Neutral Citation Number: [2024] EWHC 1492 (Admin)

Case No: AC-2023-LON-001302

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/06/2024

Before:

THE HONOURABLE MRS JUSTICE HEATHER WILLIAMS DBE

- -

Between:

THE KING (on the application of TREVOR DONALD)	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**
- and –	
(1) BLACK EQUITY ORGANISATION **(2) UNISON** **(3) SPEAKER OF THE HOUSE OF COMMONS**	**Interveners**

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Phillippa Kaufmann KC, Grace Brown and **Elaine Banton** (instructed by **Deighton Pierce Glynn Solicitors**) for the **Claimant**
Edward Brown KC and **Sian Reeves** (instructed by **Government Legal Department**) for the **Defendant**
Nicola Braganza KC, Bijan Hoshi and **Christian Davies** (instructed by **Public Law Project**) for **Intervener (1)**
Karon Monaghan KC and **Eleanor Mitchell** (instructed by **UNISON Legal Services**) for **Intervener (2)**
Saira Salimi (instructed by the **Speaker of the House of Commons)** for **Intervener (3)**

Hearing dates: 23 and 24 April 2024

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Approved Judgment

This judgment was handed down remotely at 10.00am on 19 June 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE HEATHER WILLIAMS DBE

MRS JUSTICE HEATHER WILLIAMS DBE:

Introduction

1. The Claimant challenges the 7 December 2022 decision of the former Home Secretary, the Rt Hon Suella Braverman KC MP, not to proceed with certain recommendations made in the Windrush Lessons Learned Review ("WLLR"), namely Recommendations 3, 9 and 10 ("the challenged decision"). Permission to apply for judicial review was granted by Thornton J on 21 December 2023.

2. The Claimant was born in Jamaica on 6 August 1955. He came to the United Kingdom ("UK") in 1967 and continuously resided here until 22 February 2010 when he travelled to Jamaica, primarily to attend his mother's funeral. Thereafter he was not permitted to re-enter the UK for approximately nine years and was only permitted to do so as part of the Home Office's response to what became known as the Windrush scandal. He was granted British citizenship on 4 January 2022.

3. On 21 June 2018, the then Home Secretary, the Rt Hon Sajid Javid MP, commissioned Wendy Williams CBE as the Independent Adviser to the WLLR, which had been announced on 2 May 2018 as part of the response to the Windrush scandal. The WLLR was published in March 2020. On 23 June 2020, the then Home Secretary, the Rt Hon Priti Patel MP, delivered an oral statement to the House of Commons on the Windrush Compensation Scheme ("WCS"). In her statement she acknowledged that there had been "unspeakable injustices and institutional failings spanning successive Governments over several decades". Regarding the WLLR, she said that she would be "accepting the recommendations in full". Subsequently, on 30 September 2020, the Home Office published the Comprehensive Improvement Plan ("CIP") setting out a detailed response to the WLLR.

4. The Claimant contends that the challenged decision constituted: a breach of a substantive legitimate expectation that Recommendations 3, 9 and 10 would be implemented ("Ground 1"); a breach of a procedural legitimate expectation that a decision not to proceed with WLLR recommendations would not be taken in the absence of prior consultation ("Ground 2"); indirect discrimination in the traditional sense and/or *Thlimmenos* discrimination, contrary to article 14 European Convention on Human Rights ("ECHR") read with article 8 ("Ground 3"); a breach of the *Tameside* duty of inquiry ("Ground 4"); and/or a breach of the Public Sector Equality Duty ("PSED") in section 149(1) Equality Act 2010 ("EqA 2010") ("Ground 5"). The Defendant denies that the decision involved any public law unlawfulness. Ms Kaufmann KC confirmed at the hearing that although the Claimant's skeleton argument referred to direct discrimination, this was neither pleaded nor pursued.

5. I emphasise at the outset that my role is solely to determine whether these grounds of challenge are established. It is not the Court's role to express a view on the merits of the Defendant's policies in this area or to adjudicate between competing views on their desirability.

6. When granting permission for the claim to proceed, Thornton J permitted the Black Equity Organisation ("BEO"), UNISON and the Speaker of the House of Commons to intervene in the proceedings. BEO is a charity involved with dismantling racism in Britain and driving generational change. UNISON is the largest trade union in the UK

and has an estimated 185,000 Black members working across public sector services. Many of the members of BEO and UNISON are descendants of the Windrush generation and both organisations have campaigned in relation to the Windrush scandal. BEO and UNISON were granted permission to intervene by way of written and oral submissions. The Speaker of the House of Commons ("the Speaker") was granted permission to intervene by way of written submissions as the Defendant had raised a justiciability issue. The Speaker filed written submissions dated 27 March 2024. Whilst the non-justiciable contention is not now pursued, issues concerning the scope of Parliamentary privilege remain in relation to ministerial statements to the House of Commons and evidence given to the House of Commons' Home Affairs Select Committee ("HASC"). Save where I indicate to the contrary, references below to the "the Interveners" are to BEO and UNISON.

7. With the one qualification that I mention in the next paragraph, the parties agreed the following list of issues:

Ground 1: Breach of an alleged substantive legitimate expectation

Issue 1: Do the matters relied upon by the Claimant and/or the Interveners, including the CIP, establish a substantive legitimate expectation that the Court can enforce?

Issue 2: If so, was the Defendant's policy decision in December 2022 not to implement Recommendations 3, 9 and 10 an unlawful breach of any substantive legitimate expectation?

Ground 2: Breach of an alleged procedural legitimate expectation

Issue 1: Do the matters relied upon by the Claimant and/or BEO establish a procedural expectation of consultation?

Issue 2: If so, did the Defendant unlawfully breach any such procedural legitimate expectation?

Ground 3: Indirect discrimination contrary to Article 14 ECHR

Issue 1: Does the challenged decision amount to indirect discrimination on a "de facto" basis, on the grounds that it has a disproportionately prejudicial effect on the Claimant and/or members of the Windrush generation?

Issue 2: Does the challenged decision amount to indirect discrimination in the *Thlimmenos* sense, on the basis that it fails to treat differently persons whose situations are significantly different?

Issue 3: If the challenged decision fails to treat people in different situations differently and/or has a disproportionately prejudicial effect, is it objectively and reasonably justified by reference to the matters relied upon by the Defendant?

Ground 4: Breach of the *Tameside* duty of inquiry

Issue 1: Did the Defendant fail to conduct such inquiries as were required in law by reason of the *Tameside* duty of inquiry?

Ground 5: Failure to comply with the Public Sector Equality Duty

Issue 1: When making the challenged decision, did the Defendant comply with the requirements of the PSED in section 149 EqA 2010?

Damages:

Issue 1: Is an award of damages necessary to afford the Claimant just satisfaction?

Issue 2: If an award of damages is necessary to afford the Claimant just satisfaction, how much damages should be awarded?

8. The Claimant's position is that if he succeeds on Ground 3, the claim should be transferred for damages to be determined; whereas the Defendant submits that this is something that should be resolved by this Court (in circumstances where the Claimant has failed to articulate a proper damages claim). I indicated at the outset of the hearing that I proposed to leave all submissions on consequential matters until I had handed down judgment on the five grounds. The parties were content with this course.

9. The structure of this judgment is as follows:

Material facts and circumstances:

The legal framework:

Material facts and circumstances

Events prior to the WLLR

10. On 22 June 1948, the ship HMT Empire Windrush brought 1,027 passengers from the Caribbean to the UK. This journey has come to symbolise post-war Caribbean migration to the UK at the end of the empire. According to the WLLR, 600,000 post-colonial immigrants from Africa, the Caribbean and the Indian subcontinent came to the United Kingdom between 1948 and 1973. In the "Background" section of her March 2022 WLLR Progress update report ("the Progress Report"), Wendy Williams gave the following summary of how the Windrush scandal developed:

> "Although an Act of Parliament entitled people from the Commonwealth who arrived before 1973 and who were in the UK to the 'right of abode' or 'deemed leave' to remain in the UK, it hadn't automatically given them the documentation to prove it. Nor had the Home Office kept records confirming their status. So, unless they made a further application and paid a fee, they had no way of showing that the UK was their rightful home, even though in most cases they had known no other. Some of the Windrush generation retained British status under changes to legislation in the 1980s.
>
> Others had a right to register, but that was time-limited and not widely publicised. As successive governments introduced measures to discourage migrants from entering the UK illegally, they increasingly focused on requiring people to provide documentary proof of status to access public services and other essentials, such as work, driving licences, housing and healthcare. Subsequently, cases started to emerge where members of the Windrush generation couldn't access public services as they were unable to prove their status. When they took steps to establish their status, the Home Office had no record of them, and in some cases triggered enforcement action and either removal from the UK or refusal of re-entry. This is how the tragedy unfolded."

11. In her witness statement dated 15 February 2024, Louisa Darian, Senior Civil Servant and former Deputy Director of the Home Office Windrush Programme, acknowledges that the "Windrush Scandal was a consequence of changes in Government policy in relation to immigration that failed to appreciate the historic status of (principally) immigrants from Commonwealth countries under Twentieth Century immigration legislation".

12. The experiences of Trevor Donald, the Claimant, and Michael Braithwaite (one of UNISON's witnesses), are illustrative of the circumstances summarised by Wendy Williams.

13. Mr Donald was born in Jamaica on 6 August 1956. His father migrated to the UK when he was a young boy. He travelled to the UK to join him on 22 July 1967 when 12 years old. He then lived continuously in the UK until February 2010. He had six

children in the UK and a number of grandchildren, who are all British citizens. In 2008 Mr Donald attempted to obtain British citizenship. He was asked to evidence his continuous residence in the UK since 1967 and, whilst he submitted some documentation, he was unable to do this to the Home Office's satisfaction. He wanted to travel to see his mother, who was not in good health. In the event she died on 28 January 2010 and Mr Donald decided to travel to Jamaica on 22 February 2010, using his Jamaican passport, so that he could attend her funeral. He was then unable to return to the UK. His visa applications were refused and he had to remain in Jamaica in poor conditions for nine years, estranged from his life in the UK. He missed critical moments in the lives of his children and lost his council flat and most of his possessions. In 2018 he was contacted by the Home Office and subsequently received a letter of apology from the then Home Secretary, Sajid Javid. He was able to return to the UK on 2 May 2019. On 19 April 2020 he applied for British citizenship under the Windrush Scheme and this was eventually granted on 4 January 2022, after he had initiated judicial review proceedings.

14. Michael Braithwaite came to the UK on 25 November 1961 as a nine-year-old child with his two brothers, to join his parents who were working in London. He stayed in the UK, marrying and having children. After a variety of jobs, he worked for 15 years as a teaching assistant at a particular school. However, in February 2017 he was dismissed from his employment as he was unable to obtain a biometric card showing he was eligible to work in the UK. It was only later, with the assistance of his UNISON representative, that he was able to establish that he had indefinite leave to remain. He obtained British citizenship in May 2023.

The WLLR

15. Wendy Williams is His Majesty's Inspector of Constabulary and His Majesty's Inspector of Fire and Rescue Services. I have already referred to her appointment to the WLLR. The purpose of the WLLR was to provide an independent assessment of the events leading up to the Windrush scandal and to identify key lessons for the Home Office for the future. The Home Office also set up the WCS and the Windrush Taskforce to provide help with formalising people's legal status.

16. The WLLR was published in March 2020. On page 24, the report referred to the Windrush generation sharing the protected characteristic of race ("national origin, ethnicity, nationality, and colour; the majority are black"). Part 4 of the report set out "Findings and recommendations". The introductory section to Part 4 noted that the recommendations could be boiled down to three elements, "the Home Office must acknowledge the wrong which has been done; it must open itself up to greater external scrutiny; and it must change its culture to recognise that migration and wider Home Office policy is about people and, whatever its objective, should be rooted in humanity". The recommendations were described as falling into four broad categories: the department's interaction with the communities it serves and with external stakeholders; the department's interaction with its people; the department's role in wider government; and the department's approach to race, diversity, and inclusion.

17. Recommendation 1 was that on behalf of the department, ministers should "admit that serious harm was inflicted on people who are British and provide an unqualified apology to those affected and to the wider black African-Caribbean community as

soon as possible". Recommendation 2 was for the Home Office to publish a CIP within six months of the report, which "takes account of all its recommendations, on the assumption that I will return to review the progress made in approximately 18 months' time".

18. Recommendation 3 was in the following terms:

> "**Recommendation 3** - In consultation with those affected and building on the engagement and outreach that has already taken place, the department should run a programme of reconciliation events with members of the Windrush generation. These would enable people who have been affected to articulate the impact of the scandal on their lives, in the presence of trained facilitators and/or specialist services and senior Home Office staff and ministers so that they can listen and reflect on their stories. Where necessary, the department would agree to work with other departments to identify follow-up support, in addition to financial compensation."

19. In introducing this recommendation, Wendy Williams acknowledged the measures that the Home Office had already put in place to provide redress for those affected, through the Windrush Taskforce, the exceptional payments policy and the WCS. She observed that whilst these measures would help alleviate some of the practical issues faced by the Windrush generation, purely financial help would not be enough. She said that she saw Recommendation 3 as part of the process of helping people come to terms with their experiences.

20. Recommendations 8, 9 and 10 appeared under the sub-heading "Engage meaningfully with stakeholders and communities". Wendy Williams observed that it was not clear that the Home Office had learnt the wider lesson that "it should be engaging meaningfully with the communities it serves". She said that the true test would be whether stakeholders, including those considered to represent critical voices, were invited to participate in developing the department's policies and in designing, implementing and evaluating them; and whether they considered that they had been heard. Recommendation 8 was that:

> "**Recommendation 8** – The Home Office should take steps to understand the groups and communities that its policies affect through improved engagement, social research, and by involving service users in designing its services. In doing this, ministers should make clear that they expect officials to seek out a diverse range of voices and prioritise community-focused policy by engaging with communities, civil society and the public. The Windrush volunteer programme should provide a model to develop how the department engages with communities in future…"

21. The report noted that some independent oversight existed in the form of the Independent Chief Inspector of Borders and Immigration ("ICIBI"), but that the Home Office had failed to address his recommendations sufficiently or to encourage wider community scrutiny and involvement. She noted that the ICIBI was reliant on

information provided by the department and did not investigate individual cases, as opposed to looking at teams and processes within the Home Office. She said that it was unlikely that the ICIBI would have received the sort of data that would have led to the Windrush generation being identified as an at-risk cohort. She considered that: "Effective independent oversight of the system – including introducing the voice of the individual and communities – will be vital to improve the accountability, effectiveness and legitimacy of the system".

22. Recommendations 9 and 10 were as follows:

> "**Recommendation 9** – The Home Secretary should introduce a Migrants' Commissioner responsible for speaking up for migrants and those affected by the system directly or indirectly. The commissioner would have a responsibility to engage with migrants and communities, and be an advocate for individuals as a means of identifying any systemic concerns and working with the government and the ICIBI to address them.
>
> **Recommendation 10** – The government should review the remit and role of the ICIBI to include consideration of giving the ICIBI more powers with regard to publishing reports. Ministers should have a duty to publish clearly articulated and justified reasons when they do not agree to implement ICIBI recommendations. The ICIBI should work closely with the Migrants' Commissioner to make sure that systemic issues highlighted by the commissioner inform the inspectorate's programme of work."

23. The majority of the 30 recommendations concerned Government policy rather than legislative reform. Accordingly, whether and in what form to implement them was a matter for decision-making by ministers. Ms Darian says that successive Home Secretaries have been personally involved in the development of this policy.

The initial response

24. On 19 March 2020, the then Home Secretary Priti Patel MP acknowledged in Parliament that "some members of the Windrush generation suffered terrible injustices spurred by institutional failings, spanning successive Governments over several decades". She referred to the WLLR's findings that the injustices had several causes including institutional ignorance and thoughtlessness towards issues of race. She apologised unreservedly for the pain, suffering and misery caused to members of the Windrush generation and their families. She promised to provide a formal response to the WLLR.

25. On the same day, the Home Secretary also announced the creation of the Windrush Cross-Government Working Group ("WXGWG") and its sub-groups. The terms of reference for the WXGWG, published on 28 July 2020, said that the WXGWG brought together stakeholder and community leaders with senior representatives of Government departments. The stated purposes of the WXGWG included, to "provide strategic input into the Home Office's response" to the WLLR and to "support the design and delivery of practical solutions to address the wider challenges that

disproportionately affect people from BAME backgrounds". The list of the WXGWG's objectives included providing "feedback and insights from affected communities, and expertise and experience of developing and delivering practical, evidence-based solutions in addressing challenges". The stakeholder and community leader representatives were listed. Bishop Derek Webley and the Home Secretary were to co-chair the WXGWG, which was to meet quarterly, with sub-groups meeting monthly.

26. In her statement to Parliament on 23 June 2020, the Home Secretary accepted that the WLLR was damning about the conduct of the Home Office and "unequivocal about the 'ignorance and institutional thoughtlessness towards the race and history of the Windrush generation' by the department". She acknowledged that there were "serious and significant lessons for the Home Office to learn" and that she would be "accepting the recommendations she has made in full".

27. Recommendation 6 of the WLLR was that the Home Office should devise and implement a comprehensive learning and development programme to ensure that its staff learnt about the history of the UK and its relationship with the rest of the world, including Britain's colonial history, the history of inward and outward migration and the history of Black Britons. This led to the "Historical Roots of the Windrush Scandal" report. The executive summary identified the lessons to be learned from the historical roots of the scandal as follows:

> "1. The Windrush Scandal was caused by a failure to recognise that changes in immigration and citizenship law in Britain since 1948 had affected black people in the UK differently than they had other racial and ethnic groups. As a result, the experiences of Britain's black communities of the Home Office, of the law, and of life in the UK have been fundamentally different from those of white communities.
>
> 2. Major immigration legislation in 1962, 1968 and 1971 was designed to reduce the proportion of people living in the United Kingdom who did not have white skin.
>
> 3. The relationship between the Home Office and organisations set up to deal with race relations was dysfunctional in the second half of the twentieth century…"

The CIP

28. The CIP was published on 30 September 2020. In her Foreword, the Home Secretary said that she had listened to Wendy Williams "and accepted her findings". She explained that the CIP set out how the Home Office was acting on each of the issues raised by the WLLR. She said they were "liaising with Wendy Williams, community leaders and the [WXGWG] to get it right" and that "We will continue to listen and act carefully over the months and years ahead to build a Home Office fit for the future, one that serves every corner of society". She added that her resolve to deliver for the Windrush generation and their descendants was absolute. Introductory remarks by the Permanent Secretary and Second Permanent Secretary included their own apologies for "the appalling mistreatment that some members of the Windrush generation

suffered as a result of the policies and actions of this department". They said that they had taken the lessons from the review to heart and that they would go beyond the recommendations and keep the long-term focus on wholesale and lasting cultural change.

29. The CIP indicated that the WLLR's recommendations had been organised into five broad, connected themes (para 12). Theme 1, "Righting the Wrongs and Learning from the Past", included Recommendation 3 and Theme 4, "Openness to Scrutiny" included Recommendations 8, 9 and 10. The report noted that Wendy Williams would return to the Home Office in around 12 months' time to review progress and that her findings would be published (para 35).

30. In relation to Recommendation 3, the CIP said the following:

> "41. **We are hosting a series of events** to allow members of the Windrush generation and their wider community to share their experiences. By engaging with their stories, the Home Office can acknowledge, continue to learn from the past and take the necessary measures to improve the culture in the department. We also want to celebrate the contribution of members of the Windrush generation to the UK, as a form of cultural commemoration, rebalance the Home Office's relationship with communities and look to the future.
>
> 42. We have discussed our approach to this recommendation with a wide range of stakeholders, including community and faith leaders and the Home Office network of Windrush volunteers. **We are working closely with the Windrush Cross-Government Working Group to design and develop the events** with an implementation time period for early 2021. Where necessary, the Home Office will work with other departments and the membership of the Working Group to identify follow up support, in addition to financial compensation." (Emphasis in original.)

31. In relation to Theme 4, the CIP indicated that the Home Office was "involving communities and stakeholders in all our policy development and implementation" and that the role of the ICIBI was being reviewed with a view to making it more independent and efficient. Para 161 noted that Theme 4 was about ensuring that the Home Office "is an outward-facing department that listens to, and acts on, the view and challenges of both staff and external stakeholders". As regards Recommendation 8 the CIP said:

> "162. We are taking steps to ensure we consistently involve communities and stakeholders in policy development and service design by building the department's skills and confidence in conducting meaningful engagement…We will systematically identify who the stakeholders or impacted groups are across different business areas, assessing the degree of current engagement and developing a strategy to improve this…To lead the way on community and stakeholder

> engagement we are forming a Community and Stakeholder Engagement Hub that will sit at the very centre of the department."

32. In response to Recommendation 9 the CIP said:

> "167. We agree that this would be a valuable role, to engage with migrant communities directly and facilitate their feedback into the Home Office to be considered in our policy development and operational activity.
>
> 168. We are consulting with the Windrush Cross-Government Working Group to recommend how best to advance this recommendation, including which external voices to engage with.
>
> 169. The success of this recommendation is likely to be judged by the quality of the feedback and its impact on the work of the department. We may also survey migrants to assess the effectiveness of our approach."

33. In relation to Recommendation 10 the CIP said:

> "170. We will seek to appoint an independent reviewer this year and plan to carry out a full review of the ICIBI in the first quarter of 2021 with a view to making the ICIBI more independent, effective and efficient. The review will consider the capabilities, organisational structure, role and remit of the ICIBI, as well as considering whether to establish a duty on the Home Office to explain why it is not accepting recommendations.
>
> 171. Through the review we will look at how other independent inspectorates are funded, their way of working and how other Home Office assurance functions operate. We have discussed the issues raised in the report and the specifics of this recommendation with the incumbent Independent Chief Inspector to gain insight from his experience.
>
> 172. We will then use the findings of the review to consult on changes to the ICIBI. Where formal scrutiny is not working, we will not hesitate to make further changes.
>
> 173. We expect to judge whether the changes to the role and remit of the ICIBI have been successful by the percentage of responses to reports completed within expected time frames, and the number of recommendations implemented."

Recommendation 3: the chronology

34. On 1 April 2021 officials provided the Home Secretary with an update on Recommendation 3, proposing that she agree the approach it set out for implementing

the recommendation. This included plans for external facilitation of events working with Bishop Rose Hudson and Belief in Mediation and Arbitration ("BIMA") and that the Home Secretary and her ministers would take part in some of the events. The document noted that officials were assessing the outcomes of a national communication campaign to raise awareness of the Windrush Scheme and that once this was done an Equality Impact Assessment ("EIA") covering communications, outreach and engagement would be updated.

35. The 'Discussion' section of the submission said that stakeholder feedback and experience of engagement events indicated that "there are those impacted members of the Windrush generation and their families who actively want to tell their stories and share their experiences" and that there was "the need to provide opportunities for that to happen". However, the text continued that, "Equally there are strong views that this needs to be approached very carefully, drawing on respected experts. This recommendation has been one of the more sensitive ones to negotiate a way forward on with the various stakeholders" (para 4). The approach outlined in the document had been tested with a wide range of stakeholders, including members of the WXGWG, the former Windrush Stakeholder Advisory Group, the Home Office network of Windrush volunteers and Wendy Williams (para 5).

36. In her statement, Ms Darian says that consultation with interested parties continued after the April 2021 submission and that at times the personal testimony "caused a high level of distress, and required care and patience in approach – this was of concern to all when considering how to give effect to the recommendation" (para 33).

37. An email sent on 2 July 2021 set out a revised plan. The background to this was that Home Office officials had recently met with members of the WXGWG and:

> "The Working Group continue to feel quite strongly about the sensitivities of this rec and engaging the Windrush Generation and encouraging them to share what might be painful stories, without being clear of the final outcome. They are keen to understand what difference would this make to the lives of the people who have shared their stories? What does the department hope to achieve from running these events? They are concerned the implementation of this recommendation could lead to some backlash in the media and from affected communities if there is not a clear outcome to hosting them."

38. The email said that, as the Home Secretary had "publicly committed to accepting all of the recommendations", a phased approach had been agreed with Bishop Webley. Phase 1 would involve the recommended external facilitators, BIMA, conducting a consultation exercise with stakeholders including the WXGWG, to scope the work and draw up a recommendation as to what the events could look like. The detailed proposals would then be the subject of reflection and the views of WXGWG, officials and others would be sought, ahead of deciding whether to commission the next phase. Phase 2 would entail delivering the events and would only be commissioned if and when Phase 1 met the expectations of those consulted and the plan for Phase 2 achieved sign off from the Home Secretary. An email sent on 6 August 2021 indicated that the Home Secretary had approved the suggested approach of starting Phase 1.

39. Bishop Webley wrote to the Home Secretary on 16 August 2021 voicing concern that the WXGWG had been held out as endorsing the Home Office's approach to Recommendation 3. He said that this was not the case and that WXGWG were "vehemently opposed to such events". In a further letter to the Home Secretary dated 4 October 2021, Bishop Webley indicated that it was WXGWG's view that "the moment had long since passed for its usefulness for Windrush victims" and that they remained "adamant" that Recommendation 3 should not be implemented. He continued that the WXGWG were "gravely concerned" that reconciliation events would prove divisive and could reignite divisions and discord.

BIMA 1

40. The first BIMA report, dated 14 October 2021, was entitled "Consultation with Windrush Stakeholders about the Appropriateness and Effectiveness of the Implementation of WWR's Recommendation 3" ("BIMA 1"). The author, Dr Zaza Elsheikh (referred to as "the Facilitator"), said her brief was to consult with the Windrush generation and their descendants, "to ascertain if there was sufficient appetite and readiness amongst their members to meet with Home Office staff and ministers as per Recommendation 3, or not" (para 1.2). In terms of the methodology, 21 days were allowed for the consultation; the Home Office had approached all stakeholders known to them and 17 of these had agreed to engage, a number that subsequently reduced to 14 (paras 2.1 – 3.7).

41. Under the sub-heading "Lack of a United Community Front", the report said that some of the Windrush Community Ambassadors, who had formed an alliance with the recently established Windrush National Organisation, had a significant level of mistrust in the WXGWG; and that there was also "a concerning level of division" between individuals of African and those of Caribbean heritage (paras 6.1 – 6.4). Under the sub-heading "Allegations of Racial Discrimination", the report noted that most of the contributors shared the belief that race was the fundamental reason that the Home Office had misinterpreted legislation which led to Windrush generations being wrongly deprived of citizenship (para 6.9). The report indicated that ten contributors were supportive of the events proceeding and two had insisted that it was too soon because the hostility had not ceased (para 7.1).

42. The report's conclusions included the following:

> "8.1 The Facilitator recommends proceeding with the events to ensure that this unresolved situation is prevented from becoming a weeping sore….
>
> 8.2 …more consultation on the design state is required to ensure that a more diverse range of participants are involved…
>
> 8.3 The 4 hour… events should be offered as a series of opportunities to be shared in a non-judgmental and empathetic listening environment.
>
> 8.6 These series of events will allow frustration to be fully ventilated by the contributors in the presence of Home Office

> representatives as well as officials representing other agencies such as Social Services, Mental Health, Primary Care…
>
> 8.7 If officials are able to walk towards anger, prejudice and suspicions in an empathetic non-judgmental way to prove their openness to accepting accountability, transformation of the current narratives will occur…"

43. On 25 November 2021, the Home Secretary and the Immigration Minister were asked to approve a plan to proceed to Phase 2 and to agree that officials would come back to ministers with "detailed design proposals ahead of you taking a decision about whether to deliver the events". The "Discussion" section of the submission recorded that due to the sensitivities of the recommendation, officials had considered whether to stop all work on it "and advise that despite you…accepting the recommendation, we should change our decision and not pursue the work" (para 4). Reference was made to this having "proved to be one of the most emotive recommendations and there is considerable opposition to it and divergence of views". However, officials went on to say that they considered it premature to reject the recommendation. The document referred to the conclusions of BIMA 1 and the views of the WXGWG (paras 5 – 6). It recommended a specific design phase, working again with BIMA and those who had contributed to the consultation phase "and that we should reserve judgment on whether to go ahead with a programme of work until that phase is complete and we have a detailed proposition to consider" (paras 7 – 8). Officials said that throughout implementation of the recommendation they were considering the PSED and they would ensure that the EIA was shared with the external facilitator if selected to design the events (para 16).

44. An email sent on 9 December 2021 indicated that the Home Secretary agreed with the recommendation and that she had asked that the WXGWG continue to be involved.

The Progress Report

45. In March 2022 Wendy Williams published the Progress Report. She had been invited back to the Home Office to consider the progress made in implementing her recommendations. The "Introduction" section indicated her understanding that: "The Home Office accepted all 30 recommendations and published a… [CIP]…which set out how it would implement my recommendations". She said that her "starting point" was that the department had accepted all her recommendations. Overall, she considered that "some progress" had been made on most of her recommendations, that "marked progress" had been made on several, but that there were other areas where the department "has not made progress at the pace it envisaged, or in some cases at all". She highlighted the lack of progress made in relation to Recommendations 3, 8, 9 and 10. I will return to this report when I set out the chronology concerning Recommendations 9 and 10. For now I will focus on Recommendation 3.

46. The Progress Report expressed Wendy Williams' disappointment that in the two years since the WLLR no formal reconciliation events had taken place (para 1.4). In the section of the report devoted to Recommendation 3, she said that she would have expected to see the department hosting reconciliation events with members of the Windrush generation, with senior Home Office staff and ministers present. Her

understanding was that the CIP had made a "clear commitment" to implement Recommendation 3 and to hosting events in early 2021 and she considered that the department's response was inadequate. She accepted that it had proved challenging to implement the recommendation, given the different views expressed by those consulted, and that her own engagement activity confirmed this divergence of opinion. She noted that the department was unable to point to any target dates for when events would take place and she felt that this cast doubt on whether they would take place at all. She said the department had referred to many other public engagement events that had occurred (more than 180) and that these were "clearly relevant", but they did not focus on the specific circumstances that Recommendation 3 was designed to address. She considered that there remained "a need for that work to be done". She acknowledged that the "path towards implementing the recommendation is not easy", but she nonetheless considered that insufficient progress had been made and she encouraged the department to address the issues she had identified.

BIMA 2

47. The second BIMA report, dated 15 September 2022, was entitled "Consultation on Design of Reconciliation Events" ("BIMA 2"). It explained that the consultation period had run for six months, to allow for more extensive consultation (para 2.1). The Home Office had forwarded invitations to contribute to 51 stakeholders and some of these primary contributors had introduced secondary and tertiary contributors (paras 3.1 – 3.4). Sections 7 and 12 of the report addressed the proposed design of the events in detail, noting that "Many of the contributors were keen to proceed with a pilot in London as soon as practicable" (para 7.9). The report said that "the overwhelming majority of contributors, 62 out of 63 contributors were enthusiastic and supportive" of the events taking place (para 10.3). Despite an invitation to participate, there had not been any contributions from the WXWGW (para 11.3). In terms of whether the events should proceed the report said:

> "14.1 The Reconciliation Events provide an ideal, albeit challenging, opportunity to rebuild trust between senior officials and community members…
>
> 14.2 To withdraw this opportunity after having accepted Recommendation 3 would become a huge impediment to any efforts to build trust in the future. If these events do not take place, the voices of doubt about transparency and accountability in government would undoubtedly be amplified. These voices would damage fragile community relations because of a compounded sense of not being valued for the multiple facets of their identities."

48. Ms Darian says that the difficulties of reaching a consensus mirrored the experience of Home Office Officials when they had explored delivery options the previous year (statement, para 37). She indicates that the WXGWG maintained their opposition to the events; that the "views of this group were given significant weight by Ministers both in the Home Office and No10"; and that other recommendations "were being, or had been, implemented that meant related lessons – such as seeing the face behind the

case and considering the ethics of a decision – were being embedded to strengthen protections against such a scandal happening again" (para 38).

The September 2022 Submission

49. In a submission to the Home Secretary dated 26 September 2022, officials addressed whether to proceed with Recommendations 3, 6, 7, 9 and 10 ("the September 2022 Submission"). Ms Darian says that the document was prepared following a meeting in September 2022 with the Second Permanent Secretary (statement, para 39). By this point Suella Braverman was now Home Secretary, having been appointed on 6 September 2022. (She remained Home Secretary until 13 November 2023, save for a short period in October 2022.) The submission said that the WLLR had made 30 recommendations "all of which the department accepted in full in its response, the… CIP". It recommended that Recommendation 3 was not proceeded with. In this regard, the document summarised some of the history including: (i) that the WXGWG "explicitly advised that these events do not go ahead", as they questioned whether it would build back trust and they identified risks in encouraging attendees to speak about traumatic events without professional support (para 24); and (ii) BIMA 2's recommendation that it would be more detrimental not to have some reconciliation events (para 25). The conclusion at para 26 said that:

> "There are risks of not delivering on this commitment. We are likely to face criticism from stakeholders, including those that participated in the consultation exercise and it could damage trust within fragile relationships. That said, we have already conducted more than 200 engagement events, and have made a number of changes to the compensation scheme to improve its operation and to encourage more to apply. And we will continue to do more in both of these areas. Given this, and the amount of time that has elapsed since the recommendation was made, we **recommend you do not proceed. Do you agree?**" (Emphasis in the original text.)

50. Under the heading "Public Sector Equality Duty" the September 2022 Submission said:

> "34. Each recommendation has considered the Public Sector Equality Duty. Officials note that progressing with the recommendation in this submission will improve community relationships.
>
> 35. **Not proceeding with recommendations 3 and 9 are likely to have adverse impact on the protected characteristic of Race (those predominantly impacted by Windrush are from the black Caribbean community) and Age (majority of the WLLR victims are aged 50-70). However, officials, believe any adverse impacts can be justified as a proportionate means of achieving a legitimate aim, as set out in paragraphs 23 – 30 above.**" (Emphasis in the original text.)

Recommendation 9: the chronology

51. On 7 September 2020 officials submitted advice to the Home Secretary on how to respond to Recommendation 9. The submission described Recommendation 9 as "a key recommendation that is important in substance but is also symbolic of our intent to change the way that we as a department work and engage externally" and indicated that the purpose of the paper was to "consider the nature of the role that you want to create to satisfy both the wording and intent of the recommendation". Officials recommended that the Home Secretary confirm that she would like to create a Migrant Envoy to act as the voice of migrants and inform development of Home Office policy and that the role be created on a non-statutory basis with a commitment to review and consult on the status of the Envoy in two years' time.

52. The "Discussion" section of the document said that having consulted with stakeholders, staff and interested parties, officials envisaged that the primary role of the Envoy would be to engage with organisations that represented the interests and concerns of migrants to the UK and to act as a conduit between the Home Office and this sector (para 3). It was noted that most, if not all, of the recommendations "should promote the aims of the PSED" and that "we will need to consider this in more detail as we develop delivery plans".

53. An email sent on 21 September 2020, indicated that the Home Secretary agreed with officials' recommendations. Ms Darian says that there had been a strong steer from the Prime Minister's office away from an individual Commissioner undertaking the role, as there was a wider policy against the creation of new public bodies (statement, para 41).

54. A year later, a submission from officials dated 15 September 2021 sought the Home Secretary's steer on how to take forward Recommendation 9 in light of advice from the WXGWG Sub-group set out in a letter dated 13 August 2021. This Sub-group had been commissioned to provide advice to ministers on how to progress Recommendation 9. Ms Darian says that the Sub-group met on a number of occasions, that it considered papers from officials and related material, including reports from the Institute for Government, and that it was kept appraised of Home Office consultation which included external voluntary and community sector groups and Wendy Williams (statement, para 43). The 15 September 2021 submission said that the Sub-group had undertaken informal engagement with stakeholders including other commissioner bodies and representatives from the migrant community via existing Home Office advisory groups; and had been informed of the Home Secretary's preference that the WXGWG take on the Migrants' Commissioner role (para 4).

55. The letter from the Sub-group indicated that the WXGWG did not have the requisite structure, longevity or skills to fulfil the Migrants' Commissioner role. The Sub-group's preferred option was to create a stakeholder group comprised of representatives from existing migration bodies to undertake the Commissioner's function, led by a chair recruited through the public appointment process.

56. The submission identified a number of advantages and disadvantages with the Sub-group's proposal. Advantages included that this approach would "satisfy the commitment made in the" CIP, which was important "as we know this is a

recommendation that Wendy Williams is particularly interested in". The document observed that if she did not want to accept the Sub-group's advice, the Home Secretary had the option to not implement anything and that there was some rationale for this "given the already crowded landscape of immigration bodies with occasionally overlapping functions, not to mention the WLLR recommendations that are yet to be implemented creating an Independent Complaints Examiner" and Recommendation 10 (para 12). It went on to note that to do nothing would be, "a difficult position to take…as you previously accepted the recommendation in full and stakeholders and Parliament would likely criticise the decision…It would also renege on your commitment to Wendy Williams to implement her recommendations in full" (para 13).

57. Officials proposed that the Home Secretary agree to the WXGWG's recommended approach in part, in that she accept the creation of a non-statutory panel with a chair recruited by the public appointments process, but that whilst its role became established, the panel was not added to those bodies regulated by the Commissioner for Public Appointments (para 16). The submission indicated that officials believed the creation of the Migrants' Commissioner function "should help to promote the aims of the PSED in eliminating unlawful discrimination; advancing equality of opportunity; and fostering good relations"; that a full EIA would be completed once the final delivery plans had been agreed; and that all possible delivery options would "enhance the protections for all migrants and provide greater representation to ensure their voice is heard and reflected within Home Office policy" (para 25).

58. A later submission to ministers dated 30 March 2022 referred to the Home Secretary having indicated her broad support for establishing a non-statutory stakeholder group to fulfil the Migrants' Commissioner function and her having asked officials to consider whether a new group should be created or whether an existing group could be used, of which her preferred option was the FBIS Vulnerability Advisory Group.

59. I have already referred to Bishop Welbey's letter of 4 October 2021 (para 39 above). The letter described Recommendation 9 as being "of serious concern" to the WXGWG. The Bishop said that the WXGWG had consistently reminded the Home Office of the distinction between the current wave of migrants and those of the Windrush era and that given their limited knowledge of immigration law and matters relating to modern day migration, the WXGWG had resisted the request to take on the Migrants' Commissioner role. Bishop Webley said that the Sub-group had not engaged with key stakeholders or migrant sector representative groups and their input was confined to liaison with Home Office Officials and their extensive "knowledge of the Windrush community in the narrowest sense".

60. Further advice to ministers dated 30 March 2022 sought the Home Secretary's agreement to proceeding with her preferred option for a stakeholder group with a publicly appointed chair and for officials to begin work on taking this forward. The paper noted the pros and cons of using the FBIS Vulnerability Advisory Group, as opposed to a new non-statutory stakeholder group.

61. An email sent on 24 May 2022 indicated that the Home Secretary had decided to pause the appointment "at this time. Something to be revisited later in the year".

The Progress Report

62. In the meantime (31 March 2022) in the introduction to her Progress Report, Wendy Williams urged the Home Office to implement Recommendation 9 without further delay. In the section of her report addressing Recommendation 9, she noted that the CIP made no commitment to a process or timescale for implementation and, accordingly, she assessed the plan as inadequate. She also described the WXGWG Sub-group's proposal as "something substantially different" from Recommendation 9. She did not consider that consulting with the WXGWG as to whether they could take on the Migrants' Commissioner role was a helpful way to address the recommendation, as the Commissioner's remit would extend far beyond the Windrush generation and it would provide an important opportunity for the department to understand the migrant experience and to use this insight to inform effective policy. She described the proposal approved by the Home Secretary for the Commissioner to be the chair of an existing advisory group as "a welcome step forward", but she felt that it remained to be seen whether this would achieve the spirit of the recommendation.

63. An undated update requested by the Defendant's Private Office noted that Wendy Williams had continued to set out the importance of the Migrants' Commissioner in a range of departmental and public forums. The document said that at a recent meeting of HASC, the ICIBI, David Neal, had reiterated the lack of progress made in respect of Recommendations 9 and 10; and that in response to a letter from the HASC Chair sent after the meeting, the Home Secretary had said that she remained committed to introducing a Migrants' Commissioner.

64. The 30 March 2022 submission to ministers was resubmitted in June 2022.

65. On 1 August 2022, officials wrote to the Second Permanent Secretary expressing concern about the lack of progress in respect of Recommendation 9. The letter indicated that the Home Secretary's steer was still awaited on the 30 March 2022 submission. The document continued:

> "**Whilst the Home Secretary *stated* that all 30 of the WLLR recommendations were accepted, the multiple delays faced by recommendation 9, and arguably 10, puts the department at risk of failing to do so in practice.** We are concerned communicating publicly that the department has accepted all 30 and is progressing recommendation 9 is no longer factual and would go against the Civil Service value of 'honesty' should we continue to do so. We have therefore assessed the need to remove references to officials progressing recommendation 9 and/or amending to say this work has been paused in line with recommendation 10, from our lines, as well as removing references to accepting all 30 recommendations when not referring retrospectively, unless there is a clear steer from the Home Secretary. There is of course still a large amount of positive work happening on Windrush which we will continue to point to.
>
> **We believe it is also now appropriate to officially pause work on implementing recommendation 9 until the Home**

> **Secretary has made a decision on how it should progress**."
> (Emphasis in the original text.)

The September 2022 Submission

66. The September 2022 Submission recommended that the Home Secretary did not proceed with Recommendation 9. The supporting analysis appeared at paras 27 – 30. Reference was made to Wendy Williams seeing this recommendation as a crucial means of flagging up systemic risks, to the view of the WXGWG Sub-group and to the March 2022 submission. The text then said:

> "**There are reputational risks attached to not proceeding with this recommendation** given the importance attached to it by Wendy Williams and other stakeholders. That said, we do not consider that a new group will meet the expectation of stakeholders and, in the absence of creating a statutory commissioner, believe that there are **other opportunities to fulfil the spirit of this recommendation more effectively**. This includes reforming the ICIBI (see recommendation 10 above) and/or the continued work of our Community and Stakeholder Engagement Hub (improving how the department engages with stakeholders). **We therefore recommend that you do not proceed with this recommendation. Do you agree?**" (Emphasis in the original text.)

67. Ms Darian says that in the lead up to the September 2022 Submission, officials considered the work already implemented or in train in relation to other recommendations, including work "to improve capability, capacity, and confidence of officials to undertake meaningful consultation, or the training that was underway to improve how impacts were assessed" (statement, para 45).

Recommendation 10: the chronology

68. On 18 November 2020 officials submitted advice to the Home Secretary setting out the options for appointing an independent reviewer and the selection criteria to be used. The document referred to the department having made "a public commitment to undertake a review of the" ICIBI; and commented that ensuring delivery of this commitment "is now particularly important given that we will be changing our original position on the Migrant Envoy" and that demonstrable progress on this recommendation would provide stakeholders with reassurance that the department was committed to delivering real change. The text also referred to the Home Secretary having announced that the department was accepting the recommendation in full in her 23 June 2020 Ministerial statement. The Home Secretary was asked to agree the approach set out for the appointment of an independent reviewer, agree the proposed selection criteria and confirm any names she would like added to the longlist of potential reviewers. The body of the document discussed three options for appointing the reviewer: direct appointment, limited competition, or full and open competition. Direct appointment was the recommended option, given the timeframe was short and that as the role was to last for less than 18 months, an open appointment process was not required.

69. An email sent on 1 February 2021 said that the Home Secretary had reviewed the submission and noted the process outlined in its recommendations.

70. A further submission was sent to the Home Secretary on 15 March 2021. The document indicated that a list of possible candidates had been developed and that her agreement was sought to officials contacting these potential candidates to gauge their interest and availability. The text noted that the Home Office had committed to announcing a reviewer before the end of 2020 and commencing the review in the first quarter of 2021. An email sent on 9 April 2021 said that the Home Secretary agreed with the recommendation.

71. A submission from officials dated 25 May 2021 indicated that the shortlisted candidates had now been spoken to. An update on these discussions and recommendations on appointable candidates was provided. The document recommended (in bold text) that the "review should get under way very soon in order to demonstrate our continued commitment to meeting the Windrush recommendations". The Home Secretary was asked to provide a steer on her preferred candidates.

72. An email sent on 14 June 2021 indicated that the submission had been considered by her special advisers who were concerned that the appointment of the reviewer was not following the usual public appointments process and they had asked that officials go back to the drawing board on candidates and use the usual appointments process.

73. On 22 June 2021 officials sought advice from the Home Secretary as to her preferred way forward. The text included a further comment that the review should get under way very soon. The options identified were to appoint a candidate from the existing round or to restart the process, running either a public appointment or a direct appointment exercise. Bearing in mind that it was a targeted and limited review, officials recommended the first of these options. An email sent on 29 June 2021 indicated that the Immigration Minister had suggested taking another look at those on the longlist and that the Home Secretary had asked to see a longer list of names.

74. By a submission dated 14 July 2021, officials asked the Home Secretary to confirm if she would like them to proceed with the direct appointment process from the existing round of candidates (and, if so, if she wished to add or remove any candidates) or if she would like to launch a full and open competition. Officials continued to recommend the direct appointment route. An email sent on 26 July 2021 indicated that the Home Secretary did not want to proceed with direct appointment and considered that the process should be fair and open.

75. A submission from officials dated 11 October 2021 sought the Home Secretary's agreement to commence a full and open competition to appoint a reviewer of the ICIBI. The intention was to launch the advert by the end of October 2021 with a 4-week closing date. The body of the document said in bold type that the review needed to get under way "to demonstrate our continued commitment to meeting the Windrush recommendations". An email sent on 3 November 2021, indicated that the Home Secretary and Ministers Foster and Pursglove were broadly content with the submission.

76. A further submission to the Home Secretary dated 28 March 2022 informed her that ten applications had been received and sought her agreement to reopen the advert for a further short period to enable other candidates to apply. This was not agreed at the time (24 May 2022) and instead a steer was given to resubmit the advice to her later in the year.

The Progress Report

77. As I have indicated earlier, the Progress Report was published on 31 March 2022. Recommendation 10 was another of the recommendations that Wendy Williams expressed concern about in the introductory section of her report, urging implementation without further delay. In the section of her report that was focussed on Recommendation 10, she opined that the CIP response did not adequately reflect her recommendation and she recapped her reasons for making it (para 21 above). She referred to the ongoing public appointment process to select a reviewer, noting that the aims set out in the CIP were inconsistent with aspects of Recommendation 10, but that she had obtained some reassurance from the fact that the recruitment pack for the reviewer role indicated that the review would look at the ICIBI's powers of publication and the working relationship with any Migrants' Commissioner. She concluded that Recommendation 10 had not been met at the time of writing.

78. On 28 July 2022, officials re-submitted the March 2022 submission, seeking the Home Secretary's views on the field of applicants and next steps. The recommendation remained to re-advertise for a further period. No substantive response had been received at the time of the September 2022 Submission.

79. On 1 August 2022 officials wrote to the Second Permanent Secretary in the terms that I have already referred to (para 65 above). The document set out some of the history in respect of Recommendation 10, including that the public appointment recruitment process had been launched after the Home Secretary decided that the candidates identified through the original direct appointment process were not suitable. It referred to a steer having been received from No. 10 that the applications received via the open competition advert did not adequately meet requirements.

David Neal's account

80. The 11 April 2024 witness statement of David Neal, the ICIBI from 22 March 2021 to 20 February 2024, describes his involvement in discussions relating to Recommendation 10. The ICIBI is established under sections 47 and 48 of the UK Borders Act 2007 to monitor and report on the efficiency and effectiveness of the performance of functions relating to immigration and asylum (amongst others). Pursuant to section 50 of the Act, the ICIBI has the power to report in writing to the Defendant on his findings and recommendations.

81. Mr Neal says that he consistently raised the issue of the Recommendation 10 review, as he considered it crucial to the ICIBI's role and the Home Office's openness to scrutiny. He provides an account of meetings with senior Home Office officials and ministers from 26 March 2021, at which Recommendation 10 was discussed. Mr Neal indicates that he expressed his enthusiasm for the recommendation and his disappointment over the delay in its implementation. He says that at various meetings, including a meeting on 14 February 2022 with Minister Pursglove, he stressed how

fundamental this recommendation was to the future working relationship between the ICIBI and the Home Office. He agrees with the comments in the Progress Report and indicates that it had been his understanding from the outset, that the Recommendation 10 review and its implementation went to the heart of whether the Home Office was open to oversight and scrutiny. He says that on 19 April 2022, Emma Churchill, the senior sponsor for the ICIBI, told him that there was no desire to delay the appointment; they simply had not found the right person.

82. Mr Neal describes a further meeting with Ms Churchill on 23 May 2022 at which they discussed a proposal that the Recommendation 10 review be combined with the Cabinet Office's Public Bodies Review of the ICIBI. Ms Churchill indicated that it was considered better to undertake both reviews in one, but he explained that in his view the two reviews were not the same thing and that this would run contrary to the WLLR's recommendation. Mr Neal says that he understood from Ms Churchill that the Home Office did not want to undertake two reviews concurrently, but that Recommendation 10 would not be lost. From this discussion, Mr Neal believed that a Recommendation 10 review was still being pursued in some form, albeit as part of a wider review. Mr Neal says that on the same day he discussed with Minister Pursglove whether the Recommendation 10 review should be combined with the Public Bodies Review. He emphasised that Recommendation 10 stemmed from Wendy Williams' concern about the response of the Home Office to the ICIBI, rather than a criticism of the functioning of the ICIBI; and that the Minister assured him that he understood the intention behind Recommendation 10. Mr Neal also makes the point that the ICIBI was not amongst the list of Home Office public bodies due to be reviewed in 2022/23 (nor those subsequently scheduled to be reviewed in 2023/24).

83. Mr Neal says that on 21 June 2022 he met with Minister Foster, who assured him that the plan was still to proceed with the Recommendation 10 review and that the delay was down to recruiting a good independent reviewer. Further, that on 26 July 2022, officials told him that the Recommendation 10 review was back on track. Mr Neal describes a meeting with Suella Braverman and Ms Churchill on 21 November 2022, where the Home Secretary asked for his view on the Recommendation 10 review. Mr Neal says that he explained that he was keen for it to go ahead.

The September 2022 Submission

84. In the September 2022 Submission, officials recommended that next steps were taken to implement Recommendation 10. The reasoning appeared at paras 19 – 22. Reference was made to Wendy Williams' rationale for Recommendation 10. The attempts to appoint a reviewer were summarised and it was noted that the lack of progress with the recommendation had contributed to a decline in the relationship between the department and the ICIBI. The text then continued:

> "This review presents an opportunity **to reset the relationship with the ICIBI and to identify some constructive lessons from other Inspectorates, as well as demonstrating our commitment to opening ourselves up to scrutiny.** We therefore recommend that you proceed with this recommendation, **reopening the adverts for a short period before progressing with appointment. Do you agree?**" (Emphasis in the original text.)

The Home Secretary's decision

85. The September 2022 Submission was re-submitted in early November 2022 at the Home Secretary's request. The Home Secretary's decision was set out in an email sent on 7 December 2022. She agreed with the recommendations not to proceed with Recommendations 3 and 9. She disagreed with the recommendation to progress Recommendation 10 "as she is interested in a wider review into all Home Office ALBs [Arm's Length Bodies]. Please can this be closed".

86. Minutes of a meeting of the WLLR Steering Group held on 12 December 2022 indicate that Recommendations 3, 9 and 10 were closed in light of the Home Secretary's decision. On 24 January 2023, Suella Braverman attended her first formal meeting of the WXGWG.

87. On 26 January 2023, the Home Secretary gave a Written Ministerial Statement updating Parliament on the Home Office's delivery of the WLLR recommendations and, in particular, her decision not to proceed with Recommendations 3, 9 and 10. I address the use that the Court can make of this Ministerial Statement at paras 166 – 173 below. The Statement included the following:

> "Extensive consideration has been given to how to deliver these recommendations in appropriate and meaningful ways: ensuring that individuals have opportunities to tell their stories; amplifying the voices of individuals engaging with the immigration system; and driving scrutiny of the department.
>
> On reconciliation events specifically, on the balance of expert advice received on how to approach this incredibly sensitive subject, I am persuaded that there are more effective ways of engaging with those impacted.
>
> The department has undertaken a significant programme of face-to-face engagement with the communities impacted by the Windrush scandal since 2018. Surgeries were held in community halls and places such as churches, mosques and care homes…The engagement events were held in most major cities across the UK…The events were hosted by senior members of the Windrush Programme and provided individuals with the opportunity to speak to them about the impact the scandal had had on their and their family's lives. Over 3,000 people were reached through these events…Regular dialogue hosted by senior officials are held in forums with external stakeholders from Windrush communities who provide feedback and scrutiny of our engagement and communication efforts.
>
> This type of engagement will remain an important part of our work…
>
> Recommendations 9 and 10 relate to the establishment of a Migrants' Commissioner and a review of the ICIBI. As Home

> Secretary, I remain committed to the importance of scrutiny, both internal and external. There are a number of ways in which we are inviting this challenge and scrutiny in a more efficient way. In October 2022, the department established the Independent Examiner for Complaints…This office will ensure that customers who are not satisfied with the final response to their complaints have an opportunity to have their case reviewed independently…helping the Home Office to identity learning and wider lessons from complaints to improve its service.
>
> …Beyond this, I remain committed to the importance of scrutiny. I welcome the insight and challenge that I and the wider department have received from our colleagues in the Windrush Working Group…
>
> External bodies are not the only source of scrutiny. As Wendy Williams identified the very culture of the department needed a fundamental shift, bringing policy development and service delivery into contact with those who are impacted by it, including those who might not agree with it. This is how we shift culture and subject ourselves to scrutiny and this is how we are changing."

88. The HASC held a hearing on 8 March 2023 at which the Home Secretary's decision was considered. Parliamentary Under Secretary of State, Lord Murray, attended and answered questions.

Witness and expert evidence

89. I now summarise the witness evidence and expert evidence that was before the Court. I do so relatively briefly given the inevitable length of this judgment; but I have read all of the witness evidence in full. I have already summarised how the Claimant and Mr Brathwaite were affected by the Windrush scandal (paras 12 – 14 above). I have summarised Mr Neal's statement when addressing the chronology of events regarding Recommendation 10.

Defendant's witness evidence

90. I have also summarised much of the material parts of Ms Darian's statement when setting out the sequence of events. I refer here to some additional aspects. At para 17 she describes the Home Secretary's statement of 23 June 2020 as announcing, "her intention to accept the recommendations in full" (para 17). Of the challenged decision, Ms Darian confirms that the Home Secretary took the decision personally. She adds:

> "The Home Secretary is not required to give reasons for her decision to the Home Office and I cannot therefore state what the precise reasons for the decision might have been. The Home Secretary is accountable to Parliament for her decision.

> It would be inappropriate for me to explain the reasons for the Home Secretary's decision and I do not therefore do so."

91. Ms Darian says that during 2023, the Home Office Windrush Compensation Engagement Team undertook a wide range of face-to-face events to promote the scheme and to hear directly from those affected by the scandal (para 55). She also says that in March 2023 officials sought a steer from the then Minister for Immigration about a range of matters involving the ICIBI, including options in place of the previously planned review, and that although his Private Office was prompted on a few occasions, the Minister did not provide a response before he left the department. Ms Darian says that officials continue to explore what the next steps might be (para 55).

Claimant's witness evidence

92. I return to the Claimant's statement. He says that his experience of the WCS did nothing to restore his trust and confidence in the Defendant (paras 45 – 46), but that reading the WLLR recommendations gave him some hope that the Home Secretary would take action to address the injustices that had been done (para 48). He describes the challenged decision as "extremely disappointing and a slap in the face" (para 49). He says that Recommendation 3 was an acknowledgement that the provision of compensation alone was not enough and that there was further work to be done to ensure that what had happened to the Windrush generation was embedded in the minds of senior staff and ministers (para 51). Mr Donald says that he intended to attend reconciliation events and was looking forward to the opportunity this would provide to speak to senior staff and ministers in person, as it is very important for him to feel that his story has been heard (paras 52 and 53). Mr Donald indicates that the aim of an engagement event he attended in Bristol in 2019 appeared to be to provide information about the WCS, rather than to enable people to share their experiences (para 54). He says that it will be hard for him to move on without having had this opportunity and that he does not think the passage of time has made such events any less important (paras 55 - 56). He feels that a Migrants' Commissioner would be of great benefit in bringing issues to the Defendant's attention and ensuring that there is no repetition of the Windrush scandal (para 57); and that the decision on Recommendation 10 suggests that the Home Office has something to hide (para 58).

93. The Claimant also relies upon statements made by Burnell Andrew (dated 21 April 2023), PM dated (24 April 2023) and his instructing solicitor, Dr Connie Sozi (dated 31 May 2023 and 11 April 2024).

94. Mr Andrew is a Windrush migrant who was born in Antigua and who joined his mother and father in the UK in 1961. He married in 1979 and has children, grandchildren and great grandchildren who are all British citizens. In 2005 the Department of Work and Pensions ("DWP") informed him that he was required to provide proof of his immigration status and that in the interim his jobseekers' allowance was being suspended. As he could not do so, his benefits were stopped, including his housing benefit, which led to his eviction as he could no longer pay the rent. Mr Andrew then lived in difficult circumstances for a number of years until 2018 when he was helped to make an application through the Windrush Scheme and was granted British citizenship. Of the decision not to pursue Recommendation 3, Mr Andrew says that the Home Secretary did not understand the pain she caused by

cancelling the reconciliation events and that he feels that attending such events would have been an important step for him to heal and move forward. In relation to the decision concerning Recommendations 9 and 10, Mr Andrew says that the Defendant appears unwilling to learn from what occurred.

95. PM's statement explains the experience of her sister, SH, who now has dementia and thus is unable to provide her own statement. PM and SH were born in Dominica. PM came to the UK in 1965 with other family members and SH arrived a few years later. Other family members successfully applied for naturalisation as British citizens in the 1980s, but SH had lost contact with other family members at the time. In 2016 SH sought her sister's help because all her benefits had been stopped as she could not prove that she had the right to be in the UK. PM explains that establishing SH's entitlement as a British citizen was a lengthy and complex process. For approximately two years until her benefits were reinstated, SH had to suffer the humiliation of relying on friends and family for handouts. PM considers that reconciliation events would have provided a valuable opportunity for her and other Windrush relatives and survivors to speak about their experiences. She feels that the decision not to pursue Recommendation 3 is calculated to brush their experiences under the carpet and, in consequence, people in power will not understand the impact and will not be persuaded to make changes. The decision in respect of Recommendations 9 and 10 indicates to her that the Home Office is not willing to listen to criticism about the way their policies impact on Black and ethnic minority communities.

BEO's witness evidence

96. I turn next to the witness statements provided by BEO. A statement dated 30 June 2023 from the organisation's then Chief Executive, Dr Wanda Wyporska, explains the nature of BEO and the work that it has undertaken in relation to the Windrush scandal. She indicates that members of the Windrush community and Black communities with whom BEO is in contact "understood there to have been a firm and unequivocal commitment to implement all of the 30 Recommendations of the WLLR in full" (para 22). She says that these communities were "universally shocked and angered" by the challenged decision, which has caused a "further severe fracturing of the relationship and the attempts to rebuild trust between these communities and the government" (para 27). BEO considers that the decision is insensitive and that implementation of the three Recommendations is strongly in the public interest (paras 28 – 29). BEO believes that Recommendation 3 would play a crucial part in re-setting the problematic culture at the Home Office and avoiding similar scandals in the future (para 31). BEO disagrees with the assessment of the WXGWG (para 34) and notes that there have been concerns about its composition and its competence to represent the Windrush community (para 35). BEO considers that Recommendations 9 and 10 were essential recommendations (paras 39 – 49).

97. BEO also provided witness statements dated 30 June 2023 from Janet McKay Williams, Glenda Caesar and Patrick Vernon OBE.

98. Ms Williams' partner, Anthony Bryan, was born in Jamaica and came to the UK in 1965. He did not leave the UK for 50 years. In 2015 he applied for a British passport because he wanted to visit his mother in Jamaica as she was unwell. His application was refused on the basis that he did not have the necessary papers and the Home Office informed Mr Bryan that he was in the UK illegally. He lost his employment

and in September 2016 he was taken to an immigration detention centre on the basis that he was to be deported to Jamaica. Following the commencement of legal action, the Home Office eventually accepted that he was a British citizen and issued him with a passport. Ms Williams says that everyone she knows in the Windrush community was "up in arms" about the Home Secretary's announcement in January 2023 that she would not implement Recommendations 3, 9 and 10. She was involved in delivering BEO's petition to 10 Downing Street, which had over 55,000 signatures and called on the Prime Minister to intervene to reverse this decision. She considers that the challenged decision has led families to lose what little trust they had in the Home Office and that the abandoned recommendations were very important for lesson learning purposes, for providing a voice to those affected and for external scrutiny.

99. Ms Caesar came to the UK from Dominica as a baby in 1961. She grew up in Hackney with her parents and siblings and subsequently worked in the NHS. Her employment was terminated as she was unable to prove that she had a legal right to work and live in the UK. Ms Caesar describes the impact as devastating; as well as losing her career she was unable to claim benefits. She is involved in Windrush Lives, a group made up of victims of the Windrush scandal. She participated in the consultation conducted by BIMA in relation to Recommendation 3. She says that the decision not to proceed with this recommendation has meant that hopes that individuals could tell their stories to people in power have been torn down; and that it seems as if nobody is speaking up for migrants or Windrush victims.

100. Mr Vernon has worked in the field of race and equality for over 25 years. He was not personally impacted by the Windrush scandal, but is heavily involved in Black and Caribbean communities in the UK. He has been at the forefront of responses to the Windrush scandal. He met with Wendy Williams when she was preparing the WLLR. He launched a campaign for the Government to accept all of the WLLR's recommendations and organised a petition that was submitted to 10 Downing Street with 130,000 signatures (prior to the Home Secretary's decision to accept the WLLR's findings). Mr Vernon felt that the Home Secretary's announcement on 23 June 2020 was "an important promise". He was very disappointed by the challenged decision and was not consulted before it was made, despite being a high-profile voice in the affected community. He considers the recommendations to be important for enabling the Home Office to understand the impact of its policies on affected communities. He differentiates the role of the Independent Examiner for Complaints ("IEC") from the intention of Recommendations 9 and 10.

UNISON's witness evidence

101. UNISON submitted statements from Narmadha Thiranagama (dated 24 July 2023), Michael Braithwaite (dated 26 July 2023), Hugo Pierre (dated 25 July 2023) and Stuart Tuckwood (dated 24 July 2023).

102. Ms Thiranagama is a National Policy officer at UNISON. She explains the union's engagement with the WLLR and the Windrush scandal and, more broadly, with other migrant communities. In November 2021 UNISON submitted evidence to the WLLR Progress Update review, specifically emphasising the importance of Recommendation 9 and wrote to the Home Secretary several times indicating that their members considered that implementation of the full set of recommendations was vital to demonstrating that the Home Office had learned the lessons of the Windrush scandal.

In relation to Recommendations 9 and 10, she says that UNISON is "acutely aware of the significance of these measures to its Black and migrant worker members, who continue to face challenges with obvious systemic underpinnings but are not…able to ensure they are brought to the Home Office's attention, that their causes and consequences are properly understood, and that appropriate policy changes are considered" (para 45). She gives examples of the vulnerable position of migrant healthcare workers, which raise serious systemic issues concerning Home Office policy and practice. She also refers to the lingering impact that the "hostile environment" has had on Black members who are exempt from immigration control, but remain disproportionately likely to be asked to provide their documentation in a range of circumstances from healthcare provision to renting accommodation. Ms Thiranagama says that, accordingly, Recommendations 9 and 10 were highly significant. A Migrants' Commissioner would be uniquely positioned to hear from and advocate for migrant people who experience injustices of the kind experienced by UNISON members and would be an important step for building trust with groups who have largely lost faith in the Home Office.

103. Mr Braithwaite says that he read the WLLR when it was published and saw this and the Government's response as signs of hope. He believed that the Home Office had made a solid promise and commitment to implement the WLLR recommendations. He says that he felt disillusioned when he learnt via the media that three of the key recommendations would no longer be implemented. It appeared to him that the Windrush victims did not matter. He had seen the introduction of a Migrants' Commissioner as important, as there was a need for someone who understood the situation of people like him to engage with migrants and to act as their advocate with the Government.

104. Mr Pierre is a UNISON member and shop steward. He assisted Mr Braithwaite when he faced the serious difficulties that I described earlier (para 14 above). He has also represented other members who have faced adverse consequences from their employers because of the Government's hostile environment and he gives examples of this.

105. Mr Tuckwood is a National Officer for Nursing at UNISON. He confirms Ms Thiranagama's account of the difficulties faced by the union's Black and migrant members and describes his own experience of these workers in the nursing and midwifery sector. He believes that a Migrants' Commissioner would be uniquely placed to hear directly from these workers, to obtain a clear understanding of the way that Home Office policy and practice contributes to or could help resolve the challenges that they face, and to communicate this directly to those with the power to make changes.

Wendy Williams' letter

106. By order sealed on 22 April 2024, I admitted a letter dated 18 April 2024 from Wendy Williams, which the Defendant had quite properly disclosed as part of his duty of candour to the Court. In the letter, Ms Williams says that given her previous involvement, she would have expected that the Home Office would have asked her about proposals not to implement any of her recommendations. Whilst her role formally ended after she had provided the Progress Report, she continued to have some involvement with the Home Office, including a meeting with the Home Office

Executive Committee where she went through her key findings and discussed implementation on the understanding that all of the recommendations would be implemented. She says that she was given no indication that the Home Office was proposing not to implement all of her recommendations until she was informed of the challenged decision by a letter from the Permanent Secretary which she received on 25 January 2023.

BEO's expert report

107. Lastly I turn to the expert report of Ms Frances Webber, a trustee and former Vice-Chair of the Institute of Race Relations. Ms Webber is a barrister and a published author with lengthy experience of immigration, asylum and nationality law and policy. Her 38-page report addresses the legal, historical and social context in which the challenged decision was taken and the impact of the decision on members of the Windrush generation and their descendants. She observes that central to the Windrush scandal was a failure to listen to those seeking to present evidence of lawful stay (para 103). She says that one of the main themes underlying the WLLR, was the need for the Home Office to open itself up to greater external scrutiny and undergo widespread cultural change (para 105). She observes that the need to heed warnings, to listen to evidence and to test policy against reality, were key themes that a Migrants' Commissioner and a stronger ICIBI would be able to address on a systemic level, whereas the IEC would address individual cases (paras 111 and 124). Ms Webber considers that the challenged decision effectively closed the door to the possibility of real institutional change (paras 115 and 126). She emphasises that both Wendy Williams and Dr Elsheikh saw the Recommendation 3 events as serving different purposes from the outreach and engagement events relating to the Windrush Scheme and the WCS (para 117). She describes the challenged decision as compounding the hurt, anger and mistrust experienced by the Windrush generation (para 126). Ms Webber characterises the decision not to proceed with the recommendation as a manifestation of institutional racism at the Home Office, revealing of unwitting prejudice, thoughtlessness and racist stereotyping (para 135). (Albeit, as I have indicated earlier, this is not the pleaded basis of the Claimant's discrimination claim.)

The legal framework

Substantive legitimate expectation

108. As explained by Laws LJ in *R (Bhatt Murphy) v The Independent Assessor* [2008] EWCA Civ 755 ("*Bhatt Murphy*") at para 32: "a substantive legitimate expectation arises where the Court allows a claim to enforce the continued enjoyment of the content – the substance – of an existing practice or policy, in the face of the decision-maker's ambition to change or abolish it". He went on to indicate that it "plainly cannot apply to every case where a public authority operates a policy over an appreciable period" and that it engages "a much more rigorous standard" that will be adjudged by the Court's own view of what fairness requires (para 35).

109. The expectation must be based on a representation that is clear, unambiguous, and devoid of any relevant qualification: *R v Inland Revenue Commissioners ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545 at 1570B. The test is an objective one. The question is how, on a fair reading of the promise, it would have been reasonably understood by those to whom it was made: *Paponette v Attorney General of Trinidad*

and Tobago [2010] UKPC 32, [2012] AC 1 ("*Paponette*") at para 30. It is important to have regard to the context in which the statement is made: *R (Sargeant) v First Minister of Wales* [2019] EWHC 739 (Admin), [2019] 4 WLR 64 ("*Sargeant*") at para 65. The onus of establishing that a sufficiently clear and unambiguous promise or undertaking was made is on the party claiming it: *Re Finucane's application for judicial review (Northern Ireland)* [2019] UKSC 7, [2019] 3 All ER 191 ("*Finucane*") at para 64.

110. At paras 43 – 46 in *Bhatt Murphy*, Laws LJ discussed the kind of representation that was capable of giving rise to a substantive legitimate expectation. He considered that, "it must constitute a specific undertaking, directed at a particular individual or group, by which the relevant policy's continuation is assured" (para 43). After referring to the circumstances in *Ex p Khan* [1985] 1 All ER 40 and in *R v North and East Devon Health Authority ex p Coughlan* [2001] QB 213, Laws LJ said at para 46:

> "These cases illustrate the pressing and focussed nature of the kind of assurance required if a substantive legitimate expectation is to be upheld and enforced. I should add this. Though in theory there may be no limit to the number of beneficiaries of a promise for the purposes of such an expectation, in reality it is likely to be small, if the court is to make the expectation good. There are two reasons for this, and they march together. First, it is difficult to imagine a case in which government will be held legally bound by a representation made generally or to a diverse class. As Lord Woolf MR said in *Ex p Coughlan* (paragraph 71)
>
> > 'May it be… that, when a promise is made to a category of individuals who have the same interest it is more likely to be considered to have binding effect than a promise which is made generally or to a diverse class, when the interests of those to whom the promise is made may differ, or, indeed, may be in conflict?'
>
> The second reason is that the broader the class claiming the expectation's benefit, the more likely it is that a supervening public interest will be held to justify the change of position complained of. In *Ex p Begbie* (1130G – 1131B):
>
> > 'In some cases a change of tack by a public authority, though unfair from the applicant's stance, may involve questions of general policy affecting the public at large or a significant section of it (including interests not represented before the court); here the judges may well be in no position to adjudicate save at most on a bare *Wednesbury* basis, without themselves donning the garb of policy-maker, which they cannot wear… In other cases the act or omission complained of may take place on a much smaller stage, with far fewer players… There may be no wide-ranging issues of general policy, or none with

> multi-layered effects, upon whose merits the court is asked to embark…'"

111. Nonetheless, there are cases where a promise about future actions made to the world at large has been found to constitute a sufficiently clear and unambiguous representation. *Finucane* concerned statements made by Government ministers, including a statement by the then Secretary of State for Northern Ireland to the House of Commons, that a public inquiry would be held into the murder of Northern Ireland solicitor, Patrick Finucane, given indications that members of the security forces were involved. Some years later and after a change of Government, the Prime Minister decided not to hold a public inquiry and instead appointed Sir Desmond de Silva to conduct an independent review. Following the publication of this report, Mr Finucane's widow sought a judicial review on the basis that she had a legitimate expectation that a public inquiry into her husband's death would be held. The Supreme Court accepted that a plain and explicit undertaking to hold a public inquiry had been given, although this was a policy statement about procedure that was made not just to the appellant but to the world at large (paras 63 – 68). In arriving at this conclusion, the Court considered both the individual and the cumulative effect of the statements made by Government ministers (para 68).

112. If a clear and unambiguous representation is established, then it is for the defendant to identify any overriding interest on which it relies to justify the frustration of the expectation: *Paponette* at para 37.

113. The appellants in *Paponette*, who were owners and operators of maxi-taxi routes in Port-of-Spain, challenged the reversal of Government assurances that when their taxi stand was moved, they would not be placed under the control and management of a rival bus service operator. The Privy Council determined that clear and unequivocal representations were given and that it was not possible to infer, in the absence of specific evidence, that the change had been made in response to a public interest which overrode the expectations generated by the representations (paras 38 and 41 – 42). Giving the Board's judgment, Lord Dyson JSC, observed that without evidence, a Court is unlikely to be willing to draw an inference in favour of the decision-maker: "If it wishes to justify its act by reference to some overriding public interest, it must provide the material on which it relies. In particular, it must give details of the public interest so that the Court can decide how to strike the balance of fairness between the interest of the applicant and the overriding interest relied on by the authority" (para 42).

114. Ms Kaufmann accepted that, if a sufficiently clear and unambiguous representation of a substantive benefit is established, the question that the Court should ask is whether the decision-maker's proposed action would be so unfair as to amount to an abuse of power: *Bhatt Murphy* at para 42. Lord Justice Laws emphasised at para 41:

> "… a public authority will not often be bound by the law to maintain in being a policy which on reasonable grounds it has chosen to alter or abandon… Public authorities typically, and central government *par excellence*, enjoy wide discretions which it is their duty to exercise in the public interest. They have to decide the content and the pace of change. Often they must balance different, indeed opposing, interests across a wide

> spectrum. Generally they must be the masters of procedure as well as substance; and as such are generally entitled to keep their own counsel. All this is involved in what Sedley LJ described (*BAPIO* [2007] EWCA Civ 1139 paragraph 43) as the entitlement of central government to formulate and re-formulate policy."

115. Giving the leading judgment in *Finucane*, at para 58 Lord Kerr cited from Laws LJ's judgment in *R v Secretary of State for Education and Employment ex p Begbie* [2000] 1 WLR 1115 at 1131 where he said:

> "The more the decision challenged lies in what may inelegantly be called the macro-political field, the less intrusive will be the court's supervision, More than this: in that field, true abuse of power is less likely to be found, since within it change of policy, fuelled by broad conceptions of the public interest, may more readily be accepted as taking precedence over the interests of groups which enjoyed expectations generated by an earlier policy."

116. In *Finucane,* the Supreme Court was satisfied that the Government was able to resile from the representation. At para 76 Lord Kerr said:

> "Where political issues overtake a promise or undertaking given by government, and where contemporary considerations impel a different course, provided a bona fide decision is taken on genuine policy grounds not to adhere to the original undertaking, it will be difficult for a person who holds a legitimate expectation to enforce compliance with it."

Procedural legitimate expectation

117. As discussed by Laws LJ in *Bhatt Murphy*, there are two circumstances that may give rise to a procedural legitimate expectation that consultation will take place before a decision is arrived at.

118. Firstly, there is the "paradigm case" where a public authority has provided an unequivocal assurance, whether by means of an express promise or an established practice, that it will embark upon consultation before it changes an existing substantive policy (para 29). In the paradigm case, the Court will not allow the decision-maker to effect the proposed change without consultation, unless the want of consultation is justified by the force of an overriding legal duty owed by the decision-maker or by countervailing public interests (para 30).

119. For a practice to give rise to a legitimate expectation of consultation, it must be "so unambiguous, so widespread, so well-established and so well recognised as to carry within it a commitment to a group… of treatment in accordance with it": *R (Article 39) v Secretary of State for Education* [2020] EWCA Civ 1577, [2021] PTSR 696 at para 32, citing Lord Wilson JSC in *R (Davies) v Revenue and Customs Comrs* [2011] 1 WLR 2625, para 49.

120. There is also what Laws LJ described in *Bhatt Murphy* as "the secondary case of procedural legitimate expectation" (para 39). This does not require the existence of a prior representation or practice of consultation; it arises where the law recognises that the claimant's interest in some ultimate benefit which they hope to retain or attain cannot be withdrawn or denied without them first being given the opportunity to make representations (paras 37 – 39). Laws LJ discussed the circumstances in which a public decision-maker will be required to afford potentially affected persons an opportunity to comment on a proposed change in policy and the reasons for it, where there has been no previous promise or practice of consultation (paras 47 – 49). Having reviewed the authorities, he concluded:

> "I apprehend that the secondary case of legitimate expectation will not often be established. Where there has been no assurance either of consultation (the paradigm case of procedural expectation) or as to the continuance of the policy (substantive expectation), there will generally be nothing in the case save a decision by the authority in question to effect a change in its approach to one or more of its functions. And generally, there can be no objection to that, for it involves no abuse of power… Accordingly for this secondary case of procedural expectation to run, the impact of the authority's past conduct on potentially affected persons must, again, be pressing and focussed. One would expect at least to find an individual or group who in reason have substantial grounds to expect that the substance of the relevant policy will continue to enure for their particular benefit: not necessarily for ever, but at least for a reasonable period to provide a cushion against the change. In such a case the change cannot lawfully be made, certainly not made abruptly, unless the authority notify and consult."

121. Hallet LJ summarised this basis for a duty to consult in *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662, [2015] 3 All ER 261 ("*Plantagenet*") as arising "where, in exceptional cases, a failure to consult would lead to conspicuous unfairness" (para 98(2)). She went on to explain that even where a legitimate expectation of consultation is created, "it must further be shown that there would be unfairness amounting to an abuse of power for the public authority not to be held to its promise" (para 98(11)).

122. The essential requirements of consultation are that it must take place at a time when the proposals are still at a formative stage; the proposer must give sufficient reasons for any proposal, so as to permit of intelligent consideration and response; adequate time must be given for consideration and response; and the product of the consultation must be conscientiously taken into account: Lord Wilson JSC at para 25 in *R (Moseley) v Haringey London Borough Council* [2014] UKSC 56, [2014] 1 WLR 3947, endorsing the ingredients of consultation identified in *R v Brent London Borough Council ex p Gunning* (1985) 84 LGR 168. Discussing these criteria in *R (Help Refugees Ltd) v Secretary of State for the Home Department* [2018] 4 WLR 168 at para 90(ii), Hickinbottom LJ said: "The public body doing the consulting must put a consultee in a position properly to consider and respond to the consultation request, without which the consultation process would be defeated. Consultees must be told

enough – and in sufficiently clear terms – to enable them to make an intelligent response". He went on to indicate that the content of the duty to consult is fact-specific and can vary greatly from one context to another; and that the Courts will not lightly find that a consultation process is unfair (para 90(iii) and (v)).

Article 14 ECHR

123. Article 14 ECHR provides:

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

124. Article 14 is not a free-standing right. The non-discrimination principle only applies in relation to the substantive rights and freedoms guaranteed by the ECHR. Article 14 is brought into play if the decision or policy in issue is within the "scope or ambit" of another Convention right, even if that right is not directly engaged: Sir Patrick Elias in *R v (DA) v Secretary of State for Work and Pensions* [2018] EWCA Civ 504, [2019] 1 WLR 3289 ("*DA*") at para 14. In this case, it is accepted that the complaint comes within the ambit of article 8 ECHR, in the sense that it impacts on the Claimant's private life and thus I need say no more about this requirement.

125. As with English law, the article 14 prohibition on discrimination embraces both direct and indirect discrimination. In *DH v Czech Republic* (2008) 47 EHRR 3 ("*DH*"), the European Court of Human Rights ("ECtHR") described indirect discrimination as "the situation where a general policy or measure, ostensibly applying neutrally, in fact has a disproportionately prejudicial effect on a particular group. It may be considered discriminatory notwithstanding that it is not aimed at that group". This is the case if the policy or measure has no objective and reasonable justification, Lord Reed PSC in *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, [2022] AC 223 ("*SC*") at para 49, citing *DH* and *Guberina v Croatia* (2016) 66 EHRR 11.

126. Additionally, the right not to be discriminated against is also violated when states, without an objective and reasonable justification, fail to treat differently persons whose situations are significantly different. This form of indirect discrimination was first identified by the ECtHR in *Thlimmenos v Greece* (2000) 31 EHRR 12 ("*Thlimmenos*"). As Lord Reed observed at para 48 in *SC*: "In other words, article 14 may impose a positive duty to treat individuals differently in certain situations". Whilst this is a form of indirect discrimination, I will refer to this as *Thlimmenos* discrimination, to distinguish it from indirect discrimination in the traditional sense.

127. After reviewing the Strasbourg authorities, Lord Reed summarised the requirements of indirect discrimination (once the "ambit" criterion is satisfied) at para 53 of *SC* as follows:

> "… it has to be shown by the claimant that a neutrally formulated measure affects a disproportionate number of members of a group of persons sharing a characteristic which is alleged to be the ground of discrimination, so as to give rise to

> a presumption of discrimination. Once a prima facie case of indirect discrimination has been established, the burden shifts to the state to show that the indirect difference in treatment is not discriminatory. The state can discharge that burden by establishing that the difference in the impact of the measure in question is the result of objective factors unrelated to any discrimination on the ground alleged. This requires the state to demonstrate that the measure in question has an objective and reasonable justification: in other words, that it pursues a legitimate aim by proportionate means…"

128. As Bourne J identified at para 44 in *R (Vanriel) v Secretary of State for the Home Department* [2021] EWHC 3415, [2022] QB 737 ("*Vanriel*"), a complaint of *Thlimmenos* discrimination falls to be decided by reference to the following four questions: (i) does the subject matter of the complaint "fall within the ambit" of one of the substantive Convention rights; (ii) does the ground on which the claimant claims to have suffered the discrimination constitute a "status"; (iii) has the claimant been treated in the same way as other people whose situation is relevantly different from theirs because they do not share that status; and (iv) did the claimant's treatment have an objective and reasonable justification?. The Court's approach to justification will be in keeping with that described by Lord Reed in *SC*.

129. Article 14 contains a list of grounds on which discrimination is prohibited, but the list is illustrative, rather than exhaustive. In oral and written submissions to the Court, the Claimant relied upon his status as a victim of the Windrush scandal and reference was also made to "the Windrush community". In his pleaded case, the relevant status was described as "a member of the Windrush generation" or "an individual to whom the Windrush Scheme applies" (para 62, Amended Statement of Facts and Grounds). The List of Issues referred to "members of the Windrush generation".

130. In *R (Howard) v Secretary of State for the Home Department* [2021] EWHC 1023 (Admin), [2021] 1 WLR 4651 ("*Howard*") at para 19, Swift J accepted that "Windrush generation" (as a shorthand for those who had a right to remain in the UK by virtue of section 1(2) of the Immigration Act 1971, who could have obtained British nationality by registration prior to 1 January 1988), was a relevant status for the purposes of the article 14 ECHR claim. In *R (Mahabir) v Secretary of State for the Home Department* [2021] EWHC 1177 (Admin), [2021] 1 WLR 5301 ("*Mahabir*"), a family member of a Windrush victim was found to be a relevant status for article 14 purposes. In *Vanriel*, Bourne J commented that it was clear from *Howard* and *Mahabir* that there was no legal impediment to allowing "status" to those in a recognisable legal situation referrable to the Windrush Scheme (para 52). The status accepted by the Court in that case was individuals who have been recognised, or are recognisable, as people to whom the Windrush Scheme applies, who have been denied entry to the UK and have been unable to satisfy the five-year residence rule by reason of that denial of entry (para 53).

131. Establishing indirect discrimination for the purposes of article 14 is not as technical or formalistic an exercise as meeting the domestic definition of indirect discrimination in section 19 EqA 2010. Nonetheless as I have already indicated, it is incumbent on the claimant to show that the policy or measure in question has disproportionately prejudicial effects on a particular group that shares the relevant status (para 125

above). As Lord Reed explained in his review of the Strasbourg authorities at paras 50 – 52 in *SC*, an early example of indirect discrimination in the Strasbourg case law was *Hoogendijk v The Netherlands* (2005) 40 EHRR SE22, where a requirement to qualify for a social security benefit affected more women than men. The Court held that "where an applicant is able to show, on the basis of undisputed official statistics, the exercise of a prima facie indication that a specific rule – although formulated in a neutral manner – in fact affects a clearly higher percentage of women than men" it was for the respondent to establish that the measure was objectively justified (p. 207). As Lord Reed observed, the Grand Chamber adopted a broadly similar approach in *DH*, where "the starting point was for the applicants to submit evidence (again based on official statistics) giving rise to a prima facie case, or 'presumption' of discrimination on the ground of ethnic origin" (paras 180, 189 and 195).

132. In *DH*, the Grand Chamber addressed the prima facie evidence that was capable of shifting the burden of proof on to the respondent state, indicating that there was no pre-determined formula for its assessment and that the Court would evaluate all of the evidence, including such inferences as flowed from the facts and the parties' submissions (para 178). The ECtHR also referred to the difficulties that applicants may have in proving discriminatory treatment, indicating that to guarantee effective protection of their rights, less strict evidential rules should apply in cases of alleged indirect discrimination (para 186). At para 188, the Grand Chamber said that whilst indirect discrimination could be shown by reliable and significant statistics, this did not "mean that indirect discrimination cannot be proved without statistical evidence".

133. As Sir Patrick Elias pointed out at paras 17 – 18 in *DA*, citing para 38 of Laws LJ's judgment in *R (MA) v Secretary of State for Work and Pensions* [2013] EWHC 2213 (QB), [2013] PTSR 1521, the concepts of indirect and *Thlimmenos* discrimination are distinct and an appropriate identification of the type of discrimination in issue determines what has to be justified. In the case of *Thlimmenos* discrimination, it is the failure to make a different rule for those who are adversely affected that must be justified. In respect of indirect discrimination, the rule or measure which gives rise to the disparate impact has to be justified.

134. Whether the treatment or measure in question has an objective and reasonable justification will depend on whether it has a legitimate aim and is a proportionate means of achieving that aim (paras 127 above). As identified in *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] AC 700 at para 74, the proportionality evaluation involves four questions: (i) whether the objective of the measure is sufficiently important to justify the limitation of a protected right; (ii) whether the measure is rationally connected to the objective; (iii) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (iv) whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure.

135. After reviewing the Strasbourg and domestic authorities, Lord Reed distilled the correct approach to the proportionality assessment at para 115 of his judgment in *SC*, as follows (omitting the case citations, as the summary is uncontroversial):

> "In summary, therefore, the court's approach to justification generally is a matter of some complexity, as a number of factors affecting the width of the margin of appreciation can

> arise from 'the circumstances, the subject matter and its background'. Notwithstanding that complexity, some general points can be identified.
>
> (1) One is that the court distinguishes between differences of treatment on certain grounds… which for the reasons explained are regarded as especially serious and therefore call, in principle, for a strict test of justification (or, in the case of differences in treatment on the ground of race or ethnic origin, have been said to be incapable of justification), and differences in treatment on other grounds, which are in principle the subject of less intensive review.
>
> (2) Another, repeated in many of the judgments already cited, sometimes alongside a statement that 'very weighty reasons' must be shown, is that a wider margin is usually allowed to the state when it comes to general measures of economic or social strategy… In some of these cases, the width of the margin of appreciation available in principle was reflected in the statement that the court 'will generally respect the legislature's policy choice unless it is 'manifestly without reasonable foundation'…
>
> (3) A third is that the width of the margin of appreciation can be affected to a considerable extent by the existence, or absence, of common standards among the contracting states…
>
> (4) A fourth, linked to the third, is that a wide margin of appreciation is in principle available, even where there is a differential treatment based on one of the so-called suspect grounds, where the state is taking steps to eliminate a historical inequality over a transitional period…
>
> (5) Finally, there may be a wide variety of other factors which bear on the width of the margin of appreciation in particular circumstances…"

136. Lord Reed went on to say that more than one of these points could be relevant in the circumstance of a particular case and, unless one factor is of overriding significance, it is for the Court to make a balanced overall assessment (para 116). He had earlier explained that the ECtHR had adopted a strict approach to differential treatment on the ground of race or ethnic origin (para 108).

137. Lord Reed summarised the position at para 142 as follows:

> "In summary, the European court has generally adopted a nuanced approach, which can be understood as applying certain general principles, but which enables account to be taken of a range of factors which may be relevant in particular circumstances, so that a balanced overall assessment can be

> reached. As I have explained, there is not a mechanical rule that the judgment of the domestic authorities will be respected unless it is 'manifestly without reasonable foundation'. The general principle that the national authorities enjoy a wide margin of appreciation in the field of welfare benefits and pensions forms an important element of the court's approach, but its application to particular facts can be greatly affected by other principles which may also be relevant, and of course by the facts of the particular case… In the context of article 14, the fact that a difference in treatment is based on a 'suspect' ground is particularly significant…"

138. Lord Reed went on to stress the importance of flexibility and of avoiding a mechanical approach based simply on the categorisation of the ground of the treatment in question (para 159). He concluded that the degree of weight given to the primary decision-maker will "normally be substantial in fields such as economic and social policy, national security, penal policy and matters raising sensitive moral or ethical issues" (para 161).

***Tameside* duty of inquiry**

139. A public body has a duty to carry out a sufficient inquiry prior to making its decision: *Secretary of State for Education and Science v Metropolitan Borough of Tameside* [1977] AC 1014, Lord Diplock at 1065.

140. In *Plantagenet* Hallet LJ summarised the principles to be gleaned from the *Tameside* duty authorities as follows (omitting the citations as the principles are uncontroversial):

> "(1) The obligation upon the decision-maker is only to take such steps to inform himself as are reasonable.
>
> (2) Subject to a *Wednesbury* challenge… it is for the public body, and not the court to decide upon the manner and intensity of inquiry to be undertaken…
>
> (3) The court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision…
>
> (4) The court should establish what material was before the authority and should only strike down a decision by the authority not to make further inquiries if no reasonable council possessed of that material could suppose that the inquiries they had made were sufficient…
>
> (5) The principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies

> with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant, but from the Secretary of State's duty to inform himself so as to arrive at a rational conclusion…
>
> (6) The wider the discretion conferred on the Secretary of State, the more important it must be that he has all relevant material to enable him properly to exercise it…"

141. At paras 136 – 139 of her judgment, Hallett LJ discussed the distinction between a duty to carry out sufficient inquiry and a duty to consult. She emphasised that the test for a breach of the *Tameside* duty is "fundamentally different" from the test for a duty to consult. The *Tameside* test is one of rationality, not process. It involves considering whether a rational decision-maker could have taken the decision without considering the particular facts or factors; the test is therefore higher than the test for whether consultation is required.

Public Sector Equality Duty

142. The relevant protected characteristics for the purposes of the PSED include race and age: see section 149(7) EqA Act 2010. Race includes colour and nationality: see section 9(1) of the Act. Section 149 provides (as relevant):

> "(1) A public authority must, in the exercise of its function, 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;
>
> (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it;
>
> (3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to –
>
> (a) remove or minimise disadvantage suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
>
> (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
>
> (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

> (5) Having due regard to the need foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to –
>
> (a) tackle prejudice, and
>
> (b) promote understanding."

143. The duty on the decision-maker is to have "due regard" to the matters identified in section 149, it is not a duty to achieve those outcomes; and "due regard" is the level of regard that is appropriate in all the circumstances: per Dyson LJ (as he then was) in *R (Baker) v Secretary of State and the London Borough of Bromley* [2008] LGR 239 at para 31.

144. In a well-known passage, McCombe LJ summarised the principles that he drew from the authorities in *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 ("*Bracking*"), para 26. I will refer to the aspects that are directly material to the parties' submissions in this case. In terms of the responsibility on the decision-maker, McCombe LJ said (para 26(3)):

> "The relevant duty is upon the Minister or other decision maker personally. What matters is what he or she took into account and what he or she knew. Thus, the Minister or decision maker cannot be taken to know what his or her officials know or what may have been in the mind of officials in proffering their advice …"

145. In terms of timing, McCombe LJ said (para 26(4)):

> "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…".

146. McCombe LJ referred to the points identified by Aikens LJ in *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), including that: "the duty must be fulfilled before and at a time when a particular policy is being considered"; it must be "exercised in substance, with rigour, and with an open mind"; and it is a non-delegable and continuing duty. At para 26(6) he cited the observation of Davis J (as he then was) in *R (Meany) v Harlow DC* [2009] EWHC 559 (Admin) that, "general regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria".

147. McCombe LJ also cited from paras 77, 78 and 89 - 90 in the judgment of Elias LJ in *R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin). For present purposes, I refer to two of the points that he made at para 26(8). Firstly, that provided there had been a rigorous consideration of the duty, "it is for the decision maker to decide how much weight should be given to the various factors informing the decision… the Court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker". Secondly, as to whether the PSED entailed a

duty of inquiry. Elias LJ said, "If the relevant material is not available, there will be a duty to acquire it and this will frequently mean that some further consultation with the appropriate groups is required".

148. The obligation to investigate was summarised by Lewison LJ in *R (Ward) v Hillingdon London Borough Council* [2019] EWCA Civ 692, [2019] PTSR 1738 at para 71 as: "Compliance with the PSED requires the decision-maker to be informed about what protected groups should be considered. That will involve a duty of inquiry, so that the decision-maker is properly informed before making a decision". The extent of this obligation was described at para 181 in the judgment of the Court (Sir Terence Etherton MR, Dame Victoria Sharp P and Singh LJ) in *R (Bridges) v Chief Constable of South Wales Police* [2020] EWCA Civ 1058, [2020] 1 WLR 5037 ("*Bridges*") as follows:

> "We acknowledge that what is required by the PSED is dependent on the context and does not require the impossible. It requires the taking of reasonable steps to make enquiries about what may not yet be known to a public authority about the potential impact of a proposed decision or policy on people with the relevant characteristics…"

149. The Court in *Bridges* emphasised that: "the PSED is a duty of process and not outcome. That does not, however, diminish its importance. Public law is often concerned with the process by which a decision is taken and not with the substance of that decision" (para 176).

150. It is also well-established that the question of whether the decision-maker had "due regard" is a matter of substance, rather than formulaic box ticking, and there is no statutory duty to carry out a formal impact assessment: Rix LJ in *R (Domb) v London Borough of Hammersmith and Fulham* (2009) BLGR 845 at para 52.

Parliamentary privilege

151. The Defendant no longer pursues the contention that the challenged decision is not justiciable, but it is necessary to consider the impact of Parliamentary privilege as issues have been raised as to the admissibility of and/or the use that can be made in these proceedings of: (i) the Home Secretary's 23 June 2020 oral Ministerial Statement to the House of Commons (para 26 above), which is relied upon as one of the representations giving rise to the alleged substantive legitimate expectation; (ii) the Home Secretary's 26 January 2023 written Ministerial Statement to the Commons (para 87 above), relied upon by the Defendant, not only as showing that the challenged decision was subject to Parliamentary accountability, but also to evidence the reasons for making the challenged decision; and (iii) the Minister's answers to questions when he attended the HASC on 8 March 2023, relied on by the Defendant for the same reasons as I have indicated in relation to (ii).

152. Parliamentary privilege was explained by Lord Reed in *SC* in the following terms:

> "164. Parliamentary privilege is given statutory expression in article 9 of the Bill of Rights 1688… 'the freedom of speech and debates of proceedings in Parliament ought not to be

> impeached or questioned in any court or place out of Parliament.' That is not, however, a comprehensive statement of the privilege. It was more fully explained by Lord Browne-Wilkinson in *Prebble v Television New Zealand Ltd* [1995] 1 AC 321, 332:
>
> > 'In addition to article 9 itself, there is a long line of authority which supports a wider principle, of which article 9 is merely one manifestation, viz that the courts and Parliament are both astute to recognise their respective constitutional roles. So far as the courts are concerned they will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges.'
>
> 165. As that statement makes clear, the law of Parliamentary privilege is not based solely on the need to avoid any risk of interference with freedom of speech in Parliament. It is underpinned by the principle of the separation of powers, which, so far as relating to the courts and Parliament, requires each of them to abstain from interference with the functions of the other, and to treat each other's proceedings and decisions with respect. It follows that it is no part of the function of the courts under our constitution to exercise a supervisory jurisdiction over the internal procedures of Parliament…"

153. In *Office of Government Commerce v Information Commissioner* [2008] EWHC 737 (Admin) Stanley Burnton J (as he then was) concluded that the prohibition on "questioning" debates and proceedings in Parliament, precluded a challenge to the accuracy or veracity of something said in Parliamentary proceedings (paras 39 and 64). He also held that parties to litigation could not rely on opinions expressed by a Select Committee, where the other party contended for a different result and thus asserted that the opinion of the Committee was wrong and thereby risked breaching the privilege; or, because of the risk of breaching the privilege, the other party accepted that opinion notwithstanding that it would not otherwise do so (para 58). By contrast, if the evidence given to a committee is uncontentious, there was no objection to it being taken into account (para 64).

154. In *R (Wheeler) v Office of the Prime Minister* [2008] EWHC 1409 (Admin) ("*Wheeler*") a Divisional Court (Richards LJ (as he then was) and Mackay J) considered whether Parliamentary statements could be relied upon to found a legitimate expectation. The claim concerned a 2004 promise made by the then Prime Minister, which was relied on as giving rise to a legal obligation to hold a referendum in relation to the subsequently negotiated Lisbon Treaty. The Speaker, represented by Mr Lewis QC (as he then was), was an Interested Party. The claim failed because the claimant was unable to establish an enforceable representation and so the Court's consideration of the use to which the Parliamentary material could be put is *obiter dicta*. However, at para 53 the Court said:

> "First, Mr Lewis went so far as to submit that a case of legitimate expectation could not be founded on the Prime Minister's statements to Parliament, because it would involve questioning what was said in Parliament, contrary to Article 9 of the Bill of Rights 1689 and the wider principle of Parliamentary privilege based on the need to avoid interfering with free speech in Parliament. We doubt whether that is right, and we note that the defendants as well as the claimant took issue with it. There are several cases where the courts have entertained claims of breach of legitimate expectation founded on ministerial statements in Parliament: see, for example, *In re Findlay* [1985] AC 318, 326 -328; *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, [2003] UKHHR 76, para 91; and *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] QB 1397, paras 2-3. In such cases the claimants are not questioning what has been said, but relying on it. The view that Parliamentary statements may be used for such a purpose also derives support from the judgment of the Privy Council in *Toussaint v Attorney General of Saint Vincent and the Grenadines* [2007] 1 WLR 2825. We do not, however, need to decide the question because it is common ground that the promise to hold a referendum on the Constitutional Treaty was repeated to the media outside Parliament and that no question of Parliamentary privilege arises in relation to statements to the media."

155. The Speaker was an intervener in *R (Heathrow Hub Ltd) v Secretary of State for Transport* [2020] EWCA Civ 213, [2020] 4 CMLR 17 ("*Heathrow Hub*"). The judgment of the Court (Lindblom, Singh and Haddon-Cave LJJ) recorded that the Speaker accepted that reference could properly be made to proceedings in Parliament in the following circumstances, without this constituting impermissible "questioning" of statements made in Parliament (para 158):

> "(1) the courts may admit evidence of proceedings in Parliament to prove what was said or done in Parliament as a matter of historical fact where this is uncontentious: see *Prebble v Television New Zealand Ltd*…
>
> (2) Parliamentary material may be considered in determining whether legislation is compatible with the European Convention on Human Rights…
>
> (3) the courts may have regard to a clear ministerial statement as an aid to the construction of ambiguous legislation…
>
> (4) the court may have regard to Parliamentary proceedings to ensure that the requirements of a statutory process have been complied with…

> (5) the courts may have regard to Parliamentary proceedings in the context of the scope and effect of Parliamentary privilege…
>
> (6) an exception has also been identified for the use of ministerial statements in judicial review proceedings. The Speaker accepts that such an exception exists but contends that the scope and nature of this exception has not yet been the subject of detailed judicial analysis. It calls for careful consideration of the constitutional issues involved. We respectfully agree."

156. The judgment went on to confirm that the Courts cannot consider allegations of impropriety or inadequacy in the proceedings of Parliament (para 167). The Court then made reference to *Kimathi v Foreign and Commonwealth Office* [2017] EWHC 3379 (QB), [2018] 4 WLR 48 ("*Kimathi*"), where Stewart J declined to allow the claimants to use Parliamentary material to prove facts (the number of detainees held in camps in Kenya in the 1950s) which were neither confirmed nor denied by the other party and about which there was no other evidence. At para 20, Stewart J concluded that as the defendant did not admit these underlying facts, the claimants could not rely upon Hansard for the truth of what was said; if they were able to do so, the Court would have to decide on the accuracy of the content of the proceedings in Parliament, so as to determine if those facts were proven, a course that was expressly forbidden. The Court in *Heathrow Hub* then observed at para 169:

> "Although we do not have to decide the point, we see force in the submissions made on behalf of the Speaker. The fundamental difficulty in our view, is that, if the statements were held to be admissible and if there is a dispute as to their meaning, the court would be drawn into having to resolve whether what was said on behalf of the Secretary of State was accurate or not. That would bring the court into the territory which is forbidden by art.9 of the Bill of Rights."

157. In *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2021] EWCA Civ 193, [2021] 1 WLR 3049 ("*PRCBC*") David Richards LJ (as he then was, who gave the leading judgment) considered the sixth category identified at para 158 of *Heathrow Hub*, namely the use of ministerial statements in judicial review proceedings. (The case was further appealed to the Supreme Court, but the question of Parliamentary privilege did not arise for determination at that stage.) Richards LJ noted that *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696 appeared to be the first case in which use of ministerial statements had occurred. It involved a challenge to the Home Secretary's directive to television and radio authorities not to broadcast statements made directly by members of proscribed terrorist organisations. Richards LJ said that in both the Court of Appeal and the House of Lords there was extensive quotation from, and reference to, statements made by the Secretary of State in Parliament, setting out his reasons for issuing the directive, in circumstances where it was the adequacy of those reasons that was challenged. Richards LJ continued:

> "104 This and subsequent cases where similar use of ministerial statements in Parliament has been used in judicial review proceedings have been taken to establish that a 'minister's statement [may be] relied upon to explain the conduct occurring outside Parliament, and the policy and motivation leading to it: *Toussaint v Attorney General of Saint Vincent and the Grenadines* [2007] 1 WLR 2825, para 17… In *Warsama v Foreign and Commonwealth Office* [2020] QB 1076, this court (Lord Burnett of Maldon CJ, Coulson and Rose LJJ) said at para 24 that: 'The courts have also redrawn the boundaries of privilege to allow examination in judicial review proceedings of the reasons given by a Minister in Parliament for a particular decision under challenge'.
>
> 105 As it appears to me, this use of ministerial statements is permitted for the limited purpose of identifying the Government's purposes and reasons for taking or proposing the action which is being challenged in the proceedings. Those are the purposes or reasons which have been formulated outside Parliament and explain action taken by the Government outside Parliament, either for example, by the Directive issued in *Brind* or by the decision to make subordinate legislation. Essentially, it is a convenient way of putting those purposes or reasons in evidence, which may be simpler than setting them out in a witness statement by the minister or an official."

158. In *PRCBC* the use of Parliamentary materials was not permitted as the intended purpose went beyond informing the Court of the reasons for the particular decision and required the Court to assess, by reference to questions from members of Parliament and the answers given by ministers, whether in the course of the debates the Secretary of State had performed her statutory duty (para 108).

Parliamentary privilege: discussion and conclusions

159. It is convenient to resolve the three issues regarding Parliamentary privilege that I identified at para 151 above before turning to the grounds of challenge.

The Ministerial Statement of 23 June 2020

160. The Claimant and the Defendant agree that this statement can be relied upon as part of the material that is said to found the representation giving rise to the substantive legitimate expectation. BEO and UNISON also support this position and Ms Monaghan KC made helpful oral submissions on this topic.

161. That the Court is able to admit the statement for this purpose is supported by the *obiter dicta* analysis at para 53 of *Wheeler* (para 154 above), the cases cited therein and also the Supreme Court's subsequent decision in *Finucane* (para 111 above). However, as the Speaker submits that the Home Secretary's statement should not be admitted for this purpose, I will address his concerns.

162. The Speaker submits that the recent case law does not support reliance on Parliamentary statements to establish a legitimate expectation and that, if permitted, this would develop a new area of exception in relation to judicial review of ministerial decisions. I do not agree. The recent cases cited by the Speaker in this regard are *Kimathi, Heathrow Hub, PRCBC* and *SC*, which I have discussed at paras 152 and 155 - 158 above. Whilst it is true that these authorities do not provide direct support for the admissibility of ministerial statements for the purposes of establishing a legitimate expectation, that in itself is relatively unsurprising as it was not an issue raised in those cases. More to the point, none of these authorities provide reasons to doubt such admissibility, which is supported by the case law I have just referred to. Accordingly, I do not accept the suggestion that permitting the Claimant to rely on the Home Secretary's 23 June 2020 statement for the purposes of Ground 1 would amount to the creation of a new area of exception.

163. The Speaker also submits that if the Court permits the minister's statements to Parliament to be relied upon to found a legitimate expectation, this will have an undesirable chilling effect, with ministers unwilling to express any view to the House until they were wholly certain that the policy was fixed and would not change. However, this appears to be little more than assertion, particularly given that it is not suggested that the case law I have referred to at para 161 above has had this effect. The submission also appears to be based on a misunderstanding as to the effect of a substantive legitimate expectation, if established. Such an expectation does not compel the policy in question to remain unchanged; the policy can be altered provided there is reason to do so and this does not amount to an abuse of power (paras 114 - 116 above).

164. The Speaker refers to the difficulties that would arise if the minister's statement were disputed or not admitted. However, that does not arise in the present case; it is a matter of record that the relevant statement was made to Parliament and there is no dispute as to what was said. Whether the statement, taken with the other material relied upon, gave rise to an enforceable legitimate expectation is a question of law.

165. Accordingly, whilst I am grateful for the assistance provided, I am not persuaded by the Speaker's objections. As was said in *Wheeler*, the Claimant is not "questioning" what was said to Parliament, but relying on it. I do not consider that permitting the Claimant to rely on the 23 June 2020 statement in these circumstances involves any improper trespassing on the role of Parliament.

The Ministerial Statement of 26 January 2023

166. I have already identified the purposes for which the Defendant seeks to rely on the 26 January 2023 written statement to Parliament. It is common ground that it may be relied upon as a part of the general context, namely that the Home Secretary's decision was subject to Parliamentary accountability. There is also no dispute as to what was said to the House; the written statement is a matter of record. However, the Claimant objects to the Defendant relying upon this statement to evidence the reasons for making the challenged decision, submitting that as the Home Secretary's reasons are disputed, resolving this issue would involve the Court encroaching into forbidden territory. As this issue only crystallised during the course of oral submissions, the Speaker did not express a specific view on the Defendant's proposed use of the 26 January 2023 statement. However, the Speaker's written submissions acknowledge

the existence of the exception that applies where the Court is adjudicating upon an application for judicial review, as discussed in *Heathrow Hub* and in *PRCBC* (paras 155 - 158 above), indicating that "while an exception is on balance appropriate, it should for important constitutional reasons be no wider than necessary".

167. As explained by David Richards LJ in *PRCBC*, there is now an established body of case law that supports the proposition that ministerial statements to Parliament may be relied upon in judicial review proceedings to explain ministers' decision-making outside of Parliament, by identifying the reasons for taking the relevant decision. On the face of it, the present instance engages this exception to Parliamentary privilege. In the authorities I have referred to, this exception has arisen in contexts where the Court has had to inquire into and evaluate the *adequacy* of a minister's stated reasons.

168. In one sense the rationale for the Court doing so is all the stronger in the present instance. There is force in Mr Brown KC's point that it could give rise to a striking imbalance if the Claimant is able to rely upon the 23 June 2020 Ministerial Statement in seeking to establish the alleged legitimate expectation, but the Defendant is not permitted to rely on the 26 January 2023 Statement as evidencing the reasons for the subsequent change of policy.

169. Nonetheless, as I have indicated, the Claimant submits that the Home Secretary's statement to Parliament cannot be relied upon in these proceedings because the reasons that she gave are disputed. As, I have already indicated, the sheer fact that the Claimant takes issue with the *adequacy* of the Defendant's reasons, does not distinguish the present situation from those considered in *PRCBC*. Indeed, it is the inadequacy and/or lack of the Home Secretary's reasons that is at the forefront of the Claimant's case. In these circumstances, it appears to me appropriate to examine whether there is, in truth, a significant dispute of fact that the Court has to resolve that would involve "questioning" proceedings in Parliament or trespassing upon its functions. As I go on to explain below, I do not consider that there is.

170. I bear in mind that in judicial review proceedings, absent any application to cross-examine, the defendant's evidence will be accepted unless that evidence "cannot be correct": *R (Singh) v Secretary of State for the Home Department* [2018] EWCA Civ 2861 at para 16; or the defendant's evidence is "internally contradictory, implausible or inconsistent with other incontrovertible evidence": *R (Soltan) v Secretary of State for the Home Department* [2020] EWHC 2291 (Admin) at para 88. The present instance does not come close to those sorts of circumstances, as I explain below. By contrast, *Kimathi* (para 156 above) was a civil action in which the facts of the claim were very much in issue and the claimants sought to use statements made in Parliament to prove external, disputed facts.

171. Ms Kaufmann identified two bases for suggesting that the reasons the Home Secretary gave to Parliament were in dispute. Firstly, that these reasons were contradicted by other material. In particular, she highlighted that the reason given in the 7 December 2022 document for not proceeding with Recommendation 10 (the review of ALBs), was not mentioned in the Ministerial Statement, which referred to other ways in which the Home Office was inviting scrutiny. However, it is readily apparent that the 26 January 2023 statement was a short summary, not an exhaustive itemisation of the considerations that had been taken into account. By way of example (and as I address at paras 253 - 254 below), it is clear that the strong divergence of views expressed by

stakeholders in relation to Recommendation 3 was a significant factor in the decision not to proceed with the reconciliation events. However, it is entirely understandable why this conflict of views was not identified directly in the Ministerial Statement (other than a passing reference to it being an "incredibly sensitive subject") and instead emphasis was placed on other engagement events that had taken place. Recommendation 10 was addressed quite briefly along with Recommendation 9 and the reference to other ways of inviting challenge and scrutiny had been identified in the September 2022 Submission in relation to Recommendation 9. In short, the proposition that the 26 January 2023 statement was contradicted by other material can only get off the ground if that statement is understood as purporting to contain a comprehensive account of the Home Secretary's reasons for making the challenged decision; and in my judgement, it is not to be read in that way. I also note that the two reasons highlighted by Ms Kaufmann (the review of ALBs and other means of scrutiny) are not inherently contradictory.

172. Ms Kaufmann's second basis was the concerns raised by officials on 1 August 2022 as to the lack of progress with Recommendation 9 (para 65 above). She suggested that it could be inferred that this was the real reason why officials then proposed that the Home Secretary should not proceed with Recommendation 9. This appears to be nothing more than speculation; there is no, or certainly no sufficient, evidential basis for inferring that this was the officials' thinking, rather than the reasons they actually gave in the September 2022 Submission. Additionally, even if it could be inferred that this was their reason, it involves a leap of logic to say that because Home Office officials had concerns about delay on the part of the Home Secretary, this became the reason, or one of the reasons, for the Home Secretary's own decision.

173. Accordingly, I do not consider that any significant basis has been advanced for the Court to do other than have regard to the Home Secretary's statement to Parliament on 26 January 2023 as part of the explanation for her decision-making.

The HASC on 8 March 2023

174. It is agreed that the fact of the Minister's appearance before the HASC on 8 March 2023 may be relied upon as a part of the general context, namely that the Home Secretary's decision was subject to Parliamentary accountability. Unsurprisingly, again, there is no dispute as to what was said. The Claimant's and the Defendant's respective positions are similar to those I have summarised in relation to the Home Secretary's 26 January 2023 statement.

175. I considered this material provisionally. I did not hear detailed oral submissions on it. As I do not consider that the contents advance either party's position, I decline Mr Brown's invitation to place reliance upon it. In these circumstances it is unnecessary for me to determine the Parliamentary privilege point. I will simply indicate that it appears to me significantly less clear that this material would come within the exception discussed in *PRCBC*, not least because the challenged decision was taken by the Home Secretary personally, whereas this is an account provided by another minister, Lord Murray, which he gave over a series of answers to particular questions that were posed by the HASC. In this regard I note that the Speaker submits that the judicial review exception should be narrowly confined to statements made by the minister in question setting out the reasons for his or her decision.

Ground 1: Issue 1: do the matters relied on establish a substantive legitimate expectation?

An outline of the submissions

176. The Claimant's central submission is that the CIP contained a clear, unambiguous and unqualified undertaking as to a future course of conduct, namely that the Defendant would implement all 30 of the recommendations made in the WLLR. The detail contained in the CIP concerned *how* the recommendations would be taken forward, not whether they would be implemented; the document was premised on the basis that the end point was implementation. Although given greater prominence in the submissions made by the Interveners, the Claimant also relies upon the Home Secretary's 23 June 2020 statement to Parliament as containing a clear commitment to implement all of the recommendations made by the WLLR and providing the context in which the CIP was published.

177. Ms Kaufmann emphasised the context in which the statements were made. The WLLR's recommendations were aimed at remedying and avoiding the repetition of a monumental injustice and at restoring trust. Although the statements were made to the world at large, the premise and the focus of the WLLR was upon the great harm that had been done to members of the Windrush generation and the recommendations were made primarily for their benefit (albeit others would benefit too from their implementation). Whilst accepting that the test was an objective one, she submitted that the extent to which the statements had been understood as a firm promise both by officials and by those outside Government was significant. The Interveners highlighted various examples of this.

178. Mr Brown acknowledged the profound impact upon the Windrush community. However, he disputed that the CIP contained any clear and unambiguous representation to implement Recommendations 3, 9 and 10. The document set out a plan of future action in relation to policy that would, inevitably, continue to develop and evolve and be kept under review by ministers and officials. It was a nuanced policy response to a complex and wide-ranging injustice and a series of recommendations, developed in the context of other related initiatives including the Windrush Scheme and the WCS and in circumstances where ministers had to have regard to wider community interests.

179. Mr Brown submitted that the CIP did not rule out the possibility of subsequent changes to the policy; the response to each recommendation was couched in qualified terms that referred to further steps and further consideration. Implicitly, this meant that the ultimate outcome might be a decision not to proceed. Policies may change and readers of the CIP should be taken to know that. Furthermore, the wording of the responses to Recommendations 3, 9 and 10 was not sufficiently specific to give rise to an unambiguous commitment to undertake a particular action. There was no stated commitment to maintain the policy indefinitely and the CIP was addressed to the world at large, rather than to a limited, focussed group.

Discussion and conclusions

180. I have summarised the relevant legal principles at paras 108 - 111 above. I accept that a representation capable of giving rise to an enforceable substantive legitimate

expectation *may* arise from a promise to confer a benefit that is not currently enjoyed or a promise to take some other specified future action. This is illustrated by the Supreme Court's decision in *Finucane* and the Privy Council's judgment in *Paponette* (paras 111 and 113 above). I can see no principled reason why the doctrine should be confined to cases where the substantive benefit already exists. However, the fact that a promise relates to a future course of action, may, depending upon the context, be of significance in assessing whether a sufficiently clear and unambiguous representation has been made. That is likely to be the case where the context concerns central Government policy making in the macro-political field.

181. I also accept that a representation capable of giving rise to an enforceable substantive legitimate expectation *may* arise from a promise made to the world at large. This was the case in relation to the promise of a public inquiry in *Finucane* (para 111 above) and also in *Sargeant*, where the First Minister of Wales announced that there would be an independent investigation into the death of the claimant's husband (a member of the Welsh Assembly who was removed as a minister following certain allegations). However, in both these instances, although the promise was made to the public in general and was, at least in part, made with a view to allaying public concern, a relatively small group, namely the families of the respective deceased, were the main beneficiaries of the respective promises and the central focus.

182. Additionally, I note that in each of the three cases I have referred to (*Finucane*, *Paponette* and *Sargeant*) the representation in question involved a relatively specific promise concerning a particular course of action.

183. There are a number of factors that support the Claimant's contention. I accept that it is significant that the WLLR recommendations were made in the context of and as a response to the serious wrongs suffered by members of the Windrush generation. It is also relevant that the representation relied upon was made in a considered and formalised context. The Government took time to reflect upon the WLLR recommendations and to produce a thorough plan after fairly extensive consultation. The CIP was published as the detailed response to those recommendations; it was itself the fulfilment of Recommendation 2 ("the department should publish a [CIP] within six months of this report which takes account of all its recommendations") and it was clearly understood that Wendy Williams would return in a number of months to assess the progress that had been made. In other words, the text of the CIP had been weighed carefully and it would not be expected that the contents would be taken lightly by members of the Windrush community.

184. I also attach some weight to the Home Secretary's relatively brief 23 June 2020 statement to Parliament (para 26 above). On the face of it this was a clear and unqualified statement that she "will be accepting the recommendations… in full". However, as both Ms Kaufmann and Mr Brown submitted (albeit for different reasons), the key document is the CIP. This came three months after the Ministerial Statement to Parliament; self-evidently from its contents, it was the product of detailed planning and discussion; and it was the means by which the Home Secretary set out what would be done in response to the WLLR's recommendations. By contrast, the 23 June 2020 statement was relatively brief and spoke of what the Home Secretary would be doing when she came to address implementation via the CIP (I "will be" accepting the recommendations, rather than "I have accepted" the recommendations).

185. The test is an objective one; I must determine how, on a fair reading of the promise, it would have been reasonably understood by those to whom it was made (para 109 above). I derive some, but limited, assistance from the evidence as to how the promise was understood at the time. In their submissions to the Home Secretary, officials often referred to the "commitment" that had been made to implement the WLLR recommendations (examples appear at paras 38, 49, 56, 65, 68 and 71 above). However, the use of this phrase was a shorthand and the focus was on what, politically, the Home Secretary was going to do; I do not interpret this wording as indicating that officials had made a considered evaluation of the extent to which a legally binding promise had been given. I take into account that this was the understanding that Wendy Williams expressed in the Progress Report (paras 45 – 46 above), but the context was one where she was (understandably) focussed on pressing the Home Office for greater tangible progress. The understanding of the Home Secretary's position described by Dr Wyporska, Mr Vernon and Mr Braithwaite (paras 96, 100 and 103 above), can only be a snapshot of how some individuals interpreted this.

No enforceable representation

186. Although I have taken into account all of the factors that I have just discussed, I do not consider that the Claimant has established that there was a clear, unambiguous and unqualified representation to implement the WLLR's Recommendations 3, 9 and 10. I will go on to set out my reasons.

187. Firstly, (as Ms Kaufmann fairly acknowledged) it is striking that there is no explicit statement to be found in the lengthy text of the CIP that all of the recommendations are accepted and will be implemented or that Recommendations 3, 9 and/or 10 are accepted and will be implemented. The Claimant's contention is that this is implicit from the contents of the CIP, read in the context that I have already identified. However, as I will go on to explain in more detail, the text of the CIP does not support that proposition; to the contrary, the wording used indicated that these three recommendations would be the subject of further investigation, policy deliberation and consideration, rather than a single, identifiable outcome being promised at this stage. I also note that in her Foreword, the Home Secretary said of the WLLR that she "accepted her *findings*", rather than "her recommendations". It appears to me that this, like the wording of the CIP more generally, was carefully chosen language. I turn next to the individual recommendations.

188. Paragraphs 41 and 42 of the CIP did not express an unqualified or an unambiguous commitment to implement Recommendation 3, as can be seen from a comparison of their respective wording (at paras 18 and 30 above). Recommendation 3 envisaged "a programme of reconciliation events with members of the Windrush generation…in the presence of… senior Home Office staff and ministers so that they can listen and reflect on their stories". Whereas para 41 said: "We are hosting a series of events to allow members of the Windrush generation and their wider community to share their experiences. By engaging with their stories, the Home Office can acknowledge, continue to learn from the past…". Accordingly, the CIP did not promise to hold reconciliation events in the presence of senior Home Office officials or ministers; and the "series of events", as described, was a relatively vague concept, further qualified by the indication that ongoing discussions were taking place with the WXGWG as to

the nature of these events. Additionally, the CIP did not commit to continue holding events for any particular period of time.

189. Additionally, the CIP response did not contain an unqualified commitment to introduce a Migrants' Commissioner as described in Recommendation 9; to the contrary, para 167 of the CIP expressed agreement that this would be "a valuable role" and para 168 said that the Home Office was consulting with the WXGWG "to recommend how best to advance this recommendation" (para 32 above). This wording did not commit the Defendant to advancing the recommendation in any particular way and, as such, was notably non-specific. A further indication that the CIP response did not in fact mirror the terms of Recommendation 9, is that Wendy Williams did not consider that this response fully reflected her recommendation (para 62 above).

190. Similar points apply in relation to Recommendation 10. The terms of the Recommendation itself was that the Government should give "consideration" to increasing the ICIBI's powers with regard to publishing reports (para 22 above). Recommendation 10 did state in terms that ministers "should have" a duty to publish reasons where they did not implement ICIBI recommendations, but the CIP responded with the more qualified indication that the review would include "*considering* whether to establish" this duty (para 33 above). The CIP response was qualified in other respects as well; it said that the Home Office would "seek to appoint an independent reviewer"; and that the finding of the review would be used "to consult on changes to the ICIBI". I also note that the focus of the response is somewhat different to the reasoning in the WLLR. In short, Wendy Williams wanted the powers of the ICIBI to be expanded so that they would be able to identify a future Windrush (para 21 above); whereas the emphasis, at least in part, of the response, is upon the effectiveness and efficiency of the ICIBI. This was another area where Wendy Williams did not consider that the CIP mirrored her recommendation (para 77 above).

191. A failure to fully commit to the WLLR's recommendations in the CIP was a political choice that it was open to the Government to make; and for present purposes, that failure to fully commit to Recommendations 3, 9 and 10 makes it very difficult to identify any clear, unambiguous and unqualified representation that those recommendations would be implemented.

192. I accept Mr Brown's submission that the CIP set out a plan of future action in relation to policy that, by the nature of what was indicated, was going to be kept under review and continue to develop. I take Ms Kaufmann's point that the focus of the CIP was on *how* the recommendations would be implemented, there was no indication at that stage that any of these three recommendations would not be taken forwards. However, the Claimant needs rather more than that to establish a sufficiently clear, unambiguous and unqualified representation that will give rise to a substantive legal expectation; in particular, a level of clarity, unambiguity and lack of qualification that was not present in the CIP. The starting point, as set out in the CIP, was not a simple acceptance of the three recommendations, and the text indicated that the end point might involve further divergence.

193. The post-CIP developments reinforce the proposition that this was a continuing area of policy evolution; by way of example, there was a sharp divergence of views as to the advisability of proceeding with reconciliation events; the WXGWG and the Home Secretary had a different perception as to who should act as a Migrants' Envoy; and

there were difficulties finding a person who was regarded as suitable to undertake the ICIBI review.

194. Furthermore, all this needs to be placed in the context of two features that I discussed at the outset of this section. Firstly, the alleged representation/s related to future Government actions in an area of complex policy development and where investigations and review were ongoing. Secondly, the CIP was published to the world at large. Whilst members of the Windrush generation and their families had suffered a particular harm and undoubtedly had a particular interest in the outcome, this in itself was a large group of people numerically and, as the divergence of views in relation to Recommendation 3 illustrates, it was not a group who all shared the same views in terms of appropriate remedial steps. Furthermore, the group of people that Wendy Williams intended to benefit from her Recommendations 9 and 10 was much wider still; these recommendations related to migrants and future migrants to the UK more generally. As Laws LJ observed in *Bhatt Murphy*, it is difficult to envisage a case in which Government will be held legally bound by a representation made generally or to a diverse class, not least because the wider the class of persons affected the greater the possibility of there being a countervailing public interest (para 110 above).

195. For all these reasons I conclude that the matters relied upon do not establish a substantive legitimate expectation that the Court can enforce. In the circumstances the second issue (whether the challenged decision was an unlawful breach of a substantive legitimate expectation) does not arise and I dismiss Ground 1.

Ground 2: Issue 1: do the matters relied on establish a procedural expectation of consultation?

An outline of the submissions

196. The Claimant relies on both of the situations that were discussed by Laws LJ in *Bhatt Murphy* (paras 117 – 120 above). Ms Kaufmann submitted, firstly, that clear and unambiguous undertakings to consult were given which created a legitimate expectation that before any decision was taken to resile from the commitments undertaken in the CIP, those affected and particularly the Windrush community would be consulted. She said that a theme running throughout the CIP was that the Home Office would be transparent and would liaise with and listen to the views of external stakeholders. More specifically, she relied upon the terms of Recommendations 3, 8 and 13. It was not suggested that there was an established practice of consultation.

197. Secondly, Ms Kaufmann argued that it was conspicuously unfair of the Defendant to resile from implementation of the recommendations without consulting relevant stakeholders, including: the Windrush community, for whose benefit they were adopted; Wendy Williams, as their architect; and David Neal, the then ICIBI, in relation to Recommendations 9 and 10. She relied on the points advanced in support of Ground 1. In addition, an important contextual factor was that a significant cause of the Windrush scandal was the Home Office's failure to listen to members of the

Windrush generation; and in these circumstances the need to avoid compounding the sense of injustice already felt through those failings could not have been greater. She said this was accepted by the Home Office and by way of example she cited para 18 of the submission by officials to the Home Secretary, dated 12 May 2020, which said:

> "**We will also need to engage widely with external stakeholders, including Wendy Williams, to help challenge and inform our proposals as they are developed.** As part of our work we will reach out to, listen to, and really hear the hard to reach voices that we have too often ignored in the past to build confidence that the department is committed to change. We are currently developing an external engagement plan, including the role we hope you and other ministers will play in it…" (Emphasis in the original text.)

198. BEO supported the Claimant's submissions, identifying additional references in the CIP which it was said committed the department to a policy of engagement and consultation with external stakeholders.

199. In his skeleton argument, Mr Brown took issue with the alleged duty to consult, saying that there was no unequivocal assurance of consultation, whether in the CIP or elsewhere. He submitted that the consultation referred to in the CIP was consultation that had already taken place in assessing the recommendations and developing the policy response set out in the CIP. He denied that there was an obligation to consult in relation to future changes of policy.

200. However, in his oral submissions (after having emphasised when addressing Ground 1, the extent to which the CIP response to Recommendations 3, 9 and 10 indicated that things were at a stage of ongoing discussion and development), Mr Brown said that he acknowledged that there was a commitment to consultation in relation to policy formulation.

Discussion and conclusions

201. The question for me to resolve is whether the matters relied on gave rise to a procedural expectation that the Defendant would consult with relevant stakeholders, including the Windrush community, before substantially changing the response to the WLLR's recommendations that was set out in the CIP. For the reasons that I go on to identify, I accept that there was such a procedural expectation, giving rise to a duty to consult in this instance. I will address the extent of that expectation and whether it was met when I come on to the second issue that arises under Ground 2.

202. The present circumstances are better categorised as an instance of Laws LJ's "secondary" case, where a failure to consult would be conspicuously unfair, as opposed to a "paradigm" case where the duty arises from an express representation that such consultation would occur (paras 118 – 120 above). Whilst statements were made about consultation, there was not an unequivocal explicit statement that there would be consultation before any substantial changes were made to the response set out in the CIP. Nonetheless, insofar as there were general indications given that external stakeholders would be consulted and listened to, this contributes to the

cumulative effect of the factors that I will go on to identify, which give rise to the situation where non-consultation would be conspicuously unfair.

203. Before doing so, in the interests of clarity, I will address two aspects to which I do not attach significance. Firstly, the Claimant relied on the terms of the CIP's response to both Recommendations 3 and 13. Recommendation 13 was concerned with Impact Assessments in relation to new Home Office-led *legislation*. Accordingly, what was said about consultation in that context is not directly germane to the present context. In terms of future consultation, the response to Recommendation 3 referred only to working with the WXGWG and other departments and thus does not significantly assist the Claimant for these purposes. Secondly, the Defendant was clearly incorrect in submitting that references in the CIP to consultation, were only references to discussions that had *already* taken place in formulating that response.

204. For the avoidance of doubt, I approach this issue on the basis that, consistent with my conclusion on Ground 1, there was no unambiguous and unequivocal enforceable commitment to implement the terms of Recommendations 3, 9 and 10. However, relevantly for present purposes, the CIP did indicate steps that the Home Office would be taking in response to these recommendations, including that events would be hosted that would allow members of the Windrush generation to share their experiences (para 30 above); that the Migrants' Commissioner role was considered valuable and the proposal would be advanced via discussions with the WXGWG (para 32 above); and that a full review of the ICIBI was planned, with consultation on changes to the ICIBI to follow (para 33 above).

<u>The procedural expectation</u>

205. It is the combined impact of the following factors that leads me to conclude that there was a procedural expectation that the Defendant would consult with relevant stakeholders, including representatives of the Windrush community and Wendy Williams (and the ICIBI in respect of Recommendations 9 and 10), before substantially changing the Home Office's response to the WLLR's Recommendations 3, 9 and 10 that was set out in the CIP:

    i) The recommendations of the WLLR arose from and were designed to address a serious and sustained injustice that members of the Windrush generation had experienced and to provide some reassurance for the future. Additionally, as Ms Kaufmann submitted, a recognised cause of the Windrush scandal had been the Home Office's failure to listen to and understand the concerns of members of the Windrush generation; and it was evidently important, in so far as possible, to avoid compounding the sense of injustice that arose from this;

    ii) Listening to, engaging with and consulting external stakeholders was a consistent theme that ran through the CIP. In her Foreword the then Home Secretary said: "We will continue to listen and act carefully over the months and years ahead" (para 28 above). Theme 4 (which included Recommendations 9 and 10) was centrally about the Home Office "involving communities and stakeholders in all our policy development and implementation" (para 31 above). This was reinforced by the terms of paras 161 and 162 (para 31 above). More specifically in relation to Recommendation

10, para 172 of the CIP said that the findings of the review would be used to consult on changes to the ICIBI (para 33 above);

iii) After accepting the WLLR's findings, taking time to reflect upon the recommendations and engaging in consultation, the Home Office had published a detailed, written plan. The CIP was put forward as the Home Office's thorough, considered response to those recommendations; and was itself the fulfilment of the WLLR's Recommendation 2. Progress in respect of this response was to be monitored. Although the terms of the CIP indicated that in a number of respects the policy was still in development, I accept that it would not be expected that the stated response would be materially changed without further discussion;

iv) As I have referred to at para 202 above, the CIP did identify specific actions that would be taken in response to Recommendations 3, 9 and 10;

v) As I have described in the respective chronologies, the Defendant did then take initial steps towards the implementation of each of these responses;

vi) It was apparent that Recommendations 3, 9 and 10 were all regarded by the report's author, Wendy Williams, as key components of her lesson-learning recommendations;

vii) Mr Brown rightly acknowledged that in light of the terms of the CIP, there was a commitment to future consultation on policy formulation. Such a commitment must have extended to circumstances where the Defendant was considering not proceeding with the implementation that had been indicated in the response to the recommendations;

viii) In respect of consultation with Wendy Williams, her central involvement in producing the WLLR and the Progress Report, as I have described; and

ix) In respect of consultation with David Neal, the obvious impact on the ICIBI role arising from the Home Office's response to Recommendations 9 and 10.

Ground 2: Issue 2: did the Defendant unlawfully breach the procedural legitimate expectation?

An outline of the submissions

206. Ms Kaufmann submitted that there was inadequate consultation in respect of the decision not to proceed with the Recommendation 3 response, and no consultation at all in relation to the equivalent decisions in respect of Recommendations 9 and 10. As the Defendant had not established any justification for the failure to consult, the challenged decision was made in breach of the procedural legitimate expectation of prior consultation.

207. As regards Recommendation 3 and BIMA 1 and 2, she said that only BIMA 1 involved consultation on whether to proceed (as opposed to the design of events) and the pool of consultees at that stage was inadequately small. Furthermore, consultation with the WXGWG was insufficient as it was not representative of the Windrush

community, as was implicitly acknowledged by the fact that BIMA consulted more widely.

208. BEO supported the Claimant's position, making specific submissions in relation to the BIMA reports. The consultation involved small numbers of participants and no explanation had been provided as to how they were selected. Many others, including BEO, would have participated, had they been given the opportunity to do so. Furthermore, there was no evidence that the Home Secretary had conscientiously considered the outcome of the BIMA consultation before making the challenged decision.

209. Mr Brown did not seek to justify an absence of consultation; his position was that appropriate consultation had taken place. He said that it was unrealistic to consult with the whole Windrush community and that the WXGWG was an appropriate body for these purposes. He submitted that consultation about proceeding with a recommendation in a particular way, implicitly included consultation as to whether it should go ahead at all. He said that there had been adequate consultation with Wendy Williams, particularly in light of her Progress Report.

210. As regards Recommendation 3, Mr Brown relied upon the consultation described in the 1 April 2021 submission to the Home Secretary (paras 34 – 35 above); the further 2021 discussions referred to by Ms Darian (paras 36 and 48 above); the consultation that took place in the preparation of BIMA 1 and 2; and the consultation that had occurred with the WXGWG. The terms of reference for the WXGWG made clear that its role, amongst others, was to "provide strategic input into the Home Office's response" and one of its objectives was to "provide feedback and insight from affected communities" (para 25 above).

211. In relation to Recommendations 9 and 10, Mr Brown accepted that he was not in a position to say that there had been express dialogue with the WXGWG or with other external stakeholders about whether the department should proceed with the responses indicated in the CIP. As regards Recommendation 9, he relied on the discussions that had taken place with the WXGWG Sub-group regarding the Migrants' Commissioner and the discussions with external voluntary and community sector groups referred to in the 15 September 2021 submission and in Ms Darian's statement (para 54 above). In relation to Recommendation 10, Mr Brown referred to the discussions with Mr Neal (as described in his statement) and to Wendy Williams having been consulted on the terms of reference for the independent reviewer.

Discussion and conclusions

212. As the Defendant did not assert that any failure to consult was justified in the circumstances, the focus of my consideration is on whether appropriate consultation, consistent with the legitimate expectation of consultation that I have identified, occurred before the challenged decision was taken. At the risk of stating what may be obvious, in determining this ground, I am solely concerned with whether appropriate consultation was undertaken; not with the ultimate outcome. After making a number of general observations, I will consider the position in relation to Recommendations 3, 9 and 10 in turn.

213. One of the essential requirements of consultation is that the consultee is given an indication of what is proposed and sufficient reasoning, so as to allow for an intelligent consideration and response (para 122 above). Accordingly, I reject Mr Brown's submission that a discussion about whether a particular step should be taken or whether implementation should take a particular form, *necessarily* impliedly included consultation as to whether implementation should go ahead at all.

214. In general, I do not consider that it is part of this Court's role to determine whether the WXGWG was representative of the Windrush community. Plainly, the Claimant, the Interveners and their witnesses have strongly negative views on this matter, but I do not have a complete evidential picture; others may take a different view. Furthermore, subject to the usual public law principles, it was for the Defendant to decide how it undertook consultation with external stakeholders, in circumstances where it could not realistically consult with the Windrush community as a whole. I have earlier explained that the WXGWG was set up as part of the Government's response to the WLLR and referred to its terms of reference; its objectives included providing feedback and insight from affected communities (para 25 above). There was no legal challenge, or at least no successful legal challenge, to those arrangements announced in March 2020. However, in relation to Recommendation 3, it was certainly clear to the Home Office by August 2021 (para 39 above), if not some months earlier (paras 35 and 37 above), that there was a strong and sustained divergence of views on the topic of reconciliation events, as between the WXGWG and at least a significant body of others in the Windrush community. In these particular circumstances, I accept that fair consultation on whether to proceed involved hearing from both of these viewpoints.

Recommendation 3

215. For the reasons that I will now identify, I conclude that consultation was undertaken to a sufficiently fair degree on the Recommendation 3 question of whether the holding of reconciliation events should proceed. The Claimant and BEO, rightly, accept that this was the topic of the consultation at the BIMA 1 stage (para 40 above). Whilst it is suggested that the sample consulted was too small, it is clear that a strong majority of those consulted were supportive of the events proceeding (para 41 above). In these circumstances it is difficult to see the basis for the suggestion that the consultation was unrepresentative and failed to take sufficient account of the kinds of views held by the Claimant, the Interveners and their witnesses. Whilst BIMA 2 was explicitly focused on the design of events, the consultation on whether to go ahead had already taken place at the BIMA 1 stage. It also appears from section 10 of the BIMA 2 report, that whether to go ahead at all was something that arose in the discussions and indeed it was a topic on which the facilitator herself expressed a view at section 14 of the report, having listened to the consultees (para 47 above). I bear in mind too that in her Progress Report, Wendy Williams, aware of the divergence of views, specifically engaged with the question of whether implementation should go ahead (para 46 above). It is also quite clear that the WXGWG had the opportunity to express its views on this topic (paras 37, 39, 48 and 49 above).

216. I can discern no real support for the proposition that if consultation did occur in respect of Recommendation 3 (as I have found), it was not conscientiously taken into account. The September 2022 Submission summarised both WXGWG's view that reconciliation events should not go ahead and BIMA 2's recommendation that it

would be more detrimental not to hold some reconciliation events (para 49 above); there is nothing to indicate that these competing views were not both considered by the Home Secretary.

Recommendations 9 and 10

217. However, for the reasons that I go on to identify, I conclude that the Defendant did breach the procedural legitimate expectation in respect of the decisions made with regards to Recommendations 9 and 10 and, accordingly, Ground 2 is upheld to that extent.

218. The 2021 discussions with the WXGWG Sub-group regarding implementation of Recommendation 9 focused upon whether it would be appropriate for the WXGWG itself to undertake the Migrants' Commissioner role (paras 54 - 55 and 59 above). As I have noted, Mr Brown accepted that he was not able to positively say that the WXGWG or this Sub-group was asked to consider and/or had expressed a view on whether there should be a Migrants' Commissioner at all. Similarly, there is nothing to indicate that the Home Office had addressed this topic in its discussions with external voluntary and community sector groups prior to the 15 September 2021 submission (para 54 above). Moving forwards, the chronology that I have set out earlier suggests that not a great deal happened in terms of further discussions with stakeholders after 2021. In her Progress Report, Wendy Williams addressed the implementation of Recommendation 9 on the basis of the proposal that officials had put to the Home Secretary in March 2022 (para 62 above); she did not specifically address a scenario in which the recommendation to create a Migrants' Commissioner was not to go ahead in any shape or form. The September 2022 Submission does not suggest that further consultation had taken place in relation to Recommendation 9; the proposal put to the Home Secretary appears to have been based on officials' ("we") view that there "are other opportunities to fulfil the spirit of this recommendation more effectively".

219. In the circumstances that I have identified, I accept that it was conspicuously unfair for the Home Secretary to reach the challenged decision not to proceed with the implementation of Recommendation 9 stated in the CIP, without representatives of the Windrush community and Wendy Williams having been consulted about this.

220. As regards Recommendation 10, there was very little that Mr Brown could point to by way of consultation about not proceeding with the plan to appoint an independent reviewer to review the remit and powers of the ICIBI. He referred to discussions that were held with Mr Neal. I accept that the contents of his witness statement indicates that he was consulted on this matter; it may not have been consultation in a formal sense, but it is apparent from his account that he had an opportunity to express his view as to the importance of proceeding with the implementation of Recommendation 10 at a number of meetings with ministers and senior officials (paras 81 - 83 above). As with Recommendation 9, the focus of Wendy Williams' Progress Report was upon the current plan as she understood it to be, namely that an open competition was taking place to appoint the reviewer (para 77 above). As she was not aware at that stage (or subsequently) that abandonment of the plan to appoint a reviewer was under consideration, she did not have an appropriate opportunity to address that directly and she did not do so. Furthermore, there appears to have been no consultation with the WXGWG or with any Windrush community groups in respect of a plan to abandon

the appointment of an ICIBI reviewer. It will be recalled that the September 2022 Submission proposed that the recruitment process continued and did not include views to the contrary.

221. In the circumstances that I have identified, I accept that it was conspicuously unfair for the Home Secretary to arrive at the challenged decision not to proceed with the implementation of Recommendation 10 stated in the CIP, without representatives of the Windrush community and Wendy Williams having been consulted on whether to abandon the plan to appoint a reviewer of the ICIBI role.

Ground 3: Issues 1 and 2: Does the challenged decision amount to indirect discrimination or discrimination in the *Thlimmenos* sense?

An outline of the submissions

222. I have described the Windrush-related status that is relied upon for the purposes of the article 14 ECHR claim at para 129 above. The preference that Ms Kaufmann expressed in her reply was for "Windrush victims" or "members of the Windrush community". She said that, in any event, each of the Claimant's formulations amounted to a relevant status for these purposes, as shown by the case law that I have summarised at para 130 above.

223. The Claimant's pleaded case and written submissions did not distinguish between the decision made by the Defendant in respect of Recommendations 3, 9 and 10. The Claimant's skeleton argument contended that the decision not to implement these recommendations was indirectly discriminatory because it impacted far more on the Claimant and on other victims of the Windrush scandal as the recommendations were made for the benefit of this group because of the damage caused to them by the scandal. When Ms Banton addressed me orally on this part of the case, I asked her to clarify who the victims of the Windrush scandal were being compared to for the purposes of establishing this disproportionate impact. She indicated that it was "other migrants". When I also raised this with Ms Kaufmann in her reply, she said that the comparator group could also be the rest of "the population at large". In terms of the particular impact experienced by the Claimant's group, Ms Banton emphasised the devastating, dehumanising effect of the Windrush scandal and the broken promises and broken trust that lay at its heart. As to what was the decision or measure that was applied to both the Claimant's group and the comparator group in relation to Recommendation 3, Ms Banton emphasised that the challenged decision applied to the world at large.

224. In the alternative, it was submitted that Windrush victims, including the Claimant, fell to be treated differently to others because their circumstances were relevantly different, in that they had suffered grave injury by reason of the scandal and the recommendations had been made in that context.

225. In her reply, Ms Kaufmann suggested that the Court's real focus should be on the justification issue ("Issue 3" here); that the ECtHR does not take a technical approach and tends not to focus on the earlier stages of the analysis. In this context she referred to *DH* (para 132 above) and to *AL (Serbia) v Secretary of State for the Home Department* [2008] UKHL 42, [2008] 1 WLR 1434.

226. BEO supported the Claimant's submissions. In her skeleton argument, Ms Braganza submitted that the challenged decision was indirectly discriminatory as it impacted "disproportionately on Windrush survivors and their families and with that Black and Asian communities", as the recommendations were aimed at redressing the inherently racist scandal suffered by the Windrush generation and their families, so that the decision not to proceed had a particular adverse impact upon them. In the alternative, she relied upon *Thlimmenos* discrimination, as "given the unique history, racism, and ugliness suffered by the Windrush generation and their families, they should have been treated differently" in terms of the Defendant's response to Recommendations 3, 9 and 10. After the hearing, Ms Braganza drew my attention to *R (AB) v Secretary of State for the Home Department* [2024] EWCA Civ 369 ("*AB*"). (The other parties were then given the opportunity to, but did not make written submissions on this authority.)

227. Although UNISON's submissions were focussed upon Grounds 1, 4 and 5, I did ask Ms Monaghan about the appropriate comparison to be drawn for the purposes of the indirect discrimination claim, in light of UNISON's evidence as to the impact of not proceeding with Recommendations 9 and 10 upon migrants more generally (paras 102 and 105 above). She said that both Windrush victims and the broader migrant communities were adversely impacted, but in different ways, in that, for Windrush victims, the particular impact lay in the distress caused by the perception that this was another broken promise and further disregard for their feelings; whereas for migrant workers more generally, the impact was a more practical one concerning the prospects of them obtaining British citizenship / establishing a right to remain in the UK.

228. Mr Brown accepted that "a Windrush victim" was a relevant status for article 14 purposes, although he drew attention to the different ways that the Claimant's case had been formulated, indicating that clarification was required.

229. Mr Brown submitted that the Claimant had not been able to identify a cogent case of an adverse impact on a defined group. Additionally, he disputed that the Claimant had provided sufficient evidence to show that the challenged decision disproportionately impacted on victims of the Windrush scandal. The Court had evidence of the impact on some members of the Windrush generation, but there was no evidence that this cohort overall had identical viewpoints on these matters and indeed, in relation to Recommendation 3, it was clear that they did not. Much of the Claimant's case in this area was simply assertion. This was also the case with the *Thlimmenos* claim.

Discussion and conclusions

230. I have identified what needs to be shown to establish indirect discrimination or *Thlimmenos* discrimination at paras 123 – 133 above. The question of justification is raised by Issue 3, if Issues 1 and/or 2 are answered in the affirmative. It is accepted that the Claimant's complaints are within the ambit of article 8 ECHR (para 124 above). As regards the status question, I will proceed on the basis of the primary way that the Claimant's case was put at the hearing, namely "Windrush victims" (para 222 above), albeit the conclusions that I reach would not be materially different if I were to proceed on the basis of "members of the Windrush community" instead.

231. I do not accept that I can simply consider the collective impact of the challenged decision for the purposes of Issues 1 and 2. As I go on to explain, the decision not to

proceed with the response to Recommendation 3 cannot amount to indirect discrimination other than in the *Thlimmenos* sense, whereas the decision in respect of Recommendations 9 and 10 is incapable of constituting *Thlimmenos* discrimination. However, I can see no material distinction between the decisions taken in relation to Recommendations 9 and 10 and thus I will consider those together.

232. I also decline the Claimant's suggestion to simply focus on justification. As I have indicated at para 133 above, the concepts raised by Issues 1 and 2 are distinct and correct categorisation is important because it affects what has to be justified. Secondly, as regards indirect discrimination, Lord Reed's judgment in *SC* and the Strasbourg authorities he reviewed therein, confirm that the question of justification will only arise if it is shown that there is a neutrally formulated measure which disproportionately affects a group of persons, including the claimant, who share a relevant status (paras 127 and 131 – 132 above); absent this, there is nothing to justify. The analysis of Baroness Hale in *AL (Serbia)* at paras 23 – 28 (para 225 above) was directed to a different point, namely that in a direct discrimination case where there is a difference in treatment, it will usually be better to concentrate on whether the reason for this difference amounts to objective and reasonable justification, rather than attempting to resolve whether the situation of the claimant and the comparator are sufficiently analogous (given the inter-relationship between those two questions). Similarly, *AB*, also involved a complaint of direct discrimination where there was a clear difference of treatment. At paras 42 – 43, Lady Carr, the Lady Chief Justice, cited Baroness Hale's observations in *AL (Serbia)*, adding that it will usually be convenient to arrive at the question of justification by the shortest route.

Recommendation 3

233. It does not follow from the fact that the CIP was published to the population at large, that the Home Office's response to Recommendation 3 involved a neutrally formulated measure of general application, capable of giving rise to indirect discrimination. The response to Recommendation 3 entailed events for "members of the Windrush generation and their wider community to share their experiences" and a celebration of "the contribution of members of the Windrush generation to the UK" (para 30 above). Whilst there might be a degree of intangible wider benefit resulting from consequential lesson learning by the department, the aim of this response was very much focussed upon the Windrush victims / the Windrush community and the events were to be specifically targeted at them. Equally, therefore, a decision not to proceed with this response was a decision which, in terms, was focused upon and impacted upon that same group of people. The policy was not of wider application. Accordingly, I do not consider that it can give rise to an instance of indirect discrimination.

234. The real question is whether it amounts to *Thlimmenos* discrimination. The essence of the complaint for these purposes is that the Windrush victims were being treated in the same way as the population at large, in circumstances where the injustice that they had suffered as a result of the Windrush scandal meant they were in a relevantly different situation to those who did not have this status. I accept that the two groups (Windrush victims and the rest of the population at large) were being treated in the same way in that, following this policy decision, there were not going to be reconciliation events of the kind described in the CIP for anyone. In so far as the

Defendant relies upon other events and initiatives that were aimed at the Windrush victims, they fall to be considered under the question of justification.

235. I also accept that for the purposes of the response to Recommendation 3, Windrush victims were in a relevantly different position to the rest of the population at large, given the devastating impact of the scandal and the profound effect that it had upon many victims. For all the reasons I have set out when addressing the material facts and circumstances, the Windrush scandal involved a serious and sustained wrong, characterised by the former Home Secretary Priti Patel as an "unspeakable injustice" stemming from "institutional failings" (paras 3, 24 and 26 above). This was reflected in the creation of the WLLR and in Wendy Williams' reports. That very considerable suffering that was caused cannot be doubted (and, indeed, is not disputed); by way of examples, I have described the circumstances of the Claimant (para 13 above) and those of Michael Braithwaite (para 14 above), Burnell Andrew (para 94 above), PM's sister SH (para 95 above), Anthony Bryan (para 98 above) and Glenda Caesar (para 99 above). Furthermore, witnesses have explained how holding reconciliation events, as envisaged in the CIP, would have been significantly beneficial for them and how the subsequent decision not to do so has been perceived as a further broken promise that has occasioned very substantial hurt: see the Claimant (para 92 above), Burnell Andrew (para 94 above), PM (para 95 above), Dr Wyporska (para 96 above), Janet McKay Williams (para 98 above), Glenda Caesar (para 99 above) and Michael Braithwaite (para 103 above). Whilst not all those in the Windrush community felt the same way about the proposed events, it is unnecessary to establish that they did in order for the Court to be satisfied that Windrush victims were in a relevantly different position to the general population. However, that divergence of views is pertinent when I come on to consider justification.

Recommendations 9 and 10

236. I do not accept that the Defendant's decision not to proceed with the CIP responses to Recommendations 9 and 10 can be properly categorised as *Thlimmenos* discrimination. Whilst the general focus of the WLLR and the CIP was upon the Windrush community, some of the recommendations and the responses described in the CIP were of broader reach. The response to Recommendation 9 involved developing a new role of Migrants' Commissioner and the response to Recommendation 10 entailed conducting a review of the powers of the ICIBI; neither of these steps was specific to Windrush victims and although advanced as *Thlimmenos* discrimination, it is, in fact, no part of the Claimant's case to say that Windrush victims should have been treated differently to others in respect of these wider plans. Accordingly, I turn to the case on indirect discrimination.

237. I accept that the decisions not to proceed with the Migrants' Commissioner role and the appointment of a reviewer of the ICIBI were policy decisions of a kind that could give rise to indirect discrimination (and this was not disputed by the Defendant). As I have already explained, it is incumbent upon the Claimant to show that they had a disproportionately prejudicial effect on the Windrush victims. Whilst this may be a conclusion reached by a process of inference, establishing disproportionality inevitably involves drawing a comparison and I reject the submission made on behalf of the Claimant that such a comparative exercise is unnecessary.

238. I do not consider that the primary way that the Claimant's case was put in oral submissions establishes such disproportionality. The Claimant sought to draw a comparison between the impact on Windrush victims and the impact on other migrants (para 223 above). However, it is clear from the putative role of the Migrants' Commissioner and the role of the ICIBI, that the envisaged benefit was a benefit to migrants and future migrants more generally, rather than one confined to or focused upon Windrush victims. This is underscored by UNISON's evidence from Ms Thiranagama and Mr Tuckwood (paras 102 and 105 above). Furthermore, I was told that the majority of Windrush victims have now been granted British citizenship pursuant to the Windrush Scheme and, accordingly, such practical benefits as would result from the implementation of these steps appears likely to benefit non-Windrush migrants *more* than Windrush victims. I accept, as Ms Monaghan pointed out (para 227 above), that the impact of not proceeding with the CIP response to these recommendations will have an effect upon Windrush victims, but I do not consider that I can properly conclude on the evidence before me that it is a disproportionate one as compared with the effect on other migrants.

239. Accordingly, I turn to consider the alternative way that the case was put in Ms Kaufmann's reply, namely that Windrush victims were disproportionately impacted by the decisions not to proceed with Recommendations 9 and 10 as against the rest of the population at large. I am concerned that this way of putting the claim was raised very late in the day. It is, of course, incumbent upon a claimant to identify the way that their case is put and I cannot see any good reason why this was not done at an earlier stage. However, I have decided, on balance, that in the interests of justice I should consider the indirect discrimination contention on this alternative basis. Mr Brown did not object to Ms Kaufmann advancing the indirect discrimination claim in this way, nor did he suggest that a formal amendment of the claim was required. The Defendant appears to have taken a relatively relaxed approach to the question of who the Claimant compared Windrush victims with for the purposes of showing the alleged disproportionately prejudicial effect, as is indicated by the agreed formulation of Issue 1 (in turn reflecting the rather general way that the case had been put in the Claimant's pleading and skeleton argument). The question of whom the comparison was being made with was raised by the Court, rather than by the Defendant. Mr Brown's central point on this area of the case was that the alleged disproportionate impact was unevidenced and no more than assertion, in circumstances where it could not be assumed that Windrush victims all had the same views (para 229 above). Insofar as this point has force, it was equally open to Mr Brown to advance it in respect of the Claimant's second form of comparison and so his main line of defence is not prejudiced. I also bear in mind that I have accorded a degree of flexibility to Mr Brown too in terms of his reliance on the Defendant's reasons in the 26 January 2023 Ministerial Statement, a position that only crystallised during oral submissions.

240. I did not understand Mr Brown to dispute that the disproportionately prejudicial effect may be an emotional one for these purposes (as opposed to a financial or other practical disadvantage). Whatever the precise limitations of that proposition may be in other indirect discrimination cases, I am satisfied that the impact relied upon in the instant case is capable of amounting to a disproportionately adverse effect in the exceptional circumstances of the Windrush scandal. Moreover, in this case the Defendant accepts that the complaint comes within the ambit of article 8 ECHR and does so on the basis of the effect on the ability of the Claimant, and those with a

shared status, to come to terms with the injustices experienced as a victim of the Windrush scandal (para 124 above).

241. I conclude that an inference can be drawn from the evidence before the Court that the decision not to proceed with the CIP responses to Recommendations 9 and 10 was a matter of considerable concern and hurt to a significant number of Windrush victims, given, in particular, that a cause of the scandal was a failure to listen to the voices of those from the Windrush community, as Wendy Williams identified. Whilst it may fairly be said that these decisions do not appear to have resonated as strongly as the decision not to proceed with the response to Recommendation 3, I consider that there is sufficient evidence of this concern and hurt. In particular I have in mind the accounts of the Claimant (para 92 above), Burnell Andrew (para 94 above), PM (para 95 above), Dr Wyporska (para 96 above), Janet McKay Williams (para 98 above), Patrick Vernon (para 100 above) and Michael Braithwaite (para 103 above). In addition to the individual accounts, several of these witnesses speak of the impact more broadly upon a significant cohort of Windrush victims. In the circumstances, I reject Mr Brown's characterisation of the Claimant's case as simply based on assertion. Furthermore, the September 2022 Submission accepted that not proceeding with Recommendations 3 and 9 (the proposal at that stage) was likely to have an adverse impact on race because those predominantly impacted by the Windrush scandal are from the Black Caribbean community (para 50 above). This statement involves an acceptance that not proceeding with the CIP response to Recommendation 9 involved an adverse impact on Windrush victims.

242. As to Mr Brown's point that Windrush victims are unlikely to have a uniform point of view in relation to Recommendations 9 and 10 and they are not all before the Court, it is unnecessary to show that everyone who shares the Claimant's status suffers the adverse impact; the question is whether this group is disproportionately affected in comparison to the remainder of the population at large. Whilst the latter group will include migrants who are adversely impacted (for the reasons I have already identified), they will be a small part of a far larger number of people who have no direct interest in or engagement with whether the CIP responses to Recommendations 9 and 10 are implemented or not. Accordingly, I accept that there is a disproportionately prejudicial effect upon Windrush victims (including the Claimant) from the policy decision not to proceed with the responses to Recommendations 9 and 10.

Ground 3: Issue 3: in so far as the challenged decision constitutes indirect discrimination and/or discrimination in the *Thlimmenos* sense, is it objectively and reasonably justified

An outline of the submissions

243. The Claimant submitted that the Defendant had failed to identify any legitimate aim in respect of the challenged decision and, alternatively, had failed to show that abandoning the implementation of the three recommendations was a proportionate means of achieving that aim. No reasons had been given for the Defendant's decision not to proceed with Recommendations 3 and 9 and the reason given on 7 December 2022 in respect of Recommendation 10 was brief and wholly inadequate, particularly as the September 2022 Submission had recommended continuing with the steps to recruit a reviewer. Ms Darian was unable to identify the Defendant's reasons for

making the decision (para 90 above) and Mr Brown only referenced public interest considerations in the vaguest of terms, with no clear explanation as to how or why the challenged decision was said to be in the public interest. Ms Banton contended that as the treatment / measure to be justified involved the suspect ground of race, the strongest grounds of justification were required.

244. BEO endorsed the Claimant's approach. Ms Braganza said that the Defendant's failure to identify the public interest objective that was relied upon, meant that the Court was simply unable to consider whether this aim was sufficiently important to justify an interference with Article 14 rights, whether the decision to abandon the implementation was rationally connected to the objective and whether a less intrusive measure could have been used to achieve the objective. For the Defendant to assert that the decision was made in the public interest, was not a trump card. Ms Braganza emphasised the extent to which the Windrush scandal, and thus the challenged decision, was inextricably linked to race, referring (amongst other documents) to the CIP, the Progress Report, the Historical Roots of the Windrush Scandal report and BIMA 2. She said that if the Court found that the PSED was breached, this would further undermine the Defendant's case on justification.

245. Mr Brown submitted that justification was to be considered by reference to the Government's Windrush policies as a whole. He emphasised that the Defendant's decision was made in the field of complex social policy, that it concerned matters of political controversy and it had been the subject of scrutiny and political debate in Parliament, so that a wide margin of appreciation applied and the Court should exercise caution in interfering with such a decision. Whilst accepting that the status of a Windrush victim was "connected to race", Mr Brown said that this did not mean that the decision required the strongest justification, as that approach only applied where the measure / treatment itself involved discrimination on one of the core grounds such as race.

246. As regards the Defendant's reasons for making the challenged decision, Mr Brown emphasised that the decision was taken in good faith and in the public interest. His oral submissions reflected his skeleton argument in which he said that the decision involved "a multifactorial social-economic macro judgement which balances a wide range of points" (para 46); that "a multifactorial judgement has been exercised in furtherance of a broad concept of responding appropriately to the Windrush Scandal" (para 47); and "HMG is satisfied that justice can be achieved for the Windrush generation by implementation of a large suite of other measures, including compensation, but that the present recommendations do not serve a sufficiently useful public purpose at this time" (para 72). In his oral submissions Mr Brown added that "the view of the Secretary of State, as far as one can discern, is that it's not going to deliver any meaningful restorative justice so it's a value judgment on the part of the Secretary of State [as to whether] these recommendations assist in a meaningful way". He said that appropriate inferences as to the Defendant's reasons for the challenged decision could be drawn given, in particular, the September 2022 Submission, Ms Darian's witness statement and the Home Secretary's 26 January 2023 written statement.

Discussion and conclusions

General observations

247. I have set out the relevant legal principles at paras 133 – 138 above. In light of my conclusions in respect of Issues 1 and 2, the Defendant has to justify: (i) the failure to treat Windrush victims differently by holding reconciliation events for them; and (ii) the decision not to proceed with the responses indicated in the CIP to Recommendations 9 and 10. Whilst the existence of other Windrush initiatives may be of relevance to that assessment (where that was a part of the Defendant's reasoning) Mr Brown's submission that what the Defendant had to justify was her overall policy towards Windrush victims is not supported by the case law and is inconsistent with the authorities that I referred to at para 133 above.

248. As Lord Reed's analysis in *SC* shows, the proportionality evaluation may involve a nuanced and flexible assessment of considerations that point in competing directions. In this instance, the status relied upon, Windrush victim, is linked to race for the reasons I identify in the next paragraph. However, this is not an instance where race comprises the status in question and nor is it part of the Claimant's pleaded case that the challenged decision was based on race. In these circumstances I do not consider that the Court has to make a binary choice between race having no impact on the margin of appreciation accorded to the Home Secretary (the Defendant's position) or the strongest grounds for justification being required (the Claimant's position). Consistent with Lord Reed's exposition, absent the link to race, this is an instance where the Court would give substantial weight to the primary decision-maker, given that the decisions were made in an area of complex social policy and they entailed omitting to act in particular ways (rather than actively treating those with a relevant status differently). However, I am satisfied that the connection with race tempers the substantial degree of weight that the Court would otherwise accord to the decision-maker.

249. I accept that the status of Windrush victim is linked to race for the following reasons:

i) As identified in the WLLR, the majority of Windrush victims are Black and share the protected characteristic of race (para 16 above);

ii) Many of the WLLR recommendations were primarily aimed at the Windrush victims;

iii) The Windrush scandal resulted from a failure to appreciate the historic status of (principally) Black immigrants from Commonwealth countries, as acknowledged by Ms Darian (para 12 above) and as identified in the Progress Report (para 11 above) and the Historical Roots of the Windrush Scandal report (para 27 above);

iv) Mr Brown accepted that the status relied upon was connected to race (para 245 above); and

v) The September 2022 Submission noted that not proceeding with recommendations 3 and 9 was likely to have an adverse impact on the protected characteristic of race (para 50 above).

250. I will consider justification in respect of the decisions taken with regards to Recommendations 3, 9 and 10 in turn. I reject Mr Brown's suggestion that I should consider the decisions as a package for these purposes, given that different forms of

discrimination are involved and, as the respective chronologies show, the post-CIP process of implementation took a different course in respect of the three recommendations. I also reject Mr Brown's submission that for the justification defence to succeed, I only need be satisfied that the challenged decision was made in good faith and in the public interest. Such an approach flies in the face of the requirement to demonstrate that the treatment / measure in question pursues a legitimate aim by proportionate means. Furthermore, it is unsupported by authority and would create a very low threshold for defendants to establish justification and thereby meet article 14 claims. Whilst I accept that the fact that the challenged decision was subject to Parliamentary accountability is part of the relevant context; this is all the more so with legislative measures and it does not remove the need for the Defendant to meet the conventional elements of the justification test.

251. I have already found that I can take into account the reasons contained in the Defendant's 26 January 2023 written statement to Parliament (paras 166 – 173 above). Mr Brown acknowledged that there is no one document that contains a comprehensive identification of the Home Secretary's reasons, but he submitted that I could draw inferences from the available material. Ms Kaufmann accepted that in principle a Court could draw inferences as to the Defendant's reasons for the challenged decision, but she disputed that there was any clear basis upon which I could do so in this case.

Decision not to hold reconciliation events for Windrush victims

252. The Defendant's case on justification was largely advanced in a generic, non-specific way, with repeated references to the Home Secretary having assessed the appropriate way to respond to the WLLR recommendations and her decision being multi-factorial, nuanced and made in the public interest. I have given a flavour of these submissions at para 246 above. Strikingly, and as he frankly admitted, Mr Brown was not in a position to put forward as part of his case, a positive, specific reason as to why the decisions not to proceed with the responses to Recommendations 3, 9 or 10 had been made. This is not a promising start in terms of meeting the requirements of showing justification. Nonetheless, in respect of the particular circumstances concerning the holding of reconciliation events, I am satisfied that the reasons for the Home Secretary's decision are sufficiently clear and can be inferred from the available material.

253. The divergent, strongly held views amongst members of the Windrush community was a central thread that ran throughout the chronology of the Home Office's response to Recommendation 3, as I have described in detail at paras 35 – 49 above. The WXGWG (charged under its terms of reference with providing feedback and insights from affected communities and expertise) was very strongly opposed to reconciliation events, indicating that they would be likely to prompt discord and distress, and Ms Darian indicates that its views were given significant weight by the Home Office and No. 10 (para 48 above). The conflict of views on this topic was referred to in multiple ministerial submissions, in BIMA 1, BIMA 2 and in the Progress Report. The competing views were highlighted in the September 2022 Submission, which recommended that reconciliation events were not proceeded with. As I have already observed, it is obvious, given the sensitivities, why this conflict was only referred to obliquely in the 26 January 2023 Ministerial Statement (para 171 above). There is nothing that gainsays this interpretation and I am quite satisfied that

this was the central reason why the plan to hold reconciliation events was not pursued, in a context where the Home Office was already holding, and the Defendant was able to point to, less controversial Windrush focused events that were taking place.

254. I accept that not proceeding with the reconciliation events in these circumstances constituted a legitimate aim and one that was sufficiently important and rationally connected to the decision not to hold such events. As the proposed reconciliation events were themselves the source of the controversy and the concerns, I accept that there was no less intrusive step to be taken and, as I have already noted, other Windrush focused events were being held.

255. I turn to whether the impact of the decision not to treat the Windrush victims differently (by holding reconciliation events) was disproportionate to the likely benefit of this decision. I adopt the approach that I have identified at para 248 above, but I bear in mind that this particular area was one of deep sensitivity, where considerable controversy and upset would be generated whichever decision the Defendant made (whether to go ahead with the reconciliation events or not). The September 2022 Submission fairly summarised both points of view, including referring to the views of the BIMA facilitator, and there is nothing to suggest that both viewpoints were not conscientiously taken into account. In the circumstances, the weight to be placed on these competing views was a matter of fine judgement for the Defendant. Whilst the evidence shows that a significant number of the Windrush victims viewed the reconciliation events as beneficial and the decision not to progress them caused very substantial hurt (para 235 above), the WXGWG consistently advised that they would be divisive, trigger discord and cause pain and distress (paras 37, 39 and 49 above). The Defendant was also entitled to have regard to the other events and initiatives that were taking place. I accept that the Defendant's decision was a proportionate one in these circumstances.

Decision not to proceed with the CIP response to Recommendation 9

256. No reason for making this decision was given in the 7 December 2022 email. Unlike the position in relation to Recommendation 3, I do not consider that I can safely infer what the Defendant's reason or reasons were for deciding not to proceed with the plan to appoint a Migrants' Commissioner. I have already highlighted the limited direct evidence of the Home Secretary's reasons and the very general way in which the justification defence is advanced in this case (paras 90, 246, 251 and 252 above); and I have explained why it is not enough for the Court to accept that the decision was taken in good faith in the public interest (para 250 above).

257. Communications indicated that the Defendant was still in favour of introducing a Migrants' Commissioner in both March 2022 and in June 2022 (paras 58 and 63 above). It is unclear what considerations changed thereafter. Unlike the position in relation to Recommendation 3, there was no sustained opposition to this plan from any relevant stakeholders; the WXGWG did not want to undertake the role itself, but recommended the creation of a stakeholder group from existing migrant bodies with a publicly appointed chair (para 55 above). Wendy Williams was known to be particularly keen on this recommendation (paras 56, 62, 63 and 66 above) and the September 2022 Submission also noted the importance attached to it by "other stakeholders" (para 66 above). The Home Secretary had decided to pause implementation in May 2022 (para 61 above), but the reason for this is not apparent

from the evidence. The communication from officials to the Second Permanent Secretary on 1 August 2022 suggests that they were not clear as to the reasons for the delay (para 65 above). I cannot simply infer that the Defendant followed her officials' advice and made the decision on the basis of the factors they identified in the September 2022 Submission, in circumstances where she declined to follow their advice in relation to the related Recommendation 10 and their advice regarding Recommendation 9 was predicted on the basis that the Recommendation 10 CIP response would proceed. The Ministerial Statement to Parliament did refer briefly to other ways in which the Home Office was inviting challenge and scrutiny, suggesting that the IEC, was "a more efficient way", but it is not easy to see how this provides a reason for not proceeding with the Migrants' Commissioner (still less, a reason based on perceived efficiency), as the IEC was responsible for determining particular complaints, rather than raising over-arching or systemic issues (paras 100 and 107 above) and, as I have noted, the reference to this aspect in the September 2022 Submission was premised on the basis that the response to Recommendation 10 would proceed.

258. Absent any clear inference that I can draw as to the Defendant's reason/s for deciding not to progress the CIP response to Recommendation 9 by appointing a Migrants' Commissioner, I am not satisfied that this decision was made in pursuit of a legitimate aim.

259. In the alternative, if it is considered that the 26 January 2023 Ministerial Statement does sufficiently enable the Court to infer that the decision was made in pursuit of a legitimate aim, namely that a Migrants' Commissioner was no longer considered to be an efficient means of providing scrutiny of the department; given the vagueness of this proposition, the absence of detail and the very limited evidence from the Defendant in support of this (as I have highlighted at paras 256 and 257 above), I am not satisfied that the Defendant has shown that the impact on article 14 rights (which I have already identified under Issue 1) is proportionate, rather than disproportionate, to the likely benefit involved in the decision not to proceed with this CIP response. In this regard, I also note that the Defendant's officials had described Recommendation 9 as "a key recommendation that is important in substance but is also symbolic of our intent to change the way" that the Home Office worked (para 51 above) and they assessed that the creation of a Migrants' Commissioner function should help promote the aims of the PSED (paras 52 and 57 above). As regards the points made in the September 2022 Submission, I have already referred to the premise that the response to Recommendation 10 would proceed; and the perception that the current implementation would not meet the expectation of stakeholders was not a new development (para 66 above).

Decision not to proceed with the CIP response to Recommendation 10

260. I do not consider that I can safely infer what the Defendant's reason or reasons were for deciding not to proceed with the plan to appoint an independent reviewer to carry out a full review of the ICIBI's role, or, insofar as there is some indication of the reason/s, I can be satisfied that this amounted to the pursuit of a legitimate aim. I bear in mind, without repeating, the general points that I have already made regarding the Defendant's limited evidence and the limited way that the case on justification was advanced.

261. The chronology that I have set out in respect of Recommendation 10 does not suggest that there was any significant opposition to this course of action amongst stakeholders. Wendy Williams remained in favour of implementation (para 77 above) and David Neal describes speaking in favour of this on a number of occasions with both senior officials and ministers (para 81 – 83 above). Whilst there was delay on the part of the Home Secretary (paras 76 and 78), the reason for this is unclear. Insofar as there was some concern over the suitability of those who had so far applied for the independent reviewer role (para 79 above), this was not identified as a reason for not proceeding in the September 2022 Submission, the 7 December 2022 email or the 26 January 2023 Ministerial Statement and in these circumstances I am not in a position to infer that this was one of the reasons. The September 2022 Submission recommended that the appointment of the independent reviewer should proceed and no countervailing factors were identified in that document (para 84 above).

262. Against that striking evidential picture, I have considered what was said in the 7 December 2022 email and the 26 January 2023 Ministerial Statement. As regards the latter, Recommendations 9 and 10 were addressed collectively. The reference to other ways in which the Home Office was inviting scrutiny, such as the IEC, appears to be all the more tenuous an explanation here as, unlike the potential Migrants' Commissioner role, the ICIBI role would continue to exist and thus it is unclear why the Recommendation 10 independent review of its role and remit was no longer thought desirable. The 7 December 2022 email contained only a very brief reference to the Home Secretary being interested in a wider review into all ALBs, with no supporting reasoning (para 85 above). It is not clear why the wider review provided a reason not to proceed with the Recommendation 10 response, not least because this point was not developed at all in the Ministerial Statement, it appears that a review of the ICIBI was not scheduled as a part of this (para 82 above) and Ms Darian indicates that this has not been taken forward by Ministers (para 91 above).

263. In the alternative, if it is considered that the 7 December 2022 email and the 26 January 2023 Ministerial Statement sufficiently enable the Court to infer that the decision not to proceed was made in pursuance of a legitimate aim, namely the wider review of ALBs and the independent review of the ICIBI's role was no longer considered to be an efficient means of providing scrutiny of the department; given the vagueness of these propositions, the absence of detail and the very limited supporting evidence from the Defendant on these matters (as highlighted at paras 260 - 262 above), I am not satisfied that the Defendant has shown that the impact on article 14 rights (which I have already identified under Issue 1) is proportionate, rather than disproportionate, to the likely benefit involved in the decision not to proceed. In this regard I also remind myself that Wendy Williams identified particular reasons for the recommended review (paras 21 and 77 above) and the September 2022 Submission positively considered that the independent review indicated in the CIP would provide an opportunity to identify constructive lessons from other Inspectorates, as well as demonstrating the Home Office's commitment to opening itself up to scrutiny (para 84 above).

Ground 4: Issue 1: Did the Defendant breach the *Tameside* duty of inquiry?

An outline of the submissions

264. Ground 4 was only referred to very briefly in the oral submissions. The Claimant contended that the *Tameside* duty was breached because the Defendant failed to carry out adequate consultation. In this regard Ms Kaufmann relied upon her submissions in respect of Ground 2. In particular, she submitted that the consultations undertaken by BIMA regarding the response to Recommendation 3 were inadequate; that consultation with the WXGWG was incapable of discharging a duty to consult with relevant stakeholders; and that there was no consultation on whether or not to implement the CIP response to Recommendations 9 and 10. Reference was also made to an absence of consultation with those representing wider migrant communities, Wendy Williams and David Neal.

265. UNISON submitted that no reasonable Secretary of State could have been satisfied that she had sufficient information to conclude that the reasons proffered by officials for abandoning the response to Recommendation 9 were sufficient. Ms Monaghan emphasised that the September 2022 Submission did not identify the basis on which it was now said that the current plan would not meet stakeholders' expectations (as opposed to earlier submissions identifying this as a risk). She also contended that the September 2022 Submission did not explain why the other options mentioned would meet the spirit of Recommendation 9 more effectively. As regards the response to Recommendation 10, she submitted that before making a decision, any reasonable Secretary of State would have acquainted herself with information as to how proceeding with an independent review of the ICIBI and conducting a wider review of ALBs interacted.

266. In responding to the Claimant's submissions, the Defendant also relied on the submission made in relation to Ground 2. The inquiries undertaken by BIMA were emphasised, as was the consultation with the WXGWG. Mr Brown submitted that even if there were further inquiries that could have been made, this did not begin to demonstrate a breach of the *Wednesbury* standard and it was not for the Courts to micromanage the enquiries conducted by the Defendant.

Discussion and conclusions

267. I have summarised the relevant legal principles at paras 139 – 141 above. The question for me is whether no reasonable Secretary of State could be satisfied on the basis of the inquiries made that they possessed the information necessary to make the decision. Whilst I have found under Ground 2 that there was a breach of a procedural legitimate expectation to consult in respect of the decisions not to proceed with the CIP response to Recommendations 9 and 10, this is not determinative of Ground 4 as that finding was made on the basis of fairness, namely that it was conspicuously unfair not to consult with representatives of the Windrush community and Wendy Williams on those matters. By contrast, the *Tameside* test is one of rationality, rather than process and imposes a higher test (para 141 above). I also emphasise that there is no rationality challenge to the substance of the Defendant's decision-making; it follows that it is accepted that the challenged decision was one that a reasonable Secretary of State could make. For the purposes of this Ground, I am concerned with

the information upon which the decision was based, not with the rights or wrongs of the decision that was taken.

268. The Claimant's contention is groundless in respect of the decision not to proceed with reconciliation events. It is readily apparent from the chronology of events that I set out at paras 35 – 49 above that extensive consideration was given to the question of whether to proceed with the CIP response to Recommendation 3 and I have already rejected the proposition that there was an unfair absence of consultation in relation to this (paras 215 – 216 above). Nothing other than an alleged absence of appropriate consultation was relied upon in respect of the decision concerning Recommendation 3.

269. I do not consider that it was irrational for the Defendant to proceed on the basis of the information before her in respect of her decisions not to proceed with the responses to Recommendations 9 and 10.

270. The Defendant had before her the assessment of her officials that there were other opportunities for fulfilling the spirit of Recommendation 9 more effectively. She would have been aware of the role of the ICIBI and the work of the Community and Stakeholder Engagement Hub (the alternatives referred to). I have only summarised it briefly, but the 15 September 2021 ministerial submission examined the various options in detail, including the option of not proceeding to create a Migrants' Commissioner. The 30 March 2022 ministerial submission contained a further detailed evaluation of the pros and cons of proceeding with the creation of a new non-statutory stakeholder group, with a Chair or repurposing the FBIS Vulnerability Advisory Group with a new chair. The September 2022 Submission included a full list of Wendy Williams' 30 recommendations and the current situation in terms of the department's response to each of them at Annex A and examples of good progress highlighted in the Progress Report were listed at Annex B. In the circumstances I do not consider that it can be said that no reasonable Secretary of State could have been satisfied that they possessed the necessary information to proceed to make a decision.

271. I add for completeness that I do not consider that there is any force in the point that Ms Monaghan made regarding the way that the anticipated reaction of external stakeholders and Wendy Williams was described in the September 2022 Submission. The 30 March 2022 submission had already observed that both Wendy Williams and wider stakeholders were likely to view the option of repurposing the FBIS Vulnerability Advisory Group with a new chair (at that stage, the Defendant's preferred option) as falling short of Recommendation 9 and Wendy Williams had said as much in her Progress Report (para 62 above).

272. As regards the decision not to proceed with the response to Recommendation 10, the Claimant simply relied upon the absence of consultation. I have found that there was consultation with David Neal (para 220 above). Whilst I have found that it was unfair not to consult with representatives of the Windrush community or with Wendy Williams, it does not follow that it was irrational for the Home Secretary to proceed without doing so. A reasonable Secretary of State could conclude that it was unlikely that those outside of the Government would have been able to contribute materially to an assessment of the preferability of proceeding with the ICIBI review as against awaiting the wider review of ALBs or an understanding of how the two would interact. It is also reasonable to infer that the Defendant would have had some

familiarity with the work of the ICIBI and with the wider ALB review. In the circumstances I do not consider that it can be said that no reasonable Secretary of State could have been satisfied that they possessed the necessary information to proceed to make a decision.

273. Accordingly, I dismiss Ground 4.

Ground 5: Issue 1: Did the Defendant comply with the requirements of the PSED?

An outline of the submissions

274. The Claimant submitted that the Defendant's evidence fell far short of demonstrating compliance with the PSED. There was no evidence that the Home Secretary had personally assessed how and to what extent a decision not to proceed with the CIP responses was liable to impact on the considerations identified in section 149(1) EqA 2010 or, if there was an adverse impact, how this could be mitigated. Insofar as officials had considered the PSED in the September 2022 Submission, the nature and extent of any adverse impact on race and age was not analysed, the observations were focused upon justification rather than the section 149 considerations and the position in relation to Recommendation 10 was not addressed at all. Whilst the Home Office's earlier work around how to implement the three recommendations had involved having regard to equality considerations, given the nature of the subject matter; it did not follow that this was a part of the decision not to progress those responses. Ms Brown also submitted that the Secretary of State could not make a meaningful assessment without first obtaining further information from those who would be directly affected.

275. The Interveners supported the Claimant's submissions. BEO submitted that the Defendant's case that due regard was given to the section 149(1) considerations was based on no more than assertion; there was nothing in the contemporaneous documentation or in Ms Darian's witness statement that supported this. The consideration of the PSED in the September 2022 Submission was perfunctory and mere reference to race did not equate to having due regard to the prescribed matters. UNISON submitted that all three limbs of the section 149(1) duty were engaged. The September 2022 Submission failed to refer to or consider any of the three limbs, simply referring to a generic and unparticularised "adverse impact", which was also entirely focused on those impacted by Windrush, as opposed to other impacted groups, in particular: (i) migrants more broadly, who shared the protected characteristic of non-British nationality and (ii) Black people more broadly, who shared the protected characteristic of race. Furthermore, it could not be inferred from the cursory reference to "adverse impact" in this submission, that the Defendant had complied with the statutory duty.

276. Mr Brown accepted that he could not point to a document which showed in terms that the Defendant had given due regard to the section 149(1) considerations, but he emphasised that compliance with the PSED was a question of substance rather than form. He said that the Court could safely conclude that this was the case, given that the challenged decision had an intrinsic link to equality considerations and it was inherently unlikely that the Home Secretary would not have had regard to the PSED matters. Equality considerations had factored into the department's earlier work on responding to these recommendations and it was unrealistic to expect all this work to

be re-done when a new minister was in post; the Court was entitled to view the decision taken at this stage as part of a continuum. Mr Brown contended that where the very nature of the exercise directs the mind of the decision-maker to the needs of a protected group, the substantive requirements of the PSED are met and specific reference to the terms of the PSED was superfluous. In this regard he relied upon: *R (Essex Council) v Secretary of State for Education* [2014] EWHC 2424 (Admin) ("*Essex*"), *R (McDonald) v Royal Borough of Kensington and Chelsea* [2011] UKSC 33, [2011] 4 All ER 881 ("*McDonald*") and *R (AD & Ors) v London Borough of Hackney* [2019] EWHC 943 (Admin) ("*AD*"), which Ms Brown and Ms Monaghan submitted were distinguishable. In addition, Mr Brown relied upon the September 2022 Submission, which he said expressly directed the Defendant's attention to the PSED, in relation to which proportionality was a relevant consideration. Furthermore, the proposition that further information was required before the decision was taken, put the bar too high.

Discussion and conclusions

277. I have set out the relevant legal framework at paras 142 – 150 above. The Defendant does not dispute that the PSED applied to the challenged decision. For the reasons summarised in this paragraph, I accept that all three limbs of section 149(1) were relevant to this decision-making and therefore required the Home Secretary to have "due regard" to the need: to eliminate discrimination; to advance equality of opportunity (removing or minimising disadvantage suffered by those sharing the protected characteristic of race and/or age and taking steps to meet the needs of people sharing those protected characteristics that are different from the needs of others); and to fostering good relations between persons who shared the protected characteristics of race and age and those who did not (including by promoting understanding). The September 2022 Submission acknowledged that not proceeding with Recommendations 3 and 9 was likely to have an adverse impact on the protected characteristics of race and age, given that those impacted by the Windrush scandal were predominantly from the Black Caribbean community and the majority were aged 50 – 70 (para 50 above). Furthermore, when addressing Issues 1 and 2 of Ground 3, I have found that the decisions not to proceed with the CIP response to Recommendations 3, 9 and 10 entailed, respectively, prima facie *Thlimmenos* discrimination or indirect discrimination in respect of those sharing the status of Windrush victim, a status that was, in turn, linked to race. I also bear in mind the nature of the Windrush scandal, the consequential impacts and Wendy Williams' reasons for making these three recommendations, all of which I have described earlier.

278. As Mr Brown accepted, there is no direct evidence indicating that the Home Secretary had regard to these section 149(1) considerations when making the challenged decision. The question for me is whether I can infer that she had due regard to these matters.

<u>The decision not to proceed with the response to Recommendation 3</u>

279. I have found that the Home Secretary decided not to proceed with the reconciliation events, in a context where other events and initiatives were taking place, because of stakeholders' divergent, strongly held views as to the value of doing so, including the WXGWG's view that it would likely be divisive, distressing and ineffective (paras

253 – 254 above). The September 2022 Submission referred to both viewpoints, including citing the assessment of the BIMA 2 facilitator (para 49 above) and to other events that were taking place with the Windrush community. As I noted when considering justification, there is nothing to suggest that these matters were not conscientiously taken into account (para 255 above). In these circumstances, I accept that the very nature of the decision made by the Defendant entailed her taking account of the PSED considerations, in particular the need to promote understanding between persons who do and do not share the relevant protected characteristic, taking steps to remove disadvantage connected to a protected characteristic and meeting the needs of people who share a protected characteristic. I will address the three authorities relied upon by the Defendant when I turn to Recommendation 9, but, in essence, whether the nature of the decision is such that the Court can be satisfied that the process of making it involved substantive compliance with the PSED will always be a fact-sensitive assessment. I have also accepted in relation to Grounds 2 and 4 that sufficient consultation took place before this decision was made.

280. Accordingly, I am satisfied that the Defendant complied with the PSED in deciding not to proceed with the reconciliation events. As I have emphasised earlier, provided that due regard was had, the weight to be attributed to the section 149(1) considerations was a matter for the Home Secretary (para 147 above) and the PSED does not require the outcomes specified in the section to be achieved (para 143 above).

<u>The decision not to proceed with the response to Recommendation 9</u>

281. When addressing Ground 3, I found that the Defendant's reasons for deciding not to proceed with the Migrants' Commissioner recommendation were unclear (para 256 – 258) or, at most, it was no longer considered that the Commissioner role was an efficient means of providing scrutiny of the Home Office (para 259). I also highlighted the very limited information available as to the reasoning underpinning this decision. In these circumstances, I do not consider that I can conclude that the nature of the decision-making itself inevitably indicates that the PSED considerations were taken into account. Even if there was some regard to issues of equality (which is not inherent in the decision made), this is not the same as having regard to the statutory criteria (para 146 above). In order to have "due regard", it was necessary for the Defendant to appreciate the likely benefits, in equality terms, which could result from proceeding with the Migrants' Commissioner plan and the nature and extent of the equality implications of deciding not to proceed.

282. However, there is no clear evidence that such material was before the Defendant at the material time. As I have already indicated, the September 2022 Submission referred to the adverse impact on the protected characteristics of race and age of not proceeding with Recommendations 3 and 9. However, the adverse impact in question was not identified. Furthermore, although this passage contained a cross-reference to the substantive parts of the submission on Recommendations 3 and 9, the text which addressed the response to Recommendation 9 contained no express reference to equality considerations (para 66 above). In addition, the passage addressing the PSED was somewhat misleading in suggesting that the Home Secretary need only be concerned with whether any indirect discrimination could be defended as a proportionate means of achieving a legitimate aim. It is also clear that the September 2022 Submission did not address the wider equality considerations beyond the

Windrush community, in circumstances where, as I have found at para 238 above, there was also an adverse impact in relation to migrants and future migrants more generally (a majority of whom would share the protected characteristic of race in respect of non-British nationality and/or colour).

283. Whilst I agree with Mr Brown that a new Home Secretary did not require the Home Office to re-do earlier PSED assessments (formal or informal), there is no evidence that any such material was before Suella Braverman when she made the challenged decision. For example, the 15 September 2021 submission from officials had identified that the creation of the Migrants' Commissioner function would help promote the aims of the PSED and that all the delivery options then under consideration would "enhance the protections for all migrants and provide greater representation to ensure their voice is heard and reflected within Home Office policy" (para 57 above). Mr Brown also submitted that Ms Braverman would have had discussions with officials and other ministers before making the challenged decision. Whilst I agree that it is likely that there were some discussions, I have no information as to their contents and I cannot infer from that very general proposition, that PSED matters were drawn to her attention. Mr Brown further suggested that she would have benefitted from attending the WXGWG meetings, but the documentation indicates that the first meeting after her appointment post-dated the challenged decision, as it was held on 23 January 2023.

284. I do not consider that the three cases he relied upon assist Mr Brown in this regard. They are simply fact-sensitive examples of situations where, unlike the decision I am currently considering, the nature of the decision-making did enable the Court to be satisfied that the PSED, or its equivalent, had been complied with. *McDonald* concerned a decision not to provide a nighttime carer for the disabled claimant. As such, it involved an assessment of the care needs of a particular disabled person. A majority of the Supreme Court found that there was no breach of section 49A of the Disability Discrimination Act 1995 (the forerunner to section 149 EqA 2010 for disabled persons). At para 24, Lord Brown SCJ, rejected the contention that the absence of express reference to section 49A indicated that the local authority had failed to have regard to this duty, as the authority's decision was made under statutory provisions which expressly directed attention to the needs of the disabled person. I note that *Essex* was a refusal of a renewed application for permission to apply for judicial review, rather than a decision made after a full hearing. The claimant's submission that the Secretary of State had failed to have regard to the protected characteristic of age, as the relevant EIA only referred to disability and gender, was given short shrift by Cranston J at paras 22 – 24, as it was obvious from the nature of the decision, concerning the funding of pre-school capital programmes, that the interests of young people had been considered. In *AD*, Supperstone J concluded that as the local authority had properly focused on the requirements of their statutory duty under section 42 of the Children and Families Act 2014, considering the need to advance equality of opportunity for disabled children was the very matter which its decision-making had addressed (para 59).

285. Accordingly, the Defendant has not established that in deciding not to proceed with the creation of a Migrants' Commissioner, she had "due regard" to the PSED considerations and, accordingly, I find that section 149 EqA 2010 was not complied with in this respect.

The decision not to proceed with the response to Recommendation 10

286. When addressing Ground 3, I found that the Defendant's reasons for deciding not to proceed with the independent review of the ICIBI were unclear (para 260 – 262) or, at most, that it was due to the wider review of ALBs and it no longer being considered that the Recommendation 10 response would lead to an efficient means of providing scrutiny of the Home Office (para 259). I also highlighted the very limited information available as to the reasoning that supported this decision. In these circumstances I do not consider that I am able to conclude that the nature of this decision-making itself inevitably indicates that the PSED considerations were taken into account. Even if there was some regard to issues of equality (which is not inherent in the decision made), this is not the same as having regard to the statutory criteria (para 146 above). As I have indicated in relation to the Recommendation 9 decision, in order to have "due regard", it was necessary for the Defendant to appreciate the likely benefits, in equality terms, that could result from proceeding with the CIP response to Recommendation 10 and the nature and extent of the equality implications of deciding not to do so.

287. However, as with Recommendation 9, there is no clear evidence that such material was before the Defendant at the relevant time. Because it recommended proceeding with the CIP response to Recommendation 10, the September 2022 Submission did not suggest that there was any adverse impact on the protected characteristics of race and age of not doing so. Furthermore, when the response to Recommendation 10 was addressed in the document, there was no express reference to equality considerations (para 84 above). The other points that I have made in relation to the Recommendation 9 decision also apply to this decision, including that the September 2022 Submission did not address the wider position beyond the Windrush community in circumstances where I have found at para 238 above, there was also an impact in relation to migrants and future migrants more generally (a majority of whom would share the protected characteristic of race in respect of non-British nationality and/or colour).

288. Accordingly, the Defendant has not established that in deciding not to proceed with the CIP response to Recommendation 10, she had "due regard" to the PSED considerations and, accordingly, I find that section 149 EqA 2010 was not complied with in this respect too.

Summary of my conclusions

289. I have explained the Claimant's grounds of challenge and the issues arising at paras 4 – 6 above, where I also noted the limits of this Court's role. The WLLR's Recommendation 3 concerned the holding of reconciliation events for members of the Windrush community; Recommendation 9 related to the appointment of a Migrants' Commissioner and Recommendation 10 to the role and remit of the ICIBI. The Defendant's response to each of the WLLR's recommendations was set out in the CIP.

290. As regards Ground 1, I have found that the contents of the CIP and the other materials relied upon, did not amount to a clear, unambiguous and unqualified representation that the WLLR's Recommendations 3, 9 and 10 would be implemented (paras 180 – 195 above). Accordingly, no substantive legitimate expectation to that effect arose. In relation to Ground 2, I have accepted that there was a procedural legitimate expectation that the Defendant would consult with relevant stakeholders, including representatives of the Windrush community, and with Wendy Williams, before substantially changing the response to Recommendations 3, 9 and 10 that was set out in the CIP (paras 201 – 205 above). I have concluded that this expectation was met by the consultation that was undertaken in relation to the Recommendation 3 question of whether holding reconciliation events should proceed, but that the Defendant breached this expectation in respect of the decisions not to proceed with the responses indicated in the CIP in relation to Recommendations 9 and 10 (paras 212 – 221 above).

291. In relation to Ground 3, I have accepted that the decision not to proceed with reconciliation events involved treating Windrush victims in the same way as the rest of the population, when they were in a relevantly different position (paras 234 - 235 above). However, I have found that the failure to treat the Windrush victims differently in this regard was a proportionate means of achieving a legitimate aim, given the long-standing divergent views amongst stakeholders and the opinion of the WXGWG that reconciliation events would be divisive, distressing and/or ineffective (paras 252 - 255 above). I have found that the decision not to proceed with the CIP responses to Recommendations 9 and 10 amounted to indirect discrimination, given the particular impact on Windrush victims as compared to the rest of the population at large and that the Defendant had not shown that these policy decisions were a proportionate means of achieving a legitimate aim given the very limited evidence from the Defendant as to the basis of this decision-making (paras 237 – 242 and 256 - 263 above).

292. I have rejected Ground 4 as the Claimant has not shown that it was irrational for the Defendant to proceed on the basis of the information that was before her (para 267 – 273 above).

293. Lastly, in relation to Ground 5, I have concluded from the nature of the decision and the material before her, that the Home Secretary complied with the PSED when deciding not to proceed with the reconciliation events (paras 279 - 280 above). However, I have found that no equivalent inference of compliance can be drawn in relation to the decisions not to proceed with the CIP responses to Recommendations 9 and 10 (paras 281 – 288 above).

294. Finally, I record my appreciation to counsel for the quality of their submissions. I will give them an opportunity to address me in writing on consequential matters.