Neutral Citation Number: [2021] EWHC 1159 (Admin)

Case No: CO/607/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/05/2021

Before:

MR JUSTICE LINDEN

- -

Between:

THE QUEEN **on the application of** **THE 3MILLION LTD**	**Claimant**
- and –	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

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Mr Chris Buttler QC, Mr Bijan Hoshi and Mr Ollie Persey (instructed by The Public Law Project) for the Claimant
Ms Joanne Clement and Ms Hannah Slarks (instructed by the Government Legal Department) for the Defendant

Hearing date: 28 April 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10.30am on 5 May 2021

MR JUSTICE LINDEN:

Introduction

1. On Wednesday 28 April 2021, I heard the Claimant's renewed application for permission to claim judicial review of the decision of the Defendant to adopt a policy of "digital only status" for those granted leave to remain in the United Kingdom under the EU Settlement Scheme ("the EUSS"). This decision is part of a government strategy to move to a position whereby the border and immigration system should be "digital by default" for all foreign nationals.

2. Permission was refused on the papers by Eady J on 30 March 2021. Her view was that the Claim is premature. I respectfully agree with her decision to refuse permission and briefly state my reasons below.

Background

3. The EUSS is the scheme by which EU, EEA and Swiss ("EEA+") citizens and their family members may remain in the United Kingdom following its exit from the EU, in exercise of citizens' rights conferred pursuant to the Withdrawal Agreement. The scheme provides for EAA+ citizens to be given settled status or pre-settled status according to whether they entered the United Kingdom before specified dates and have been resident here for more or less than 5 years, as the case may be. An application for leave to remain on this basis generally has to be made through a digital application process, and there is a cut-off date of 30 June 2021 to do so, with provision for an extension of time in a case where there are reasonable grounds for not meeting this deadline. I am told that, as at the end of February 2021, around 5.1 million applications had been made under the EUSS.

4. The digital only status policy, which I will refer to as "the Policy" will come into effect on 1 July 2021 when the Defendant will cease to issue physical immigration documents, such as biometric residence cards, to EEA+ citizens who are granted leave under the EUSS. Instead, where they need to do so, they will be able to prove their immigration status by accessing a "view and prove" digital service. In very brief summary, subject to one important exception which I will come to, this service requires a user to have access to the internet so as to visit a website on which they can apply for an access code which they can then give to the third party which requires to verify their immigration status. This may be necessary for the purposes of, for example, employment or renting accommodation or opening a bank account or for various other reasons.

5. At the heart of the Claim is a concern, which the Defendant has recognised from the outset, that a requirement to be able to access the internet, and to be able to operate digital applications effectively, is likely to place some of those who have leave to remain under the EUSS at a disadvantage in terms of proving this to third parties. For the purposes of the Claim, the particular disadvantaged groups within this class of people are said to be older people, people with certain disabilities and members of the Roma community ("the relevant protected groups").

6. As to the statistical position:

i) I am told that, as at December 2020, around 100,000 people aged over 65 had been granted leave to remain under the EUSS, and Mr Buttler QC estimates, on the basis of data relating to disabled people in general, that at least 13.5% of them will never have used the internet.

ii) There are no equivalent statistics for disabled people (i.e. statistics for people who have been granted settled or pre-settled status and who have disabilities which may prevent them from using the internet). But I am told that around 280,000 EEA citizens resident in the UK have disabilities, and around a third of people with disabilities do not use the internet, including 37% of severely visually impaired people.

iii) Again, there are no statistics for numbers of Roma people who have applied for or been granted settled or pre settled status under the EUSS but, in 2013, it was estimated that there were 200,000 Roma people in the United Kingdom, and a survey in 2018 indicated that around a third of Roma people could not use technology at all.

7. There are various other statistics which suggest that, all other things being equal, these groups are more likely to be disadvantaged by a digital only system than people who do not share their protected characteristics. Perfectly reasonably, Mr Buttler predicts that the position in the general population is likely to be repeated amongst those members of these protected groups who are granted leave under the EUSS. He therefore estimates that around 180,000 people in total will be adversely impacted by a digital only system to a greater degree than what may turn out to be in the order of 5 million or more people who are granted leave under the EUSS.

The issues in the Claim

8. The Claimant is an organisation which campaigns on behalf of EU citizens who live in the United Kingdom and, in particular, seeks to protect their rights and interests after Brexit. The grounds on which it challenges the Defendant's decision are as follows.

9. First, it is alleged that the Policy was adopted in breach of the public sector equality duty ("PSED") under section 149(1)(a) and/or (b) of the Equality Act 2010 ("the 2010 Act"). As is well known, this section provides, so far as material, that:

> *"(1) A public authority must, in the exercise of its functions, have due regard to the need to –*
>
> *(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;*
>
> *(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;"*

10. In very broad terms, under this ground it is said that, in deciding to introduce the Policy, the Defendant failed to have due regard to the need to eliminate discrimination, particularly in the form of indirect discrimination against the relevant protected groups, and to advance equality of opportunity between people who share the relevant protected characteristics and people who do not share them. It is said that this is *"novel and*

controversial technology" and a comparison with facial recognition software, which was the subject of **R (Bridges) v Chief Constable of South Wales Police** [2020] 1 WLR 5037 CA, is made. The Defendant was therefore under a duty of particularly intensive inquiry and he failed to meet this standard given the likely impact of the Policy.

11. Second, the Policy is said to be indirectly discriminatory *"on grounds of disability, older age and/or race"* contrary to sections 19 and 29 of the 2010 Act and/or in breach of the Withdrawal Agreement. Section 19 provides that:

> *"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
>
> *(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—*
>
> > *(a) A applies, or would apply, it to persons with whom B does not share the characteristic*
> >
> > *(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it*
> >
> > *(c) it puts, or would put, B at that disadvantage, and*
> >
> > *(d) A cannot show it to be a proportionate means of achieving a legitimate aim."*

12. Section 29 prohibits discrimination in relation to the provision of services to the public.

13. Again, in very broad terms, the allegation here is that the Policy places the relevant protected groups at a particular disadvantage compared with those who have leave to remain under the EUSS but do not have the same protected characteristics. The legitimacy of the Defendant's stated aims is challenged. Whether or not the Policy seeks to achieve legitimate aims, such as greater identity security, convenience and the saving of cost, as the Defendant says, the Claimant argues that a digital status only policy is not a proportionate means of achieving these aims, particularly when it is considered that there are alternatives to a digital only approach and, indeed, physical proof of immigrations status is provided in some cases and in relation to certain forms of leave to remain in the UK. In particular, biometric residence permits or cards are provided to Hong Kong citizens who are eligible under the new HKBNO scheme and to family members of EEA+ citizens who are not themselves EEA+ citizens, and do not have a readable biometric chip in their passport, but are eligible for leave to remain under the EUSS. At the hearing, Mr Buttler also emphasised that as part of the arrangements for applying for leave under the EUSS there is an exception which allows a paper application where the applicant cannot access the digital system, even with assistance from another person.

14. Third, the Policy is said to be irrational. Here, again in very broad terms, Mr Buttler relies on the exceptions to the digital only policy referred to in the previous paragraph.

At the hearing he appeared to accept that there is a rational distinction between these cases and the cases of the putative disadvantaged groups, but he emphasised that evidence of the Defendant's thinking on whether similar exceptions should be made to the Policy was not yet available given that the case is at the permission stage.

15. Each of the grounds of Claim is contested on its merits and the Defendant also disputes the Claimant's standing to bring the indirect discrimination claim in particular. But the Defendant's fundamental objection to the Claim, at least at this stage, is that it is premature in the sense that the facts which form the basis for the Claim, or which at least must be established in order to adjudicate the Claim fairly, have not yet fully occurred. The essential basis for this contention is that, whilst there clearly has been a final decision to introduce the Policy with effect from 1 July 2021, the Defendant recognises the potential inconvenience and difficulty which it will cause to some who have leave to remain under the EUSS if the arrangements which are made to implement it do not include measures to address the position of those who have difficulties in accessing the internet and using digital technology. She has therefore made a commitment to take measures to mitigate that risk.

16. Indeed, the Defendant deliberately chose to build in a "grace period" before the Policy took effect. During the grace period, which began in February 2021, the view and prove digital service is available and in operation, albeit not in its final form, but is not the only means by which the relevant immigration status may be verified: it remains permissible to do so by physical evidence such as a passport. The Defendant took this approach precisely so that she could consider how best to minimise any difficulty and inconvenience caused by the move to digital, by modifying the system in the light of experience. She also sought the views of interested groups on this question and is willing to consider any concerns which are raised, including by the Claimant.

17. On the evidence, these commitments do not appear to be empty promises. The steps which have been taken, and are being taken, fall under four broad headings:

    i) First, steps are being taken to reduce the number of situations in which individuals will need to use the view and prove service. These include a series of measures to increase information sharing between government departments and agencies and the NHS. I understand that systems have been put in place for the DWP and HMRC to ensure that an individual will not be required to use the view and prove service to prove their immigration status in connection with applying for state benefits, and that work is continuing in relation to the rollout of this process for all benefits. I also understand that work is underway to ensure that foreign nationals will not need to use the view and prove service to access NHS treatment in England, and that this will be in place before the end of the grace period. Systems are also in place to ensure that information about immigration status can be checked automatically at the UK border. Additional services in relation to other government departments are planned for development in 2021 and local authorities are able to check an individual's immigration status themselves by contacting the Status Enquiries and Checking service at the Home Office.

    ii) Second, steps have been taken, and are being taken, to ensure that the view and prove service is as accessible and user-friendly as possible. Modifications such as screen magnifiers, screen readers and speech recognition tools have been

introduced and the Defendant continues to work with interested groups to improve accessibility.

iii) Third, there is a Settlement Resolution Centre ("SRC") which is essentially a call centre which is available seven days a week to assist those who are having difficulties in using the view and prove service. This is open between 8am and 8pm on weekdays, and between 9.30am and 4.30pm on Saturday and Sunday, and it is staffed by 220 people. In the case of a person who has access to the internet but is experiencing difficulties with the view and prove service, and who has difficulties in accessing telephone assistance (for example for reasons of vulnerability or language) a friend or carer is permitted to take part in the call and to assist them to use the view and prove service.

iv) Fourth, it has been decided that the SRC will also assist those who are not able to access online systems at all. In such a case, the individual is able to ask that the SRC digitally share information on the status holder's immigration status with third parties. Initially, this process has worked by SRC personnel placing a request for colleagues in UK Visas and Immigration ("UKVI") to provide a status verification directly to the third party which needs to check the immigration status of the individual. By the end of the grace period, SRC personnel will be able to complete the view and prove status check for the individual concerned and then provide the individual with a verification code which they can show to the third party or, alternatively, they will be able to send the verification to the third party directly. I will refer to this as the telephone verification exception.

v) Fifth, the Defendant will continue to fund 72 grant funded organisations across the UK to provide support for vulnerable and "hard to reach" applicants under the EUSS.

The Defendant's arguments as to why permission should be refused

18. The essential point made by Ms Clement, and accepted by Eady J, is that the Policy will not be implemented until 1 July 2021 and the view and prove service is not in its final form. The implication of this is that the true impact of the Policy cannot be known at this stage. For example:

i) The total number of people who are finally granted settled or pre-settled status under the EUSS is not known given that the cut-off date for applications is 30 June 2021. Nor is the age profile of this group. Nor is the number of people with relevant disabilities and nor is the number of members of the Roma community. The numbers of people in the disadvantaged groups are therefore not currently known. Although statistically significant numbers are likely to be more adversely effected by a purely digital service for reasons connected to the relevant protected characteristics, the size of these groups relative to the EUSS group as a whole is a highly relevant consideration in relation to the proposed Claim and this is not yet known.

ii) Secondly, the number of situations in which those with leave to remain under the EUSS will need to use the view and prove service will be affected by the progress which is made by the Defendant, during the grace period and beyond,

in reducing the need to use the view and prove service at all. Again, this is highly relevant to assessing the impact of the Policy. It is not at all clear that members of the relevant protected groups will frequently be called upon to verify their immigration status.

iii) Thirdly, further progress in improving the accessibility of the digital services will affect the seriousness of the impact of the Policy.

iv) Fourthly, the development of the services offered by the SRC will affect the degree of disadvantage, if any, experienced by those with the relevant protected characteristics, relative to those who do not have those characteristics. This applies both to assistance in using the view and prove service and the telephone verification exception.

19. I note that Mr Buttler's skeleton argument tends, with respect to him, to bear out this aspect of Ms Clement's argument. Thus, at paragraphs 15 to 20.3 he criticises the lack of information about the telephone service which the Defendant says is and will be available to those who are unable to access the view and prove service. Notwithstanding this he goes on to assert that the telephone service will be "burdensome" and will lead to a loss of autonomy in respect of a core aspect of their personal life. He goes on to identify "potential" disadvantages associated with the telephone helpline including cost, waiting time, the lack of an interpretation service and problems for deaf people. He also relies on evidence that call wait times may be up to 25 minutes. In relation to the PSED issue he complains that the equality issues relating to this measure were not considered in the documents which considered the equality impact of the Policy.

20. Mr Buttler's assertions and predictions about the telephone helpline are challenged by Ms Clement. She says that further guidance about the helpline will be published before the end of the grace period. The people who are unable to access the helpline owing to language barriers or deafness, for example, will be able to nominate a trusted individual to make the call on their behalf. She says in relation to waiting times, and in answer to the evidence served on behalf of the Claimant, that the SRC flags quieter times of day to callers and that waiting times are expected to drop substantially after 30 June 2021. At the moment the SRC is very busy dealing with applications for leave to remain under the EUSS but that will change after the cut-off date and waiting times will inevitably shorten. In relation to cost, she says that the Defendant will not charge for calls, that the SRC number is 03 number and that these numbers are typically included in free call packages. She says that, contrary to Mr Buttler's assumption, the caller will be given a share code which is valid for up to 30 days and will therefore permit multiple use during that period.

21. But the critical submission which Ms Clement makes is that the facts that the Policy is not in operation and the view and prove service is not in its final form mean that:

i) First, the allegation that the Defendant has failed to have *"due regard"* to the matters required by section 149(1)(a) and (b) of the 2010 Act in deciding on the Policy is disputed. Ms Clement submits, and I agree, that the technology in this case is not comparable to the facial recognition technology which was the subject of **Bridges**. In any event, detailed consideration was given to the relevant equality issues arising out of the Policy, as the documents show. But, in any event, the sensible and fair point at which to examine this question is when it is

implemented. Ms Clement submits that the Defendant has had regard to the relevant considerations, and she continues to do so in developing the view and prove service and the measures which will mitigate or remove any disadvantages which the Policy would otherwise cause. Whether she has had *"due"* regard can only be assessed once the system is in its final form, has been implemented and its discriminatory impact, if any, is known. Mr Buttler's complaint that there has been no regard to the equality impact of the helpline is contested but, says Ms Clement, it may well have been addressed to the satisfaction of the court by the end of the grace period.

22. Second, in relation to the complaint of indirect discrimination Ms Clement advances technical objections based on the fact that there is no individual claimant who provides evidence that they have suffered a particular disadvantage. But whether or not this argument is sound, she says that the fact that there is no evidence from actual users who have experienced difficulties with the system is reflective of her overall argument that it is not appropriate for the indirect discrimination claim to be determined on hypothetical rather than actual facts.

23. Ms Clement argues that the *"provision, criterion or practice"* in this case is the sum of the arrangements which will apply from 1 July 2021 i.e. the general requirement to use digital proof of immigration status together with any exceptions, including the telephone verification exception referred to above. The Claimant's case on particular disadvantage is disputed given the availability of assistance from the SRC and the telephone verification exception which, Ms Clement predicts, will mean that the Policy will cause minimal difficulty or, at least, will mean that the putative disadvantaged groups are not subject to a particular disadvantage when compared with others in the EUSS cohort. But, in any event, the case on particular disadvantage will also need to be proved in relation to each of the protected groups relied on for the purposes of the Claim. Whether there is a particular disadvantage to a given group will depend on the impact of the Policy when the view and prove service and the assistance offered by the SRC are in their final form.

24. More importantly, in assessing the proportionality of the Policy the court will apply the test in **Bank Mellat v HM Treasury (No 2)** [2014] AC 700 [74] which is as follows:

> *"it is necessary to determine (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, and (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."*

25. In order to do so fairly and reliably, Ms Clement argues, the court will therefore need to have a clear understanding of the impact - the degree of any disadvantage which the arrangements or scheme cause - both in terms of the numbers of people affected in absolute terms and relative to the EUSS cohort as a whole and in terms of the severity of the effect on any of the groups which are disadvantaged. This, in turn, will involve consideration of the demographics of the relevant cohort, the frequency of the situations in which they need to prove their immigration status and the degree of difficulty in

doing so under the system as it turns out to be, including the telephone verification exception. The court will also need to consider the mitigating steps which have been taken, how effective they have been and why other mitigating measures have not been adopted. These matters will then need to be considered alongside the advantages to the Policy relied on by the Defendant. All of these considerations are particularly relevant to the third and fourth **Bank Mellat** questions set out above.

26. Thirdly, as regards irrationality, the matters which I have just summarised will also be relevant to the question whether the Defendant's approach is rational and/or any differences in approach in relation to other groups or in other situations are permissible. In this regard, Ms Clement submits that there is a clear rational distinction between the EEA+ and Hong Kong nationals on whom the Claimant relies and those who argue that they are disadvantaged in the present case, namely that the former do not have biometric passports and/or the HKBNO scheme is materially different in nature. In relation to the paper application exception emphasised by Mr Buttler at the hearing, Ms Clement pointed out that this exception applies in the context of a different type of process – an application for leave to remain under the EUSS – and it is a one off application which involves filling in a form. The considerations in relation to the EUSS application process are therefore materially different to those which apply for an ongoing system for proving immigration status from time to time.

The Claimant's rebuttal of the Defendant's arguments

27. Mr Buttler addressed Ms Clement's arguments as follows.

28. In relation to the PSED ground, he focused on his point that there is little information available about the ability of individuals to ask for or arrange verification of their immigration status by phone and/or to ask for unauthorised third party to speak on their behalf. This, he said, reflected the fact that this was a relatively recent modification of the arrangements. Whilst the ability to seek assistance from the SRC by phone may have been known for some time, and considered as part of the equality assessment of the Policy, the proposal to allow individuals, by way of an exception, actually to seek verification of their immigration status by phone had not been. This proposal, in itself, raised equality issues given its potential drawbacks and no regard had been paid to these issues. There was, said Mr Buttler, a clear breach of the PSED in respect of this proposal and that fact would not alter, so the PSED claim could not be premature. In making this submission Mr Buttler relied on the well-known principle that *"a Minister must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy and not merely as a rearguard action following a concluded decision"*: per McCombe LJ in **Bracking v Secretary of State for Work and Pensions** [2013] EWCA Civ 1345 [26(4)].

29. In relation to the indirect discrimination ground, Mr Buttler submitted that on any view each of the relevant protected groups would at least arguably establish particular disadvantage, however effective the mitigating measures were. He also submitted, in reliance on paragraph [75] of the decision of the Divisional Court in **R (Unison) v Lord Chancellor** [2014] ICR 498 ("**Unison 1**") that, contrary to Ms Clement's submission, it is not necessary for a claimant to be able to identify any particular individual who has suffered the relevant particular disadvantage. In relation to "objective justification" he submitted that the view can be taken at this stage that arguably the Defendant will fail on this issue given, for example, that she has recognised that it is feasible to make

physical proof of immigration status available to some EEA+ and Hong Kong citizens and given that she has recognised, in the context of the EUSS application scheme, that some individuals may not be able to apply under a digital system, even with assistance, and that it is feasible to provide such individuals with a paper-based option. At the very least, then, she has accepted that there is a less intrusive measure which could have been used and at least arguably she therefore would never be able to win on the third **Bank Mellat** question, whatever the facts turned out to be.

30. In relation to the question of prematurity, Mr Buttler relied on paragraph [127] of the judgement of Underhill LJ in **R (Unison) v Lord Chancellor** [2016] All ER 25. In **Unison 1** the Divisional Court had held that the claim was premature because the statistical evidence about the impact of the employment tribunal fees regime was limited and had not been analysed. It therefore was not possible to achieve a just resolution of the claim, particularly on the question of "objective justification". However, whilst Underhill LJ agreed with the result in **Unison 1,** in obiter remarks he did not agree that the claim had been *"formally premature"*.

31. In relation to irrationality, Mr Buttler's submission was that the critical facts would not change given that the Defendant had made her decision to introduce the Policy. Insofar as she had failed to "grapple with" the question of the differential treatment of some EEA+ and Hong Kong citizens and/or whether there should be a paper-based exception available, she had reached an irrational decision. The decision-making documents were not available at this stage and nor was there evidence as to her thinking on these points other than that the aim was to achieve maximum use of digital verification. This ground was, and would continue to be, reasonably arguable

Conclusion

32. I accept Ms Clement's characterisation of the present case as a continuing process of decision-making. This does not detract from Mr Buttler's point that a final decision has been made to implement the Policy with effect from 1 July 2021 and that there are certain unavoidable consequences of that decision. But that decision has not yet taken effect, and the overall scheme – *"the provision criterion or practice"* which is at the heart of this case - is subject to modification as a result of further decisions before it does so.

33. It therefore seems to me that Mr Butler's PSED argument is highly artificial and does not have realistic prospects of success. One can analyse the reasons for this in a number of ways. If the complaint is simply that there was a failure to have *"due regard"* to the relevant considerations at the time when the decision was made to apply the Policy to the beneficiaries of the EUSS scheme, then the claim is weak because the Defendant clearly did have detailed regard to these matters and proposed to take mitigating measures in relation to them. Perhaps for this reason, Mr Buttler focused on the introduction of the ability for individuals to seek telephone verification from the SRC, including with the assistance of a trusted helper. However, in my view the development of this measure flows from the original decision and follows through on the decision to introduce mitigating measures. Insofar as there prove to be deficiencies in this particular measure, the true nature of Mr Buttler's complaint will be that it does not sufficiently mitigate the effect of the original decision in respect of which there was *"due regard"*, rather than that this is a fresh decision with a fresh equality impact which therefore

triggers a fresh duty under section 149(1) of the 2010 Act with which it is now too late to comply.

34. An alternative way of looking at the matter is that the final decision in relation to this measure has not yet been made because it is subject to modification and because any adverse equality impact which it has, has not yet been felt given that verification by telephone is not (yet) the only alternative to digital verification. Until 1 July 2021, it continues to be permissible to verify immigration status by the presentation of physical evidence and, until then, it is open to the Defendant to discharge any additional duty under section 149 of the 2010 Act in relation to this aspect of the scheme.

35. As far as Mr Buttler's arguments in relation to indirect discrimination are concerned, in my view it is unarguably the case that this claim cannot fairly be determined at this stage. I agree with Mr Buttler that it is at the very least arguable that no individual claimant is required in order to bring a claim under section 19 of the 2010 Act in this context. I also see the force of his argument on particular disadvantage although I accept Ms Clement's argument that he might fail on this issue in relation to one or more of the relevant protected groups if the evidence ultimately shows that telephone verification is, in practice, easy to use. A system which requires either digital or telephone verification and allows third party assistance is not one which will inevitably place all of the putative protected groups at a particular disadvantage given that the requirement is that the disadvantage be relative to the comparators who do not share the protected characteristic. The fact, if it be a fact, that the Policy makes verification of immigration status more complicated for all is not sufficient.

36. More importantly, I do not consider that the question of proportionality can fairly be determined until the facts have, as Ms Clement put it, "happened". It seems to me to be obvious that in the present case, the **Bank Mellat** test can only be applied in the context of all of the evidence and that, although the four questions under this test each have to be answered in the Defendant's favour, the evidence which is relevant to each is likely to overlap. In this regard, I note that the Divisional Court in **Unision No 1** took a similar view:

> ***"88*** *For the reasons we have already foreshadowed, we do not find it possible to reach a conclusion as to whether the imposition of a higher rate of fees for type B claims can be objectively justified if it has an indiscriminate effect. We repeat that we suspect that the imposition of this fee regime will have a disparate effect on those within the protected classes, but that it is not possible as yet to gauge the extent of the impact. For that reason, it is not possible, and would be wrong for this court, to reach a conclusion as to objective justification, dependent as that exercise is on weighing the extent of the disparate impact."*

37. So plainly Mr Buttler's argument that the availability of verification by physical proof or a paper-based application for certain other groups in certain other situations necessarily means that the justification defence will fail is unsound. Whether it does fail will depend on what the evidence turns out to be. Mr Buttler's argument, skilfully presented though it was, became even less attractive when he confirmed that he did not concede that the fourth **Bank Mellat** question should be answered in the Defendant's favour and that he reserved the right to advance arguments under this limb of the test on the basis of the facts as he predicted they would be. That being so, fairness surely

requires that the whole picture is available for examination before the test as a whole is applied.

38. As for the **Unison** litigation, to my mind the crucial point is that the Divisional Court dismissed the claim because the then current state of the evidence did not permit it fairly to find in the claimant's favour. It described this as an objection based on prematurity. Whether this description is technically correct may not matter. Underhill LJ said:

> ***"27*** *My conclusions on the substantive issues mean that it is not necessary to decide whether that approach was right, but I will state my views briefly in case a similar situation arises in the future. There was of course nothing wrong in Unison seeking to strike down the Fees Order prior to its implementation on the basis of procedural failures or of unlawful effects which it would necessarily have if implemented: on the contrary, the sooner any such challenge was raised the better. But the position is not so straightforward in so far as the challenge was based on predictions as to the effect of the Order which could not definitively be established from the evidence available pre-implementation. Even in such a case Unison could in principle have succeeded by showing that the risk of an unlawful impact was so great that the Lord Chancellor could not rationally have discounted it, and I do not therefore believe that the proceedings in Unison 1 were formally premature. But I think the court was right to be reluctant to reach a decision on the effectiveness and discrimination challenges on the material before it. It is a strong thing to strike down legislation on the basis of disputed predictions as to its effect when the passage of a comparatively short period of time will prove their correctness or otherwise. In my view it was a proper exercise of the court's discretion in the present case, given the real difficulties with the quality of the evidence available pre-implementation, to decline to grant any relief."* (emphasis added)

39. So, Underhill LJ's view was obiter. He held that the claim was not *"formally premature"* on the basis that there might in principle have been an argument that the risk of an unlawful impact was so great that it could not rationally be discounted. But that argument does not seem to me to be open to the Claimant here and, in any event, Underhill LJ agreed with the dismissal of the claim on the grounds that it had been brought before the facts were fully known.

40. As to Mr Buttler's irrationality arguments, what one has is Summary Grounds of Defence which put forward a fairly obvious rational distinction between those to whom physical proof remains available and the other beneficiaries of the EUSS scheme as the explanation for the difference in approach. This document was prepared by counsel in the context of the duty of candour. As far as the paper-based exception under the EUSS application process is concerned, Ms Clement took instructions and pointed out what, again, is a fairly obvious rational point of distinction. In my view, then, an irrationality challenge on the basis of these points is doomed to failure. But I also consider that the question of rationality requires to be considered in the light of the evidence as a whole as to the impact of the Defendant's approach, and that the prematurity objection applies in the same way as it does to the "objective justification" defence under section 19 of the 2010 Act.

41. Mr Buttler was, in my view, right that where factual assumptions can confidently be made by the court it may be willing to give permission for a claim to be made on the basis of such assumptions, particularly if there is no reason to suppose that the

evidential position will alter when the decision is taken or implemented. In my view, however, the court will not be in a position to do this in the present case before the end of the grace period at the earliest.

42. For all of these reasons, then, I agree with the decision of Eady J and refuse this renewed application for permission. Contrary to Mr Buttler's submission, I do not accept that there will necessarily be serious injustice in taking this course. The current state of the evidence as to the frequency with which it will be necessary for the relevant protected groups to use the view and prove service or the SRC to verify their immigration status, and as to the mitigating measures which will be in place from 1 July 2021, does not establish that contention.

Costs

43. In these circumstances, Mr Buttler has indicated that he accepts that the Defendant should be awarded her costs of preparing the Acknowledgment of Service. There is, however, an issue as to quantum. The sum claimed by the Defendant is £7,749.67 and this is disputed, as being too high, in a helpful Note dated 20 April 2021 which has been submitted by the Claimant. In the event that a sum cannot be agreed, I will determine the appropriate sum in the light of any further submission which are received pursuant to the Order of Eady J dated 30 March 2021. Any such submissions should be marked for my attention.