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

JR-2024-LON-000082

In the matter of an application for Judicial Review

The King on the application of

RM, EM, JM & YM (RM and others)
(JM & YM by their litigation friend MM)
(Anonymity Orders made)

Applicants

versus

Secretary of State for the Home Department

Respondent

ORDER

ANONYMITY ORDER

No-one shall publish or reveal any information, including the name or address of the Applicants or their Sponsors, likely to lead members of the public to identify the Applicants or their Sponsors. Failure to comply with this order could amount to a contempt of court.

BEFORE Upper Tribunal Judge Gleeson and Upper Tribunal Judge Jackson

HAVING considered all documents lodged and having heard Ms C Kilroy KC and Ms M Knorr of Counsel, instructed by Migrants' Law Project, for the Applicants and Mr A Payne KC and Ms S Reeves of counsel, instructed by the Government Legal Department, for the Respondent at a hearing at Field House on 29 February 2024;

AND UPON the Upper Tribunal on 7 March 2024 making an Order allowing the Applicants; judicial review on ground 2, reserving the decision in relation to further grounds with reasons to follow, and granting remedies as set out in the 7 March 2024 Order.

IT IS FURTHER ORDERED THAT:

1. The Applicants' claim for judicial review is also allowed on Ground 1 for the reasons set out in the judgment.
2. In so far as the "Unable to travel to a Visa Application Centre to enrol biometrics (overseas application)" guidance version 1, dated 3 May 2023 requires 'evidence that a person faces dangers beyond the current situation in their location and along the route they need to travel' that is declared to be contrary to Article 8 of the European Convention on Human Rights.

3. The Respondent do pay the Applicants' reasonable costs on a standard basis to be assessed if not agreed.
4. The Applicants' legally aided costs be subject to a detailed assessment.
5. The Respondent's application for permission to appeal to the Court of appeal is refused.

Reasons for refusal of permission to appeal

The Respondent sought permission to appeal to the Court of Appeal on four main points. The first three concerned the findings in relation to the second, third and fourth criterion of the Unsafe Journeys guidance and the fourth in relation to the findings on Article 8 of the European Convention on Human Rights.

In respect of the first three points; it is unarguable that the Upper Tribunal failed to give adequate reasons for the findings and unarguable that the Upper Tribunal stepped in to the shoes of the primary decision maker. To the contrary, this is one of those rare cases in which the evidence only rationally permitted of one answer when applying the relevant guidance lawfully.

In relation to the Article 8 grounds, it is unarguable that the Upper Tribunal erred in considering the wrong comparator in circumstances where the Unsafe Journeys guidance was applicable worldwide and was not location specific to those in Gaza. It is unarguable that the Upper Tribunal erred in law in finding that Article 8 was engaged and breached because the Applicants were outside the jurisdiction, in circumstances where the primary focus of those findings was on the Sponsor's right to respect for private and family life, the Sponsor being resident in the United Kingdom. It is further unarguable that the Upper Tribunal erred in law in giving insufficient weight to the public interest. This part of the grounds of appeal fails to engage with the reasons given for the weight to be attached to the public interest, particularly in this case where it was not in dispute that these particular Applicants did not pose any personal risk.

Signed: G Jackson

Upper Tribunal Judge Jackson

Dated: **4th April 2024**

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): **04/04/2024**

Solicitors:
Ref No.
Home Office Ref:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a point of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).

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

JR-2024-LON-000128

In the matter of an application for Judicial Review

The King on the application of

WM, NM, LM, KM and LM (WM and others)
(NM, LM, KM and LM by their litigation friend WM)
(Anonymity Orders made)

Applicants

versus

Secretary of State for the Home Department

Respondent

ORDER

ANONYMITY ORDER

No-one shall publish or reveal any information, including the name or address of the Applicants or their Sponsors, likely to lead members of the public to identify the Applicants or their Sponsors. Failure to comply with this order could amount to a contempt of court.

BEFORE Upper Tribunal Judge Gleeson and Upper Tribunal Judge Jackson

UPON the Respondent having decided on 21 February 2024 to withdraw his decision of 5 January 2024;

AND UPON the Upper Tribunal considered all documents lodged and having heard Ms C Kilroy KC and Mr D Chirico of Counsel, instructed by the Islington Law Centre, for the Applicants and Mr A Payne KC and Ms S Reeves of counsel, instructed by the Government Legal Department, for the Respondent at a hearing at Field House on 29 February 2024;

AND UPON the Upper Tribunal on 7 March 2024 making an Order allowing the Applicants; judicial review on grounds 5 and 6, reserving the decision in relation to further grounds, with reasons to follow, and granting remedies as set out in the 7 March 2024 Order.

IT IS FURTHER ORDERED THAT:

1. The Applicants' claim for judicial review is also allowed on Grounds 4 and 7 for the reasons set out in the judgment.

2. In so far as the "Unable to travel to a Visa Application Centre to enrol biometrics (overseas application)" guidance version 1, dated 3 May 2023 requires 'evidence that a person faces dangers beyond the current situation in their location and along the route they need to travel' that is declared to be contrary to Article 8 of the European Convention on Human Rights.
3. In so far as the "Unable to travel to a Visa Application Centre to enrol biometrics (overseas application)" guidance version 2, dated 8 February 2024 requires, (i) 'evidence that a person faces dangers beyond the current situation in their location and along the route they need to travel'; ; (ii) 'circumstances unique to the individual and not related to the general conditions in the country in which they are resident'; (iii) 'that they would personally face an immediate and real risk of significant injury or harm because of personal circumstances that are unique to them when compared to the circumstances faced by the general population'; and (iv) 'that they would personally be at risk of harm which is separate to the level of risk faced by the wider population'; are declared to be contrary to Article 8 of the European Convention on Human Rights.
4. The Respondent do pay the Applicants' reasonable costs on a standard basis to be assessed if not agreed.
5. The Applicants' legally aided costs be subject to a detailed assessment.
6. The Respondent's application for permission to appeal to the Court of appeal is refused.

Reasons for refusal of permission to appeal

The Respondent sought permission to appeal to the Court of Appeal on four main points. The first three concerned the findings in relation to the second, third and fourth criterion of the Unsafe Journeys guidance and the fourth in relation to the findings on Article 8 of the European Convention on Human Rights.

In respect of the first three points; it is unarguable that the Upper Tribunal failed to give adequate reasons for the findings and unarguable that the Upper Tribunal stepped in to the shoes of the primary decision maker. To the contrary, this is one of those rare cases in which the evidence only rationally permitted of one answer when applying the relevant guidance lawfully.

In relation to the Article 8 grounds, it is unarguable that the Upper Tribunal erred in considering the wrong comparator in circumstances where the Unsafe Journeys guidance was applicable worldwide and was not location specific to those in Gaza. It is unarguable that the Upper Tribunal erred in law in finding that Article 8 was engaged and breached because the Applicants were outside the jurisdiction, in circumstances where the primary focus of those findings was on the Sponsor's right to respect for private and family life, the Sponsor being resident in the

United Kingdom. It is further unarguable that the Upper Tribunal erred in law in giving insufficient weight to the public interest. This part of the grounds of appeal fails to engage with the reasons given for the weight to be attached to the public interest, particularly in this case where it was not in dispute that these particular Applicants did not pose any personal risk.

Signed: G Jackson

Upper Tribunal Judge Jackson

Dated: **4th April 2024**

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): **04/04/2024**

Solicitors:
Ref No.
Home Office Ref:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a point of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).

Case Numbers: JR-2024-LON-000082
JR-2024-LON-000128

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Field House,
Breams Buildings
London, EC4A 1WR

4th April 2024

Before:

UPPER TRIBUNAL JUDGE GLEESON
UPPER TRIBUNAL JUDGE JACKSON

- -

Between:

THE KING
on the application of

RM, EM, JM & YM (RM and others)
(JM & YM by their litigation friend MM)
(Anonymity Orders made)

WM, NM, LM, KM and LM (WM and others)
(NM, LM, KM and LM by their litigation friend WM)
(Anonymity Orders made)

Applicants

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- -

Ms C Kilroy KC and Ms M Knorr
(instructed by Migrants' Law Project), for the Applicants in RM and others
Ms C Kilroy KC and Mr D Chirico
(instructed by Islington Law Centre), for the Applicants in WM and others

Mr A Payne KC and Ms S Reeves
(instructed by the Government Legal Department) for the Respondent

Hearing date: 29 February 2024

- -

J U D G M E N T

- - - - - - - - - - - - - - - - - - - -

ANONYMITY ORDER

No-one shall publish or reveal any information, including the name or address of the Applicants or their Sponsors, likely to lead members of the public to identify the Applicants or their Sponsors. Failure to comply with this order could amount to a contempt of court.

Judge Jackson:

1. These two cases have been linked to be heard together as they both raise similar issues in relation to requests for either pre-determination of an application for entry clearance to the United Kingdom to join a family member prior to the completion of biometric enrolment and/or deferral from biometric enrolment until after arrival in the United Kingdom (known as biometric excuse).

2. The Applicants are currently displaced persons within Gaza, where there is no current functioning Visa Application Centre ("VAC") that they could attend to enrol their biometric information, which is usually required before substantive consideration is given to an application. It is common ground that the Applicants face significant difficulties in exiting Gaza to attend a VAC in another country, such as that in Cairo, Egypt.

3. Anonymity orders are made in respect of all Applicants and their Sponsors in the United Kingdom in light of their general circumstances and also having regard to specific information about vulnerabilities of each of them, most of whom are also children.

4. Litigation friends have been appointed in respect of all of the minor Applicants, in the case of RM and others, that is their Sponsor, MM and in the case of WM and others, that is their mother, the First Applicant, WM.

5. These two cases were both expedited to varying degrees and listed together for an urgent hearing on 29 February 2024. The Upper Tribunal was invited to give an oral decision without reasons on the day of the hearing which was ultimately not practicable or possible to do. However, given the urgent nature of the claims and for reasons of expediency, an oral decision was given on 7 March 2024 to find in the Applicants' favour on the ground of Article 8 of the European Convention on Human Rights (with the decision on all other grounds reserved) and to quash all of the Respondent's decisions as a disproportionate interference with the Applicants' and Sponsors' rights to respect for private and family life. Orders were agreed in respect of both cases on that basis. This is the full decision on all grounds with reasons.

Legal Framework

The Immigration (Biometric Registration) Regulations 2008

6. If an individual applies for entry clearance to the United Kingdom for a period of six months or more, they are required to apply for a biometric immigration document at the same time as the application, pursuant to Regulation 3A of the Immigration (Biometric Registration) Regulations 2008 (as amended). There would not normally be substantive consideration of any such application for entry clearance prior to the registration of their biometrics, which includes a record of an individual's fingerprints and photograph of their face (subject to certain exclusions set out in guidance). Provision as to the process of obtaining the same is set out in Regulation 8.

7. Regulation 5 of the Immigration (Biometric Registration) Regulations 2008 provides for a discretion to require that a person provide their biometrics (as opposed to a discretion to dispense with a mandatory requirement) as follows:

> "5 – (1) Subject to regulation 7 [which is not relevant], where a person makes an application for the issue of a biometric immigration document in accordance with … 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), a person must provide it."

8. There is further provision in Regulation 6 for the use and retention of finger prints/photographs retained by the Respondent, allowing him to use or retain a record of a person's fingerprints or photograph of a person's face in his possession for the purposes of the Immigration (Biometric Registration) Regulations 2008.

Biometric enrolment: policy guidance, v.9

9. The Respondent published version 9 of the Biometric enrolment policy guidance on 24 of October 2023[1] which explains to immigration officials and caseworkers the overarching policy requirements for enrolment of biometric information for persons subject to immigration control and how to apply for a biometric immigration document. The purpose of the biometric enrolment is said to be to record an individual's biometric information and to seek to verify the claimed identity, with high quality biometric data resulting in more accurate comparison with those at a later date and within an enrolment. The guidance covers who is required to enrol their biometrics, who is exempt from enrolling biometrics and which biometrics must be enrolled. The introductory section sets out as follows:

> "Biometrics, in the form of fingerprints and facial images, underpin the current UK immigration system to support identity assurance and suitability checks on foreign nationals who are subject to immigration control. Information about biometrics is contained in the policy guidance Biometric Information: introduction.

[1] A further version 10 of this policy was published on 8 February 2024, which is not referred to in any detail in this decision because it post-dates the decisions under challenge and/or has not been directly relied upon in the latest decisions in respect of any of the Applicants.

> We use biometrics to fix and confirm the identities of all foreign nationals who are required to apply for an Electronic Travel Authorisation (ETA), to apply for entry clearance or are applying to 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."

10. In relation to whether a person could be excused from providing biometric information, the policy goes on to state:

> "Individuals who are required to apply for a visa or a biometric immigration document **must**, in most circumstances, enrol their biometrics as part of their application at a VAC or other location authorised by the Secretary of State, unless they are excused, or officials have decided to use previously enrolled biometrics. Officials **must**, in most circumstances, not consider an application until checks against the individual's biometrics are completed, except where the individual is excused from having to enrol their biometrics before the application is decided. This is to ensure officials can confirm the identity and suitability of the individual before considering whether they are eligible for the leave or status being sought."

11. The guidance cross refers to the Unsafe Journeys guidance which must be followed where an individual is applying to come to the United Kingdom from overseas and claims it is too unsafe for them to travel to a VAC to enrol their biometrics. Where there are short-term reasons why an individual cannot attend an enrolment centre overseas to enrol their biometrics, for example in medical cases, the guidance states that they should normally delay their plans until they can get to an enrolment centre. The guidance goes on to state:

> "Officials will not normally defer or waive the requirement to provide biometric information, unless there are circumstances that are so compelling as to make them exceptional and which are beyond the control of the individual."

12. In addition, the guidance requires consideration of whether biometric information previously given can be reused and cross refers to guidance specifically on that issue, 'Biometric reuse' version 4 issued on 20 June 2023, which covers individuals who hold a valid biometric residence permit or biometric residence card, enabling them to reuse fingerprint biometric information when making applications under specified routes for leave to remain.

Unable to travel to a Visa Application Centre to enrol biometrics (overseas applications), v.1

13. The 'Unable to travel to a Visa Application Centre to enrol biometrics (overseas applications)' version 1 (the "Unsafe Journeys guidance") is said to be expressly for those who claim that it is too unsafe to travel to a VAC to enrol their biometrics and sets out the process for them to request their application be pre-determined before they attempt travel to a VAC, or ask to be excused from having to attend a VAC before travelling to the United Kingdom because they claim the journey to it is unsafe. It is said to be primarily aimed at individuals applying to join sponsoring family members in the United Kingdom.

14. *Pre-determination.* "Pre-determination" is defined as meaning that the Respondent will "[assess] the individual's entry clearance application before they give their biometrics and if they meet the requirements of the relevant Immigration Rules a provisional decision is made, subject to the individual attending a VAC and enrolling their biometrics (where the pre-determination is positive, entry clearance will only be granted after biometrics submitted and background checks are completed and there are no adverse results which would mean the individual does not meet the requirements of the Immigration Rules)."

15. *Biometric excuse.* The alternative, "biometric excuse", is defined as meaning that "the individual is excused from attending a VAC to enrol their biometric information and the requirement to provide biometrics will be normally deferred until after the individual has been granted entry clearance and arrived in the UK."

16. The guidance sets out the requirement for an individual to first make an online application for entry clearance and then to contact UKVI to request either pre-determination or biometric excuse. There is an expectation that individuals should attempt to resolve their difficulties before such a request is made and consider delaying their journey until it is safe and consider alternative options or potentially delay their application. The guidance then sets out the following as to the correct application route:

> "In most circumstances, decision makers **must not** consider any requests individuals make to either predetermine their application or excuse them from the requirement to attend a VAC to enrol their biometric information unless they have applied using the correct route for their circumstances and the correct application form for that route. If the individual appears to have applied on the wrong route or used an incorrect application form for their route, decision makers should notify them of this and ask if they wish to withdraw the current application. Applications made on the wrong form or where the wrong fee is paid may be liable to be treated as invalid and rejected without consideration.
>
> Where the application is for leave outside the rules (LoTR) an individual who is applying from overseas is required to use the form closest to their circumstances. Guidance on making LoTR applications is set out in the

> Leave outside the rules guidance. Where an individual wants an application fee to be waived, they **must** follow the Fees guidance."

17. The guidance sets out important principles as follows:

> "Any decision to predetermine or excuse an individual from the requirement to attend a VAC to enrol their biometric information should be an exceptional occurrence, because biometrics are an essential part of ensuring we protect the public. Decision makers should only offer to predetermine an application or excuse individuals from the requirement to attend a VAC to enrol their biometric information, where the individual circumstances are so compelling as to be exceptional and there are no alternative options.
>
> Decision makers must only agree to predetermine an application or excuse the requirement of individuals to attend a VAC to enrol their biometric information in exceptional circumstances. This applies, even when individuals find it difficult to safely travel to a VAC, unless they can demonstrate their circumstances are so compelling as to make them exceptional and to refuse to predetermine their application or waive the requirement for them to attend a VAC to enrol their biometric information would be a disproportionate barrier to them completing an application to come to the UK.
>
> Any offer to predetermine the individuals' application or excuse individuals from the requirement to attend a VAC to enrol their biometric information should be sufficient to enable them to complete their application to come to the UK. This means decision-makers will not offer to excuse the requirement for individuals to attend a VAC in circumstances where predetermining their application is sufficient.
>
> Decision makers must not offer to predetermine an application or excuse the requirement to attend a VAC to enrol biometric information in circumstances where individuals have no reasonable prospect of being able to travel to the UK. This includes circumstances where they are detained in prison, or where their circumstances are not compelling, such as they could travel to an alternate VAC location."

18. The guidance sets out four criteria which must be considered and agreement should only be given to predetermine an application or excuse individuals from the requirement to attend a VAC to enrol their biometric information where an individual can demonstrate they meet all four of the following criteria:

> "1. Individuals **must** satisfy a decision maker about their identity to a reasonable degree of certainty before coming to the UK.
>
> 2. They **must** provide evidence they need to make an urgent journey to a VAC that would be particularly unsafe for them based on the current situation within the area they are located and along the route where they would need to travel to reach a VAC to enrol their biometrics, and they cannot delay their journey until later or use alternative routes.
>
> 3. They **must** demonstrate their circumstances are so compelling as to make them exceptional, which go beyond simply joining relatives who are living in the UK, for example, the UK based sponsor requires full-time care

and there are no other viable alternatives to meet the sponsor's or the young children's needs.

4. They **must** confirm they are unable to travel to any VAC if they want their application to be predetermined, or where they are requesting decision makers to excuse them from the requirement to attend a VAC to enrol their biometrics, they need to explain why they cannot attend any VAC but are able to travel to the UK."

19. Decision makers are to provide written reasons for each of the criteria, where they consider the individual has not provided sufficient evidence to demonstrate that they meet the requirements. Each of the four criteria is then explained in greater detail in later sections of the guidance. With regard to the second criterion, unsafe journey, the detail includes:

"Decision makers **must** not normally agree to predetermine an application or excuse the requirement to attend a VAC just because individuals consider their journey to the VAC is unsafe. Individuals **must** provide evidence they:

- face dangers beyond the current situation that exist in area where they are located and along the route where they would need to travel to reach a VAC to enrol their biometrics and there are no alternative routes they could use
- personally face an immediate and real risk of significant injury or harm because of their personal circumstances, if they attempt to travel to any VAC
- have an overriding need to travel urgently and cannot delay their journey
- are in an area of ongoing conflict or the area has become unsafe following a catastrophic natural disaster or where travelling to any VAC is through an area of conflict and there are no alternative options available to them
- needed to travel to an unsafe location, when they could have simply travelled to another place to provide their biometric information

Other factors decision makers **must** also have regard to when making that assessment include:

- vulnerabilities such as the individual as a lone female, they are frail or they are a young child with demonstrable evidence there is no protection available to them either by relatives, governmental or Non-Governmental Organisation (NGO) to assist them to travel to any VAC
- mental or physical health issues with demonstrable evidence this prevents them from travelling to any VAC but **not** travelling to the UK

decision makers must consult a range of data sources when undertaking an assessment of the journey the individuals need to make to be able to attend any VAC, which may include NGO, open-source information, foreign government assessments and other government departments when considering the levels of risk the individual may face attempting to travel to a VAC.

20. In relation to compelling circumstances, decision makers are advised that they should not regard an individual's circumstances as being compelling unless they are applying to join family members who are sponsoring them to join them in the United Kingdom, where such family members have protection status, are settled in the United Kingdom or are British citizens and there is an urgent need to travel. Further, decision makers must consider the circumstances of the Sponsor in the United Kingdom, including under Article 8 of the European Convention on Human Rights and there is a cross reference to the guidance on family and private life when considering the impact on the sponsor.

21. In relation to the ability to travel to a VAC, an applicant must confirm that they will be able to travel to any VAC to enrol their biometric information within 240 days of submitting the online application and before travel to the United Kingdom; failing which an application may be disregarded. The guidance makes clear that decision-makers will not be able to guarantee an individual safe passage to a VAC or to provide them with assistance to enable them to cross borders.

22. If a positive predetermination decision is reached, the applicants must then attend a VAC to enrol their biometric information within 240 days and in doing so must bring any travel documents to enable checks to be completed and a vignette to be fixed to the document. This includes any travel documents which have been obtained since the positive predetermination decision. Once the biometric information has been given and any outstanding background identity security checks have been made, the decision-maker will then make a final decision on the application for entry clearance.

23. If a negative predetermination decision is reached, there may be a right of appeal to the First-tier Tribunal, and if that appeal is successful, then the same process as above is to be followed in terms of obtaining biometric information.

24. The guidance also tells decision-makers how to consider a request to excuse the requirement for an individual to attend a VAC to enrol their biometric information, in circumstances where all four criteria are met and this is a last resort, for example with evidence of an urgent need to come to the United Kingdom which overrides the need to ensure public safety. This is anticipated only to apply to a few individuals who could not travel to an alternative VAC in relative safety.

Unable to travel to a Visa Application Centre to enrol biometrics (overseas applications), v.2

25. The second version of the 'Unable to travel to a Visa Application Centre to enrol biometrics (overseas applications)' (the "Unsafe Journeys guidance v.2") was issued on 8 February 2024 and is relevant only in respect of the Third Decision in WM and others which reviewed and maintained the Second Decision under the latest version of the policy.

26. The changes in the second version of the guidance state that they are to make clear that (i) a person may either request predetermination or biometric excusal and not both; (ii) where individuals meet the compelling circumstances criterion under the guidance, it should not be interpreted as meaning that they also meet it for the purposes of the substantive entry clearance application; and (iii) the purpose of predetermination is not to support an application to another non-UK authority for entry or exit permits needed to enable an individual to travel to a third-country.

27. In substance much of the guidance is the same with the following relevant additions. In relation to the correct application form, the guidance now also states:

> "Decision makers **must** take account of the status of the sponsor when considering whether the individual has used the correct application route to their circumstances. In most circumstances, the decision makers may treat an application as invalid and will not consider the request where the individual has used the family reunion application form and the UK based sponsor does not have protection status in the UK or is a British citizen as there are other application routes that are more appropriate."

28. There is a further expectation of individuals that they should resolve any challenges in coming to the United Kingdom themselves or delay their journey to the United Kingdom until they are able to travel to a VAC, including the ability to address any entry or exit requirements to enable them to travel to a VAC outside of the country where they are located should they need to cross international borders. In addition to the requirement that decision-makers must not offer to predetermine applications or excuse requirement to attend a VAC to enrol biometric information in circumstances where individuals have no reasonable prospect of being able to travel to the United Kingdom, it is added that this includes circumstances where they are unable to leave the country due to the prevailing circumstances there.

29. The important principles section now states in relation to compelling circumstances:

> "Circumstances are considered to be so compelling as to be exceptional if they are unique to the individual and are not related to the general conditions in the country in which they are resident."

30. In relation to the Unsafe Journey criteria, detailed guidance has been added to require an individual to demonstrate that they would personally face an immediate and real risk of significant injury or harm because of:

> "…personal circumstances that are unique to them when compared to the circumstances faced by the general population. …In most cases, decision-makers will not agree to an individual's request to predetermine their application or excuse the requirement for them to attend a VAC to enrol their biometric information, unless the individual provides objective evidence that shows they would personally be at risk of harm which is separate to the level of risk faced by the wider population. It will not be

sufficient to simply claim the journey to a VAC is dangerous, or a conflict is ongoing."

RM and others

31. The Applicants in RM and others are a husband, wife and their two children, aged 13 and 17. They made an application on 14 November 2023 for entry clearance to join the daughter of the adult Applicants/sibling of the minor Applicants, who is currently in the United Kingdom with leave to remain as a Global Talent Migrant, pursuant to which she had arrived here on 5 October 2024. The applications were made on a form for Family Reunion under Appendix Family Reunion (Protection) (form VAF4A plus Appendix 4) but were expressly applications for leave outside of the Immigration Rules.

32. In the representations which accompanied the applications, there was an explanation of the form used as the closest one to the circumstances given that the Applicants could not meet the requirements as dependents under the Global Talent route which was not inherently a human rights route and on the basis that the Sponsor is now a *sur place* refugee in accordance with Article 1D of the Refugee Convention. The Sponsor is registered with UNWRA as a Palestinian refugee in Gaza, but the UNWRA has ceased to be able to provide protection and assistance.

33. In respect of RM specifically, a request was made to reuse her biometric information taken for a visit visa to the United Kingdom which was issued on 30 May 2022 and valid to 30 November 2022. In the alternative and in respect of the other Applicants, there was a request for predetermination of their applications and/or biometric excuse. A request for urgent consideration and a decision within seven days in view of the situation was made on 15 November 2023.

34. The Applicants are internally displaced within Gaza, having fled their home in Rimal, Gaza City, at the beginning of the conflict after the building in front of theirs was destroyed and their home damaged. The Applicants doubt that their family home is still standing. They are currently staying in an overcrowded apartment with other relatives in Deir al-Balah in southern Gaza; an area heavily targeted by tanks and airstrikes and where there is a lack of food, clean water and access to medical treatment. Nearby homes have been destroyed and close friends have been killed and injured, including the Sponsor's best friend and her entire family; as well as many school friends of YM. Communication between the Sponsor and Applicants is very difficult due to conditions in Gaza.

35. The Applicants are suffering from acute mental distress and are fearful of dying in addition to the daily trauma of living in a conflict zone. In particular, YM describes feeling depressed and suicidal and JM is unable to speak more than a few words, suffering from trauma and unable to sleep. There is a formal report in respect of the Sponsor by Dr Hyde, Clinical Psychologist, who describes her as having post-traumatic stress disorder, severe major depressive disorder and suffering from severe

anxiety and panic attacks. The evidence from the Sponsor and a number of her friends and tutors consistently describe her daily functioning as severely impaired due to the current situation.

36. On 22 December 2023, the Respondent refused to predetermine the applications or excuse the biometrics (the "First Decision"). At the outset, the Respondent stated that the Applicants had not used the most appropriate form for their applications and as such, their applications should be rejected as invalid, in particular because the Sponsor does not have protection status in the United Kingdom and therefore would not meet the requirements under Appendix Family Reunion (Protection). The most appropriate form was considered to be one under the Global Talent route as that is the basis of the Sponsor's status in the United Kingdom. Notwithstanding that and an invitation for a new application to be made using a different form, the Respondent went on to consider the Unsafe Journeys guidance, but found that there was insufficient evidence to show that all of the criteria were met as the Applicants had not provided sufficient evidence that they could travel to a VAC. As such, the Respondent did not offer any predetermination or biometric deferral and the Applicants were advised to apply again using the correct application form and provide the biometrics at a VAC to progress their applications.

37. The application for permission to apply for Judicial Review was issued on 18 January 2024. An expedited timetable was ordered and permission was granted on 8 February 2024 by UTJ Gleeson; following which amended grounds of challenge were agreed by consent.

38. On 2 February 2024 the Respondent issued a further decision, (the "Second Decision"), said to be in response to factual developments since the First Decision and matters raised in response to it. The earlier decision was however maintained as although the Applicants' identities were accepted for the purposes of predetermination (although not for a biometric excuse), they did not meet the other three criteria in the Unsafe Journeys guidance. The Respondent stated that in light of that decision, it was not necessary to decide whether the most appropriate form for the applications had been utilised; but that would be revisited afresh if the applications are considered and would be done on the basis of circumstances existing at that time. However, it was maintained that the most appropriate form had not been used and the request for predetermination and/or biometric excuse would be considered on an exceptional basis.

39. In relation to travel to a VAC, the Respondent stated that there was no explanation or evidence as to the nature or identity of those with whom the Applicants would negotiate an exit from Gaza or how a positive predetermination decision could assist in any such negotiations. The Respondent then set out his understanding of the process to allow a person to leave Gaza, which included a request being made to the Israeli authorities (with whom there was no evidence of any possibility of negotiation or payment of a bribe) and if accepted, a further request needed to be made to the Egyptian authorities. A request to the Israeli authorities by individuals seeking to travel to the United Kingdom can

currently only be made by being placed on the Foreign, Commonwealth and Development Office ("FCDO") referral list. The criteria for inclusion on the referral list includes British nationals and United Kingdom Visa holders who have a spouse/partner or a child aged 17 or under currently living in the United Kingdom and who holds permission to enter or remain in the United Kingdom for longer than six months.

40. At present none of the Applicants meet the criteria for inclusion on the FCDO referral list and even a positive predetermination decision would not equate to valid permission to enter or remain in the United Kingdom for longer than six months. The Respondent noted that the FCDO have a residual discretion to include individuals outside of the published criteria for inclusion but that no such requests have been made by these Applicants, nor was there any evidence that a predetermination decision would be relevant to the exercise of any such discretion. Overall therefore it was considered that it was too speculative to attach weight to the possibility of assistance being given by the FCDO on an exceptional basis, to assist the Applicants to exit Gaza. In the alternative, it was also not accepted that there was sufficient evidence of any realistic prospect of any third country assisting the Applicants to do the same, nor that any such assistance would become available with a positive predetermination decision.

41. The Respondent also did not accept that there was any explanation as to how the Applicants would get their passports to a VAC to be endorsed with a visa or how they could be collected for use and as two passports had expired, there was no information as to how those Applicants would be able to attend a VAC to be issued with an alternative Form to Attach a Visa for the purpose of travel.

42. In relation to an unsafe journey, the Respondent set out briefly the Applicants' circumstances and noted that: *"No reasons have been identified, nor put forward that the family are of a targeted interest from those directly involved in the fighting ongoing in Gaza."* He considered that there was a lack of objective evidence to show they would personally be at risk of harm. The letter goes on to state that whilst deserving of great sympathy, the circumstances of the Applicants:

> "…are similar to the very difficult circumstances faced by the wider population of that territory and do not attest to a particular circumstance that would mean that your clients as individuals would face an Unsafe Journey in comparison to other people living on the territory. Whilst the situation in Gaza is undoubtedly very difficult, I am not satisfied that your clients have demonstrated that they are at personal risk, need to make an urgent journey, or that any such journey would be particularly unsafe for them over and above other persons currently living in the territory."

43. In relation to compelling circumstances, the Respondent stated that the Applicants had not provided information as to why their circumstances were different to those of other people currently living in Gaza and in respect of the Sponsor, there is medical care and support available in the United Kingdom. Article 8 is then considered, but it is not accepted that

the refusal to predetermine or agree a biometric excuse would interfere with any Article 8 rights of the Sponsor because there is no reasonable prospect of the Applicants leaving Gaza. In any event, even if there was an interference, it would be proportionate when balanced against the weighty public interest in obtaining biometrics prior to an entry clearance application being decided.

44. The Respondent sets out the very important role played by biometrics in securing effective immigration control and protecting the national security of the United Kingdom. It underpins the United Kingdom's immigration system to support identity assurance and suitability checks on foreign nationals who are subject to immigration control. Further, it provides a unique capability to conduct comprehensive checks to prevent leave being granted to those who pose a threat to national security or are likely to breach the laws of the United Kingdom.

45. The Respondent refers to the public interest in the protection of national security, the prevention of crime and protection of borders which would be placed at risk if biometric checks are not undertaken prior to arrival in the United Kingdom. It would also heighten the risk of an individual entering the United Kingdom who would normally be refused on non-conducive grounds and may prevent the ability to return them to their country of origin. A further policy reason for requiring fingerprint biometrics is to prevent abusive applications being submitted using multiple identities.

46. The Respondent's conclusion on Article 8 was:

> "40. In considering Article 8, I note that your clients are in a family group who are residing with other family members in a flat in Deir al Balah, Southern Gaza. Although there are difficulties in obtaining food and water it is not suggested that they have been unable to do so. Their position is not therefore materially different to other people in Gaza. As for the sponsor I note that she has support in the UK by way of friendship groups and can access medical treatment if this is needed. As such, having regards to the current family circumstances, the decision not to predetermine the applications or permit a biometric excuse would, if Article 8 is engaged, be proportionate and not breach Article 8 ECHR."

47. Finally the Respondent considered that section 55 of the Borders, Citizenship and Immigration Act 2009 does not strictly apply outside of the United Kingdom, albeit the guidance in relation to it applies the spirit of the same to such cases. However, the evidence provided did not support the proposition that the Applicants are at particular risk beyond any other individual in Gaza.

48. As to the separate request for RM to reuse her biometric information given for her visit visa issued in 2022, this was refused on the basis that she had not been issued with a BRP or BRC, nor was her application in one of the routes eligible for biometric reuse in accordance with the Biometric Reuse guidance.

WM and others

49. The Applicants in WM and others are a mother and her four minor children, aged between three and nine years. They made an application on 1 December 2023 for entry clearance to join the first Applicant's brother/minor Applicants' uncle who is a British citizen living in the United Kingdom with his wife and young baby. The applications were made on a form designed for family reunification under Appendix Family Reunion (Protection) but were expressly an application for leave outside of the Immigration Rules.

50. On the same date the Applicants made a request to the Respondent to defer the requirement that they enrolled their biometric information at a VAC until after a decision has been taken in principle on their applications, i.e. a request for predetermination. There was a further request for expedition of either or both of the substantive applications and the request for predetermination. These requests were accompanied by detailed reasons and representations as to the current circumstances of the Applicants and the risks to them in Gaza.

51. The Applicants are currently internally displaced within Gaza where they are said to be living in the most precarious conditions, facing imminent danger both generally because of the ongoing conditions within Gaza as an active conflict zone, including significant shortages of basic necessities and more specifically because they are living in overcrowded conditions with other family members in a container where they face the risk of ongoing direct and indirect domestic violence from the First Applicant's husband/minor Applicants' father with whom circumstances have forced them to live. The First Applicant had previously separated from her husband due to domestic violence, and divorce proceedings were ongoing at the time the most recent conflict in Gaza started.

52. The Applicants have been internally displaced within Gaza on two occasions already, initially from their home in the Jabalia Camp in the north of Gaza and then from the al Maghazi camp in central Gaza to where they initially relocated. They are currently in Rafah. In all three locations, there have been military attacks, with members of their family being killed and buildings nearby damaged or destroyed. All applicants were previously protected by UNWRA until, because of the conflict, they were unable to offer them protection.

53. The Sponsor has been assessed as presenting with moderately severe depression, survivor guilt and severe anxiety, directly related to the current situation in Gaza and the danger to the lives of his family members. This includes the Applicants, as well as wider family members also resident in Gaza.

54. On 21 December 2023, the Applicants issued an application for permission to apply for Judicial Review (JR-2023-LON-002810) challenging the Respondent's delay in responding to either of the applications made on 1 December 2023. That application was settled by consent on 3 January 2024 on terms that the Respondent would reach a decision on

the request for predetermination of the entry clearance applications by 4pm on 5 January 2024.

55. On 5 January 2024, the Respondent rejected the Applicant's application for entry clearance (the "First Decision") and declined to consider their applications for predetermination of those applications on the basis that they had not used the application form closest to their circumstances, which was that under the Appendix FM of the Immigration Rules route.

56. This application for permission to apply for Judicial Review was issued on 23 January 2024, following pre-action correspondence. An expedited timetable was ordered, albeit not complied with fully by the Respondent and permission was granted by UTJ Rimington on 8 February 2024.

57. On 9 February 2024, the Respondent issued a further decision which stated that the issue of the appropriate route for the application would be assessed afresh if the application for entry clearance was substantively determined and went on to reject the request for predetermination and any request for biometric excuse (the "Second Decision").

58. The Second Decision reiterates the conclusion in the First Decision that the Applicants' applications were, in accordance with Appendix Family Reunion (Protection); the 'Family reunion: for individuals with protection status in the UK' guidance, v.10 and the Unsafe Journeys guidance, not made on the most appropriate application form and should have been treated as invalid and not amenable to predetermination for that reason. However, the Respondent considered the particular circumstances of the Applicants and on an exceptional basis considered the request to predetermine the application in accordance with the Unsafe Journeys guidance. It was additionally made clear, for the avoidance of doubt, that the issue of the appropriate route will be assessed afresh if the application is substantively determined and by reference to the situation which exists as at that date.

59. The Second Decision sets out the Respondent's assessment of the four criteria for a predetermination or biometric excuse under the Unsafe Journeys guidance. In respect of identity, it was accepted that all of the Applicants' identities have been established for the purposes of predetermination of their applications; although not accepted that there was sufficient evidence of their identity for the purpose of a biometric excuse.

60. In relation to travel to a VAC, the Respondent set out his understanding of the process to allow a person to leave Gaza, which included a request being made to the Israeli authorities and if accepted a further request to the Egyptian authorities. A request to the Israeli authorities for individuals seeking to travel to the United Kingdom can currently only be made by those who have been placed on the FCDO referral list. The criteria for inclusion on the referral list includes those who are British nationals and United Kingdom Visa holders who have a spouse/partner or a child aged 17 or under currently living in the United Kingdom and hold

permission to enter or remain in the United Kingdom for longer than six months.

61. At present none of the Applicants meet the criteria for inclusion on the FCDO referral list and even a positive predetermination decision does not equate to valid permission to enter or remain in the United Kingdom for longer than six months. The Respondent noted that the FCDO have a residual discretion to include individuals outside of the published criteria but that no such requests have been made by these Applicants, nor was there any evidence that a predetermination decision would be relevant to the exercise of any such discretion. Overall therefore it was considered that it was too speculative to attach weight to assistance being given by the FCDO on an exceptional basis to assist the Applicants to exit Gaza. In the alternative, it was also not accepted that there was sufficient evidence of any realistic prospect of any third country assisting the Applicants to do the same, nor that any such assistance would become available with a positive predetermination decision.

62. In addition, the Respondent was not satisfied that the Applicants had established that they would in the alternative be able to travel to the United Kingdom if a biometric excuse was given as not all of the Applicants have a valid travel document, nor could they, for the reasons already given, attend a VAC to be issued with a Form to Attach a Visa.

63. In relation to the unsafe journey criteria, the Respondent refers to the circumstances of the Applicants in Gaza, that they are in an area of ongoing fighting but have access to food, water, internet and electricity and there is nothing to suggest that they are of a targeted interest from those directly involved in the fighting. It was not accepted therefore that they would be personally at risk of harm and in circumstances similar to the very difficult circumstances faced by the wider population in Gaza. Further, any such journey by the Applicants would not be particularly unsafe for them over and above other persons currently living in the territory.

64. In relation to the compelling circumstances criteria, the Respondent sets out the Applicants' living circumstances and wider family in Gaza, noting the evidence of domestic violence to the First Applicant but stating that there was no evidence that the children were directly at risk from their father or his family and there is no evidence of whether they have sought to live with other family members instead. The Applicants have limited accommodation and limited access to food and water, such that they are not at any greater risk of harm compared to others who are in Gaza. Specifically the Respondent stated, "I do not consider that the evidence provided indicates that your client is distinguishably vulnerable, whether having regard to their particular circumstances or by comparing their circumstances to others living in Gaza.".

65. The Respondent also refers to the Sponsor's circumstances in the United Kingdom and medical evidence in relation to him, adding the following conclusions:

> "36. Without minimising any stress or anxiety caused to the sponsor and the potential benefit of your clients being able to come to the UK, I am not satisfied your clients have demonstrated circumstances which are so compelling as to make an exception. It is noted that your client has other family members in Gaza for support, as the evidence suggests that, if there are difficulties with her former husband, your client has other options of places to live.
>
> 37. In respect of the Sponsor, unfortunately, many persons who have family members in Gaza are caused distress and anxiety because of the situation in Gaza and their separation from family members. Whilst it is noted that unfortunately the situation in Gaza has exacerbated his pre-existing condition, there is no evidence that he is currently a risk of suicide, and the sponsor can (if necessary) access medical care and support whilst in the UK. He has his immediate family with him, as well as his friends, and the unfortunate reality is that the Sponsor has many family members in Gaza, including his mother and siblings, whose continued presence in Gaza is likely to cause him stress and anxiety. Should the position change regarding the sponsor's health, a further request can be made."

66. In relation to Article 8 of the European Convention on Human Rights, the Respondent stated:

> "39. Since your clients have not established any reasonable prospect of leaving Gaza it is not accepted that the decision to not pre-determine or excuse from the requirement to attend a VAC, to enrol biometric information, interferes with the Article 8 rights of the family member in the UK.
>
> 40. Even proceeding on the basis that Article 8 could be engaged in a refusal to predetermine or excuse from the requirement to attend a VAC, the application does interfere with the family's Article 8 rights, any interference is considered proportionate to the weighty public interest in obtaining biometrics prior to an entry clearance application being decided.
>
> 41. From the evidence submitted, it is considered that the relationship between the lead applicant, [WM], and the Sponsor is one of a normal sibling relationship, where support is provided not just to each other but to the other family members as well. In the Sponsor's Witness Statement, he covers that your lead client, and he were studying in the United States at the same time, seeing each other most weekends and are close (paragraph 60). It is also stated that they confided in each other about their personal relationships, and also your lead client initially spoke to the Sponsor initially the difficulties of her marriage to her husband, before drawing in other family members for support (Sponsor's Witness Statement paragraph 106 – 114). The Sponsor has been in the UK since 2014 and has visited his family in Gaza, including your client, since being in the UK. There is nothing further to suggest he is the only person who can provide support your clients noting the presence of other family in Gaza, including adult siblings. In addition, the Sponsor has his own family in the UK for support.
>
> 42. In considering Article 8, I note that your clients are a family group who are residing in Al Maghazi , in Central Gaza and, whilst reference is made to domestic challenges where your clients are currently staying, it is noted that there are other family members in Gaza with whom the family could stay. Also, although there are difficulties in obtaining food and water it is

> not suggested that they have been unable to do so and, for the reasons already given, their position therefore whilst very difficult is not materially different to the resource-based difficulties faced by other people in Gaza.
>
> 43. As for the Sponsor, for the reasons already given, the exacerbation of his mental [sic health] is caused by the presence of many of his family members in Gaza, and whilst this is unfortunate, he has support by way of his immediate family in the UK and can access support and medical treatment."

67. The Respondent goes on to set these considerations against the very important role played by biometrics in securing effective immigration control and protecting the national security of the United Kingdom. These underpin the United Kingdom's immigration system to support identity assurance on suitability checks on foreign nationals who are subject to immigration control and provide a unique capability to conduct comprehensive checks to prevent being granted to those who pose a threat to national security or are likely to breach the United Kingdom laws. Further, these checks are particularly important in relation to protecting the United Kingdom from the threat of terrorism, and Gaza, alongside Israel and the wider Occupied Territories, are assessed by the FCDO as 'very likely' to continue to see terrorist attacks, including by individuals acting alone. Hamas is a proscribed terrorist group under the Terrorism Act 2000 and they view British nationals as legitimate targets.

68. The Respondent refers to the public interest in the protection of national security, the prevention of crime and protection of borders which would be placed at risk if biometric checks are not undertaken prior to arrival in the United Kingdom. It would also heighten the risk of an individual entering United Kingdom who would normally be refused on non-conducive grounds and may prevent the ability to return them to their country of origin. A further policy reason for requiring fingerprint biometrics is to prevent abusive applications being submitted using multiple identities.

69. In conclusion, having regard to the family circumstances and the public interest, the Respondent concluded that even if Article 8 is engaged, the decision not to undertake a pre-determination or biometric excuse is proportionate and does not breach Article 8 of the European Convention on Human Rights. Finally, there is reference to section 55 of the Borders, Citizenship and Immigration Act 2009, which does not strictly apply to children outside of the United Kingdom but guidance requires adherence to the spirit of the duty in those circumstances. There is a repeated reference to the evidence not supporting the proposition that the Applicants are at particular risk beyond any other individual in Gaza and it is not asserted that they are facing risk because of who they are currently living with in Gaza. Separately the Sponsor's child has the support of their mother and father with them in the United Kingdom.

70. On 21 February 2024, the Respondent issued a further decision (the "Third Decision") which firstly formally withdrew the First Decision; and secondly reviewed the Second Decision in light of the recently published

Unsafe Journeys guidance v2, dated 8 February 2024. Without any further substantive consideration or reasons, the Second Decision was maintained.

The common grounds of challenge

(i) Common law grounds

71. At the substantive hearing, Ms Kilroy KC made a single set of submissions on these grounds of challenge in respect of the Applicants in both cases. Before turning to those submissions and the response to them, we set out for completeness the way in which each case was put originally in the grounds of claim as these contain further detail which we appreciate could not necessarily all be covered orally given the time constraints of the hearing. We also note at the outset that to some extent the Article 8 claims overlap with these common law grounds of challenge to the policy, but deal with those separately so far as possible.

72. The first ground of challenge in RM and others is that the Respondent's First Decision is unlawful because it is not in accordance with the Unsafe Journeys guidance as the Applicants' circumstances fall squarely within it, and/or no adequate reasons have been given for the conclusion that the Applicants do not have a reasonable prospect of exiting Gaza to provide biometric information at a VAC (the only reason given for refusal in the First Decision). In respect of the Second Decision, the Respondent fails to properly consider all relevant matters within the available policies or as a matter of general discretion; and elevates one aspect of the Respondent's policy to a rigid criterion which fetters discretion.

73. In the grounds of claim for WM and others, these grounds are put on the basis that the Respondent errs in:

(1) requiring the Applicants to demonstrate before applying for predetermination of their applications and/or biometric excuse, that they have approached FCDO who will facilitate their travel out from Gaza; which delegates responsibility for the decision elsewhere; fetters discretion; acts inconsistently with the relevant policy (which does not include such a requirement) and is irrelevant to the question of whether someone should be granted entry clearance;

(2) refusing the applications in part for lack of evidence that a positive predetermination would assist the Applicants in travelling to a VAC without having regard to relevant considerations and requires an established means of travel at the date of request rather than at the date of predetermination or the period thereafter within which biometric information would need to be given;

(3) requiring the Applicants to demonstrate not only exceptionality, but uniqueness, specific targeting, or a distinguishable vulnerability;

(4) failing to have proper regard to the risk of domestic violence both directly and indirectly on the minor Applicants;

(5) concluding that the Applicants have other places they could go in Gaza or other people who could take care of them; and

(6) failing to consider in light of all of the available information, whether the Applicants' circumstances are so compelling as to be exceptional.

74. In oral submissions, although the challenge to the Respondent's refusal to agree to a biometric excuse for the Applicants to defer providing their biometrics until after arrival in the United Kingdom was not formally withdrawn (on common law or other grounds); the focus was on the applications for and refusal of predetermination of the applications as the Applicants' position was that they would be able to travel to the VAC in Cairo to have their biometric information taken before entry to the United Kingdom. It was submitted that this reduced or even fully protected against the public interest concerns on the facts of their cases.

75. We heard brief oral argument on 7 March 2024 as to whether the Respondent should go further in consequence of our decision to not only issue a decision in principle on each of the applications but to issue a decision on whether to grant entry clearance to them. This was not the basis on which the Applicants' claims had been put at the oral hearing on 29 February 2024 and ultimately it was not pursued. In all of the circumstances and given the terms of the Orders agreed on 7 March 2024, it is not necessary for us to separately consider the biometric excuse point or detail relating to it.

76. In essence, the oral submissions in relation to the common law grounds were that the Respondent's exercise of discretion and application of the Unsafe Journeys guidance was unreasonable. The Applicants were unable to provide their biometrics at the time of application due to circumstances beyond their control; namely that they are all trapped in a war zone; at imminent risk, the children of RM having already been injured; at risk of starvation; living in squalid conditions where there is a spread of disease; and in circumstances where the International Court of Justice has found credible evidence of genocide. The Respondent has not established that there is a security risk posed by any of the Applicants and as such it was submitted that no reasonable decision maker could, in all of the circumstances, refuse to give an in principle decision on the applications. When considering the four criteria in the Unsafe Journeys policy, all Applicants meet the criteria based on a lawful application of the policy.

77. The Applicants' primary case is that they all meet all four of the criteria in the Unsafe Journeys guidance, but that in any event, the Respondent has an overarching discretion in the Unsafe Journeys guidance to predetermine an application in exceptional circumstances and where a refusal to do so would be a disproportionate barrier to them completing an application to come to the United Kingdom. There is no dispute between the parties that for the purposes of the request for predetermination of the applications, the identities of all Applicants are accepted; such that the first criteria is satisfied. The identities were not

accepted for the purposes of biometric excuse, but as above, it is not necessary to consider that aspect of the original request further.

78. As to the second criteria, that the Applicants need to make an urgent journey to a VAC that would be particularly unsafe for them and they cannot delay their journey or use alternative routes; their case is in part that they are unable to travel at all to a VAC because of the difficulties of crossing the border out of Gaza (albeit with a realistic prospect of doing so with the benefit of an in principle decision) and in part that in any event, any movement within Gaza is unsafe, including the journey to the border itself which is inherently unsafe. The Applicants would all be at risk of harm on the journey.

79. In the case of WM and others, there was further specific evidence of the journey to a VAC being particularly unsafe for them travelling as a lone woman with four young children. There is supporting evidence of the children already being too scared to leave the container within which they are currently sheltering within Gaza, even for essential necessities. The first written statement of WM (albeit dated 24 February 2024 and therefore not before the Respondent at the time of the decisions under challenge) gives more specific examples of sexual harassment/assault against women, including members of her own family and describes that it is not culturally acceptable for a woman to do certain things alone, with danger of attacks, robberies and harassment, particularly as people become more and more desperate. WM also describes practical difficulties of being able to find basic necessities with four young children who can't be left alone to get what is needed. This statement is consistent with the information available at the date of decisions, only adding more specific examples.

80. The Respondent's case on the second criteria is that the evidence on behalf of the Applicants focuses on the general situation in Gaza rather than establishing in any way that it is the journey to a VAC itself which is unsafe for them. The first point to establish is that the Applicants would in fact be able to travel to a VAC (covered in the fourth criteria) and if so, whether the journey they would need to undertake to do so would itself be unsafe. Mr Payne KC submitted that in truth, the Applicants cases were not about whether their journey to a VAC would be unsafe, but their current inability to travel to a VAC at all because of the practical difficulties in crossing the border between Gaza and Egypt (with no other border crossing currently open).

81. By contrast, the Unsafe Journeys guidance has been more applicable in two particular groups of cases, first, individuals in Afghanistan who face multiple dangerous journeys to a VAC in Pakistan and secondly, a group of mainly minors who were trapped in Libya where there was specific evidence from the UNHCR that they would support and facilitate their onward travel only if there was a positive predetermination decision in their favour. The current situation in Gaza is closer to the Libyan cases, but does not have the benefit of the clear evidence from a third party to facilitate travel to a VAC if there is a positive predetermination decision.

82. The Respondent's Detailed Grounds of Defence focused more on the conclusion that in respect of all Applicants, it was not accepted that they were a targeted interest by those involved in the fighting; that they would be personally at risk of harm and any journey would not be particularly unsafe for them over and above other persons living on the territory.

83. In respect of RM and others specifically, the second criteria about whether the journey was unsafe was only substantively considered in the Second Decision. The conclusion in respect of these Applicants is in paragraph 31:

> "31. The situation your clients have outlined in respect of their circumstances in Gaza, whilst deserving of great sympathy, are similar to the very difficult circumstances faced by the wider population of that territory and do not attest to a particular circumstance that would mean that your clients as individuals would face an Unsafe Journey in comparison to other people who are currently living on the territory. Whilst the situation in Gaza is undoubtedly very difficult, I am not satisfied that your clients have demonstrated that they are at personal risk, need to make an urgent journey, or that any such journey would be particularly unsafe for them over and above other persons currently living on the territory."

84. We find in relation to this that the Respondent has not properly considered all of the factors set out in the Unsafe Journeys guidance which expressly acknowledge that a journey to a VAC may be unsafe because a person is in an area of ongoing conflict; nor considered whether the Applicants in RM and others face a personal risk. In the context of the situation in Gaza, in which thousands of civilians have been killed and injured in the conflict, alongside the daily risks occasioned by a severe shortage of access to basic necessities such as food, water and medical care; it is not necessary for a person to show that they are specifically targeted to be able to establish that they are at risk due to their personal circumstances.

85. We do however acknowledge that the Unsafe Journeys guidance requires evidence that a person faces dangers beyond the current situation in their location and along the route they would need to travel. The reason for such a comparison is however entirely unclear. If a journey is unsafe, as it rationally is on the basis of cogent background evidence as to the current conditions in Gaza, why would it need to be more unsafe for some than others, particularly in light of the other conditions set out not only for the unsafe journey criteria but in combination with the other three conditions as well?

86. The Respondent submitted that the consideration of whether a person's circumstances are 'particularly unsafe' by reference to the position of the population in Gaza reflected a permissible 'departure from the general' position of those in Gaza in accordance with R (Hesham Ali) v Secretary of State for the Home Department [2016] UKSC 60; [2016] 1 WLR 4799. As to the departure from the general position, the Respondent has misconstrued what the general position is that is to be departed from in the Unsafe Journeys guidance – it is not the general position or norm in

Gaza; but the general position or norm that a person is required to provide their biometric information before substantive consideration is given to an application. It is and only can be the latter than can be departed from in accordance with this guidance. We do not therefore accept that a comparison to a particular local geographical area, in this case Gaza, is a permissible yardstick against which to assess whether an individual faces a particularly unsafe journey. It is more of an objective test.

87. We also reject the Respondent's concern that on that basis everyone in Gaza could meet the criteria given that this is not the only consideration, there are three other criteria to meet and in any event, this is only realistically applicable at all to those with family members with status in the United Kingdom who have a sufficiently close relationship to engage Article 8(1) of the European Convention on Human Rights. These are all factors which restrict the potential application of the Unsafe Journeys guidance to a much smaller group than all of those in Gaza (or any other conflict zone).

88. Further, the Respondent relies on the acknowledgment in R (on the application of JZ) v Secretary of State for Foreign, Commonwealth and Development Affairs; Secretary of State for the Home Department; and Secretary of State for Defence [2022] EWHC 771 (Admin), that the mere fact that a person came from a conflict zone was not of itself a good ground for a waiver. However, at this point we are considering only the second criteria in the guidance, which itself expressly accepts that a journey may be unsafe due to ongoing conflict in an area. JZ does not therefore assist the Respondent's case on this particular point as neither party is suggesting that of itself, being in a conflict zone is sufficient, there are further criteria to consider within the Unsafe Journeys guidance and an overall assessment in accordance with Article 8.

89. At the oral hearing on 29 February 2024, we invited Mr Payne KC to give us examples of situations in which the Unsafe Journeys guidance would be met such that there would be agreement to predetermine an application. Only one by reference to the need for urgent medical treatment of a child was given at the hearing, but further examples were given in subsequent written submissions. Of the five scenarios proposed, only one even potentially engaged with the second criteria about the safety of a journey to a VAC, but not directly as it was for a person who could not travel to a VAC at all for medical reasons and was therefore a biometric excuse case for a person who could travel only directly to the United Kingdom on a medical flight. In the other examples, there was no mention of the safety of travel itself or how a person who would meet this part of the criteria by showing the journey itself was more dangerous than for others in Gaza. Notwithstanding that, for the reasons set out below, we accept that the Applicants in WM and others have evidenced this on their particular circumstances, we have concerns about how realistic it is for any individual to meet this heightened comparative test.

90. In any event, for the reasons set out more fully below, we find that the requirement for an individual to provide evidence that they *"face*

dangers beyond the current situation that exist" amounts to a limitation that only applicants with extraordinary, and therefore rare, unique or unusual circumstances can succeed. For the reasons set out in R (on the application of MRS and FS) v Entry Clearance Officer (Biometrics – entry clearance – Article 8) [2023] UKUT 00085 (IAC), that is incompatible with Article 8 and goes beyond an individual assessment of a person's circumstances.

91. For these reasons and given that the Applicants in RM and others meet the remainder of the bullet points set out in relation to the second criteria as to unsafe journeys and considering all of the evidence in the round, it was irrational and unreasonable for the Respondent to conclude that this criteria was not met.

92. In respect of WM and others specifically, the second criteria about whether the journey was unsafe was only substantively considered in the Second Decision. The conclusion is contained in paragraph 30:

> "30. The broader situation in relation to the ongoing conflict that your clients have outlined in respect of their circumstances in Gaza, whilst deserving of great sympathy, are similar to the very difficult circumstances faced by the wider population of that territory and do not attest to a particular circumstance that would mean that your clients as individuals would face an Unsafe Journey in comparison to other people who are currently living on the territory. Whilst the situation in Gaza is undoubtedly very difficult, I am not satisfied that your clients have demonstrated that they are at personal risk as a result of the conflict, and need to make an urgent journey, or that any such journey would be particularly unsafe for them over and above other persons currently living on the territory."

93. We find in this regard the Respondent has not followed his own Unsafe Journeys guidance as to the unsafe journey criteria, which as set out above, expressly acknowledges that a journey may be unsafe because it is in an area of ongoing conflict; nor considered whether the Applicants in WM and others face a personal risk. We do not consider that in the context of the conflict in Gaza, in which thousands of civilians have been killed and injured, alongside the daily risks occasioned by a severe shortage of access to basic necessities such as food, water and medical care; that it is necessary for a person to show that they are specifically targeted to be able to establish that they are at risk due to their personal circumstances.

94. As above, we acknowledge that the Unsafe Journeys guidance refers to a person also facing dangers beyond the current situation, but in the case of WM and others, there has simply been no proper consideration of one of the factors that decision makers are expressly told that they **must** have regard to (emphasis in policy); which is vulnerabilities such as a lone female or a young child without assistance for travel. The Respondent sets out that WM is a lone female, with four children aged nine and under; but gives no express consideration of the impact of these vulnerabilities on whether they would face greater danger as a result.

95. We find that it was irrational and unreasonable for the Respondent to have concluded that the Applicants in WM and others had not established that their journey to a VAC would be unsafe; by reference to his own guidance and cogent background evidence both as to general conditions and personal circumstances of these Applicants. On the facts before us, the only rational conclusion would be that these Applicants met this criteria; they have established that their journey to a VAC would be unsafe and they would personally face dangers as a lone woman travelling with four young children over and above others making any journey within Gaza to the border, which is of itself inherently dangerous.

96. As to the third criteria, that the Applicants must demonstrate that their circumstances are so compelling as to make them exceptional. The Applicants' challenge to the conclusions on this criteria are in part that the Respondent has not properly considered all of their circumstances and in part, that the Respondent has applied an exceptionality test requiring something unique about their circumstances or a distinguishable vulnerability compared to others in Gaza. For the latter, we focus here on version 1 of the Unsafe Journeys guidance and deal with the differences in version 2 in the additional grounds of challenge in relation to WM and others as this is relevant only in respect of the Third Decision in relation to them.

97. In relation to the requirement that the Applicants' circumstances are compelling, the Respondent submits that he has legitimately considered their circumstances by reference to the situation in Gaza rather than requiring or using any test of exceptionality. It is said that the assessment of 'compelling' reflects the exercise of residual discretion and is self-evidently context specific, with a high bar to establishing such circumstance when considering applications for entry clearance (as opposed to when considering the impact of removal from the United Kingdom on a person).

98. The Respondent's case in oral submissions is that the Unsafe Journeys guidance should be read in the context of the decisions in Hesham Ali and JZ, as not requiring exceptionality but that the circumstances must be so compelling as to be exceptional to justify a departure from the general rule. As such, it is necessary to consider the outcomes as by definition, compelling circumstances should not produce potentially thousands of positive responses as this would undermine the guidance on it being a residual discretion to defer or waive biometric requirements. Mr Payne KC submitted that when considering whether there were sufficiently compelling circumstances in accordance with the guidance, the Respondent was entitled to use a yardstick of the conditions in Gaza facing the population as a whole given that most of the issues raised by the Applicants would apply equally to everyone in Gaza. We have already addressed these points above in relation to the second criteria.

99. We noted at the hearing that given only those with a family relationship with a person in the United Kingdom that engages Article 8(1) would potentially be able to apply, the numbers are likely to be significantly less than the whole population of Gaza. On the day of the hearing on 29

February 2024, the Respondent had disclosed to the Applicants broad numbers of those who had made applications for entry clearance from Gaza within different categories. In relation to family reunion, the largest group (the other categories had less than 10 applications in each in respect of one or two family groups), there were only 130 applications comprising of sixteen different family groups. Of those 130, two applicants had died and another eleven had withdrawn their applications. Whilst we appreciate any decision to predetermine applications from such applicants may set a precedent and encourage further applications; we do not consider that these are significant numbers or in any way places an overly significant administrative burden on the Respondent to at most, make sixteen decisions (encompassing the family groups who presumably applied together) in principle based on numbers so far.

100. Mr Payne KC emphasised that there is also a wider application of the policy throughout the world and not just in Gaza meaning that there are potentially much wider implications. In these circumstances, the Respondent is entitled to consider what are compelling circumstances by reference to categories given the large number of people worldwide who are facing hardship. The question was posed as to what yardstick should be used if compelling circumstances is not judged by reference to the local population. To consider what is compelling in a particular case, there must be consideration of the public interest in play to set the criteria to justify a departure from the norm to outweigh that. This is what the Unsafe Journeys policy seeks to do. Mr Payne KC accepted the reference in the guidance to 'unique' was clumsy, but the wider references to circumstances being exceptional is accurate and guides caseworkers to focus on the needs of individuals to depart from the norm. Overall it was accepted that the circumstances of the Applicants were deserving of great sympathy, but not that they met the high threshold to be compelling as against the public interest.

101. In terms of the Unsafe Journeys guidance, in the section providing more detailed guidance on the third criteria, that of 'compelling circumstances' there is no express direction to decision makers that a person's situation must be compelling over and above others in the local area, in this case, worse than others in Gaza. The guidance itself refers only to a need to demonstrate "circumstances that are so compelling they are exceptional, such as where an individual has an urgent need to come to the United Kingdom and is facing difficulties beyond their control in travelling to any VAC." Examples are then given of situations which may or may not be compelling by reference to general scenarios and relationships to the Sponsor or circumstances pertaining to them.

102. In RM and others, there is only substantive consideration of the 'compelling circumstances' criteria in the Second Decision. This section of the decision letter begins with, "For the reasons given above your clients have not provided information as to why their circumstances are different to other people currently living in Gaza." As above, there is nothing at all in the Unsafe Journeys guidance which requires the Applicants to show that their circumstances are different from those of others in Gaza, it only requires an assessment of their own circumstances

as to whether they are so compelling as to be exceptional. The decision is not in accordance with the Respondent's published policy in this regard, there is no need, as a matter of policy or general interpretation of 'compelling circumstances' or 'exceptional', which are common terms within the immigration field and well understood, for a level of exceptionality. Further, the Unsafe Journeys guidance is not applicable only to Gaza, but to applications from anywhere outside of the United Kingdom and is to provide circumstances of an exception against the norm that biometrics are required; not an exception to a norm for a local area such as Gaza.

103. The decision goes on to consider the Sponsor's circumstances in the United Kingdom, with some reference in paragraph 33 of the decision as to the medical evidence available in relation to the Sponsor, but again making a comparison between her and others in the United Kingdom who have anxiety and distress caused by the situation of family members in Gaza. The overall impact was noted as 'unfortunate', but with medical care available in the United Kingdom.

104. For the reasons already given, there is no requirement in the Unsafe Journeys guidance or as a matter of general principle that the Sponsor's situation must be worse than others in a similar position for there to be compelling circumstances. In any event, on the evidence, the Respondent's position in relation to the Sponsor is at the very least unreasonable and irrational in light of the detailed medical evidence, supported by other written evidence; and is bordering on the perverse.

105. The summary of the medical evidence given in paragraph 33 does not appropriately reflect the very dire state of the Sponsor's current mental state and is factually incorrect when it is said that there is nothing as to what treatment or support the Sponsor needs. To the contrary, the report of Dr Hyde is clear that there is no effective treatment option for the Sponsor at all whilst the situation for her family in Gaza continues. The evidence of a very significant detrimental impact on both the Sponsor's private and family life (considered in further detail below in relation to Article 8) is overwhelming. It describes a person who has been rendered unable to function on a daily basis by the current situation and goes far beyond the rather derisory reference to 'distress and anxiety' caused to many by separation from family members in Gaza.

106. Without needing to go further and consider the circumstances of the Applicants themselves in Gaza, we consider the evidence as to the position of the Sponsor alone permits of only one rational conclusion that the circumstances are compelling and exceptional such as to meet the third criteria in the Unsafe Journeys guidance. The current living conditions and circumstances of the Applicants, including the dangers they face and impact on their health and wellbeing only adds to and reinforces this conclusion.

107. In the case of WM and others, there is only substantive consideration of the 'compelling circumstances' criteria in the Second Decision. In

relation to the Applicants, the conclusion is in paragraph 34 of the decision:

> "34. Having consider [sic] this information, whilst noting the challenges caused by the separation of your client from her husband, the fact remains that your clients have limited accommodation and access to food and water (albeit limited), and it is not suggested that they are at any greater risk of harm than others who live in Gaza. As such, whilst recognising how difficult the position is for all persons in Gaza, including young children, I do not consider that the evidence provided indicates that your clients are distinguishably vulnerable, whether having regards to their particular circumstances or by comparing their circumstances to others living in Gaza."

108. As already set out in relation to a similar comparative conclusion in the case of RM and others; there is no requirement in the Unsafe Journeys guidance that a person's situation must be worse than others in the local area to be established as 'compelling circumstances' or exceptional and certainly no requirement that a case is 'distinguishably vulnerable'. As such, the Respondent's Second Decision in WM and others is not in accordance with the Unsafe Journeys guidance for this reason alone. There is again no proper consideration of whether the Applicants' personal circumstances are compelling and exceptional and the reasons above are repeated.

109. Further, the conclusion later in paragraph 36 that the Applicants have other family members in Gaza for support and other options of places to live is not a fair reflection of the evidence from the Sponsor and the Applicants as to the current circumstances in Gaza, not just for the Applicants but also wider family members. There are clear and cogent explanations as to why WM does not in fact have alternative accommodation or support from other family members, who are also displaced, some of whom have medical conditions and many of whom remain in the north of Gaza where travel to them would be practically impossible and incredibly dangerous in light of the dispersal of persons from the north to the south which started early on in the conflict. It is not rational against that evidence for the Respondent to conclude either that there are other options for the Applicants than joining a family member in the United Kingdom; nor that overall their circumstances are not compelling or exceptional.

110. The decision goes on to consider the Sponsor's current circumstances and medical evidence in relation to him. Again, as in RM and others, there is a rather derisory reference to 'stress and anxiety' suffered by many who are separated from family in Gaza which rather minimises the conclusions of the medical evidence in relation to this Sponsor which shows a much more significant and serious impact on his mental health and risks of further deterioration if the situation persists or family members are killed in Gaza.

111. As above, there is no requirement in the Unsafe Journeys guidance or as a matter of principle that the Sponsor's situation must be distinguishable or worse than other relatives in the United Kingdom for the

circumstances to be 'compelling' or exceptional. The medical evidence, together with the Sponsor's own evidence is sufficient alone, without having to consider the particular circumstances of the Applicants, to establish 'compelling circumstances' which are exceptional to meet the third criteria. The Respondent's conclusion otherwise is not rational or reasonable, nor has there been a proper detailed consideration of the evidence before him of the individual circumstances of the Sponsor and the Applicants. As above, the evidence as to the circumstances of the Applicants themselves, particularly in relation to the history of and ongoing risks from domestic violence have not been properly considered by the Respondent and only add to and reinforce the only rational conclusion being that the circumstances are 'compelling' and exceptional.

112. As to the fourth criteria, that the Applicants must be able to travel to any VAC to enrol their biometrics, the Applicants have identified three possible routes through which they could exit Gaza. First, with FCDO assistance using their residual discretion on the basis that with a positive pre-determination decision, the FCDO would be obliged to comply with its obligations under Article 8 of the European Convention on Human Rights. Secondly, with a positive pre-determination decision there is a greater potential to negotiate exit directly with the authorities in Egypt or with other countries facilitating evacuations – for example, in RM and others, there are connections in Qatar who may be able to assist, particularly if a United Kingdom visa has been issued as that would give reassurance of onward travel from Egypt. Thirdly, by means of a co-ordination payment (or bribe) for example by using the Hala travel agency[2] who has historically and currently facilitated exit from Gaza with these means and the chances of being able to do so are also increased by a positive pre-determination decision as evidence of onward travel.

113. In support of these three possible means of exiting Gaza, there are a number of witness statements from the solicitor acting for RM and others and from Amanda Taylor (an Immigration Advisor at Refugee and Migrant Forum of Essex London who works principally on family reunion cases). These detail not only the history of exit from Gaza prior to the start of the current conflict, but the means of doing so afterwards with a number of examples of this happening in practice, both via the payment of bribes/using the Hala travel agency and with facilitation assisted by FCDO even for those who did not meet the published criteria to be placed on the referral list; and provide an example of a specific application from Gaza by a person who was sadly killed whilst waiting for a decision. The written evidence, particularly in the written statement of Amanda Taylor, explains why a predetermination decision could assist the Applicants in exiting Gaza and examples have been provided of the FCDO and a third state making enquiries as to whether there is a positive predetermination decision, the inference being that that would be relevant to the question or whether they could assist in any way in facilitating exit of a particular individual.

[2] We understand that the Applicants in RM and others did in fact exit Gaza on 7 March 2024 using this method.

114. These points of detail were not directly addressed in the decisions under challenge, but were responded to in oral submissions on behalf of the Respondent. Concerns were raised as to the quality and nature of the evidence submitted, which, for example, included a record of a conversation with a Ms Galili (who works for Gisha) but no written statement from that person and a lack of detail about the basis for her belief as to a particular situation.

115. Overall, it was submitted that there was a lack of evidence to support the Applicants' claim that they could be included on the FCDO referral list, with or without a positive predetermination decision and the suggestion that a positive predetermination would be relevant to the exercise of discretion by the FCDO was characterised as 'misconceived', not least because if the applications for predetermination are accepted with a positive decision, there would be no reasons given which could be passed on to the FCDO and no reference to Article 8. Mr Payne KC also reiterated that none of the Applicants in the present cases had made any approach to the FCDO for inclusion on the referral list and had no correspondence from them indicating the relevance of a positive predetermination decision. There is only a single example of such correspondence which was submitted only served to highlight the weaknesses in the Applicants' claims.

116. As to the possibility of a third state assisting the Applicants to leave Gaza, there was simply no example of where this had actually happened and no explanation as to how this could be used to establish a realistic prospect of assistance, nor that any such prospect would be improved with a positive predetermination decision.

117. In relation to the possibility of a bribe being paid for the Applicants to leave Gaza, the examples were only from two individuals, who did not make a written statement, who believed that their exit from Gaza would have been easier with a visa. Given the lack of detail, the Respondent was unable to make any detailed assessment of whether this was a realistic prospect of a route to be used. Further, the evidence in relation to the Hala travel agency did not assist because there was nothing to show that a positive predetermination decision was necessary or helpful for their services and the evidence suggested that route was currently closed with no new applications being possible; so it is not in any event a viable current route. It was however accepted that there was very recent evidence of a brief opening of applications such that the situation was fluid, but that of itself did not support the claim that there was a reasonable prospect of the Applicants actually travelling to a VAC.

118. In oral submissions, in response to the Applicants' submission that there would be no prejudice to the Respondent in predetermining an application, Mr Payne KC submitted that in circumstances where there is no prospect of the Applicants leaving Gaza, there would be a decision making requirement which could set a precedent and apply to cases outside of Gaza which would entail an unnecessary use of resources. If there is a gap between a predetermination decision and the provision of

biometric information at a VAC at a later date, the circumstances may have changed and the initial decision be undermined, with a greater risk of this the longer the gap between. Administratively, a negative predetermination decision may also attract a statutory right of appeal which would be an additional administrative burden.

119. On behalf of the Respondent, Mr Payne KC also reiterated the significant public interest in biometric information being obtained and the risk to the public interest even in a predetermination decision. One such risk was said to be that of a different individual using a positive predetermination decision to cross the border from Gaza, such as a person from Hamas, even if they did not proceed to a VAC or attempt to enter the United Kingdom. It was however accepted that this risk was not included in any of the Respondent's evidence which set out the policy objectives and public interest and was in any event at best only a general public interest point with no suggestion that there was such a risk in relation to the present Applicants; particularly the child Applicants.

120. We appreciate that not all of the evidence referred to above was before the Respondent at the date of the initial decisions under challenge and some of it post-dates even the most recent decisions; we find that there was sufficient evidence at the material times for each decision before the Respondent to establish that there was a reasonable prospect that the Applicants could travel to a VAC and that a positive predetermination would improve such prospects; such that the Respondent's conclusion otherwise was not reasonable or rational having regard to that evidence.

121. In reaching this conclusion, we have taken into account that the quality of the evidence relied upon is of a lower standard than what may be available in a different context and falls short of objectively establishing that the Applicants would definitely be able to travel to a VAC as there were no set plans in place to enable them to do so at the time of their applications/request for predetermination. The Respondent's decision was based on there being no reasonable prospect of travel to a VAC, the contrary of which does not require proof to such a high standard. In any event, in the context of a frequently changing situation in a conflict zone, from which communication is very difficult and where routes of exits from Gaza are not necessarily legal ones or subject to published criteria (for example using the Hala travel agency), the quality of the evidence available could not reasonably be expected to be much greater. It is not reasonable to assess evidence in these circumstances against a requirement that, for example, the improved chances of exit from Gaza with a positive predetermination decision should be quantifiable from the evidence. It is, in our view, in addition to the specific examples relied upon by the Applicants, a matter of common sense that a positive predetermination decision would assist the Applicants in exiting Gaza into Egypt. This is particularly so where the public stance of the Egyptian authorities is not to take in any individuals fleeing the conflict in Gaza and to require those exiting from Gaza to remain only for a short transition period of 72 hours before leaving for their final destination; such that a predetermination decision indicating likely (but not

conclusive) evidence of onward travel would be less of a cause for concern.

122. We find overall that the Applicants have established that there was a reasonable prospect of their being able to travel to the VAC in Cairo such that the Respondent erred in his conclusion that there was insufficient evidence and therefore no reasonable prospect of them being able to do so. The Respondent's decisions failed to engage with the detailed evidence available from the Applicants which included examples of exit via various means, both in principle and of possible routes being utilised by others in practice. The oral submissions addressing some of the detail of the evidence did not directly address the deficiencies in the decisions under challenge in failing to consider the same and in any event, was not sufficient to challenge the evidence as a whole that established a reasonable prospect of travel to a VAC.

123. On a separate and more minor point, the Applicants in WM and others challenged the Respondent's decision on the basis that it effectively required them to have first at least approached the FCDO for inclusion on their referral list, if not having obtained a positive response from them that their travel from Gaza would be facilitated. We do not consider that the Respondent's decision elevates consideration of this to precondition or requirement for an application for predetermination of an application. It goes no further than one of the matters to be considered in the round as to whether a person is able to travel to a VAC. Logically, if a person has received an indication from the FCDO that they would be on their referral list, that would clearly be powerful evidence of a person's ability to travel out of Gaza. The contrary is not however determinative by any means and the Applicants have good reason in these cases not to have yet approached the FCDO given their published policy and experience in other similar cases. This point in any event adds nothing to the consideration of the main grounds set out above.

(ii) Article 8 of the European Convention on Human Rights

124. As with the common law grounds above, we set out first the grounds of claim as pleaded for each individual case and then deal with the composite submissions made on both at the oral hearing.

125. In the case of RM and others, the challenge to the Respondent's decisions are that they are in breach of Article 8 of the European Convention on Human Rights. This is premised on the existence of family life in the case of RM and others, of a close family unit with very recent cohabitation, emotional and practical dependency and ongoing trauma; the obligation on the Respondent to provide a procedure for achieving family reunification which is expeditious, effective and strikes a fair balance between the public interest and a right to reunification; and the requirement for pre-conditions to such a procedure being proportionate and not defeating the essence of the right. On the facts of the present case, the refusal to predetermine the applications or agree a biometric excuse amounts to a complete bar on the Applicants making a successful application for family reunion, particularly where the countervailing

public interest is minimal for these Applicants whose identities have been accepted.

126. In the First Decision in respect of RM and others, there is no consideration at all by the Respondent of Article 8 of the European Convention on Human Rights. In the Second Decision, it is challenged on the basis that the 'weighty' public interest considerations do not apply to these particular Applicants given RM has already provided biometrics in 2022, all Applicants can give their biometric information at a VAC prior to entering the United Kingdom; all have valid passports and all of the Applicants' identities have been accepted. Further, in the context of family reunion with a Sponsor in the United Kingdom, there is a particularly low risk of future undetected fraudulent applications. The Respondent has failed to undertake a proper balancing of the circumstances of the Applicants, requiring an unlawful exceptionality test over and above others in Gaza and of the Sponsor with inadequate consideration of the effect on her.

127. In the case of WM and others, the Respondent's decisions are challenged on the basis that the refusal to predetermine their applications or excuse the registration of their biometric information is both a procedural and a substantive breach of the Applicants and Sponsors' Article 8 right to family and private life as it effectively puts an end to their applications without consideration and blocks their access to the procedures in place to give effect to those rights. First, the Respondent has not determined whether the Sponsor and Applicants enjoy family life for the purposes of Article 8(1) and to the extent that it was concluded that they do not, there is a lack of adequate reasons for that conclusion; a failure to properly assess family life between adult relatives; considers unlawfully whether anyone else could instead provide support; and fails to consider the potential for family life if entry clearance were granted. Further, the Respondent has failed to consider that if there were a positive decision, that would be relevant to FCDO who would itself be under a positive obligation to facilitate family reunion.

128. Secondly, the Respondent has not considered all relevant matters and takes into account irrelevant matters when conducting a proportionality balancing exercise; relying on a requirement of uniqueness or differential vulnerability which is incompatible with a case-by-case assessment.

129. Thirdly, the Respondent unlawfully treats the public interest in biometric enrolment as a fixity without taking into account (i) that the Applicants' identities have been accepted; (ii) that there is no suggestion any of the Applicants pose any risk to national security; (iii) that even if there was a risk to national security that could be mitigated by predetermination; and (iv) that the risk on family cases is in any event significantly mitigated.

130. Stepping back for a moment from the individual assessments in relation to Article 8 for these Applicants; we consider two matters of general principle that were, at least to an extent, in dispute between the parties. The first of which is the scope of consideration of Article 8 in

circumstances where the Applicants are outside the territory of the United Kingdom and therefore not within the jurisdiction.

131. The Applicants' case is in essence both that family life is indivisible such that when one family member is within the United Kingdom, there must be consideration of the circumstances of all of those with whom family life is engaged with in accordance with the House of Lords decision in Beoku-Betts v Secretary of State for the Home Department [2008] UKHL 39; [2009] 1 AC 115; and that it is relevant here that the facts relate to a matter of risk to life and limb. In particular, reliance was placed on the Court of Appeal's decision in R v Lord Saville of Newdigate and others, ex parte A and others [2000] 1 WLR 1855 for the proposition that where there is a risk to life, there is an increased intensity of scrutiny of the reasonableness of any decision and greater justification is required where a person's safety is at stake. In the present cases, Ms Kilroy KC submitted that exceptional weight should be given to the risk to the Applicants' lives and of family life being extinguished. That weight can not and should not be reduced by the Respondent simply because there is currently a widespread risk to life in Gaza.

132. The Respondent's case is that although Article 8 can be engaged in a case where there is a family member within the jurisdiction in the United Kingdom, it is only engaged to a limited extent in respect of individuals outside of the territory which at its highest engages the procedural requirement for the Respondent to provide for a procedure which may facilitate family reunion but does not got so far as to require the Respondent to remove family from a conflict zone to facilitate reunion. In this regard, the Respondent has a wide margin of discretion. Mr Payne KC distinguished cases such as Saville and Beoku-Betts on the basis that they all concerned individuals who were all present within the jurisdiction at the time and instead relied on the Court of Appeal's decision in R3 v Secretary of State for the Home Department [2023] EWCA Civ 169 which considered the issue of the reach of the European Convention on Human Rights for a decision about an individual who is abroad. It was further noted that there could be a distinction informed by the consequences of a particular decision, such as in SI v Secretary of State for the Home Department [2013] EWCA Civ 1743 in which by analogy, Article 8 may not be engaged in relation to a deprivation decision taken against an individual who is abroad, but may be for an application for entry clearance.

133. There is no dispute that Article 8 is relevant to and has an application to the two cases before us, primarily because of the family members currently in the United Kingdom with whom family life is engaged (for the reasons set out in more detail below). We accept that alone, without such a family member in the United Kingdom, the Applicants would not be able to rely on Article 8 at all as they are outside of the jurisdiction and as a matter of principle, have no unqualified rights as such to family reunion in the United Kingdom. There is only a more limited qualified right to a fair and appropriate procedure to apply for the same. This is our focus in the present case which concerns whether the Applicants can make an effective application with or without predetermination of the

same before provision of their biometric information and not as a matter of substance as to whether they should be granted entry clearance or even a positive predetermination decision.

134. As to the substantive consideration of Article 8, in light of the above the focus must primarily be on the individual who is within the United Kingdom and the impact on their right to respect for private and family life. We acknowledge that the impact on family life is however practically likely to be felt with similar force on all family members, particularly in situations such as the two cases before us; such that there is little difference in reality in the impact on family life between those within the United Kingdom and those outside of it. The impact on the person in the United Kingdom, both in terms of family life and its knock on impact on their private life is of course impacted by the circumstances that family members outside of the jurisdiction are living in. In the present cases, the risk to life and limb to the Applicants and the lack of regular contact with them in such circumstances is the key issue which is having the greatest detrimental impact on the Sponsors within the United Kingdom. On an individual assessment, it can not be discounted because part of the family is outside of the jurisdiction, it is directly relevant to the impact on those within it.

135. On the very specific facts of these cases, we consider that it is both sufficient and in accordance with the territorial reach of the European Convention on Human Rights to focus on the circumstances of the Sponsor as a primary consideration for the purposes of Article 8. That is not to say that the circumstances of the Applicants are not relevant, only that their position is more indirectly relevant to the assessment which is required in entry clearance cases.

136. The second issue of principle is whether a policy or set of guidance is compatible with Article 8 if it contains a test of exceptionality, which requires some level of uniqueness or rarity.

137. The Applicant's case in short is that this is well established in case law that such a requirement is not compatible with Article 8. The Respondent's case in short is that the Unsafe Journeys guidance does not in fact impose any test of exceptionality and that in any event, a requirement for circumstances to be compelling or exceptional must take into account the outcomes of such decisions, which should be limited to a very small number. Whilst we do not accept that the number of positive exercises of discretion would necessarily need to be very small to show that circumstances are sufficiently compelling or exceptional; we consider that the number is in fact likely to be proportionately very small when assessed against the appropriate comparator, being those that have to provide their biometric information before substantive consideration of their applications. As we have already said above, it is the exception to that general requirement which is the relevant comparator and not any exception to the local situation in Gaza. In any event, even when looking at the situation in Gaza, even if every family reunion application made so far with a request for predetermination was accepted; that is only 130 decisions in respect of 16 family groups

(presumably therefore only 16 specific decisions when individuals are grouped applying together as a family), which on any view is at its highest only a small number.

138. On this point, we agree that the Upper Tribunal's decision in MRS is persuasive as a matter of principle as to the line which should be drawn when considering the discretion to require biometric information in line with Article 8.

139. In MRS, the policy specifically under consideration was the Family Reunion: for refugees and those with humanitarian protection (the "Family Reunion policy"); which predated the Unsafe Journeys guidance, first issued in May 2023. At the relevant time, the Family Reunion policy contained the relevant reference to the use of discretion not to require biometric enrolment before substantive consideration of an application. It had been reissued following a finding in R (on the application of SGW) v Secretary of State for the Home Department (Biometrics – family reunion policy) [2022] UKUT 00015 that the absence in the previous policy of any reference to the availability of such discretion was unlawful.

140. In terms of the Family Reunion policy, UTJ Lindsley held:

> "25. I find that the biometric discretion policy applied by the respondent in this particular context is unlawful as it breaches Article 8 ECHR as it misdirects the decision-making caseworker as to how they should proceed in reaching the decision in line with the third category of illegality in policies identified at paragraph 46 of R (A v SSHD [2021] UKSC 37 which appears at paragraph 84 of the Upper Tribunal decision in R (SGW) v SSHD when identifying the standards to be applied by a court when conducting a judicial review of a policy document issued by government because the policy includes a misleading statement of law.
>
> 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. This is simply incompatible with the Article 8 case law I have outlined above. It follows that I find that the policy therefore fails to ultimately provide for a fair balance under Article 8 ECHR, and the decision in relation to the applicants are unlawfully made through application of an unlawful policy.
>
> 27. It also follows that relevant Article 8 ECHR considerations are not properly considered by application of the policy and irrelevant considerations, caused by a condition narrowing the pool of potential applicants by reason of some unusual feature in their case, have been unlawfully given weight. As such the respondent has unlawfully fettered her discretion to partially defer the collection of biometrics by application of this policy in making the decisions under challenge."

141. In R (on the application of MS and others) v Secretary of State for the Home Department, unreported, JR-2021-LON-001566, the Upper Tribunal

considered the lawfulness of a suite of policies referring to the discretion not to require biometric information before substantive consideration of an application. The particular case concerned a request not for predetermination, but for biometric excuse such that biometric information would not be taken before the applicant's arrival in the United Kingdom. The policies under consideration for that purpose were the 'Biometric Information: introduction guidance', version 9.0, published on 6 April 2022, the 'Biometric Enrolment: Policy guidance', version 5.0, published on 18 July 2022 and the 'Family Reunion: for refugees and those with humanitarian protection guidance', version 7.0, published on 29 July 2022. As above, all of these predate the Unsafe Journeys guidance first published in May 2023. In those cases, it was decided that the relevant policies were compliant with an Article 8 assessment as they did not include a prohibited exceptionality test nor require extraordinary circumstances to meet the requirement for the exercise of discretion.

142. As a matter of principle, MRS is clear that a test of exceptionality is not compatible with Article 8 although each relevant policy must be considered individually to determine whether it does in fact contain such a test. The occasions on which this has been specifically considered have led to different results depending on the policy in question. The task for us therefore is to determine whether the Unsafe Journeys guidance crosses the prohibited line by including an exceptionality test.

143. We have already set out above one aspect of the Unsafe Journeys guidance which we find does cross this line and is incompatible with the individual assessment required to be compliant with Article 8; that is the requirement within the second criteria for an unsafe journey that an individual must provide evidence they, "face dangers beyond the current situation that exist in area where they are located and along the route where they would need to travel to reach a VAC to enrol their biometrics *…".* That requires a level of uniqueness or exceptionality over and above the basic requirement to establish that a journey is dangerous for them to undertake. We find no other parts of the Unsafe Journeys guidance which cross the line into a prohibited exceptionality test, in relation to either an applicant or a sponsor and which can, subject to this one exception, be applied in a way which is compatible with Article 8.

144. We note however that in both cases, the Respondent's decisions go considerably further than the Unsafe Journeys guidance (in WM and others even more than RM and others) to make a comparative assessment of their circumstances compared to others in Gaza, to compare the Sponsors' circumstances to others in the United Kingdom separated from family in Gaza, or at the most extreme, to require 'distinguishable vulnerability'. As above, those were matters which the decision maker was not directed to in the policy itself, but were in contravention of it given that no such test or comparison formed part of the Unsafe Journeys guidance.

145. On the actual decisions in relation to Article 8 and the individual facts of the Applicants and Sponsors, it is not disputed that we should, in cases such as these, make the assessments under Article 8 for ourselves on the

circumstances pertaining at the date of hearing before us. We therefore focus on that assessment rather than on the detail of the Respondent's decisions on Article 8, although we do make some comment as to these in the points which follow where appropriate.

146. In making the Article 8 assessment, we follow the usual five stage process set out in Razgar v Secretary of State for the Home Department [2004] UKHL 27. The first issue is whether family life engages Article 8(1).

147. The legal position when considering whether Article 8(1) is engaged, is summarised by the Court of Appeal in Rai v Entry Clearance Officer [2017] EWCA Civ 320, from paragraphs 17 onwards. In essence, for family life to be established to engage Article 8(1), there needs to be support between adult family members which is real, committed or effective and looking at the circumstances of the individuals involved.

148. In the case of RM and others, the Sponsor is a young adult who, apart from some limited periods of study abroad (which for at least part of the time was with her immediate family), has always lived with her parents and siblings. She has not yet formed an independent family life and the written evidence from her and the Applicants describes a very close ongoing relationship between all family members. For example, the Sponsor seeks very regular advice and feedback from her mother in particular about even basic day to day matters as well as on more important issues. The Sponsor had only arrived in the United Kingdom on 5 October 2024 such that the physical separation from her family was very recent and they have all continued to be in close communication when the situation in Gaza permits this. In these circumstances, there is clear evidence of a continuing very close relationship involving real, committed and effective support to the Sponsor from her family.

149. In the case of WM and others, the relationship between the Sponsor is one of siblings/uncle to the minor Applicants which is less common for the engagement of family life, particularly where both the Sponsor and WM have formed independent family units (the Sponsor is married in the United Kingdom with a young child and WM was married with four children, albeit in the process of a divorce). However, there is detailed evidence primarily from the Sponsor, but also more recently from WM (because this could not be sensibly obtained earlier given the communication and other difficulties in Gaza) of a very close relationship between the two siblings in particular. This includes their shared history growing up close in age in Gaza, studying together in the United States at the same time and in more recent times, significantly close contact despite being in different countries. The nature of that contact, which involved WM disclosing details of problems in her marriage and domestic violence and seeking advice from the Sponsor before other family members; mutual support around the death of their father; and the Sponsor seeking and receiving support both in relation to his situation in the United Kingdom away from family in Gaza and in relation to becoming a father; demonstrates real, committed and effective mutual support between the Sponsor and WM. There is also some evidence of

financial support from the Sponsor to WM. Although perhaps unusual, in these circumstances, there is sufficient evidence to show that Article 8(1) is engaged and that the Sponsor and RM (and by extension her children) enjoy family life.

150. In both cases, the Respondent did not accept that Article 8(1) was engaged, in the case of RM and others, this was implicit in the decision and in the case of WM and others, this was expressly concluded. The reasons given in both was that there could be no engagement of family life or interference with it by the refusal of the request for predetermination because there was no reasonable prospect of the Applicants leaving Gaza. Whilst that may be relevant to interference and more so on any proportionality assessment, it is wholly irrelevant to the first question of whether family life exists at all for the purposes of Article 8(1). In addition, we have already found that the conclusion that there was no reasonable prospect of leaving Gaza was unreasonable and irrational on the evidence.

151. As to interference with family life, we do not accept the Respondent's assertion that there is none because there is no realistic prospect of leaving Gaza. Whilst if accepted that there was no reasonable prospect that they could leave Gaza (which we do not), the Respondent's position was essentially on the basis that it is not the refusal of predetermination that is interfering with family life but the conflict in Gaza and approach of the authorities on both sides of the border; however, that still only considers the circumstances from the perspective of a substantive breach.

152. There is in these cases a more important procedural aspect to Article 8, which is to give the Applicants an appropriate opportunity to pursue their family life in the United Kingdom by making an application for entry clearance. The interference in these cases is that without a predetermination of their application, they are effectively unable to make a valid application or have it determined by the Respondent and the risk is that this may lead to a permanent extinguishment of family life altogether if one or more of the Applicants were to be killed in Gaza, or die due to lack of access to basic necessities, before any decision on an application for entry clearance would be made.

153. Even as a matter of substance, we find an interference in circumstances where there is not only a day to day interference with the ability of family members to even communicate by phone, but also no opportunity for any physical contact (in any country). The impact particularly on the Sponsors, but also documented in relation to RM in particular, is well documented in the medical and written evidence as to be significantly adverse to the mental health of those involved. Both Sponsors gave examples of tracking incidents in Gaza and not being able to contact family members, not knowing for some time whether they were still alive or not. All of these matters easily reach the low threshold for interference with family life in circumstances where the refusal to predetermine the applications effectively prevents an application for entry clearance ever being considered.

154. There is no dispute between the parties that the general requirement for a person to enrol their biometric information before an application is given substantive consideration is in accordance with the law and in pursuit of a legitimate aim, namely national security and control of immigration.

155. The final assessment is a proportionality balancing exercise of the public interest on the one hand and the circumstances of the Applicants on the other. We start by outlining the common public interest factors, then considering the relevance of those to each of the Applicants; the matters in their favour and an overall assessment in each case.

156. In terms of the public interest, this is set out clearly by the Respondent both in the policy documents referred to above and the written evidence of John Allen. These matters are also effectively summarised and relied upon expressly in the Respondent's decisions under challenge in these cases.

157. The public interest in obtaining biometric information includes the following. First, as a matter of national security and public security, it provides confirmation of a person's identity and allows checks to identify individuals who pose a threat to national security, public safety and immigration control; which includes checks against immigration and criminality records. The checks are also against other datasets, such as watchlists and fingerprint records and includes suitability checks on suitability for a person to be granted a visa.

158. Secondly, they are used to fix a person's identity to prevent future fraudulent applications, for example, by making a later application in a different identity and avoiding the consequences of the first application. It is important that a person's identity is fixed at the time of application for these purposes and even a relatively limited deferral of biometrics can undermine the system and open up a possible risk of future fraudulent applications.

159. Thirdly, in John Allen's written evidence, it is said that biometric checks are particularly important for individuals from Gaza, Israel and the wider Occupied Territories given the FCDO assessment that terrorist attacks are very likely, including by individuals acting alone given that Hamas is a proscribed terrorist group who view British nationals as legitimate targets.

160. Fourthly, Mr Payne KC identified a separate risk that a different individual to the recipient of a positive predetermination may use that decision to leave Gaza, even if they did not then seek to enter the United Kingdom. There are a number of difficulties with this last point. First, it was not referred to at all in any of the Respondent's written evidence. Secondly, it undermines the Respondent's primary case that a positive predetermination decision does not assist a person leaving Gaza. Thirdly, it somewhat ignores the role of the authorities at the border crossing in Rafah (being the only open border at this time) in conducting

their own identity and security checks. In these circumstances, we do not attach any significant weight to this final point.

161. In terms of the public interest, we note the findings in the following cases where consideration has already been given to the importance of the provision of biometric information, considering both the public interest as a matter of general principle and in the specific context of family reunion cases.

162. Lieven J in JZ, in the context of an application for interim relief by a person and his immediate family seeking predetermination of their applications for entry clearance made in Afghanistan because of the dangerous and possible repeated nature of the journey to Pakistan to give their biometric information, stated:

> "40. I note that the Defendant has accepted in some instances, such as the evacuation under Operating Pitting and the present Ukrainian crisis, that it may be appropriate to allow individuals to only provide biometric information once they enter the UK. Such general waivers are plainly ones for the discretion of the Defendant. Mr Allen makes the point which I accept, that the fact someone is coming from a conflict zone is not itself a good ground for a waiver.
>
> 41. Ms Giovannetti also argues that it is of great importance to provide biometric data before an application is processed. She says that this is to ensure that the person who submits the application is the person they say they are and ensures that they cannot subsequently submit a further application but in a different name. As a generality I entirely accept that this is a good reason.
>
> 42. 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 relevant databases can be checked before he enters the UK.
>
> 43. In respect of the argument about the same person not being able to apply twice, I fully accept the generality of Ms Giovanetti's argument but, in my view, it fails to engage with the facts of the particular case. Unlike most applicants for entry clearance, certainly most asylum seekers, JZ is a known and documented individual with a history that is transparent and verifiable. He has been accepted by the Defendant to have been a judge in Afghanistan with an accepted and evidenced history and full documentation. He can be fully authenticated by both Colonel English but also UK citizens who were working in Afghanistan for the UK mission. It is relevant that Colonel English says he was security vetted in his position.
>
> 44. Therefore, on the facts of his case I can see no risk that the person who submitted the application for LOTR will not be the same person who attends the biometric centre in Pakistan and, if found to be so entitled, would then be granted entry clearance. There is no risk that JZ would be rejected for LOTR on the present facts and then present himself again in a different guise.

> 45. In my view the harm to the public interest that is relied upon by the Defendant is one of generality and fails to engage with the specifics of the present case. As such it is a good example of failing to apply the discretion to defer biometrics in a rational manner, taking into account the individual facts of the case."

163. In MRS, UTJ Lindsley accepted in paragraph 20 the legitimate aim that biometrics assists in preventing individuals involved in serious criminality, including acts of terrorism, from being able to travel to the United Kingdom by being able to check those details against other datasets. However, the fact that such biometric information would be given and checked before the individuals enter the United Kingdom would not reduce that level of protection on the individual cases before her. UTJ Lindsley continued in relation to the risk of immigration fraud as follows:

> "21. As such the legitimate aim in this case is limited to fixing the particular applications with the applicant's biometric data from the start, and helping thereby prevent immigration fraud. There was some discussion in the hearing about what this ultimately prevents. It is easy to see that if refused in principle without biometrics being taken entry clearance applicants with no family connection to the UK, such as students, visitors and business people, might reinvent themselves as different people therefore addressing the refusal reasons with a fake identity and an "improved" application without declaring the past unsuccessful one, and thus deprive the respondent of a way of identifying dishonest applicants. It is not impossible that a family applicant might do the same, although they would then also have to involve a fake new sponsor, as, for instance, an applicant could not plausibly make a new application in a new identity as the spouse of the same sponsor. I find that this is a legitimate aim applicable in the current applications, although when striking a fair balance with any interference with family life consideration would have to be given to the greater complexity of the fraud needed to take advantage of the lack of biometrics being taken at the start of the entry clearance process, and thus, I find, the probably lesser likelihood of it taking place."

Conclusions in relation to RM and others

164. We first consider the strength of the public interest in relation to these particular Applicants. The Respondent accepted before us, that the public interest matters raised were more ones of general principles rather than giving rise to any particular concern about RM and others as individuals. In accordance with the authorities above, we find that the public interest is protected or reduced for a number of reasons on the specific facts of these applications:

(1) The identity of all of the Applicants has been accepted for the purposes of predetermination of their applications;
(2) The Applicants all have valid passports (able to be delivered directly to the VAC in Cairo by another family member as they are held outside of Gaza) and their biometric information will be given there before entry clearance is granted and before they physically enter the United Kingdom. As such, the national security interests are fully protected;

(3) In respect of the immigration fraud public interest, it was common ground that there is far less of a risk of this in family reunion cases, not least because there would need to be a different sponsor in the United Kingdom for any such application to avoid detection in another identity and there is nothing to indicate any other family members currently in the United Kingdom;
(4) Two of the applicants are children and as such are inherently less of a risk to the public interest; and
(5) Although not accepted for the purposes of biometric reuse, the Respondent does have a record of RM's biometric information from 2022 which can be checked against the provision of biometric information for this application which can provide some further comfort as to her identity for this and any future applications.

165. As above, we do accept the Respondent's evidence that this is not sufficiently secure to reuse without the need for RM to give her biometric information for this application, but as a standalone matter, it can only support confirmation of her identity.

166. Overall, whilst we acknowledge and accept the significant public interest and policy reasons for the provision of biometric information before substantive consideration is given to an application by the Respondent; on the facts of RM and others applications; these general points are reduced in weight given the provision of biometric information prior to entry to the United Kingdom and as there is nothing to suggest any particular risk posed by them, either as family members, as children, or as those whose identity is accepted (and supported by documentary evidence including but not limited to valid passports).

167. This public interest needs to be balanced against the circumstances of the Sponsor's private life in the United Kingdom and the Sponsor's and Applicants' family life. As above and supported by medical evidence and written statements, the impact of the current situation on the Sponsor is significant and extremely adverse in terms of her mental health and day to day functioning. She no longer has the meaningful support of her immediate family that she has benefited from all of her life; is limited even in basic communication with them through modern means because of the conditions in Gaza; and in the absence of predetermination of the applications, means that there is no effective application at all to allow her family to even apply to join her in the United Kingdom as a place of safety for all of them to continue to allow their family life together.

168. There is a real risk that in the absence of the ability to make an effective application, family life between the Sponsor and any or all of the Applicants could be permanently extinguished, which would have an even greater detrimental effect on the Sponsor. It would be an understatement on the facts before us to say that the adverse impact of the Respondent's decision on the Sponsor's private and family life is significant. That is before any consideration is given more broadly to the situation that the Applicants are currently living in day to day and the impact on their family life with the Sponsor.

169. We find overall that the Respondent's refusal to predetermine the Applicants' applications, in circumstances where this effectively precludes any substantive consideration of their applications for entry clearance to join the Sponsor in the United Kingdom; is a disproportionate interference with all of their rights to respect for family life and in the case of the Sponsor only, her private life.

170. The public interest in provision of biometric information at the level of general principle is reduced on the facts of the case of RM and others and is outweighed by the very significant detrimental impact on family life (and the Sponsor's private life) which cannot be even considered without predetermination, let alone enjoyed outside of the United Kingdom. That conclusion is only reinforced when also taking into account our findings on the application of the Unsafe Journeys guidance.

Conclusions in relation to WM and others

171. As above, we first consider the strength of the public interest in relation to these particular Applicants. As with RM and others, the Respondent accepted before us that the public interest matters raised were more ones of general principles rather than giving rise to any particular concern about WM and others as individuals. In accordance with the authorities above, we find that the public interest is protected or reduced for a number of reasons on the specific facts of these applications:

    (1) The identity of all the Applicants has been accepted for the purposes of predetermination of their applications;
    (2) WM has a valid passport and all Applicants will have their biometric information given before entry clearance is granted and before they physically enter the United Kingdom. As such, the national security interests are fully protected;
    (3) In respect of immigration fraud public interest, it was common ground that there is far less of a risk of this in family reunion cases, not least because there would need to be a different sponsor in the United Kingdom for any such application to avoid detection in another identity and there is nothing to indicate any other family members currently in the United Kingdom.
    (4) In respect of the two youngest Applicants, they are in any event excluded from the collection of their fingerprint data as they are under the age of five years (which is not therefore required in accordance with the Biometric enrolment: policy) so only limited data is required from them in any event; and
    (5) Four of the Applicants are young children, all aged nine and under and any risk in relation to them is inherently less of a risk to the public interests identified by the Respondent.

172. Overall, whilst we acknowledge and accept the significant public interest and policy reasons for the provision of biometric information before substantive consideration is given to an application by the Respondent; on the facts of WM and others applications; these general points are reduced in weight given the provision of biometric information prior to entry to the United Kingdom and as there is nothing to suggest any

particular risk posed by them, either as family members, as children, or as those whose identity is accepted.

173. The final part of the exercise is to balance these public interests against the circumstances of the Sponsor's private life in the United Kingdom and the Sponsor's and Applicant's family life. As set out above, supported by medical evidence and written statements, the adverse impact of the current situation and separation of the Sponsor from the Applicants without being able to be even in regular telephone contact is significant both in terms of the Sponsor's mental health and day to day impact on him and family members in the United Kingdom.

174. The Sponsor and WM in particular are currently prevented from maintaining their regular communication due to the conditions in Gaza, in which they would normally provide each other with mutual and effective support and preventing them from physically meeting at all. In the absence of predetermination of the Applicants' applications, they are prevented from making an effective application for entry clearance to allow family life to be continued to be enjoyed between the Sponsor and the Applicants in the United Kingdom.

175. There is a real risk that in the absence of the ability to make an effective application, that family life between the Sponsor and any or all of the Applicants could be permanently extinguished; which would have an even greater detrimental effect on the Sponsor. The current impact on the Sponsor alone is significant; even before any broader consideration of the impact on the Applicants, particularly given the risk they face due to domestic violence on top of the dangers of living in a conflict zone with restricted access to basic necessities of food, water and medical care.

176. We find overall that the Respondent's refusal to predetermine the Applicants applications, in circumstances where this effectively precludes any substantive consideration of their applications for entry clearance to join the Sponsor in the United Kingdom; is a disproportionate interference with all of their rights to respect for family life, and in the case of the Sponsor, his private life as well. The public interest in provision of biometric information at the level of general principle is reduced on the facts of the case of WM and others and is outweighed by the very significant detrimental impact on family life (and the Sponsor's private life) which can not be even considered without predetermination, let alone enjoyed outside of the United Kingdom. That conclusion is only reinforced when also taking into account our findings on the application of the Unsafe Journeys guidance.

(iii) Appropriate form

177. In both cases, the Respondent initially decided that all the Applicants had used the wrong application form and for that reason alone did not fall

within the Unsafe Journeys guidance for any predetermination of their applications. Albeit in both cases, the Respondent considered on an exceptional basis whether they otherwise met the guidance for predetermination and stated that if and when there was any further substantive consideration of the applications, the matter of the appropriate form would be considered afresh.

178. In RM and others, the Respondent's refusal to consider the applications on the basis that they did not use the form closest to their circumstances is challenged on the basis that it is irrational. On the facts, the form used was the closest to their circumstances and in any event, given the very urgent circumstances, it would be unreasonable to refuse on that basis.

179. As to the form used, the Applicants in RM and others assert that it was the most appropriate in the context of family reunion from the conflict in Gaza; where the Sponsor is a de facto refugee and where the form used under Appendix Family Reunion (Protection) permits of a discretion as to the Immigration Rules and an assessment under Article 8 of the European Convention on Human Rights. In contrast, the Applicants could not meet the requirements as a dependent under the Global Talent route and there is no similar discretion or fallback consideration of Article 8; nor a right of appeal on human rights grounds (only a right to administrative review). Further, there is no discretion to grant a fee waiver for an application under the Global Talent route which is a requirement for Article 8 cases and would make such an application unaffordable (the fees would be over £7000).

180. In WM and others, it is submitted that the Applicants' application was made on a form designed for family reunion under Appendix Family Reunion of the Immigration Rules; albeit on the basis that leave outside of the rules was sought given that not all of the requirements in paragraph FRP 1.1 of Appendix Family Reunion could be met (for example, that the Sponsor has protection status in the United Kingdom, is not a British citizen and the Applicant is the partner or child of someone in the United Kingdom with protection status; as well as a need to provide biometric information). There is however discretion to depart from the requirement to provide biometric information as set out above and express discretion in paragraph FRP 7.1 to consider Article 8 in circumstances where the Applicant is not the partner or child of the Sponsor but a refusal would result in unjustifiably harsh consequences for the Applicant or a family member. The Applicants' case is that absent the Sponsor's British citizenship he is now a de facto refugee and that in any event, there is a residual discretion available to the Respondent to consider and grant the application.

181. The Applicants' case in WM and others is that insofar as the Respondent's policies, either version 1 or version 2 of the Unsafe Journeys guidance (or similar provisions in the Respondent's 'Family Reunion' policy, version 10) purport to oblige the Respondent to treat a family reunion application as invalid because it was not made on the appropriate form and/or refuse to consider the request for predetermination for the same reasons; it is an unlawful fettering of

discretion (both as to what is the appropriate form which most closely matches the circumstances and as to whether in any event a request should be considered); incompatible with Article 8 of the European Convention on Human Rights; and inconsistent with the provisions of the Immigration Rules.

182. On the specific First Decision, the Applicants in WM and others challenge the rejection of the application and request as invalid because of the form on the basis that the conclusion as to the most appropriate form was irrational; failed to have regard to relevant material; failed to give adequate reasons and was perverse. In particular, it is submitted that the fact that a substantive requirement of the Immigration Rules could not be met could not rationally be a reason to reject as invalid an application made expressly outside of the Immigration Rules and the alternative route under Appendix FM would have the same difficulty in that it does not encompass the specific family relationships set out as a substantive requirement in that route either. Further, on the facts of the case in WM and others, the Sponsor was for most of his life a mandate refugee and can no longer be protected by UNRWA; such that absent his application for British citizenship, there is little doubt that he would have the required protected status for an application under Appendix Family Reunion.

183. The Respondent's primary position in relation to these grounds is that other than the First Decision in WM and others which has been withdrawn (and therefore any challenge to it is academic), the validity of the applications based on the form used was not relied on as a reason for refusal of the requests to predetermine the applications and would be considered afresh if and when the applications are substantively determined. As such, it is the Respondent's case that any challenge on this basis was premature and there is no legitimate purpose served by consideration of these grounds of challenge at this time.

184. In response to the Respondent's case that any challenge to the use of the appropriate form is premature because the Respondent has indicated this will be considered afresh if any substantive consideration is given to the claim; the Applicants' submit that it is inappropriate in the context of these cases to defer such consideration in light of the urgency and the need for effective relief.

185. At the hearing on 29 February 2024, we sought an explanation from the Respondent as to what material differences there were between the applications completed by the Applicants in these cases and the forms which it was otherwise said were more appropriate and in particular whether there was any pertinent information missing which would be required for a decision to be made (on a request for predetermination or otherwise). Mr Payne KC submitted that the appropriate form would be determined by reference to the status of the Sponsor in the United Kingdom and there may be a difference as to which team the application is routed to determine depending on the application form. The issue would be to use the team with the correct expertise to determine the application and that there may be technical or practical difficulties on

moving it between teams. As to the difference between the actual forms used in these applications, we gave permission for written representations to be made the day after the hearing by the Respondent.

186. In the event, written submissions were received only on 5 March 2024 and did not contain any comparative analysis of the forms used by these Applicants and those said to be more appropriate by the Respondent; nor was any specific information identified as missing from the forms completed in these cases which would be necessary for a decision to be made, either in principle or substantively.

187. We do appreciate that the online forms are dynamic, such that they pose relevant questions to a person for their application to include all the required information based on the form used and information given; which also allows an application to be routed to an appropriate decision maker. As submitted by the Respondent, we also accept that there are fee implications depending on which form is used and as a matter of principle, when assessing leave outside the Immigration Rules on Article 8 grounds, it is lawful to require a fee (alongside an appropriate fee waiver scheme). These points are however general in nature rather than addressing the particular facts of the Applicants in these two claims.

188. We have a number of concerns as to the Respondent's approach to the correct form in the cases of these Applicants as follows. First, there was at the time of the applications made, no guidance as to what the most appropriate form may be.

189. Secondly, the circumstances of the Applicants were such that they were making very urgent applications in the most difficult circumstances, where conditions in Gaza are such that access to communication, including internet connection and power is very limited alongside the daily difficulties in accessing basic necessities and remaining safe in an active conflict zone. These are matters which are relevant to the reasonableness of requiring a particular form to be used. This is reinforced by the representations made in the case of S (and another) v Secretary of State for the Home Department [2022],where the Respondent's Advocate explained that:

> "14. … the essential purpose of the requirement that the applicant should use one of the online VAFs was simply so that the application could be dealt with under the Home Office's automated system for dealing with applications, with an assigned reference number and access (among other things) to the procedure for the provision of biometrics as described above. That being so, it was in truth a matter of indifference which online route the applicant selected as most closely matching their circumstances. By definition many of the boxes in the form would be inappropriate to the basis on which they were seeking leave, which they would be expected to explain in the "additional information" box. […] [I]n practice applications would not be rejected on the basis only that a form more closely matching their circumstances could have been chosen."

190. Thirdly, in the case of RM and others, the alternative form said to be more appropriate (for Global Talent Migrant dependents) was one which

did not permit of any clear discretion outside of the Immigration Rules on Article 8 grounds; nor was there any option of a fee waiver; nor was there any human rights decision or appeal against the refusal of the same available. Procedurally, at first sight, it looks far less appropriate than the form used by the Applicants in RM and others.

191. Finally, we had concerns that the Unsafe Journeys guidance, v2 would now expressly exclude all of the Applicants in these two cases from having their applications accepted as valid as they all used forms designed for Family Reunion applications. This was not the guidance in place at the time of any of their initial applications and any reconsideration of the matter in light of the circumstances at the date of reconsideration would therefore considerably disadvantage them and risk effective relief on the grounds above already considered.

192. However, in light of the undertakings given in both cases by the Respondent and reflected in the Orders made on 7 March 2024 "not to reject the applicants' requests for predetermination of their entry clearance applications on the ground that the wrong form has been used for an application for entry clearance outside the Immigration Rules HC 395 (as amended)", it is not necessary for us to formally decide either of the Applicants' grounds on the validity of the application for use of the wrong form. This was not formally a ground of refusal in the decisions under challenge and will not now arise when those decisions are reconsidered.

Additional ground specific to RM and others

193. The only additional ground specific to RM herself relates to her request to the Respondent to reuse her biometric information provided to the Respondent in 2022 alongside her passport for the purposes of an application for a visit visa which was subsequently issued. This was refused expressly in the Second Decision on the basis that RM did not fall within the scope of biometric reuse as her visit visa had expired and she has not held a BRP or BRC.

194. RM relies on the Respondent's 'Retention and usage of biometric information policy' pages 7 and 15; 'Biometric Guidance' at page 27 and 'Biometric Reuse Policy' at page 9. It is submitted on her behalf that read together, the Respondent had the opportunity to reuse her biometric information given in 2022, which included her fingerprints and facial image and which would be retained for 15 years.

195. The 'Biometric Reuse Policy' is however clear that biometric information can only be reused for individuals who hold a valid biometric residence permit (BRP) or a biometric residence card (BRC) and for particular routes of applications. As a visitor, RM would never have required or held a BRP or BRC; nor was her application for leave to remain outside the Immigration Rules one of the routes for which biometric reuse was permissible. The other policies relied upon do not in anyway undermine the clear position set out in the 'Biometric Reuse Policy' which RM can not meet.

196. The rationale and technical reasons behind the 'Biometric Reuse Policy' are set out in some detail in the written statement of John Allen, the Respondent's policy lead on biometric policy for the Border Security and Identity Policy Unit. In particular, this statement gives cogent practical reasons as to why biometric information taken outside of the United Kingdom is not sufficient to currently be reused in line with the policy objectives of taking such information.

197. For these reasons, this ground of challenge in respect of RM fails; she simply did not fall within the Biometric Reuse Policy for the reuse of her biometric information from her application for a visit visa in 2022.

Additional grounds specific to WM and others

198. As originally pleaded, there were three distinct grounds of challenge to the First Decision in relation to WM and others. The first ground was that the decision was unlawful for breach of an undertaking given to the Upper Tribunal in the Consent Order in the previous application for Judicial Review. The parties agree that now that the First decision has been withdrawn, that ground is academic, save as to costs.

199. The second ground of challenge was that the First Decision was unlawful on conventional public law grounds for (a) breach of a legitimate expectation; (b) threatening of (or failure to identify the existence of) a discretion about whether an application form is the "most appropriate" one; (c) fracturing of (or failure to identify the existence) of a discretion whether or not to reject an application as invalid even if the "most appropriate" form was not used; (d) misapplication of published policy and/or irrational/perverse conclusion that Appendix FM provides the "most appropriate form"; and/or (e) failure to have regard to relevant considerations or give any or adequate reasons when deciding whether to exercise the discretionary power to accept entry clearance applications as valid even if the Applicant had not used the "most appropriate form".

200. The Respondent's position is that this second ground of challenge is either academic because the First Decision has been withdrawn and/or premature because there has been a commitment by the Respondent to consider the matter of the most appropriate form afresh if and when there is substantive consideration of the applications for entry clearance. The Applicants maintain that this is a live issue for determination and as above, we have considered this is one of the common grounds of challenge.

201. The third ground of challenge was that the First Decision breached the Applicants' protected rights under Article 8 and/or Article 14 of the European Convention on Human Rights. In respect of Article 8, to the extent that this remains a live issue after the withdrawal of the First Decision, it is considered as one of the common grounds of challenge above. In relation to Article 14, this point was not addressed in the Applicants' skeleton argument, nor in oral submissions before us of the

hearing on 29 of February 2024. Further, it was not responded to in any detailed way, if at all, by the Respondent, who maintains that this ground is also academic because of the withdrawal of the First Decision.

202. At the hearing, we noted that the Article 14 challenge had not been fully pleaded and responded to by the parties and that although it was a discrete point, it was one which nonetheless may take a not insignificant amount of time to address separately from the primary grounds on which we heard submissions. Counsel on behalf of the Applicants, including those in RM and others, indicated that they did not want consideration of this discrete issue to delay a decision on the grounds above given the urgency of an overall decision on these applications for the individuals involved. In all of the circumstances, including where the Respondent's decisions have been quashed for other reasons, we do not consider it appropriate to address this issue within this decision and it will be a matter for the parties as to whether they wish to pursue it at all or in a different forum.

203. The fourth and fifth grounds of challenge are considered above within the common ground between the two cases.

204. An additional sixth and seventh grounds of challenge were added by consent shortly before the substantive hearing, further to the Respondent's Third Decision and publication of the most recent policy. The sixth ground of challenge is that the Third Decision is unlawful for all of the same reasons as outlined against the Second Decision because it is in substance, the same and is therefore dealt with in the common grounds above. The seventh and final ground of challenge is that the Unsafe Journeys guidance, v.2 is unlawful because it fetters the Respondent's discretion and/or it is incompatible with Article 8 of the European Convention on Human Rights.

205. More specifically, it is said that the second version of the policy is unlawful because it imposes mandatory requirements to be satisfied; imposes an exceptionality threshold rather than a balancing exercise (with reference to uniqueness and distinguishable vulnerability); fails to direct decision makers to relevant matters and is likely to lead to decisions which breach Article 8 of the European Convention on Human Rights, in particular as it fails to direct a proper balancing exercise of the public interest against the rights of the individuals.

206. We have already set out the relevant case law above in relation to the common Article 8 grounds of challenge to the Respondent's First and Second Decisions in respect of both cases and our conclusions by reference to the Unsafe Journeys guidance. This ground concerns only the Third Decision in relation to WM and others which expressly applies the Unsafe Journeys guidance v.2. It is necessary therefore to undertake a similar analysis of whether that policy crosses the prohibited threshold of requiring a level of uniqueness or rarity such as to be an exceptionality test going beyond an individual assessment of whether there are compelling or exceptional circumstances.

207. As a starting point, the Unsafe Journeys guidance v2 suffers from the same problem as the earlier version requiring in relation to the second criteria that required a person to provide evidence that they, "face dangers beyond the current situation …".

208. We find that for the same reasons, the three additional sections outlined in paragraphs 29 and 30 above relating to compelling circumstances and requiring for the purposes of the second criteria, circumstances that are 'unique' to the applicant and evidence that a person faces a personal risk of harm, *"*which is separate to the level of risk faced by the wider population*",* cross the line in to a prohibited exceptionality test which is in breach of Article 8.

Conclusion

209. For all of these reasons, these applications for Judicial Review are allowed in respect of the common law grounds of rationality and reasonableness and on Article 8 grounds.

~~~~0~~~~
~~~~