Neutral Citation Number: [2022] EWHC 517 (Admin)

Case Nos: CO/4338/2021 & CO/4366/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/03/2022

Before:

LORD JUSTICE LEWIS

MRS JUSTICE HEATHER WILLIAMS

Between:

THE QUEEN ON THE APPLICATION OF
(1) THE PUBLIC AND COMMERCIAL SERVICES UNION
(2) CARE 4 CALAIS **Claimants**

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT **Defendant**

THE QUEEN ON THE APPLICATION OF CHANNEL RESCUE **Claimant**

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT **Defendant**

- -

Chris Buttler QC, James Robottom & Katy Sheridan (instructed by **Duncan Lewis Solicitors**) for the Claimants in CO/4338/2021
James M Turner QC, Chris Buttler QC & James Robottom (instructed by **Reed Smith LLP**) for the Claimant in CO/4366/2021
David Blundell QC, Julia Smyth, Naomi Hart and Harriet Wakeman (instructed by **Government Legal Department**) for the Defendant

Hearing date: 25 February 2022

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Approved Judgment

Lord Justice Lewis and Mrs Justice Heather Williams:

Introduction

This is the judgment of the court on two applications for permission to rely on expert evidence in claims for judicial review each of which challenge the lawfulness of the Secretary of State's tactical plan to redirect boats carrying migrants out of UK territorial waters and to induce them to return to France ("the Pushback Policy"). The Pushback Policy is contained in three documents, namely:

i) Policy Statement: Enforcement Operations at Sea Against Migrant Boats Through Use of a Tactical Plan to Redirect Boats out of UK Territorial Waters in the English Channel ("the Policy Statement");

ii) Preventing small boats progressing through UK Territorial Waters -Guidance, version 1.0 ("the Guidance"); and

iii) Border Force Maritime Command (BFMC) Combined SOP for preventing small boats progressing through UK Territorial Waters, version 1.0 ("the SOP").

2. The first application arises in a claim brought by the Public and Commercial Services Union ("PCSU") and by Care 4 Calais ("C4C"). The PCSU is a trade union representing approximately 80% of Border Force officials responsible for maritime immigration enforcement in the English Channel. These officials will be charged with implementing the Pushback Policy. C4C is a charity that assists migrants who travel from France to the UK via the English Channel. In their Statement of Facts and Grounds, the PCSU and C4C sought permission to rely on a report dated 16 December 2021 prepared by Matthew Schanck, an expert on domestic and international maritime search and rescue.

3. The second application arises in a claim brought by Channel Rescue, an unincorporated association, concerned with the rescue of migrants at sea and monitoring enforcement actions taken in the English Channel. Channel Rescue applied in its Statement of Facts and Grounds for permission to rely on a report dated 20 December 2021 from Captain John Simpson, a Master Mariner and member of Lloyd's Panel of Special Casualty Representatives.

4. The defendant does not dispute that the authors of the reports are appropriately qualified and experienced in their fields. She does contend that the test for admission of expert evidence is not met in relation to any part of the two reports.

5. The hearing of the applications for permission to rely upon the expert evidence of Mr Schanck and Captain Simpson took place before us on 25 February 2022 and we reserved our decision. This is our judgment on the two applications to rely upon expert evidence. We stress that we express no view on the merits of either of the two claims (or on a third, linked claim where issues of expert evidence do not arise). We express no views on whether or not any of the grounds of challenge will be made out. This judgment is concerned solely with the question of the admission of expert evidence.

The issues

6. The applications depend on whether the expert evidence is reasonably required to resolve the proceedings. The starting point is to identify the issues raised by the claims

and then to consider whether the expert evidence is reasonably required to resolve those issues.

PCSU and C4C

7. In their Amended Statement of Facts and Grounds, PCSU and C4C rely on two grounds of challenge, namely:

   i) The Pushback Policy is ultra vires Part IIIA and Sch. 4A of the Immigration Act 1971 (as amended), which sets down a complete code for the Border Force's ("BF") enforcement powers ("Ground 1");

   ii) Alternatively, the Pushback Policy directs or positively authorises action which will at least in some cases breach Articles 2 and 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and/or breach the statutory requirement that the power be exercised only where necessary and/or breach BF officials' common law duty of care ("Ground 2").

8. The defendant's response is that:

   i) The Pushback Policy is within the power to stop a ship conferred by para 2(2)(a) of Sch. 4A to the 1971 Act;

   ii) Ground 2 constitutes an impermissible attempt to circumvent the fact that the claimants would be unable to show that they are "victims" within the meaning of section 7(1) of the Human Rights Act 1998 ("the 1998 Act") and thus lack the necessary standing to advance claims under the Act that the defendant's policy is incompatible with Convention rights;

   iii) Further or alternatively, as confirmed by the Supreme Court in *R (A) v Secretary of State for the Home Department* [2021] UKSC 37; [2021] 1 WLR 3931 ("*R (A) v SSHD*"), the challenge to the Pushback Policy can only succeed if it is shown that the policy in question authorises or approves unlawful conduct by those to whom it is directed; and the terms of the Pushback Policy documents indicate this is not the case.

Channel Rescue

9. In its Amended Statement of Facts and Grounds, Channel Rescue relies on three grounds of challenge, namely that the Pushback Policy:

   i) Is internally inconsistent and therefore irrational, in that it mandates compliance with international maritime law, but directs, encourages or permits BF officials to act in a manner that is incompatible with international maritime law ("Ground 1");

   ii) Directs, encourages or permits BF officials to breach the Merchant Shipping (Distress Signals and Prevention of Collisions) Regulations 1996 ("the 1996 Regulations") ("Ground 2");

iii) Directs, encourages or permits BF officials to act contrary to the ordinary practice of seamen and thereby contrary to implied limitations to the Immigration Act 1971 and/or the common law ("Ground 3").

10. The defendant's response is that:

i) The Pushback Policy does not direct, encourage or permit BF officials to act in a manner incompatible with international maritime law. There is therefore no internal inconsistency or irrationality arising from the fact that the Policy Statement says that the Pushback tactic will be applied "only in compliance with all applicable international law";

ii) The Pushback Policy does not direct, encourage or permit BF officials to breach the 1996 Regulations (which give domestic effect to the Convention on the International Regulations for Preventing Collisions at Sea 1972 ("COLREGs")). The Pushback Policy does not allow for any breach of the COLREGs;

iii) Similarly, the Pushback Policy does not direct, encourage or permit breaches of the ordinary practice of seamen.

The Pushback Policy documents

11. We do not set out a comprehensive summary of the Pushback Policy documents, rather we will highlight passages that are particularly relevant to the submissions we heard as to the extent to which risks highlighted in the experts' reports are in fact acknowledged in these materials. That will be relevant to whether the expert evidence is reasonably required to identify the risks said to arise.

12. The Policy Statement says:

> "4. These crossings are often dangerous. In addition to migrant injuries (hypothermia, dehydration) and several cases where boats have nearly sunk, there have been 9 confirmed migrant deaths by drowning (and a further 3 missing) since 2018, including children. Six of these deaths occurred towards the latter part of 2020, pointing to a significant upward trend and reflecting a dramatic increase in the risks being taken by the migrants and the organised crime groups (OCGs), as regards weather conditions and overloading of boats…As the attraction of this route continues to grow, so does the risk of further accidents and loss of life, particularly as many of the vessels are hardly seaworthy, they are crossing one of the busiest shipping lanes in the world, and the migrants on board are often without safety equipment or navigation experience…"

13. The SOP, dated 8 October 2021, summarises what is described as the current situation in section 2. Reference is made to the types of craft that are used and then statistics are given in relation to small boats intercepted by BF officials in 2021: over 74% contained children; 23% had someone on board with a medical condition; in only 21% of incidents were all migrants wearing lifejackets; in 95% of the cases the migrant vessel ("MV") was assessed as being overloaded; and in only 5% of the interceptions were migrants

said to be wearing appropriate clothes for sea travel. Section 2 says that the Dover Straits is dominated by an International Maritime Organisation TSS (a Traffic Separation Scheme) and it is "the busiest stretch of water in the World for shipping, the migrants are required to transit both French and then UK traffic lanes before reaching safer inshore waters" which are referred to as an "ITZ", an Inshore Traffic Zone.

14. Section 3 of the SOP lists threats and risks that have been identified and which "need to be fully considered and where possible mitigated in relation to the developing tactical options, contingencies and decision making at the time". The risks that are identified in a series of bullet points include the following:

- "…death or serious injury, drowning, cold water shock, hypothermia"
- "MV failing to recognise and avoid other navigation hazards whilst attempting to cross the Dover Straits…"
- "MV being unsuitable for the crossing and unable to cope with changing weather conditions resulting in being swamped by waves or dragged off course by currents and tides."
- "The seasonal drop in both land and sea temperatures is a significant impact factor in relation to the risk and there is an increased risk…to those who are vulnerable, including children, the elderly and those with health conditions or disabilities, as a result of either a prolonged period of time at sea, being wet and without suitable clothing or entering the water…"
- "Poor navigation equipment and mariner skills increase the risk of MV going off course and becoming lost at sea, particularly during reduced visibility or at night."
- "Inability of those onboard the MV to rescue themselves or anyone who falls into the sea (inability to manoeuvre, heavily overloaded, no rescue equipment) …"
- "No equipment on board the MV to ensure those suffering from serious medical issues such as hypothermia can be treated (warm / suitable clothing)."
- "The lack of ability to identify numbers onboard MV and any vulnerabilities such [redacted] or medical emergencies before all are removed from the vessel."
- "The risk to other General and Commercial Maritime within the area of identified migrant crossings. This is likely to increase during the night and during reduced visibility and could be a contributing factor in relation to collisions at sea and/or dangerous attempts at rescuing migrants by other maritime vessels in the area."
- "…getting into difficulty at sea without immediate assistance being available."

15. Section 1 of the SOP sets out the objective. It includes the following:

> "To deliver the strategic aim of preventing entry to the UK and to acting as a genuine deterrent to migrants and organised crime gangs, the tactics should be delivered in as many cases as is safely possible.
>
> Tactics must not be deployed if, in the circumstances, there is reason to suspect that action could result in inhumane treatment contrary to Article 3 of the European Convention on Human Rights (ECHR). This [redacted] and must be carefully assessed by the on-scene commander."

16. Section 4 of the SOP is headed "Operational strategy". It includes a summary of "preferred", "acceptable" and "unacceptable" outcomes. Preferred outcomes include: "If a crossing is attempted in an unsuitable vessel, action is taken to minimise the risk to the migrants by rescuing and taking them to a place of safety" and also that a MV which enters UK waters is "intercepted and safely turned around and escorted back into French Waters where they are able to safely return to France". Acceptable outcomes include: "That during operational deployments no MV's are assessed as suitable for a safe turnaround". Unacceptable outcomes include death or serious injury to migrants or to any other person; significant disruption to other commercial users of the Dover Straits and a "seaworthy small boat becoming subject to SAR [search and rescue] procedures because it is damaged, flooded or disabled by a BF vessel, such that it requires immediate rescue".

17. Section 5 of the SOP deals with "Assessment of Vulnerability", amongst other topics. The section is currently heavily redacted, but the text includes that:

> "The Operational Commander should not attempt to initiate a turnaround of a MV unless:
>
> - They are reasonably confident that the MV can safely make it back to French shores unaided."

18. Section 8 of the SOP recognises that the tactics outlined can only be exercised by immigration officers who have been trained in delivering them and when those deployed and in command "have assessed and mitigated risks to the health and safety of officers, migrants and other mariners and they reasonably believe it is appropriate in the circumstances to deliver the tactics in accordance with this SOP".

The claimants' witnesses of fact

19. We are only concerned at this stage with the claimants' witness evidence in so far as it may bear on the admissibility of the proposed expert evidence. There are two statements that have been served by the PCSU and C4C that are potentially relevant to that issue.

20. Mark Pester, a BF employee from 1979 to April 2021, has provided a witness statement dated 28 January 2022. He worked on and then commanded vessels used for Maritime Enforcement Operations. From 2016 he was deployed for over a year in the Mediterranean, where he was in charge of a BF attachment of officials assisting the Greek authorities. In early 2018 he was appointed Senior Officer in Command of a Coastal Patrol Vehicle Fleet and from July 2019 he was a First Officer of the Border Force Cutters. Mr Pester says that he has been involved in numerous search and rescue operations involving MVs in the Channel. From his para 14 onwards, Mr Pester sets

out his key concerns about the Pushback Policy. He says that it would be very difficult to adequately assess whether a MV was suitable for making a return journey once it has been intercepted. In particular, it would be impossible to assess whether there would be enough fuel to complete the journey back to France or the experience and training of the person in charge of the boat (paras 15 and 35). In paras 16 and 18 he describes the difficulties of assessing passenger vulnerabilities in this situation. He also refers to the poor condition of the MVs, saying they are very rarely seaworthy when they embark on their journey across the Channel, let alone at the point of interception (para 17).

21. Thomas Matson worked as an Enforcement Officer in the Maritime Command of the BF from June 2018 to May 2021. He has made a statement dated 16 December 2021. His duties included patrolling the UK waters of the Dover Straits, intercepting MVs and bringing those on board to Dover for processing. In Spring 2019 he was involved in a feasibility test relating to the BF's capabilities for intercepting MVs in UK waters. Mr Matson refers to BF officials not being able to predict how much fuel a MV has left without physically boarding the boat (which is not contemplated in the Pushback Policy documents) and also to the unpredictability of weather conditions (para 24). He refers to the inevitability that a crew on board a MV will lack training and the difficulties of landing safely in France without skills, experience or navigational equipment (para 26).

Admissibility of expert evidence: the principles

22. CPR 35.1 provides that: "*Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings*". CPR 35.4(1) states: "*No party may call an expert or put in evidence an expert's report without the court's permission*". CPR 35.5(1) indicates that expert evidence is to be given in a written report unless the court directs otherwise.

23. The principles governing the admission of expert evidence in judicial review proceedings are set out in *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin); [2019] 1 WLR 1649 (Leggatt LJ and Carr J, as they then were). The Divisional Court observed that:

> "36. …It follows from the very nature of a claim for judicial review that expert evidence is seldom reasonably required in order to resolve it. That is because it is not the function of the court in deciding the claim to assess the merits of the decision of which the judicial review is sought. The basic constitutional theory on which the jurisdiction rests confines the court to determining whether the decision was a lawful exercise of the relevant public function. To answer that question it is seldom necessary or appropriate to consider any evidence which goes beyond the material which was before the decision-maker and evidence of the process by which the decision was taken – let alone any expert evidence.
>
> 37. The classic statement of the extent to which evidence other than evidence of the decision under challenge is admissible in judicial review proceedings is that of Dunn LJ in *R v Secretary of State for the Environment Ex p Powis* [1981] 1

> WLR 584, 595. The categories identified in that case can be summarised as follows: (a) evidence showing what material was before or available to the decision-maker; (b) evidence relevant to the determination of a question of fact on which the jurisdiction of the decision-maker depended; (c) evidence relevant in determining whether a proper procedure was followed; and (d) evidence relied on to prove an allegation of bias or other misconduct on the part of the decision-maker.
>
> 38. Although these categories are a useful and well-established list, it would be wrong to treat them as if they were embodied in a statute or as necessarily exhaustive. That is particularly so as public law has developed in ways which were not in contemplation when *Ex p Powis* was decided. In *R (Lynch) v General Dental Council* [2004] 1 All ER 1159, Collins J was prepared to allow some extension of the possibility of admitting expert evidence beyond the *Ex p Powis* categories in a case where a decision is challenged on ground of irrationality. The judge accepted that, where an understanding of technical matters is needed to enable the court to understand the reasons relied on in making the decision in the context of a challenge to its rationality, expert evidence may be required to explain such technical matters."

24. The Divisional Court's observation that the categories were not closed in terms of when expert evidence may be admitted in judicial review proceedings was illustrated by the approach taken to the expert reports in that case. The Divisional Court identified a further category at paras 39 - 40, namely where the decision under challenge is said to be irrational because it was reached by a process of reasoning involving a serious technical error of a kind that is not obvious to a lay person but can be demonstrated by a person with the relevant expertise. However, as an irrationality challenge could not succeed if there was room for reasonable differences of opinions: "if an expert report relied on by the claimant to support an irrationality challenge of this kind is contradicted by a rational opinion expressed by another qualified expert, the justification for admitting the expert evidence will fall away" (para 41).

25. The court also identified two further issues raised in the proceedings where expert evidence "could in principle be admissible". Firstly, on the question of whether the consultation procedure in that case was unfair because information of substantial importance had not been disclosed and whether consultees had thereby been prejudiced; and, secondly, in relation to an argument that the challenged decision to reduce legal aid fees constituted an unlawful interference with the right of access to justice (paras 42 – 43).

26. Additional circumstances justifying the admission of expert evidence *may* arise where the claimant's grounds of challenge raises issues of compatibility with ECHR rights. By way of example, in *R (Gardner and Harris) v Secretary of State for Health and Social Care & Ors*. [2021] EWHC 2946 (Admin) ("*Gardner*") in the context of allegations that the defendants had failed to protect care home residents from the risk

of serious harm or death from COVID during the first wave of the pandemic, the Divisional Court (Bean LJ and Garnham J) accepted that the claimants could make use of expert evidence to argue their case for the purposes of showing the material that would have been available to the defendants at the time when the relevant decisions were made. However, the court declined to admit expert evidence that post-dated the defendants' decisions (paras 20 – 21). Although Mr Buttler QC sought to draw some support from the court's observation in para 20 that it would be wrong "at this interlocutory stage to deny [counsel] the material on which to argue his case as to the intensity of review", he accepted that it is the CPR 35.1 test that we must apply.

27. The proposition that expert evidence is rarely reasonably required to resolve a judicial review claim was endorsed by the Divisional Court in *R (AB) v Chief Constable of Hampshire Constabulary & Ors* [2019] EWHC 3461 (Admin) (the President of the Queen's Bench Division and Lewis J, as he then was) at para 117. In the same paragraph the court also observed:

> "While there will be some occasions when expert evidence is needed on some technical issue, the views of experts on whether or not a decision is rational or otherwise lawful in public law terms will not be admissible."

28. Determining whether the expert evidence is reasonably required to resolve the proceedings thus involves: (i) identifying the issues in the proceedings to which the expert evidence is said to be relevant; and (ii) evaluating whether the expert evidence is reasonably required to resolve those issues. This will usually entail a close focus on the pleaded issues and the content of the expert report, as is illustrated, for example, by the court's approach in *R (Banks Renewables Limited) v Secretary of State for Business, Energy and Industrial Strategy* [2020] EWHC 436 (Admin).

29. When is expert evidence "reasonably required"? In *Banks Renewables* at paras 12 - 13, Lewis J (as he then was) referred to the judgment of Warren J in *BA Plc v Spencer* [2015] PLR 519. The passages that were cited included the following:

> "63. A judgment needs to be made in every case and, in making that judgment, it is relevant to consider whether, on the one hand, the evidence is necessary (in the sense that a decision cannot be made without it) or whether it is of very marginal relevance with the court being well able to decide the issue without it, in which case a balance has to be struck and the proportionality of its admission assessed. In striking that balance, the court should, in my judgment, be prepared to take into account disparate factors including the value of the claim, the effect of a judgment either way on the parties, who is to pay for the commissioning of the evidence on each side and the delay, if any, which the production of such evidence would entail (particularly delay which might result in the vacating of a trial date).
>
> 68 …it is necessary to look at the pleaded issues and…the court must ask itself the following important questions:

(a) The first question is whether, looking at each issue, it is necessary for there to be expert evidence before that issue can be resolved. If it is necessary, rather than merely helpful, it seems to me that it must be admitted.

(b) If the evidence is not necessary, the second question is whether it would be of assistance to the court in resolving that issue. If it would be of assistance, but not necessary, then the court would be able to determine the issue without it….

(c) Since, under the scenario in (b) above, the court will be able to resolve the issue without the evidence, the third question is whether, in the context of the proceedings as a whole, expert evidence on that issue is reasonably required to resolve the proceedings. In that case the sort of questions I have identified in paragraph 63 will fall to be taken into account…"

30. Deciding if expert evidence is reasonably required will likely also involve an assessment of the evidence *already* available to the court on the particular issue, whether this is by way of documents or statements from witnesses of fact. In some instances, expert evidence may be of potential relevance to an issue in the case but may not significantly assist the court in light of the other evidence that it already has and may not, therefore, be required to resolve the proceedings.

Submissions

31. We will address the submissions made about particular sections of the reports when we come to our ruling on their contents. At this stage we summarise and consider some general contentions advanced by the parties.

32. The PCSU and C4C do not suggest that Mr Schanck's report is relevant to their Ground 1. They submit that it is relevant to resolving Ground 2, as the court will need to understand the risks of deploying the new tactical plan and then determine the effectiveness or otherwise of the safeguards provided for in the Pushback Policy documents. Mr Buttler accepts that in light of the way his challenge is formulated, the role of the court will be to evaluate the legality of the Pushback Policy through the prism of *R (A) v SSHD*. However, he says that the Supreme Court acknowledged in that case that where the policy is to be tested against rights derived from the Convention, the approach in *R (Bibi) v Secretary of State for the Home Department* [2015] UKSC 68; [2015] 1 WLR 5055 ("*Bibi*") of asking whether the policy "would inevitably result in some decisions which were unlawful" was the appropriate approach and was consistent with *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 ("*Gillick*"). Further, or alternatively, he says that at paragraph 79 of its judgment in *R (A) v SSHD,* the Supreme Court accepted that in assessing unlawfulness on the ground of incompatibility with article 3 of the Convention, the test is whether the policy gives rise to a significant risk of treatment that would be prohibited by this article, as set out by Lord Bingham and Lord Hope in *R (Munjaz) v Mersey Care NHS Trust* [2006] 2 AC 148 ("*Munjaz*").

33. In support of the propositions that the Pushback Policy will inevitably result in migrants' deaths; put their lives at risk in at least some instances; and/or give rise to a significant risk of treatment that will infringe articles 2 and/or 3 of the Convention, the PCSU and C4C rely on the risks set out in para 79 of their Amended Statement of Facts and Grounds. In this regard, Mr Buttler emphasises the risks associated with ramming a MV with jet skis and the risks involved in sending a MV back towards French shores when its seaworthiness, crew and ability to reach its destination safely could not be properly assessed, and in light of the risks associated with the return journey. Mr Buttler says that it would not be possible to reduce the risks to a sufficiently safe level and that accordingly the policy was based on a false premise.

34. Channel Rescue submit that the expert evidence it seeks to rely on is relevant to all three of its grounds of challenge. It adopts the submissions of the PCSU and C4C. Particular emphasis is placed upon the need for the court to determine the content of the duty to act in accordance with the ordinary practice of seamen, which is a matter of technical expertise and one where the court lacks maritime experience and will be assisted by information regarding the practical context. Mr Turner QC submitted that the court will also need to understand the context of what is prohibited by the COLREGs and the practical consequences of adopting a particular construction of its rules.

35. The claimants also draw attention to the use of nautical assessors in the Admiralty Court pursuant to CPR 61.13 in relation to matters of navigation and seamanship. Mr Turner emphasised that the assessors sit with the court on the hearing of appeals, not just where there are factual disputes to be resolved. He cited the recent Supreme Court case of *Evergreen Marine (UK) Ltd v Nautical Challenge Ltd* [2021] UKSC 6; [2021] 1 WLR 1436 ("*Evergreen Marine*") as an example.

36. Mr Blundell QC for the Secretary of State emphasises the limited role played by expert evidence in judicial review proceedings. He relies on the nature of the issue that arise in a claim for judicial review of the lawfulness of a policy following the Supreme Court's decision in *R (A) v SSHD*. He submits that whilst the claimants seek to prove by expert evidence that it is not possible to assess whether a migrant vessel can return safely to France, that will not be the issue for the court. The question will be whether the policy itself directs, encourages authorises or approves unlawful conduct in the respects contended for by the claimants. Accordingly, he submits that the expert evidence is not relevant. Furthermore, he submits that neither the *Bibi* nor the *Munjaz* approach avails the claimants as they disavow bringing a challenge to the compatibility of the policy with the Convention, aware that they are unable to meet the requisite definition of a "victim" that would give them standing to bring a claim under the 1998 Act.

37. Mr Blundell highlights various aspects of the Pushback Policy documents. He says that the risks identified by the experts are recognised in these materials and that the policy makes clear that the pushback tactic will only be used when it is safe to do so. He places particular emphasis on the passage in section 5 of the SOP that we have already cited, that the tactic should only be used if a commander is reasonably confident that the MV can make it back to French shores safely. Accordingly, submits Mr Blundell, the issue for the court is what the policy says in this regard, not whether or when or how often in practice a BF official could be reasonably confident of this. Furthermore, he submits

that the expert evidence is not "incontrovertible"; the defendant does not accept it and she would seek to obtain her own expert evidence if permission is granted.

38. Mr Blundell also submits that some parts of the reports are not expert evidence at all; opinions are proffered on questions of law and comments outside of the authors' areas of expertise are made. Furthermore, in some respects the experts purport, impermissibly, to answer the very questions that the court must determine.

Discussion and conclusions

39. We will first address the more general points raised by the parties, before turning to consider the particular contents of the reports.

40. We are not persuaded by the claimants' reliance on the practice of the Admiralty Court in sitting with nautical assessors. This occurs in collision claims or other claims involving navigation and seamanship, where the circumstances of a particular incident are being evaluated to see if there was negligence or other blameworthy conduct. It is not, as Mr Turner suggested in his skeleton argument, that we believe we are "better placed…when it comes to matters of seamanship". It is that the task of the Administrative Court is different. Although the Supreme Court sat with assessors in *Evergreen Marine*, Lord Briggs and Lord Hamblen JJSC explained:

> "16. …The role of the nautical assessors is to provide advice as to matters of navigation and seamanship. The court is not bound by that advice, and must form its own view about those matters in the light of all the submissions received from the parties. The interpretation of the Collision Regulations is a matter of law for the judge to determine…"

41. In relation to the issues that arise, in *R (A) v SSHD* in affirming the applicability of the test identified in *Gillick* to a domestic law policy challenge, Lord Sales JSC and Lord Burnett of Maldon CJ emphasised that it was not sufficient for a claimant to show that the policy gave risk to an unacceptable or unjustified risk of unlawful conduct or that it could lead to unlawful acts. They explained the *Gillick* approach as follows:

> "34. …Lord Scarman was explicit that it was not the role of policy guidance to eliminate all uncertainty regarding its application and all risk of legal error…It was to be read objectively, having regard to the intended audience…the drafter of a policy statement is not required to imagine whether anyone might misread the policy and then draft to eliminate that risk…
>
> 38. …It is best encapsulated in the formulation by Lord Scarman at p 181 (reading the word 'permits' in the proper way as 'sanction' or 'positively approve') and by adapting Lord Templeman's words: does the policy in question authorise or approve unlawful conduct by those to whom it is directed? So far as the basis for intervention by a court is concerned, we respectfully consider that Lord Bridge and Lord Templeman were correct in their analysis that it is not a matter of rationality, but rather that the court will

> intervene when a public authority has, by issuing a policy, positively authorised or approved unlawful conduct by others. In that sort of case, it can be said that the public authority has acted unlawfully by undermining the rule of law in a direct and unjustified way. In this limited but importance sense, public authorities have a general duty not to induce violations of the law by others…
>
> 41. The test set out in *Gillick* is straightforward to apply. It calls for a comparison of what the relevant law requires and what a policy statement says regarding what a person should do. If the policy directs them to act in a way which contradicts the law it is unlawful. The courts are well placed to make a comparison of normative statements in the law and in the policy as objectively construed. The test does not depend on a statistical analysis of the extent to which relevant actors might or might not fail to comply with their legal obligations…"

42. It would be premature for us to determine at this stage whether Mr Buttler is correct in his submission that the lawfulness of the Pushback Policy is to be judged by reference to the *Bibi* test or the *Munjaz* test (see para 32 above) in circumstances where the claimants disavow advancing any claim under the 1998 Act based on incompatibility with a Convention right. This is likely to be a significant issue of law for the court to resolve at the substantive hearing. For present purposes we will proceed on the basis that this is how the PCSU and C4C put their case and we will evaluate the extent to which Mr Schanck's expert evidence is reasonably required with this in mind.

43. Further, we were not persuaded that the fact that the Secretary of State may seek to put in evidence in response to contradict the evidence of Mr Schanck or Captain Simpson assists us in this case in determining whether permission should be granted for their evidence to be adduced.

44. With these observations in mind, we turn to the specifics of the two experts' reports.

The reports

45. We asked counsel to take us through the two reports, explaining how each section was said to be reasonably required for the court to resolve the matters in issue. During this process, counsels' reliance upon substantial parts of each report was either abandoned or not maintained with any degree of enthusiasm.

Mr Schanck's report

46. Section 1 of his report sets out Mr Schanck's qualifications and experience, his instructions and the materials he used. Admission of this section is plainly dependent upon the decision we make in relation to the substantive parts of the document. The same is true of sections 8 and 9, which, it is accepted, simply contain a summary of his conclusions. Sections 2 – 7 respond to a series of questions that Mr Schanck was asked by the claimants' solicitors.

47. Section 2 of the report addresses Question 1 which asked Mr Schanck to identify the UK regulatory requirements and applicable international standards for the type of vessels which are permitted to cross the English Channel. Mr Schanck focuses on the requirements that apply to pleasure crafts under, for example, the 1996 Regulations, the Merchant Shipping (Safety of Navigation) Regulations 2002, the International Convention for the Safety of Life at Sea ("SOLAS") and guidance issued by the Maritime & Coastguard Agency ("MCA"). Section 3 of the report answers Question 2, which asked the author to set out the UK regulatory requirements and applicable international standards for the qualifications of captains of vessels which are permitted to cross the Channel. Mr Schanck explains the requirements under the 1978 International Convention on Standard of Training, Certification and Watchkeeping for Seafarers. Section 4 addresses Question 3 where Mr Schanck was asked to comment on whether the primary purpose of the regulatory requirements and applicable international standards is safety at sea. In short, he says that it is.

48. Our preliminary view after reading the report was that sections 2 – 4 dealt with matters of law, rather than expert evidence; and ranged widely, encompassing a number of matters that are not referenced in the Amended Statement of Facts and Grounds. When we asked Mr Buttler about the relevance of these sections, the only aspect he sought to rely on was para 2.25, albeit he said this was not the principal focus of the application. This passage refers to the importance of a boat having a VHF radio as a means of communication, including with search and rescue authorities. This appears to us to be largely self-evident and we note that communication difficulties with other vessels is acknowledged in the SOP (see para 14 above) . Accordingly, we do not consider that this passage or indeed any other parts of sections 2 – 4 of the report are reasonably required for the resolution of the proceedings.

49. Mr Schanck addresses Questions 4 – 6 in section 5 of his report. He was asked to define the meaning of a seaworthy vessel and to address the circumstances in which small migrant boats crossing the Channel are seaworthy; to detail the safety conditions a mariner must assure themselves of before sending a boat back to France; and to comment on the degree to which it would be possible to assess this at sea. Mr Buttler indicated that he attached particular importance to paras 5.31 – 5.79 of the report, save for the section on welfare at paras 5.64 – 5.74.

50. We will firstly deal briefly with the parts of section 5 that Mr Buttler did not place particular reliance upon.

51. In paras 5.1 – 5.13 Mr Schanck says there is no formal definition of a seaworthy vessel, but then sets out his opinion as to what this would entail and what should happen if the criteria he identifies are not met. We do not consider that this is reasonably required to resolve the proceedings. The issue for the court is the lawfulness of the approach taken in the Pushback Policy as to when a vessel can be diverted and Mr Schanck's own definition of seaworthiness will not materially assist with this. Mr Buttler was right not to press, or place any particular reliance upon, this aspect.

52. Between paras 5.14 – 5.30 Mr Schanck addresses vessel certification and standards for vessel construction. At para 5.30 he accepts that a vessel's general structural condition could be assessed visually at sea. Accordingly, para 5.30 does not advance the claimants' contentions and much of this part involves matters of law that are peripheral at best, such as the Work Boat Code.

53. In paras 5.64 – 5.77 Mr Schanck discusses matters that are likely to arise in relation to the welfare of passengers and crew, including absence of medical supplies or medically trained people, lack of correctly fitted lifejackets and cold sea temperatures. These kinds of risk factors are acknowledged in the SOP (see para 14 above) and expert evidence dealing with the existence of those risks is not reasonably required. Furthermore, we do not consider that the court would be assisted by expert evidence on these areas which are largely matters of common sense rather than maritime expertise.

54. We turn then to the passages that PCSU and C4C say are important for their submissions.

55. Between paras 5.31 – 5.63 and 5.78 – 5.83 Mr Schanck discusses the significance of the condition of a MV's engine and steering equipment, its navigation equipment, radiocommunications, stability, provisions of fuel, food, water and medical equipment and the training and experience of the crew. He identifies the risks involved and the extent to which he considers these matters can be assessed at sea. In summary, he says:

    i) The MV's engine would need to be inspected to ensure it is in good working order and of suitable power (paras 5.33 – 5.35). The inspection should be carried out by someone familiar with maritime machinery and systems, entering the MV to check the matters he lists in para 5.37;

    ii) An absence of navigational equipment is extremely unsafe. This would be relatively easy to assess visually at sea (paras 5.38 – 5.41);

    iii) An absence of a radio communications system is extremely unsafe. This would be relatively easy to assess at sea (paras 5.42 – 5.45);

    iv) The majority of MVs are overloaded and in turn this will have a large impact on vessel stability. Additionally, overcrowding may cause damage to the vessel (paras 5.46 – 5.48). It would be difficult to assess the stability of a MV at sea given the need to take into account the condition of various aspects of the boat, as well as overcrowding and the amount of free water within the vessel (para 5.50);

    v) MVs do not tend to carry large quantities of food, drinking water or medical supplies (paras 5.52 – 5.54);

    vi) Fuel is difficult to assess, in particular in terms of whether the fuel on the MV is of suitable type and quality, as well as the quantity available; and in order to do so, it would be necessary to know the engine's specifications (paras 5.56 – 5.57 and 5.62). Accordingly, it would be impossible for this to be assessed at sea (para 5.63). If an incorrect assessment is made there is an extremely high chance of the MV being left adrift in the Channel, which would pose a significant risk to life (paras 5.59 – 5.61);

    vii) MVs do not usually carry any professionally trained or qualified people (para 5.79). A pleasure craft skipper attempting a passage across the Channel with no formal training or qualifications is extremely dangerous and will pose significant risks not only to themselves, but to other water users (para 5.81).

56. Mr Buttler submitted that the significance of section 5 needed to be assessed by looking at the conclusions drawn in section 6 of the report, which addressed Question 7, which asked Mr Schanck to comment on the prospects "an untrained person in charge of a small boat which has been directed to leave UK waters has of reaching French shores safely". Mr Schanck says that without proper maritime navigation equipment, charts and training, the MV would be unable to safely navigate to France. He refers to the absence of navigational equipment, communications equipment and navigational lights and the crew's likely lack of training. He says that the English Channel is one of the busiest shipping lanes in the world and he considers MVs may be unable to avoid a collision with other vessels, creating a highly dangerous situation both for the small boat and for other vessels in the vicinity (paras 6.3 – 6.6). Mr Schanck says in his professional opinion, the only way a migrant vessel can be returned to France is if the vessel and people on board are deemed seaworthy, but this cannot be fully assessed at sea for the reasons he gave in section 5 of his report and thus "it would be impossible to make the affirmation that a migrant vessel is seaworthy, regardless of the assessing person's qualification and experience" (paras 6.7 – 6.8). In light of this he considers that the risks of sending a MV back across the Channel "would be unacceptable and the return passage incredibly dangerous for the vessel and people on board" (para 6.10). Mr Schanck then addresses the likely duration of a return voyage to France, indicating that on a best case scenario it would be approximately 3 hours 48 minutes (paras 6.12 – 6.17).

57. Having carefully reflected on the point, we do not consider that this expert evidence is reasonably required for the resolution of these proceedings. We bear in mind the nature of the Ground 2 challenge and we note:

    i) The majority of the risks that Mr Schanck identifies in section 5 of his report are in any event acknowledged in the Policy Statement and/or the SOP; see paras 12, 14 and 16 above. This includes the absence of navigational equipment, overloaded and poor quality boats, a lack of provisions, a lack of safety equipment and the absence of a competent or experienced crew. The very busy nature of the shipping lanes and the consequential risks of drowning, of hypothermia and the dangers presented to other vessels in the vicinity are all acknowledged as well. Accordingly, Mr Schanck's report is not needed to inform the court as to these risks;

    ii) Additionally, the witness statements of Mr Pester and Mr Matson, who speak from their own experience, refer to the difficulties of assessing how much fuel a MV has, the likely lack of a trained crew, the absence of navigational equipment and the consequential difficulties for a vessel returning safely to France (paras 20 – 21 above);

    iii) Much of what Mr Schanck then draws from the risks he identifies appears to us to be little more than common sense. For example, his observation that if an incorrect assessment is made as to the amount of fuel, then there is a very high chance of the MV being left adrift in the Channel; or his observation that a boat attempting a passage across the Channel with a skipper who has no formal training will pose dangers to those on board and to other vessels;

    iv) As to the likely time period for a return voyage to French shores, Mr Schanck acknowledges that he is unable to give a very precise time, given the number of

variables that he identifies. It seems self-evident to us that it is likely to take several hours and we do not consider that Mr Schanck's assessment materially advances matters;

v) Moreover, once the risks are identified (which, as we have indicated, does not, in the main, appear to be a matter of controversy), the key question for us, even on the *Munjaz* approach, is to examine the policy to see how those risks are addressed. That is not something that Mr Schanck's report can significantly assist with and indeed it (rightly) does not purport to analyse the detail of the Pushback Policy documents. This will be an issue for the court to determine; and

vi) The same observations apply to section 6 of the report. Furthermore, in so far as he purports to express a view on whether the risks can be safely and acceptably managed by the policy, if this is the correct test to apply, then it is a matter for the court's evaluation and ultimate conclusion.

58. Section 7 of the report addresses Question 8, which asked Mr Schanck to comment on any concerns he has "with regards to compliance with the UK's regulatory requirements for vessels in the Channel". Mr Schanck says that as MV are unseaworthy and operated by people with no maritime experience, they should be classed as in "distress" as defined by the International Convention on Maritime Search and Rescue 1979 (paras 7.2 – 7.11). He says it follows that "there is no situation in which the tactics disclosed by the Home Office could be used on any migrant vessel as the vessels are in distress" and thus to do so would contravene Chapter V of SOLAS and article 98 of the United Convention on the Law of the Sea 1982 ("UNCLOS") (paras 7.31 – 7.14). During the hearing, Mr Buttler said that he did not rely on this section of the report. Nonetheless, it is relevant for our purposes to note that Mr Schanck expressed a different view to that contained in Captain Simpson's report as to when a MV should be regarded as in "distress". It is not easy to see how different conflicting experts' opinions relied on by two claimants challenging the same policy in linked judicial review claims that are to be heard together would assist the court in resolving any issues that arise.

Captain Simpson's report

59. In section 1 of his report Captain Simpson summarises his instructions, his qualifications, his experience and his conclusions. He then gives some background about the introduction of the Pushback Policy and pre-action steps. Section 2.1 of the report summarises his understanding of the policy. Accordingly, the admissibility of these passages is parasitic on the conclusions we draw regarding the substantive sections of the report.

60. Section 2.2 is headed "The English Channel and Dover Straits". Mr Turner accepted that paras 2.2.1 – 2.2.3 are simply background, but he maintained reliance upon para 2.2.4. This refers to the risk of MVs being swamped by the wash of larger boats, the difficulties of detecting small craft particularly if they are not fitted with radar reflectors and the time it may take for larger vessels to take avoiding action because of their size and the presence of other vessels. However, as we have already discussed, the risks posed to and by other vessels, the lack of appropriate equipment on the MV and the likely overloaded nature of the small boat are all risks that the Pushback Policy

documents acknowledge and therefore we do not consider that this expert evidence is required to draw them to the court's attention.

61. Captain Simpson then sets out extensive passages from the "MCA's Guidance – Dover Strait crossings: channel navigation information services", which Mr Turner did not try to persuade us was reasonably required. He was right not to do so. He also accepted that the contents of para 2.2.6 appeared elsewhere in the report.

62. Captain Simpson then addresses the ordinary practice of seamen. He says at para 2.3.1 that a pushback operation would "in my opinion, be completely different to anything I have encountered at sea, and at variance to everything I have been trained to consider as being the ordinary practice of seaman" [sic]. He also says that the ordinary practice of seamen is the overriding duty of every seafarer (para 2.3.1). Mr Turner initially indicated a wish to rely on this paragraph, but when we inquired as to how the first part would assist us in resolving the proceedings and why the second aspect was not a question of law, he accepted that this was not a matter on which he would wish to rely. Mr Turner also informed us he no longer relied upon paras 2.3.2 – 2.3.3, but that he did wish to rely on para 2.3.4, which contained Captain Simpson's opinion that consideration of the ordinary practice of seamen entailed compliance with IMO standards, including the COLREGs and SOLAS. We do not accept that this is reasonably required for resolving the proceedings; the opinion expressed relate to questions of law.

63. In a lengthy section of his report commencing at para 2.4.1, Captain Simpson refers to the COLREGs and his understanding of how they would apply. He says that it came "as a profound shock to me" that the courts have held that jet skis may not be subject to the COLREGs (para 2.4.2). He goes on to say, giving reasons, that he considers this logic to be "questionable" (paras 2.4.3). Mr Turner said he did not seek to rely on para 2.4.2, but he did wish to rely on 2.4.3 in which the author gave his perspective as a mariner, which could assist the court. We do not consider that such evidence is reasonably required for the resolution of the proceedings. The issue, in so far as it may arise, is one of law.

64. Between para 2.4.4 and 2.4.7 Captain Simpson summarises the adoption of the COLREGs by the IMO. Mr Turner accepted that he did not rely upon this. Again, these passages appeared to us to address matters of law.

65. Mr Turner maintained reliance upon paras 2.4.8 – 2.4.10 on the basis that they contained information about the training and expected knowledge of the BF officials in terms of the COLREGs. However, the Policy Statement addresses the training of BF officials at para 22 and section 13 of the SOP lists applicable legal instruments, including international Regulations and Conventions. Accordingly, this part of Captain Simpson's report does not materially add to the picture before the court and we do not consider that it is reasonably required for the resolution of the proceedings.

66. Paragraph 2.4.11 simply introduces the next section of Captain Simpson's report, where he refers in detail to rules 7, 8 and 10 of the COLREGs. What follows is mostly no more than a recitation of the legal provisions and Mr Turner indicated that he did not seek to rely on paras 2.5.1 – 2.5.11. However, he did ask that paras 2.5.12 – 2.5.13 be admitted. Para 2.5.12 is simply introductory, setting out rule 10 concerning a vessel's use of traffic separation schemes and inshore traffic zones. In para 2.5.13 he explains

that much of the Channel is covered by a TSS. This is a matter of fact and is referred to in the Pushback Policy documents, as we have indicated. Captain Simpson then opines that if BF vessels were operating in the area in an attempt to pushback MVs, this could result in confusion for other vessels trying to keep clear and he continues that: "I do not see how a pushback operation could operate in the area without creating an unacceptably high risk of confusion and collision". Whether the policy gives rise to unacceptably high risks will be a matter for the court to assess (if that is found to be the correct test to apply); as we have already noted, expert evidence is not admissible on the ultimate issues of legality that the court must decide. The observation in the penultimate sentence that some confusion could be caused, appears to be little more than common sense and, as we have noted, the SOP acknowledges risks to other vessels. In the circumstances we do not consider that this evidence is reasonably required to resolve the proceedings.

67. In making his submissions Mr Turner sought to rely on paras 2.5.15 – 2.5.20 of the report in which Captain Simpson addressed rules 13 – 17 of the COLREGs. However, no reference is made to these rules in Channel Rescue's Amended Statement of Facts and Grounds and we do not see how these passages can materially assist the court.

68. Captain Simpson's next section comprises paras 2.6.1 – 2.6.6 and is headed "Identification of Risk and Potential Impact". Mr Turner said he did not seek to rely upon the first two paragraphs. He suggested that para 2.6.3 was relevant as it referred to weather conditions being an important factor and their changing at short notice. This is already covered by the SOP and the witnesses of fact we referred to earlier and in any event it is little more than a statement of the obvious. This passage is not reasonably required for the resolution of the proceedings. Para 2.6.4 where Captain Simpson opines that the interception of MVs under the policy would be "completely at odds with the ordinary practice of seamen, good seamanship and a contravention of the COLREGs" is another example of a passage containing an opinion on matters that, if relevant, will ultimately be for the court to decide and, as such, it is inadmissible. In para 2.6.5 Captain Simpson lists the factors that he would expect to be taken into account by a BF vessel contemplating an interception. They include: the physical condition of those on board; swamping or destabilising the boat with wash; whether those on board are wearing lifejackets; the construction and stability of the MV; the extent to which it is overloaded; the risk of those on board panicking and behaving erratically; and the risk to other vessels in the vicinity. These are risks which the SOP identifies, including the risk of a MV becoming damaged, flooded or disabled by a BF vessel (para 16). As such, this part of the report does not significantly advance matters. As we have already observed in respect of Mr Schanck's report, it is how the Pushback Policy addresses the risks that will be of particular significance. Para 2.6.6 sets out the author's opinion that the only possible conclusion that could be reached by the assessment process "would be to confirm that the risks are unacceptably high and that the Policy is wholly unsafe". Again, if and in so far as it may be decided that this observation reflects the test to be applied, this is a question for the court and Captain Simpson's view on it is inadmissible.

69. The next section of the report is headed "Distress at Sea". Mr Turner accepted that paras 2.7.1 - .2.7.5 simply refer to the legal position in respect of UNCLOS and the Search and Rescue Convention 1979. Para 2.7.6 says that the condition of migrant boats is very often dangerous, which Mr Turner accepted "we may find is obvious". He also accepted that para 2.7.8 was concerned with a question of law, but he said he wanted to rely on

paras 2.7.7 and 2.7.9 – 2.7.13. These passages describe potential risk factors that could be visually assessed by BF officials and which could raise the assessment of the situation through the "alert phase" to the "distress phase" with the consequential obligations under article 98 of UNCLOS and the Search and Rescue Convention 1979 applying. Captain Simpson says that if there is an indication of this, the BF ship must abandon any pushback operation and put a rescue mission in place. We do not understand this proposition to be in issue; the SOP recognises that the operation is subject to SOLAS and UNCLOS and, as we have already indicated, the SOP acknowledges the kind of risk factors that are referred to here. Accordingly, we do not consider that this part of the report advances the issues in dispute and it is not reasonably required for the resolution of the proceedings. We are reinforced in our view by the fact that the two experts are not in agreement on the question of when the "distress phase" would arise. Accordingly, we do not see how this would materially assist the court or how it could be said to be reasonably required for resolving issues in the proceedings.

70. Section 2.8 of Captain Simpson's report is headed "Other Issues". Mr Turner accepted that he did not rely upon paras 2.8.1 or 2.8.3, but he sought to rely on the remaining paragraphs. Therein Captain Simpson says that it would be impossible for BF officials to make a full risk assessment and undertake the necessary essential checks whilst at sea; and he goes on to explain this by reference to the difficulty of assessing: the construction and capacity of the boat; the workability of the engine; the adequacy of the equipment, including life jackets, smoke flares and a radio; and whether there was sufficient food and water for a return journey. Section 2.8 of this report appeared to cover issues that had also been addressed by Mr Schanck, and Mr Turner acknowledged that the contents were similar on this particular topic. We have already explained why these parts of Mr Schanck's report do not meet the test for admissibility and, for the same reason, we do not consider that these parts of Captain Simpson's report are reasonably required. We would make one further observation. We do not consider that admitting the reports of two experts who express essentially the same view on the same topic would reasonably be required. If we had accepted that the evidence of one expert on this topic satisfied CPR 35.1, we would have been minded to admit the material part of Mr Schanck's report in the first claim and grant permission to the claimant in the second case to rely on Mr Schanck's report. We would not have been minded to admit Captain Simpson's report as well. This is because he deals with this particular subject in less detail. We also note that in part Captain Simpson appeared to be willing to espouse views on matters that were not within his field of expertise, both of a legal nature and otherwise (for example predicting when those on the MV may feel panicked and how they would react in consequence).

71. In paras 2.9.1 – 2.9.21 the report addresses the MCA Marine Guidance Note MGN 599. In response to our questions, the only aspect that Mr Turner continued to place reliance on was the reference in para 2.9.5 to voyage planning and the difficulties of BF officials assessing the extent to which the MV crew had undertaken this. We do not consider that the test for admissibility is met in relation to this passage. Mr Turner accepted that it is not relied upon in Channel Rescue's Amended Statement of Facts and Grounds and it does not appear to us to materially add to the question of seaworthiness and the ability to assess it, which we have already addressed.

72. Captain Simpson sets out his conclusions in section 3 of the report. As would be expected, they largely reflect what has gone before in section 2 and Mr Turner accepted that they had no independent life. We simply note for completeness, that most of the

opinions expressed in this section concern matters that it will ultimately be for the court to decide (in so far as they reflect the correct test to be applied). By way of example, Captain Simpson says that the lives of those on board the MV would be at significant risk if the Pushback Policy is implemented (para 3.4); that it carries "the unacceptable risk of the interception of a migrant boat becoming, if it was not already, a distress situation if already traumatised people panicked" (para 3.5); and that in his opinion a MV "could not be safely turned back to the French coast… without extreme risk to the lives of those onboard… the Policy would create a real and present danger to life at sea…" (para 3.9).

Conclusion

73. For the reasons given above, we conclude that there are no parts of the report of Mr Schanck or the report of Captain Simpson that are reasonably required by the court to resolve these proceedings. We therefore refuse permission to the claimants to put these reports in evidence. We emphasise that this is the only question that we have addressed in this judgment. The parties' submissions as to the legality of the policy will be made at the hearing in May 2022 and will be considered by the court at that stage. Nothing that we have said in this judgment is to be taken as an expression of view or any comment upon those issues.