect" status.

(3) There was a difference in treatment on the ground of that other status.

24. The Judge noted, at para. 46, that the claim did not expressly put in issue the legality of the DVILR, since the decision challenged was that dated 6 August 2021, refusing temporary leave to SWP under the DDVC. The Judge, however, found at para. 49 that there was "an implicit" assertion that the DVILR is discriminatory**.**

25. At para. 52, the Judge noted that the main focus of the argument before him related to the comparison between the expectations of settlement of, on the one hand, Tier 2 migrant workers said to be on a path to settlement and, on the other, refugees and EEA nationals on a path to settlement.

26. At para. 66, the Judge rejected any suggested analogy with a British citizen or settled person. At paras. 67-69 he also rejected a suggested analogy between a Tier 2 worker and a refugee.

27. At paras. 73-74 the Judge was prepared to proceed on the assumption that there was a sufficiently close analogy between the Tier 2 worker and the EEA national with pre-settled status.

28. He therefore turned to the crucial issue in the case which was that of justification, at paras. 75-83. He concluded that the difference in treatment between a Tier 2 worker and an EEA national under the EUSS scheme was objectively justified. For that reason he dismissed the claim for judicial review.

29. It is that conclusion on justification which is the subject of challenge in the present appeal.

Relevant policies

30. The relevant provisions of the Immigration Rules, in Appendix FM, have been amended to include the partner of a person with refugee leave; or a person in the UK with limited leave under Appendix EU, that is under the EUSS: see Section E-DVILR 1.2. Those in the UK with "pre-settled status" ("PSS") under Appendix EU are eligible to become qualifying sponsors under Appendix FM without waiting for a five year qualifying period. Although the details need not be set out here, this is a "closed class" because it only applies to EEA nationals who were in the UK before the EU exit transition period came to an end on 31 December 2020.

31. It should be noted, however, that the only published version of the DDVC, (which was published on 5 February 2018 and is intended to guide Home Office staff as well as members of the public), is inaccurate and out of date. At page 3 it says that the concession does not apply to those whose leave was given as the partner of a refugee or recipient of humanitarian protection who was not settled at the time of the application. Further, in referring to Appendix FM, it says that the concession only applies to applicants who have previously been granted leave to enter or remain as the spouse, civil partner or unmarried or same-sex partner of a British person or a settled person. At page 4 the guidance, in emphatic terms, tells the Home Office caseworker that:

> "You must reject an application for the DDV concession, from those whose partner:
>
> - is not at the time of application a British citizen or settled in the UK
>
> - was not at the time when the leave as a partner was first granted, a British citizen or settled in UK …"

32. It is highly regrettable, to say the least, that these inaccurate and out of date statements still appear in the only published guidance, including what Home Office staff are expected to apply when dealing with relevant applications. At the hearing we were informed that the Secretary of State intends to amend this guidance. I can only express the hope that these amendments to make it accurate and bring the policy up to date will be achieved as soon as possible in the interests of all concerned.

Rationale for the DDVC

33. On behalf of the Secretary of State there is in these proceedings a witness statement from Mr Nick Wood, a Senior Policy Advisor on Domestic Abuse Migration Policy in the Human Rights and Family Unit of the Home Office. He explains the rationale for the DDVC at para. 5 as follows:

> "The rationale for the terms of the DV Rule concession was (and is) that individuals who come to the UK as the spouse or dependant of a partner who is present and settled in the UK will have come to the UK in the knowledge that their UK based partner already has a right to live permanently in the UK. It is reasonable for them to expect to have their future and their permanent home with their partner in the UK, so from the outset they may well loosen or cut their ties with their country of origin. The domestic violence provisions concession means that someone who has come to the UK on this basis and who is the victim of domestic violence should not feel compelled to remain in the abusive relationship for the sake only of qualifying for indefinite leave. They should also not feel compelled to leave the UK when the reason for being here (to live here permanently with their British or settled partner) falls away through no fault of their own."

34. He sets out the rationale for the current policy at para. 23 as follows:

> "The rationale for the present policy is, as stated above, that those who have come to the UK as the spouse or partner of a person present and settled in the UK (or with refugee status or pre-settled status) have come to the UK in the reasonable expectation of being able to live permanently. They would have an expectation of permanent settlement but for the breakdown in the relationship as a consequence of domestic abuse. But those who have come as the partner of a person on a temporary work or study visa have no such legitimate expectation."

35. This is consistent with the way in which the rationale for the DDVC was understood by this Court in *R (T) v Secretary of State for the Home Department* [2016] EWCA Civ 801, where Moore-Bick LJ said, at para. 2:

> "The DDV Concession was established outside the Immigration Rules in April 2012 as a means of providing temporary support and assistance to destitute victims of domestic violence, who through lack of means would otherwise be forced to remain in abusive relationships. Under it a successful applicant is granted leave to remain for a period of three months, without a condition prohibiting recourse to public funds, to enable her (most applicants are inevitably women) to make an application for indefinite leave to remain under section DVILR of Appendix FM to the Immigration Rules. The Concession can therefore be viewed as a basis of granting temporary relief designed to enable a victim of domestic violence to make a substantive application for indefinite leave to remain."

36. I summarised the position in *R (FA (Sudan)) v Secretary of State for the Home Department* [2021] EWCA Civ 59; [2021] 4 WLR 22, at paras. 46-50 as follows:

> "46. The fundamental starting point is, as the judge recognised, the rationale for the policy in the Concession. It was that a person whose application for settlement in the UK is dependent on her spouse or partner should not feel compelled to stay in an abusive relationship for that reason. Otherwise there is a danger that the immigration system itself will contribute to an injustice, because the victim of domestic violence may be exploited by her abuser precisely because her ability to apply for settlement will be jeopardised if she is no longer living with the abusive partner.
>
> 47. That underlying rationale was recognised by this court in the case of *T*, at para. 2 … . It was also recognised by the Inner House of the Court of Session in *A v Secretary of State for the Home Department*, at para. 28 (Lady Dorrian).
>
> …
>
> 49. It is important to bear in mind that the Concession is limited in its scope. It is not a general policy dealing with all aspects of domestic violence in this country or even all aspects of domestic violence against people who have no right to remain in the UK. It is a limited concession, for a period of three months, to enable a person to make an application for settlement in the UK, so that they can access public funds that would otherwise be unavailable to them.

> 50. There are many other ways in which a state protects the victims of domestic violence. An obvious way is through the criminal law. The enforcement of the criminal law will not depend on the immigration status of the victim. There may also in principle be access to publicly funded accommodation or other assistance. …"

Article 14

37. The most recent and authoritative articulation of the approach to Article 14 in the Supreme Court was given by Lord Reed PSC in *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26; [2022] AC 223, at para. 37, where he summarised the general approach taken by the European Court of Human Rights (Grand Chamber) in *Carson v United Kingdom* (2010) 51 EHRR 13, at para. 61, in the following four propositions:

> "(1) 'The court has established in its case law that only differences in treatment based on an identifiable characteristic, or "status", are capable of amounting to discrimination within the meaning of article 14.'
>
> (2) 'Moreover, in order for an issue to arise under article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations.'
>
> (3) 'Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.'
>
> (4) 'The contracting state enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin will vary according to the circumstances, the subject matter and the background.'"

38. In the present case there is no dispute about the first of those issues but there is about the other three. The primary issue relates to justification for the difference in treatment, so I turn to that issue now.

The primary issue

39. It is plain that the Appellant cannot rely on any suggested analogy with the categories of person who could qualify under the original version of the DVILR, that is the partner of a person who is a British citizen or is permanently settled in the UK.

40. Nor can the Appellant rely on the fact that an exception has now been created for the partner of a person with refugee leave, a change which was made to give effect to the judgment of the Inner House in *A v Secretary of State for the Home Department*. Although it is true that a person with refugee leave will initially not be settled in the UK, the analogy is not made out for the two main reasons set out by Lady Dorrian at paras. 66-67 of her judgment in *A*. The first reason is that the status of refugee is one which is required by international law, and which is given effect in the domestic law of the UK, to reflect the fact that the refugee is in this country out of necessity and not from choice. The second reason is that the data before the Court in that case made it clear that almost all (95 percent) of refugees with limited leave went on to be given ILR. It is worth pointing out in this context that, until 2005, a person who was recognised as a refugee in this country was given ILR straightaway but the policy changed in that year. This is of some significance because, at the time when the original version of the DVILR was created, the system was one in which refugees would have qualified as having ILR.

41. Accordingly, the only category of persons with limited leave to which Mr Fripp can realistically seek to compare the Appellant is the partner of a person who has pre-settled status under the EUSS, a category which was created in 2020.

42. Mr Fripp contends that he does not have to challenge the decision to give those rights to persons who qualify under the EUSS arrangements. The focus of his oral submissions was on a different point. He submits that, once it is accepted that the DVILR is not confined to persons who have citizenship or settled status in the UK, but includes some categories of those with limited leave, then there is no proper basis for distinguishing the Tier 2 (General) migrant, who is on a path to settlement.

43. In that context he draws attention to the fact that the guidance published on 4 June 2020 in respect of Tier 2 (General) settlement requirements, at page 86, stated that ILR must be granted if the relevant criteria are met, the most material of which was that the applicant had spent a continuous period of five years lawfully in the UK in any combination of various categories, of which the most recent period must have been spent with leave as a Tier 2 migrant. It is for this reason that, as the Judge accepted at para. 66, such a person can be regarded as being "on a path that leads to settlement" and again, at para. 70, that Tier 2 workers are "on a path that normally leads to settlement." In that paragraph he expressly drew a contrast with those on intra-company transfers, "who have no expectation of settlement." This is something which Mr Fripp accepts.

44. I do not accept Mr Fripp's submission that he does not need to challenge the decision to include the EEA nationals under the EUSS. That is the analysis which Article 14 requires because it is the difference in treatment between that category and the category into which the Appellant falls that needs to be justified. It is important to emphasise that the only ground for judicial review which is presently before this Court is one based on Article 14. It is not based on any freestanding ground of public law, even if such an argument could have been made. Accordingly, the well-established requirements of an Article 14 analysis must be carried out, as summarised by Lord Reed in *SC*, at para. 37.

45. I accept, as the Judge did, at para. 68, that a Tier 2 worker faces economic vicissitudes such as employer insolvency or loss of sponsorship, which may be outside the

worker's own control. He may also bring about loss of his leave by "moonlighting" for an unlicensed employer or getting in trouble with the police and Courts. As the Judge acknowledged, at para. 72, there are clearly differences from the EEA national, who does not normally have to worry about their sponsor becoming insolvent. They may not have to wait as long as five years to attain settlement. Nevertheless, like the Judge, I am prepared to assume that there is a sufficiently close analogy between the Tier 2 worker and the EEA national with pre-settled status to address the question of justification, which is the primary issue in this appeal.

46. The Judge dealt with the issue of justification at paras. 75-83. Mr Fripp criticises his reasoning on the following three grounds.

47. First he submits that the Judge fell into error at para. 77, where he distinguished the decisions of the European Court of Human Rights in *Gaygusuz v Austria* (1996) 23 EHRR 365 and *Ponomaryov v Bulgaria* (2014) 59 EHRR 20 on the ground that both were "stark cases of direct discrimination." Mr Fripp reminds this Court that in the present case there is also direct discrimination on grounds of immigration status, and it is not a case of indirect discrimination. Nevertheless, in my view, the critical point of distinction from those two decisions of the European Court of Human Rights was correctly identified by the Judge at para. 77 in that both cases involved discrimination based on nationality. Such a basis for distinction has been said to require "very weighty reasons", as in *Gaygusuz*. In contrast, immigration status is not a "suspect" ground._

48. Secondly, Mr Fripp submits that the Judge was wrong to say that the present case was one in which a wide margin of discretion should be afforded to the Secretary of State because it concerns general measures of economic or social strategy. Mr Fripp submits that in the present context no margin of discretion should be afforded to the decision-maker at all. This is because he submits that the decision-maker has decided to introduce the DDVC and that, therefore, any policy decision on economic or social matters has already been taken by the Secretary of State in choosing to have the DDVC. He goes on to submit that the Appellant falls squarely within the rationale of that policy. He even submits that the issue is really one of the correct interpretation of the policy.

49. I do not accept those submissions. The plain fact is that the Appellant does *not* qualify under the DDVC as currently formulated. That was the basis for the decision of 6 August 2021 which is challenged in these proceedings. The issue which arises is therefore whether the Respondent's failure to give the Appellant (and others in her situation) the benefit of the DDVC, when it is given to others (in particular those who fall within the EUSS) is compatible with Article 14. It is that difference in treatment which needs to be justified under Article 14.

50. In my view, this is clearly an area where a wide margin of judgement should be afforded to the Government because it does concern general measures of economic or social strategy. In particular, there were difficult, sensitive and potentially "polycentric" issues which the Government faced in negotiating the terms on which the UK withdrew from the EU. Although Mr Anderson fairly acknowledges that not all of the provisions of the EUSS were strictly required as a matter of international treaty law under the Withdrawal Agreement, nevertheless I accept that this is a

context which can properly be described as "unique", as the Judge concluded at para. 82 of his judgment, quoting Mr Wood.

51. Mr Fripp's third criticism of the Judge is in substance a "catch all" submission that the Judge was wrong to find that the difference in treatment between Tier 2 workers from outside the EU/EEA and those who qualify under the EUSS was objectively justified: see para. 83 of his judgment. I disagree. In my view the Judge was plainly correct to find that there was an objective justification for that difference of treatment, arising from the "unique phenomenon" of the UK's withdrawal from the EU.

52. In that context I accept Mr Anderson's submission that some analogy, although not exact, can be drawn with what was said by the European Court of Human Rights in *Ponomaryov*, at para. 54, where the Court said that there may be certain circumstances where preferential treatment can be given to nationals of Member States of the European Union because the Union forms "a special legal order". If one turns the clock back to a time when the UK was still a member of the EU, there would have been an objective and reasonable justification for the difference in treatment between partners of EU nationals and partners of nationals from outside the EU or the EEA. Similarly, now that the UK has left the EU, in my view, there is an objective and reasonable justification for the difference in treatment which now arises under the EUSS.

53. Mr Fripp sought to draw an analogy with the decision of Lieven J in *R (AM) v Secretary of State for the Home Department* [2022] EWHC 2591 (Admin); [2023] 1 WLR 732. In that case, after her spousal visa had expired, the claimant's husband effectively forced her to travel to Pakistan with him and then disappeared with their two year old daughter, leaving the claimant in Pakistan. The claimant was therefore the victim of a phenomenon known as "transnational marriage abandonment". She applied for indefinite leave to enter the UK as a victim of domestic abuse. She received no decision on that application but was issued a visa for six months' leave to enter outside the Immigration Rules, with no recourse to public funds. She sought to challenge that decision by way of judicial review, contending that Section DVILR of Appendix FM to the Immigration Rules was unlawful because it discriminated against victims of transnational marriage abandonment, contrary to Article 14 of the ECHR read with Article 8. Lieven J granted the claim for judicial review. We were informed that there has been no appeal against that decision and the Secretary of State intends to amend the relevant policies to make it clear that a person in the position of the claimant in *AM* can apply for DVILR.

54. In my view, *AM* is distinguishable because, as Lieven J said at para. 71, if the claimant in that case had been the victim of spousal abandonment in the UK, she would have been able to rely on the DVILR. Such a person will have suffered the same form of domestic abuse, with the only difference being that one is in the UK and the other is not at the time of abandonment. The policy issues in terms of such women having an expectation of a right to settlement, and the defendant's wish to protect such victims of abuse, were the same. Lieven J went on to find that the difference, being present or otherwise in the UK, was not justified because there had in fact been no consideration given to the issue in the making of the Rules: see paras. 74-79.

55. In my view, therefore, the decision in *AM* is not analogous to the present case. The Appellant in the present case cannot qualify under the DVILR for reasons which go much wider than the fortuitous fact of where a person happens to be at the time of abandonment.

56. Since I do not accept any of the Appellant's three grounds of appeal, I would dismiss this appeal.

The Respondent's Notice

57. In the Respondent's Notice the Secretary of State submits that the High Court should have dismissed the claim for the additional reason that the Claimant, as a person who entered the UK as the partner of a person with limited leave on a Tier 2 Migrant Worker Visa was not in an analogous position to a person who enters the UK as the partner of an EEA national granted pre-settled status under the EU Settlement Scheme.

58. At paras. 70-74 of his judgment the Judge was well aware that there are "clearly differences" between the two types of person (para. 72). Nevertheless, applying what he described as "a reasonably broad brush without the aid of statistics or a minute and detailed comparison", he was prepared to assume that there is a sufficiently close analogy between the two types of person and therefore to assume that the rationale of the policy in the DDVC applies to the partners of Tier 2 migrant workers, as it does to EEA nationals with pre-settled status. Accordingly, the Judge proceeded to consider the issue of justification for that difference in treatment at paras. 75-83 of his judgment.

59. Although there can be cases in which it is helpful to draw a sharp distinction between the issue of whether there is an analogous situation and the issue of justification, I regard as salutary what was said by Lord Nicholls of Birkenhead in *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37; [2006] 1 AC 173, at para. 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 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."

60. As became clear during the hearing before this Court, and appeared to be common ground, it is often the case that the answer to the question whether two persons are in an analogous situation only becomes clear once one has addressed the question of whether there is a justification for the difference in treatment between them. Once that is done, it can often become clear that there is no true analogy between them. In other words, the answer to the two questions can often be simply two sides of the same coin.

61. Accordingly, if it had been necessary to reach the Respondent's Notice in the present appeal, I would not have accepted the Respondent's submission. In my view, the Judge was entitled to take the "reasonably broad brush" approach which he did and to reach the question of justification on the assumption (without deciding the point) that there was a sufficiently close analogy between the Tier 2 worker and the EAA national with pre-settled status so that the question of justification had to be addressed.

The Respondent's application to adduce fresh evidence

62. On behalf of the Respondent Mr Anderson applies for permission to adduce fresh evidence to show that the true factual position was misunderstood by the Judge. He accepts that this was not through any fault on the part of the Judge but for the simple reason that the correct facts were not put before him. In brief, the submission is that the correct factual position was that the Appellant's husband was not given leave to enter the UK as a Tier 2 (General) Migrant; rather he was given leave to enter as Tier 2 (ICT) Migrant. That is a reference to "Intra-Company Transfer", a concept which enables multinational employers to transfer their existing employees from outside the EEA to their UK branch for training purposes or to fill a specific vacancy that cannot be filled by a British or EEA worker: see para. 245G of the Immigration Rules. There is before this Court an unagreed bundle of documents to this effect.

63. On behalf of the Appellant Mr Fripp strongly objects to the admission of this evidence. If it were admitted, however, he accepts that the documents do show the correct factual position of the Appellant's husband at the material time. He also concedes that his submission on this appeal, to the effect that the Appellant's husband was "on the path to settlement", could not then be sustained. Nevertheless, he invites the Court, if it decides to admit the evidence, to determine the underlying point of principle anyway because of its general importance.

64. The question which this Court has to determine is whether to admit the so-called "fresh" evidence. The Court has a discretion to admit such evidence under CPR 52.11(2), which provides that, unless it orders otherwise, the appeal court will not receive evidence which was not before the lower court.

65. It is well established that the principles in *Ladd v Marshall* [1954] 1 WLR 1489, at 1491 (Denning LJ) remain relevant to the exercise of the Court's discretion: (1) the evidence could not with reasonable diligence have been obtained for use at the trial; (2) the evidence must be such that, if given, it would probably have had an important influence on the result of the case (though it need not be decisive); and (3) the evidence is apparently credible though it need not be incontrovertible. See *Terluk v Berezovsky* [2011] EWCA Civ 1534, at paras. 31-32 (Laws LJ).

66. On behalf of the Respondent Mr Anderson submits that this Court should admit the evidence even though it does not meet the criteria in *Ladd v Marshall*, in particular because the evidence was clearly obtainable at the time of the High Court proceedings, because that would be in the interests of justice. Although he did not seek to shift the blame onto the Appellant's representatives for the error that occurred before the High Court, he did suggest that blame should not be attached only to the Respondent.

67. I reject those submissions. First, the Appellant was (on the material before the High Court) the victim of domestic abuse and had left home in order to seek refuge with her child. She did not have the relevant documents relating to her husband's immigration status in this country. It is true that a claimant for judicial review has a duty of candour but, in my view, in the circumstances of this case the Appellant and her representatives did their best with the limited evidence that they had. For example, in the statement of facts which accompanied the claim form, it was stated, at para. 5, that the Appellant's husband "was resident in the United Kingdom as a Tier 2 migrant visa [*sic*]. His current status is unknown."

68. The Home Office, on the other hand, had all the relevant documents and could have given an accurate factual position to the High Court but did not do so, even though a witness statement by Nick Wood was filed in these proceedings. At para. 33 of that statement, it was said that the Appellant's husband "had only limited leave to remain as a skilled worker (the route formerly known as Tier 2 under Points Based System)." After that witness statement was filed, there was email correspondence from the Appellant's solicitors on 1 June 2022 and 6 June 2022, asking the Respondent to provide the Court "with a full account", setting out the Appellant's immigration history. This was not done.

69. On the basis of that evidence it is unsurprising that everyone (including the Judge) proceeded on the basis that the Appellant's husband was a Tier 2 (General) Migrant and not a Tier 2 (ICT) migrant. The Judge accepted, at para. 66, that a Tier 2 migrant worker "is on a path to settlement" but considered that this was not "as good as settled already" since "[o]bstacles may lie on the path." Mr Anderson now submits that, if the true facts had been known to the Judge, it would have been obvious that the Appellant's husband was not in fact on a path to settlement at all. The whole edifice on which the arguments for the Appellant were mounted below would have fallen away. He submits that, for that reason, the appeal is academic.

70. Secondly, it is important to recall that the defendant in judicial review proceedings has a duty of candour and cooperation with the court, so as to assist the court in arriving at the correct result. It is therefore important that the defendant public authority should set out an accurate factual position to the court quite apart from what the claimant has placed before the court.

71. Thirdly, the courts have frequently reaffirmed in recent years that it is important in judicial review proceedings for there to be appropriate "procedural rigour". As this Court explained in *R (Dolan) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605; [2021] 1 WLR 2326, at paras. 116-117, procedural rigour is important not for its own sake but in order for justice to be done. It is important that there must be fairness to all concerned, including the wider public as well as the parties.

72. In case there is any doubt about this, the need to observe appropriate procedural rigour applies as much to defendant public authorities as it does to claimants. In the present case, there is no good reason (and Mr Anderson has not suggested that there is) why the Home Office did not provide the assistance to the High Court which was required in this case by placing the correct factual material before it. I cannot see any good reason to allow the so-called fresh evidence to be admitted late in the day before an appellate court. Accordingly, I would refuse that application.

73. Fortunately, this has not affected the outcome of this appeal but, for future reference, public authorities, including Government departments, must be alert to the need to get their procedural house in order just as much as claimants and their representatives must. Otherwise there is a risk of injustice in a future case.

Conclusion

74. For the reasons I have given I would dismiss this appeal.

Lord Justice Baker:

75. I agree.

Lady Justice Elisabeth Laing:

76. I also agree.