Neutral Citation Number: [2024] EWHC 2031 (Admin)

Case No: AC-2023-MAN-000410

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

Wednesday, 21st August 2024

Before:
FORDHAM J

- -

Between:
THE KING (on the application of SAMER ALABBOUD ALHASAN) — **Claimant**
- and -
(1) THE DIRECTOR OF LEGAL AID CASEWORK
(2) THE LORD CHANCELLOR — **Defendants**

- -
- -

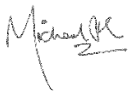
Shu Shin Luh (instructed by Greater Manchester Immigration Aid Unit) for the **Claimant**
Malcolm Birdling (instructed by Legal Aid Agency) for the **First Defendant**
Tom Tabori (instructed by Government Legal Department) for the **Second Defendant**

- -

Hearing date: 10 & 11.7.24
Written submissions: 19.7.24 & 30.7.24
Draft judgment: 2.8.24

- -

Approved Judgment



- -

FORDHAM J

Remote hand down. This judgment was handed down remotely at 10am on 21st August 2024 by circulation to the parties or their representatives by email and by release to The National Archives.

FORDHAM J:

Introduction

1. This case is about legal aid for Home Office asylum interviews, where the person seeking asylum was under-18 when they claimed asylum – making a "Child-Claim" – but where they have "Turned-18" by the date of the interview. It is a case about differential treatment and bright lines rules by the Lord Chancellor, and an individualised assessment by the Director of Legal Aid Casework ("the Director"). Like all judicial review cases, it is about the limits of the primary powers of public authorities and – at the same time – the limits of the secondary powers of the judicial review court. Throughout this judgment I will use the term "Child-Claim" to mean 'a claim for asylum made by a person who is a child at the time of making the claim'; and "Turned-18" to mean 'has had their 18th birthday'. These terms are my inventions, adopted to aid clarity and flow.

2. Here is a broad outline of what happened in this case. The Claimant arrived in the UK (14.6.22) and made a Child-Claim. He was a refugee, with a well-founded fear of persecution, as was later recognised by the Home Office. He had documentary proof of his date of birth (5.1.05) and became a looked-after child in the care of Bury Council. The Council subsequently referred him (22.8.22) to the Greater Manchester Immigration Aid Unit ("the Unit"). The Unit was able to accept him and allocate him a legal representative (17.11.22). After he Turned-18 (5.1.23), the Claimant's statement of evidence form (SEF) and accompanying witness statement were submitted (17.2.23), with the assistance of his legal representative. They were notified (5.4.23) of his asylum interview (12.4.23). Having Turned-18, he was now caught by a legal aid exclusion in relation to having his lawyer at the interview, an exclusion which the Unit had indicated in earlier cases (29.3.23) that it wished to challenge. Acting to promote and protect the Claimant's interests, the Unit decided not to ask for a deferral of the asylum interview and the lawyer attended 'at risk', having first applied to the Director for Exceptional Case Funding (ECF), which – if granted – would be back-dated. The interview went ahead, with the lawyer's assistance (12.4.23). Asylum was granted (9.6.23). ECF was refused (13.4.23), a refusal maintained on review (26.7.23). Judicial review proceedings were commenced (26.10.23) challenging the legal aid exclusion and the ECF refusal. Permission for judicial review was granted (21.12.23).

Asylum Interviews

3. The immigration rules are made by the Home Secretary pursuant to s.3(2) of the Immigration Act 1971. Rule 339NA (§24 below) confers a general entitlement on a person seeking asylum to "the opportunity of a personal interview" conducted by a "representative" of the Home Secretary "who is legally competent to conduct such an interview". Rule 352 confers the same general entitlement on an unaccompanied child. The asylum interview is "an integral part of the administrative decision making process" (R (Dirshe) v Home Secretary [2005] EWCA Civ 421 [2005] 1 WLR 2685 at §2), which "can be a critical factor in the determination of any appeal in the event of a refusal" of asylum by the Home Secretary, since "it can be relied on, on the one hand by the applicant to show consistency in [their] account, or on the other hand by the Secretary of State to throw doubt on [their] credibility by reason of either inconsistency, or … omission" (Dirshe at §8). The Home Office Guidance: Asylum Interviews version 9.0 (28.6.22) (which I will call the "2022 Interview Guidance") describes the asylum interview as "an important part of the asylum process because it is the main opportunity for the claimant

to provide relevant evidence about why they need international protection" and for the interviewing officer "to help draw out and test that evidence" in order to "assess the credibility of the claimant's statements, give the claimant an opportunity to explain anything that appears to be implausible or inconsistent" (pp.8-9). It has been recognised that "the substantive interview is the centrepiece of the investigation of the child's asylum claim" (AN v Home Secretary [2012] EWCA Civ 1636 at §116). Nicola Burgess, the Head of Legal Strategy at the Unit, explains that "in practice, it is at the substantive asylum interview where the Home Office really test the individual's nationality, the plausibility of their reasons for claiming asylum and will scrutinize any inconsistencies between the welfare interview or SEF and statement to the account given on the day"; and that "for the young people we represent it can be a gruelling experience, it can feel very similar to undergoing cross-examination in a court setting".

Unaccompanied Children

4. As is explained in the Equal Treatment Bench Book (July 2024) at p.33, local authorities have an overarching responsibility for safeguarding and promoting the welfare of all children and young people in their area; but everyone who comes into contact with children has a role to play; and that safeguarding and promoting the welfare of children means protecting children from maltreatment, preventing impairment of children's health or development, ensuring that children grow up in circumstances consistent with the provision of safe and effective care, and taking action to enable all children to have the best outcomes. In dealing with "the rights of young and vulnerable witnesses to effective participation", the Benchbook reminds us (p.30):

> ***The United Nations Convention on the Rights of the Child sets out a number of key principles, including: Article 3: The best interests of the child must be a top priority in all decisions and actions that affect children. Article 12: Every child has the right to express their views, feelings and wishes in all matters affecting them, and to have their views considered and taken seriously. This right applies at all times, for example during immigration proceedings, housing decisions or the child's day-to-day home life.***

As Jason Pobjoy explains in The Child in International Refugee Law (2017) at p.59:

> ***Article 12(2) has particular consequence in the context of the refugee status determination process, stipulating that children have a right to be heard in 'any judicial and administrative proceedings affecting the child". In the refugee context, the language is wide enough to cover … the original administrative decision-making process … [D]ecision-makers in … administrative proceedings have a duty not just to hear the child's views but also to afford them due weight, having regard to age and maturity …***

5. As Lady Hale observed in AL (Serbia) v Home Secretary [2008] UKHL 42 [2008] 1 WLR at §19, by reference to the Home Office policy towards unaccompanied minors: "It is acknowledged that unaccompanied asylum seeking children need especially sensitive treatment". Rule 351 of the immigration rules states that "particular priority and care is to be given to the handling of their cases". The Department for Education and Home Office Safeguarding Strategy: Unaccompanied Asylum Seeking and Refugee Children (November 2017) opens with this statement:

> ***Unaccompanied asylum seeking and refugee children can be some of the most vulnerable children in our society. They are alone and in an unfamiliar country, at the end of what could have been a long, perilous and traumatic journey. Some of these children may have experienced exploitation or persecution in their home country or on their journey to the UK. Some may have been trafficked, and many more are at risk of being trafficked, being exploited in other ways, or***

> ***going missing once they arrive in the UK. We must remember that they are children. It is true that their immigration status will have an impact on their future, but they should not be defined solely by their status as an asylum seeking or refugee child. They are children who are likely to have faced many difficulties in their lives and will need to be cared for while they are in the UK. They are children who will need access to education and a range of public services to offer them the support and accommodation they need to promote their safety, health and wellbeing.***

The Cliff-Edge Point

6. In the world of criminal sentencing, it was explained in R v Clarke [2018] EWCA Crim 185 at §5) that "reaching the age of 18 has many legal consequences, but…it does not present a cliff edge for the purposes of sentencing"; that "full maturity and all the attributes of adulthood are not magically conferred on young people on their 18th birthdays"; and that "experience of life reflected in scientific research … is that young people continue to mature, albeit at different rates, for some time beyond their 18th birthdays". When Lord Hoffmann was considering the brightline of a biological age (of 25) in the context of welfare benefits (R (Carson) v Work and Pensions Secretary [2005] UKHL 37 [2006] 1 AC 173 at §41), he said that "a person one day under 25" is in a "virtually identical situation to a person aged 25".

7. The cliff-edge point was addressed, in the context of persons seeking asylum and the asylum interview, throughout the witness statement evidence before the Court. In the Claimant's own words:

> ***I really think that I needed my solicitor present at the interview, even though I was already 18 at the time of the interview. To me my age didn't make a difference, I still needed his support and guidance.***

Ms Burgess explains, by reference to real life examples, literature and views of professionals: that Turning-18 "does not suddenly render a young person able to represent themselves in this adversarial setting where the issues at stake are of such gravity for the individual and where they have most likely experienced at least one of the forms of trauma"; that this is "the reality" for those fleeing war and persecution and experiencing this as children, with the impact of the trauma experienced when they were under 18; that the trauma encompasses the individual reason why they were forced to leave their own country, their separation from parents and family, their journey to the UK, the impact on their mental health, and their inability to fully integrate into the UK without their status being resolved. Julie Brauer, a solicitor at Islington Law Centre explains that challenges relating to the asylum interview do not become less difficult and complicated just because a child applicant has Turned-18 before the asylum interview can take place; and that the same difficulties can just as easily arise, such as with knowledge about specific issues or the inappropriateness of questions. Daniel Chapman, a social worker employed by Manchester City Council explains why he cannot accept, from the perspective of a social worker in child development that "there is any actual difference between a young person who is 17 years and 11 months and one who is 18 years and 1 day"; that "nothing actually changes at 18"; that "they still have similar needs" and "they don't suddenly become able to" describe details of their asylum claims "which often involve recalling trauma, stress and experiences of violence or ill-treatment". Professor Helen Stalford of the University of Liverpool, a founding member of the European Children's Rights Unit and principal investigator in the LOHST (Lives on Hold, Our Stories Told) project, describes – as an established and successful feature

of other areas of our legal system – the recognition of the fact that young people's vulnerabilities and needs do not expire when they turn 18.

Bright Lines

8. Judicial review courts are frequently required to consider the legality of an impugned rule or measure which involves a "bright line", whose impacts are illustrated by taking the position of a person on either side of that bright line. Carson and the under-25 welfare benefit rule is an example. For example, bright line rules were justified in R (A) v Criminal Injuries Compensation Authority [2021] UKSC 27 [2021] 1 WLR 3746 at §90; AL (Serbia) at §§44 and 51. Sometimes, the point is made that there is no real alternative, in light of a particular objection being made. In R (MOC) v Work and Pensions Secretary [2022] EWCA Civ 1 [2022] PTSR 576 the bright line was a cut-off of disability living allowance after 28 days as an inpatient in a publicly funded hospital. Singh LJ said this (at §70(5)):

> ***This is a context in which a "bright line" rule is appropriate and necessary. Ms Weston did not submit that there must be individual consideration of every case. Once that is accepted, it is very difficult to see how the rule could be changed. The fact that a particular case may fall on the wrong side of the line simply illustrates that there are sometimes hard cases but that does not mean that the rule itself is unjustified…***

The idea of an alternative rule being very difficult had also arisen in the context of the two-child welfare rule in R (SC) v Work and Pensions Secretary [2021] UKSC 26 [2022] AC 223. There, in considering the position of unplanned pregnancies, Lord Reed made the point that an exception for these would be "completely impractical" (§206).

A Shared Bright Line

9. A conspicuous feature of the present case is that the position of Ms Luh for the Claimant and of Mr Tabori for the Lord Chancellor involve a shared bright line. Their shared bright line involves the same biological age, of Turning-18. What divides them is the way in which that Turning-18 delineation is used. Ms Luh says that once there is a Child-Claim – where the person seeking asylum had not Turned-18 (using the biological age bright line) on the day they made their asylum claim – the Lord Chancellor is unable, in the context and circumstances, to justify the exclusion of legal aid for Turned-18 asylum interviewees. She points out that there is nothing difficult or impractical about that. Mr Tabori says the Lord Chancellor is justified, in taking that very same biological age bright line, but applying it to the date of the asylum interview.

Home Office Reference Points

10. At the heart of the Claimant's case against the Lord Chancellor there are some key reference points. They are all derived from the Home Secretary and Home Office. First, there is rule 352ZD of the immigration rules made by the Home Secretary (§25 below). This rule provides as follows (underlining in quotations connotes emphasis added):

> ***352ZD An unaccompanied asylum seeking child is a person who: (a) is under 18 years of age when the asylum application is submitted; (b) is applying for asylum in their own right; and (c) is separated from both parents and is not being cared for by an adult who in law or by custom has responsibility to do so.***

Rule 352ZD was one of a suite of provisions added to the immigration rules by instrument dated 14 March 2013 (HC 1039), taking effect from 6 April 2013. It appears in the "definitions" section (p.10) of the Home Office's Guidance: Children's Asylum Claims version 4.0 (31.12.20) (which I will call "the 2020 CAC Guidance").

11. Secondly, there is this paragraph within the 2020 CAC Guidance (p.49):

> ***When a child turns 18 before the substantive interview. If the child's 18th birthday passes before a substantive asylum interview has been conducted, they are legally an adult, however, staff must, wherever possible, follow best practice for children's cases. The child should be interviewed by a decision maker who has completed minors training and be given an opportunity to discuss the statement of evidence form (SEF) as it may refer to issues that are child specific. The decision maker should also be trained in handling children's cases.***

There was an equivalent passage (p.36) in version 1.0 of that same guidance (12.7.16), when it was entitled "Processing Children's Asylum Claims". I will deal with one contested point immediately. Mr Tabori says the three points made (trained interviewer, SEF discussion and trained decision-maker) are, as a matter of interpretation of this paragraph, exhaustive of the relevant "best practice". I am unable to agree. Certainly, the paragraph is emphasising those three features. But not exhaustively. Zahid Hussain – the Home Office's Chief Caseworker within the Asylum Children & Secondary Casework command – has filed a witness statement which describes "best practice" as a wide range of aspects, from the approach taken to the interviewee recalling events, through to ensuring regular breaks.

12. Thirdly, there is this paragraph (p.16) within the 2022 Interview Guidance:

> ***When a child turns 18 before the substantive interview. If an asylum seeker makes a claim as a child, but their 18th birthday passes before a substantive asylum interview has been conducted, they are legally an adult. An asylum seeker who has recently turned 18 is a young adult and as their asylum claim relates to circumstances experienced as a child, you must take into account their age, level of maturity and experiences when interviewing and deciding the claim. For further details about how to handle these cases, refer to the guidance on processing children's asylum claims [ie. the 2020 CAC Guidance].***

13. Fourthly, there is statement within the Home Office's Guidance: Streamlined Asylum Processing for Children's Casework (25.7.23):

> ***Children's asylum casework processes are for claims from claimants who raised their claim for asylum as a minor under the age of eighteen years.***

Retaining the Advantages of Minority

14. The idea of a protective inclusion using the same bright line of biological age 18, but viewed at an earlier time, has been described – in the context of historic injustice as the idea of "retaining the advantages of minority": see KA (Afghanistan) v Home Secretary [2012] EWCA Civ 1014 [2013] 1 WLR 615 §1. I was shown an example from a different area of law. As the Equal Treatment Benchbook explains (p.42) statutory "special measures" and related directions achieve their objective of helping a witness or defendant to give evidence, and improving the quality of that evidence: see ss.16-33 of the Youth Justice and Criminal Evidence Act 1999. Those who are entitled to special measures include "all witnesses under 18 at the time of the hearing or video recording" (ss.16, 22). In identifying as eligible, those witnesses "under the age of 18 at the time of the hearing" (s.16(1)(a)), Parliament defined "the time of the hearing" as meaning "the time when it

falls to the court to make a determination for the purposes of section 19(2) in relation to the witness". All of which means that some witnesses who have Turned-18 can retain their statutory eligibility for special measures at a Crown Court trial.

Scaled-Down Provision and Local Authorities

15. Reference was also made to an example of continuing, but 'scaled-down' protection, having Turned-18. It related to looked-after children, and former looked-after children, pursuant to statutory duties on local authorities under the Children Act 1989. Professor Stalford describes the extension of support for looked-after children up to the age of 25 as a "particularly clear example of a 'long view' of children's welfare, which goes beyond strict age boundaries". She points to the extension of the duty on local authorities, to provide the support of a personal adviser to all care leavers up to age 24, whether or not they are in education or training; which includes young unaccompanied asylum seekers who arrived in the UK as children. Ms Burgess describes the move from the support of a specialist social worker to a more generalist personal adviser and the likely move from supported accommodation to independent accommodation; because on Turning-18 the young person is no longer in the care of the local authority and the "wraparound support reduces", but they continue to be provided with some support up to the age of 25. Mr Chapman explains that "as soon as the child turns 18, they transition from our team to leaving care services" and are "allocated a personal advisor shortly before or just after they turn 18", whose role is "to be an advocate and to support the young person".

Legal Aid, Asylum Claims and Asylum Interviews: 2012

16. Legal help for persons seeking asylum, whatever their age, is within scope of the statutory civil legal aid scheme. That is by virtue of Schedule 1 (Part 1) §30(1) to the Legal Aid Sentencing and Punishment of Offenders Act 2012. However, by §30(3) there is then this "specific exclusion":

> ***(3) The services described in sub-paragraph (1) do not include attendance at an interview conducted on behalf of the Secretary of State with a view to reaching a decision on a claim in respect of the rights mentioned in that subparagraph, except where regulations provide otherwise.***

17. Regulations 2-4 of the Civil Legal Aid (Immigration Interviews) (Exceptions) Regulations 2012 (SI 2012 No. 2683), made by the Lord Chancellor pursuant to the rule-making power conferred by §30(3), provide as follows:

> ***2. In these Regulations – "the Act" means the Legal Aid, Sentencing and Punishment of Offenders Act 2012; "child" means – (a) an individual who is under the age of 18; or (b) an individual whose age is uncertain and who, at an immigration interview, is being treated by the Secretary of State as being under the age of 18; "immigration interview" means an interview described in paragraph 30(3) of Part 1 of Schedule 1 to the Act; "screening interview" means the first immigration interview in respect of the claim.***
>
> ***Attendance at immigration interviews: children. 3. The civil legal services described in paragraph 30(1) of Part 1 of Schedule 1 to the Act include attendance at an immigration interview (including a screening interview) in any case in which the individual to whom the civil legal services are provided is a child at the time of that interview.***
>
> ***Attendance at immigration interviews: individuals who are not children. 4. The civil legal services described in paragraph 30(1) of Part 1 of Schedule 1 to the Act include attendance at an***

> ***immigration interview in which the individual to whom the civil legal services are provided is not a child where – (a) the individual – (i) is detained at a removal centre; or (ii) lacks capacity within the meaning of section 2 of the Mental Capacity Act 2005; and (b) the interview is not a screening interview.***

It is common ground that where legal aid is available for an asylum interview, it covers attendance by a legal representative and an independent interpreter.

18. As can be seen, there is a clear and express link between this legal aid legislative scheme, made by Parliament and by the Lord Chancellor, and the asylum decision-making functions of the Home Secretary. Under Schedule 1 §30 it is the Home Secretary who is the "Secretary of State" on whose behalf the asylum interview is conducted, with a view to the taking of a decision. Under regulation 2(b) it is the Home Secretary who is the "Secretary of State" treating the person seeking asylum as being under the age of 18. It is also the Home Secretary who has the relevant statutory powers to which detention at a removal centre relates (regulation 4(a)(i)).

Legal Aid, Asylum Claims and Asylum Interviews: 2004

19. The substantive content of regulation 3 was not new in 2012. On 31 March 2004, the Justice Secretary had made a statutory direction pursuant to s.6(8)(b) of the Access to Justice Act 1999, authorising the Legal Services Commission to fund in specified circumstances services generally excluded from the scope of community legal service. Schedule 2 §1(i) to the 1999 Act, inserted by the Justice Secretary by regulations taking effect from 1 April 2004, had excluded asylum interviews. The statutory direction (by §2(3)) authorised funding for "services [in] relation to attendance with a client at an asylum interview conducted by the Home Office … where the client is a minor or claims on reasonable grounds to be a minor". There were four other categories, including being "subject to any Home Office fast track process" and mental incapacity. It has not been contested that "is a minor" from 2004 to 2012 meant "at the time of the interview".

Legal Assistance at an Asylum Interview

20. There are real and significant advantages of legal assistance being given at an asylum interview. The Lord Chancellor would have found it difficult to contest that, because it must be the premise and logic of regulations 3 and 4; just as it was the premise and logic of the March 2004 statutory direction. That means the Justice Secretary and Lord Chancellor have – for more than 20 years – recognised the importance of the role that a legal representative can play at an asylum interview. The 2022 Interview Guidance (p.64) says this:

> ***Legal representatives are normally invited to add any comments at the end of the interview, rather than during questioning, but you must not apply this rigidly, particularly when interviewing children. The interview should be conducted in a constructive spirit of cooperation between you, the claimant and their legal representative. Interventions by the legal representative may be justified for a variety of reasons. A legal representative can, for example, assist the interview process by drawing attention to a misunderstanding.***

So, the legal representative can make points and can ask questions. An asylum interview can be unpredictable. It may be insufficient that there is legal help before the interview and after. It may be insufficient that there is a written record of the interview and that the tape is made available. These are clear and illustrated benefits, emphasised by Ms Luh and emphasised through multiple real-world case study examples throughout the

materials filed in the case. The references to refugee are where this was subsequently recognised. The ages are at the date of asylum interview. They had all made Child-Claims. Here, in outline, is how they have been described to me:

21. These are case study examples from the work of the Unit. KM (a refugee who fled Sudan) was aged 18y 6d and a victim of rape and torture. Her lawyer (Ms Burgess) attended at-risk, recognising KM's vulnerabilities as a victim of sexual violence; intervened several times during a 2½ hour interview, as to the nature and intensity of irrelevant, inappropriate and distressing questioning; and was able to address concerns about the standard of proof and its application. AO (a refugee who fled Afghanistan) was aged 18y 9d. His lawyer attended pro bono, recognising his vulnerability, poor mental health and suitability for a streamlined decision; intervened several times during a 2½ hour interview, pointing out AO's fragile mental health and asked that questions be limited to those really necessary, in light of relevant Home Office policy and practice on Afghanistan. Mr Chapman attended as responsible adult and emphasises the importance of AO's lawyer also being present. BHA (who fled Iraq) was aged 19y 2m 10d. His lawyer was local authority-funded, exceptionally, recognising his particular vulnerability; and intervened to prevent inappropriate questioning on mental health, despite this having beforehand been flagged to and confirmed in writing by the Home Office. LHH (who fled Iraq) was aged 18y 2d. His pro bono lawyer was able promptly to intervene to point out a non-existent supposed inconsistency from the witness statement accompanying LHH's SEF. AD (a refugee who fled Afghanistan) was aged 18y 3m 9d. His pro bono lawyer was able to intervene, in the context of particular mental health vulnerabilities, and ensure that an important point (about having been in the control of an agent) was not omitted. AA (a refugee who fled Syria) was aged 17y 3m 5d; whose legal aid lawyer was able to raise and resolve concerns about the interpreter there and then. AMA (who fled Iran) was aged 17y 11m 25d; whose legal aid lawyer intervened to avoid an age dispute and to address concerns about the interpreter. BHA (who fled Ethiopia) was aged 17y 10m 24d; whose legal aid lawyer was able to intervene in the face of inappropriate and repetitive questioning. MSH (a refugee who fled Sudan) was aged 18y 4m 24d; whose unfunded lawyer attended because of MSH's vulnerabilities, who was able to intervene when questioning fell outside the agreed scope of a targeted interview.

22. Then there are these case study examples from the work of Islington Law Centre. SA (who fled Iran) was aged 18y 6m. His lawyer (Ms Brauer) attended pro bono, concerned about SA's mental health, and was able to intervene when distressing repeated questioning arose from the interviewer's misappreciation of the local geography. KK attended without a lawyer and 8 hours of avoidable post-interview work was needed to repair from the tape the inadequate interview record of part-answers. DDM attended without a lawyer and again hours of avoidable and distressing post-interview work was needed to repair the inadequate interpretation from the tape. Case studies from Asylum Aid are BA (aged 18y 3m) whose lawyer (Ms Rowsell) attended pro bono because BA was a recognised trafficking-victim with diagnosed mental health conditions; and intervened to raise comments and concerns about a retraumatising, unprepared and ill-informed interview. And also DD, where Ms Rowsell was able to intervene and avoid what would have been an unnecessary and damaging lengthy deferral.

Ageing Out

23. Although the relevant Article 14 "status" for the analysis of differential treatment is a person seeking asylum who made a Child-Claim and has since Turned-18, Ms Luh and Mr Tabori agree that the axis for the differential treatment is age. This has been called "ageing out". In June 2023, the Unit published its report "We lost our lives when we arrived here: Children in the UK's asylum system". Under the heading "Ageing Out", the Unit says this (p.11):

> ***The combined wait for legal representation and for an asylum decision means that more children than ever are turning 18 before their claim is decided, or "ageing out". This is happening through no fault of their own and, caught up in the failings of two government systems, there is nothing children can do to prevent it. Our data shows this is affecting growing numbers of children [the Unit] represents – 56% of the young people we represent who received decisions so far this year. In 2019, only 19% of young people we represented would turn 18 before a decision was made…***
>
> ***Home Office policy states that an "aged out" young person must still have their claim decided as if they were a child. But if they are over 18, legal aid funding from the Ministry of Justice is not available for their legal representative to attend their interview or for them to have an independent interpreter (both of which would be available were they still under 18), denying them key procedural safeguards for the fair determination of their claim… Big arms of government not aligning their systems is leading to children getting lost in the middle. The approach to 18, and turning 18, also causes a great deal of anxiety for young people who can see the time running out for their opportunities in education, and who are likely to turn 18 without the right to work, to rent, to claim benefits or enter higher education. It also marks the transition from being a child in care to leaving care services. In the words of one legal practitioner, they "kind of fall of a cliff edge with no support"; a social worker says "they become adults who haven't got the capacity or the capability to live as adults". And being an adult in the asylum system is different from being a child.***

The Immigration Rules

24. Within Part 11 of the immigration rules (asylum), here are the general provisions concerned with the asylum interview (rules 339NA to 339NE):

> ***Personal interview.***
>
> ***339NA. Before a decision is taken on the application for asylum, the applicant shall be given the opportunity of a personal interview on their application for asylum with a representative of the Secretary of State who is legally competent to conduct such an interview. The personal interview may be omitted where: (i) the Secretary of State is able to take a positive decision (a grant of refugee status or humanitarian protection) on the basis of evidence available; (ii) the Secretary of State has already had a meeting with the applicant for the purpose of assisting them with completing their application and submitting the essential information regarding the application; (iii) the applicant, in submitting their application and presenting the facts, has only raised issues that are not relevant or of minimal relevance to the examination of whether they are a refugee, as defined in Article 1 of the Refugee Convention and/or has only raised issues that are not relevant or of minimal relevance to the examination of whether they are eligible for humanitarian protection; (iv) the applicant has made inconsistent, contradictory, improbable or insufficient representations which make their claim clearly unconvincing in relation to having been the object of persecution or serious harm; (v) the applicant has submitted a subsequent application which does not raise any relevant new elements with respect to their particular circumstances or to the situation in their country of origin; (vi) the applicant is making an application merely in order to delay or frustrate the enforcement of an earlier or imminent decision which would result in their removal; (vii) it is not reasonably practicable, in particular where the Secretary of State is of the opinion that the applicant is unfit or unable to be interviewed owing to enduring circumstances beyond their control; or (viii) the applicant is an EU national whose claim the Secretary of State has nevertheless decided to consider substantively in accordance with section***

> ***80A(4) of the Nationality, Immigration and Asylum Act 2002. The omission of a personal interview shall not prevent the Secretary of State from taking a decision on the application. Where the personal interview is omitted, the applicant and dependants shall be given a reasonable opportunity to submit further information.***
>
> ***339NB. (i) The personal interview mentioned in paragraph 339NA above shall normally take place without the presence of the applicant's family members unless the Secretary of State considers it necessary for an appropriate examination to have other family members present. (ii) The personal interview shall take place under conditions which ensure appropriate confidentiality.***
>
> ***339NC (i) A written report shall be made of every personal interview containing at least the essential information regarding the asylum application as presented by the applicant in accordance with paragraph 339I of these Rules. (ii) The Secretary of State shall ensure that the applicant has timely access to the report of the personal interview and that access is possible as soon as necessary for allowing an appeal to be prepared and lodged in due time.***
>
> ***339ND The Secretary of State shall provide at public expense an interpreter for the purpose of allowing the applicant to submit their case, wherever necessary. The Secretary of State shall select an interpreter who can ensure appropriate communication between the applicant and the representative of the Secretary of State who conducts the interview.***
>
> ***339NE The Secretary of State may require an audio recording to be made of the personal interview referred to in paragraph 339NA. Where an audio recording is considered necessary for the processing of an application for asylum, the Secretary of State shall inform the applicant in advance that the interview will be recorded.***

25. Next, here are the provisions of the immigration rules concerned with unaccompanied children (rules 350 to 352ZB) and requirements for limited leave to remain as an unaccompanied asylum seeking child (rules 352ZC to 352ZF):

> ***Unaccompanied children.***
>
> ***350. Unaccompanied children may also make a protection claim and, in view of their potential vulnerability, particular priority and care is to be given to the handling of their cases.***
>
> ***351. A person of any age may qualify for refugee status under the Convention and the criteria in paragraph 334 apply to all cases. However, account should be taken of the applicant's maturity and in assessing the protection claim of a child more weight should be given to objective indications of risk than to the child's state of mind and understanding of their situation. An asylum application made on behalf of a child should not be refused solely because the child is too young to understand their situation or to have formed a well founded fear of persecution. Close attention should be given to the welfare of the child at all times.***
>
> ***352. Any child aged 12 or over who has made a protection claim in their own right must be given the opportunity to be interviewed about the substance of their claim before a decision is taken. The opportunity for a personal interview may be omitted for a child aged 12 or over where: (a) the child is unfit to be interviewed; or (b) the child is unable to be interviewed; or (c) protection status can be granted to the child without an interview based on the evidence available; or (d) one of the exceptions in paragraph 339NA applies. Where the personal interview is omitted, the child must be given a reasonable opportunity to submit further information if insufficient information is available to take a decision on protection status. If the interview can be omitted and the child still requests an asylum interview, then this request must be considered. When an interview takes place: (a) it must be conducted in the presence of a parent, guardian, representative or another adult independent of the Secretary of State who has responsibility for the child; and (b) the interviewer must have specialist training in the interviewing of children; and (c) the child must be allowed to express themselves in their own way and at their own speed and, if they appear tired or distressed, the interview should be suspended, and the interviewer***

> ***should consider whether it would be appropriate for the interview to be resumed the same day or on another day.***
>
> ***352ZA. The Secretary of State must, as soon as possible after an unaccompanied child makes a protection claim, take measures to ensure that the child has a person to represent and/or assist the child with respect to the examination of their claim and ensure that the representative is given the opportunity to inform the child about the meaning and possible consequences of the interview and, where appropriate, how to prepare themselves for the interview. The child's representative has the right to be present at the interview and ask questions and make comments in the interview, within the framework set by the interviewer. For the purposes of paragraph 352 and 352ZA a representative can include a legal representative, social worker, local authority representative, independent child trafficking guardian, Scottish guardianship service representative, Northern Ireland independent guardian service representative, foster carer, relative, a Refugee Council representative or charity worker or other representative permitted to attend by the Secretary of State.***
>
> ***352ZB. The decision on the application for asylum shall be taken by a person who is trained to deal with protection claims from children.***
>
> ***Requirements for limited leave to remain as an unaccompanied asylum seeking child.***
>
> ***352ZC The requirements to be met in order for a grant of limited leave to remain to be made in relation to an unaccompanied asylum seeking child under paragraph 352ZE are: (a) the applicant is an unaccompanied asylum seeking child under the age of 17 ½ years throughout the duration of leave to be granted in this capacity; (b) the applicant must have applied for asylum and been granted neither refugee status nor Humanitarian Protection; (c) there are no adequate reception arrangements in the country to which they would be returned if leave to remain was not granted; (d) the applicant must not be excluded from being a refugee under Article 1D and 1E of the 1951 Refugee Convention and Article 1F of the Refugee Convention, as defined in section 36 of the Nationality and Borders Act 2022 or excluded from a grant of Humanitarian Protection under paragraph 339D or both; (e) there are no reasonable grounds for regarding the applicant as a danger to the security of the United Kingdom; (f) the applicant does not constitute a danger to the community in the United Kingdom as a result of having been convicted by a final judgment of a particularly serious crime (as defined in section 72 of the Nationality, Immigration and Asylum Act 2002); and (g) the applicant is not, at the date of their application, the subject of a deportation order or a decision to make a deportation order.***
>
> ***352ZD An unaccompanied asylum seeking child is a person who: (a) is under 18 years of age when the asylum application is submitted. (b) is applying for asylum in their own right; and (c) is separated from both parents and is not being cared for by an adult who in law or by custom has responsibility to do so.***
>
> ***352ZE. Limited leave to remain should be granted for a period of 30 months or until the child is 17½ years of age whichever is shorter, provided that the Secretary of State is satisfied that the requirements in paragraph 352ZC are met.***
>
> ***352ZF. Limited leave granted under this provision will cease if (a) any one or more of the requirements listed in paragraph 352ZC cease to be met, or (b) a misrepresentation or omission of facts, including the use of false documents, were decisive for the grant of leave under 352ZE.***

26. Finally, here is a definition from rule 6.2:

> ***6.2. In these rules: … (b) unless the contrary intention appears, the following definitions apply.***
> ***…***
> ***"Child" means a person who is aged under 18 years.***

Child-Claims and Adult-Claims: Compared and Contrasted

27. Before turning to the position of a person seeking asylum who has made a Child-Claim but has Turned-18 prior to the asylum interview, it is helpful to consider the position of a person seeking asylum who has made a Child-Claim and has not Turned-18 up to the time of the asylum decision; and the position of a person seeking asylum who was aged 18 or over when they made their asylum application (an "Adult-Claim").

28. In both the Child-Claim case and the Adult-Claim case, legal help with the asylum application is within the scope of legal aid. That is the effect of Schedule 1 §30(1) to the 2012 Act. It includes legal help before the asylum interview. It also includes legal help in making post-interview representations to the Home Secretary. Those who can provide legal help and advice are highly regulated. However, there may be a delay in securing the services of a legal aid lawyer. The fact that legal help is within scope does not mean that the person seeking asylum will find a legal representative promptly. There are problems of lack of supply of legal aid providers. In both the Child-Claim case and the Adult-Claim case, the asylum interview is conducted by a legally competent person (rule 339NA), with a state-funded interpreter present (rule 339ND). There is, in both cases, no prohibition on a legal representative attending the asylum interview and providing assistance (2022 Interview Guidance p.64). The person seeking asylum will receive a written record of the interview (rule 339NC) and the tape-recording of the interview (rule 339NE), and the person seeking asylum is entitled to make post-interview representations (2022 Interview Guidance pp.29, 63).

29. There are distinct features of a Child-Claim case – where the person seeking asylum has not Turned-18 at the time of each stage or event – by contrast with an Adult-Claim case. The following all apply in the case of a Child-Claim. An unparticularised application for asylum is valid (rule 327AB(iv)). A welfare interview is conducted at point of first contact (2020 CAC Guidance p.25). A case review is conducted to ensure that the applicant has legal representation and check on their progress in completing the SEF (p.34). The interview will not proceed without a legal representative present, unless the person seeking asylum – having had that opportunity – continues to insist (p.38). By contrast, unavailability of a legal representative to attend on the scheduled day is not a reason to defer an asylum interview in the case of an Adult-Claim (2022 Interview Guidance p.20). In the case of a Child-Claim, the interview will not proceed unless the SEF has been returned (p.39); the interview will not proceed without a responsible adult present (rule 352 at (a); 2020 CAC Guidance p.44), having a distinct (welfare) role from the legal representative (pp.48-49). By contrast, in an Adult-Claim case, the interviewer may exceptionally and with advance notice allow a friend or companion to be present to provide emotional support (2022 Interview Guidance p.22). In the Child-Claim case, there are 8 general principles for interviewing children (2020 CAC Guidance p.43), and a special rule (rule 352 at (c)); and the interviewer must have received training in interviewing children (rule 352 at (b); 2020 CAC Guidance pp.43-44). There are also 9 general principles for decision-making (p.51) and the decision-maker must have received training to deal with protection claims by children (rule 352ZB).

The Article 14 Claim

30. Ms Luh says that, because regulation 3 of the 2012 Regulations says "a child at the time of that interview" rather than "a child at the time of making the claim", there is a breach by the Lord Chancellor of s.6 of the Human Rights Act 1998. That is by reason of action

incompatible with Article 14 of the European Convention on Human Rights, read with Articles 3 and/or 8. It is common ground that the alleged discrimination relates to a matter which falls within the "ambit" of those substantive articles, as required (SC §39). Article 14 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.***

Lord Reed has identified these four propositions (SC at §37):

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

31. The essence – as I saw it – of the Article 14 claim advanced by Ms Luh on behalf of the Claimant is as follows. There is a difference in treatment between those persons seeking asylum who made a Child-Claim and have not yet Turned-18, and those who have made a Child-Claim and have Turned-18. Persons seeking asylum who made a Child-Claim and have since Turned-18 have an identifiable characteristic which is a "status" (this is also common ground). The two groups are in an analogous, or relevantly similar, position. Although channelling public funds for legal aid to prioritised areas is a legitimate aim, it requires a rational set of criteria. The difference of treatment cannot be justified, and is disproportionate. This is for the following reasons:

    i) Those who have made Child-Claims for asylum are a class of individuals associated with vulnerability, traumatic experience and particular mental health challenges, for whom so much is at stake in the asylum decision-making process, and for whom a legal representative at the asylum interview makes a recognised and substantial contribution.

    ii) Those who have made Child-Claims for asylum and have subsequently Turned-18 before the date of their asylum interview are still, necessarily, advancing an asylum claim which is based on their lived experiences as a child. They have ceased in law to be children in circumstances which are entirely beyond their control and they had "no power to change" (JT v First-Tier Tribunal [20187] EWCA Civ 1735 [2019] 1 WLR 1313 at §91). Those circumstances, moreover, link to realities as to stretched resources of legal aid providers and the operation of waiting lists; as well as to the timing of Home Office processes. Yet those who have become timed-out are the same individuals with the same associations with vulnerability, traumatic experience in particular mental health challenges, for whom so much is at stake,

and for whom the legal representative would make the recognised and substantial contribution.

iii) The question for the judicial review court is whether the differentiating provision is manifestly without reasonable foundation. But the breadth of the latitude – applying the adapted domestic principle which stands in place of the Strasbourg margin of appreciation – must be applied in a non-mechanical way. In the present context, although there is no 'suspect' ground for discrimination, an intense standard of scrutiny is apt. That is because of what is at stake, because of the absence of choice and control, and because of youth and vulnerability.

iv) There is a patent mismatch between the design by the Lord Chancellor of regulation 3 and the safeguards recognised as to their suitability by the Home Office, as the arm of Government (the Home Office) operating the administrative interviewing and decision-making process in question. There is a clear and necessary link (§18 above) between this legal aid provision and the processes for which the Home Office is responsible. The effect of rule 352ZD of the immigration rules, from April 2013, was that "child" in the context of "unaccompanied asylum seeking child" included a person under 18 "when the asylum application is admitted". That means for "unaccompanied children" (rule 350), although the person who made the Child-Claim has Turned-18, they are a "child" for the purposes of the safeguards of a responsible adult and an interviewer with specialist training (rule 352); a representative able to advise, be present at the interview, ask questions and make comments (rule 352ZA); and a decision-maker with specialist training (rule 352ZB). The exclusion of legal aid where the person who has made the Child-Claim has Turned-18 ("at the time of that interview") conflicts with the express recognition in the immigration rules (since 2013) that Child-Claim safeguards and assistance should in principle endure after the person has Turned-18. The exclusion collides head-on with the requirement in the rules for a representative who can advise about the interview and "has the right to be present at the interview and ask questions and make comments in the interview" (rule 352ZA). That appropriate guarantee can only be secured if the shape of the legal aid rules matches the shape of the immigration rules.

v) Even leaving aside the immigration rules, there is a patent mismatch with the Home Office's stated policy position, that the child asylum decision-making processes and safeguards remain applicable to a person who made a Child-Claim but has Turned-18 – with the identifiable rationale that the applicant is (necessarily) making a claim based on lived experiences as a child – "wherever possible" (§11 above). It is "possible" for the person seeking asylum to have their responsible adult present at the interview, because local authorities – with their ongoing duties to former looked-after children – provide the personal adviser attending the asylum interview. The Lord Chancellor's rule-making design thwarts it being "possible" to have the legal representative present at the interview, which fails to recognise the need – recognised by the Home Office itself – for the protections and safeguards to continue. The Lord Chancellor has failed to appreciate the mismatch.

vi) There is no answer which can withstand scrutiny. Indeed, the Lord Chancellor is unable to point to any material at any time – whether in 2004 or in 2012 or at any time thereafter – which involves addressing the distinction between those persons seeking asylum who made a Child-Claim and have not yet Turned-18, and those

> who have made a Child-Claim and have Turned-18. The phrase "at the time of that interview" appears in the design of regulation 3, but that is no substitute for a reasoned evaluative judgment which addresses the design of the rule (JT at §93). There is no evidence of monitoring, to which reference was made when the measure was first introduced in 2004. It is no answer that the provision is a long-standing one, since that would be a licence to perpetuate unjustified discrimination (JT at §109). It is no answer that this is a bright line rule involving invoking the biological age 18: so is the Home Office position which uses age 18 at the time of making the asylum claim (§§10-13 above). The fact that other safeguards and protections remain intact is no answer, and indeed serves to emphasise the principled policy position of the Home Office which insists on that being so. The availability of so-called exceptional funding (2012 Act s.10) is also no answer, in principle or in practice. In principle, because it involves an individualised decision which cannot address the inherent generic shortcoming. In practice, because asylum interviews are scheduled at short notice, deferral is likely to be contrary to the interests of the person seeking asylum, and the recognised time-frame for a s.10 decision cannot accommodate the urgency. For all these reasons there is a violation of Article 14.

That is the argument. I will address it at §§37-40 and 46-57 below.

The Thlimmenos Alternative

32. Ms Luh submits that regulation 3 is a violation of Article 14 viewed in another way. By treating as adults those who have made Child-Claims and who have Turned-18 prior to their asylum interview, the Lord Chancellor has failed without objective justification to treat differently two groups who are materially different: the first is those who made Adult-Claims; the second is those who made Child-Claims but have Turned-18. That is itself a violation of Article 14, on a familiar alternative basis: see Thlimmenos v Greece (2001) 31 EHRR 15 at §44; R (DA) v Work and Pensions Secretary [2019] UKSC 21 [2019] 1 WLR 3289 at §§40, 107; A (CICA) at §69; SC at §48. I will deal with this at §58 below.

The Johnson Alternative

33. In the further alternative, Ms Luh submits in essence as follows. Regulation 3 is unreasonable applying common law standards of public law reasonableness. Leaving aside Article 14 questions, such as "ambit" and "status", and even if those making Child-Claims who have Turned-18 were not "analogous" for Article 14 purposes with those making Child-Claims who have not Turned-18, there is a disciplined common law framework to consider the reasonableness of the differential treatment. It involves the framework of questions articulated by the Court of Appeal in R (Johnson) v Work and Pensions Secretary [2020] EWCA Civ 778 [2020] PTSR 1872. Viewed against that principled sequence of questions, for all the reasons identified in the context of Article 14, regulation 3 is without reasonable justification and unlawful. I will deal with this at §§59-61 below.

The Delay Issue

34. Before I can deal with these arguments, I must deal with three preliminary objections raised by Mr Tabori. The first is the agreed issue of whether the Claimant's challenge to

the 2012 Regulations is out of time. Mr Birdling accepts that no delay objection arises in relation to the challenge to the Director's refusal of ECF, maintained on 26 July 2023. Mr Tabori says the claim against the Lord Chancellor should fail on grounds of delay. He accepts that time started to run on the date of the interview (12.4.23), when the regulation was applied to the Claimant's case to deny him public funding for attendance by a lawyer: see R (Badmus) v Home Secretary [2020] EWHC 657 [2020] 1 WLR 4609 at §77. But filing the claim 6½ months later (26.10.23) constituted undue delay and the claim should be dismissed. I am unable to accept that submission. The passage of time is attributable to the reasonable pursuit of ECF, consistently with judicial review as a last resort, a pursuit which the Lord Chancellor had previously told the Unit was an alternative remedy rendering premature any challenge to regulation 3. Delay is a permission-stage issue. It was not taken in the summary grounds of resistance. It is an afterthought; unsupported by any hardship, prejudice or detriment to good administration (Senior Courts Act 1981 s.31(6)(b)).

The Victim Issue

35. The second preliminary objection is the agreed issue of whether the Claimant is a victim for the purposes of section 7 of the Human Rights Act 1998. Mr Birdling accepts that no standing or victim objection arises in relation to the challenge to the Director's refusal of ECF, including the argument based on breach of Convention rights (s.10(3)(a) of the 2012 Act). Mr Tabori says the claim against the Lord Chancellor should fail for want of a victim (s.7(3) of the Human Rights Act 1998). He accepts that the at-risk attendance of the Claimant's unfunded lawyer at the asylum interview is no answer, accepting the analogy with a charity who provides accommodation denied by a public authority in breach of Convention rights. In R (Oji) v Director of Legal Aid Casework [2024] EWHC 1281 (Admin) [2024] 4 WLR 53, the compensation application had been made "with the voluntary assistance of her present team" (§4), but the judicial review court still had to decide (§29) whether the refusal of legal aid breached Convention rights (s.10(3)(a)). But, says Mr Tabori, HRA victimhood is necessarily absent by reason of the combination of the asylum interview taking place and asylum being granted. I am unable to accept that submission. The legal aid exclusion operated in the Claimant's case at the interview, when it took place. That is why, as Mr Tabori accepts, time started to run; and the at-risk attendance of a lawyer is no answer. Legal aid has never been granted, including by way of ECF. The present case is distinguishable from R (DXK) v Home Secretary [2024] EWHC 579 (Admin) [2024] 4 WLR 46 where the claimant had been given dispersal accommodation and dropped the challenge based on past violation (§§3, 108). The breach is not a remedied exclusion from asylum, but an unremedied exclusion from legal aid. Furthermore, I agree with Ms Luh that victimhood is not the same as a required species of concrete long-term harm. If it were, many arguments about sufficient "just satisfaction" could never be reached. ECF itself involves asking whether denial of funding would breach Convention rights (s.10(3)(a)), which would itself make the individual a victim of the "breach" by reference to the denial of legal aid, independently of whether they achieved refugee status. Otherwise, the Director's short answer to the s.10(3)(a) question (26.7.23) would have been the grant of refugee status (9.6.23). I agree with Mr Birdling that the judicial review court can ask whether the refusal of ECF breached Convention rights (s.10(3)(a)), the logic of which involves victimhood.

The Academic-Claim Issue

36. The third preliminary objection is the agreed issue of whether the Claimant's challenge to regulation 3 is academic. Again, Mr Birdling accepts that no such objection arises in relation to the challenge to the Director's refusal of ECF, including the argument based on breach of Convention rights (s.10(3)(a)). Mr Tabori says the claim against the Lord Chancellor should fail because it is academic, in circumstances where the Claimant had his interview, attended at-risk by his lawyer, and has achieved refugee status. I am unable to accept that submission. The legal aid exclusion operated, legal aid was never secured, and victimhood is satisfied. It would, moreover, be invidious for the law to insist on a legal representative securing a long-term deferral of the asylum interview or refusing to attend an interview at-risk. This is a real case, with a real exclusion said to have been a past violation, and with a concrete evidential foundation (cf. DXK §§8, 111). It raises an important question of law, with widespread implications, ready for resolution and - if these practical points are good answers – seems unlikely ever to be decided. Even if it were academic – which I do not think it is – I would determine it in all the circumstances on public interest grounds: cf. L v Devon County Council [2021] EWCA Civ 358 at §§37-38, 50, 56. Having dealt with the three preliminary objections, I turn to the legal substance. I would have done so in any event, even had I acceded to a preliminary objection, in case I was wrong about it.

The Comparability Issue

37. I can turn to the substance of the Article 14 claim against the Lord Chancellor, leaving aside for now the Thlimmenos Alternative. That means dealing with the issue of comparability. The agreed issue is whether persons seeking asylum who made a Child-Claim and have, or have not, Turned-18 are in an analogous situation (ie. relevantly similar), as regards the measure in question (regulation 3 of the 2012 Regulations).

38. On this part of the case, Mr Tabori for the Lord Chancellor submitted – in essence as I saw it – as follows. The requirement that the difference in treatment is of people in relevantly similar (analogous) positions is a distinct requirement for a viable Article 14 claim (SC §37(2)). The onus is on the claimant to satisfy it. The fact that the points to be made overlap with those that would be made in relation to the reasonable relationship of proportionality (SC §37(3)) is not a basis for putting this distinct requirement to one side. The effect would be to delete it. The Article 14 claim in Carson which went to the Strasbourg Court – which concerned overseas-resident and UK-resident state pensioners – was disposed of on this distinct basis (Carson v UK (2010) 51 EHRR 13 at §90). That is the discipline of an Article 14 analysis. Correctly understood, this was also the point which Lord Hoffmann was addressing in the other claim in Carson – about a welfare benefit rule and under-25s (at §41), when he accepted an argument about the under-25 and 25-plus groups as relevantly different (§37). The present case is even clearer. What straightforwardly distinguishes the two groups is a very obvious difference which pervades the world of public authority provision and regulation. One group of asylum interviewees are children. The other group of asylum interviewees are adults. This is not just an age-line (as in Carson with age 25). This is a child/adult age line. The difference is self-evident and that is the end of the case. No further enquiry is called for.

39. I have been unable to accept this submission. On this part of the case I accept the submissions of Ms Luh. These are my reasons. The starting point is that I entirely accept that the requirement of relevantly similar (analogous) groups has been framed as a

distinct step in the analysis, whose absence is fatal to an Article 14 claim. But suitable circumspection is called for. Whether the two groups are relevantly similar (analogous) is a contextual question. It must be asked in the context of the measure in question, and its purpose. The conclusion in SC that children and adults were not comparable in the context of child tax credit was reached in the light of the aims of the limitation (§§56-60 and 186). It may sound obvious that adults and children are self-evidently different. But if the legal age for driving a car (having met all test requirements) starts at 17, a driving-related measure which restricted licensed drivers under-18 (because they are "children") may surely require justification. If the compulsory school age ends at aged 16, an education-related measure which restricted 18-plus students (because they are "adults") may also call for justification. And if a child/adult line is lawful in a particular context, this may properly be a function of legitimate aim and reasonable relationship of proportionality, rather than lack of a contextually relevant similarity. In the special educational needs and local authority transport arrangements case of R (Drexler) v Leicestershire County Council [2020] EWCA Civ 502, there was an age-based restriction, justified in circumstances where it matched compulsory school age. Had it been a child/adult age line, in the context of school students, I think it would also have called for justification. Lord Hoffmann's discussion of the under-25 welfare rule spoke of "objective justification" (Carson at §41); and Lord Walker declined to look at contextual comparability in isolation (§88) There is a big overlap between those considerations which can justify the differential treatment and those considerations which mean an absence of contextual comparability. They can become two sides of a single coin, so that the exercise of considering justification is in any event necessary (see R (SWP) v Home Secretary [2023] EWCA Civ 439 [2023] 4 WLR 37 at §60).

40. Here, the nature and purpose of the measure involves providing state-funded legal assistance for an asylum interview, in the context of two groups both of whom have made a Child-Claim, entered the child asylum decision-making process, and are necessarily making a claim about life experiences as a child. In the context and circumstances of the present case, and in particular given the Home Office reference-points on which reliance has been placed (§§10-13 above), I think there is a contextual comparability which calls for justification through a legitimate objective and reasonable relationship of proportionality. I do not consider, in light of the particular complaint being made (see R (SM) v Lord Chancellor [2021] EWHC 418 (Admin) [2021] 1 WLR 3815 at §25), and in the particular context of the measure in question and its purpose, there is such an obvious difference to find an absence of relevant similarity calling for justification of the differential treatment (see In re McLaughlin [2018] UKSC 48 [2018] 1 WLR 4250 at §26). It is, in my judgment, better in this case to concentrate on the reasons for the difference in treatment and whether they amount to objective and reasonable justification: AL (Serbia) §§24- 25. The points which go to relevant similarity and distinctiveness are far better directed and addressed in the context of objective justification. Turning it round, if the reach of regulation 3 of the 2012 regulations in including persons seeking asylum who have made Child-Claims except when they have Turned-18 by the time of the interview is incapable of being objectively justified, the claim should succeed. On this part of the case, I therefore accept the submissions of Ms Luh.

The Nature and Intensity of Review

41. I have recorded Ms Luh's position on intensity of proportionality scrutiny (§31iii above). When the judicial review court is approaching a question about substantive review, there are a number of points which can be borne in mind:

> Point (1): What is it that has to be justified?
>
> Point (2): Is there a relevant framework or sequence of questions to ask?
>
> Point (3): How close or intense is the Court's scrutiny?
>
> Point (4): How broad is the latitude afforded to the primary public authority rule-maker, policy-maker or decision-maker?

42. Point (1) is an elementary but important point. Frequently in public law, what has to be justified is a decision or measure. Sometimes, it is a departure, for example from policy guidance or a legitimate expectation. Sometimes, it is an interference with a qualified right. In Article 14 cases, what has to be justified is "not the measure in issue but the difference in treatment between one person or ground and another": see A v SSHD [2004] UKHL 56 [2005] 2 AC 68 at §68; AL (Serbia) at §38. So, in A (SSHD) it was not whether the measure of detaining suspected terrorists was justified; but whether the differential treatment in detaining only foreign suspected terrorists was justified. Here, it is not whether the measure of removing legal aid for asylum interviews is justified; but whether the differential treatment is justified, in giving it to those who have made Child-Claims except where they have since Turned-18.

43. Point (2) recognises that there may be a further necessary discipline. In many cases, there may be no particular sequence of questions. In some case, there will be the familiar sequence of proportionality questions. In Article 14 cases that familiar sequence of proportionality questions is encountered (see eg. DA at §111) and it fits within a framework involving other and prior questions, as seen in SC at §37 (§30 above)

44. Points (3) and (4) raise questions about what we mean by close scrutiny. At common law, those questions arise against the backcloth of recognition that the degree of intensity of reasonableness review varies according to the context and nature of the decision (§60ii below). In relation to Point (3), we can I think see two basic ideas. One is the idea of the judicial review court which does more. The other is the idea of the judicial review court which needs more. The first of these can lead to a "careful scrutiny". The second of these is about "the strength of the reasons required to justify" whatever it is that has to be justified. All of this is linked to Point (4), which is about the width of the latitude or margin for the primary decision-maker's evaluative judgment and choice. Sometimes, Point (4) may be rolled-into Point (3). Sometimes, they are stated separately, as in SC at §37(3)(4) (§30 above).

45. In thinking about Point (3) and the two basic ideas involved in close scrutiny, I have derived particular assistance in the language – in the specific context of Article 14 and justifying the difference in treatment – in this discussion by Leggatt LJ (as he then was) in JT at §§88-89, making two points:

> ***First, the fact that the hurdle for intervention is a high one does not mean that justifications put forward for the measure in question should escape careful scrutiny.…***

> ***Second, as mentioned earlier, the strength of the reasons required to justify a difference in treatment will vary according to the nature of the ground on which the difference in treatment is based.***

This language was being used in the context of Article 14, where the relevant "hurdle" was the formulation "manifestly without reasonable foundation", and where the question arises whether there are so-called "suspect" grounds of differential treatment triggering a need for "very weighty reasons". Those are the themes which pervaded SC. But what can be derived from Leggatt LJ's discussion is an encapsulation of two basic ideas, straightforwardly expressed. One is the idea of "careful scrutiny", which is about what the court does. The other is the idea of "the strength of the reasons required" to justify (whatever has to be justified at Point (1)), which is about what the court needs. I find in this language a helpful and straightforward encapsulation of ideas which unlock what is under consideration in judicial review, wherever standards of substantive review involve questions about the intensity of review.

Nature and Intensity of Review: The Present Case

46. In the present case, this is how I have seen the position. So far as concerns what the Court does, I accept that the question of objective justification is one which deserves "careful scrutiny" (JT §88). That is informed by all the contextual points I made at the outset (§§3-7, 10-15 above). I am satisfied that I ought to look with care, to ensure that there has been an appropriate balance between competing considerations (SC §153). That is about what the Court will do. I turn to what the Court needs. There is no "suspect" class here. To take an example, legal aid for asylum interviews is not being made available to boys but not to girls. The reasons required to justify the difference in treatment are not, in my judgment, required to be particularly strong or very weighty. Closely linked to that, there is in my judgment a wide latitude for evaluative judgment and policy choice. The question is whether the differential treatment is "manifestly without reasonable foundation". I recognise the following in particular: that this case is about the assistance of a lawyer in an important decision-making context, but it is not about access to a court or effective judicial protection; that this is a general measure of economic and social strategy, prioritising economic resources for areas of greatest need; that the judicial review Court has no relevant institutional primacy or advantage in relation to the question in issue; and that the Lord Chancellor has a clear and manifest institutional primacy and advantage, reflected in the primary legislation, for making the evaluative judgment embodied in the rule-making design. Perhaps it comes to this. It is a careful look; but a light touch. That is how I have seen the nature and intensity of review, and the width of the latitude.

The Objective Justification Issue

47. I therefore arrive at this agreed issue: whether there is an objective justification for the differential treatment of persons seeking asylum who have made Child-Claims and have, or have not, Turned-18, as regards their entitlement to legal aid for legal representative attendance at substantive asylum interview.

48. Ms Luh is right to accept that the delineated boundary within regulation 3 of the 2012 Regulations ("at the time of that interview") pursues a legitimate aim. This is the targeting of public resources for priority areas. The overarching purpose of the 2012 Act had been identified in extra-statutory materials as being (see eg. R (Public Law Project)

v Lord Chancellor [2015] EWCA Civ 1193 [2016] UKSC 39 [2016] AC 1531 at §12 (CA); echoed at §14 (SC)):

> ***to bear down on the cost of legal aid, ensuring that every aspect of expenditure is justified and that we are getting the best deal for the taxpayer. Unless the legal aid scheme is targeted at the persons and cases where funding is most needed, it will not command public confidence or be credible . . . the reforms seek to promote public confidence in the system by ensuring limited public resources are targeted at those cases which justify it and those people who need it.***

The question is whether there is an objective justification: a reasonable relationship of proportionality. As to that, Ms Luh is right to recognise that the question is whether the differential treatment is "manifestly without reasonable foundation". I have summarised her key submissions as to why the answer should be no (§31 above).

49. I have not been able to accept those submissions. In my judgment, the Lord Chancellor has – through the materials filed and the submissions made by Mr Tabori – discharged the onus of establishing an objective justification for the difference of treatment. The differential treatment is not "manifestly without reasonable foundation". On the contrary, it is in my judgment clear (and manifest) that there is a reasonable foundation. I will now explain why:

50. First, there is a very well-established bright-line delineation, in the context of state assistance and support for the individual, which uses whether the individual has or has not Turned-18 at the time of the state assistance and support. Like the Equal Treatment Benchbook, we can trace this onto the international plane. The UN Convention on the Rights of the Child, having recalled in a recital that "the child, by reason of … physical and mental immaturity, needs special safeguards and care, including appropriate legal protection", describes state authorities' responsibilities to ensure that the views of the "child" are given due weight, with the opportunity of the "child" being heard, directly or through a representative or appropriate body, in any administrative proceedings (Article 12); with appropriate measures to ensure that a "child" seeking refugee status receives "appropriate protection", with family-tracing assistance for "such a child" (Article 22). In its first provision (Article 1), "a child means every human being below the age of 18" (unless majority is attained earlier under applicable law). This point has been emphasised in the witness statement of Kerenssa Kay, Head of Civil and Family Legal Aid at the Ministry of Justice. To recognise this starting point is not to fall into any suggested trap of answering the Article 14 question by determining a question of violation or non-violation of an international treaty (SC §2(7)(i), 84 and 91). What is seen and recognised from the international plane is clearly reflected in relevant domestic primary legislation. That includes the Children Act 1989 which imposes duties of state assistance and support for the individual, using Turned-18 at the time of that state assistance and support. That includes persons seeking asylum who have made Child-Claims but have Turned-18. The statutory duties of special assistance to a looked-after child are replaced, on Turning-18, with scaled-down duties. That is because s.22 (the general duty), s.22A (accommodation) and s.22B (maintenance) all use "child", and the statutory definition is "a person under the age of eighteen" (s.105), except in the context of orders for financial relief (s.15(1), Sch 1), where it can include a person who has Turned-18 (Sch 1 §16). Local authorities can continue to provide funded responsible adults for asylum interviews, in the context – within the scaled-down duties – of the continuity provisions relating to the "personal adviser for a former relevant child" (s.23C). As is emphasised in the witness statement of Mr Hussain, it is the duty under s.55 of the Borders, Citizenship and Immigration Act

2009 which provides the overarching principles for the Home Secretary's handling of asylum claims from unaccompanied children. That is the Home Secretary's statutory duty to make arrangements for ensuring that functions in relation to asylum are discharged having regard to the need to safeguard and promote the welfare of "children" who are in the United Kingdom; and "children" means "persons who are under the age of 18" (s.55(6)). When EU Directive 2005/85/EC identified (Article 17) those "specific procedural guarantees for unaccompanied minors [which] should be laid down on account of their vulnerability" (recital 14) it defined "unaccompanied minor" as "a person below the age of 18" (Article 2h). It even spelled out that a state did not need to appoint a representative for a minor who would "in all likelihood reach the age of maturity before a decision at first instance is taken" (Article 17(2)(a)). When Lord Reed recognised in SC (at §§86, 114, 158 and 203) that "the best interests of children" is treated as "an important factor in assessing proportionality" and can "call for a stricter standard of review", this was all a reference to "children" because of an "age group" with recognised particular needs and vulnerabilities. That, in turn, is why "the bests interests of children" cannot be deployed in the present case to heighten the intensity of review.

51. Secondly, although it is familiar and well-understood that there is no "cliff edge" in terms of the "physical and mental immaturity" which call for special safeguards, care and legal protection, it remains the case that this well-established bright-line delineation operates, by reference to whether the individual has or has not Turned-18 at the time of the state assistance and support. The reason why this is so must, in my judgment, be the one given by Mr Tabori, with which Ms Luh did not disagree. The Children Act 1989 safeguards and care – and the arrangements informed by the s.55 duty – are designed and intended, in principle, to be suitably inclusive. So is the UN Convention. It is not the case that the "average" young person needs the special safeguards, care and legal protection until they have Turned-18. By that logic, every young person whose immaturity is below average when they Turn-18 would be denied the special safeguards, care and legal protection warranted by their immaturity. Taking age 18 must be intended as broadly and suitably inclusive, including in terms of local authority statutory duties and the Home Secretary's s.55 duty.

52. Thirdly, the function and purpose of providing legal aid for an interview (or a hearing) is, properly and legitimately, closely linked to the needs and interests of the individual at the time of that interview (or hearing). The same is true of the 1989 Act statutory duties of accommodation and maintenance. It is the time of discharging the asylum function, for the purposes of the s.55 duty. Regulation 4 gives legal aid for the asylum interview for the person who "is detained" or "lacks capacity". Regulation 3 gives legal aid for the asylum interview for the person who "is a child". All the witnesses who have given the valuable evidence to assist the Court, in support of the claim, are emphasising needs at the time of the interview. That reflects the important truth that it can – and should – be something about the individual at the time of the interview which lies behind the delineation. Ms Luh agrees that a bright line is justified. She agrees that it is the Turned-18 bright line. But she locates it at the time of making the claim for asylum. The Lord Chancellor is justified in locating it at the time of the interview. True, the individual who made a Child-Claim but has Turned-18 will be recounting events which were lived experiences as a child. But a person may have Turned-18 prior to arriving in the UK and making their asylum claim. They too would be recounting events which were lived experiences as a child. But they would fall outside the scope of legal aid, even on the

logic of this claim; if the differential treatment were reversed; and if all those who have made a Child-Claim were eligible for legal aid for their subsequent asylum interview.

53. Fourthly, the suggested legal analysis based on the definition in rule 352ZD of the immigration rules is incorrect. Rule 352ZD defines "unaccompanied asylum seeking child". That is the phrase in the heading to rule 352ZC and in that rule. Rule 352 speaks of "unaccompanied children" and says "child" when mandating the presence of a responsible adult for "the child" and that the interviewer must have "specialist training in the interviewing of children". Rule 352ZA speaks of an "unaccompanied child" who "makes a protection claim" and requires that the child's representative "has the right to be present at the interview and ask questions and make comments at the interview". Rule 352ZB requires that the decision be taken by a person trained to deal with "protection claims from children". Rules 352ZC to 352ZF are a suite of rules with their own heading. The definition in rule 352ZD does not say it governs "child" and "children" in rules 350 to 352ZB. The phrase "unaccompanied asylum seeking child" is not used in that suite of rules to match rule 352ZD. There is no "contrary intention [which] appears", so as to give "child" in rules 350 to 352ZB a meaning other than in the rule 6.2 definition. All of this is the natural interpretation of the rules, standing as they now are, and read as a whole. Resort to the history is unnecessary. But, in fact, rules 352ZC to 352ZF (discussed in the 2020 CAC Guidance at p.64) were introduced in March 2013, not to transform the meaning of "child" in other rules, but so as to bring within the rules a species of discretionary leave (see the Explanatory Memorandum to HC 1039 at §7.35). So far as the other immigration rules are concerned, amendments made in November 2007 (HC 82) were designed to implement EU Directive 2005/85/EC, including the "guarantees for unaccompanied minors" (Article 17) based on a definition of "a person below the age of 18" (Article 2h).

54. Fifthly, the position in the Home Office policies about "when a child turns 18 before the substantive interview" (§§11-12 above) cannot not bear the weight which is being placed on it. The key passage (§11 above) is concerned with the "practice" which Home Office "staff" should follow, involving the nature of the interview and the specialism of the interviewer and decision-maker. I accept that this policy extends the reach of provision in rule 352 (specialist training in the interviewing of children) and rule 352ZB (decision-maker trained to deal with protection claims from children). That policy position, in the context of those who made Child-Claims and have submitted a SEF, extends safeguards in the case of those who have Turned-18. It goes beyond the scope of the immigration rules themselves. It is wider than Mr Tabori submitted (§11 above). A clear example would be the "best practice" of allowing accompaniment by a responsible adult – available from the local authority because of the scaled-down support for former looked-after children – and not doing so only exceptionally and with advance notice (2022 Interview Guidance p.22). There is strong evidence, filed in support of the claim, that responsible adults are permitted in Turned-18 Child-Claim cases. This reflects a Home Office policy position. But the paragraph on which reliance is placed is a "best practice" provision. And it is specifically caveated by the words "wherever possible". I do not accept that it states a policy position, on behalf of the Home Office, that a person who has made a Child-Claim but has Turned-18 must have a representative who is a legal representative (cf. rule 352ZA). That would have been a collision with statutory legal aid arrangements, including as to legal representation at the asylum interview. Those statutory arrangements are expressly referred to in the 2020 CAC Guidance (p.23). The unavailability of legal aid for an individual who has Turned-18 would be a reason why it

may not be "possible" to adopt a "best practice" which involves (p.44) explaining that the person being interviewed "can speak to their legal representative … at any time".

55. Sixthly, it follows that the patent mismatch with the immigration rules and/or Home Office policy position, which is the substantial underpinning of the argument, is not substantiated. The immigration rules and 2020 CAC Guidance involve no inconsistency with the delineation of the scope of legal aid since 2012 (indeed, since 2004). The express regulation 3 timing out of legal aid for the asylum interview, for a person who has Turned-18, does not defeat or undermine any safeguard insisted upon by the immigration rules or Home Office policy guidance. The difference in treatment is justified, by reference to the adult age of the individual at the time of the interview, that being the relevant time of the assistance and the need for it. That has consequences for those who have Turned-18 by that date, including those who are within the child asylum process having made a Child-Claim, including in relation to their recounting of lived experiences as a child. They are excluded, with others aged 18 and over at the time of the asylum interview, from the guaranteed benefits of a state-funded legal representative which, by design, stands to deny them the advantages of having a legal representative present at the interview. They have the same further provision as others aged 18 and over at the time of the asylum interview: in-scope legal help before and after the interview; the state-funded interpreter; the record of interview and tape; the right to make post-interview representations; and the potential safety-net of s.10 individualised funding. They can have an appropriate adult, including by reason of the continuity of provision for former looked after children by a local authority. These are contextual features of the situation in which the justified bright-line rule has been adopted. All of this is consistent with the scope of the s.55 duty on the Home Office, with the special protections in the 2005 EU Directive, and can be traced back to the reach of the Convention on the Rights of the Child.

56. Seventhly, I cannot in the present case accept that the justification is undermined by the absence of a contemporaneous reasoned evaluation addressing the differentiation. The express wording of regulation 3 ("is a child at the time of that interview") shows that this was a design feature which the drafter was thinking about. This was not the perpetuation of historic injustice. I do not see the Lord Chancellor's rule-making latitude as having appreciably been narrowed by the absence of a reasoned document which addressed the specific position of those who have made Child-Claims but have Turned-18, having regard to the nature and purpose of the provision being made (help at an asylum interview for those representing a class of priority need) and the well-established nature of the bright-line delineation being adopted.

57. Finally, the question is not whether the Lord Chancellor would be able to justify the alternative approach of using the same bright-line of biological age 18, but applied at the time of the asylum claim (as with immigration rule 352ZD). That would confer the advantages of minority, like the policy continuation of Home Office best practice (§54 above). There would be differential treatment. Two persons of the same age at the time of interview would be treated differently depending on their age when they made their asylum claim. That would have been a different policy choice. The important point, for present purposes, is that it cannot be characterised as the sole objectively justified policy choice, for the reasons I have given. The policy choice made by the Lord Chancellor in the design of regulation 3 involves allocating funds "according to some rational set of criteria" (JT §111). It follows that the Article 14 claim fails.

The Thlimmenos Issue

58. The agreed issues on this part of the case (§32 above) were whether those who have made Child-Claims but have Turned-18 are relevantly (and, if required, significantly) different to other adult asylum seekers in respect to the aims of the measure in question; and, if so, whether there is an objective justification for not treating them differently as regards their entitlement for legal aid for legal representative attendance at the substantive asylum interview. In the end, these issues fell away. Legal aid is afforded to those making Child-Claims, making an exception of those who have Turned-18. Legal aid is denied to adult interviewees, without making an exception for those who had made Child-Claims. If the Article 14 claim fails when analysed in terms of the differentiation (compared with other Child-Claim cases), it is impossible to see how it could succeed when analysed in terms of the non-differentiation (compared with other adult interviewees). In the end, nobody submitted that it could. Whether, as Mr Tabori says, Thlimmenos claims require a 'suspect' ground (SC §62) will have to await a case in which it matters.

The Johnson Issue

59. The agreed issue on this part of the case (§33 above) was whether it was unreasonable for the Lord Chancellor not to provide legal aid funding to persons seeking asylum who have made Child-Claims but have Turned-18 for legal representation at a substantive asylum interview and to require them to apply for such funding on a case by case basis via Exceptional Case Funding. This was advanced as an unjustified differential treatment argument, invoking common law reasonableness and the "helpful framework" adopted in Johnson at §50. That was derived from R (Law Society) v Lord Chancellor [2018] EWHC 2094 (Admin) [2019] 1 WLR 1649 at §113. It was deployed in R (RAMFEL) v Home Secretary [2024] EWHC 1374 (Admin) at §212. But there was no "read-across" of "the reasoning in Johnson" in R (Pantellerisco) v Work and Pensions Secretary [2021] EWCA Civ 1454 [2021] PTSR 1922 at §84; and no "analogy with Johnson" in R (Salvato) v Work and Pensions Secretary [2021] EWCA Civ 1482 [2022] PTSR 366 at §116. The Johnson "helpful framework for how to approach irrationality in this case" was as follows:

> ***We need to consider what are the disadvantages of deciding not to "fine-tune" the Regulations thereby allowing the nonbanking day salary shift problem to persist unresolved; what are the disadvantages of adopting a solution to the non-banking day salary shift problem; would a solution be consistent or inconsistent with the nature of the universal credit regime; and has a reasonable balance been struck by the SSWP—or rather is it possible to say that no reasonable Secretary of State would have struck the balance in the way the SSWP has done in this case?***

Its inspiration was this passage from Law Society (at §113):

> ***We accept that in principle it was open to the Lord Chancellor to adopt a policy response which did not directly correspond to the problem which it was designed to meet. A policy-maker may reasonably decide that the disadvantages of a finely tuned solution to a problem outweigh its advantages and that a broader measure is preferable, even if the broader measure is both over- and under-inclusive in that it catches some cases in which there is no or no significant problem and fails to catch some cases in which the problem occurs. Such an approach is in any event consistent with the nature of the Scheme, which uses criteria such as PPE as proxies for the complexity of cases. It is inherent in the use of such proxies that they will result in under-compensation in some cases. But this does not cause unfairness if it is off-set by overcompensation in other cases. What matters is that overall a reasonable balance is struck.***

60. Ms Luh and Mr Tabori were agreed that the Johnson framework has a function within an analysis of common law reasonableness, including where what has to be justified as reasonable is differential treatment, or the failure to differentiate. Johnson was described (at §73) as being about "the rationality of failing to make an exception for [a] particular group of people. Mr Tabori says it is a framework applicable only to cases of failures to 'fine-tune' a scheme, having an acknowledged arbitrary dysfunction in the delivery of its purpose (Johnson §47; Salvato §116; RAMFEL §215). I have derived the following from this line of authority:

    i) There are three elements within the Law Society framework: (a) a balancing of disadvantages and advantages; (b) consistency with the purpose and nature of the relevant scheme; and (c) the striking of an overall reasonable balance.

    ii) These are capable of providing a relevant framework or sequence of questions to ask (§43 above), in the context of common law reasonableness review; where it is "well-recognised that the degree of intensity with which the Court will review the reasonableness of a public law act or decision … varies according to the nature of the decision in question" so that "the nature of judicial review in every case depends upon the context" (Pantellerisco §56; RAMFEL §171).

    iii) This framework proved the basis for finding a rigid universal credit rule to be unreasonable, but only where there is a readily remediable arbitrary dysfunction in the delivery of the scheme's purpose (Johnson §47); not for the wholesale departure from fundamental policy choices underpinning the scheme (Pantellerisco); and not where a rationale scheme feature pursues legitimate aims (Salvato).

    iv) The framework was used in Law Society to test the reasonableness of a legal aid fee-setting response if, without directly corresponding to the problem which it was designed to meet, it struck an overall reasonable balance (§113). That was not about acknowledged arbitrary dysfunction. Methodological flaws meant no overall reasonable balance had been struck (§§114-115, 122). Focusing on the aims (§§100, 111) and overall reasonable balance, Carr J and Leggatt LJ (as they then were) were at ease with the language of "disproportionate", "inherently disproportionate" and a "rational and proportionate solution" (§§110, 114).

    v) The framework also had utility (RAMFEL §§163, 212) in understanding the unreasonableness of a practice denying e-proof of a statutorily conferred immigration status, having no legitimacy of aim or reasonable overall balance, in the light of impacts and the ease of unactioned remediation (§§197, 207 and 210).

61. In the present case, Ms Luh deployed the Johnson framework squarely in support of claimed unreasonableness as to the same differential of treatment (or failure to make an exception) which had featured in her Article 14 claim, and by reference to the same considerations. That is not an alternative analysis which could flourish, leaving aside the question whether an arbitrary dysfunction in the delivery of the scheme's purpose stands as a precondition. I can see how common law unreasonableness can assist, as to reasonable justification and differential treatment or failure to differentiate, where Article 14 involves difficulties as to threshold questions of "ambit" or "status" (see Johnson itself at §108). Given that these – and indeed contextual-comparability – have been resolved in the Claimant's favour, I was not able to see how a claim by reference to Article 14's principles of contextual comparability and objective justification could fail, and yet

succeed at common law (cf. AL (Serbia) §42), including by reference to the Johnson framework.

The ECF Issue

62. I now turn to the claim against the Director. On this part of the case the agreed issue is whether the Director's refusal of the Claimant's Exceptional Case Funding was unlawful or unreasonable.

63. Section 10 of the 2012 Act provides as follows:

> ***10. Exceptional cases. (1) Civil legal services other than services described in Part 1 of Schedule 1 are to be available to an individual under this Part if subsection (2) or (4) is satisfied. (2) This subsection is satisfied where the Director – (a) has made an exceptional case determination in relation to the individual and the services, and (b) has determined that the individual qualifies for the services in accordance with this Part (and has not withdrawn either determination). (3) For the purposes of subsection (2), an exceptional case determination is a determination – (a) that it is necessary to make the services available to the individual under this Part because failure to do so would be a breach of – (i) the individual's Convention rights (within the meaning of the Human Rights Act 1998), or (ii) any rights of the individual to the provision of legal services that are assimilated enforceable rights, or (b) that it is appropriate to do so, in the particular circumstances of the case, having regard to any risk that failure to do so would be such a breach. (4) This subsection is satisfied where – (a) the services consist of advocacy in proceedings at an inquest under the Coroners Act 1988 into the death of a member of the individual's family (b) the Director has made a wider public interest determination in relation to the individual and the inquest, and (c) the Director has determined that the individual qualifies for the services in accordance with this Part (and neither determination has been withdrawn). (5) For the purposes of subsection (4), a wider public interest determination is a determination that, in the particular circumstances of the case, the provision of advocacy under this Part for the individual for the purposes of the inquest is likely to produce significant benefits for a class of person, other than the individual and the members of the individual's family. (6) For the purposes of this section an individual is a member of another individual's family if – (a) they are relatives (whether of the full blood or half blood or by marriage or civil partnership), (b) they are cohabitants (as defined in Part 4 of the Family Law Act 1996), or (c) one has parental responsibility for the other.***

64. It is helpful to extract the two limbs (s.10(3)(a) and (b)):

> ***(a) … it is necessary to make the services available to the individual … because failure to do so would be a breach of – (i) the individual's Convention rights (within the meaning of the Human Rights Act 1998), or (ii) any rights of the individual to the provision of legal services that are assimilated enforceable rights,***
>
> ***or (b) … it is appropriate to do so, in the particular circumstances of the case, having regard to any risk that failure to do so would be such a breach.***

65. By s.4(3) of the 2012 Act, Parliament imposed duties on the Director to comply with the Lord Chancellor's published directions, and to have regard to the Lord Chancellor's published guidance, about the carrying out of the Director's statutory functions. Directions and guidance cannot relate to an individual case and the Director's independence must be preserved in the application of directions or guidance (s.4(4)). In having regard to statutory guidance, the Director would need a good and clear reason for a departure from it. The Lord Chancellor has issued Exceptional Funding Guidance (Non-Inquests) pursuant to s.4(3) of the 2012 Act (the "ECF Guidance"). It is dated July 2023. It draws on the analysis of the Court of Appeal after a 4 day hearing ten years ago: R (Gudanaviciene) v Director of Legal Aid Casework [2014] EWCA Civ 1622 [2015] 1 WLR 2247. Under the first limb (s.10(3)(a)), the critical question is whether legal aid is

needed to ensure that the individual is able to participate effectively in the proceedings, without obvious unfairness, having regard to the decision-making process viewed as a whole and all the circumstances, including complexity, the importance of what is at stake, and the ability of the individual (having regard to their age and mental capacity) to cope with stress, demands and complexity (Gudanaviciene §§56, 70-72, 76; ECF Guidance §3.20). Under the second limb (s.10(3)(b)), of a provision which "carefully describes the scope … by reference to Convention or EU rights", there is a discretion having regard to "the risk" that failure would be a "breach", where "the greater … the risk", the more likely it will be appropriate, but "the seriousness of the risk is only one of the factors" and regard should be had to "all the circumstances" (Gudanaviciene §§12, 30, 32; ECF Guidance §2.6).

66. How does the first limb link with the Article 14 claim? Counsel agreed that if regulation 3 were incompatible with Article 14, the legal logic would be that failure to make legal aid available "would be a breach of … the individual's Convention rights" for the purposes of the first limb (s.10(3)(a)). So, if regulation 3 had involved unjustified differential treatment (eg. legal aid for asylum interviews for children at the time of the interview, but only if they are boys and not girls), the Director would have the statutory responsibility to protect against the breach by granting ECF. But Article 14 was no part of the case against the Director. The Article 14 claim has been argued, against the Lord Chancellor, who has defeated it.

Two-Tiered Review

67. It was common ground that the first limb (s.10(3)(a)) engages an objective correctness standard of review; whereas the second limb (s.10(3)(b)) engages a reasonableness standard of review. This two-tiered approach reflects the nature and structure of the questions; and finds support in Gudanaviciene §§90-91, 123; Thompson v Director of Legal Aid Casework [2017] EWHC 230 (Admin) [2017] 1 Costs LR 163 at §§23, 34, 37; and Oji at §29.

Temporal and Evidential Focus

68. The impugned decision (26.7.23) was made after the asylum interview had taken place (12.4.23). The Claimant's legal representative had appeared at-risk. There was – and is – information about how the legal representative was able to assist. There may be questions about 'fresh evidence' in judicial review challenges to ECF refusals. This topic was touched on in Oji at §§5, 21-23. I note that the "inestimable benefit of hindsight" featured, to illustrate the complexities of a case, in Gudanaviciene at §135. I think it was and is right to consider, for illustrative purposes, what was known about the interview by the time of the impugned decision. However, as is agreed, what the Director had to look at was the picture on the basis of the asylum interview taking place without the presence of the legal representative. That is how the impugned decision approached the matter.

The First Limb

69. This is a summary of the Director's assessment in the decision:

    i) It is accepted that whether or not the Claimant is recognised as a refugee and his interests in remaining in the UK are matters of great importance to him; that the asylum interview is an important step in his application. But the Director assesses

that, without the attendance of a legal representative, the Claimant has the ability effectively to attend his asylum interview, to understand and to be able to engage with the process, to a degree sufficient to provide him with the requisite protection of his interests under the ECHR.

ii) The fact that the Home Office does not remove a person seeking asylum who has made a Child-Claim but Turned-18 from the UASC process does not mean that the person must still be treated as a child for the purposes of the asylum interview. The fact that legal aid is available for a person seeking asylum who has made a Child-Claim but has not Turned-18 does not mean that Convention rights would require that. The Claimant is in receipt of legal help, and will have received legal advice and assistance about his case including the asylum interview process. Yes, immigration law as a whole is complex and rapidly evolving but the focus must be on the level of complexity involved in an individual case, at the stage in proceedings for which legal aid is sought. And the asylum interview is only one part of the asylum claim.

iii) At the interview, a Home Office interviewer will be asking the Claimant about the reasons why he is claiming asylum in the UK, after the submission by the Claimant of an SEF and witness statement, which explains the basis of claim clearly and will be the starting point, with the interview as an opportunity to give more detailed information, to put his case across to someone from the Home Office, being asked questions about his identity and to explain why he is claiming asylum. The interview is based on facts that are all within the Claimant's knowledge and there is nothing to suggest it would involve complex legal issues. The Claimant can explain to the Home Office, with the assistance of a Home Office interpreter, why he wishes to remain in the UK and not return to Syria. The Claimant does so with in-scope legal help, so that a legal representative has the opportunity to submit representations, evidence, requests and clarifications both pre- and post- interview if necessary. After the interview there would be the right to the interview notes and tape recording, and to put in post-interview representations. That means the legal representative would be able to review the record and ask the Claimant – and the responsible adult who had been present – if they have had any issues in respect of the interview; making any representations or comments. That would include any inconsistencies which have arisen during the interview, or the interview not following Home Office policy, correcting inconsistencies and issues, so as to influence the outcome of the asylum decision, without needing the actual presence of a legal advisor at the interview.

iv) The fact that the Claimant is a vulnerable, young adult who has only recently Turned-18 would not preclude him from understanding and engaging in the process to a degree sufficient to provide him with the requisite protection of his Convention rights. A specific adjustments request could be (and has been) made. The Home Office is under a duty to be sensitive to those who are identified as vulnerable or who have had traumatic experiences. The 2022 Interview Guidance deals with safeguarding the interest of claimants and their best interest. The Claimant would also have the additional safeguard because a responsible adult would be attending the asylum interview. The Claimant has the ability to effectively attend his asylum interview, understand and be able to engage with the process without funding, seen

as a whole, to a degree sufficient to provide him with the requisite protection of his interests under the Convention. His interests are being properly protected.

70. In submitting that the Director was incorrect as to the first limb (s.10(3)(a)), Ms Luh emphasises the following. The important part which the asylum interview is within the asylum decision-making process. The important role that a lawyer plays at the interview. The implications of recounting lived experience as a child and understanding through the lens of a child. The Home Office policy position as to "best practice" being applied "if possible" where the person who has made a Child-Claim has Turned-18. The complexities of the applicable law. The particular factual complexities of the present case, where the Claimant had as a young child left Syria (the country where persecution was risked on return), there was a complex history involving displacement to Lebanon at a young age and a period in Libya (including circumstances of child-exploitation); with issues as to inability to access protection and safety in three relevant countries. The prospect of being probed and tested at the asylum interview. The Claimant's characteristics, traumatic experiences and special vulnerabilities. The huge significance for him of what was at stake. The inadequacy and incompleteness of the other protections and safeguards, removing the legal representative from the picture at the hugely significant moment of the all-important asylum interview itself. In the light of these key points, the Director was wrong that refusing legal aid would be a breach of Article 3 or Article 8 positive obligations.

71. I have been unable to accept Ms Luh's submissions. I have considered the features of the context and circumstances, including what I have said at the beginning of this judgment about the significance of the asylum interview, the absence of a cliff edge, and the significant role that a legal representative can properly play at the asylum interview. I have also considered all the points which were made in the context of the Article 14 claim. But, in my judgment, the Director has answered the question of breach of Convention rights in the legally correct way. Legal aid for a lawyer to attend the asylum interview was not – in the context and circumstances – necessitated as a positive Article 3 or Article 8 obligation, to ensure that the Claimant was able to participate effectively in the administrative asylum proceedings without obvious unfairness; having regard to the decision-making process viewed as a whole; and having regard to all the circumstances, including complexity, the importance of what was at stake, and the Claimant's ability – in light of his age, characteristics and circumstances – to cope with the stress, demands and complexity. The reasoning of the Director – which I have summarised – stands as a cogent explanation of the basis for a legally correct decision. The question is not whether the Claimant's position would have been "improved by representation", which "will very often be the case" (Thompson §34). The question is whether the circumstances fell below a line of inability to participate effectively in the administrative asylum proceedings without obvious unfairness, having regard to the process as a whole and all the circumstances. The Director, in my judgment, answered that question correctly.

The Second Limb

72. In submitting that the Director was unreasonable as to the second limb (s.10(3)(b)), Ms Luh emphasised the same points as were made in the context of the first limb. That was entirely appropriate, because features said to be capable of substantiating breach may in the alternative be capable of substantiating a claim of unreasonable failure to appreciate the risk of breach. The risk of breach is the sole legal relevancy identified in s.10(3)(b).

It follows that the decision-maker is required to ask whether there is a risk of breach, and if so assess the nature and strength. The Director focused on risk of breach. This can be seen from the following, extracted from the impugned decision:

> ***I am … required to consider whether withholding legal aid would amount to, or risk, a breach of your client's Convention rights or of an enforceable EU law right. The proper approach to the assessment of this question was considered by the Court of Appeal in Gudanaviciene … which I have considered, along with the Lord Chancellor's [ECF] Guidance… I have therefore focussed on your contentions that a failure to make funding available in your client's case would amount to (or risk) a violation … In assessing whether there would be a breach (or a risk of a breach) of your client's Convention rights, the ultimate question is whether he would be unable to participate in the decision-making process sufficiently to present his position… I consider that by refusing funding for attendance at the interview the LAA is not denying effective participation in the process, and therefore there is no risk of a breach of Convention rights… I am of the view that the withholding of legal aid would not prevent your client having effective participation in the process that he requires, nor would it create an overall unfairness within the process. I do not therefore consider that withholding funding would result in a breach of your client's Convention rights. Having regard to the matters discussed above, I also do not consider that it appropriate to provide funding in all of the circumstances of your client's case, having regard to my conclusions regarding the risk or the level of risk of a breach of your client's Convention rights.***

73. The ECF Guidance says this (§§2.5-2.6):

> ***2.5 Section 10(3)(b) provides a discretion to make an exceptional case determination where it is considered "appropriate" to do so having regard to any risk that failure to do so would be a breach of Convention rights or retained enforceable EU rights. 2.6 The purpose of section 10(3) of the Act is to enable ECHR and retained EU law rights to be secured in the context of a civil legal aid scheme that has refocused limited resources on the highest priority cases. Caseworkers should approach section 10(3)(b) with this firmly in mind. It would not usually be appropriate to fund simply because a risk (however small) exists of a breach of the relevant rights. The greater the risk of a breach, the more likely that it will be appropriate to make a determination. However, the seriousness of the risk is only one of the factors that may be taken into account in deciding whether it is appropriate to make a determination. Regard should be had to all the circumstances of the case [fn. Gudanaviciene §§31-32).***

74. The Court of Appeal said this in Gudanaviciene at §§30 and 32:

> ***30. Section 10(3) carefully describes the scope of the exceptional cases by reference to an individual's Convention or EU rights. Unsurprisingly, section 10(3)(a) obliges the Director to make an exceptional case determination if he is of the opinion that it is necessary to make the services available because failure to do so would be a breach of the individuals Convention or EU rights. Section 10(3)(b) gives him a discretion to make a determination if he considers it "appropriate" to do so having regard to the risk that failure to do so would be a breach… 32. In short, therefore, if the Director concludes that a denial of ECF would be a breach of an individual's Convention or EU rights, he must make an exceptional funding determination. But … the application of the European Court of Human Rights and Court of Justice case law is not hard-edged. It requires an assessment of the likely shape of the proposed litigation and the individuals ability to have effective access to justice in relation to it. The Director may conclude that he cannot decide whether there would be a breach of the individuals Convention or EU rights. In that event, he is not required by section 10(3)(a) to make a determination. He must then go on to consider whether it is appropriate to make a determination under section 10(3)(b). In making that decision, he should have regard to any risk that failure to make a determination would be a breach. These words mean exactly what they say. The greater he assesses the risk to be, the more likely it is that he will consider it to be appropriate to make a determination. That is because, if the risk eventuates, there will be a breach. But the seriousness of the risk is only one of the factors that the Director may take into account in deciding whether it is appropriate to make a determination. He should have regard to all the circumstances of the case.***

75. At the hearing I had asked whether the correct interpretation of s.10(3)(b) is that a "risk" that legal aid refusal "would be a breach" is a statutory precondition to ECF as being appropriate in the particular circumstances. Mr Birdling drew to my attention the judgment in Oji, which relies on this part of Gudanaviciene. I received oral and written submissions for which I am grateful. The point was argued in Oji (§§40-41) which decides (at §§88-93), by reference to the 2012 Act as a whole and Gudanaviciene in particular, that there is no "general discretion" independently of risk of breach. I note that Judge Bird recognises (at §88) that this cannot be derived from the language of s.10(3)(b) in isolation. It appears to turn on what to make of "having regard to any risk", as delivering a purpose limited to prospective protection from breach and risk of breach, as the Court of Appeal saw it. Having considered the point with the assistance of all Counsel, I have concluded that nothing can turn on this question in the present case. First, it has never been part of the claim for judicial review that the Director made a material error in law in focusing on the question of risk. Secondly, the request for a review of the refusal of ECF (27.4.23) had 10 pages of submissions which squarely focused on breach. The request for ECF was not put on the basis of – and no case was advanced to support – appropriateness, independently of any breach or risk of breach. Thirdly, and unlike Oji, this is a case where the Convention rights are treated as "engaged". That means the field is occupied by principles which protect necessity for effective participation, and then by asking whether there is risk of breach of those principles. In the present case, I see no room for a viable claim to ECF on appropriateness grounds, once breach and risk of breach have been eliminated. Fourthly, not only does the unimpugned ECF Guidance – as statutory guidance – address the second limb by reference to risk (§73 above), but this is how the Court of Appeal has analysed it (§74 above). I have taken this from the Claimant's pleaded grounds and skeleton argument:

> ***In Gudanaviciene, the Court of Appeal was asked to consider the approach to be taken by the [Director] when determining ECF applications, and laid down the following principles … [The Director] has to consider two alternative bases on which ECF may be required: (i) where there would otherwise be a breach of the person's ECHR or EU rights if funding is not granted (s.10(3)(a)); or (ii) where there would be a risk, in all the circumstances of the case, that a failure to make a favourable determination would be a breach (s.10(3)(b)): §32.***

76. In my judgment, the focus was on risk of breach. I can detect no unlawfulness or unreasonableness in the Director's conclusion as to the second limb, having lawfully concluded that the refusal of legal aid would not breach the Claimant's Convention rights, in concluding that there was no risk of breach and that legal aid was not appropriate in all the circumstances. I have already held, as to breach, that her conclusion was objectively and legally correct. As to risk of breach, and appropriateness in all the circumstances, I am satisfied that her conclusion was reasonably open to her and involved no public law flaw in the reasoning process.

Conclusion

77. For the reasons I have given, I will dismiss the claim for judicial review, against both the Lord Chancellor and the Director. Neither has acted unlawfully, as was claimed. Counsel were agreed, having received the judgment in draft, that the terms of the Order should be as follows. (1) The claim against each Defendant is dismissed. (2) There be no order as to costs as between the Claimant and the Director. (3) The Claimant shall pay the Lord Chancellor's costs on the standard basis, save that as the Claimant is publicly funded, this costs order shall not be enforced without a determination by a costs judge of the amount which it is reasonable for the Claimant to pay in accordance with s.26(1) of the

2012 Act and regulations 15 and 16 of the Civil Legal Aid (Costs) Regulations 2013. (4) There shall be a detailed assessment of the Claimant's costs in accordance with s.2(4) of the 2012 Act and CPR 47.18.