In the Upper Tribunal (Immigration and Asylum Chamber) Judicial Review

JR/227/2021

In the matter of an application for Judicial Review

The Queen on the application of

SGW
(ANONYMITY DIRECTION MADE)

Applicant

versus

Secretary of State for the Home Department

Respondent

ORDER

UPON hearing Mr P Haywood, Counsel, instructed by the Migrants' Law Project, on behalf of the applicant, and Mr B Seifert, Counsel, instructed by the Government Legal Department, at hearings conducted on 21 June and 22 October 2021

AND UPON the enrolment of FGW's biometric information having taken place on 4 November 2021

IT IS ORDERED THAT

(1) The Applicant's claim for judicial review is granted;

IT IS DECLARED THAT

(2) For the reasons set out in paragraphs 76 to 87 of the judgment accompanying this Order and to the limited extent stated in paragraph 85 of the judgment, the respondent's policy guidance "Family reunion: for refugees and those with humanitarian protection", version 5.0, published on 31 December 2020, is unlawful.

IT IS ORDERED THAT

(3) For the reasons set out at paragraphs 94 to 99 of the judgment accompanying this Order, the respondent's decision of 22 December 2020 that FGW is an adult is quashed;

(4) Following the enrolment of FGW's biometric information on 4 November 2021, the respondent shall expedite the consideration of his application for entry clearance and make a substantive decision on the application as soon as possible and in any event within 14 days of the date of this Order;

(5) The Respondent shall pay the Applicant's reasonable costs of bringing these proceedings up to the date of this order, to be assessed if not agreed;

(6) There be a detailed assessment of the Applicant's publicly funded costs.

PERMISSION TO APPEAL

(7) There has been no application from either party to appeal to the Court of Appeal. Pursuant to rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008, I refuse permission in any event on the basis that there are no arguable errors of law in the judgment.

Signed: H Norton-Taylor

Upper Tribunal Judge Norton-Taylor

Dated: 25 November 2021

The date on which this order was sent is given below

For completion by the Upper Tribunal Immigration and Asylum Chamber

Sent / Handed to the applicant, respondent and any interested party / the applicant's,

respondent’s and any interested party’s solicitors on (date): 26/11/2021

Solicitors:
Ref No.
Home Office Ref:

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Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant or members of his family. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

JUDGMENT

A: INTRODUCTION

1. On a purely human level, this case illustrates the significant dangers encountered by would-be migrants to Europe when attempting to pass through Libya. As will be seen, the series of events which have befallen the applicant's brother, FGW, in that country, induce sympathy and an appreciation of the potential consequences of irregular status there, and indeed in numerous other countries around the world.

2. However, I am of course concerned not simply with the human dimension to this case, but also the legal framework within which it must be considered. The first issue in this case is one of process. It

arises prior to any consideration of the substance of an application and can be stated as follows:

> Is the enrolment of biometrics a necessary condition for the making of a valid application for entry clearance?

Hereafter, I shall refer to this question as the “validity issue”.

3. The case also includes challenges to: the respondent’s policy guidance, “Family reunion: for refugees and those with humanitarian protection”, version 5.0, published on 31 December 2020 (“the Family Reunion guidance”) - the “family reunion issue”; the lawfulness of the respondent’s assessment of FGW’s age - the “age issue”; and the lawfulness of the respondent’s exercise of discretion - the “exercise of discretion issue”.

4. On the facts of this case, the matters described above arise in the context of family reunion outside the scope of the relevant Immigration Rules (“the Rules”).

5. In the event, and following significant developments in these proceedings, including a final matter occurring during the writing of this judgment, the applicant’s essential complaint, namely that the respondent had acted unlawfully by effectively preventing the making of a valid application for entry clearance, has been resolved in his favour. On 4 November 2021, I received an email which had been sent by the applicant’s solicitors to the respondent on that same date, confirming that FGW had in fact enrolled his biometric information earlier that day.

6. On the face of it, this event has rendered the applicant’s claim for judicial review academic. As a consequence, it may then be appropriate to issue only a short judgment refusing the claim, or at least not granting any relief. However, in this particular case, and

exceptionally, I adopt a different course of action. This is for the following reasons.

7. Firstly, the question posed in paragraph 2, above, is of significance beyond the applicant's case. The same applies to what I say about the respondent's Family Reunion guidance.

8. Secondly, notwithstanding the most recent development on 4 November, the issue of FGW's age retains a certain relevance. As matters stand, the respondent deems him to be an adult. If that position is flawed, appropriate relief would be potentially relevant to the consideration of the substance of the entry clearance application.

9. Thirdly, the timing of the enrolment of biometric information is such that no meaningful additional time and effort need be expended by the parties or the Tribunal. The work has already been done, as it were.

B: FACTUAL BACKGROUND

10. Aside from FGW's age, much of the essential factual background to this case is uncontentious. The applicant himself is an Eritrean national who has at all material times been recognised as a refugee by the respondent and has indefinite leave to remain in the United Kingdom. FGW is also an Eritrean national, who it is said was born in February 2004.

11. FGW left Eritrea in October 2016 and eventually entered Libya in the spring of 2018. He made an unsuccessful attempt to leave Libya by boat, but after the craft was intercepted and sent back, he was held for almost two years at a detention centre. Whilst in detention, FGW obtained assistance from UNHCR who regarded him as an unaccompanied minor. That organisation began advocating for his release. At the same time, the applicant instructed the Migrants' Law Project, who then made contact with the respondent

to advise that an application would be made for FGW to join the applicant in the United Kingdom by way of family reunion, albeit outside the scope of the relevant Rules. Evidence relating to FGW's identity and age was submitted.

12. UNHCR secured FGW's release from detention in October 2020 and then provided him with accommodation.

13. Following an exchange of correspondence, further representations and supporting evidence (from, amongst other sources, UNHCR) were provided by the solicitors to the respondent. This led to the decision, dated 22 December 2020, which is a subject of the challenge in these proceedings. The relevant passages of the decision letter read as follows:

> "Thank you for your correspondence. As explained in the letter dated 4 September 2020 it was confirmed that a Family Reunion application had not been lodged for us to consider as your client had not attended a VAC [Visa Application Centre] or provided his biometrics. Your request for biometrics for this application to be waived pre-assessment was rejected as it was considered there was insufficient evidence to waive the usual application process.
> Whilst the further DNA evidence and email from UNHCR has been noted, it is considered that this does not warrant a reconsideration of the original request. It is still considered that a biometric waiver pre-application is not considered appropriate, as UKVI maintains its position that [FGW] is an adult. Furthermore, it is noted that all Libyan nationals and irregular migrants in Libya are in the same position of having to leave Libya and attend a VAC in another country.
> As such, it is considered a full entry clearance application has not been submitted for UKVI to consider.
> …
> Applications for leave outside of the rules should be made on the application form for the route which most closely matches their circumstances and pay the relevant fees and charges…
> …"

14. Following receipt of this letter, the solicitors then attempted to make an online entry clearance application on 13 January 2021,

clearly indicating that it was to be considered outside of the Rules. In written submissions following shortly thereafter, the solicitors asserted that the respondent was wrong to treat FGW as an adult and highlighted the potential difficulties in the enrolment of biometrics, given the lack of a British diplomatic presence in Libya. When no response was received, the solicitors sent a Pre-Action Protocol letter. The relevant passages in the response to that letter state:

> "v) The SSHD asserts that your client has not completed an application for Entry Clearance as of the date of this letter. In order for a valid application to be assessed, there are specific requirements varying in specifics depending on the application, notable payment of the relevant fee, enrolment of biometric details, provision of travel documents and so forth.
> vi) As such the SSHD is not duty-bound to follow the quoted guidance, subject to service standards, conduct interviews et cetera, until such time as a valid application is made.
> vii) You refer in your representations to the difficulties your client faces in travelling to enrolled biometric information in support of his application. You propose a course of action wherein your client attend a biometric appointment at the Italian Consulate/embassy in Tripoli.
> viii) the SSHD asserts that she does not share biometric enrolment equipment or data with the Italian authorities, and as such the proposed approach is not possible.
> ix) You further suggest in your representations that the SSHD agree to allow your client to enrolled them biometric details following their entry to the UK on a successful prospective application for Entry Clearance.
> x) The SSHD asserts that this is not a possibility. Entry Clearance of this kind to the UK is subject to security checks that rely on biometric data. These checks need to be completed before an entry clearance application is considered and could affect the decision to issue entry clearance, depending on the outcome of the cheques. As such they cannot be pre-empted.
> …

xvi) The SSHD therefore asserts that there has not been an unreasonable or unlawful impediment in the handling of your client's prospective application or your correspondence regarding the same."

15. Unsatisfied with this response, the application for judicial review was made on 22 February 2021. The grounds of challenge can be condensed to three essential points: firstly, that the respondent's refusal to accept that FGW was a minor was irrational; secondly, that the respondent had acted unlawfully, and was continuing to do so, by requiring the enrolment of biometric information prior to, or as a necessary condition for, the making of a valid entry clearance application; thirdly, that the respondent was acting unlawfully by failing to exercise discretion on the enrolment of that information.

16. The Acknowledgement of Service maintained the position adopted in the response to the Pre-Action Protocol letter and in respect of FGW's age.

17. Permission to apply for judicial review was initially refused on the papers, but granted at an oral hearing on 17 March 2021. Upper Tribunal Judge L Smith considered it to be arguable that the respondent's approach to FGW's age and the apparent inflexibility of approach relating to the enrolment of biometrics prior to the consideration of an application was unlawful.

18. Once permission had been granted a good deal of correspondence between the parties ensued, with a focus on possible means of enrolling FGW's biometrics. As alluded to in the Pre-Action Protocol letter response, quoted above, the possibility of allowing the Italian authorities to take the biometrics was again ruled out. This position was supported by evidence from Mr John Allen, Home Office policy lead on biometric policy for immigration and nationality, and Ms Sabrina Pickering, Technical Casework and Change Implementation Lead at UKVI Cross Cutting Operations.

Another avenue explored was the possibility of FGW crossing from Libya to Tunisia (where a VAC does exist). Although UNHCR had confirmed their willingness in theory to assist with such a journey, the insuperable obstacle to this course of action was that a safe border crossing could only occur if the Libyan authorities were provided with documentary confirmation that FGW had already been given a visa to travel to the United Kingdom. Such confirmation by the respondent would not have been forthcoming and so this route was eventually discounted.

19. Notwithstanding the aforementioned difficulties, constructive endeavours continued, resulting in apparently tangible progress. On 22 September 2021 the respondent confirmed that an exceptional arrangement had been approved at Ministerial level whereby a British diplomat would travel from the Tunisian capital Tunis to Libya in order to enrol FGW's biometric information.

20. Prior to this development, the solicitors received information from the applicant that FGW and many other irregular migrants had been detained and contact was lost following raids on accommodation in Tripoli. He managed to escape and contact was re-established, but his location was unknown and his situation was highly precarious.

21. Following further correspondence with the respondent, a date of 6 October 2021 was fixed for the enrolment of biometric information by the British diplomat. Three days prior to that, information came through that a large number of raids had taken place in Libya in which thousands of irregular migrants had been detained. It was unknown whether FGW was amongst those held. In the absence of contact with FGW, the enrolment of biometrics could not take place. The respondent did however confirm that once contact was re-established, the enrolment of biometrics through the exceptional arrangement could take place and consideration of the application for entry clearance would be expedited.

22. As of 14 October 2021, FGW's whereabouts remained unknown. However, on an unknown date, it appears that contact was re-established. The exceptional arrangement to enrol FGW's biometric information was seemingly implemented and as mentioned previously, that important event took place on 4 November 2021.

23. This is the factual scenario existing at the date of this judgment. I have already explained why, despite this, I am considering the various issues in this case substantively.

C: THE VALIDITY ISSUE: RELEVANT LEGAL SOURCES

The Immigration Act 1971

24. Section 3A(3) of the Immigration Act 1971 allows for the respondent to make provision for entry clearance to have effect as leave to enter the United Kingdom.

25. Nothing in the Immigration Act 1971, as amended, specifies any requirements as to the validity of an application for entry clearance.

UK Borders Act 2007

26. Sections 5, 6, and 7 of the UK Borders Act 2007 provide the legislative source for the making of regulations relating to the requirement for and enrolment of biometric information, together with the consequences of non-compliance.

27. Sections 5 and 6 need not be set out. In respect of non-compliance, section 7 provides, in so far as is relevant:

> "7 **Effect of non-compliance**
> (1) Regulations under section 5(1) must include provision about the effect of failure to comply with a requirement of the regulations.
> (2) In particular, the regulations may–

(a) require or permit an application for a biometric immigration document to be refused;
(b) require or permit an application or claim in connection with immigration to be disregarded or refused;
(c) require or permit the cancellation or variation of leave to enter or remain in the United Kingdom;
(d) require the Secretary of State to consider giving a notice under section 9;
(e) provide for the consequence of a failure to be at the discretion of the Secretary of State.
(2A) If the regulations require a biometric immigration document to be used in connection with an application or claim, they may require or permit the application or claim to be disregarded or refused if that requirement is not complied with.
…"

The Immigration (Biometric Registration) Regulations 2008

28. Under the heading "Requirement to apply for a biometric immigration document" ("BID"), regulation 3A of the Immigration (Biometric Registration" Regulations 2008, as amended by the Immigration (Biometric Registration) (Amendment) Regulations 2015 ("the 2008 Regulations") provides:

"3A.—
(1) A person who is subject to immigration control and satisfies the conditions in paragraph (2) must apply for the issue of a biometric immigration document.
(2) The conditions are—
(a) that the person makes an application—
(i) for entry clearance, which, by virtue of provision made under section 3A(3) of the Immigration Act 1971, has effect as leave to enter the United Kingdom for a limited period which exceeds 6 months; or
(ii) for entry clearance, which, by virtue of provision made under section 3A(3) of the Immigration Act 1971, has effect as indefinite leave to enter the United Kingdom; or
(iii) as the dependant of a person who is making an application in accordance with paragraph (i) or (ii); and
(b) the person specifies in that application that they will enrol their biometric information [outside the United Kingdom.

(3) Where a person is required to apply for a biometric immigration document, that application must be made on the form or in the manner specified for that purpose (if one is specified) in the immigration rules."

29. There is a power for an authorised person to require a person to provide biometric information. Regulation 5 of the 2008 Regulations provides:

"5.—
(1) Subject to regulation 7, where a person makes an application for the issue of a biometric immigration document in accordance with regulation 3, or regulation 3A an authorised person may require him to provide a record of his fingerprints and a photograph of his face.
(2) Where an authorised person requires a person to provide biometric information in accordance with paragraph (1), the person must provide it."

30. Regulation 8 provides:

"8.— **Process by which an individual's fingerprints and photograph may be obtained and recorded**
(1) An authorised person who requires an individual to provide a record of the individual's fingerprints or a photograph of the individual's face under regulation 5 may do any one or more of the following—
(a) require the individual to make an appointment before a specified date, which the individual must attend, to enable a record of the individual's fingerprints or a photograph of the individual's face to be taken by an authorised person or by a person acting on behalf of an authorised person;
(b) specify the date, time and place for the appointment;
(c) require the individual to attend premises before a specified date to enable a record of the individual's fingerprints or a photograph of the individual's face to be taken by an authorised person or by a person acting on behalf of an authorised person; and
(d) specify any documents which the individual must bring to the appointment or premises, or action which the individual must take to confirm the individual's identity.

(2) An authorised person may require a record of fingerprints or photograph to be of a particular specification.
(3) Where an authorised person requires an individual to submit to any requirement in accordance with paragraph (1), the individual must submit to it."

31. Finally, regulation 23 provides:

"23.— **Consequences of a failure to comply with a requirement of these Regulations**
(1) Subject to paragraphs (3) and (4), where a person who is required to make an application for the issue of a biometric immigration document fails to comply with a requirement of these Regulations, the Secretary of State—
(a) may take any, or any combination, of the actions specified in paragraph (2); and
(b) may consider giving a notice under section 9 of the UK Borders Act 2007.
(2) The actions specified are to—
(a) refuse an application for a biometric immigration document;
(b) treat the person's application for leave to enter or remain or for entry clearance as invalid;
(c) refuse the person's application for leave to enter or remain or for entry clearance; and
(d) cancel or vary the person's leave to enter or remain.
(3) Where a person is required to apply for a biometric immigration document under regulation 3(2)(a) or (b) or regulation 3A(2)(a) or (b) or as a dependant of such a person 6 and fails to comply with a requirement of these Regulations, the Secretary of State—
(a) must refuse the person's application for a biometric immigration document;
(b) must treat the person's application for leave to enter or remain or for entry clearance as invalid; and
(c) may cancel or vary the person's leave to enter or remain.
(4) Where a person is required to apply for a biometric immigration document under regulation 3(2)(e), (f) or (g) or as the dependant of a person who has made an application in accordance with regulation 3(2)(e) or (f) and fails to comply with a requirement of these Regulations the Secretary of State—
(a) may refuse the application for a biometric immigration document; and

(b) may consider giving a notice under section 9 of the UK Borders Act 2007.

(5) Where any person apart from a person referred to in paragraph (1), (3) or (4) fails to comply with a requirement of these Regulations, the Secretary of State must consider giving a notice under section 9 of the UK Borders Act 2007.

(6) The Secretary of State may designate an adult as the person responsible for ensuring that a child complies with the requirements of these Regulations."

32. There is no challenge, nor could there be, to the vires of the 2008 Regulations.

The Immigration (Provision of Physical Data) Regulations 2006

33. I mention the Immigration (Provision of Physical Data) Regulations 2006, as amended ("the 2006 regulations"), only in passing. By regulation 3, an authorised person "may require an individual who makes an application to provide a record of his fingerprints and a photograph of his face." However, regulation 2(a) defines "application" as "an application for entry clearance save for when the applicant is required to apply simultaneously for a biometric immigration document." In the present case, FGW was required to apply for a BID and therefore did not fall within the ambit of the 2006 Regulations. I note that regulation 7(1) includes a discretion to treat as invalid an application for entry clearance where the applicant has failed to provide a record of fingerprints or a photograph in accordance with the 2006 Regulations. But, as I have just found, these Regulations do not apply to the applicant's case.

The Immigration Rules

34. Paragraph 30 of the Rules provides as follows:

"30. An application for an entry clearance is not made until any fee required to be paid under the regulations made under sections 68 and 69 of the Immigration Act 2014 has been paid."

35. Paragraph 34, 34A, and 34B of the Rules provide, in so far as relevant:

"34. an application for leave to remain must be made in accordance with sub-paragraphs (1) to (9) below.

(1) (a) Subject to paragraph 34(1)(c), the application must be made on an application form which is specified for the immigration category under which the applicant is applying on the date on which the application is made.

(b) An application form is specified when it is posted on the visa and immigration pages of the GOV.UK website.

(c) An application can be made on a previous version of a specified paper application form (and shall be treated as made on a specified form) as long as it is no more than 21 days out of date.

(2) All mandatory sections of the application form must be completed.

(3) Where the applicant is required to pay a fee, this fee must be paid in full in accordance with the process set out in the application form.

(4) Where the applicant is required to pay the Immigration Health Surcharge, this must be paid in accordance with the process set out on the visa and immigration pages of the GOV.UK website.

(5) (a) Subject to paragraph 34(5)(c), the applicant must provide proof of identity as described in 34(5)(b) below and in accordance with the process set out in the application form.

(b) Proof of identity for the purpose of this paragraph means:

(i) a valid passport or, if an applicant (except a PBS applicant) does not have a valid passport, a valid national identity card; or

(ii) if the applicant does not have a valid passport or national identity card, their most recent passport or (except a PBS applicant) their most recent national identity card; or

(iii) if the applicant does not have any of the above, a valid travel document.

(c) Proof of identity need not be provided where:

(i) the applicant's passport, national identity card or travel document is held by the Home Office at the date of application; or

(ii) the applicant's passport, nationality identity card or travel document has been permanently lost or stolen and there is no functioning national government to issue a replacement; or

(iii) the applicant's passport, nationality identity card or travel document has been retained by an employer or other person in circumstances which have led to the applicant being the subject of a positive conclusive grounds decision made by a competent authority under the National Referral Mechanism; or

(iv) the application is for limited leave to enable access to public funds pending an application under paragraph 289A of, or under Part 6 of Appendix Armed Forces or section DVILR of Appendix FM to these Rules; or

(v) the application is made under Part 14 of these Rules for leave as a stateless person or as the family member of a stateless person; or

(vi) the application was made by a person in the UK with refugee leave or humanitarian protection; or

(vii) the applicant provides a good reason beyond their control why they cannot provide proof of their identity.

(6) Where any of paragraph 34(5)(c)(ii)-(vii) applies, the Secretary of State may ask the applicant to provide alternative satisfactory evidence of their identity and nationality.

(7) Where the main applicant is under the age of eighteen, their parent or legal guardian must provide written consent to the application.

(8) Where the application is made on a paper application form, it must be sent by pre-paid post or courier to the address on the application form.
(9) An applicant must comply with the application process set out on the visa and immigration pages on GOV.UK and in the invitation to enrol biometrics which is provided as part of the application process in relation to –
(a) making an appointment to provide biometrics, and
(b) providing any evidence requested by the Secretary of State in support of their application.

Invalid applications
34A. Subject to paragraph 34B, where an application for leave to remain does not meet the requirements of paragraph 34, it is invalid and will not be considered.

34B. (1) Where an application for permission to stay does not meet the requirements of paragraph 34(1) to (9), or the validity requirements for the route under which they are applying, the Secretary of State may notify the applicant and give them one opportunity to correct the error(s) or omission(s) identified by the Secretary of State within the timescale specified in the notification.
(2) Where an applicant does not comply with the notification in paragraph 34B(1), or with the requirements in paragraph 34G(4), the application is invalid and will not be considered unless the Secretary of State exercises discretion to treat an invalid application as valid and the requirements of paragraph 34(3) and (5), or a requirement to pay a fee and provide biometrics has been met
(3) Notice of invalidity will be given in writing and served in accordance with Appendix SN of these Rules."

36. There are no equivalent provisions in respect of biometric information and applications for entry clearance generally. However, when one examines the Appendices to the Rules, it is apparent that the validity of applications for entry clearance covering a wide variety of categories is, in part, dependent on biometrics having

been provided. For example, paragraphs ST1.2(b) and ST1.6 of Appendix Student provide:

> "ST1.2 An application for entry clearance or permission to stay as a Student must meet all the following requirements:
> …
> (b) the applicant must have provided any required biometrics; and
> …
>
> ST 1.6. An application which does not meet all the validity requirements for a Student is invalid and may be rejected and not considered."

37. The same requirements apply to all other categories set out in the Appendices. There is no Appendix relating to family reunion.

D: VALIDITY ISSUE: RELEVANT GUIDANCE

Biometrics guidance

38. Although it is the Family Reunion policy which is in the applicant's line of fire in these proceedings, it is in my view best to start with the guidance relating to biometric information, namely "Biometric information: introduction", version 6.0, dated 19 November 2019 ("the Biometrics Guidance"). The guidance confirms what is meant by "biometric information", namely a digital photograph of the face and a scan of fingerprints. The legislative background to the guidance is correctly stated to be the UK Borders Act 2007 and the 2008 Regulations.

39. The following passages from the document have been canvassed in argument before me: Pages 9, 10, and 22 of the Biometrics Guidance which includes the following passages:

> "A person automatically makes an application for a BRP [a biometric residence permit] when they make an application for leave for longer than 6 months or apply for entry clearance for longer than 6 months. [Page 9]
>
> Applying for a BID is part of the leave process. Biometric information enrolment must take place before the case can be

concluded. This is so you can check the applicant's details against the Home Offices existing databases and link the biographical details provided in the current application against any unique biometric information provided in previous applications to the Home Office. [page 10]

[Under the general heading entitled "**People who must enrol their biometric information**"] Biometric information has been taken overseas for some time as part of standard identity checks undertaken before a decision is made on an applicant's application [page 22]

40. Certain categories of individuals do not have to enrol biometric information or may have enrolment deferred. Pages 23 and 24 of the Biometrics Guidance state as follows:

"This page tells you about the types of applicants who are not required to have some or all of their biometric information taken because they are exempt from immigration control or are excused from some requirements.
The information in this section only applies to applications made in the UK. A person who is exempt from immigration control, for example, diplomat cannot be required to give their biometric information or apply for a biometric residence permit.
The following people are not required to give finger scans as they are excused from this requirement:
• children under the age of 5 (at the date of application, not at the date of enrolment):
up to the age of five the Home Office only requires a digitised image of the child's face
there is no upper age limit for biometric information to be taken
• amputees with one or no fingers: a biometric verification caseworker must check all of these applicants
you must obtain the finger scans from applicants with two or more fingers
you must not record these applicants as amputees
• applicants who are medically unable to provide finger scans:
this could be because of a medical condition such as severe arthritis where it is impossible to obtain finger scans of a suitable quality the

biometric verification caseworker must make these exceptions when they apply
you must record the reasons on the (BRP) database
applicants must provide a letter from a clinician registered with the General Medical Council (GMC) detailing the medical condition the evidence that the applicant had provided would be sent to the caseworking team considering the application

These people must still have a photograph taken of their face and the usual photograph standards will still apply. See Passport photograph requirements.

Exceptions are not made for cultural or religious reasons. However, hats or head coverings are permitted when worn for religious reasons, provided the full facial features are clearly visible.

You must make every effort to provide privacy when this is requested or is appropriate.

People who are unable to enrol their biometric information
This page tells you about the process to follow if a person claims they cannot submit their biometric information for health reasons.

On this page the term residence card (biometric format) relates to residence cards, derivative residence cards, and permanent residence cards. For more information please Definition of residence card (biometric format)

This is only applicable to applications made within the UK.

If an applicant cannot enrol their biometric information because of disability or other medical condition they may qualify for mobile biometric enrolment. You will need to consult your senior caseworker for advice. Each case will be assessed on a case by case basis.

If an applicant is not eligible for mobile enrolment
There may be situations where it is decided that the applicant cannot submit their biometric information, but it is not considered a suitable case for mobile enrolment. Examples of this would include:
• if the applicant has a terminal illness
• if the applicant is in a coma
• if the applicant is considered, because of mental illness, to be a risk to either themselves or other people

If the senior caseworker or senior manager within the operational team, who must be a HEO or above is satisfied that it:
• would be difficult for an applicant to enrol in the near future
• is not possible for the Post Office mobile enrolment team to make a visit then you can:
• defer the requirement to enrol biometrics until a later date
• exceptionally validate the application (see paragraph below for further details about what this means)
• explore options to capture a facial image of the applicant, as a minimum biometric. If necessary, this can be of a lower standard than we would normally enrol

A decision to exceptionally validate an application does not mean that the applicant is exempt from providing biometrics. It means that they have been issued leave, but we have been unable at present to issue a BRP because we cannot obtain any biometric information (face or fingerprints). Biometrics must be enrolled at the earliest opportunity when the applicant is able to do so, even if it is only their facial image.

You must tell the applicant of the decision and update CID, by following your own operational guidance instructions.

If you consider the application and refuse it, you can issue the refusal. In circumstances where leave must be granted, you may want to consider issuing a civil penalty and refusing to issue the BRP. If you approve the application, you must make sure the decision letter clearly states it is not proof of the applicant's immigration status. If public authorities need evidence of the applicant's status they can request confirmation from Status Verification, Enquiries and Checking (SVEC) in UK Visas and Immigration."

41. The restriction of these passages to applications made in United Kingdom is to be noted.

The Family reunion guidance

42. Under the heading of "Policy intention", the Family Reunion guidance states that:

“The policy objective is to deliver a fair and effective family reunion process, which supports the principle of family unity by:
• acknowledging the speed and manner in which families may become separated by conflict and persecution, recognising the stress this may cause and providing a means for immediate family members to reunite in the UK
• allowing a spouse or partner and children under the age of 18 of those granted refugee status or humanitarian protection to reunite with them in the UK, providing they formed part of the family unit before their sponsor fled their country of origin
• ensuring applications are properly considered in a timely and sensitive manner on an individual, objective and impartial basis, acknowledging the vulnerable situation that applicants (particularly women and children) may find themselves in and, where possible, expediting claims without unnecessary delay
• preventing abuse of the process by carefully reviewing applications where fraudulent documents are submitted or there is evidence that the sponsor obtained leave by deception, and refusing such applications where appropriate
• preventing those who would otherwise be excluded from the Refugee Convention from obtaining leave under the family reunion Rules by subjecting them to the same security checks as asylum seekers

Application in respect of children
The duty in section 55 of the Borders, Citizenship and Immigration Act 2009 to have regard to the need to safeguard and promote the welfare of children in the UK means that consideration of the child’s best interests is a primary, but not the only, consideration in immigration cases. This guidance and the Immigration Rules it covers form part of the arrangements for ensuring that this duty is discharged.

Although Section 55 only applies to children in the UK, the statutory guidance, Every Child Matters - Change for Children, provides guidance on the extent to which the spirit of the duty should be applied to children overseas. Caseworkers considering overseas applications must adhere to the spirit of the Section 55 duty and make enquiries when they suspect that a child may be in need of protection, or where there are safeguarding or welfare needs that

require attention. In some instances, international or local agreements are in place that permit or require children to be referred to the authorities of other countries.

Caseworkers must abide by these arrangements and work with local agencies in order to develop arrangements that protect children and reduce the risk of trafficking and exploitation. Caseworkers must carefully consider all of the information and evidence provided as to how a family member in the UK who is a child will be affected by a decision and this must be addressed when assessing whether an applicant meets the requirements of the Rules. The decision notice or letter must demonstrate that all relevant information and evidence provided about the best interests of a child in the UK have been considered. Caseworkers must carefully assess the quality of any evidence provided. Original documentary evidence from official or independent sources must be given more weight in the decision-making process than unsubstantiated statements about a child's best interests.

Where it is relevant to a decision, caseworkers dealing with overseas applications must make it clear in their decision letter that the child's welfare has been considered in the spirit of section 55 without stating that it is a duty to do so.

Where an applicant does not meet the requirements of the Rules for entry clearance or leave to remain, caseworkers must, in every case, consider the 'Family life (as a partner or parent), private life and exceptional circumstances' guidance or consider whether there are any compassionate factors which may warrant a grant of leave outside the Immigration Rules."

43. On page 12 of the document, the following paragraph can be found; one which, the applicant submits, demonstrates the existence of a "blanket policy" as to the requirement for biometrics to be enrolled prior to an application for entry clearance being considered: in other words, a requirement going to validity:

> "Security and identity checks must be completed on the applicant and their sponsor before considering the application."

44. Sections later on in the document refer to age, exceptional or compassionate factors, and evidence. These matters go in truth to the substance of a family reunion application, not its validity as such.

Every Child Matters guidance

45. The guidance entitled "Every Child Matters: Change for Children", dated November 2009 ("Every Child Matters guidance"), was issued in respect of the duty arising under section 55 of the Borders, Citizenship and Immigration Act 2009. It is well-known in this jurisdiction. Although the statutory duty under section 55 only applies to children in the United Kingdom, the guidance makes it clear that the "spirit" of that duty must be applied when applications made by or involving children overseas are considered: paragraph 2.34.

Validation, variation and withdrawal of applications policy guidance

46. The parties did not refer me to the document entitled "Validation, variation and withdrawal of applications", version 4.0, dated 15 October 2021, which updated a previous version of the guidance. The document begins by stating its remit:

> "This guidance is for decision makers and describes how to decide whether an application for leave to remain in the UK is valid, and what to do if it is not. It also describes how an applicant can vary and withdraw an application and how to calculate the date of application."

47. Having perused the guidance for myself, and despite its applicability to applications for leave to remain, to an extent it nonetheless bears on the central issue in this case, namely that of

the validity of an application for entry clearance. At page 14, the following is stated:

> "**Requirement: providing biometrics**
> You cannot accept an application as valid if the applicant has not provided their biometric information and none of the exceptions apply. The requirement to provide biometrics and the exceptions are included in the Immigration (Biometric Registration) Regulations 2008."

Afghanistan Resettlement and Immigration Policy Statement

48. The Afghanistan Resettlement and Immigration Policy Statement, dated 13 September 2021, was issued by the respondent in response to the unfolding situation in that country. Mr Seifert provided it only for, in his words, "illustrative purposes" so as to emphasise the point that the provision of biometrics was one of the prerequisites of a valid application for entry clearance even where difficult circumstances prevail. Paragraph 40 of the document reads as follows:

> **"Afghan family members of British citizens and settled persons who were not notified they were eligible for evacuation under Op PITTING**
> 40. For other non-UK family members are British citizens and settled persons who are not called forward as part of Op PITTING, or who are not offered resettlement under the ACRS, they will need to apply to the UK under the existing economic or family migration rules. They will be expected to meet the eligibility requirements of their chosen route, which include paying relevant fees and charges, and providing biometrics. There is currently no option to give biometrics in Afghanistan. The British Embassy in Kabul has suspended in-country operations and all UK diplomatic and consular staff have been temporarily withdrawn. The UK is working with international partners to secure safe routes out of Afghanistan as soon as they become available, but while the security situation remains extremely volatile, we recommend people in Afghanistan do not make applications and pay application fees at this time as

> they will not be considered until biometrics are provided. Those Afghans who are outside of Afghanistan and able to get to a Visa Application Centre (VAC) to provide their biometrics are able to make an application in the usual way."

E: THE VALIDITY ISSUE; ANALYSIS AND CONCLUSIONS

49. As mentioned earlier in this judgment, the parties have put a great deal of work into the preparation and presentation of this case. I intend no disrespect to the respective legal teams by not setting out the written and oral submissions here. I have taken them all into account and sought to incorporate the salient points into the analysis which follows.

50. As a general proposition, the respondent's desire to have applicants for leave to remain or entry clearance enrol biometric information, afforded Parliamentary approval through the 2008 Regulations is in my judgment a rational position to hold. As set out in the evidence of Mr Allen and Ms Pickering, there is a legitimate national security purpose to ensuring, in so far as possible, that applicants are who they say they are and do not pose an actual or potential risk to the security of the United Kingdom. The enrolment of biometric information enables the respondent to undertake appropriate checks against databases and suchlike which may disclose important information. As it was put during the course of argument, it is not just about who a person is, but also who they are not.

51. In fairness to the applicant, there has been no suggestion from the applicant that the underlying rationale behind the need to obtain biometrics is unjustified. His complaint is that the validity of an application for entry clearance on the basis of family reunion does not depend on the enrolment of biometric information.

52. I wish to make it abundantly clear that there has been no suggestion in this case that FGW is in fact a person of concern to the respondent.

The 2008 Regulations

53. The appropriate starting point as regards the legal materials is, in my judgment, not the Rules, but the 2008 Regulations. Whilst the former are statements of the respondent's current practice, the latter represents secondary legislation made with the express imprimatur of Parliament, pursuant to the relevant sections in the UK Borders Act 2007, and rank above the Rules in the legal hierarchy.

54. It is uncontroversial that FGW was and remains a person "subject to immigration control" within the meaning of regulation 3A(1) of the 2008 Regulations on the basis that he requires leave to enter or remain in the United Kingdom. It is also common ground that he has made (or purported to have made) an application for entry clearance which would, if granted, have effect as leave to enter the United Kingdom for a limited period exceeding 6 months, thereby satisfying the condition in regulation 3A(2)(a)(i). There is no suggestion that FGW did not specify in the application for entry clearance that he would enrol his biometric information outside United Kingdom, although having looked at the application form it is not immediately apparent where the specification is found. In any event, the applicant has not suggested that FGW was not a person required to apply for a BID.

55. It follows from the above that FGW was required to apply for the issue of a BID, pursuant to regulation 3A(1) of the 2008 Regulations. The fact that an application for a BID is contingent upon the individual also making an application for entry clearance demonstrates that the two applications are in effect simultaneous and run in parallel. They are not one and the same. This is consistent with the definition of "application" in regulation 2(a) of

the 2006 Regulations: see above. It also fits with the respondent's guidance on entry clearance, in which it is stated that:

> "Applicants must submit biometric information as part of their application [for entry clearance] and pay a fee."
>
> ("ECB3: What is entry clearance?", 1 January 2013)

56. I acknowledge the applicant's submission that regulation 3A of the 2008 Regulations only requires a person to apply for a BID (there has been no suggestion by the respondent that FGW did not in fact apply for the issue of a BID, as he was required to do). But reading the relevant regulations as a whole, it is inescapable that the enrolment of biometric information is, in the absence of a waiver or exemption, part and parcel of a BID application.

57. As is clear from regulation 5(1) of the 2008 Regulations, the requirement to provide biometric information (namely a record of fingerprints and photograph of the face) is discretionary: the word "may" is used, rather than "must". In this way, the 2008 Regulations allow for waivers of and exemptions from a requirement to provide biometric information. The Biometrics Guidance provides further details as to the categories of individuals who do not have to provide all or any of the biometric information: see paragraph 40, above. In his first witness statement, Mr Allen confirms the utility of the Biometrics Guidance and the use of waivers/exemptions in order to avoid preventing, for example, disabled individuals from making "a valid application for entry clearance or leave to enter or remain in the UK." That would appear to be a sensible and fair position to hold.

58. Without seeking to impugn the knowledge and experience of Mr Allen, it is not easy to square what he says about the discretion described in his witness statement with the contents of the Biometrics Guidance itself. As can be seen from the extracts set out

at paragraph 40, above, the waiver, exemptions, and deferment of the enrolment of some or all biometric information for certain categories of individual applies only to applications made in the United Kingdom. It appears to me that the Biometrics Guidance is deficient in so far as it fails on its face to make reference to any discretion for the waiver, exemption, or deferment of enrolment of biometric information in respect of applications for entry clearance; a discretion expressly contemplated by Mr Allen.

59. Having said that, the Biometrics Guidance is not the subject of the applicant's challenge in these proceedings. In any event, it has never been the applicant's case that FGW sought a waiver or exemption from having to enrol his biometric information at all. His case has been, and remains, that the enrolment of biometric information does not act as a prerequisite for an application for entry clearance to be valid and that substantive consideration of his entry clearance application should commence, with the enrolment of biometric information to follow at a later date.

60. Regulation 5(2) of the 2008 Regulations makes it clear that once an authorised person requires a person to provide biometric information (i.e. a waiver or exemption has not been given), that person must provide it. In the present case, FGW has been required to provide biometric information. As matters currently stand, he has not in fact complied with this requirement, albeit through no fault of his own.

61. Once a requirement to provide biometric information is imposed, as here, regulation 8 of the 2008 Regulations provides for discretion on the part of an authorised person in respect of, in effect, the when, where, and how, as to the enrolment of biometric information. Where requirements in respect of these matters are stated, the individual concerned must submit to them. Regulation 8 does not indicate that enrolment may occur after an application for

entry clearance has been substantively considered, nor, conversely, does it necessarily preclude that possibility.

62. I turn to what is in my judgment the critical legislative provision in this case, namely regulation 23 of the 2008 Regulations. Regulation 23(1) provides a discretionary power to, amongst other actions, treat a person's application for entry clearance as invalid if they fail to comply with a requirement of the Regulations. That power is subject to regulation 23(3) and (4). Regulation 23(3) relates to a person required to apply for a BID under regulation 3A(2)(a) or (b): as I have already found, FGW is a person falling within regulation 3A(2)(a). Thus, the discretionary actions under regulation 23(1) do not apply. Instead, the mandatory actions under regulation 23(3) apply. These include the refusal of the person's application for a BID (regulation 23(3)(a)) and, importantly, treating the person's application for entry clearance as invalid (regulation 23(3)(b)). The remaining paragraphs in regulation 23 have no application in this case.

63. I have already highlighted an apparent discrepancy between the contents of the Biometrics Guidance and the evidence of Mr Allen relating to the applicability or otherwise of waivers or exemptions in relation to applications for entry clearance. Beyond this, I harbour a concern that certain terminology employed in the document is unclear and may be seen as inconsistent with the provisions of the 2008 Regulations, in particular regulation 23 and the consequences of non-compliance. Firstly, in the passage at page 10, quoted earlier in this judgment, it is stated that: "Biometric information enrolment musk take place before the case can be concluded." This might suggest that: (a) "the case" could include both the application for a BID and an application for entry clearance; and (b) that an application for entry clearance will be regarded as validly made and considered substantively (if not in fact decided) even if biometric information has not been enrolled. Such an

interpretation of the guidance would run contrary to the effect of regulation 23(3)(b) of the 2008 Regulations. Secondly, the passage at page 22 which I have also quoted earlier states that: “Biometric information has been taken overseas for some time as part of standard identity checks undertaken before a decision is made on an applicant’s application.” Again, it might appear as though an entry clearance application will be given active consideration, but not decided, prior to the provision of biometric information. This too suggests that an application would be validly made, when regulation 23 states that a failure to provide the information, if so required, will render that application invalid.

64. In my judgment, the Biometrics Guidance suffers from deficiencies which should be addressed by the respondent so as to ensure clarity and what I might describe as a more ‘joined-up picture’ of the relationship between making an application for a BID and making applications for entry clearance.

65. Having attempted to follow a path through the 2008 Regulations and the Biometrics Guidance, I conclude as follows. The statutory provisions have the effect that where a person subject to immigration control makes (or purports to make) an application for entry clearance which has effect as leave to enter the United Kingdom for a limited period exceeding 6 months, and, at the same time, is required to apply for a BID, and where that person is required to provide biometric information but fails to do so, the application for a BID must be refused and the application for entry clearance must be treated as invalid. The 2008 Regulations themselves admit of no discretion in so far as non-compliance is concerned. In this way, the validity of an application for entry clearance based on family reunion (whether falling within or without the Rules) is contingent on legislative provisions relating first and foremost to a separate, but parallel, application, namely for a BID.

66. In turn, the answer to the core question posed at paragraph 2 of this judgment is “yes”, subject to the relevant provisions of the 2008 Regulations being applicable.

67. With this conclusion as a starting point, what then of the applicant’s submissions on the Rules and the Family Reunion guidance?

F: THE FAMILY REUNION ISSUE; ANALYSIS AND CONCLUSIONS

The Rules

68. As we have seen, the Rules are silent on the question of whether enrolment of biometrics goes to the validity of applications for entry clearance in general. The various Appendices to the Rules covering particular routes for entering the United Kingdom (not including family reunion) do link the validity of applications to the provision of required biometric information.[1]

69. Given the existence of paragraph 30 the Rules relating to the payment of fees and applications for entry clearance, it is unclear to me why no equivalent provision has been inserted dealing with the enrolment of biometric information and its relationship to such applications. Paragraph 30 specifically ties the making of a valid application for entry clearance to the relevant regulations relating to fees and I can see no reason (and no reason has been offered) why the same could not be done with reference to the 2008 Regulations.

70. Further, paragraph 34 of the Rules stipulates validity requirements for applications for leave to remain in the United

[1] I note that the validity requirements go on to state that such invalid applications “may” be rejected and not considered. On the face of it, an invalid application may seemingly be treated as valid and then considered. Further, this discretionary element does not appear to sit happily with the 2008 Regulations, when read together with the Biometrics Guidance. Firstly, as has been discussed previously, a failure to comply with a requirement under those Regulations will invalidate an application for entry clearance. Secondly, the waivers and exemptions set out in the Biometrics Guidance apply only to applications made in the United Kingdom.

Kingdom, with one of these relating to the enrolment of biometric information. Paragraph 34A provides for the consequences of a failure to satisfy the validity requirements, namely that the application will be invalid and will not be considered. Paragraph 34B(1) then allows for the respondent to notify the person attempting to make the application and give them an opportunity to correct the errors or omissions identified within a specified timescale. Paragraph 34B(2) confirms the existence of a discretion to treat an invalid application as valid, even in circumstances where biometric information has not been provided.

71. The discretion contained in paragraph 34B(2) of the Rules appears to be consistent with what is said in the Biometrics Guidance about waivers and exemptions in respect of applications made within the United Kingdom.

72. Bringing matters back round to the present case, the applicant has contended that the omission from the Rules as to validity and enrolment of biometric information is highly problematic. It is his submission that a validity requirement has been imported into the entry clearance application process by way of the Family Reunion guidance and that this falls foul of the Supreme Court's judgment in Alvi [2012] UKSC 33; [2012] Imm AR 998, in which Lord Dyson, JSC, held at paragraph 94 that:

> "In my view, the solution which best achieves these objects is that a rule is any requirement which a migrant must satisfy as a condition of being given leave to enter or leave to remain, as well as any provision "as to the period for which leave is to be given and the conditions to be attached in different circumstances" (there can be no doubt about the latter since it is expressly provided for in section 3(2) [of the Immigration Act 1971]). I would exclude from the definition any procedural requirements which do not have to be satisfied as a condition of the grant of leave to enter or remain. But it seems to me that any requirement which, if not satisfied by the migrant, will lead to an application for leave to enter or remain

> being refused is a rule within the meaning of section 3(2). That is what Parliament was interested in when it enacted section 3(2). It wanted to have a say in the rules which set out the basis on which these applications were to be determined."

73. Strictly speaking, what is said in Alvi relates to requirements which are substantive; in other words, a failure to satisfy them will lead to a refusal of an application. In the present case, I am concerned with validity requirements, in respect of which a failure to comply will result in a rejection of an application as invalid. There is, however, a more significant consideration which undermines the applicant's submission.

74. On my analysis of the 2008 Regulations the validity requirement relating to enrolment of biometric information is derived from secondary legislation. The respondent is bound to apply the 2008 Regulations, mandatory and discretionary provisions alike, subject to any residual discretion resting with her to treat an invalid application as valid.

75. It follows from this that the Family Reunion policy does not have the effect of impermissibly importing a validity requirement into the Rules, as alleged. The requirement to enrol biometric information is derived from the 2008 Regulations and the Family Reunion guidance has no bearing on this. That the Rules currently do not reflect the relevance of the 2008 Regulations is a separate matter upon which I have commented, above.

The Family Reunion guidance

76. The document as a whole focuses on the substantive consideration of family reunion applications, including issues of age, evidence, and exceptional or compassionate factors. It says very little about the prior question of whether an application is valid in the first place.

77. Two references are made to the provision of biometric information, one oblique and the other express. The first has already been quoted at paragraph 43, above. For ease of reference I repeat it here:

> "Security and identity checks must be completed on the applicant and their sponsor before considering the application."

78. The second reference is contained in the following paragraph of the document and states that:

> "Proof of identity
> In all cases, caseworkers must be satisfied that the appellant is who they claim to be. All applicants in-country and overseas are required to give their biometrics. For applicants over 5 years of age, this will be a scan of their fingerprints and a digital photograph. Applicants who are under 5 are not required to provide their fingerprints but must still provide photograph."

79. As Mr Seifert correctly noted, the first reference does not include the term "biometrics". However, seen in context, everything points towards a conclusion that the "checks" in question do in fact relate to the enrolment of biometric information. Firstly, the underlying rationale for the provision of biometrics is the need to undertake security and identity checks on putative applicants: see paragraph 50, above. Secondly, Mr Seifert himself described evidence of identity and biometric information as being "fundamental" to the entry clearance process. With these two factors in mind, it is in my view very difficult to see that "security and identity checks" could relate to anything other than, at least in part, the provision of biometric information. Thirdly, the phrase "before considering the application" indicates that the provision of biometric information is inextricably linked to the validity of the entry clearance application itself: an application will only be "considered" (adopting an ordinary and common-sense meaning of that word) once it is validly made. Fourthly, the second reference

quoted above followed immediately after the first. It quite clearly links the provision of biometric information to the issue of identity, and identity is one of the two types of checks referred to in the first reference.

80. All-told, I am satisfied that the wording of the Family Reunion guidance strongly suggests to decision-makers that an application for entry clearance will not be considered unless and until biometric information has been enrolled. In other words, a failure to enrol biometrics precludes the validity of the application. In so far as a potential applicant or their legal representative might make reference to the Family Reunion guidance, it would be equally suggestive to them that the enrolment of biometric information would have to be completed in all cases except where a child under 5 was concerned before an application for entry clearance could be considered (i.e. treated as valid).

81. What the Family Reunion guidance does not do is go on to confirm the existence of any discretion as to the provision of biometric information, derived from regulations 5 and 8 of the 2008 Regulations; whether in respect of a waiver, exemption, or deferment, save, to a limited extent, in respect of the under-5s. Even in respect of that category of very young children, there is no express reference to the Biometrics Guidance and, in any event, as has been discussed previously, the relevant part of the guidance relates only to applications made in the United Kingdom.

82. Mr Seifert submitted that the Family Reunion guidance should be read in conjunction with the Biometrics Guidance, and that this would provide a sufficiently clear picture as to the existence of discretion in the process. For the following reasons, I disagree. Firstly, The guidance relating to the type of application in question (i.e. family reunion) should itself contain references to discretion. Secondly, the Family Reunion guidance does not in fact make any reference to the Biometrics Guidance and it is difficult to see how a

decision-maker looking at an application for entry clearance on the basis of Family Reunion would have in mind a separate guidance document which was not brought to their attention in the guidance specifically relating to the application before them. Even if the first two reasons were put to one side, my third reason is, in my judgment, fatal to the respondent's argument on this point. The acknowledgement of discretion in the Biometrics Guidance relates only to applications made in the United Kingdom. In the absence of any express indication to the contrary, there is a real danger that a decision-maker would (if they did in fact look at the Biometrics Guidance at all) conclude that no discretion existed as regards the enrolment of biometric information in the context of application for entry clearance.

83. Two judgments of the Supreme Court are of particular relevance to the next question of whether, in light of my conclusions above, the Family Reunion guidance is unlawful. The first of these is Lumba [2011] UKSC 12; [2012] AC 245, a case concerning the lawfulness of immigration detention and policies related thereto. For current purposes, it is what was said by Lord Dyson, JSC, at paragraph 20 which is of relevance:

> "20. Here too, there is little dispute between the parties. Mr Beloff QC rightly accepts as correct three propositions in relation to a policy. First, it must not be a blanket policy admitting of no possibility of exceptions. Secondly, if unpublished, it must not be inconsistent with any published policy. Thirdly, it should be published if it will inform discretionary decisions in respect of which the potential object of those decisions has a right to make representations."

84. The second authority is the recent judgment in R (A) [2021] UKSC 37; [2021] 1 WLR 3931. That case concerned "the standards to be applied by a court when it is asked to conduct a judicial review of the contents of a policy document or statement of practice issued by the Government." The specific policy in question related to

convicted sex offenders. Following on from the existing authorities, including Gillick v West Norfolk and Wisbech Area Health Authority [1986] AC 112, Lord Sales, JSC, and Lord Burnett, LCJ, summarised the legal position at paragraph 46:

> "46. In broad terms, there are three types of case where a policy may be found to be unlawful by reason of what it says or omits to say about the law when giving guidance for others: (i) where the policy includes a positive statement of law which is wrong and which will induce a person who follows the policy to breach their legal duty in some way (ie the type of case under consideration in *Gillick*); (ii) where the authority which promulgates the policy does so pursuant to a duty to provide accurate advice about the law but fails to do so, either because of a misstatement of law or because of an omission to explain the legal position; and (iii) where the authority, even though not under a duty to issue a policy, decides to promulgate one and in doing so purports in the policy to provide a full account of the legal position but fails to achieve that, either because of a specific misstatement of the law or because of an omission which has the effect that, read as a whole, the policy presents a misleading picture of the true legal position. In a case of the type described by Rose LJ, where a Secretary of State issues guidance to his or her own staff explaining the legal framework in which they perform their functions, the context is likely to be such as to bring it within category (iii). The audience for the policy would be expected to take direction about the performance of their functions on behalf of their department from the Secretary of State at the head of the department, rather than seeking independent advice of their own. So, read objectively, and depending on the content and form of the policy, it may more readily be interpreted as a comprehensive statement of the relevant legal position and its lawfulness will be assessed on that basis. In the present case, however, the police are independent of the Secretary of State and are well aware (and are reminded by the Guidance) that they have legal duties with which they must comply before making a

> disclosure and about which, if necessary, they should take legal advice."

85. I conclude that the Family Reunion guidance falls within category (iii) within paragraph 46 of R (A) and is, for that reason, unlawful. The respondent has published guidance for decision-makers which fails to acknowledge the existence of discretion derived from the 2008 Regulations as to the enrolment of biometric information. Indeed, the distinct impression arising from the guidance is that there is no discretion, save in respect of children under 5 years old. This is a misleading picture of the true legal position, which in fact provides for a broader discretion.

86. One consequence of the unlawfulness is the failure to acknowledge the relevance of an individual's age to the question of the exercise of discretion (leaving aside the under 5s).

87. In reaching this conclusion I have kept very much in mind the need for judicial restraint and have had full regard to what R (A) says at paragraphs 39 and 40 concerning the limited scope for intervention:

> "39. The approach to be derived from Gillick is further supported by consideration of the role which policies are intended to play in the law. They constitute guidance issued as a matter of discretion by a public authority to assist in the performance of public duties. They are issued to promote practical objectives thought appropriate by the public authority. They come in many forms and may be more or less detailed and directive depending on what a public authority is seeking to achieve by issuing one. There is often no obligation in public law for an authority to promulgate any policy and there is no obligation, when it does promulgate a policy, for it to take the form of a detailed and comprehensive statement of the law in a particular area, equivalent to a textbook or the judgment of a court. Since there is no such obligation, there is no basis on which a court can strike down a policy which fails to meet that standard. The principled basis for intervention by a court is much narrower, as we have set out above.
>
> 40. There are further reasons which indicate that this is the appropriate standard. If the test were more demanding there would be a practical disincentive for public authorities to issue policy statements for fear that they might be drawn into litigation on the

> basis that they were not sufficiently detailed or comprehensive. This would be contrary to the public interest, since policies often serve useful functions in promoting good administration. Or public authorities might find themselves having to invest large sums on legal advice to produce textbook standard statements of the law which are not in fact required to achieve the practical objectives the authority might have in view. Also, if the test were of the nature for which Mr Southey contends, the courts would be drawn into reviewing and criticising the drafting of policies to an excessive degree. In effect they would have a revising role thrust upon them requiring them to produce elaborate statements of the law to deal with hypothetical cases which might arise within the scope of a policy. Such a role for the courts cannot be justified. Their resources ought not to be taken up on such an exercise and it would be contrary to the strong imperative that courts decide actual cases rather than address academic questions of law."

88. I am bound to say that my conclusion on the Family Reunion guidance is, unfortunately, consistent with the rather unsatisfactory position relating to the enrolment of biometric information and applications for entry clearance more generally, as I have endeavoured to set out in this judgment.

G: THE AGE ISSUE; ANALYSIS AND CONCLUSIONS

89. The next core aspect of the applicant's case relates to FGW's age. As with the validity issue, I do not replicate the detailed submissions made to me here as they are subsumed into my analysis.

90. It has always been asserted by the applicant and FGW that the latter was born in February 2004 and is currently a minor. The principal sources of evidence which have been relied on to make good that assertion are:

(a) a detailed witness statement from the applicant;
(b) a baptism certificate for FGW, purporting to include his correct date of birth;
(c) an expert report from D Mekonnen, dated 12 May 2021, relating specifically to the baptism certificate: the conclusion being that it is a reliable document; and

(d) correspondence from UNHCR in Libya confirming that organisation's view that FGW is a child.

91. In initially rejecting FGW's asserted age, the respondent's reasons, as stated in a letter dated 4 September 2020, can be summarised as follows. In his asylum screening interview, conducted in July 2014, the applicant stated that FGW was born in June 1999, thereby making him an adult at all material times. Additionally, initial evidence from UNHCR had been based only on the applicant's and FGW's account, and the organisation was unaware of the applicant's screening interview.

92. On the evidence before the respondent at that time, I see no error, either of approach or in respect of the conclusions reached. The respondent was rationally entitled to rely on the apparent discrepancy as to FGW's date of birth. It is undeniable that the applicant stated that FGW was his youngest sibling and that he was born in June 1999. The screening interview was signed by the applicant and, on the face of the record, there did not appear to be any indication that the date given was erroneous for one reason or another. The respondent was also rationally entitled to conclude (at least at that time that UNHCR had been unaware of the discrepancy as to FGW's date of birth when preparing its best interests assessment in January 2020.

93. Following the letter of 4 September 2020, further evidence was submitted to the respondent. This included a response to that letter from the UNHCR and evidence from the applicant seeking to explain the discrepancy in dates contained within the screening interview. This evidence was accompanied by detailed written submissions.

94. For the reasons set out below, it is the respondent's subsequent letter, dated 22 December 2020, and her stance

maintained thereafter which, in my judgment, discloses unlawfulness on her part.

95. Firstly, the letter makes no reference to the witness statement from the applicant, the explanation contained therein as to the discrepancy in dates, or the submissions related thereto. Neither the response to the Pre-Action Protocol letter nor the second witness statement from Mr Allen address this evidence or the associated points raised in the submissions. In my judgment, the explanation provided was capable of belief and required consideration.

96. Secondly, the UNHCR evidence as a whole required consideration. By the date of the December 2020 letter, the evidence consisted not only of the original best interests assessment from January 2020, but also an explanatory email from Ms D Beasley, Child Protection and Family Reunification Specialist, confirming: the organisation's knowledge of the applicant's screening interview; the fact that a "thorough interview" had been conducted with FGW; the approach that a formal age assessment would only be undertaken if there were "serious doubts" about an individual's stated age; the absence of any such doubts; and the view of the organisation's trained staff that FGW's presentation was consistent with his claimed age.

97. Notwithstanding the absence of a formal age assessment report by UNHCR, the evidence from a source which, in the normal run of cases, would at least arguably ordinarily attract a certain amount of weight, required something more by way of consideration than simply a reference in the letter of 22 December 2020 to it being "noted". Having regard to the Every Child Matters guidance, I note that as part of the respondent's commitment to adhere to the spirit of the duty under section 55 of the Borders, Citizenship and Immigration Act 2009, she will seek to work with "local agencies". One might imagine that such agencies include UNHCR. When detailed evidence from such a source is put forward, it is in my view

incumbent on the respondent to afford it appropriate assessment and, if it is to be rejected, provide reasons for this.

98. As with the applicant's witness statement, subsequent materials emanating from the respondent do not engage with the substance of the UNHCR evidence. It is of course not the case that the respondent was bound to accept the views of UNHCR: but failing to engage with the evidence and seeming to rely only on the absence of a formal age assessment is not, I conclude, sufficient.

99. Thirdly, I am prepared to accept that the expert report from Mr Mekennon has been considered by the respondent through the evidence contained in the second witness statement from Mr Allen. The points he makes are in my judgment rational. However, this still leaves un-rectified the failure to have engaged with the applicant's witness statement and UNHCR evidence.

H: THE EXERCISE OF DISCRETION ISSUE; ANALYSIS AND CONCLUSIONS

100. It is plain that a very large amount of work has gone into advancing FGW's interests prior to and during these proceedings. As a result of this and the constructive dialogue between the parties in the run-up to, during, and after the adjourned hearing on 21 June 2021, the respondent put in place an exceptional arrangement for the enrolment of FGW's biometric information by means of a diplomat travelling from Tunis to Tripoli with the appropriate equipment to enrol his biometrics. This arrangement was in effect an exercise of discretion pursuant to regulation 8 of the 2008 Regulations. Rather than requiring FGW to attend a VAC (which was, for all practical purposes, impossible for reasons set out earlier in this judgment), Ministerial approval was given for the enrolment process to be taken to FGW.

101. Having regard to all the circumstances of this case, including the age issue, I conclude that the respondent's exercise of discretion was rational and lawful.

102. There has never been any question of waiving the requirement to enrol biometric information entirely, and the respondent's continuing refusal to do so is both undisputed and rational in any event. The impossibility of crossing the border from Libya into Tunisia has been addressed by virtue of the exceptional arrangement. By its very existence, that arrangement also recognises the precarious situation in which FGW has found himself.

103. The fact that the applicant's solicitors have had to apply pressure on the respondent prior to the exercise of discretion is not in my judgment a basis for concluding that the exceptional arrangement is itself unlawful, or that it fails to address the core issue of FGW's ability to make a valid application for entry clearance in the first place. There will invariably be differences between the approaches of legal representatives: some will be more persistent than others. Many individuals will have no representation at all. Such considerations cannot, however, bear on the exercise of discretion in this particular case.

104. I have concluded that as from the letter of 22 December 2020 to date, the respondent's approach to FGW's age has been unlawful. Yet, when this is placed in the context of the unfolding events during the course of proceedings, a hypothetical acceptance by the respondent that FGW is a child would be highly unlikely to have made any difference to the exercise of discretion manifested in the exceptional arrangement. Whether he was treated as a 17 year old or a young adult, the respondent was rationally entitled to rule out the possibility of enrolment in Tunisia for reasons already discussed. The evidence from Mr Allen and Ms Pickering illustrates the important consideration of national security and the legitimate desire not to permit an individual to arrive in the United Kingdom

without having first enrolled biometric information and thus being subject to security and identity checks beforehand, in all but very exceptional circumstances. It has been acknowledged by the respondent that if FGW, as an Eritrean national, came to the United Kingdom he would not then be removable.

105. As for Mr Haywood's submission that an acceptance by the respondent that FGW is a minor would provide UNHCR with leverage when attempting to assist at the pre-enrolment stage, this has been overtaken by events. In any case, I cannot see such a material benefit. That organisation currently views FGW as a minor and no doubt would continue to hold this position in their dealings with other parties in Libya. Further, they have clearly worked closely with the respondent behind the scenes in order to facilitate the exceptional arrangement for the enrolment of biometrics in Libya. It is not apparent to me that a recognition of FGW as a child would have had a significant bearing on this arrangement, nor can I see that it would have created a realistic prospect of different and more advantageous arrangements for enrolment.

106. Related to the above, the applicant has relied on the case of YO (in fact, the individual's initials appear to be OY), concerning an Afghan national who, in the particular circumstances of his case, was permitted to travel to the United Kingdom prior to biometrics being enrolled. Enrolment seemingly took place as part of an application for leave to remain once the individual had arrived. The implication is that FGW should have been treated in a similar fashion.

107. Whilst the applicant has sought, at least implicitly, to draw comparisons with the YO case, I am satisfied that the respondent was rationally entitled to regard them as materially different in important respects, having regard to the evidence of Ms Ghelani, the applicant's solicitor, and Mr Paul Kramer, Head of Cross Cutting

Casework at UKVI. The “exceptional circumstances” arising in YO’s case and referred to in Mr Kramer’s witness statement included: his status as an orphan; his accepted age (15 at the time); information suggesting that YO was being abused by persons he was residing with in Afghanistan; and that he was in possession of a valid passport. This last factor was clearly relevant to the issue of identity and the possibility of making certain checks thereon. In addition, the email correspondence accompanying Ms Ghelani’s second witness statement confirms that the respondent had been unable to engage support from agencies within Afghanistan. By contrast, FGW has been assisted by UNHCR, albeit this has not prevented his circumstances from having deteriorated in the lead up to the hearing on 22 October 2021. Even if it were accepted that FGW was 17 years old, there is no realistic prospect that he would have been treated in the same way as YO, a position stated in clear terms by Mr Kramer.

108. The final point on the issue of age concerns the potential benefits to a minor applicant for entry clearance arising from the Family Reunion guidance and the Every Child Matters guidance. It is common ground that the approach to evidence and the assessment of applications generally will materially differ from that relating to applications made by adults. However, these matters relate to the substantive consideration of applications, not, in general terms, the issue of whether an application is valid in the first place.

109. The considerations set out above also lead me to conclude that there was no unlawfulness on the respondent’s part in respect of the refusal to exercise discretion prior to the negotiations concerning enrolment of biometric information and the eventual exceptional arrangement. FGW has always been in a vulnerable position in Libya. Further, even on the hypothetical scenario that the application for entry clearance was deemed valid with the enrolment of biometric information and substantive consideration

commenced, it is unquestionably the case that no outcome decision would have been made without such enrolment, given the legitimate security rationale described earlier in this judgment. Thus, FGW would in any event have had to remain in the country pending this stage in the process.

I: RELIEF

110. The final issue be addressed is that of relief. As will be apparent from the judgment so far, the question of what, if any, relief is appropriate is not entirely straightforward given the developments during the course of proceedings. I propose to go through the various forms of relief sought by the applicant, beginning with those set out in section 6 of the judicial review claim form and replicated in the grounds of challenge.

111. Notwithstanding that the applicant has now achieved, in substance, what he sought at the outset, namely the enrolment of FGW's biometric information, I conclude that it is appropriate to grant declaratory relief in respect of the Family Reunion guidance. For the reasons set out at paragraphs 76 to 87, above, I have found that the guidance is, to a limited extent (with particular reference to paragraph 85), unlawful. This conclusion has application beyond the instant case.

112. I have concluded that the respondent's decision to treat FGW as an adult, articulated previously and maintained in the decision letter of 22 December 2020, is unlawful for the reasons set out at paragraphs 94 to 99, above. I have also concluded that this unlawful position was not material in respect of the exercise of discretion eventually undertaken by the respondent by way of the exceptional arrangement. However, this arrangement does not "cure" the unlawfulness itself: the respondent has maintained her position on FGW's age throughout and there is no indication that this will change. Now that the biometric information has been enrolled and

substantive consideration of the application for entry clearance will commence, there is in my view real value to the applicant in having the decision of 22 December 2020 quashed. To the extent that that decision also refused to exercise discretion, it has of course been overtaken by subsequent events, but it remains the latest decision-making source on FGW's age.

113. Clearly, the exercise of discretion by the respondent means that there is no longer a failure on her part in this regard. I have also concluded that the exercise of discretion was lawful. For the reasons set out in paragraph 109, above, it would in my judgment be inappropriate to grant a declaration that the respondent's initial failure to exercise discretion was unlawful. An additional consideration is the fact that this is not a case in which damages have been sought in respect of previous alleged unlawful conduct.

114. As matters now stand, there is no basis on which I should make mandatory orders requiring the respondent to enable FGW to enrol his biometric information and then for her to commence substantive consideration of the application for entry clearance. In respect of the former, the act has been done. In respect of the latter, I have no reason to doubt that the respondent will now commence substantive consideration of the application.

115. There is clearly now no basis on which to accede to the additional forms of relief set out in Mr Haywood's note for the hearing on 22 October 2021. It would never have been appropriate to make a mandatory order "requiring SSHD to make her best endeavours, by taking all reasonable urgent steps to assist in locating FGW." The respondent was not responsible for FGW's detention or the uncertainty as to his subsequent whereabouts in Libya, and he has now been located in any event. There is now no need to make a mandatory order for the respondent to use her "best endeavours" to ensure the enrolment biometric information: enrolment has occurred.

116. It is, however, appropriate to make a mandatory order requiring the respondent to now expedite consideration of the (valid) application for entry clearance. This properly reflects the position taken by the respondent in an email dated 6 October 2021, in which she confirmed (through the GLD) that. “Once contact is made with FGW and his biometrics are collected, the SSHD will expedite consideration of his application.”

117. The issue of costs will need to be the subject of further written submissions if agreement between the parties cannot be reached.

Signed: H Norton-Taylor

Upper Tribunal Judge Norton-Taylor

Dated: 25 November 2021

The date on which this order was sent is given below

For completion by the Upper Tribunal Immigration and Asylum Chamber

Sent / Handed to the applicant, respondent and any interested party / the applicant's, respondent’s and any interested party’s solicitors on (date):

Solicitors:
Ref No.
Home Office Ref: