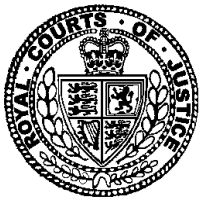

Neutral Citation Number:[2025] EWHC 519 (Admin)

Case No: AC-2023-LON-000202

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 March 2025

Before :

MICHAEL FORD KC, sitting as a Deputy High Court Judge

Between :

THE KING
(on the application of RAYMOND ALFRED LEE)

Claimant

- and –

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

- -

Mr Buttler KC and **Mr Berry** (instructed by **Leigh Day Solicitors**) for the **Claimant**
Mr Hansen (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 10-11 December 2024

- -

Approved Judgment

This judgment was handed down remotely at 12noon on Friday 7 March 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Michael Ford KC:

Introduction

1. This is a judicial review claim arising from the Defendant's decision to refuse the Claimant compensation under the Windrush Compensation Scheme ("WCS"), established to compensate those who were victims of what has been called the "Windrush scandal", named after a ship which arrived in the UK in 1948 with around 1,000 passengers from the Caribbean. As explained in the *Windrush Lessons Learned Review* (March 2020, HC 93), people who arrived in the UK from Commonwealth countries before 1973 had a right of abode or deemed leave to remain in the UK, but were not issued with documents confirming their status. Nor did the Home Office have records. According to the *Lessons Learned Review*, this "set a trap" for those referred to as the "Windrush generation" because it led to people, mostly from the Commonwealth, suffering serious adverse effects, including when they sought to re-enter the UK, owing to their not having documents to demonstrate their lawful immigration status. The aim of the WCS was to compensate for these detrimental effects.

2. The Claimant was a member of the "Windrush generation". His claim for compensation under the WCS stemmed from his refusal of entry when he sought to enter the UK from Jamaica on 29 July 1999. His claim was initially refused in a letter dated 17 March 2021 and subsequent reviews reached the same conclusion, culminating in the Defendant's decision set out in a letter dated 20 December 2022 which is the target of the judicial review.

3. The Claimant was granted permission by Poole J on three grounds on 16 November 2023, numbered 1 to 3 in the Statement of Facts and Grounds. Ground 1 is that the Defendant misconstrued the WCS. Ground 2 is that she wrongly misunderstood how immigration law, including the Immigration Rules in force in 1999, would have applied to the Claimant. Ground 3 is principally a contention that the Defendant failed to conduct sufficient enquiries into the Claimant's immigration status in July 1999.

4. The Claimant was represented by Chris Buttler KC and Adrian Berry and the Defendant by William Hansen. I am grateful for the high quality of the written and oral submissions.

Background

5. The Claimant was born in Jamaica on 12 May 1956. On 1 December 1971, aged 15, he left Jamaica and joined his mother and siblings in the UK, where he attended school in Brockley, London. When Jamaica became independent in 1962, as a result of the Independence Constitution of Jamaica he became a Jamaican citizen while under the British Nationality Act 1948 he remained a British subject/Commonwealth citizen.

6. It is common ground that by virtue of s.1(2) of the Immigration Act 1971 (the "IA 1971"), from 1 January 1973 the Claimant had indefinite leave to remain (or "ILR") in the UK as a result of being settled in the UK when the IA 1971 came into force. However, in common with other members of the "Windrush generation" he was not issued with any document confirming his immigration status.

7. In 1979 the Claimant married his wife, Joy, who was born in then British Guiana (now Guyana) and who has a British passport, at a church in Sydenham, as confirmed by his marriage certificate. Their first child was born in 1979 (the Claimant's eldest child, Kevin, he had from a prior relationship). The Claimant and Joy eventually had four children.

8. After his arrival in the UK, according to the Claimant's statement provided with his application to the WCS (the "WCS Statement"), he travelled to Jamaica "every so often" and also travelled to visit his wife's family in Guyana. He added that "Until 1999, [he] had travelled back and forth between the UK, Guyana and Jamaica without any issues".

9. Some of this account is supported by passport records (see below) and is accepted by the Defendant for the purpose of these proceedings. However, there are no documentary records of the Claimant's movements in the critical period from 1989 until June of 1999 because he has lost his passport covering that period and no Home Office records exist for that period.

10. On 29 July 1999 the Claimant was refused entry to the UK - the event that gave rise to his application to the WCS. The Claimant had flown from Jamaica: according to the WCS Statement, he and his family "had been living in Jamaica since 1997 but wanted to return to the UK".

11. The Claimant explained in his WCS Statement that, on arrival in the UK on 29 July, he was questioned by immigration officers, was not given a reason why he was not allowed to enter but was told he would be put in a detention centre and sent back to Jamaica on the next available flight. He was subsequently detained at Harmondsworth from 29 July until 31 July, when he was put on a plane to Jamaica. According to the Defendant's "PAS" records, he had asked for leave to enter as a visitor but immigration officials were not satisfied he genuinely was a visitor.

12. The Claimant stayed in Jamaica until 18 March 2000 when he again travelled to the UK to join his wife and two of his children, who had returned to the UK in January 2000. In the WCS Statement he states that his immigration status at this time prevented him from working in the UK. Eventually, in April 2001 he was granted leave to remain until 23 April 2002, meaning he could work in the UK, and in May 2002 he was granted ILR. In 2009 he returned to Jamaica to visit his ill father who was unwell and who sadly died on 23 December 2009. From that time the Claimant has been in Jamaica, separated from his family in the UK.

(i) The Claimant's passports

13. The Claimant's past passports were referred to in the proceedings and are potentially relevant to this claim. Four passports are relevant, but one has been lost.

14. The first passport, no. 395881, which it seems was issued in 1970, has a stamp for the Claimant's entry to the UK on 1 December 1971 as a child. It also has a stamp for 26 October 1979, by the Jamaican High Commission ("JHC") in the UK, tending to confirm that the Claimant was in the UK then. Copies of pages from this passport were

provided to the WCS in connection with the application with, for example, a letter from the Claimant's solicitors of 5 May 2020.

15. In October 1979, on expiry of the previous passport, the Claimant was issued with a second Jamaican passport, no. 005251. It too was issued by the JHC in the UK, as confirmed by a stamp of 26 October 1979, and was valid until 25 October 1989. It is not clear to me whether pages from this passport were provided to the Defendant for the purpose of the Claimant's WCS application, but nevertheless the parties showed me pages from it, it provides evidence of past practice and in her Detailed Grounds of Defence the Defendant accepted various events it recorded. For example, the Defendant accepts that the Claimant was re-granted indefinite leave to enter ("ILE) when he arrived in the UK in January 1981. (The Claimant was re-granted ILE because, under the legislation in force until 2000, his ILR lapsed each time he left the UK but he could be re-granted leave to enter or remain on return to the UK: see "Legal Framework", below.)

16. The triangular stamps in the passport recorded when the Claimant left the UK, I was told, and the rectangular stamps when he arrived. It shows, for example, that the Claimant left the UK on 6 December 1980 and returned on 17 January 1981, with the rectangular stamp stating that he had been given leave to enter for an indefinite period. Although other rectangular stamps did not state this, it was common ground that, in the absence of any express endorsement in the passport limiting the period of stay, their effect was to grant the Claimant ILE/ILR. For example, the Claimant was re-admitted as a returning resident to the UK on 31 May 1984, 4 April 1987 and on 10 September 1989 (having left on 4 February 1989) and on each occasion his passport was stamped with a rectangle, without any limitation on the length of his stay.

17. On 4 October 1989 the Claimant was issued with a third passport, no. 899655. By the time of his application to the WCS, the Claimant no longer had a copy of that passport. One consequence is that there was no documentary evidence before the WCS decision-makers of the Claimant's movements in the 1990s until 16 June 1999, when his new, fourth passport was issued. According to the witness statement of Mr Smith for the Defendant, although residents in the UK were "stamped in" on arrival in the UK and, until the spring of 1998, also "stamped out" on leaving, no central records were created or kept to show, for example, that persons in the position of the Claimant had been granted ILE or not when they entered the UK. In the absence of this passport, the only information about the Claimant's movements between October 1989 and June 1999 was the information he provided in his application and subsequently for the purpose of the WCS claim.

18. In June 1999 the Claimant was issued with a new, fourth passport, no. 2483232, which was also provided to the WCS decision-makers (it was enclosed, for example, with a letter from his solicitors, Leigh Day, dated 14 May 2021 requesting a Tier 1 review). According to a date stamp on the passport, it was issued on 16 June 1999 by the JHC in the UK. It gives the Claimant's country of residence as the UK. It also refers to his previous passport, no. 899655, stating it had been cancelled and returned and includes a stamp dated 21 June 1999, recording that the Claimant landed in Jamaica on that day - supporting his account that he personally collected the passport from the JHC in London.

19. The same passport has a stamp recording the Claimant's arrival in Jamaica on 31 July 1999 following his refusal of entry to the UK on 29 July and his detention between 29 and 31 July, as well as later stamps.

(ii) The WCS application and information provided

20. Although at times both parties have referred to factual evidence which was not before the WCS decision-makers, they both accept that the principal focus of the judicial review grounds is on the evidence before them, which I summarise below.

21. The Claimant made an application for compensation under the WCS initially via a letter from his solicitors, then acting *pro bono*, dated 8 August 2019. He claimed compensation for various losses which were said to have been a direct result of his being unable to demonstrate his lawful status to stay in the UK and which led to his refusal of entry and detention. The documents provided included the following:

    (1) The completed WCS claim form on which the Claimant ticked the relevant box for eligibility under the scheme and included the numbers and dates of issue and expiry of his four passports, saying no. 899655 had been lost. In section 3 he claimed compensation for his detention and removal from the UK in July 1999, loss of access to employment from around 2000 onwards and the impact on his life owing to matters such as his detention, deportation, inability to work and separation from his family.

    (2) At various stages of the form, the application referred to an attached statement from the Claimant - what I have referred to as the "WCS Statement". In that statement, under the heading "Detention, deportation and removal", the Claimant included very brief details of when he came to England in 1971, his schooling and work in the UK, and his detention and removal to Jamaica in July 1999. As set out in §8 above, the WCS Statement said that he had travelled back and forth between the UK, Guyana and Jamaica without any issues prior to 1999, but did not give dates or periods for when he was or was not in the UK prior to the time he was detained in 1999. It explained how the Claimant felt distraught and humiliated by his detention. In a separate section entitled "Loss of access to employment" the Claimant gave very brief details of the work he did from age 17 in the UK. Other sections in the WCS Statement dealt with the psychological impact on him of matters such as his detention and removal to Jamaica in 1999, his separation from his family at different periods, and his inability to work between March 2000 and May 2001.

    (3) The enclosures with the application included some pages from passport no. 2483232, issued on 16 June 1999, and his detention records in July 1999, as well as documents relevant to his subsequent application to stay as a spouse and for leave to remain.

22. On 25 March 2020 the Claimant's solicitors applied for an exceptional payment to enable the Claimant to travel to the UK in October/November 2020 to attend the 83rd birthday party of his mother (who was elderly and in poor health) and to see his children, grandchildren and other family members. The letter stated that the Claimant

had been "resident in the UK without difficulties until 1999, when he was refused re-entry".

23. By letter dated 5 May 2020, the Claimant's solicitors provided further information to the WCS in connection with his application. The information included copies of pages from his passports nos. 395881 and 2483232.

24. Following early e-mail exchanges, in an email of 14 October 2020 a case-worker of the Defendant asked for evidence of the date the Claimant had returned to reside in Jamaica in 1997 (based on what he had said in his WCS Statement), saying this was "crucial" for his claim. The writer also said they needed confirmation of this date and whether Mr Lee returned to the UK between 1997 and 29 July 1999 along with any documents to support this. In their reply of 11 November, the Claimant's solicitors said that the Claimant had provided all the information and documents available to him and concluded by saying "Please proceed with the application on the basis of the information and documents you have already received".

(iii) The WCS decisions and the further information provided

25. There are three decisions relevant to this judicial review. It is also relevant to consider the additional information which was provided in the course of the process.

26. The first decision was set out in a letter of 17 March 2021**.** The decision was to refuse the Claimant compensation. It was based on the assumption that the Claimant had been out of the UK since 1997 and for more than two years prior to 29 July 1999. After referring to the events on that day, the letter stated:

> "In coming to a decision, we have considered evidence taken from Home Office records. We can confirm that upon your arrival to the UK on 29 July 1999 you sought entry as a Visitor, which was refused. This resulted in you being denied entry in to the UK and later removed.
>
> Home Office records show that you were granted Indefinite Leave to Remain (ILR) in the UK in 1981. You have told us that you left the UK in 1997 and did not return back to the UK until 29 July 1999. From the information gathered on Home Office systems, we are satisfied that you had been outside the UK for over two years when you attempted to re-enter as a Visitor on 29 July 1999. This means your ILR had lapsed and therefore you did not have free movement to enter the UK. We have not been provided with, nor seen any evidence, to contradict these findings. Therefore, the Home Office did not act unlawfully when refusing entry into the UK.
>
> Taking the above into account, unfortunately, we are unable to offer an award under the Detention, Deportation, Removal and Return category."

In the section dealing with the Claimant's claim for compensation based on the impact on his life, the letter repeated that "The basis of your claim is negated by the fact your ILR had lapsed when you attempted to re-enter the UK on 29 July 1999", adding that as the Claimant "did not have settled status at this time" he fell outside the scope of the WCS.

27. The Claimant applied for a "tier 1" review of that decision in a letter dated 14 May 2021. Among other matters, the letter challenged the factual premise that the Claimant had been out of UK for more than two years prior to 29 July 1999, pointing out that the pages from passport no. 2483232 already provided showed that he must have been in the UK on 16 June 1999 when the passport was issued until he flew to Jamaica on 21 June.

28. In a letter of 10 June 2021 the Defendant once again asked for the date the Claimant moved to Jamaica in 1997 as well as the circumstances of his move there, the reasons for the issue of his passport in 1999 and, assuming the Claimant collected the passport himself, "when did he enter the UK and with what permissions?".

29. In their reply dated 3 August 2021, the Claimant's solicitors said that the Claimant had no documents from the 1990s from which he could confirm with any confidence dates of residence or employment. They enclosed letters showing two of his children enrolled in school in Jamaica on 1 September 1997. The letter also said that the Claimant was in the UK on 16 June 1999 when his passport was issued by the JHC, he had obtained the new passport because the previous one would shortly expire but "he did not know when he entered the UK prior to 16 June 1999 because he entered on his previous passport which has now been lost". The letter expressed the Claimant's frustration at the repeated questions, concluding "Please decide the tier 1 review on the basis of the information already supplied".

30. The second, "tier 1" decision of 6 December 2021 upheld the first decision, though it changed the factual premise. It no longer assumed that the Claimant had been outside the UK for more than two years prior to 29 July 1999; instead, the focus was now on the Claimant's status during the previous visit, when he obtained a passport in June 1999. It stated:

> "We accept that you were issued with a Jamaican passport by the [JHC] in London on 16 June 1999, approximately 1 month before you were refused entry. However, we have been unable to establish on what conditions you entered the UK or that you held lawful status at this time. We have also been unable to establish that you were in the UK in the 2 years prior to this entry. Therefore, we are unable to conclude that the refusal of entry and removal were incorrect due to an inability to demonstrate lawful status.
>
> As there is no information to show you held ILR prior to your detention and removal, we are unfortunately unable to offer you an award."

The decision went on to state towards the end that "we have been unable to establish, on the balance of probabilities, that you still held ILR at the point you were refused entry to the UK". For that reason, the original decision was upheld.

31. The Claimant sought a "tier 2 review" by the independent adjudicator in a letter of 20 December 2021. This letter, too, said the Claimant did not have details of the precise dates he entered and left the UK in 1999 or in the two years prior to that date and made similar points to those set out in the letter requesting a "tier 1" review. It did not provide any new information.

32. For reasons set out in a letter dated 20 April 2022, the independent adjudicator did not recommend a review of the decision, principally because challenges to decisions on an individual's immigration status fell outside the adjudicator's remit. However, she considered the Home Office had not satisfactorily explained the decision-making process on the issue and asked it to provide a full explanation.

33. This led to the third and final decision - the one under challenge - dated 20 December 2022. The letter explained that the Defendant had accepted the recommendation of the adjudicator's office and accordingly provided "a detailed explanation" of the Defendant's decision-making. After setting out a summary of the history, the letter said that the Defendant did not know when the Claimant had returned to live in Jamaica in the 1990s, saying "You told us it was in 1997 but you do not know the exact date". It then dealt with the events in 1999 surrounding the Claimants refusal of entry in July:

> "You were issued with a Jamaican passport on 16 June 1999. The passport was issued by the Jamaican High Commission in London. It is noted this potentially placed you 1 month before you were refused entry. However, it is also possible the passport was posted to you in Jamaica or collected by a friend/family member. Although there is a Jamaican landing stamp noted in your passport dated 21 June 1999, indicating you travelled on the passport to Jamaica days after it was issued.
>
> Whether or not you were in the UK on 16 June 1999, we have been unable to establish under what conditions this would have been at that time.
>
> Following the issue of your passport on 16 June 1999, Home Office records show you subsequently sought entry to the UK as a visitor. This does not support the claim that your status had not lapsed at this time. We have not been provided with or found documentary evidence which allows us to place your residence in the years prior to this."

34. After referring to events after January 2000, the concluding section of the letter stated as follows:

> "The basis of your claim is negated by the fact that we have no information to show you held ILR when you were refused re-

> entry to the UK on 29 July 1999. The issues you describe appear to stem from this event.
>
> We know the reason for your refusal of entry to the UK in July 1999 was because you had sought entry as a visitor and the immigration officer was not satisfied you would return before your visa expired.
>
> From the available evidence, as noted above, we have no information to show you still held ILR prior to your detention and removal. Without proof of when you left the UK, prior to your passport issues, we cannot determine you held ILR in June 1999 when your new passport was issued".

As a result the original decision to refuse compensation was upheld.

(iv) The Claimant's witness statement for the judicial review

35. In his witness statement for the judicial review the Claimant has given a much fuller - and different - version of the events prior and up to 1999 than the account set out in his WCS Statement and in the information subsequently provided. Mr Buttler explained that he relied on this fuller account solely to show what the Defendant might have learned if it had asked the correct question and made the correct enquiries: it therefore went to the materiality of the alleged public law errors.

36. In contrast to the very brief details in his WCS Statement, in his witness statement for these proceedings the Claimant states that throughout the 1980s he and his wife travelled frequently between the UK, Jamaica and Guyana. He says that one of them would take a child with them and the other would stay in London to look after the others. However, in 1989 he states they took their four children to Guyana and enrolled them in school there. He states, however, that he and his wife still worked in England to earn money and he spent "several months a year" in England during the 1990s.

37. Again according to his statement in these proceedings, the Claimant states that he and Joy moved the children from Guyana to Jamaica in 1997 and, while his wife stayed with the children, he recalls being in England from December 1998 or January 1999 until June 1999 - information not provided to the WCS decision-makers. He also gave a much fuller account than he did in his application of other matters, such as how his passport no. 899655 was lost.

38. Although at times both parties have referred to the evidence in this statement, I have kept it firmly in mind that it contains information which was not before the decision-makers.

The Legal Framework

(i) The WCS

39. Published on 3 April 2019 and recognised by s.1 of the Windrush Compensation Scheme (Expenditure) Act 2020, the WCS provides compensation payable to the "Windrush generation". Convenient summaries of the history and background to the WCS are set out in the judgments of Tim Smith, sitting as a Deputy High Court Judge, in ***R(Mahabir) v Secretary of State for the Home Department*** [2021] 1 WLR 5301 at §§37-56, Bourne J in ***R (Vanriel) v Secretary of State for the Home Department*** [2022] QB 737 at §§2-3 and Henshaw J in ***Kaur v Secretary of State for the Home Department*** [2023] 1 WLR 3855 at §4, which I gratefully adopt.

40. I was referred to the provisions of WCS in November 2022, the version in force at the time of the decisions made in the Claimant's case. The aim of WCS is set out in §1.1, to "compensate individuals who have suffered loss in connection with being unable to demonstrate their lawful status in the United Kingdom". "Lawful status" is defined in §1.5 so as to include "settled status", which embraces those who had indefinite leave to enter or remain in the UK under the IA 1971. It was not in dispute that the Claimant could potentially claim compensation under §2.1(g) of WCS on the basis that he was settled in the UK before 1 January 1973 but his settled status had now lapsed.

41. Part 6 of the WCS sets out the procedure for making a claim and states that the Home Office may request information from a claimant and claimants should provide information as reasonably required and co-operate with the Home Office. In the context of a scheme based on events that may have occurred many years ago and established in order to compensate for problems due to the lack of documentary records, I accept that uncorroborated testimony from a claimant may be sufficient to establish factual matters on the balance of probabilities. Part 7 explains how the Home Office notifies claimants of the determination of the claim. Part 10 deals with the process of seeking reviews of determinations.

42. Annex C explains that the conditions for making an award for detention, deportation, removal and return. By §C1 of Annex C an award may be made, among other circumstances, where (i) a claimant is detained, deported, removed or returned under the IA 1971; (ii) a material reason for such detention, deportation or removal was the claimant's "inability to demonstrate lawful status" and (iii) but for that inability, the Home Office reasonably determines that the claimant would not have been detained, deported, removed or returned. These questions are determined on the balance of probabilities: see §C3. Similar provisions allow an award to be made for loss of access to employment or for impact on life where, in each case, this is a consequence of an individual being unable to demonstrate their legal status: see Annex D, §D9 and Annex H, §H1.

43. The principles on interpreting an *ex gratia* compensation scheme, such as WCS, were not in dispute and are set out in the judgment of Henshaw J in ***Kaur*** at §35. They include that WCS should be read in light of its overall purpose.

(ii) Relevant immigration law and practice prior to and in 1999.

44. The historical immigration law is relevant to understanding the legal position which would have applied at the time the Claimant was refused entry in July 1999.

45. As I have already explained, it is not in dispute that, following his entry to the UK on 1 December 1971, the Claimant obtained deemed ILR on 1 January 1973 by virtue of s.1(2) of the IA 1971 (it was not contended he had a right of abode within the meaning of s.1(1)). Section 1(2) provided that "indefinite leave to enter or remain in the United Kingdom shall, by virtue of this provision, be treated as having been given to those in the United Kingdom at its coming into force, if they are then settled there".

46. It is also not in dispute that each time the Claimant went abroad outside the common travel area prior to 30 July 2000, his ILR/ILE lapsed by virtue of s.3(4) IA 1971. Thus, in 1999 s.3(4) provided so far as is material:

> "A person's leave to enter or remain in the United Kingdom shall lapse on his going to a country or territory outside the common travel area (whether or not he lands there), unless within the period for which he had leave he returns to the United Kingdom in circumstances in which he is not required to obtain leave to enter."

(The position changed in 2000 as a result of the Immigration (Leave to Enter and Remain) Order 2000, SI 2000/1161, (the "2000 Order") made under ss 3A and 3B of the IA 1971 (introduced by the Immigration and Asylum Act 1999) and in force from 30 July 2000. Article 13 of the 2000 Order provided, in summary, that leave to enter or remain "shall not lapse" on a person travelling outside the common travel area (Article 13(2)). However, this was subject to Article 13(4) by which "where the holder stayed outside the United Kingdom for a continuous period of more than two years, the leave...shall thereupon lapse".)

47. Prior to 2000, the automatic lapsing of ILR by virtue of s.3(4) IA was subject to the Immigration Rules (the "Rules"), which at the relevant times provided that a person who was settled in the UK could be re-admitted for settlement on return to the UK. This presumably explains why, for example, when the Claimant left the UK on 6 December 1980 and re-entered on 17 January 1981 his passport recorded that he was given ILE; and it was the effect of the later rectangular stamps in passport no. 005251, such as the stamp dated 31 May 1984 (when he appears to have returned to the UK after leaving on 20 April 1984).

48. I was shown the historical Rules applying at the material times. For example, paragraphs 56 and 57 of the Immigration Rules in effect from 1 January 1983, HC 169, provided as follows:

> "56. A Commonwealth citizen who satisfies the Immigration Officer that he was settled in the United Kingdom at the coming into force of the Act, and that he has been settled here at any time during the 2 years preceding his return, is to be readmitted for

> settlement. Any other passenger returning to the United Kingdom from overseas (except one who received assistance from public funds towards the costs of leaving this country) is to be admitted for settlement on satisfying the Immigration Officer that he had undefinite [*sic*] leave to enter or remain in the United Kingdom when he left and that he has not been away for longer than 2 years.
>
> 57. A passenger who has been away from the United Kingdom too long to benefit from the preceding paragraph may nevertheless be admitted if, for example, he has lived here for most of his life."

Under those paragraphs and the successor rules (HC 388), there was no requirement that an individual needed to show that he was seeking admission for the purpose of settlement, as Mr Smith explained in his statement.

49. An additional requirement of seeking admission for the purpose of settlement was first introduced, according to Mr Smith, by paragraphs 58 and 59 of the Rules in force from 1 May 1990 (HC 251). By paragraph 58 of HC 251, a "passenger" returning to the UK who had not received public funding towards the cost of his leaving was to be admitted for settlement on satisfying the immigration officer that (i) "he had indefinite leave to enter or remain in the United Kingdom when he last left"; (ii) that he had not been away longer than 2 years; and (iii) that he now sought admission for the purpose of settlement. Paragraph 59 conferred a discretion to admit in identical terms to paragraph 57 of HC 169.

50. Of central relevance to this claim is the version of the Rules applying in 1998 and 1999, HC 395 (which came into effect on 1 October 1994; Mr Smith gives an earlier date but nothing turns on this). They were similar to the predecessor Rules. Thus paragraphs 18 and 19 of those Rules stated:

> "18. A person seeking leave to enter the United Kingdom as a returning resident may be admitted for settlement provided the Immigration Officer is satisfied that the person concerned:
>
> (i) had indefinite leave to enter or remain in the United Kingdom when he last left; and
>
> (ii) has not been away from the United Kingdom for more than two years; and
>
> (iii) did not receive assistance from public funds towards the cost of leaving the United Kingdom; and
>
> (iv) now seeks admission for the purpose of settlement.
>
> 19. A person who does not benefit from the preceding paragraph by reason only of having been away from the United Kingdom

> for too long, may nevertheless be admitted as a returning resident if, for example, he has lived here for most of his life".

51. Although paragraph 18 said "may" be admitted for settlement, the Defendant accepted that a returning resident who met the conditions of paragraph 18, including element (iv), would normally be granted ILR. It was not suggested to me that the result would be any different where the discretion was exercised to admit someone under paragraph 19, even though the paragraph is worded slightly differently, referring to being admitted as a "returning resident".

52. According to Mr Smith's evidence, in practice if a person claiming to be a returning resident did not appear to meet paragraph 18(ii) - the two-year provision - an immigration officer would next consider whether to admit them under paragraph 19, and he or she had a broad discretion to admit under that rule (whereas a decision to refuse admission would require approval of a chief immigration officer or higher). In addition, a person who was not admitted as a returning resident under either paragraph 18 or 19 might nonetheless be admitted as a visitor for six months (with restrictions on employment) or for two months' limited leave on what Mr Smith referred to "Code 1". This was a residual discretion available to immigration officers to admit persons whom they did not consider it was appropriate to refuse entry there and then, requiring them to apply to the Immigration and Nationality Directorate for e.g. ILR before the expiry of the two months. However, apart from entries in an individual's passport, no central records were kept of these decisions.

53. It was not in dispute that "settlement" for the purpose of paragraph 18 of the Rules was defined in s.33(2A) of the IA 1971, in which "settled" is said to mean "ordinarily resident" in the UK. In ***R v Barnett LBC ex parte Shah*** [1983] AC 309 Lord Scarman (in a speech with which the other Lords agreed) held that the phrase "ordinarily resident" bore its natural and ordinary meaning (at 342), that a person could be ordinarily resident in two countries at the same time (at 342) and that, while the words connoted a purpose to settle, they did not require a purpose to stay indefinitely, only a "sufficient degree of continuity to be properly described as settled" (344C-D): "Education, business or profession, employment, health, family, or merely love of the place spring to mind as common reasons for a choice of regular abode" (344C-D).

54. The meaning and effect of paragraphs 58-59 of HC 251, the forerunner to HC 394, was considered by a distinguished Court of Appeal in ***Entry Clearance Officer Bombay v De Noronha*** [1995] Imm AR 341. Mr Noronha had been ordinarily resident in the UK between 1965 until 1978. From 1978 he spent most of his time in India, looking after his sister, but he always returned to the UK at least once every two years so as to preserve his right to be considered settled in the UK, and was given leave to enter on each such occasion. However, when he returned to the UK on 15 July 1991 he was given leave to enter as a visitor for six months. When he later sought to enter the UK on 30 January 1992, he was refused entry. He argued this was wrong because the immigration officer had a discretion under paragraph 59 to admit him which the officer had failed to exercise.

55. The Court of Appeal rejected this interpretation. They held the two rules must be read together. The discretion in paragraph 59 was only triggered in circumstances where the

person satisfied all the conditions in paragraph 58 except the condition of not being away for more than two years. On the facts Mr de Noronha did not meet those conditions because when he last left the UK prior to January 1992 he did not have ILE or ILR. His refusal of entry in January 1992 had nothing to do with him being away for more than two years.

56. The same interpretation, I consider, must apply to paragraph 19 of HC 395. Indeed, the addition of the words "by reason only of" in paragraph 19 means this version of the Rules confirms, if confirmation were needed, the result reached by the Court of Appeal in ***Noronha***. To fall within paragraph 19, at the time of entry the returning individual must have met all the conditions in paragraph 18, including having indefinite leave to enter or remain when he last left, and the only reason he could not benefit from paragraph 18 was that he had been away "too long".

Preliminary - the meaning of "inability to demonstrate lawful status" in WCS

57. Before turning to the grounds of challenge, there is a point of construction of WCS relevant to ground 1 which I should address. It is a pre-condition of an award being made under Annexes C, D and H of WCS that the detrimental impact was a consequence of the individual being unable to demonstrate their legal status: see §42 above. At the time the Claimant was detained and then removed to Jamaica in July 1999, he did not then in fact or in law hold lawful status within the meaning of §1.5 of WCS because his ILR had lapsed when he left the UK prior to that visit by virtue of s.3(4) IA 1971. Rather, he had the right or expectation to benefit from the application of paragraphs 18 and 19 of the then Rules, under which he could be admitted to the UK.

58. Mr Buttler submitted that, properly construed, "inability to demonstrate lawful status" in Annex C and the cognate expressions in Annexes D and H applied to individuals in that position. First, he argued, the relevant provisions of WCS do not refer to those who "have" lawful status but allow awards to be made for "inability to demonstrate lawful status" (§C1(b), §H1(b)). Second, such an interpretation is in harmony with the purpose of WCS because if the scheme required a person to hold lawful status, every person who was wrongly denied re-entry to the UK prior to 31 July 2000 following the lapsing of their ILR on leaving, would be denied compensation *in limine*. The independent *Lessons Learned Review*, the recommendations of which were accepted by the Government, supported that interpretation. One of its case studies illustrating the Windrush problem involved Vernon Vanriel (Case Study 5) whose ILR had lapsed and who was denied re-entry because he had left the UK for more than two years. Third, where WCS requires a person in fact to hold legal status, it says so expressly (see, e.g., Annex B at §B1(d)). For these and other reasons, Mr Buttler contended "inability to demonstrate lawful status" did not require an applicant in fact to have lawful status at the material time.

59. Mr Hansen did not dispute this interpretation: see Detailed Grounds of Defence, §10. I consider he was right not to do so: I accept the submissions of Mr Buttler on this point. "Inability to demonstrate lawful status" within the meaning of Annex C of WCS, and the similar phraseology in Annexes D and H, can therefore encompass an individual who was potentially entitled to be readmitted to the UK under the relevant Immigration Rules, even if he or she did not strictly have lawful status at the time due to the

automatic lapsing of ILE. It follows that if a material reason for the Claimant's detention or removal from the UK in July 1999 was his inability to demonstrate his lawful past immigration status and if, but for that inability, he would not have been detained or removed - because, for example, he would have been admitted under paragraph 18 or paragraph 19 of the Rules - he would meet the conditions for an award under in Annex C §C1(b) and (c). I understood this to be common ground.

60. It is against that background that I consider the grounds of challenge. I begin with Grounds 1 and 2.

Grounds 1 and 2

61. Grounds 1 and 2 are closely related and were mostly dealt with together in the oral submissions. Although ground 1 relates to the interpretation of the WCS Scheme, and ground 2 goes to whether the Defendant misunderstood how immigration law applied to the Claimant in 1999, central to both was whether the Defendant asked herself the wrong question. More specifically:

    (1) Ground 1 is that the Defendant misread WCS. It is that the Defendant erred "in thinking that the Claimant needed to demonstrate that he in fact had leave to enter the UK on 29 July 1999". Its legal premise is that WCS, properly construed, extends to those in the position of the Claimant, whose leave had lapsed on leaving the UK but who was eligible to be considered for readmission under paragraphs 18 and 19 of the then Rules, an interpretation which I accept and which was not in dispute (see above).

    (2) Ground 2 has two elements, which I have numbered grounds 2(a) and (b), corresponding to §§68 and 69 of the Statement of Facts and Grounds. Ground 2(a) is that the Defendant wrongly thought that the Claimant retained ILR for two years after leaving the UK, and that was wrong in law because prior to July 2000 there was no such thing as non-lapsing leave. To that extent, it is closely related to ground (1). Ground 2(b) is that the Defendant "failed to recognise that under the Immigration Rules then in force, the Claimant had a right to seek readmission to the UK as a returning resident (whether or not he had been outside the UK for more than two years)". It therefore by implication invokes paragraphs 18 and 19 of the then Rules.

62. In addressing these grounds, I have found it helpful to begin by summarising what I understand immigration law required in 1999, which would fall to be applied in light of the evidence before the WCS decision-makers. That would be the starting point in deciding, for example, whether a material reason for the Claimant's detention and removal in July 1999 was his inability to demonstrate his prior lawful immigration status.

    (1) First, when the Claimant arrived at Heathrow on 29 July 1999, his leave would have lapsed by virtue of s.3(4) of the IA 1971 prior to the coming into force of the 2000 Order, just as it would every time he left the common travel area. He would therefore have required leave to enter the UK: strictly, he could not as a matter of law have held ILR at that time.

(2) Second, the immigration officers should therefore have considered whether the Claimant should have been granted leave to enter - whether he should be "admitted for settlement" - under paragraph 18 of the then Rules. It seems his passport, disclosed in the course of the WCS application, would have shown them that he last left the UK less than two years ago, on 21 June 1999 (assuming the Defendant accepted that he was in the UK then - which I did not understand Mr Hansen to dispute). Moreover, on his account in his WCS Statement, he and his family "wanted to return to the UK". Assuming his evidence was accepted on this point, he would have met all the conditions of paragraph 18 save for, potentially, element (i) - that is, that he had ILE or ILR when he last left the UK. Paragraph 19 could not have applied to him on 29 July 1999 because he would not have met the condition precedent, of not benefiting from paragraph 18 "by reason only of having been away from the UK for too long".

(3) Third, to ascertain whether the Claimant met condition (i) in paragraph 18 as at 29 July 1999 would have required focussing on whether the Claimant had ILE or ILR at the point he last left the UK, on (presumably) 21 June 1999.

(4) This, fourth, would have required asking the critical question of what probably would have happened when the Claimant entered the UK prior to the visit that ended 21 June 1999 and whether, assuming there were documents showing his immigration status, he would have met the terms, in particular, of paragraph 18 or 19 of the Rules on the occasion of *that* entry. This would have involved asking whether the Claimant had ILE/ILR when he had last left prior to that entry, whether he had been away from the UK for more than two years and whether he was seeking admission for the purpose of settlement so that he would have been granted ILE/ILR on that entry under paragraph 18 (just as seemed to happened in the past, demonstrated by the rectangular stamps in his passport, though in the context of gaps of less than two years). If it was considered he had been away for more than two years prior to that visit, the question would arise whether he would nonetheless have been admitted under paragraph 19.

63. Answering the critical question (4) was, of course, hampered by the absence of the passport which the Claimant had lost (and which was presumably used in order to enter the UK prior to 21 June 1999), as well as the lack of any other records of his entry. It was also made more difficult because, so far as I can tell, the Claimant never informed the Defendant in the course of his application to the WCS when he had entered the UK prior to 21 June 1999.

64. For the Claimant, Mr Buttler KC submitted that the correct (and better) interpretation of the decision of 20 December 2022 was that the WCS decision-makers never in fact directed themselves to how paragraphs 18 and 19 would have applied when the Claimant entered the UK prior to the visit that ended on 21 June 1999. Instead, the decision wrongly assumed that the Claimant held ILR until it automatically lapsed as a result of his being outside the UK for two years, at which point he no longer had ILR and was no longer eligible compensation under the WCS.

65. For the Defendant, Mr Hansen relied especially on the statement in the letter of 20 December 2022 that "we cannot determine whether you held ILR in June 1999, when your new passport was issued". When the decision is read fairly as whole and in context, he submitted, it showed that the Defendant was asking herself the relevant question

based on paragraphs 18 and 19 of the Rules: the decision-maker was addressing the critical question (4) above as it applied to the Claimant. That was why the Defendant requested information from the Claimant about his movements prior to 1999. In the same sentence the Defendant answered that question against the Claimant in light of, e.g., the lack of evidence of when he entered the UK prior to 21 June 1999, the evidence in his WCS Statement that he and his family had decided to move to Jamaica in 1997 and the fact that he had sought leave to enter on 29 July as a visitor. The letter was effectively stating that the evidence was not sufficient to show the Claimant would have been granted ILR under paragraphs 18 or 19 in the visit that ended in June 1999, with the consequence that neither paragraph would have availed him in July 1999.

66. Persuasively as the submissions of Mr Hansen were advanced, in the end I prefer Mr Buttler's arguments. I accept that the decision of 20 December 2022 (and the preceding decisions) should be read fairly and as a whole, without focussing on individual phrases and without being hypercritical. It was, as Mr Buttler accepted, open to the Defendant to conclude that, on the evidence before it, the Claimant had not established that he would have been admitted to the UK under paragraphs 18 and 19 of the then Rules when he entered prior to June 1999 even if he had documents recording his earlier ILR (with the necessary consequence that it would have been open to the Defendant to conclude he would not have been admitted under either paragraph on 29 July 1999). In addition, I accept that the Defendant was not required to set out every step in its reasoning, still less what Mr Hansen described as a "discourse on the law relating to lapsing leave".

67. Nonetheless, in my judgement the better interpretation of the decision of 20 December 2022 is that the Defendant failed to ask herself the correct question and failed properly to address the potential "right" the individual had to be considered for admission or settlement under paragraphs 18 or 19 of the then Rules. My reasons are the following.

(1) Nowhere in the letter of 20 December 2022 did the Defendant expressly refer to paragraphs 18 and 19 of the then Rules. Nor did the preceding decisions of 21 March 2021 and 6 December 2021.

(2) This would not matter, of course, if the Defendant addressed, however briefly, in substance how paragraphs 18 and 19 would have applied to the Claimant when he sought admission on 29 July 1999. But I do not consider the decision of 20 December did this when it is read fairly and as a whole. The letter never explained, for example, that under the law as it stood in 1999 the Claimant's leave would have lapsed every time he left the UK. It did not explain or address the issues relevant to whether he would have been able to benefit from paragraph 18 of the Rules when he sought entry on 29 July 1999. The statement in the letter that the claim was "negated by the fact that we have no information to show you held ILR when you were refused re-entry to the UK on 29 July 1999" is difficult to reconcile with the automatic lapsing of leave under s.3(4) IA or with how paragraph 18 would have applied to the Claimant on that date, under which the focus would be on whether he had ILR when he last left the UK. It was unclear from the decision whether the Defendant accepted (let alone found) that the Claimant had not been away from the UK for more than two years prior to that visit - an essential issue in considering the application of paragraph 18. On the assumption that the Defendant was prepared to assume that the Claimant had not been away from the UK for more than 2 years as at 29 July 1999 because he had

visited the UK when he collected his new passport - as confirmed by the JHC stamp in his passport and as his solicitors contended to the WCS decision-makers - the letter never grappled with the issues critical to what probably would have happened when the Claimant entered the UK for the purpose of the visit which ended on 21 June 1999. For example, the decision did not expressly address each of the elements of paragraph 18 or explain what it had concluded in relation to each of them. Nor, importantly, did the letter of 20 December explain why the Defendant considered, on the evidence before it, that the Claimant would not have been admitted under paragraph 19 on the visit that ended on 21 June 1999.The failure to address these issues is especially conspicuous in the context of a letter in which the Defendant accepted the recommendation of the adjudicator that it would give a "detailed explanation" of its decision-making on why the Claimant did not have returning resident status.

(3) To support his interpretation that the decision-maker was effectively addressing the application of paragraphs 18 and 19 in relation to the visit that ended on 21 June 1999, Mr Hansen relied on two parts of the letter: the phrase "[w]hether or not you were in the UK on 16 June 1999, we have been unable to establish under what conditions this would have been at that time" and the conclusion "[w]ithout proof of when you left the UK prior to your passport issues, we cannot determine you held ILR in June 1999 when your new passport was issued". I decline to accept that interpretation. The letter made no clear finding that the Claimant could not establish he had visited the UK for the purpose of settlement on the June 1999 visit (or July 1999 visit) and so was excluded from paragraph 18 by virtue of paragraph 18(iv). If the writer had paragraph 18 in mind and were making such a finding, I would expect it to be stated explicitly, especially given the Claimant's evidence that he and his family wanted to return to the UK and the "detailed explanation" the letter was meant to provide. In fact the only reason given why the Claimant did not hold ILR in June 1999 was that he could not prove when he left the UK prior to the passport issues. That could be read as implicitly invoking the two-year gap which figured in paragraph 18(ii). But if the writer was applying paragraph 18 of the Immigration Rules, I consider they would then have gone on to address the application of paragraph 19 to that visit (and the consequential implications for the visit in July 1999) – which the decision never did. In the circumstances, I do not consider these statements will bear the weight Mr Hansen sought to place on them.

(4) Moreover, the implicit invocation of a two-year gap is equally consistent with what Mr Buttler characterized as the "two-year" rule: the assumption that leave was held until it lapsed after two years away from the UK. That interpretation fits with the letter referring to the Claimant as not having "held" ILR in June or July 1999 or to his status having "lapsed" in June 1999. It is also consistent with the first decision dated 17 March 2021, in which the Defendant decided that the Claimant had in fact been outside the UK for over two years when he sought entry on 29 July 1999. According to the letter, this meant his "ILR had lapsed and therefore [he] did not have free movement to enter the UK" (my emphasis). The decision again failed to consider whether the Claimant would have been re-admitted under paragraph 19 of the then Rules, as someone who had been away from the UK for too long. It suggests the Defendant understood there was a two-year rule as a result of which an individual's ILR simply lapsed so that he or she

no longer held ILR. The internal caseworker consideration preceding that decision points to the same conclusion: it said that on 29 July 1999 it was "deemed that as [the Claimant] had been out of the UK for more than 2 year [sic] his ILR had lapsed", referred to his having "exceeded the 2-year rule" and said that if his ILR "had lapsed" he would not be entitled to an award, without referring to paragraph 19 at all. Although by the time of the second decision dated 6 December 2021 the Defendant appears to have accepted that the Claimant was in the UK when he collected his passport on 16 June 1999, and the wording of the letter is rather opaque, it too referred to whether the Claimant "still held" ILR; and it too failed to consider whether, on the factual assumption that the Claimant could not establish he had been in the UK two years prior to entry which ended on 21 June, he would probably have been admitted as a returning resident under paragraph 19 of the then Rules. Interpreted in context and against the background, the terms of the letter of 20 December 2022 are more consistent, I consider, with Mr Buttler's interpretation than Mr Hansen's.

(5) Finally, the "Guidance for decision makers considering cases under the [WCS]" (Version 13.0) published on 16 March 2023 supports Mr Buttler's interpretation. It stated that "Where individuals left the UK for more than two years, their settled status (ILR) would have lapsed", adding that they lost the right to live in the UK, would have needed to make a new application in order to return and "will not be eligible for compensation with respects to periods of time in which they did not hold settled status". It stated that "[t]his 'two-year rule' has always applied to Commonwealth citizens". That guidance made no reference to, e.g., the potential for admission where a person was absent for more than two years under e.g. paragraph 19 of the Rules and its predecessors. The latest guidance (1 November 2024) has been amended and indicates that WCS can potentially apply to those whose lawful status had lapsed. Although the March 2023 version post-dated the decision in December 2022, Mr Buttler relied on it as showing how decision-makers probably would have understood the legal position in around December 2022. Supporting that submission is the fact that the internal case consideration for the first decision made the same reference to the Claimant exceeding the "2-year rule" (see (4) above).

68. The upshot is that, in my judgement, the Defendant failed to ask herself the correct questions, based on how paragraphs 18 and 19 of the Rules would have applied to the Claimant in 1999 - both on 29 July 1999 and in relation to the visit that ended on 21 June 1999 - assuming he had documents to show his past immigration status. Although it is sufficient for the purpose of the judicial review to conclude the Defendant failed to ask herself the right question, I consider the error probably arose because the Defendant wrongly assumed the Claimant's ILR lapsed if he could not establish he had not been outside the UK for more than two years: what has been referred to as the "two year rule", bearing some similarity to the position following the 2000 Order. It was this legal error, I consider, which led the decision-makers to decide that the Claimant was ineligible for compensation. As he could not show he "held" ILR in June or July 1999, he was not eligible for an award because he was not eligible for entry to the UK in any event.

69. Mr Hansen did not press in his submissions any argument that any such error was immaterial to the decision, though he raised an argument based on s.31 of the Senior Courts Act 1981 which I consider below. In any case, I consider it is not possible to say that, had the correct question been asked, the decision would inevitably been the same. If the Defendant had asked the critical questions set out in §62 above, including the considering the application of paragraph 19 of the Rules, there was a real possibility that she would have reached a different decision as to whether, on the balance of probabilities, the Claimant's detention and removal were a consequence of his inability to demonstrate his previous immigration status.

70. Where does this end up in terms of the grounds? It means, I consider, that ground 2 succeeds: the Defendant failed to recognise the entitlements the Claimant had to seek readmission under paragraphs 18 and 19 of the Rules, applying whether he had or had not been outside the UK for more than two years (ground 2(b)) and, separately, wrongly thought the Claimant's ILR lapsed after more than two years outside the UK (ground 2(a)).

71. In that light, it is of little consequence whether ground 1, based on a misreading of WCS, succeeds as a separate ground of challenge. To the extent the Defendant, in deciding the Claimant was not entitled to an award under the WCS, failed to ask herself the correct question about the application of paragraphs 18 and 19 of the Rules (or wrongly assumed leave lapsed after two years outside the UK) it was an error about the position under immigration law and thus parasitic on ground 2. I do not consider ground 1 discloses any separate and distinct error of law. The relevant error was related to the misinterpretation or misunderstanding of the position under immigration law, about how paragraphs 18 and 19 of the Rules would have applied to the Claimant in 1999.

Ground 3

72. I can deal with the third ground of challenge much more briefly. There are two aspects to the challenge.

73. The first element (§70 of the Statement of Facts and Grounds) is that the Defendant unreasonably concluded that the Claimant had not shown on the balance of probabilities that he was outside the UK for less than two years as at 29 July 1999. Reference is made to the evidence provided on behalf of the Claimant, such as the passport collected from the JHC in London on 16 June 1999 and the stamp showing he used it to travel to Jamaica on 21 June 1999. This ground was barely touched upon in the skeleton arguments and oral submissions.

74. I consider that the factual premise of the ground is not made out and/or that the ground is immaterial. There is no clear finding in the letter of 20 December 2022 that the Claimant had not shown he had been outside the UK for less than two years as at 29 July 1999: the letter was equivocal on this point (contrast the original decision of 17 March 2021 and the later decision of 6 December 2021). In addition, it seems clear from the decision - "Whether or not you were in the UK on 16 June, we have been unable to establish under what conditions this would have been at that time" - that the decision-makers would have reached the same conclusion even on the premise that the Claimant was in the UK in June 1999, less than two years before 29 July.

75. The second element is a Tameside challenge (***Secretary of State v Tameside Metropolitan Borough Council*** [1977] AC 1014, per Lord Diplock at 1065B-C). Lord Diplock referred to two matters dealt with in a single question: "did the Secretary of State asked himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?". However, the pleaded ground only refers to the duty to conduct sufficient enquiries and I have already concluded that the Defendant did not ask herself the correct question in addressing grounds 1 and 2.

76. The Claimant contends that the Defendant failed to make reasonable enquiries to ascertain how long the Claimant had been outside the UK prior to 29 July 1999 and whether he was eligible for lawful status at that time. In that regard, in the skeleton argument the Claimant contends that the Defendant "did not ask when (prior to 21 June 1999), the Claimant returned to the UK or for his travel history before 1997" (§64). Had she done so, it was submitted, she would have elicited the detailed information which the Claimant provided in his witness statement for these proceedings, including that he and his wife took the children to Guyana in 1989 and moved them to Jamaica in 1997; throughout this whole time he continued to spend several months a year in England; and after leaving the UK for Jamaica in June or August 1997 he returned to the UK in December 1998 or January 1999, staying there until June 1999.

77. The principles informing the Tameside duty are summarised in the judgment of the Court of Appeal in ***R (Plantagenet Alliance) v Secretary of State for Justice*** [2015] 3 All ER 261 at §100. Four are relevant: (i) the duty is only to take such steps as are reasonable; (ii) subject to a ***Wednesbury*** challenge, it is for the public body not the court to decide upon the manner and intensity of the inquiry; (iii) the court "should not intervene merely because it consider that further inquiries would have been sensible or desirable"; and (iv) the court should establish the material before the public body and "should only strike down a decision not to make further inquiries if no reasonable [authority] possessed of that material could suppose that the inquiries they had made were sufficient".

78. The Defendant did ask for information in the course of the WCS application.

    (1) In an email of 7 September 2020 a case worker asked for a copy of the stamp in the Claimant's passport showing the date on which he landed in Jamaica in 1997 (the request was based on what he had said in his WCS Statement)

    (2) Following an email of 14 September 2020 from the Claimant's solicitors asking where the date of 1997 had come from, the Defendant sent the email of 14 October 2020, summarised in §24 above, asking for details of when the Claimant left the UK to reside in Jamaica and whether he travelled back and forth between Jamaica and the UK between 1997 and 1999 as well as supporting documents to demonstrate his travelling between UK and Jamaica. It is notable that passport no. 005251 would have shown his movements from 1979 until 1989, yet I do not believe it had by then been provided. However, the curt response of the Claimant's solicitors was to say that all the information and documents had been provided and to request that the decision be made "on the basis of the information and documentation that you have already received".

(3) A further exchange of correspondence took place in June 2021 in connection with the Tier 1 review. Working on the assumption that the Claimant had moved to Jamaica in 1997 - an entirely reasonable assumption because the Claimant had said at §9 of his WCS Statement that he and his family had been living there since 1997, implying they had been resident in the UK beforehand - in a letter of 10 June 2021 the Defendant asked for information of any circumstances surrounding that move to Jamaica, such as whether the Claimant purchased property, as well as any information about the date he returned there. The reply of the Claimant's solicitors dated 3 August 2021, summarised at §29 above, said nothing about the move to Guyana in 1989: consistent with his WCS Statement, it implied that the Claimant had only returned to Jamaica in 1997. It explained that the Claimant could not provide dates of residence or employment for the 1990s "with any confidence" and did not know when he had entered the UK prior to 16 June 1999. Once again, it asked that a decision be taken on the basis of the information already supplied.

79. Mr Buttler accepted it would no doubt have been better if that letter had set out the much fuller and very different chronology of the Claimant's movements in the 1990s which was in his witness evidence for these proceedings. I acknowledge that the solicitors were then acting *pro bono*; but, still, the letter was very unhelpful, to say the least, and both it and the earlier letter of 14 October 2020 are highly relevant to the ***Tameside*** duty. In light of them, I have no hesitation in rejecting this ground of challenge.

80. First, the duty of sufficient enquiry is only subject to review on ***Wednesbury*** grounds. On the information before the decision makers, they reasonably considered that the Claimant's case was that he had returned to Jamaica in 1997. That is what he had told them in his WCS Statement and nothing in his subsequent correspondence suggested he and his family might have moved to Guyana and Jamaica earlier. In that light, I do not consider a reasonable decision-maker was required to make inquiries about his movements prior to 1997, as now contended.

81. Second, in light of the material before the Defendant, it was entirely reasonable of the Defendant to seek to establish exactly or approximately when the Claimant had moved to Jamaica in 1997. That was no doubt part of the ***Tameside*** duty. But, contrary to the submission for the Claimant, the case workers *did* ask for information about when he travelled to Jamaica in 1997 and when he travelled backwards and forwards between the UK and Jamaica in the two years prior to 1999, in particular in the email of 14 October 2020. The response of the Claimant's solicitors fundamentally undermines the submission that such a request would have elicited the information now set out in his witness statement because, when asked for information, none was forthcoming.

82. Third, the Claimant's solicitors expressly asked twice that the decision be taken on the basis of the information already provided and were explicit in both the email of 11 November 2020 and the letter of 3 August 2021 that the Defendant had provided all the information he could. In those circumstances, the Defendant could reasonably decide that no further inquiries were reasonable or would be fruitful.

Section 31 Senior Courts Act 1981

83. The final issue to consider is whether I should refuse relief under s.31(2A) of the Senior Courts Act 1981 ("SCA"). The relevant provisions of s.31 state as follows:

> "(2A) The High Court—
>
> (a) must refuse to grant relief on an application for judicial review, and
>
> (b) may not make an award under subsection (4) on such an application,
>
> if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.
>
> (2B) The court may disregard the requirements in subsection (2A)(a) and (b) if it considers that it is appropriate to do so for reasons of exceptional public interest.
>
> (2C) If the court grants relief or makes an award in reliance on subsection (2B), the court must certify that the condition in subsection (2B) is satisfied."

84. I was referred to various authorities on the meaning and effect of these provision, which I summarise below in chronological order.

(1) Although s.31(2A) lowers the previous threshold for refusal of relief, the threshold "remains a high one". It requires an "evaluation of the counter-factual world in which the identified unlawful conduct by the public authority is assumed not to have occurred": see Sales LJ (as he then was) in ***R (Public and Commercial Services Union) v Minister for the Cabinet Office*** [2018] 1 All ER 142 ("***PCS***") at §89. Sales LJ also warned at §91 that the Court should approach with a degree of scepticism statements from officials that the outcome in a counterfactual world would have been the same.

(2) It is "axiomatic that the court must not cast itself in the role of decision-maker. In order to decide if a particular outcome was "highly likely" not to have been substantially different, the court "must necessarily undertake its own objective assessment of the decision-making process, and what its result would have been if the decision-maker had not erred in law": see ***R (Goring-on-Thames Parish Council) v South Oxfordshire DC*** [2018] 1 LR 5161 at §§55-56.

(3) In ***R (Plan B Earth) v Transport Secretary*** [2020] PTSR 1446, the Court of Appeal (Lindblom, Singh and Haddon-Cave LLJ) explained at §272 that the test is one of duty, not discretion (subject only to the "exceptional public interest" provision in s.31(2B)); it is sufficient that the same outcome was "highly likely", not that it was inevitably the same; and the outcome does not have to be exactly the same, only not "substantially different". In comparing these provisions with pre-existing discretion

to refuse relief in accordance with ***Simplex GE (Holdings) v Secretary of State for the Environment*** [2017] P.T.S.R. 1041, the Court of Appeal also gave these words of caution at §273:

> "It would not be appropriate to give any exhaustive guidance on how these provisions should be applied. Much will depend on the particular facts of the case before the court. Nevertheless, it seems to us that the court should still bear in mind that Parliament has not altered the fundamental relationship between the courts and the executive. In particular, courts should still be cautious about straying, even subconsciously, into the forbidden territory of assessing the merits of a public decision under challenge by way of judicial review. If there has been an error of law, for example in the approach the executive has taken to its decision-making process, it will often be difficult or impossible for a court to conclude that it is "highly likely" that the outcome would not have been "substantially different" if the executive had gone about the decision-making process in accordance with the law. Courts should also not lose sight of their fundamental function, which is to maintain the rule of law. Furthermore, although there is undoubtedly a difference between the old *Simplex* test and the new statutory test, "the threshold remains a high one" (see the judgment of Sales LJ, as he then was, in ***R (Public and Commercial Services Union) v Minister for the Cabinet Office*** [2018] ICR 269, para 89)."

85. Mr Hansen also drew my attention to cases concerned with WCS in which s.31(2A) has been applied, such as ***R(Thompson) v Home Secretary*** [2024] 1 WLR 1449 at §§108-110.

86. I fully accept that it was open to the Defendant, correctly directing herself and considering the evidence provided by the Claimant prior to the decision of 20 December 2022, to decide that the Claimant would not lawfully have been admitted to the UK on 29 July 1999 under the then Rules, even if there were records of his immigration status. Mr Buttler KC did not dispute this.

87. However, that is not how Mr Hansen puts his case on s.31(2A) SCA. He relies, not only on the material before the decision-makers at the time of the decision in December 2022, but also on the new evidence in the Claimant's witness statement for these proceedings. The "totality" of that evidence, he submits, shows that the Claimant was not on any view entitled to ILR on 29 July 1999, meaning it is highly likely the outcome for the Claimant would not have been substantially different (skeleton §66). For that purpose, he invites me to make findings of fact, contending that the Claimant's evidence is inconsistent, vague, unreliable and not candid. He also relies on the witness evidence of Ms Birtles-Maule, in which she says that the Claimant still cannot provide any evidence of his movements prior to 1999 or that he still held ILR when he left on "apparently" on 21 June 1999 making it "inevitable" that the decision would have been the same.

88. Mr Hansen did not suggest I should find as a fact that the Claimant did not visit the UK in June 1999 to collect his passport, and the passport strongly corroborates him on that point. Nevertheless, other factual questions on how the Rules would have applied to the Claimant depend, in part, on an assessment of the reliability of his evidence.

89. In his witness statement for these proceedings, the Claimant states that, after the family moved to Guyana 1989, he spent several months each year in England; that he travelled to Jamaica in about June 1997; and that he returned to the UK in December 1998 or January 1999, staying until June 1999. If accepted, this evidence would appear to resolve, or probably resolve, some key factual questions relevant to the application of paragraphs 18 and 19 in favour of the Claimant. If accepted, it indicates that the Claimant had been outside the UK for less than two years prior December 1998/January 1999, that he may well have been "settled" in the UK throughout the 1990s (so that each return was for the "purpose of settlement"), and that he may well have been in the UK for most of his life (since according to his account he had been living in the UK since 1971, first left in 1980 and returned in January 1981, and from then on spent several months each year in the UK).

90. The Defendant invites me to find this account lacks overall credibility in light of what the Claimant said in his WCS Statement, in which he did not mention the move to Guyana, nor that he spent several months in year in the UK and simply said he had been living in Jamaica since 1997. Mr Hansen also refers to the inconsistency between the detail given in the latest statement and what was said in correspondence from the Claimant's solicitors, in which it was stated for example that he had been "resident in the UK without difficulties until 1999" (letter of 25 March 2000) and, more than once, that the Claimant had no information about his movements in the 1990s.

91. I consider that, were I to undertake this exercise, I would be casting myself in the role of primary decision-maker - something which the authorities such as ***Goring*** caution against. In my judgement, section 31(2A) is not a licence for the court to supplant the public authority's fact-finding function and to undertake a role which is not appropriate in judicial review proceedings. It is the WCS decision-makers who have expertise and experience in making assessments about such matters and to whom Parliament and WCS have entrusted the task of making factual judgments on the balance of probabilities (see ***Kaur*** at §65). The evidence in the Claimant's latest witness statement which the Defendant seeks to contend is unreliable was not before the WCS decision-makers at the time: it is effectively fresh evidence. It has not been the subject of cross-examination, no application was made to cross-examine the Claimant and nor have the alleged inconsistencies been put to him in writing (though Mr Buttler addressed them in his reply). In the circumstances, I consider I am in no position to decide the relevant matters of fact simply based on assessing the Claimant's latest witness statement and the other documentary evidence before the WCS. To undertake that task, in my view, would be to extend the reach of s.31(2A) beyond that which Parliament intended and to stray into the "forbidden territory" recognised by authorities such as ***Plan B Earth***.

92. In any case, if I am wrong about that and s.31(2A) *does* require me to decide what happened on the balance of probabilities, I am not prepared to find on a review of the documentary material before me that the totality of the evidence means it is "highly likely" that the Claimant has failed to establish on the balance of probabilities the relevant facts set out in his latest witness statement. I do not consider the alleged inconsistencies or differences between the evidence in that statement and the material

before the decision-makers are sufficient for me to determine that, on the balance of probabilities, the Claimant did not enter the UK in December 1998 or January 1999 and stay until 21 June 1999, for example. Contrary to evidence of Ms Birtles-Maule, the Claimant has given evidence in his latest witness statement that he spent several months each year in the UK in the 1990s, and to a degree his evidence is supported by the pattern of travel to and from the UK in the 1980s shown by his passport. Nor do I consider I am able to decide, on a review of the documents and submissions alone, that he has failed to show on the balance of probabilities that he entered the UK in December 1998/January 1999 or on 29 July 1999 for the purpose of settlement: his original WCS statement said he wanted to return to the UK and his latest statement suggests he may well have always been settled in the UK; that the Home Office records refer to him having sought leave to enter as a "visitor" in July 1999 is not sufficient to make his account implausible.

93. In addition, there is a further problem with the argument based on s.31(2A). Some of the questions to be answered in the "counter-factual world" relate not to the credibility of the Claimant's evidence but to evidence of the practice at the time. If I were to accept the Defendant's argument that the Claimant had not shown, or it is highly likely he will not show, that he had not been away from the UK for more than two years prior to the visit that ended on 21 June 1999, and for that reason he could not benefit from paragraph 18, I would need to consider whether the Claimant would have been admitted under paragraph 19 of the then Rules. In doing so, I would need to make the further counterfactual assumption that there was a documentary record showing that he had held ILR in the past. But there is no adequate evidence about how immigration officials would have approached that matter in practice. While Mr Smith explains officials had a "broad discretion" to admit, he provides no explanation of how likely it is that they would have done so faced with someone in the Claimant's position.

94. A consideration of these matters, and of the difficulties I would have in making factual findings about them, reinforces my view that if I were to undertake the task Mr Hansen invites me to do, I would be straying into the forbidden territory reserved for the primary decision-maker. In the circumstances, I do not consider the threshold of showing it is "highly likely" that the outcome would not have been substantially different if the Defendant had asked herself the correct question has been crossed.

95. None of the above is intended to mean, of course, that the Defendant could not, when the matter is remitted to the decision-makers, make findings of fact against the Claimant and decide he cannot show that he probably would have been lawfully admitted to the UK on 29 July 1999.

Disposal

96. My conclusion is that the Claimant succeeds on ground 2. The other grounds are dismissed.

97. The Claimant seeks an order quashing the decision of 20 December 2022 - and the earlier decisions so far as is necessary - and requiring a prompt redetermination of the Claimant's claim. He also seeks a declaration. My preliminary view is that it is sufficient for the decision of 20 December 2022 and the earlier decisions to be quashed,

and the matter to be referred to the Defendant for reconsideration in light of this judgment. But I shall invite the parties to make submissions on the terms of the order if it cannot be agreed.