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

JR-2021-LON-001566

In the matter of an application for Judicial Review

The King on the application of

MS (1)
SS (2)
AS (3)
BS (a minor, by his litigation friend MS) (4)
CS (a minor, by her litigation friend MS) (5)
DS (a minor by her litigation friend MS) (6)

Applicants

versus

Secretary of State for the Home Department

Respondent

FINAL ORDER

UPON the Applicants' application for judicial review challenging the Respondent's decision of 23 September 2022, refusing to defer the enrolment of biometric information for the purposes of making linked applications for entry clearance by way of family reunion outside the Immigration Rules until the Second to Sixth Applicants have arrived in the United Kingdom

AND UPON hearing Counsel for the Applicants and Counsel for the Respondent at a hearing on 20 October 2022

AND UPON judgment being handed down on 29 November 2022

IT IS ORDERED THAT

1. The Applicants' application for judicial review is dismissed.
2. 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 Applicants or members of their family. Any failure to comply with this direction may be punishable by contempt of court.
3. With respect to costs, the parties are to make submissions on costs as follows:

    (i) Within 3 days of this Order being sealed, the Respondent shall file and serve written submissions as to what the appropriate order for costs should be;

    (ii) The Applicants shall, if so advised, file and serve any written submissions in reply within 7 days of receipt of the Respondent's submissions at (i), above;

    (iii) The Respondent shall, if so advised, file and serve any reply to the Applicants' written submissions within 7 days of receipt of the submissions at (ii), above;

4. The issue of costs shall be decided by the Upper Tribunal on the papers.

PERMISSION TO APPEAL

There has been no application by the Applicants for permission to appeal to the Court of Appeal. In any event, and pursuant to rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008, permission is refused on the basis that there are no arguable errors of law contained within the judgment handed down.

Signed: H Norton-Taylor

Upper Tribunal Judge Norton-Taylor

Dated: 29 November 2022

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:

Case No: JR-2021-LON-001566

IN THE UPPER TRIBUNAL

(IMMIGRATION AND ASYLUM CHAMBER)

Field House,

Breams Buildings

London, EC4A 1WR

29 November 2022

Before:

THE HONOURABLE MRS JUSTICE LANG DBE,

SITTING AS A JUDGE OF THE UPPER TRIBUNAL

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

- -

Between:

THE KING

on the application of

MS (1)

SS (2)

AS (3)

BS (a minor, by his litigation friend MS) (4)

CS (a minor, by her litigation friend MS) (5)

DS (a minor, by her litigation friend MS) (6)

Applicants

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- -

Mr J Pobjoy and Ms G Sarathy, Counsel (instructed by Duncan Lewis Solicitors), for the Applicants

Ms H Masood, Counsel (instructed by the Government Legal Department) for the Respondent

Hearing date: 20 October 2022

- -

J U D G M E N T

- -

Judge Norton-Taylor:

INTRODUCTION

1. The Applicants are all citizens of Afghanistan. The First Applicant (“MS”) is the adult son of the Second Applicant and the sibling of the Third to Sixth Applicants. MS resides in the United Kingdom, whereas the Second to Sixth Applicants are currently living in Kabul. They all challenge the

Respondent's decision, dated 23 September 2022 ("the decision"), refusing to defer the enrolment of biometric information (hereafter, "biometrics") for the purposes of making linked applications for entry clearance by way of family reunion outside the Immigration Rules ("the application") until the Second to Sixth Applicants have arrived in the United Kingdom. Biometrics comprise digital images of the iris and up to ten fingerprints and ordinarily have to be submitted at a Visa Application Centre ("VAC"), but there was, and is, no VAC in Afghanistan.

2. The Applicants' challenge consists of a number of elements, but it is important to emphasise at the outset that we are not concerned with a substantive consideration of the merits of the application. What is under the spotlight here is the lawfulness of the prior question of whether the Second to Sixth Applicants should have to enrol their biometrics before arrival in this country.

FACTUAL BACKGROUND

3. MS was born in 2002. He left Afghanistan on an unknown date in 2015 and made a lengthy and difficult journey to Europe. He eventually arrived in Sweden, where he made an asylum claim. This was refused. In the belief that he was to be removed to Afghanistan, he left Sweden and travelled to France. He then made the onward journey to the United Kingdom in the back of a lorry, arriving in this country in 2018, aged 16/17. He made an asylum claim on 24 October of that year. The stated basis of that claim was a fear of the then government of Afghanistan and of the Taliban, who were at that time an insurgent force in the country. In respect of the former, MS claimed that he came from a communist family and would have been targeted on return for that reason. He claimed that his father had worked for the old Soviet-backed regime. When the mujahedin took control, his father and mother fled to Pakistan in fear of retribution. Once the Taliban overthrew the government in 1996, MS' parents returned to Kabul. The father then assumed an important position within the Taliban. Following the intervention of Allied forces in 2001, the father returned to Pakistan once again, but visited Kabul from time to time. MS claimed that his father was arrested by unknown persons in 2015 and never seen alive again. This event

prompted arrangements for the family unit to leave Afghanistan. The intention was for them to leave the country as a single family unit. However, for reasons primarily related to cost, only MS was allowed to travel on from the Afghan/Iranian border. The other Applicants were forced to turn back.

4. Following MS' asylum claim in the United Kingdom, by a decision made on 19 May 2019, the Respondent concluded that MS was a refugee and granted him limited leave to remain on that basis. In evidence adduced during the course of these proceedings, it became apparent that the basis of the favourable decision was not a risk from the Afghan authorities (as they then were) or the Taliban, but because MS was an unaccompanied minor. MS has leave to remain the United Kingdom until May 2024.

5. At an unknown point in time after MS' departure from Afghanistan, the Second to Sixth Applicants travelled to Pakistan, where they remained without status until being forced to return to Afghanistan in the early spring of 2020. They were all issued with Afghan passports in March 2020.

6. On 25 June 2020, the Second to Sixth Applicants made the application (this was done outside the scope of the Immigration Rules because a refugee in the United Kingdom cannot sponsor an application for family reunion with a parent or siblings). The application was accompanied by a covering letter from the legal representatives (then, as now, Duncan Lewis Solicitors). The letter contained detailed submissions on why the application should have been granted on exceptional or compassionate grounds, with particular reference to Article 8 ECHR ("Article 8") and supporting evidence. At that point, MS and the solicitors believed that the Second to Sixth Applicants were still residing in Pakistan unlawfully. In fact, by then they had returned to Afghanistan.

7. In a letter dated 20 July 2020, the solicitors confirmed that the Second to Sixth Applicants had been forced to return to Afghanistan. Importantly,

the letter raised (albeit implicitly) the issue of the deferral of biometrics enrolment, asserting that the absence of a VAC in Afghanistan and the risk associated with travelling to a country in which one was operating meant that the Second to Sixth Applicants could not enrol biometrics and that the application should be considered without the need to attend a VAC overseas.

8. The Respondent responded by asserting that the Second to Sixth Applicants' circumstances did not warrant "waiving" the requirement to enrol biometrics. This prompted a further letter from the solicitors, dated 30 July 2020, in which it was stated that requiring a journey to Pakistan to enrol biometrics would pose a "disproportionate and excessive risk to their lives." The Respondent was requested to defer the enrolment biometrics until the Second to Sixth Applicants arrived in United Kingdom, or, in the event that the application was successful (presumably, on an in-principle basis), enrolment could take place at the VAC in Pakistan prior to onward travel to the United Kingdom. Having reviewed the materials before us, we cannot see that the alternative course of action was relied on subsequently. Certainly, it does not form any part of the Applicants' pleadings in these proceedings.

9. On 23 September 2020, the Respondent refused the deferral request. It was asserted that Afghan nationals "regularly and routinely" made the journey to Pakistan to enrol biometrics and that other VAC locations were potentially available. In addition, it was concluded that the Second to Sixth Applicants' circumstances were not "sufficiently exceptional" to "waive" the requirement to enrol biometrics and that the UNHCR or other organisations may have been able to assist.

10. Further pre-action correspondence ensued during the latter part of 2020. It was submitted on the Second to Sixth Applicants' behalf that they were living in a makeshift tent in a camp in Kabul and had had to resort to begging for food. The difficulties in travelling to Pakistan to enrol biometrics were re-emphasised. In support of that contention, reliance was placed on a country report by Dr Ayesha Ahmad, a Senior Lecturer in Global Health at St Georges' University of London. A

psychological report on MS' mental health was obtained from Dr Rachel Falk, Registered Clinical Psychologist. In addition, witness statements from MS and the Second Applicant were provided to the Respondent.

11. The Respondent agreed to reconsider her original decision to refuse to waive or defer the enrolment of biometrics. By a decision dated 16 March 2021, the Respondent again refused to either waive or defer the enrolment of biometrics. The primary reasons for the decision were that: (a) enrolment of biometrics was an important aspect of immigration control and national security; (b) any practical obstacles relating to the Covid-19 pandemic applied to all Afghan nationals; and (c) the Second to Sixth Applicants had previously been able to travel to Pakistan and could do so again, or alternatively they could travel to Iran.

12. On 16 June 2021, this claim for judicial review was then made on a protective basis. At that point, only MS was named as an applicant.

13. As a result of the assumption of power by the Taliban in Afghanistan in August 2021, the Respondent agreed to reconsider her decision of 16 March 2021.

14. A third decision was then made on 18 November 2021, once again refusing to waive or defer the enrolment of biometrics. In addition to the reliance on matters previously set out, the Respondent did not accept that the Second to Sixth Applicants were at imminent risk of harm from the Taliban, nor that their circumstances were exceptional when compared to other Afghan nationals in a broadly similar situation.

15. In light of the third refusal, the Second to Sixth Applicants applied to be joined to MS' judicial review claim, for MS to be appointed as the litigation friend of the minor Applicants, anonymity directions to be made, and for the grounds of challenge to be amended. By an order sealed on 5 May 2022, Upper Tribunal Judge L Smith granted those applications. The amended grounds were fourfold: (a) that the Respondent's third refusal to waive or defer the enrolment of biometrics

was irrational; (b) that it breached the Applicants' Article 8 rights; (c) that it was discriminatory, with reference to Article 14 and Article 8; and (d) that the version of the Respondent's Biometric Information guidance in place at the time was unlawful.

16. By an order sealed on 26 May 2022, Judge Smith granted permission on all grounds.

17. Following the grant of permission, on 8 August 2022 the Respondent agreed to reconsider her third decision. The Applicants were asked, by way of a proposed consent order, to withdraw their judicial review claim, with the Respondent to pay their costs. The Applicants declined this offer.

18. The case was then listed for a substantive hearing on 20 October 2022. A case management hearing was held on 9 September 2022. Following discussion with the parties, Upper Tribunal Judge Norton-Taylor set out what he acknowledged was a "demanding" timetable for the progression of the case prior to the substantive hearing. This included the provision of further information by the Applicants, the making of a new decision by the Respondent, the possible re-amendment of the grounds of challenge, the provision of detailed grounds of defence, and the production of an agreed trial bundle. In the event, the parties clearly worked extremely hard in order to comply with that timetable and we express our gratitude to the respective legal teams for their efforts.

19. The Respondent did make a further decision, the fourth in total. It is dated 23 September 2022, two years to the day from the original decision. It is the fourth decision which is the subject of challenge before us.

THE DECISION UNDER CHALLENGE

20. The decision is relatively detailed and we propose only to summarise it here.

21. Following a comprehensive chronology of events, the decision letter listed the numerous items of evidence provided by the Applicants over the course of time, including expert reports from Dr Ahmad, the report from Dr Falk, and witness statements from the First and Second Applicants and others. There was reference to what remains the current relevant policy guidance from the Respondent: Biometric Information: introduction guidance, version 9.0, published on 6 April 2022 ("the Biometric Information guidance"), Biometric Enrolment: Policy guidance, version 5.0, published on 18 July 2022 ("the Biometric Enrolment guidance"), and Family Reunion: for refugees and those with humanitarian protection guidance, version 7.0, published on 29 July 2022 ("the Family Reunion guidance").

22. The decision correctly observed that the Second to Sixth Applicants were seeking a deferral of the enrolment biometrics until they arrived in the United Kingdom, and not a waiver, as had been stated in previous decisions.

23. The importance of immigration control and national security was reiterated, with specific emphasis on the consequences of not enrolling biometrics until arrival in the United Kingdom. These included, it was said, the potential inability to return an individual to their country of origin if there was a "hit" once checks on the biometrics had been undertaken. The threshold for waiving or deferring the enrolment of biometrics was high, and required circumstances "so compelling as to make them exceptional." On the basis of the evidence provided, the Respondent was not satisfied that the Second to Sixth Applicants' circumstances were "sufficiently compelling so as to outweigh the public interest considerations of protecting public safety and justify the deferral sought, namely that they should be permitted to enrolment biometrics on arrival in the UK."

24. The Respondent concluded that photocopies of the Second to Sixth Applicants' passports were insufficient to allow satisfactory identity checks to be undertaken. The latest information provided by the Second to Sixth Applicants indicated that they were renting a room in Kabul and

had been receiving remittances from MS. If the body of MS' father had indeed been left outside the house in June or July 2022, as claimed in the most recent representations, there was no evidence to indicate that it was the Taliban who had killed him. In all the circumstances, there was no risk from the current regime. Whilst the Second Applicant was a widow, the Third Applicant was over 18 years old and could accompany his family members on any journey to a VAC in a neighbouring country. The Respondent took the view that the family unit would in principle be able to travel to Pakistan, but were, on their case, unable to afford to do so: this differed from being at risk. It was open to them to apply for a visa to enter Pakistan. MS had some connections with the Red Cross and could potentially use these to assist the other Applicants in enrolling biometrics and travelling to the United Kingdom. MS would have been in a position to send remittances to the other Applicants if they were in Pakistan.

25. Referring to the report of Dr Falk, the Respondent concluded that it showed that MS had stated that a separation from the other Applicants was "having an effect on his mental health", but there had been no update since June 2020. The Second Applicant's high blood pressure was noted. It was concluded that the medical evidence was not so compelling as to make the Applicants' circumstances exceptional. The best interests of the minor Applicants (relevant by virtue of the "spirit" of section 55 of the Borders, Citizenship and Immigration Act 2009) was considered by reference to the absence of any "particular risk" from the Taliban.

26. The decision letter concluded with a consideration of Article 8. It was said that the refusal to defer the enrolment biometrics was a proportionate interference with MS' rights.

PROCEDURAL ISSUE: APPLICATIONS TO AMEND AND RELY ON NEW EVIDENCE

27. As result of the case management hearing and the subsequent making of the decision, an application was made by the Applicants on 3

October 2022 to re-amend their grounds of challenge and to rely on new evidence, comprising:

(a) an addendum report by Dr Ahmad, dated 28 September 2022 (in fact, the third addendum report from that expert);

(b) a report from Dr Nuwan Galappathie, Consultant Forensic Psychiatrist, dated 30 September 2022;

(c) a witness statement, dated 30 September 2022, from Maria Thomas, a solicitor at Duncan Lewis Solicitors, who had recently assumed conduct of the case.

28. On 14 October 2022, the Respondent made an application to amend her detailed grounds of defence and to adduce further evidence of her own. Whilst served in stages, this new evidence eventually comprised:

(a) a witness statement, dated 17 October 2022, from Mr Kevin Burt, deputy policy lead on biometric policy for the Border Security and Identity Policy Unit at the Home Office;

(b) a printout from the gov.uk website relating to the location of VACs around the world;

(c) materials relating to MS' asylum claim;

(d) the "Asylum Grant Minute" from the Respondent's database, confirming the basis on which MS was recognised as a refugee;

(e) two printouts of source material referred to in Dr Ahmad's most recent report (a document entitled "Visa Application" from the Embassy of Pakistan in Kabul and an article, dated 14 June 2022, from the Gandhara website relating to the position of Afghans attempting to obtain visas for Pakistan);

(f) a dataset obtained from the Home Office's Performance Reporting and Analysis Unit relating to the number of applications for family reunion made by Afghan nationals in a third country for the years 2018 to 2022.

29. In light of the restricted timeframe and the contentious nature of, at least, the Applicants' application, both applications were left over for consideration at the substantive hearing on 20 October 2022.

30. At the outset of the hearing, Mr Pobjoy confirmed that the Applicants did not oppose the Respondent's application to amend the detailed grounds of defence and to rely on the new evidence referred to above.

31. The Applicants' application remained contentious. Mr Pobjoy set out in concise oral submissions why the application should be granted. He submitted that there was no rule against a "rolling review", and that the proceedings had to an extent already started off on that path. The new evidence was relevant to the Respondent's decision and the Tribunal's task when assessing Article 8.

32. Ms Masood's principal objections were threefold: first, the re-amended ground of challenge amounted to a "rolling review" of the sort which should be avoided, with reliance placed on R (Dolan and Others) v SSHSC [2020] EWCA Civ 1605; [2021] 1 WLR 2326, at paragraph 118; second, and connected to the first objection, the new evidence sought to treat these proceedings as an appeal, rather than a judicial review. In this regard, she relied on the judgment of Beatson LJ in R (A) v The Chief the Constable of Kent Constabulary [2013] EWCA Civ 1706. Although it was for the court itself to determine whether there had been a breach of a right protected under the ECHR, the process did not constitute a merits review and "the appropriate course in many cases, was not to review a decision on the basis of new material, but rather for the matter to be remitted, or for a new application to be made in order that the new material could be considered by a primary decision-maker"; third, that

the late timing of the new evidence prejudiced the Respondent's ability to properly respond.

33. Ms Masood did not accept that any "rolling review" had already begun. She submitted that the re-amended grounds had no merit in any event. Much of the new evidence could and should have been obtained sooner. She confirmed that the Respondent had concerns with certain aspects of Dr Ahmad's report.

34. Ms Masood confirmed that if the new evidence was admitted, the Respondent would not seek an adjournment.

35. In reply, Mr Pobjoy referred us to the case of R (BAA) v SSHD [2021] 4 WLR 124, where the Court considered R (A) and, at paragraphs 43-46, confirmed that a reviewing court or tribunal was not necessarily precluded from considering post-decision evidence in a case concerning fundamental rights.

36. Having risen to consider our decision, we announced to the parties that we were granting both applications. Our reasons for this are as follows.

37. First, it is right that "rolling review" is generally undesirable: R (Dolan and Others) v SSHSC, at paragraph 118. Having said that, R (Dolan) acknowledges that "there is no hard and fast rule" on the issue, referring back to R (Spahiu) v SSHD [2018] EWCA Civ 2604; [2019] WLR 1297, per Coulson LJ at paragraph 63, in which he stated that a "certain procedural flexibility" should be maintained so as to do justice between the parties. The particular circumstances of this case warrant, on an exceptional basis, "procedural flexibility" of the kind envisaged in R (Spahiu).

38. Second, the Respondent has now made four decisions, having withdrawn the previous three of her own volition in order to reconsider. In general terms, the re-amended ground of challenge and new evidence

go to meet the latest decision. In our view, it would be contrary to the interests of justice to require the Applicants to start over again by having to issue a new judicial review claim.

39. Third, these proceedings in fact began "rolling", at least to an extent, by virtue of the amendment to the grounds of challenge permitted by Judge Smith in her order of 5 May 2022. We note her observation that if relevant policy guidance was to change during the course of proceedings, a further amendment may have been required. This recognised the particular nature of his case and its evolution.

40. Fourth, the re-amended grounds do not in truth raise entirely new heads of challenge. The previously amended grounds included an irrationality challenge, an Article 8 challenge, and a discrimination challenge, as do the re-amended grounds. A challenge to the Respondent's Biometric Enrolment guidance had stood as a free-standing ground, but that has essentially now been subsumed within the Article 8 challenge.

41. Fifth, the Respondent has been able to respond substantively to all of the re-amended grounds and we see no prejudice in that regard.

42. Sixth, the re-amended grounds all have arguable merit and that is an important consideration.

43. Seventh, the new evidence sought to be relied on is, in our view, relevant to our task under the Article 8 challenge and does not cause the Respondent any significant prejudice. The witness statement from Maria Thomas addresses certain apparent inconsistencies in the evidence which, it is said, arose out of errors by the solicitors, not the Applicants. The report from Dr Galappathie acts in effect as an updating report on MS' mental health, following on from the report of Dr Falk in 2020. Finally, the addendum report of Dr Ahmad is again in reality by way of update and follows on from her previous reports in 2020 and 2021.

Following from this, and having considered R (A) and R (BAA), we see no barrier in principle to the admission of the new evidence

44. In light of the above, the Applicants are able to rely on the re-amended ground of challenge and the new evidence.

45. As noted above, there was no opposition to the Respondent's application to amend her detailed grounds of defence and to rely on the additional evidence. In all the circumstances, it was clearly appropriate for us to grant the application.

RELEVANT LEGAL FRAMEWORK

46. The essential legislative framework relating to biometrics is not in dispute. We set out here only those provisions which are necessary for the purposes of this judgment.

The UK Borders Act 2007

47. 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 biometrics for the purposes of issuing a biometric immigration document ("BID"), together with the consequences of non-compliance. The relevant provisions in section 5 are as follows:

> "5. Registration regulations
>
> (1) The Secretary of State may make regulations—
>
> (a) requiring a person subject to immigration control to apply for the issue of a document recording biometric information (a "biometric immigration document");
>
> (b) requiring a biometric immigration document to be used—
>
> (i) for specified immigration purposes,
>
> (ii) in connection with specified immigration procedures, or
>
> (iii) in specified circumstances, where a question arises about a person's status in relation to nationality or immigration;

(c) requiring a person who produces a biometric immigration document by virtue of paragraph (b) to provide information for comparison with information provided in connection with the application for the document.

(2) Regulations under subsection (1)(a) may, in particular—

(a) apply generally or only to a specified class of persons subject to immigration control (for example, persons making or seeking to make a specified kind of application for immigration purposes);

(b) specify the period within which an application for a biometric immigration document must be made;

(c) make provision about the issue of biometric immigration documents;

(d) make provision about the content of biometric immigration documents (which may include non-biometric information);

(e) make provision permitting a biometric immigration document to be combined with another document;

(f) make provision for biometric immigration documents to begin to have effect, and cease to have effect, in accordance with the regulations;

(g) require a person who acquires a biometric immigration document, without the consent of the person to whom it relates or of the Secretary of State, to surrender it to the Secretary of State as soon as is reasonably practicable;

(h) permit the Secretary of State to require the surrender of a biometric immigration document in other specified circumstances;

(i) permit the Secretary of State on issuing a biometric immigration document to require the surrender of other documents connected with immigration or nationality.

…

(5) Regulations under subsection (1)(a) may require a person applying for the issue of a biometric immigration document to provide information (which may include biographical or other non-biometric information) to be recorded in it or retained by the Secretary of State; and, in particular, the regulations may—

(a) require, or permit an authorised person to require, the provision of information in a specified form;

(b) require an individual to submit, or permit an authorised person to require an individual to submit, to a specified process by means of which biometric information is obtained or recorded;

(c) confer a function (which may include the exercise of a discretion) on an authorised person;

(d) permit the Secretary of State, instead of requiring the provision of information, to use or retain information which is (for whatever reason) already in the Secretary of State's possession.

…”

48. Section 6 relates only to supplementary matters. 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.

..."

49. Section 15(1A) defines what is meant by “biometric information”:

“(1A) For the purposes of section 5 “ biometric information ” means—

(a) information about a person's external physical characteristics (including in particular fingerprints and features of the iris), and

(b) any other information about a person's physical characteristics specified in an order made by the Secretary of State.”

The Immigration (Biometric Registration) Regulations 2008

50. Under the heading "Requirement to apply for a biometric immigration document, regulation 3A of the Immigration (Biometric Registration) Regulations 2008 (SI 2008/3048), as amended, ("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."

51. 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."

52. 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."

53. 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."

54. The 2008 Regulations were the subject of analysis by the Upper Tribunal in R (SGW) v SSHD (Biometrics - family reunion policy) [2022]

UKUT 15 (IAC). The following uncontroversial propositions can be taken from R(SGW):

(a) The 2008 Regulations contain a discretion to waive or defer the provision of biometrics in any given case: paragraphs 57 and 61;

(b) once a requirement to enrol biometrics has been imposed (i.e. a waiver, exemption, or deferment has not been granted), the provision of the information must be undertaken by the individual(s) concerned: paragraph 61;

(c) the 2008 Regulation do not preclude the possibility that the enrolment of biometrics be undertaken after substantive consideration of an application for entry clearance (in other words, a so-called “in the-principle decision” could be made prior to enrolment): paragraph 61;

(d) a central policy consideration underpinning the enrolment of biometrics, namely the protection of national security, is rational: undertaking checks using biometrics enables the Respondent to obtain a picture “not just about who a person is, but also who they are not.”: paragraph 50.

55. In the present case, there is in truth no material dispute about the legal framework as a whole; it is the application of the facts to that framework which separates the parties’ respective positions.

THE RESPONDENT’S GUIDANCE

56. We intend only to set out those passages from the relevant guidance which have a bearing on the issues with which we are concerned.

57. The Biometric Enrolment guidance is the most important of the three guidance documents in play here. It explains to the Respondent’s officials the overarching policy justification for the enrolment of

biometrics and how this is to be applied in practice. Under "Introduction", one finds at page 6 of 34 the following:

> "We use biometrics to fix and confirm the identities of all foreign nationals who are required to apply for a visa, who intend to come or extend their stay in the UK for over 6 months and then from those applying to become British citizens.
>
> Biometrics enable us to conduct comprehensive checks against immigration and criminality records to prevent leave being granted to illegal immigrants and foreign nationals who are a public protection threat or use multiple identities. For example, enrolling fingerprints from individuals who apply for a visa has helped us to identify individuals who are involved in terrorist activities or organised criminality and enabled us to prevent them coming to the UK.
>
> We require biometrics to be enrolled as part of an application for an immigration product or British citizenship. They **must**, in most circumstances, be enrolled before a decision is made on an application as they enable us to confirm the identity of individuals and assess their suitability, by checking for any criminality or immigration offending unless they are exempt or excused."
>
> [Emphasis in the original]

58. At page 10 of 34, one finds a section entitled "Who is excused", the first paragraph of which states:

> "This page tells officials and individuals about the types of circumstances when the Secretary of State may exceptionally excuse individuals from having to attend a Visa Application Centre (VAC) to enrol their biometrics at the time they make their application by either deferring the requirement until later or excusing them from having to enrol fingerprints."

59. This passage clearly acknowledges the existence of a discretion to defer the enrolment of biometrics.

60. Within that section is a sub-section covering "exceptional individual circumstances":

> "Where a senior official considers an individual who is applying for a visa and / or a BID to come to the UK should be excused from the requirement to enrol their biometrics as part of their application for reasons other than medical grounds or their role as a senior governmental official, such as:
>
> • there are compassionate circumstances that are so compelling as to make them exceptional and there are no operational alternatives that warrant excusing or deferring an individual from having to attend a VAC to enrol their biometrics before they travel to the UK
>
> • the individual's circumstances or status warrants them from being excused from having to enrol their biometrics on the basis it is in the interest to the UK's economy or reputation
>
> they **must** refer the matter to Ministers to approve the proposal to waive the requirement to attend a VAC to enrol their biometrics or defer the requirement for an individual to enrol their biometrics for a BID."

[Emphasis in the original]

61. These passages are of particular relevance to the present case and we shall have to consider them greater detail when addressing the Applicants' arguments under Article 8.

62. The Biometric Information guidance does not feature significantly in the parties' respective cases. The only passage to which reference has been made is contained at page 5 of 14 and it essentially emphasises the underlying policy rationale for the enrolment of biometrics (a matter addressed in R (SGW)):

> "Why we use biometrics
>
> Biometrics play a significant role in delivering security and facilitation in the border and immigration system. The biometrics that we currently use (facial image and fingerprints) enable quick and robust identity assurance and suitability checks on foreign nationals' subject to immigration control, delivering 3 broad outcomes:

> • establishing an identity through fixing an individual's biographic details (for example, name, date of birth, nationality) to biometric data
>
> • verifying an individual accurately against an established identity
>
> • matching individuals to other datasets (for example, against watchlists or fingerprint collections) to establish their suitability for an immigration product."

63. The Family Reunion guidance has been relied on by the Applicants, but only by way of apparent contrast to what is said in the Biometric Enrolment guidance as regards the circumstances in which discretion should be exercised. At page 23 of 35, and under the heading "Compassionate Factors" one finds the following passage:

> "If any compassionate factors are raised in the application, caseworkers should consult the leave outside the rules (LOTR) guidance. Caseworkers should ensure where an applicant is granted limited leave to remain on the basis of compassionate factors, the decision letter must clearly show that the grant has been given outside the Immigration Rules on the basis of compassionate factors and must be clear that the grant is not being made on the basis of their ECHR Article 8 family or private life rights.
>
> The applicant should demonstrate as part of their application what the exceptional circumstances or compassionate factors are in their case, and/or what unjustifiably harsh consequence would be faced should they be refused leave to enter or remain in the UK. Each case must be decided on its individual merits. 'Exceptional' does not mean 'unusual' or 'unique'. Whilst all cases are to some extent unique, those unique factors do not generally render them exceptional. For example, a case is not exceptional due to the applicant's need for protection alone. Consideration should be given to interviewing both the applicant and sponsor where further information is needed to make an informed decision."

64. It is to be noted that the passage quoted relates to the substantive consideration of a family reunion application, with reference to Article 8. It does not relate to the question of whether the enrolment of biometrics should be waived or deferred.

THE GROUNDS OF CHALLENGE

65. As pleaded, the Applicants' grounds of challenge appear in the order (a) rationality; (b) Article 8; and (c) discrimination. Ordinarily, we would address each in that sequence. However, Mr Pobjoy took the Article 8 ground first and concentrated the majority of his submissions on it. At the outset, he recognised, in our view realistically, that if Article 8(1) was engaged but the Applicants failed on the proportionality issue, it would be "difficult" to succeed on the rationality challenge. Further, a significant element of his submissions on the rationality challenge was a reliance on points previously made under the Article 8 challenge. In these circumstances, we deem it appropriate to take the Applicants' grounds in the order in which they were presented to us at the hearing. In so doing, we confirm that we have taken full account of all of the evidence relied on by the parties, including that to which no specific reference is made in this judgment.

The Article 8 challenge

66. There are in effect three strands to the Applicants' challenge under Article 8. It is asserted that (i) Article 8(1) is engaged by virtue of the family life as between MS and the Second to Sixth Applicants (ii) the refusal to defer the enrolment of biometrics is a disproportionate means of achieving the legitimate aim of conducting identity and security checks (iii) alternatively, the Respondent's guidance is unlawful because it is incompatible with Article 8. Importantly, it is the alleged disproportionate interference with MS' family life which is in issue here because it is he who is able to rely on the ECHR by virtue of being the territory of the United Kingdom.

67. As regards (iii), we note that the re-amended statement of facts and grounds refers to the Respondent's "Biometric Information Policy" as being the target of challenge. However, it is plain from the context and the passages to which both parties have referred in argument, that it is in fact the Biometric Enrolment guidance, not the Biometric Information guidance, which is said to offend against Article 8.

68. Article 8, in so far as relevant, provides as follows:

> "1. Everyone has the right to respect for his… family life…
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country…"

69. As regards our task in these judicial review proceedings when assessing the Article 8 challenge, we have directed ourselves to the judgment of Underhill LJ in Caroopen v SSHD [2016] EWCA Civ 1307; [2017] 1 WLR 2339, wherein, under the heading "The correct approach to judicial review in an article 8 case", he undertook a review of the relevant authorities. Having done so, at paragraph 82 he expressed the firm view that there was no longer "any doubt" about the correct approach to be taken when considering challenges made in judicial review proceedings against the Respondent's assessment of proportionality under Article 8. That approach was pithily summarised at paragraph 73:

> "73… Where the issue raised by a judicial review challenges whether there has been a breach of Convention rights, the court cannot confine itself to asking whether the decision-making process was defective but must decide whether the decision was right."

70. We proceed on that basis.

Article 8(1): family life

71. The first question to be addressed is whether Article 8 is engaged at all. The Respondent's detailed grounds of defence expressly assert that it is not, presumably on the basis that there is either no family life between MS and the Second to Sixth Applicants, or that if there is, the Respondent's refusal to defer the enrolment of biometrics does not constitute an interference with the family life. Although Ms Masood's oral submissions did not elaborate on this position, she did not resile from it.

72. We conclude that there was and remains family life for the purposes of Article 8(1). Until he was separated from the rest of his family at the Afghan/Iranian border in 2015, aged just 13, MS had resided with them

as a family unit. It is quite clear to us that at that point in time there existed family life.

73. The body of evidence before the Respondent at the time of the decision, comprising in particular witness statements from MS and the Second Applicant and Dr Falk's unchallenged report, demonstrate the ongoing emotional effects of separation and, as a corollary, the parent/child bond which has, we find, perpetuated notwithstanding the passage of time. We will consider the medical evidence in greater detail later in this judgment, but for present purposes we note the observation of Dr Falk that MS seemed "understandably, to be totally preoccupied by his family's well-being and the daily risks they face." That corresponds entirely with MS' own evidence set out in his various witness statements. We acknowledge that MS turned 18 in June 2020, but there is no "bright line" as to when a pre-existing family life ceases. In the particular circumstances of this case, we are satisfied that family life has continued.

74. Our own view is borne out by the decision letter itself, paragraph 18 of which accepts that there is a "familial connection and relationship" between MS and the Second to Sixth Applicants. The tenor of the letter strongly suggests that the Respondent was basing her Article 8 assessment on proportionality, not the absence of family life.

Article 8(1): interference

75. The Respondent has submitted that even if family life exists, the decision in the challenge does not interfere with that life and thus Article 8 is not engaged. We reject that argument. The threshold for establishing interference with a protected right under Article 8 is "not a specially high one": AG (Eritrea) [2007] EWCA Civ 801; [2008] 2 All ER 28, at paragraph 28. In the present case, the refusal to defer the enrolment of biometrics acts as a bar to the substantive consideration of the application, which in turn perpetuates the separation of MS from his mother and siblings. We discuss the possibility of travelling to another country to attend a VAC in greater detail below, but on any view this

course of action is not without practical difficulties. In all the circumstances, there is a sufficiently serious interference with family life such that Article 8(1) is engaged.

Article 8(2): in accordance with the law and legitimate aim

76. It is common ground that the Respondent's decision is in accordance with the law. It was made in the context of an identifiable and accessible legal framework, in particular the 2008 Regulations.

77. Similarly, there is no dispute that the decision pursues the legitimate aim of protecting national security and ensuring the economic well-being of the United Kingdom through effective immigration control.

Proportionality: the Biometric Enrolment guidance

78. As set out earlier, one strand of the Applicants' challenge under Article 8 is that the Biometric Enrolment guidance is unlawful and, as that guidance was applied to their case, it would follow that the decision is flawed for that reason alone. Thus, although the policy challenge featured as an alternative argument in the re-amended grounds, it was the starting point for Mr Pobjoy's oral submissions and we address it as the first step in our assessment of proportionality.

79. In R (MRS) v ECO (JR-2022-LON-000178), Upper Tribunal Judge Lindsley considered the case of Afghan citizens who had applied for family reunion and had asked for a deferral of the enrolment of biometrics until they could get to a VAC in Pakistan. The Respondent refused the request on the basis that they had failed to demonstrate the existence of "exceptional and extraordinary circumstances." It is unclear from the judgment as to whether that test had been set out in a specific guidance document, or whether it had emerged through the evidence and pleadings in the proceedings themselves. During her submissions, Ms Masood confirmed that there had in fact been no guidance document as such, although she also informed us that there had been no secret policy. In any event, Judge Lindsley reached the clear conclusion that the Respondent's position was incompatible with Article 8, in essence

because it set the threshold too high in order to equate to the need to strike a "fair balance" between protected rights under Article 8 and the public interest: paragraph 25. At paragraph 26, she made the observation that:

> "26. It would be open to the respondent, in line with a proper Article 8 ECHR balancing exercise, to outline that significant weight must be given to the public interest and proper legitimate aims which justify biometrics, and that only exceptional in the sense of very compelling cases can outweigh that interest, but not to direct decision-makers that only Applicants with extraordinary, and therefore rare, unique or unusual, circumstances can succeed…"

80. It is perhaps uncontroversial to state that the judgment in R (MRS) prompted a degree of reflection on the Respondent's part as regards the waiving or deferral of biometrics enrolment. Indeed, the current iteration of the Biometrics Enrolment guidance confirms at page 5 of 34 that:

> "This version represents a comprehensive update and reorganisation of the guidance. Biometric enrolment guidance was spread across the previous version of this guidance and the 'biometric information: introduction' guidance, which has also been updated."

81. Although the relevant passages in the Biometrics Enrolment guidance have been set out earlier in our decision, we re-state the most relevant passage here:

> "there are compassionate circumstances that are so compelling as to make them exceptional and there are no operational alternatives that warrant excusing or deferring an individual from having to attend a VAC to enrol their biometrics before they travel to the UK."

82. The second part of the sentence (beginning "… and there are no operational alternatives …") was not immediately clear to us, but we accept the explanation provided by Ms Masood on instructions that it relates to the absence of any other means by which an applicant could enrol biometrics other than by attending a VAC. It may be that this seeks to address the undoubtedly very rare situation in which, for example,

relevant equipment with which to enrol biometrics was brought to the applicant, as occurred in R (SGW).

83. The substance of the Applicants' challenge to the Biometric Enrolment guidance is that the test set out does not "cure the deficiency" identified in R (MRS) and remains incompatible with Article 8. It makes no reference to the need to strike a fair balance between competing interests and there is what Mr Pobjoy described as a "very significant risk" that a decision-maker will look for something extraordinary, or apply an exceptionality threshold, when considering a request to waive or defer the enrolment of biometrics. In this way, it is said that the guidance falls foul of the third category of case where a policy may be found to be unlawful, as identified by the Supreme Court in R (A) v SSHD [2021] UKSC 37; [2021] 1 WLR 3931, at paragraph 46:

> "46.…(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…"

84. For the reasons set out below, we reject the Applicants' challenge to the Biometrics Enrolment guidance.

85. First, the phrase "exceptional circumstances" has been the subject of a certain amount of judicial examination over the course of time. The relevant authority to which we have been referred is MF (Nigeria) v SSHD [2013] EWCA Civ 1192; [2014] 1 WLR 544. That case concerned the question of whether the phrase "exceptional circumstances", which had been included in the Immigration Rules relating to foreign criminals, was compatible with a proportionality assessment under Article 8. Lord Dyson, MR, concluded at paragraph 41 that it would have been surprising if the Respondent had sought to reintroduce an "exceptionality test", contrary to the jurisprudence of the European Court of Human Rights. At paragraph 42 he concluded that the body of

Strasbourg case-law demonstrated that requiring "exceptional circumstances" did not equate to an exceptionality test:

> "Rather it is that, in approaching the question of whether removal is a proportionate interference with an individual's article 8 rights, the scales are heavily weighted in favour of deportation and something very compelling (which will be "exceptional") is required to outweigh the public interest in removal…"

86. Of course, the specific context of the present case is different. However, the underlying reasoning is, in our judgment, applicable to the wording of the Biometric Enrolment guidance. The need for an applicant to demonstrate "compassionate circumstances that are so compelling as to make them exceptional" is found under the heading "Exceptional individual circumstances". Seen in context and on a sensible reading of the instruction to decision-makers, we conclude that there is no incompatibility between the guidance and the balancing exercise required under Article 8. It is not an exceptionality test, but rather a recognition that, as a matter of *outcomes*, it will only be in exceptional cases that a request to waive or defer the enrolment of biometrics will outweigh the strong public interest in providing that information prior to a substantive consideration of an application and, by extension, arrival in United Kingdom. Put another way, the compassionate circumstances must be sufficiently compelling to justify an exception to the general rule that biometrics must be enrolled together with an application.

87. Second, it can be seen from paragraph 26 of R (MRS) that the wording of the Biometric Enrolment guidance is consonant with Judge Lindsley's conclusion that it was "open" to the Respondent to issue guidance which was "in line with a proper Article 8 ECHR balancing exercise… and that only exceptional in the sense of very compelling cases…" could outweigh the public interest.

88. Third, it is clear from R (A) that guidance issued by an authority (here, the Respondent) need not "eliminate all uncertainty regarding its application…" and the drafter of such a document "is not required to imagine whether anyone might misread the policy and then to draft it to

eliminate that risk.": paragraph 34. In addition, guidance will not be deemed defective simply because "it does not spell out in fine detail" how decision-makers should approach any particular case: paragraph 42 (to similar effect, see paragraphs 39 and 47). Thus, the absence of a list of factors potentially relevant to the exercise of discretion in the Biometrics Enrolment guidance does not materially detract from its compatibility with Article 8 and, in turn, its lawfulness.

89. Fourth, the Applicants' attempt to contrast the wording of the Biometric Enrolment guidance with that in the latest Family Reunion guidance takes their case no further. The latter does make reference to proportionality and the need to "strike a balance" between competing interests. However, these references are provided in the express context of whether "exceptional circumstances or compassionate factors" exist. If anything, this supports the view that there is no inconsistency between undertaking a proportionality exercise on the one hand and, on the other, considering whether there are exceptional circumstances. In addition, the passages relied on in the Family Reunion guidance relate to the substantive consideration of an application, not the enrolment of biometrics, which, unless a waiver or deferral has been granted, will already have been enrolled. We note that the Family Reunion guidance now contains a specific sub- section entitled "Biometrics enrolment - exceptional individual circumstances" and that decision-makers are referred to the Biometric Enrolment guidance.

90. Fifth, the decision letter itself rather undermines the Applicants' challenge. The decision-maker confirmed that they had considered the Biometric Enrolment guidance. At paragraphs 8 and 18, they referred in terms to the failure of the Applicants to demonstrate circumstances sufficiently compelling "so as to outweigh the public interest considerations…" In due course we will reach our own conclusions on the question of whether the decision was proportionate, but for present purposes the terminology employed is indicative of the undertaking of a balancing exercise, as opposed to the position of a hard and fast (and impermissible) exceptionality threshold.

91. Sixth, the Applicants have relied on several passages in the witness statement of Mr Burt in support of their contention that an impermissible threshold test has been incorporated into the Biometrics Guidance. In particular, it is said that his reference to the need to show "circumstances that are so compelling as to make them exceptional" raises a concern as to the nature of the test to be applied by decision-makers.

92. This submission adds nothing to the Applicants' case. There is nothing inconsistent between the wording employed by Mr Burt and that set out in the Biometrics Guidance. Further, that terminology is, as we have already concluded, compatible with Article 8.

93. In summary, the Biometrics Guidance is compatible with Article 8 in so far as it directs decision-makers to assess whether an applicant has demonstrated the existence of "compassionate circumstances that are so compelling as to make them exceptional" when considering whether to exercise the discretion to waive or defer the enrolment of biometrics in any given case. Placing this in the context of category (iii) in paragraph 46 of R (A), the Biometrics Guidance contains no "specific misstatement of the law" relating to Article 8 and there is no omission which has the effect of presenting a "misleading picture of the true legal position."

94. It follows from the above that the Applicants are unable to show that the Respondent's decision is disproportionate solely on the basis that it applied the Biometrics Guidance.

95. Before moving away from the guidance issue, we note the evidence of Mr Burt that the respondent is in the process of drafting what has been described as an "unsafe journey policy" which will, we were told, "address cases where the applicant believes that travelling to a VAC would be unsafe."

Proportionality: factors on the Respondent's side of the balance sheet

96. We now turn to the particular factors requiring analysis and weighing up in the proportionality exercise under Article 8.

97. We begin with the central feature resting in the Respondent's side of the scales, namely the public interest. It is important to emphasise the context in which that interest falls to be considered. The Applicants' case is firmly based on a request for a deferral of biometric enrolment until arrival in United Kingdom. During the course of his submissions, Mr Pobjoy raised the possibility of the granting of alternative relief in the form of requiring the Respondent to make an in-principle decision and deferring biometric enrolment until the Second to Sixth Applicants attended the VAC in Pakistan. On reflection, and recognising that this had never been pleaded, Mr Pobjoy confirmed that this alternative was not being pursued. He was quite right to have taken that position.

98. The Applicants have recognised throughout that there is "a legitimate national security objective to obtaining biometric information for the purpose of ensuring that applicants do not pose an actual or potential risk to the security of the UK." In light of the evidence, relevant case-law, and the nature of the Applicants' challenge, we need to say some more about the content and significance of that objective.

99. We find that the evidence of Mr Burt is both instructive and deserving of considerable weight. He is clearly in a position to provide relevant information on the issue of biometrics and the Applicants have not suggested otherwise. He confirms that biometrics are required in order to produce a BID and that this information allows the respondent to (a) link an individual's changeable biographic details (such as name, date of birth, nationality, or gender) to the biometrics; (b) verify an individual accurately against an established identity; and (c) conduct checks against relevant databases to ensure suitability for a visa or other immigration document. Those checks require the respondent to have a "reasonable degree of certainty about the identity of the applicant…" Such checks, it is said, are "so important" in respect of both immigration control and the protection of national security because they provide the Respondent with the best opportunity to detect attempts to

conceal adverse immigration histories, use multiple identities, stand in as imposters, or conceal links to terrorist activities or serious organised crime.

100. Importantly, Mr Burt addresses the scenario in which biometrics were only enrolled once an individual arrived in the United Kingdom. He makes the uncontroversial point that if relevant checks made against the biometric information revealed adverse results and the individual concerned could not be forcibly returned to the country of origin, it would fall to the authorities here to manage their (potentially indefinite) residence. In cases where an individual posed a potential risk to the United Kingdom's national security, there would be additional burdens placed upon the police and/or other services in respect of monitoring.

101. Mr Burt goes on to address three situations in which the enrolment of biometrics has been deferred until arrival in United Kingdom. The first of these was the closing stages of Operation Pitting where the increasingly dangerous situation in Afghanistan justified such a policy. The second relates to the ongoing Ukraine Family Scheme and the Homes for Ukraine Scheme and only applied to those holding valid passports and having submitted a valid online application under the relevant Scheme. The stated rationale for this is the volume of Ukrainian citizens leaving their country due to the Russian invasion, with the additional consideration that passports can still be verified with the authorities of that country, which is not the case in respect of Afghan passports. The final category relates to those requiring urgent and life-saving medical treatment.

102. Self-evidently, the Second to Sixth Applicants do not fall within any of these categories.

103. The case-law concerning the deferment of biometrics enrolment has recognised the importance of the particular considerations surrounding arrival in the United Kingdom prior to it being undertaken. In R (SGW), it

was said at paragraph 104 that the evidence put forward by the respondent illustrated:

> "…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 Eritrea National, came to the United Kingdom he would not then be removable."

104. Reference was made by the Applicants to the example of YO, addressed in R (SGW) at paragraphs 106 and 107. YO was an Afghan National who had been permitted to travel to the United Kingdom prior to his biometrics being enrolled. It is to be noted that his case was not the subject of any litigation: the respondent had exercised her discretion in the first instance. As explained in the evidence, YO was an orphaned minor, in possession of a valid passport, and was being, or at risk of being, abused by the individual with whom he was residing in Afghanistan.

105. When granting interim relief to an Afghan judge who sought an in-principle decision on his application prior to the enrolment of his biometrics in R (JZ) v SSFCDA and Others [2022] EWHC 771 (Admin), Lieven J observed at paragraph 42 that:

> "In the present case there is no suggestion that JZ should be allowed to enter the UK without providing the biometric data, he agrees to provide it once he is in Pakistan. Therefore, that aspect of the public interest is fully protected because a relevant databases can be checked before he enters the UK."

106. At paragraph 43, Lieven J relied on the fact that the applicant was a "documented individual with a history that is transparent and verifiable. He has been accepted by the Defendant to have been a judge in Afghanistan within accepted in evidence history and full documentation."

107. Whilst the decision of Upper Tribunal Judge Lindsley in R (MRS) concerned Afghan nationals who were not prominent in terms of any professional standing (in contrast to the applicant in R (JZ)) and were thus in a broadly similar situation to the Applicants, her reasoning indicates that the limited nature of the deferral sought (biometrics to be enrolled in Pakistan) was a relevant consideration. At paragraph 16 she stated that it was "helpful to clarify that these applicants do not seek to postpone collection of biometrics until they are in the UK."

108. The recent judgment of Julian Knowles J in R (KA and Others) v SSHD and Others [2022] EWHC 2473 (Admin) concerned Afghan applicants who sought to join their British citizen relative in the United Kingdom, pursuant to the Afghanistan Resettlement and Immigration Policy Statement. The first respondent had refused to even consider an application for entry clearance until biometrics had been enrolled. One element of the challenge against that decision focused on the Respondent's apparently blanket refusal to consider deferring the enrolment of biometrics until their arrival in the United Kingdom, which was said to disproportionately interfere with the United Kingdom-based relative's Article 8 rights: paragraphs 11, 100-101, and 106. It was argued that individuals fleeing the conflict in Ukraine had been granted deferral of the enrolment of their biometrics until arrival in the United Kingdom, as had a number of Afghan citizens evacuated under Operation Pitting, and the situations potentially represented a precedent for a similar deferral in KA's family members' case.

109. Ultimately, a shift in the Respondent's position at the hearing rendered that part of the challenge academic. There was an undertaking by the Respondent that she would consider the exercise of discretion to defer the enrolment of biometrics: paragraphs 90-93. Three points of some relevance emerge from the judgment, however. First, Julian Knowles J concluded that it was "not… helpful or realistic" to draw parallels between the situation pertaining in Afghanistan and that in Ukraine (and the two Schemes we have referred to previously): the former potentially raised more significant security considerations than the latter: paragraph 77. Second, there is the recognition that whilst

individuals arriving at port in the United Kingdom would not "enter" this country for immigration purposes until leave to enter was granted, they would clearly be on its soil. If biometrics were not enrolled until arrival and checks disclosed adverse matters, there could potentially be obstacles to removal: paragraph 113. Third, there was no indication by the Respondent that the deferral sought (namely, enrolment on arrival in the United Kingdom) was to be granted: the undertaking related to the consideration of the deferral request only.

110. The case of R (YBN) v SSHD (JR-2022-LON-000674) concerned an Eritrean residing unlawfully in Libya, where there was no operating VAC. The Respondent refused his request to defer the enrolment of biometrics until after an in-principle decision on his family reunion application had been made (it is unclear whether there had been request for a deferral until arrival in the United Kingdom). His rationality challenge was rejected by Upper Tribunal Judge Pitt, essentially on the basis that the "serious policy imperatives behind the requirement for biometrics and the high threshold for deferral" were sufficient to sustain the decision: paragraph 58. R (YBN) is of limited assistance the present case, given that there was no substantive consideration of Article 8.

111. The cumulative effect of Mr Burt's evidence and the authorities to which we have referred is to demonstrate what in our judgment is a powerful public interest in ensuring that biometrics are enrolled prior to the substantive consideration of a family reunion application. That already powerful public interest is significantly enhanced where, as here, applicants seek to defer the enrolment of biometrics until arrival in the United Kingdom. In such cases, the singular importance of protecting national security will weigh very heavily indeed against a deferral request.

Proportionality: factors on the Applicants' side of the balance sheet

112. We turn now to the factors weighing in the Applicants' favour, addressing them in the order in which they were presented to us by Mr Pobjoy.

The Second to Sixth Applicants' circumstances in Afghanistan

113. The first factor is what was described by Mr Pobjoy as "the situation on the ground" as it related to Afghanistan in general and the Second to Sixth Applicants' particular circumstances. In essence, this focused on the very difficult economic and humanitarian situation now prevailing in the country as a whole and the living arrangements of the family unit in Kabul.

114. We accept that the evidence contained in Dr Ahmad's reports and the media coverage over the course of time paints a largely uncontroversial picture of a country whose economic and humanitarian situation has deteriorated further since the Taliban seized control in August 2021. As Dr Ahmad notes in her latest report at paragraph 1.2:

> "The new Taliban government has failed to rectify the challenges that the Afghan population are facing in regard to meeting their basic needs and the absence of assistance by the international community."

115. Dr Ahmad is also of the view that the general security situation has worsened. We agree, at least to an extent. There is no generalised conflict in the country, but for certain individuals or groups, the position is undoubtedly more precarious.

116. We take full account of the country situation as it affects all Afghan citizens, or at least a significant majority thereof.

117. As regards the particular living circumstances of the Second to Sixth Applicants, it is important to note material changes in recent times. We accept that following their forced return from Pakistan at some unspecified point in February or March 2020, the family unit went to Kabul and were homeless. At some point thereafter, they found rudimentary accommodation in a camp for homeless people, living in a "tent". We accept that they were reliant on handouts and begging in order to obtain sufficient food and money. This was undoubtedly a dire

scenario. However, at an unspecified point in 2022, MS began remitting funds to his mother and siblings. It seems that the remittances have amounted to approximately £100 a month, with a maximum of £200 on occasion. These funds have in fact been received and utilised to rent a single room in a property and to purchase food and what are described as “some minimal living supplies”.

118. It is commendable that MS has undertaken part-type work in addition to his current studies in order to send money back to Afghanistan. We readily accept that his own financial circumstances must be limited and that remitting funds places an additional strain on him, both practically and emotionally. Having said that, the provision of funds has, on the evidence before us, materially improved the Second to Sixth Applicants’ living circumstances in Kabul.

119. There is evidence from MS’ maternal uncle, who resides in the United Kingdom, which asserts that he is unable to provide meaningful financial support to the Second to Sixth Applicants. His evidence also suggests that another maternal uncle, who resides in Afghanistan, is unable to assist in that regard.

120. Before moving on, we observe that, to an extent, the considerations addressed above could be said to go more to the merits of the application itself, rather than the question of whether the refusal to defer the enrolment of biometrics is lawful. This much was recognised by Mr Pobjoy during the course of argument, although he nonetheless submitted that it bore some relevance to the deferral issue.

121. Reliance has been placed on what is said to be a risk to the Second to Sixth Applicants from the Taliban. Specifically, it is said that such a risk is connected to the familial history and disappearance and/or death of MS’ father.

122. It is not disputed that the father was arrested in 2015 and, although there had been an inconsistency as to precisely when the father’s body

was left outside the property in which the Second to Sixth Applicants were residing, we are prepared to accept that this occurred on 6 July 2022. Originally, it was said that the Applicants believed the Taliban to have been responsible for the latter act. This was subsequently clarified by Ms Thomas' evidence to the effect that they suspected it was the "Afghan government" who had killed him. We are prepared to accept that correction, but in light of the following considerations, the attribution of responsibility is so speculative as to carry little, if any, weight.

123. MS' evidence is that his father had held a "high position" and was a "very important person" within the Taliban after it took control of Afghanistan in 1996. Assuming that the father had held pro-Communist views in the past, this clearly did not prevent him from finding favour with the Taliban. The father's role militates against that organisation taking action against the father subsequently. We know from the reasons contained in the Asylum Grant Minute that MS was recognised as a refugee by the Respondent not because of an accepted fear of the Taliban (or indeed the then Afghan government), but because he was an unaccompanied minor. Further, if the Taliban did indeed have a particular adverse interest in the family unit and it was that organisation who had delivered the father's body to the property (in the knowledge that the Second to Sixth Applicants resided there), it would seem to stand to reason that they could and would have taken action against the family then, or soon thereafter.

124. Conversely, it would appear highly unlikely that the father was killed by the previous Afghan government. If he had been arrested by those authorities in 2015, it is difficult to understand how they could have been responsible for his death, given the evidence indicating that this event had occurred relatively shortly before delivery of the body. By July 2022, the Afghan government had been out of power for almost a year and there's been no evidence to suggest that remnants of that government had been able to maintain detention centres or suchlike since August 2021.

125. It follows from the above that, for the purposes of our proportionality assessment, we conclude that there is no material individualised risk to the Second to Sixth Applicants by virtue of MS' father's background. In this regard, the position of the Second to Sixth Applicants can be contrasted with that in R (JZ), where it had been accepted that the applicant was at specific risk from the Taliban as a result of his role as a judge.

Making a journey to Pakistan or Iran

126. The second factor relied on is the claimed difficulties of the Second to Sixth Applicants undertaking the journey to a VAC, in particular that located in Islamabad, Pakistan. Those difficulties concern the safety of any journey and its cost.

127. The Applicants' case on the issue of safety is predicated on Dr Ahmad's evidence. Dr Ahmad professes expertise on "the impact of conflict on gender-based violence", with a particular focus on Afghanistan and matters relating to psychological trauma and mental health. We accept that to be the case. We harbour certain concerns as to her expertise on matters relating to the logistics and formal requirements for Afghan citizens seeking to travel to Pakistan through legal routes. Dr Ahmad does not, for example, claim any expertise in respect of Pakistani immigration law. In addition, we see some merit in the Respondent's submission that aspects of Dr Ahmad's reports tend towards the position of advocacy. For our part, it might be said that a degree of balance is missing from her evidence. However, taking a global view and for the purposes of this case, we conclude that her general reliability is not significantly undermined.

128. Having regard to Dr Ahmad's reports as a whole, her evidence on the question of whether the Second to Sixth Applicants can safely travel from Afghanistan to Pakistan can be summarised as follows:

(a) the Second Applicant would be vulnerable as a lone widowed woman travelling with children;

(b) her own mental health may be compromised;

(c) the Third to Sixth Applicants, in particular MS' two sisters, would be vulnerable to exploitation and/or violence during the journey, at least if that journey was made overland;

(d) The presence of the MS' two younger brothers (one of whom is now over 18) would not reduce the risk to the family unit;

(e) the two brothers will themselves be subjected to violence by the Taliban by seeking to leave Afghanistan

(f) the assumption of control by the Taliban in August 2021 has increased the level of insecurity in general;

(g) in light of the family's background, there is a specific risk from the Taliban: if the history came to light, the Second and Third Applicants would in particular face a risk of harm.

129. The final risk factor attributed by Dr Ahmad does not in fact apply, given our previous consideration of the father's circumstances.

130. We accept that the position of women under the Taliban regime is difficult and, by logical extension, such difficulties will be exacerbated in the case of widowed/lone women. Similarly, girls will be in a potentially more vulnerable position than boys.

131. The Third Applicant turned 18 in January 2022. We recognise that being "an adult" is a relative concept and will depend on the norms and laws of any particular society. Having said that, we have difficulty in accepting Dr Ahmad's assertion that the Third Applicant's position as a *mahram* (a member of a family who is prohibited from marrying the other members by virtue of their close relationship, with the effect that they act as a male chaperone) would have no material bearing on the

safety of the family unit on any journey. It is speculative to suggest, as Dr Ahmad does, that they might be split up during the course of the journey. As we have found, there is no risk to the Third Applicant by virtue of his father's background.

132. As regards danger from the Taliban to those seeking to leave Afghanistan, one might assume that this would apply to departures by air as much as to overland journeys. On the other hand, it is not implausible that checkpoints on the roads and/or border crossings might entail greater levels of scrutiny than at the airport (a point made by Dr Ahmad in her October 2021 report).

133. It is difficult to quantify the level of risk to the family unit were they to journey from Afghanistan to Pakistan. We conclude that the risk would be greater if an overland journey were undertaken than if by air, and that the risk would clearly have to be taken more than once if the biometrics enrolment and/or application process required multiple entries into Pakistan. The risk is not as great as if there was a targeted adverse interest because of the father's background. The presence of the Third Applicant is in our view a mitigating factor as well.

134. Overall, the existence of a risk in undertaking an overland journey, or journeys, carry significant weight in our proportionality assessment. That weight is materially reduced in respect of a journey, or journeys, by air because the risk is commensurately lower.

135. On the Applicants' behalf, it is submitted that they simply cannot afford flights to Pakistan, and this is all the more so if multiple journeys were required as part of the process whereby biometrics would be enrolled during an initial visit, with the Second to Sixth Applicants having to return to Afghanistan to await a substantive decision on the application itself, and then, if the application was granted, to make another journey in order to collect their visas and have their passports endorsed before travelling on to the United Kingdom.

136. Prior to her latest report, Dr Ahmad's evidence on the question of cost was to the effect that the Second to Sixth Applicants' circumstances were such that any form of transport to Pakistan (in particular, flights or taxis) would have been prohibitively expensive. In the December 2020 report, the costs of flights via Dubai was put at £3105 and a taxi journey from Kabul to Islamabad was approximately £87-£107 each way. In the May 2021 report, the estimated cost of flights had come down to £742, with no reference to the costs of a taxi journey. The subsequent reports of October 2021 and September 2022 make no amendments to the previous conclusions on cost.

137. It is not entirely clear whether Dr Ahmad was aware of the remittances from MS at the time of her latest report. In any event, it is reasonable for us to assume that there has been, and remains, a sufficiency of funds available to the Second to Sixth Applicants in order to permit them to make *a* journey out of Afghanistan. If this were not the case, the whole exercise of seeking a deferral of biometrics enrolment would be futile.

138. It is not clear to us whether the Second to Sixth Applicants will be in a position to fund the necessary trips to Pakistan to obtain visas. Assuming in their favour that they cannot do so, we place weight on this factor, although we do not consider that financial constraints are of great significance when set against the public interest applicable in this case.

139. The possibility of travelling to Iran in order to enrolled biometrics has been addressed by Dr Ahmad, but was not the subject of any detailed submissions by the parties, either in writing or orally. On balance, we are prepared to accept that the realistic prospect of travelling to Iran legally in order to enrolled biometrics and potentially await the outcome of consideration of the application, is remote. The evidence before us indicates that the Iranians authorities are a good deal more hostile to Afghan travellers. In addition, the journey to Teheran would be substantially more difficult than that to Islamabad and the third Applicant had already tried to enter Iran, but was detained and ill-treated.

140. We effectively discount the possibility of travelling to attend a VAC in Iran. That is a factor weighing in the Applicant's favour in that the potential options open to them are more limited than they otherwise might have been.

Obtaining a visa for Pakistan

141. The next factor relied on is the claimed difficulty, if not impossibility, of the Second to Sixth Applicants obtaining a visa for Pakistan. In her October 2021 report, Dr Ahmad asserts that:

> "3.4 Because Pakistan continues to permit entry only for returning citizens, evacuees from Afghanistan with appropriate documentation, or Afghan nationals requiring medical attention, [MS'] family are **not eligible** for travel to Pakistan, either by land or air.
>
> 3.5 My conclusions from my 27th of May 2021 report regarding the ineligibility of [MS'] mother and siblings to obtain a Pakistani VISA due to a lack of residential address in Afghanistan and lack of affordability continue to be reasons why travel to Islamabad from Kabul is simply not possible."
>
> [Emphasis in the original]

142. In her latest report, Dr Ahmad states that the fact that the Second to Sixth Applicants now have a rented room in Kabul would not meet the Pakistani visa requirements because it was not a permanent address and would not be in the Second Applicant's name because she is a woman. Further, it is "extremely difficult" to obtain visas to Pakistan (and Iran). Pakistani visas are only issued for a maximum of 30 days, which would be insufficient for the time required by the biometrics enrolment and application process. Since May 2022 there has been discouragement on the part of the Pakistani authorities towards Afghans seeking entry to that country. There are significant penalties for overstaying a visa. Dr Ahmad was of the opinion that it would be "highly unlikely" that visas would be issued to the Second to Sixth Applicants.

143. On the face of it, there would appear to be significant obstacles in the path of obtaining relevant visas. Yet we are bound to say that the certainty of Dr Ahmad's opinion has not been tested, as it were, by any attempt by the Second to Sixth Applicants to actually apply for a visa. Whilst it might have been said that there was little point in doing so if the means of travel to Pakistan was out of reach, this argument was not made.

144. Pakistan has a functioning Embassy in Kabul. According to a printout from the Embassy's website, cited as a source by Dr Ahmad, certain categories of persons will not be issued with visas (including those of "unsound mind" and those with criminal convictions). The Second to Sixth Applicants do not fall within any of these.

145. Three types of visas are issued: single entry; multiple entry; and transit. The purposes for which visas may be granted are: visits; medical reasons; studies; business/work; and "official". The requirements for visas to be issued to Afghan nationals are listed (these are replicated in Dr Ahmad's latest report). We cannot see any reference therein to the need to demonstrate a "permanent" residential address. The Second to Sixth Applicants would appear to now have a secure residential address, whether that be in the Second or Third Applicants' name. Dr Ahmad's assertion does not satisfy us that the current address would not suffice the purposes of obtaining a visa.

146. There is no evidence from Dr Ahmad or any other source which engages with the nature of single and/or multiple entry visas, nor the 30-day transit visas mentioned in an article from the Gandhara website, cited by Dr Ahmad as a source and provided to us by the Respondent. We are prepared to accept that there is a degree of discrimination against Afghans residing in Pakistan, but we note that her reference to official discouragement towards Afghans from entering and remaining Pakistan relates to those intending longer periods of residence: yet this would not apply to the Second to Sixth Applicants, who would only seek residence for the purposes of the biometrics enrolment and/or application process (residence would be shorter still if an in-principle

decision had been made, or if consideration of the application was to be expedited whilst they were in Pakistan). Further, the introduction in June 2022 of the 30-day transit visas was said by the Pakistani Prime Minister himself to be in furtherance of his country's "efforts to continue helping our Afghan brothers and sisters in their hour of need."

147. Again, the absence of any attempt by the Second to Sixth Applicants to make a visa application means that the possibility of getting to the VAC in Pakistan has not been tested (leaving aside the present purposes the safety and/or financial ability to make a journey). We are not satisfied, on the evidence available, that they cannot obtain visas for entry to Pakistan for the purpose of attending the VAC.

148. The Respondent has provided what is described as a "dataset", comprising figures of refugee family reunion applications made by Afghan nationals in third countries in the years 2018 to 2022. It is apparent that a good deal more such applications were made in 2022, as opposed to the previous year (1086 compared to 530). We agree with Mr Pobjoy's submission that this information is of little value to our assessment, given the absence of any "granular" detail on, for example, the status of the Afghan National applicants in the third countries (including Pakistan) at the time, how long they might have resided in that country, and suchlike.

149. What is of some relevance is the statement in the Gandhara article that over 100,000 Afghan nationals have entered Pakistan on visas obtained after the Taliban took control of Afghanistan in 2021. Although it is said that most of these are "educated professionals looking to resettle in another country", it does show that a significant number of visas have been issued by the Pakistani authorities.

MS' mental health

150. There has been no real dispute by the Respondent as to the evidence on the impact on MS of continuing separation from his mother and siblings. From the time of MS' witness statement prepared for the

application in June 2020, he has clearly expressed the significant anxiety which has flowed from the separation. He has spoken of his “really close” relationship with his mother, given that his father had never been around much during his childhood; he was “constantly worried” about the Second to Sixth Applicants’ safety; and believed that he could not move on with his own life until they were reunited with him in this country. He stated that his happiness was “completely dependent” on them being with him once again. These emotions were supported by the witness statement of the then caseworker at his solicitors, who confirmed his levels of distress during the process of obtaining evidence for the application.

151. Dr Falk’s unchallenged report of June 2020 provides a clear picture of MS’ state of health at that time. The history recorded is commensurate with MS’ own evidence. Having utilised various assessment tools, Dr Falk expressed the opinion that MS was experiencing moderately severe to severe symptoms of PTSD, depression and anxiety. She was of the opinion that MS’ separation from his family had had a “severe impact” on his mental health and was affecting numerous aspects of his day to day life. He was, in Dr Falk’s words, experiencing “survivor guilt”. It was in MS’ best interests to be reunited with his family members (at that time, MS was still a minor). Reunification was, in general terms, beneficial for the well-being of refugees, and in MS’ case it would be likely to have a positive effect on his ability to participate in society. Dr Falk recorded that MS had had counselling, but had not found it particularly helpful: reunification was what he really wanted. It is not recorded that MS was taking any relevant medication at the time.

152. We have taken account of the fact that Dr Falk had very little documentation before her when writing her report (it consisted only of MS’ initial asylum statement from 2019). That was, as she noted, unfortunate. In the circumstances of this case, however, the dearth of additional evidence does not materially undermine the value of the opinions stated.

153. As we have stated earlier in our judgment, we regard Dr Galappathie's report as constituting, in effect, updating evidence on MS' mental health. Given that over two years had elapsed since Dr Falk's report, we have noted the absence of any reference to GP patient records or prescribed medication. In respect of both, it would appear as though MS has not been seen by his GP, is not on any medication, and has not been undertaking any other form of therapy.

154. As to what Dr Galappathie does say, MS reported feeling low in mood and feeling anxious and worried "all the time." MS stated that he would be happy to see his GP and would consider taking medication, if that was recommended, and having psychological therapy. Dr Galappathie states a diagnosis of a severe episode of depression, severe generalised anxiety disorder and PTSD. In respect of all three conditions, MS' symptoms had worsened since Dr Falk's report. Like Dr Falk, Dr Galappathie attributed much of MS' state of mental health to the ongoing separation from his family. It was felt that MS' mental health might improve if he knew that a decision on his family's case would be made by the Respondent. A continued separation and the lack of a decision on the application would be likely to lead to a worsening of the conditions, which could in turn lead to thoughts of self-harm and suicide and to a "high risk" of such acts occurring, notwithstanding MS' religious beliefs. The opinion is expressed that the need to attend a VAC to enrol biometrics should be "waived" and a decision on the application expedited in order to avoid any further deterioration in MS' mental health.

155. At the end of his report, Dr Galappathie confirmed that he had read an unidentified extract from MOJ and Others (return to Mogadishu) Somalia CG [2014] UKUT 00442 (IAC). It is unhelpful not to specify particular extracts from a case said to be relevant to the duties of an expert. We also wondered whether the more recent case of HA (expert evidence; mental health) Sri Lanka [2022] UKUT 00111 (IAC) had been brought to Dr Galappathie's attention. In any event, what might in another case be seen as potential shortcomings in the report do not have a material bearing on our assessment. One reason for this is the

fact that MS is not an individual who is seeking to resist removal from the United Kingdom and thus certain aspects of the reasoning in HA do not have the same application as they otherwise would. Further, Dr Galappathie's report is essentially consistent with the opinions of Dr Falk.

156. We accept the opinion and consequent diagnoses in Dr Galappathie's report. We conclude that MS does suffer from significant mental health conditions and that these are, to a large extent, rooted in his past experiences and continuing separation from his family. It is likely that reunification with his family would improve his mental health. We do, however, regard Dr Galappathie's suggestion that a continuation of the current circumstances might lead to a "high risk" of self-harm and suicide, as being too speculative. We also take account of the fact that MS is not currently receiving any specialised treatment (in the form of medication and/or therapy) in respect of his conditions. In the absence of this, it must be open to question as to whether the current symptoms could not be alleviated to an extent, or at least prevented from worsening.

157. We have of course considered the evidence on MS' mental health for ourselves when conducting our proportionality assessment. We acknowledge the criticism made by the Applicants to what is said in paragraph 16 of the decision, where, with reference to Dr Falk's report, it is recorded that "[MS] is stating that the separation is having an effect on his mental health…" That is accurate in as far as it goes. However, the report also contained a full psychological assessment based not simply on what MS reported, but also his objective presentation and the application of various diagnostic tools. This aspect of the decision is poor, but does not of itself render it disproportionate in its entirety.

158. Overall, we consider that MS' mental health is to be accorded considerable weight in the proportionality exercise.

The health and well-being of the Second to Sixth Applicants

159. There is no medical report in respect of the Second to Sixth Applicants, but it would have been relatively surprising if there was, given their circumstances. We certainly do not profess to provide any view as to their mental health. Having said that, they have had to live through a number of very difficult experiences, including:

(a) being separated from MS at the Iranian border in 2015;

(b) travelling to Pakistan and then being forcibly returned to Afghanistan in 2020;

(c) the Third Applicant attempting to cross the Iranian border and being detained and ill-treated;

(d) being effectively destitute in Kabul for a time;

(e) living through the fall of the government and the assumption of power by the Taliban in August 2021;

(f) the death of their father and husband in about July 2022;

(g) the likely effects of the ongoing separation from MS - a mother from her child and siblings from their eldest brother;

(h) the uncertainty surrounding the application to join MS in the United Kingdom.

160. Their living arrangements are currently better than they were and we have concluded that there is no specific risk from the Taliban connected to MS' father's background. Nonetheless, the cumulative effect of the past experiences and the ongoing anxiety caused by separation, together with the fact that the Fourth, Fifth, and Sixth Applicants are still minors (the two youngest being girls), represents an important consideration to which we attach due weight.

The passports as a source of identification

161. It is of course the case that the Second to Sixth Applicants have had, since March 2020, valid Afghan passports. This distinguishes them from those who are entirely undocumented. The Applicants submit that scanned copies of those passport enabled the Respondent to undertake provisional checks on identity and that she was wrong to have apparently rejected this evidence out of hand.

162. The possession of validly issued passports counts in the Applicants' favour, at least to a limited extent. Yet it does not, in our judgment, come close to being sufficient for the Respondent to be able to "validate their identity" (as asserted in the re-amended statement of facts and grounds). Scanned copies are no substitute for the originals, a point clearly made in Mr Burt's witness statement, wherein he notes that satisfactory checks cannot be undertaken without been able to analyse the security features of the document in question. In addition, we accept his evidence that the Afghan passports do not contain biometric chips and it is impossible to undertake enquiries with the Afghan authorities to confirm the validity of documents.

163. The Respondent did of course have access to MS' asylum papers and details of the Second to Sixth Applicants are contained therein. As with the passports, the existence of this information carries a degree of weight in the Applicant's favour, but it could only ever be fairly limited in its value, given the particular security implications set out in the evidence of Mr Burt.

164. We remind ourselves of the position in R (JZ), in which the applicant had a history which was "transparent and verifiable." Even then, of course, the fact that he was only seeking deferral of biometrics enrolment until he got to Pakistan was a significant consideration in Lieven J's decision.

Delay

165. The final factor sought to be relied on by Mr Pobjoy was what he described as the “manifest delay” by the Respondent in dealing with the Applicants’ deferral request over the course of time. The matter had been ongoing for over two years and this exacerbated the anxiety caused to them all.

166. It is entirely understandable that the protracted nature of this case (incorporating the initial application and deferral request and continuing through the judicial review proceedings themselves) has been a very difficult time for MS and his family members. We have addressed this consideration, above. On the narrow issue of delay, we observe that it does not feature as a point raised in the re-amended statement of facts and grounds. In any event, this is not a case involving delay in the sense of inaction on the Respondent’s part. In our judgment, the Respondent has not been guilty of sitting on her hands, as it were. It is clear that a good deal of correspondence has flowed between the parties over the course of time and this all contributed to the passage of time, without the attribution of significant fault. It is the case that three previous decisions refusing a deferral were withdrawn, but there has been no bad faith on the Respondent’s part. She has responded to further representations/evidence and changes in situation in Afghanistan.

167. We have taken account of the length of time accrued, but this has been relevant to the effect on the Applicants. It does not represent a free-standing consideration in our proportionality assessment.

Proportionality: conclusions

168. It may come as no surprise when we say that the balancing exercise required by the assessment of proportionality in this case has been a difficult task. Quite clearly, the position of the Applicants has been, and continues to be, demanding of compassion.

169. We have considered with care all of the factors weighing in the Applicants’ side of the balance and have assessed them on a cumulative basis. We reiterate that we have considered all of the evidence to which

we have been referred, including that to which no express reference has been made in our judgment.

170. Having undertaken the required task, we conclude that the Respondent's refusal to defer the enrolment of biometrics until the Second to Sixth Applicants have arrived in United Kingdom does strike a fair balance between the competing interests in this case and is therefore not disproportionate. The various factors weighing in the Applicants' favour are outweighed by the very powerful public interest in maintaining immigration control and national security (as described in paragraphs 99 - 100 above), which would be undermined by allowing the Second to Sixth Applicants to enter the UK without prior enrolment of biometrics, particularly when there is little prospect of removal back to Afghanistan if adverse matters did come to light.

171. For the reasons set out above, the Article 8 challenge fails.

The rationality challenge

172. The Applicants accept that there is a legitimate national security objective in obtaining biometrics for the purpose of ensuring, insofar as it is possible, that individuals seeking to enter the United Kingdom do not pose an actual or potential security risk. However, they contend that the Respondent has acted irrationally in refusing to exercise her discretion in favour of allowing them to enrol their biometrics upon entry to the UK.

173. The legal basis for an irrationality challenge was helpfully described by the Divisional Court (Leggatt LJ Carr J) in R (Law Society) v Lord Chancellor [2018] EWHC 2094 (Admin); [2019] 1 WLR 1649, at paragraph 98:

> "98. The second ground on which the Lord Chancellor's Decision is challenged encompasses a number of arguments falling under the general head of "irrationality" or, as it is more accurately described, unreasonableness. This legal basis for judicial review has two aspects. The first is concerned with whether the decision under review is capable of being justified or whether in the classic

> Wednesbury formulation it is "so unreasonable that no reasonable authority could ever have come to it": see *Associated Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223, 233-4. Another, simpler formulation of the test which avoids tautology is whether the decision is outside the range of reasonable decisions open to the decision-maker: see e.g. *Boddington v British Transport Police* [1998] UKHL 13; [1999] 2 AC 143, 175 (Lord Steyn). The second aspect of irrationality/unreasonableness is concerned with the process by which the decision was reached. A decision may be challenged on the basis that there is a demonstrable flaw in the reasoning which led to it – for example, that significant reliance was placed on an irrelevant consideration, or that there was no evidence to support an important step in the reasoning, or that the reasoning involved a serious logical or methodological error."

174. An irrationality review should be conducted with sensitivity to the context, including the nature of any interests that may be adversely affected. A heightened standard of review - anxious scrutiny - will apply where a decision involves a potential breach of fundamental human rights: R (Sandiford) v SSFCA [2014] UKSC 44; [2014] 1 WLR 2697, per Lord Carnwath and Lord Mance, JJSC, at paragraph 66.

175. We remind ourselves of the "high threshold" applicable to rationality challenges: R (Sandiford v SSFCA), at paragraph 66 and R (Khatun) v Newham London Borough Council [2004] EWCA Civ 55; [2005] QB 37, at paragraph 40, wherein Laws LJ observed that:

> "…the court has no role to impose what it perceives as ideal solutions under cover of the *Wednesbury* principle's application."

176. With the above in mind, we turn to the parties' arguments.

177. As mentioned earlier in our decision, Mr Pobjoy realistically acknowledged that the rationality challenge faced something of an uphill task if the Article 8 challenge failed on proportionality grounds. Cognisant of this, it was perhaps understandable that in pursuing the rationality challenge Mr Pobjoy relied on the submissions put forward under the Article 8 challenge, whilst acknowledging that the former could only be pursued on the basis of the materials which were before the Respondent at the time of the decision, with the exception of Maria

Thomas' witness statement, which went to address actual or apparent discrepancies highlighted in the decision.

178. We confirm that in considering the rationality challenge, we have left out of account the report of Dr Galappathie and the latest report from Dr Ahmad.

179. Given this reliance on the Article 8 arguments, it is in our judgment appropriate to refer back to our discussion of and conclusions on those arguments and to transpose them over to our consideration of the rationality challenge, insofar as it is appropriate to do so. In particular, we have already addressed the following matters upon which the Applicants have sought to rely in respect of both the Article 8 and rationality challenges:

(a) The lawfulness of the Biometrics Enrolment guidance: paragraphs 84 - 94;

(b) The Second to Sixth Applicants' circumstances in Afghanistan: paragraphs 113 - 125;

(c) The difficulties of the Second to Sixth Applicants travelling outside of Afghanistan to attend a VAC: paragraphs 126 - 149;

(d) The medical evidence relating to MS and the impact the continuing separation from his mother and siblings was having on his mental health: paragraphs 150 - 158;

(e) The impact of separation on the Second to Sixth Applicants, three of whom are minors: paragraphs 159 - 160;

(f) The significance of the scanned copies of the Second to Sixth Applicants' passports and information obtained from MS as regards the verification of their identities: paragraphs 161 - 164;

(g) Delay: paragraphs 165 - 167.

180. Applying the high threshold pertaining to an irrationality challenge, having due regard to the context in which that challenge is mounted, and leaving out of account the report of Dr Galappathie and the most recent report of Dr Ahmad, we conclude that factors (a)-(g) relied on by the Applicants do not demonstrate, whether taken individually or cumulatively, that the decision was outside the range of reasonable decisions open to the Respondent. This is so essentially for the reasons previously articulated when addressing the relevant aspects of the Article 8 challenge.

181. In short terms, we have concluded that the Respondent's decision was proportionate and it follows that, absent any significant factor which was not considered under the Article 8 challenge, the decision was also rational.

182. The only factor raised by Mr Pobjoy which had not featured in one way or another under the Article 8 case was the submission that it was, as a matter of process, irrational for the Respondent not to have sought clarification in respect of the alleged inconsistency in the Applicants' evidence as to the obtaining of their passports. The family reunion application form, the covering letter, and MS' first witness statement confirmed that the Second to Sixth Applicants did not have passports, whereas in fact passports had, unbeknown to MS and his legal representatives, been issued to them in March 2020. For the following reasons this complaint does not disclose any form of irrationality on the Respondent's part.

183. First, we agree with the substance of Ms Masood's submission that this particular complaint does not appear in the re-amended statement of facts and grounds. It is true that she characterised the complaint as one of procedural unfairness, whereas Mr Pobjoy asserted that it was in fact simply an aspect of the rationality challenge. Whichever way one

looks at it, the real point is that the complaint involved a specific assertion which required inclusion in the Applicants' written case in order for the Respondent to have a fair opportunity to respond.

184. Second, and in any event, it is plain from paragraph 9 of the decision that the apparent discrepancy was only one consideration among a large number considered by the Respondent. Indeed, that same paragraph makes it clear that even if the existence of the passport had been stated in the evidence, it would have made no material difference because the scanned copies of those documents was not sufficient to verify the Second to Sixth Applicants' identities. That conclusion was one we have already regarded as a proportionate response and, in the present context, it was clearly rational.

185. Third, it follows from the above that even if the Respondent should have sought an explanation in respect of the passport prior to making her decision, her failure to have done so does not come close to rendering that decision irrational.

186. Before turning to address the third and final ground of challenge, we re-iterate the significance of the public interest. The weight attributable to it in the context of Article 8 and proportionality also applies to the rationality challenge. For reasons already elucidated, the legitimate purpose of controlling immigration and, in particular, protecting national security is substantially heightened where an individual seeks deferment of the enrolment of biometrics until they arrive in the United Kingdom.

187. In light of the above, the rationality challenge fails.

The discrimination challenge

188. The Applicants' third ground of challenge contends that the Respondent's decision infringed their right not to be discriminated against under Article 14, read together with Article 8.

189. Article 14 provides that:

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

190. In the field of immigration control, there is a wide margin of appreciation afforded to Contracting States: see, for example, Bah v United Kingdom (2012) 54 EHRR 21, at paragraph 47, and R (Tigere) v SSBIS [2015] UKSC 57; [2015] 1 WLR 3820, at paragraph 74.

191. The particulars of the Applicants' discrimination challenge can be summarised as follows. Their complaint falls within the ambit of Article 8 by virtue of the engagement of protected family life as between MS and the Second to Sixth Applicants. Refugee status and other immigration statuses constitute "other status" for the purposes of Article 14. In particular, immediate family members of refugees are in an inherently more vulnerable position than other such family members seeking entry clearance, or alternatively, immediate family members of Afghan refugees are in a different position to such family members of refugees other countries because of the particular circumstances prevailing in Afghanistan, including the absence of an operating VAC. In either case, the Respondent was required to treat those in the Second to Sixth Applicants' position in an appropriately different manner by deferring the enrolment of biometrics until they arrived in United Kingdom. Her failure to treat them differently by deferring the enrolment of biometrics to the extent sought demonstrated the absence of objective and reasonable justification and, in turn, was a disproportionate interference with Article 14 rights.

192. In her amended detailed grounds of defence, the Respondent has described this ground of challenge as "*Thlimmenos* discrimination", referring to the judgment of the Grand Chamber of the European Court of Human Rights in Thlimmenos v Greece [2000] ECHR 162; Application no. 34369/97, which, at paragraph 44, confirmed the proposition that:

> "44…The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different."

193. Against the Applicants' case, the Respondent contends as follows. The statuses relied on, namely a refugee or an Afghan refugee seeking family reunion with immediate family members, is artificial and essentially defined only for the purpose of prosecuting the discrimination challenge. Alternatively, it is not accepted that immediate family members of refugees are more likely to be placed in a vulnerable position and Afghanistan is not the only country in a position of crisis or without an operating VAC. In light of the wide margin of appreciation in the context of Article 14, there are strong public policy reasons for requiring the enrolment of biometrics prior to travel to United Kingdom and, in any event, there is discretion to waive or defer enrolment in any given case, depending on its particular circumstances.

194. In view of our analysis and conclusions on the Article 8 ground of challenge, we can deal with the discrimination challenge in relatively brief terms.

195. We have accepted the existence of family life as between MS and the Second to Sixth Applicants. Thus, the complaint made by the Applicants falls within the ambit of Article 8.

196. We accept that immigration statuses can in principle constitute "other status" for the purposes of Article 14. Having said that, we see merit in the Respondent's submission that the Applicants have sought to define the statuses relied on by reference to the alleged discrimination complained of: R (Clift) v SSHD [2006] UKHL 54; [2007] 1 AC 484, at paragraph 28, and R v Doherty [2016] UKSC 62; [2017] 1 WLR 181, at paragraph 63. It is least arguable that the statuses of refugees or Afghan refugees seeking reunion with immediate family members are both artificial in the sense that they exist only because of the alleged discrimination by the Respondent by way of a failure to treat them

differently from others seeking entry clearance for immediate family members.

197. Further, it is not clear to us that refugees or Afghan refugees seeking reunion with immediate family members are in a different situation from others, nor that family members of Afghan refugees in particular are in a different situation from refugees from other countries. The evidence relied on by the Applicants in support of their position is found in a report from the Independent Chief Inspector of Borders and Immigration entitled "An inspection of family reunion applications", published in September 2016. This found that in 69 of 181 refugee family reunion applications sampled, 36% involved the family members of the refugee sponsor having to cross an international border to attend a VAC. That cannot be said to constitute a particularly significant figure. In any event, the report itself acknowledged that conflict-stricken countries other than Afghanistan had no VAC at that time. The same is true today: we see from the print-out from the "Find a visa application centre" printout from the gov.uk website adduced by the Respondent that Libya, Syria, and Somalia do not have an operating VAC. Thus, it would appear as though not only do those seeking to join non-refugee sponsors in the United Kingdom from such countries have to travel to attend a VAC to enrol biometrics, but there are also a number of countries in respect of which immediate family and those of refugees face a similar prospect.

198. In the event, we do not need to reach settled conclusions in respect of the issues of status and differential treatment. During the course of oral argument, Mr Pobjoy accepted that if we were to conclude that the Biometrics Enrolment guidance was lawful (i.e. compliant with Article 8), then the discrimination ground would effectively fall away because an appropriate mechanism for flexibility - treating certain family members in an appropriately different way from others - would exist by virtue of the discretion contained in the 2008 Regulations and articulated in the guidance. In our judgment, Mr Pobjoy was entirely correct to adopt that position.

199. For reasons set out previously, we have concluded that the Biometric Enrolment guidance is compliant with Article 8 and thus lawful.

200. In our judgment, even if we were to assume that a relevant status existed and that the Respondent has treated the Applicants in a similar way to others not sharing that status whose situation is relatively different from theirs, the lawful provision for the exercise of discretion to defer enrolment in any given case plainly satisfies the requirement for objective and reasonable justification in respect of the general proposition that all applicants for entry clearance must enrol biometrics prior to a substantive consideration of their applications. In essence, the discretion under the 2008 Regulations and recognised in the Biometrics Enrolment guidance allows for differential treatment of those in different situations, depending on the individual facts of the case. On our analysis, the refusal to exercise the discretion in the Applicants favour was both rational and compliant with Article 8.

201. It follows that the discrimination ground of challenge must fail.

SUMMARY OF CONCLUSIONS

202. The Applicants' challenge to the Respondent's decision, dated 23 September 2022, refusing to defer the enrolment of biometrics until arrival in the United Kingdom, is dismissed on all grounds.

ANONYMITY

203. An anonymity direction, pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 has been in place throughout these proceedings. It was originally made on the basis that MS is a refugee and the other Applicants are his family members who, it has been claimed, were potentially at risk as a consequence, direct or otherwise.

204. We have considered whether the direction should be maintained and have concluded that this is the case. There is a weighty public

interest consideration in open justice, but, notwithstanding our analysis of the evidence in this judgment, the Applicants remaining in Afghanistan could still potentially face a risk if they were identified, whether directly or through identification of MS.

205. Therefore, 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 Applicants or members of their family. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

DISPOSAL

206. The parties are invited draw up an Order which reflects the conclusions set out in our judgment, and should include any ancillary matters.

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