Neutral Citation Number: [2024] EWHC 786 (Admin)

Case No: AC-2023-LON-001801

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/04/2024

**Before** :

**SIR PETER LANE**
**(sitting as a High Court judge)**

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**Between:**

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| **THE KING**<br>**On the application of** | **Claimants** |
| **HR** | |
| **HR2**<br>**(A minor by their adult sister HR acting as a litigation friend)** | |
| **FR**<br>**(A minor by their adult sister HR acting as a litigation friend)** | |
| **- and –** | |
| **SECRETARY OF STATE FOR THE HOME DEPARTMENT** | **Defendant** |
| **and** | |
| **(1) MMR** | **Interested parties** |
| **(2) BHF** | |
| **(3) MYR** | |

**(4) MOR**

**(5) SPELTHORE BOROUGH COUNCIL**

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**Ms S Naik KC and Ms S Pinder** (instructed by **Duncan Lewis Solicitors**) for the **Claimants**
**Mr T Tabori** (instructed by **the Government Legal Department**) for the **Defendant**

Hearing dates: 7 and 8 November 2023 and 5 March 2024

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# Approved Judgment

This judgment was handed down remotely at 10.30am on 11 April 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR. JUSTICE SHELDON

**Sir Peter Lane:**

1. The three claimants are sisters[1]. They are Afghan nationals and were evacuated to the UK on or around 27 August 2021 in the course of what is known as Operation Pitting. HR is the eldest of the three and is now 24 years old.

2. HR2 is now 17 years old. FR is now 15 years old. At the time that they were evacuated, HR and her sisters were respectively aged 22, 15 and 13. HR has effectively become the *de facto* guardian of HR2 and FR while in the UK.

3. The first and second interested parties are the claimants' parents and the third and fourth interested parties are the claimants' two brothers. These four interested parties remain in Afghanistan. It appears that the family went together to Kabul Airport in August 2022, with the aim of being evacuated, but in the event only the claimants succeeded in this aim. The claimants' father was employed directly by an international organisation as a driver.

4. The claimants state that as a result of the difficult circumstances and attacks at the airport at the time when they travelled there with their other family members, they became separated from the rest of their immediate family. As a consequence, the claimants were evacuated without their other family members. The claimants say they were told to proceed towards the flight as young women/children whilst the parents and brothers were told to wait.

5. The defendant has found no evidence that the whole family was ever cleared for evacuation as a unit during Operation Pitting. Neither party contends that the claimants are family members of British nationals, or ARAP eligible, or on the LOTR call forward instruction lists (i.e. beneficiaries of the Afghan Relocations and Assistance Policy ("ARAP") and *"*other Afghan nationals in groups identified by ministers as priorities for evacuation because their profile might make them particular targets for the Taliban (for example certain Chevening scholars, journalists, women's rights activists and senior Afghan government officials*"*: R (KA) v SSHD, SSFCA and SSD [2023] 1 WLR 896, paragraphs 27(b) and (c), and 172(a). The defendant understands that the claimants were simply evacuated together from Kabul in August 2021, without the other family members. The defendant cannot speculate as to why.

6. Spelthorne Borough Council is the local authority for the area in which the claimants currently reside. The claimants were on 16 August 2023 moved from hotel accommodation into local authority accommodation, arranged with the assistance of the local authority and the defendant's liaison officer. They are not currently, and have not been, in the care of the local authority but referrals have been previously made in relation to them. The local authority has been served throughout these proceedings as an interested party and has confirmed that its position is neutral.

7. The claimants were granted Indefinite Leave to Remain ('ILR') and their bio-metric cards were issued to them reflecting this grant on 11 March 2022. Their grant of ILR stated that this is under 'ALES' – 'Afghanistan Locally Employed Staff'. This was

[1] Originally, only HR was the claimant but an application to add the other claimants was subsequently granted. For ease of reference, the second and third claimants are hereafter referred to as such, regardless of whether they were interested parties at the time in question.

subsequently corrected and the defendant re-issued ILR to them on 26 June 2022 with the confirmation that this was under the Afghan Citizens Resettlement Scheme ('ACRS').

8. On 21 December 2022, the claimants' solicitors emailed the defendant representations requesting a grant of LOTR for those family members remaining in Afghanistan. On 8 March 2023, the solicitors sent the defendant a PAP (pre-action protocol) letter challenging lack of response to representations.

9. On 4 April 2023, the defendant sent a PAP response, stating:

> "You submit that representations were sent directly seeking Family Reunion for the interested parties on 21 December 2022, and that there has been no response to these representations at the time of drafting. You do not appear to have made an application for entry clearance, and you have not provided a GWF reference number of a copy of any application forms which one would expect to see had a visa application been formally submitted. All that has been provided in the bundle accompanying your letter before action is a letter dated 21 December 2022 letter that was sent to the following email address:
>
> Afghanresettlementinforequests@homeoffice.gov.uk sent, no trace of formal visa application"

10. On 2 May 2023, the solicitors sent the defendant an 'Addendum' to the claimants' original PAP letter of 8 March 2023, stating inter alia that the defendant's PAP response that the family members in Afghanistan should apply for entry clearance in the form and under the Immigration Rules that most closely match their circumstances was *Wednesbury* unreasonable and unlawful.

11. On 12 June 2023, the sealed judicial review claim form was served and Linden J directed abridged response. On 26 June 2023, the defendant re-issued ILR to the claimants, with the confirmation that this was under the ACRS. On 5 July 2023, Lang J directed that there be a rolled-up hearing.

12. On 4 August 2023, the defendant filed and served his detailed grounds of defence.

13. On 14 August 2023, the claimants' solicitors made a request under CPR Part 18 for certain information relating to the judicial review. One of the questions was "Can the SSHD confirm the number of children evacuated through Operation Pitting, who became separated from their parents during the operation/evacuation?" On 13 September 2023, the defendant responded. In answer to this question, he replied "The Home Office does not hold data for this category". To the question "How many cases have been brought to the UK Government's attention involving such children and requesting assistance with their parents' reunification?", the response was "This is ambiguous as it refers to UKG rather than the Home Office. As to the Home Office, it does not hold data for this category."

14. On 21 September 2023, a Ministerial Submission (hereafter "the Ministerial Submission") was escalated to the defendant, recommending that he establish a route for the parents of children under 18 who were evacuated in Operation Pitting to join them in the UK.

15. On 11 October 2023, the defendant accepted the recommendation in the Ministerial Submission and decided to establish a route for the parents of children under 18 who were evacuated in Operation Pitting to join them in the UK. *Prima facie*, this will

include the claimants' parents on the basis that HR2 and FR are under 18, but the precise eligibility and cohort for this policy has not yet been finalised. The defendant's intention is to begin to accept referrals under this route in the first half of 2024.

16. On 17 October 2023, the claimants sent the defendant a further Part 18 request, replying to perceived insufficiency in the defendant's original Part 18 response. On 19 October 2023, the claimants filed and served a reply. On 24 October 2023, the claimants filed and served their skeleton argument.

17. On 27 October 2023, the defendant sent the claimants an Amended Part 18 Response, notifying them of the policy development mentioned in paragraph 15 above. So far as timescale for implementation was concerned, the response said that "Due to the specific vulnerabilities of this cohort there is a need to properly consider safeguarding requirements which could impact delivery timelines. The additional period is justified in light of ensuring that any route that is established prioritises the best interests of children."

18. The rolled-up hearing was listed before me for 7 and 8 November 2023. On 7 November, during the claimant's reply, I requested that the defendant disclose the Ministerial Submission. On 8 November 2023, the defendant disclosed the Ministerial Submission and a witness statement from Dr Peter Illing. Also on that day, the defendant notified the court and the claimants of the existence of further material that needed to be disclosed pursuant to candour, that the defendant wished to disclose now, but which could only be disclosed into CLOSED proceedings. D therefore applied to adjourn in order to make this application under section 6 of the Justice and Security Act.

19. On 24 November 2023, that section 6 application was then made and granted by Swift J on 5 December 2023.

20. On 27 November 2023, I ordered the defendant to file a further witness statement explaining (a) when the defendant's legal representatives at GLD first became aware of the Ministerial Submission; (b) the reasons for not disclosing it to the claimants sooner; (c) when the defendant's legal representatives with conduct of this litigation first became aware of the further material and its relevance to this claim; (d) *"*further information as to any data held by the D, or other Departments of HMG, or referrals made to the same, as well as the sources of any such data and referrals, that presumably supported the summary of the 'background' at [3] (noting that this is information (at least in part) that the claimant requested as part of her Part 18 request and which was not provided by the defendant". I also gave the claimants permission to file amended grounds subsequent to the defendant filing that statement and gave the defendant permission to file amended grounds of defence thereafter.

21. On 4 December 2023, the defendant filed a second witness statement from Dr Illing, addressing the questions set by the court, as well as the reasons for the Ministerial Submission stating that the Refugee Resettlement and Integration Unit were aware of around 80 children evacuated during Operation Pitting, when the defendant's Part 18 response stated, in answer to the question "Can the SSHD confirm the number of children evacuated through Operating Pitting, who became separated from their parents during the operation/evacuation?*"*, that *"*The Home Office does not hold data for this category".

22. On 7 December 2023, further to application by the claimants, the court ordered that

the defendant file and serve a further witness statement addressing (a) the reasons why the Ministerial Submission was not disclosed earlier by the defendant to the claimants; (b) the reasons why the information contained in the Ministerial Submission, in the absence of the Ministerial Submission itself being disclosed, was not disclosed earlier in correspondence and/or the defendant's pleaded defence; (c) when and why the need for a recommendation, leading to the Ministerial Submission was identified *inter alia* with regard to the claimants' case and by whom; (d) the steps taken and by whom leading to the Ministerial Submission and when; and (e) concerning the position of the defendant's legal representatives.

23. On 13 December 2023, the claimants filed the amended statement of facts and grounds. On 14 December 2023, I made a further order, pursuant to the claimants' application, directing that Dr Illing provide a third statement.

24. On 18 December 2023, the defendant sent a letter to the court along with a draft order, agreed with the special advocate, setting aside the section 6 order and allowing the proceedings to continue as OPEN only, with no CLOSED element.

25. On 19 December 2023, the defendant filed a third statement from Dr Illing, a statement from Kara Minto-Simpson and a statement from the defendant's solicitor with conduct, Moshe Bordon.

26. On 21 December 2023, the defendant filed amended detailed grounds of defence.

27. The adjourned hearing took place on 5 March 2024. I am grateful to Ms Naik KC and Mr Tabori for the quality of their oral submissions.

28. Despite what is said above, a CLOSED hearing took place before me on 6 March 2024. After being informed of the intention to set aside the section 6 order, the claimants' OPEN representatives asked the court not to discharge the order until a leading special advocate had been appointed and had had an opportunity to confer with those representatives in OPEN and then consider the material in CLOSED. This was done and as a result the set aside application was not pursued. A CLOSED judgment is being handed down, as well as the present judgment.

***LEAVE OUTSIDE THE RULES POLICY***

29. The defendant's LOTR policy states, under the heading "Applying overseas for LOTR":

> "Applicants overseas must apply on the application form for the route which most closely matches their circumstances and pay the relevant fees and charges. Any compelling compassionate factors they wish to be considered, including any documentary evidence, must be raised within the application for entry clearance on their chosen route. Any dependants of the main applicant seeking a grant of LOTR at the same time will need to apply separately and pay the relevant fees and charges. An ARAP form cannot be used to apply for LOTR (see Afghanistan Relocations and Assistance Policy (ARAP)).
>
> …
>
> **Important principles**
>
> A grant of LOTR should be rare. Discretion should be used sparingly where there are factors that warrant a grant of leave despite the requirements of the Immigration Rules or specific policies having not been met. Factors raised in

their application must mean it would not be proportionate to expect the person to remain outside of the UK or to leave the UK.

The Immigration Rules have been written with clear objectives and applicants are expected to make an application for leave to enter or remain in the UK on an appropriate route under the relevant Immigration Rules and meet the requirements of the category under which they are applying – including paying any fees due.

Considerations of whether to grant LOTR should not undermine the objectives of the rules or create a parallel regime for those who do not meet them.

Where you consider LOTR, you must have regard to part 9 grounds for refusal within the Immigration Rules and refer to the general grounds for refusal guidance.

…

**Reasons to grant LOTR**

Compelling compassionate factors are, broadly speaking, exceptional circumstances which mean that a refusal of entry clearance or leave to remain would result in unjustifiably harsh consequences for the applicant or their family, but which do not render refusal a breach of ECHR Article 8, refugee convention or obligations. An example might be where an applicant or relevant family member has experienced personal tragedy and there is a specific event to take place or action to be taken in the UK as a result, but which does not in itself render refusal an ECHR breach.

Where the Immigration Rules are not met, and where there are no exceptional circumstances that warrant a grant of leave under Article 8, Article 3 medical or discretionary leave policies, there may be other factors that when taken into account along with the compelling compassionate grounds raised in an individual case, warrant a grant of LOTR. Factors, in the UK or overseas, can be raised in a LOTR application. The decision maker must consider whether the application raises compelling compassionate factors which mean that the Home Office should grant LOTR. Such factors may include:

- emergency or unexpected events
- a crisis, disaster or accident that could not have been anticipated

LOTR will not be granted where it is considered reasonable to expect the applicant to leave the UK despite such factors. Factors, in the UK or overseas, can be raised in a LOTR application. These factors can arise in any application type." (emphasis added)

30. It also states, in respect of applications for LOTR, under the heading "In respect of children and those with children":

"The application of this guidance must take into account the circumstances of each case and the impact on children, or on those with children, in the UK. Section 55 of the Borders, Citizenship and Immigration Act 2009 places an obligation on the Secretary of State to take account of the need to safeguard and promote the welfare of children in the UK when carrying out immigration, asylum and nationality functions.

> In practice, this requires a consideration to be made of the best interests of the child in every decision that has an impact on that child. This is particularly important where the decision may result in the child having to leave the UK, where there are obvious factors that adversely affect the child, or where a parent caring for the child asks us to take particular circumstances into account. All decisions must demonstrate that the child's best interests have been considered as a primary, but not necessarily the only, consideration. Caseworkers must be vigilant that a child may be at risk of harm and be prepared to refer cases immediately to a relevant safeguarding agency where child protection issues arise."

***CASES INVOLVING AFGHANISTAN***

31. R (S) v SSFCA **[**2022] EWHC 1402 (Admin) ("S") concerned judges in Afghanistan prior to the events of August 2021, seeking judicial review of the refusal to consider their applications made to the Ministry of Defence under the ARAP as visa applications for LOTR. It was not in dispute that the claimants were at risk of serious harm or death at the hands of the Taliban: paragraph 1. They had applied under ARAP and, in the alternative, had applied to be granted LOTR. The SSHD declined to consider granting LOTR on the basis that they had not submitted Visa Application Forms ("VAF"). Lang J held that it was irrational for the SSHD not to allow the applicants to apply using the ARAP forms: paragraph 133, and was followed in SH v SSFCDO and SSHD [2022] EWHC 1937 (Admin) (Eyre J), paragraph 5. On the general requirement to lodge an application form at all, however, importantly for the present case, in S, Lang J affirmed the logic of the SSHD's policy requirement that applications for LOTR be made on the VAF for the visa most closely matching an applicant's circumstances:

> "130. I agree with the Claimants' submission that there is an obvious reason why LOTR policy directs that applications be made on the form for the visa type which most closely matches their circumstances. That is because any compelling compassionate circumstances will be decided by reference to the IR which most closely matches their circumstances, and the criteria in the rules which they are unable to meet."

32. On appeal from Lang J's decision, in S and AZ v SSHD and SSD [2022] EWCA Civ 1092 ("S and AZ"), the Court of Appeal:

    a. Allowed the appeal against the conclusion that it was irrational to reject the applications for LOTR because they were made in the ARAP online application form: §27-28, 34; and

    b. Upheld Lang J's decision that it was irrational and procedurally unfair to refuse to consider visa applications without prior attendance at a Visa Application Centre for biometric enrolment, with no option for waiver or deferral, and S and AZ did not want to take the risk of making a false entry on the form, which they were advised to do by GLD: paragraphs 34-35. The Court of Appeal however noted that this defect had been remedied since Lang J's decision, with the online application form amended to allow applicants to request waiver or deferral of the requirement to submit biometric information when they make their application: paragraph 22.

33. The Court of Appeal's judgment records that, in respect of the defendant's statement of the purpose of requiring submission of a VAF:

"14. The requirement that applicants for LOTR must apply "on the application form for the route which most closely matches their circumstances" is at the heart of the issues on this appeal, and I will return to it below. But it is convenient to note at this stage that Ms Giovannetti explained that 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. She told us on instructions that in practice applications would not be rejected on the basis only that a form more closely matching their circumstances could have been chosen."

34. The Court of Appeal declined to find the decisions challenged in that case irrational on the basis of a requirement to use inappropriate forms on the basis that it was not addressed in the evidence or in developed submissions before it: S and AZ, paragraph 31. However, Underhill LJ held at paragraph 30 that:

"… it remains on the face of it very odd that applicants are required to use forms which are admittedly inappropriate, and it is not hard to see how applicants, particularly those without access to sophisticated advice, might be concerned that their application would be jeopardized by choosing a route which the Secretary of State believed matched their circumstances less closely than some other route and be puzzled how to answer questions that had no application to their circumstances. If, as Ms Giovannetti told us, the only reason for requiring the use of an inappropriate form was to have a vehicle by which applicants could be assigned a reference number and plugged in to the system for obtaining biometrics, why could that not be more straightforwardly achieved by providing a separate form for LOTR applications?".

35. The defendant addressed the issue of why there was no specific LOTR form for overseas applicants posed by Underhill LJ where the issue arose in R (MA) v SSHD, SSFCDA, and SSD, CO/1876/2022, via a witness statement of Ms Sally Weston of the Home Office. That case was settled but Ms Weston's statement was filed in connection with the present proceedings and is considered below.

36. In R (KBL) v SSHD [2023] EWHC 87 (Admin), the claimant submitted that the defendant acted irrationally in requiring the claimant to submit her application for LOTR in an online VAF which did not match her circumstances: KBL, paragraph 104, relying on Underhill LJ's obiter consideration of this requirement in S and AZ at paragraph 30. Lang J declined to find irrationality, stating: "[S]ince the Court of Appeal gave "careful consideration" to this point, but decided that it would not be appropriate to find irrationality on this basis, I do not consider that I can now find for the Claimant on this ground.".

37. In R (CX1) v SSD and SSHD [2023] EWHC 284 (Admin), the court considered the evidence of Ms Weston and further information from the defendant regarding the "free text" box in all VAFs: paragraphs 108-109. At paragraphs 121-127, the court held that it was rational for the defendant to require applicants seeking LOTR to use the most closely connected VAF, notwithstanding it being *"*distinctly sub-optimal*"* for the claimants to have to use a VAF for a category of leave whose requirements they could not meet (paragraph 127).

***EVIDENCE REGARDING THE CLAIMANTS***

38. Witness statements have been filed from the claimants' aunt and uncle, detailing the difficulties the claimants have experienced since being separated from their parents and brothers. Evidence from an independent social worker, a GP and a psychiatrist concerns the stress and resulting medical problems for the claimants arising from the separation and the circumstances of the claimants' accommodation in the UK, involving bridging hotel accommodation. There is also evidence of a neck injury to the claimants' mother, following an attack by the Taliban and evidence that the brothers are receiving anti-depressant medication.

***THE MINISTERIAL SUBMISSION AND THE WITNESS STATEMENT OF KARA MINTO-SIMPSON***

39. The Ministerial Submission defined the issue as being that there is a small group of children who were evacuated from Afghanistan during Operation Pitting without their parents. The Submission said that "We are aware of around 80 children (including sets of siblings) who were evacuated to the UK during Op Pitting without their parents." There was currently no route for these children to be reunited with their parents under the Afghan Citizens Resettlement Scheme Pathway 1 ("ACRS P1"). I note here that Pathway 1 is being used to grant long term immigration status to people who arrived under Operation Pitting.

40. The Submission recommended that the Immigration Minister should agree in principle to the recommended approach of Option 1. This would involve developing a referral process to allow eligible parents and their immediate family members to be resettled under ACRS P1. It would facilitate travel to the UK (subject to availability of settled accommodation) and fee-free visa applications. Initial analysis had begun into possible digital options for delivering the route. There may, however, be cases where it would not be in the best interests of children for the parent to be brought to the UK. Funding would need to be provided to enable local authorities to carry out required safeguarding assessments through trained social workers.

41. The Ministerial Submission said that "Due to the complexity of this issue and capacity constraints, which have affected the pace at which we could establish a route for reunion, some of the children will now have reached 18". The Submission advised that such persons should also be able to reunite with their parents.

42. Option 2, which was not recommended, was to create a new specific type of leave for the cohort. This Option could, however, create a disparity between the type of leave granted to parents of evacuated children and the wider ACRS.

43. Option 3, which was not recommended, was to do nothing and allow parental reunification only through existing visa and immigration routes. The submission did not recommend Option 3 because "parents would only be able to apply through existing visa routes, such as Appendix FM of the Immigration Rules. Most, if not all, of the parents involved would be unlikely to satisfy the requirements of this route. While they may go on to be granted under article 8 [of the ECHR] this is not guaranteed."

44. Under the heading "Media and parliamentary handling", the Ministerial Submission recognised that "there is a chance that the number of Afghan children in the UK by

themselves will be made public leading to criticism about why we did not allow them to reunite with their parents sooner… There is also a risk that comparisons will be made with UASCs and whether we will apply the same policy to this group of children". The Submission advised that it would be explained that "our policy is only for children evacuated from Afghanistan while reminding on safeguarding and welfare concerns if we allowed children to sponsor parents, which could encourage more young people to come over on small boats".

45. Kara Minto-Simpson's witness statement is dated 19 December 2023. It is heavily relied on by the claimants; in particular in respect of Ground 1 of the grounds of claim. Ms Minto-Simpson is the Policy Lead for Pathway 1 of ACRS and Operational Policy issues relating to the ACRS scheme. Her statement addresses the process of preparing the Ministerial Submission. Ms Minto-Simpson led the team responsible for preparing the Submission.

46. Ms Minto-Simpson says that the Afghanistan Resettlement and Immigration Policy Statement ("ARIPS") was published in September 2021. Whilst Ms Minto-Simpson: "… was able to establish that a route under Appendix FM existed that could be used for parents to be reunited with their children in the UK, the route may not align with parents with the same form [of] permission to stay and conditions as their children, such as the right to work, education and access to public services, who have been resettled under the ACRS and would not be aligned with the ARIPS to provide parents with eligibility to the ACRS. The need for a ministerial decision on a route that would allow the parents of children who were evacuated without them as eligible individuals on the ACRS was identified when it became clear that this cohort was not covered by the ARIPS. I first became aware that there was such a cohort when operational colleagues sent a query to policy colleagues in May 2022… I made a number of initial enquiries with relevant policy teams to establish high level details, including but not limited to understanding if any existing immigration route could be used for this cohort" (paragraph 4).

47. Ms Minto-Simpson established that "no route existed that could uniformly allow the reunification of parents with children that would result in a consistent application for leave across the cohort." Applications made under Appendix FM "would not support a consistent approach to grant leave across the cohort as each application would be assessed on a case-by-case basis which could result in each applicant being granted a different length of time for their associated leave" (paragraph 5).

48. Preparing the Submission involved first understanding the issue "within the best of my abilities with the resources available to me". There needed to be meetings with various subject matter experts and legal advisers. The bulk of meetings took place between June 2022 and December 2022. A spreadsheet recording known cases of children evacuated without their parents was shared with Ms Minto-Simpson in July 2022. "Due to the complexity of the children without parents advice I was advised, along with my policy colleague who was drafting the submission, in March 2023 that the issues should be split into two separate submissions" (paragraph 7).

49. Ms Minto-Simpson says that recommendations to Ministers have to be operationally deliverable and that, accordingly, a number of conversations with colleagues took

place in March to May 2023 to ensure that recommendations would be so deliverable. All submissions must go through a clearance process, which began in May 2023, with follow up meetings in June and July. Updating work took place in July and August. In September 2023, the submission received legal clearance and proceeded through the remainder of the clearance chain. By this time, Ms Minto-Simpson says they were aware of listed hearings for judicial reviews brought by evacuated children.

50. Ms Minto-Simpson says that her understanding of the reference in the Ministerial Submission to there being "no viable route" referred to "the lack of a clear route within the Immigration Rules for children evacuated without their parents … It is not the case that there were no mechanisms which could be used but that existing routes may not easily be identified by applicants to allow parents seeking to join evacuated children in the UK with ACRS eligibility and the same form of leave under the scheme". That was expanded upon later in the same paragraph of the Ministerial Submission. Ms Minto-Simpson says that:

> "For example, applicants might try to apply under Appendix FM, fail to meet the eligibility criteria as a matter of course while not appreciating what evidence they need to satisfy a decision-maker that a refusal would result in unjustifiably harsh consequences for a relevant child… For an overseas applicant to be considered for LOTR, for instance, an application must first be made under the Rules such as (for example) Appendix FM. It is acknowledged within the LOTR guidance that a person may not meet all the criteria of a route but people should apply to the route that most clearly meets their criteria. Even if the parents do not meet all of the criteria there would be decisions on a case-by-case basis that would determine if a grant of leave was given and what grant of leave was given. As policy lead, I did not think entirely utilising existing routes would fulfil the publicly-stated ACRS eligibility intent of Ministers as set out in the ARIPS" (paragraph 11).

***THE GROUNDS OF CHALLENGE***

51. Ground 1 contends that it was irrational for the defendant to refuse to provide bespoke assistance to facilitate the reunion of the family in the UK, insisting instead that an application should be made for the Afghan-located members of the family to enter the UK under the LOTR process.

52. Ground 1 was originally founded on a number of Parliamentary statements by Ministers, in response to written questions, including the statement on 17 March 2023 that "Following the evacuation of Kabul any children who we became aware of in the UK that were not with their parents, have been dealt with on a case by case basis. Where this has happened, we work in close collaboration with social services and the relevant local authority". On 30 March 2023, the Immigration Minister said "For those evacuated from Afghanistan under the ACRS without their immediate family members, further information will be made available in due course about options for reuniting with them. We are unable to provide a target date at this time."

53. The defendant objected to reliance being placed on these Parliamentary statements, on the basis that this infringed the prohibition in article 9 of the Bill of Rights 1689 on calling Parliamentary proceedings into question. As reformulated in December 2023, the grounds of claim state that these statements are no longer relied upon in

connection with Ground 1. Whether the claimants have disavowed all reliance upon the Ministerial statements is, however, disputed by the defendant. I shall return to this in due course.

54. Ground 1 now focuses on the Ministerial Submission which, as we have seen, was accepted by the defendant on 11 October 2023. The Ministerial Submission also confirmed that the Home Office was aware of around 80 children (including sets of siblings) in the same or similar circumstances to the claimants. The Ministerial Submission also told the defendant that a decision from him was urgent due to upcoming cases scheduled for judicial review on 9 October and 7 November (the latter being the first day of the hearing in the present proceedings).

55. Ground 1 asserts that in the light of the "policy announcements, recommendations and policy decisions and the particular vulnerabilities" of the claimants, "expecting the interested parties to apply under the Immigration Rules in the closest matching online application forms, with all the procedures that this entails including the payment of fees or the making of fee waiver applications, is irrational and unfair." There are said to be good reasons in the claimants' case to be flexible with the defendant's entry clearance requirements. The Ministerial Submission recognises that it is widely acknowledged to be in the best interests of children to be with their parents. The Ministerial Submission did not recommend Option 3, which was "Do nothing and allow parental reunification only through existing visa and immigration routes … Under this option, parents would only be able to apply through existing visa routes, such as Appendix FM of the Immigration Rules. Most if not all, parents involved would be unlikely to satisfy the requirements of this route. While they may go on to be granted under article 8 this is not guaranteed."

56. Ground 1 also makes reference to the Afghan Girls' Football team, who were dealt with by the defendant on a bespoke basis and who did not have to apply for leave to enter the UK.

57. It is said that the claimants' parents are effectively in hiding in Afghanistan and are unlikely to be able to satisfy any fee waiver application requirements as their circumstances are complex and they would not satisfy the relevant requirements in relation to any of the routes specified under Appendix FM including the relationship and financial eligibility requirements. There is said to be no form or rule that comes close to the circumstances of the interested parties. Thus, the defendant's position is irrational. The fact that no form or rule comes close is said to be demonstrated by the defendant's disclosure out of hours on 7 November 2023 of the Ministerial Submission.

58. Ground 2 argues that the defendant is in breach of his duty under section 55 of the Borders, Citizenship and Immigration Act 2009 to ensure that immigration etc. functions are "discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom": section 55(1)(a). Reference is made to the medical evidence concerning HR, who suffers from depression and moderate Post-Traumatic Stress Disorder ("PTSD"). HR2 has been diagnosed with, *inter alia*, severe PTSD. Without family reunification, treatment is unlikely to be effective. FR has struggled at school in the UK.

59. The claimants argue that the defendant had an obligation arising from the duty of candour to disclose "the steps that led to the formulation of the policy recommendation" in the Ministerial Submission. The implication appears to be that this would have shown that the defendant was in breach of section 55 during the period, described by Ms Minto-Simpson, when the apparent need for a policy was identified and when the policy submission was being devised and worked on. In any event, there has been a clear breach of section 55 in the case of the claimants. Furthermore, the defendant actively considered his section 55 duty on 11 October 2023, when agreeing to the policy recommendation, which was precisely in line with what the claimants had been asking for. In the alternative, therefore, the defendant has been in breach of section 55 since 11 October 2023.

60. Ground 3 submits that, given the timescales associated with the claimants' arrival in the UK, the granting to them of leave under ACRS P1 and the "repeated promises made for a bespoke route between January and March 2023 and then subsequently recommended in the Ministerial Submission, the Claimants had, and continue to have, a legitimate expectation that a bespoke route would be introduced within a reasonable period of Operation Pitting."
61. Ground 4 argues that there has been an unlawful and/or disproportionate delay in introducing the ACRS family reunion scheme. Save for assertions that the issue is complex, there is said to be no indication as to why the claimants and others in their position have had to wait 21 months to be given an effective right to be reunited with their immediate families. The claimants have been "left lingering in hotel accommodation". Attempts to draw the defendant's attention to the claimants' plight have not been responded to or adequately resolved. As matters stand, the claimants still have no application route to avail themselves of and have not been informed of when they can expect to receive assistance from the defendant on this issue.

62. Ground 5 contends that the defendant has failed to consider the exercise of his discretion under the Immigration Act 1971, either timeously or at all. In particular, the claimants say the defendant should not expect or insist, for the sake of administrative convenience, that the claimants sponsor their parents and brothers to join them, by applying for visas, in circumstances where the defendant has confirmed that a bespoke route will be implemented. The Ministerial Submission does not recommend doing nothing. A failure in these circumstances to consider exercising discretion is "irrational, unfair and unlawful, particularly in light of the timescales that have elapsed". The defendant is said to have demonstrated an ability to exercise such discretion, as evidenced by the actions taken by the defendant to grant leave to the Afghan Girls' Development Football Team.

63. Ground 6 concerns what the claimants say are delays on the part of the defendant that have caused them detriment. As a result of the defendant's failure to engage with the claimants and the delays in effecting family reunification, the claimants have been wholly or substantially deprived of the right to their family life under article 8 of the ECHR. In addition, the delays have impacted on their private life, as it relates to their health and wellbeing in the UK. The delays have accrued, at the very least, since the request made to the defendant on 21 December 2022.

64. The relief sought comprises declarations as to the alleged forms of unlawfulness, a mandatory order requiring the defendant to effect reunification of the family subject

to the satisfactory completion of security checks and biometric information enrolment and damages including but not limited to damages under section 8 of the Human Rights Act 1998. A declaration is also sought that the defendant breached his duty of candour.

## *DECIDING THE CLAIM*

### *Ground 1*

65. The defendant's response to Ground 1 in particular but also to the claimants' challenge generally is that there is and always has been, an adequate alternative remedy; namely, for the interested parties to make an application for visas on the form and under the Immigration Rules that most appropriately fit their circumstances, and invoking the defendant's LOTR policy. The defendant submits that the closest categories would be entry clearance as a parent under Appendix FM to the Rules and, for the brothers, entry clearance as an adult dependant relative (Appendix Adult Dependant Relative). The parents could seek to rely on GEN 3.2 and both the parents and the brothers could state on the form that, insofar as they do not fulfil each requirement of the relevant category, they also seek LOTR, setting out any compelling circumstances they wish to be considered as justifying LOTR, including any documentary evidence. If necessary, they could apply for fee waivers and biometric discretion. The submissions regarding section 55 of the 2009 Act that feature in the claimants' Ground 2 could be made in support of the applications for entry clearance.

66. The starting point is that the case law mentioned in paragraphs 31 to 37 above provides powerful support for the defendant's case. Even in the challenging context of Afghanistan, following the Taliban takeover, the courts have recognised the importance of requiring applications to be made using the online forms: see esp. S at paragraph 130 and S and AZ at paragraph 14. The witness statement of Sally Weston (Head of the Home Office's Simplification and Systems Unit in the Migration and Borders Group), originally filed in connection with another case but provided also in these proceedings, explains that the requirement is not only a matter of good and efficient administration but is imposed "with a view to applicants being treated fairly". The visa application process "involves an integrated system which aims to be efficient and where possible automated to make consideration of applications manageable and which easily enables identification of the type of application for the appropriate Home Office officials to consider". Mr Tabori also points out that the applications process prevents spurious applications being submitted by the same person using multiple identities.

67. These are not considerations to be brushed aside, even where the facts of the individual case are apparently demanding of sympathy. Requiring the process to be followed creates a "level playing field" for all applicants, many of whom might possess characteristics equally demanding of sympathy. It furthermore minimises the potential for error. There is also the important point that the LOTR policy involves consideration not only of whether a grant of leave is required in order to avoid a breach of article 8 of the ECHR (and so a breach of section 6 of the 1998 Act) but also whether there are compelling compassionate factors which mean that a refusal of entry clearance "would result in unjustifiably harsh consequences for the applicant or their family, but which do not render refusal a breach of ECHR Article 8…".

68. Zoe Bantleman, the Legal Director of the Immigration Law Practitioners' Association, has filed a witness statement dated 19 October 2023. She issued a call for evidence in August 2023 regarding LOTR applications and fee waiver applications in the context of applications by family members of individuals who were evacuated from Afghanistan and/or relocated to the UK following the Taliban takeover in 2021. She refers to the Parliamentary Ministerial statements mentioned earlier. She highlights the English language requirement in Appendix FM. Ms Bantleman received only a small number of responses to her call for evidence. Very few ILPA members said they had made LOTR applications specifically for individuals evacuated during Operation Pitting who had been granted leave under ACRS P1. Even fewer had made applications to join family members with separated children in the UK. She considers that factors including the lack of sufficiently clear and detailed guidance, confusion experienced by applicants and many representatives, the unclear merits of success under Appendix FM and LOTR, the difficulties of finding legal aid representatives with capacity for complex human rights applications and the promise of a new policy/route for family members may have individually or cumulatively have contributed to the low response rate due to ACRS P1 evacuees waiting for a route to open rather than risking an application that would be difficult to navigate.

69. Ms Bantleman reported delays in obtaining fee waivers. A number of applications made by reference to Part 11 of the immigration rules as the closest category had been refused. Overall, Ms Bantleman is "unaware of a simple and efficient mechanism for reunification of families separated during Operation Pitting".

70. Jamie Bell of Duncan Lewis has filed a witness statement dated 19 October 2023. He says that the fees chargeable if the interested parties applied under the adult dependant relative route would be £12,100 for a visa application "for which they are very clearly not eligible". Mr Bell considers it would be very difficult for the family to meet the requirements that permit them even to seek to make an application for fee waiver. MMR does not have a bank account and is paid his income by cheque, which he then cashes. MMR would not be able to provide any of the evidence suggested in the fee waiver guidance.

71. I am not persuaded that this evidence assists the claimants in their contention that the alternative remedy suggested by the defendant is not an adequate one, in all the circumstances. Ms Bantleman's view that persons in the position of this family might be waiting for the new route to open supports the defendant, as Mr Tabori's alternative submission to the LOTR route is that the claimants can use the new route as soon as it becomes available, as to which the defendant's case is that this is anticipated to be in the first half of 2024. As Mr Tabori says, the defendant and the claimants are, in this regard, pushing in the same direction.

72. But even if one ignores this point, the evidence of Ms Bantleman and Mr Bell does not disclose that the LOTR route is not a suitable alternative one. The response to the call for evidence was so small as to preclude any meaningful conclusions. The fact that some LOTR applications were unsuccessful underscores the point that grants are expressly acknowledged by the defendant in the LOTR policy document to be "rare". It does not mean that applications by the interested parties will be doomed to failure

or so unlikely as to make that process an inadequate remedy. The evidence regarding fee waiver does not show a systemic degree of delay on the part of the defendant's officials. The points made by Mr Bell about difficulties the father would encounter in proving his income in Afghanistan are ones that can be made in the application. The defendant cannot in any sense be said to be by now unfamiliar with the position on the ground in that country, as it relates to those seeking to use the visa application route.

73. The claimants' case for resisting the defendant's suitable alternative remedy submission and making good Ground 1 rests on the fact that the defendant has expressly recognised that a case has been made for a new bespoke route for individuals in the position of the parents of the claimants (and by extension the claimants' brothers). As we have seen, the Ministerial Submission did not recommend the "do nothing" Option 3, which would have allowed parental reunification only through existing visa and immigration routes. This was because most if not all parents would be unlikely to satisfy the requirements of this route; and "While they may go to be granted under article 8, this cannot be guaranteed."

74. The claimants also rely heavily on Ms Minto-Simpson's witness statement, summarised at paragraphs 45 to 50 above. The claimants say that her statement and the Ministerial Submission serve to distinguish the line of cases referred to at paragraphs 31 to 37 and 66 above. They also serve to distinguish cases such as R (Celik) v SSHD [2022] Imm AR 1438, which recognise that the defendant is entitled to require those wishing to make human rights claims within the meaning of the Nationality, Immigration and Asylum Act 2002 to do so by means of the application process laid down by the defendant.

75. I can understand why the claimants make these submissions, which at first sight might have a superficial attraction. There is, however, on closer analysis a false assumption inherent in the submissions; namely, that the fact the defendant has accepted the advice of officials to create a bespoke route means it was and is irrational for the defendant to require the interested parties to use the visa application/LOTR route; and that, by the same token, the use of such a route cannot constitute an adequate alternative remedy. To draw such a conclusion would constitute an unwarranted incursion by the courts into administrative decision-making. Government policy is entitled to alter in order to meet changed factual circumstances, or to reflect a new way of approaching the same such circumstances. In neither case does the pre-existing policy fall to be viewed as unlawful in public law terms, merely because the new policy is regarded as in some way "better" than its predecessor. If it were otherwise, officials would be likely to avoid recommending that Ministers alter their policies and Ministers would likely be reluctant to accept any such recommendations, for fear of legal challenges being brought to decisions made under the previous policy. The resulting "chilling effect" on the operation of government would be profound.

76. The claimants would no doubt respond first, that there must nevertheless be situations where the policy change of course is occasioned by the realisation that the existing policy is so flawed as to be unlawful; and second, that the present case is such an instance. I agree that the first proposition is correct. The serious consequences described in paragraph 75 above are, however, such that the court must be careful not

to read too much into the mere fact that the policy has changed. Irrationality is a high threshold and must not be allowed to be lowered by over-reliance on that fact.

77. In order to determine whether the second proposition is made out, it is necessary to examine the evidence by reference to the considerations articulated in paragraphs 75 and 76 above.

78. The Ministerial Submission did not recommend the "do nothing" Option 3 because "parents would only be able to apply through existing visa routes such as Appendix FM of the Immigration Rules. Most if not all of the parents involved would be unlikely to satisfy the requirements of this route. While they may go on to be granted under article 8, this is not guaranteed." I am not satisfied that this renders irrational the defendant's present policy to require an application for a visa and the operation of the LOTR policy. It is important to realise that any decision under article 8 ECHR will involve a broad evaluation, as opposed to an exercise involving hard-edged rules. There may, accordingly, be scope for variations in decision-making in cases involving article 8, which are unlikely (or at least less likely) to feature in purely rules-based decisions. Article 8 ECHR nevertheless is a rational tool for the defendant to give consideration to members of the cohort. The lack of a "guarantee" that article 8 will always produce the same result as a bespoke rules-based system does not mean it is irrational for the defendant to use the ECHR. Indeed, since 2011 many aspects of the Immigration Rules incorporate what are, in effect, article 8 assessments and therefore are, to that extent, more susceptible to differences in outcomes. The ability of the defendant to achieve appropriate outcomes via the present process is reinforced by the fact that consideration is required by the LOTR policy to be given to the presence of compelling compassionate factors, which are not such as to mandate a grant of leave by reference to article 8.

79. The policy advocated in the Ministerial Submission would move a specific category of case from individualised assessment under the LOTR policy by reference to exceptional circumstances to a criteria-based system. I accept that such a system is generally likely to be easier to navigate for applicants and easier to administer for officials. Overall, it is likely to be "better" than the existing approach. But the claimants have not shown that the existing approach is so deficient as to be irrational. On the contrary, the Ministerial Submission and the defendant's decision of 11 October 2023 constitute a good example of how an administrative system responds to events. Where the number or nature of cases having special or exceptional features is recognised to warrant it, those cases are made the subject of their own new rules-based criteria, rather than having to be dealt with as exceptions to existing rules.

80. The claimants highlight the fact that the nature of the leave that might be granted by applying the LOTR policy might not result in a consistent standardised form of leave across the cohort. I do not consider that this issue weakens the defendant's case. The officials applying the LOTR policy to the facts of an application can be expected to be aware of the point, which depending on the precise circumstances of all the persons concerned, may be relevant in the article 8/compelling compassionate factors analyses.

81. I do not consider there is anything in Ms Minto-Simpson's statement that contradicts the above or otherwise serves to support the claimants' case. Her explanation of the evolution of thinking leading to the Ministerial Submission is in accord with what is to be found in the Submission. Importantly, at paragraph 11, she is clear that it "is not the case that there were no mechanisms which could be used but that existing routes may not be easily identified by applicants to allow parents seeking to join evacuated children in the UK with ACRS eligibility and the same form of leave under the scheme". She gives an example of an applicant "not appreciating what evidence they would need to satisfy a decision-maker that a refusal would have unjustifiably harsh consequences for a relevant child". Her conclusion as policy lead was that she "did not think entirely utilising existing routes would fulfil the publicly-stated ACRS eligibility intent of Ministers as set out in the ARIPS".

82. That conclusion and, indeed the rest of the evidence set out in Ms Minto-Simpson's statement is a paradigm example of the way Government policy evolves. The move to a policy which better reflects current Ministerial thinking and which has the improvements described by her in no sense means that the existing policy should, as a general matter, be regarded as unlawful.

83. The application of the policy to the claimants and the interested parties has in any event to be seen against the background that the claimants have at all material times been represented by highly experienced immigration solicitors, well able to advise on how to make a compelling case by reference to the LOTR policy. The position of the interested parties in Afghanistan is well evidenced. The position of the claimants in the United Kingdom is covered in detail in the witness statements and expert medical evidence.

84. The claimants submit that there is an unfair difference in treatment as between them/the interested parties, on the one hand and, on the other, the Afghan Girls' Development Football Team. To be actionable, such unfairness has to be *Wednesbury* unreasonable (ie irrational). Lang J was unimpressed by what appears to have been a similar submission in S. At paragraph 127, she held that the treatment of the team "demonstrates the wide discretion which the SSHD enjoys under LOTR. No meaningful comparison can be drawn between the position of the football team and the claimants".

85. So too here. The witness statement of Elloise Gordon, dated 19 April 2022, explains that the defendant considered there to be exceptional circumstances in the case of the Team, including their young age, gender, enhanced risk from the Taliban as a girls' football team who have followed Western values, combined with their media profile, and that they were an identifiable group located together in Lahore. Apart from age and gender, there is nothing directly comparable in the present case. The claimants can therefore do no more than submit that their overall position is cumulatively as serious and compelling as that of the Football Team. But it is obvious that other conclusions can rationally be drawn.

86. The claimants submit that the evidence in the present case supports the court considering and determining Underhill LJ's observation in paragraph 30 of S & AZ that there could be more straightforward means of achieving LOTR applications: see paragraph 33 above. Underhill LJ's observation was, in fact, the significantly

narrower one that "requiring the use of an inappropriate form … could be more straightforwardly achieved by providing a separate form for LOTR applications." Doing this, however, would not meet the claimants' case, which is that the interested parties should be granted entry clearance without having to go through the LOTR process at all.

87. For the above reasons, I find that the claimants had and have a suitable alternative remedy. The policy development described in the Ministerial Submission and the statement of Ms Minto-Simpson did not render the defendant's decision to require the making of an application irrational or unlawfully unfair.

88. Ground 1 accordingly fails.

***Ground 2***

89. The existence of an alternative remedy in the shape of an application by the interested parties for leave to enter the UK undermines Ground 2, which contends that the defendant has breached his duty under section 55 of the 2009 Act. The LOTR policy expressly enjoins the defendant's caseworkers to treat the best interests of children as a primary consideration: see paragraph 29 above. Thus, once the application is made, the minor claimants' best interests will form such a consideration and so serve to inform whether article 8 ECHR requires the grant of leave or, if not, whether there are other compelling considerations such as to make such a grant appropriate.

90. In order to succeed, the claimants' case under Ground 2 has therefore to show that, on the facts, the defendant's section 55 duty was engaged at some point and not discharged.

91. In R (Kent CC) v SSHD [2023] EWHC 3030 (Admin), Chamberlain J held, at paragraph 36, that the section 55 duty "is not breached simply because (in the view of the court) the relevant functions could have been exercised in a way that better safeguards and promotes the welfare of children. The question for the court is whether the Home Secretary made arrangements for ensuring that, when the functions were exercised, the persons exercising them had regard to the specified need". In R (FA (Sudan) v SSHD [2021] 4 WLR 22, the Court of Appeal was concerned with the "destitution domestic violence concession" operated by the SSHD. The concession did not distinguish between those with and without children. At paragraphs 71 and 72, the Court (per Singh LJ) held that section 55 "is a process duty and does not dictate any particular outcome in a case like the present … 72. Section 55 does not in my view require the Secretary of State to contradict the fundamental rationale for the Concession … if the policy were to be extended in the way which the appellant seeks to do, that is the effect of what would happen".

92. R (DM) v SSHD, UNHCR intervening [2023] EWHC 740 (Admin) was a judicial review of what was said to be the SSHD's "ongoing decision that parents and siblings of refugee children will not be entitled to family reunion on the same basis as the spouses and children of adult refugees under the Immigration Rules". Amongst other things, the claimant sought a declaration that the SSHD "has failed to comply with her duty … under section 55 of the Borders, Citizenship and Immigration Act 2009" (paragraph 3). The claimant's case was that, although it was not necessary to identify precisely the point when the SSHD had discharged a relevant function or functions,

there were several occasions since the coming into force of section 55 on 2 November 2009 when she had done so; including publishing family reunion guidance and laying before Parliament statements of changes in Immigration Rules in which paragraphs concerning family reunion were deleted and re-enacted (paragraph 112). The SSHD's case was that she had not since 2 November 2009 discharged a function, such as by making a rule or subordinate legislation, and that it would be a significant extension of section 55 to hold that it applies where the SSHD did not propose to make any changes to her current policy or practice (paragraph 113).

93. At paragraph 120, Lavender J held that the relevant function was making Immigration Rules and that, in the case before him, that function had been discharged in 2000, long before section 55 came into force. At paragraph 121, Lavender J held that "the question for consideration in this case is whether the Secretary of State discharges a relevant function when she gives active consideration to the question whether to change the Immigration Rules in a particular way, even if her decision is not to make the proposed change." In deciding the matter, Lavender J had regard to the judgment of the Divisional Court in R (Adiatu) v HM Treasury [2021] 2 All ER 484. That case concerned whether the HM Treasury had failed to comply with the public sector equality duty in section 149 of the Equality Act 2010 in connection with the introduction of certain measures occasioned by the Coronavirus pandemic because it failed to consider other options that were said to have been more beneficial to women and BAME workers. The Divisional Court held at paragraph 242 that the exercise of functions for the purposes of section 149 "consists of the implementation of the measures that the public authority decides upon … A public authority must have regard to the equalities implications of the steps that it intends to take. It need not have regard to the equalities implications of other steps, which it is not taking, and is not even considering…".

94. At paragraph 133 of DM, Lavender J held that the SSHD discharges a function when she makes a change in the Immigration Rules and that, in order to discharge that function the SSHD has to consider from time to time whether to make any and, if so, what changes: "It seems to me that when she decides to choose one option rather than another, including the option of making no change to the Immigration Rules, she is discharging her function of reviewing the Immigration Rules and considering and deciding whether to change them in one or more ways". At paragraph 137, Lavender J rejected the claimant's "ongoing decision" argument, holding that a "decision is an act or event, not an ongoing state of affairs…". Noting at paragraph 140 that the evidence was that "the Secretary of State and Home Office ministers, have not given active consideration since 2 November 2009 to the policy option of changing the Immigration Rules so as to create a route to family reunion for refugee children," Lavender J concluded that the SSHD had not since that date exercised a relevant function for the purposes of section 55. He accordingly dismissed that ground of challenge.

95. Relying on the witness statements of Dr Illing and Ms Minto-Simpson, the claimants contend that the need to take specific action in respect of children evacuated from Afghanistan without their parents has been known since May 2022, when officials first became aware there was such a cohort. Some 80 children were understood to be in that position. Thus, the defendant has been in breach of section 55, as the defendant failed to act in a timely manner and even now has not implemented the policy

recommended in the Ministerial Submission.

96. There is a degree of overlap here with Ground 4, which concerns delay. So far as section 55 is concerned, I find that Ground 2 must fail. It proceeds contrary to the case law, which rejects an interpretation of section 55 that enables it to be founded on an amorphous ongoing state of affairs. Whilst Lavender J found that, on the facts of the case before him, the section 55 duty arises when the SSHD engages in or gives "active consideration" (paragraphs 133 and 140), there may be difficulty in identifying both the point in time at which active consideration begins, and whose active consideration counts. In the present case, I consider that the engagement of section 55 could not be said to take place until the formulation of the Ministerial Submission. That was the point at which official thinking was comprehensively articulated, having been refined by the processes described by Ms Minto-Simpson. To fix engagement of section 55 at any earlier time would be incoherent, as there was no decision-making on the part of the defendant to which the duty could adhere. The Ministerial Submission gives express consideration to the best interests of children.

97. But, even assuming that the development of the official thinking that led to the Ministerial Submission did start in 2022, when the existence of the cohort was first recognised, there has been no breach of section 55. On the contrary, the fact that the cohort comprised children and that the matter at issue was reunion with (at least) parents who remained outside the UK was the very reason why officials began their deliberations. That the process was, at least in part, driven by section 55 considerations is evident from the Ministerial Submission, with its specific reference to the best interests of children. All this is plain, without needing to require the defendant to "disclose the steps that led to the formulation of the policy recommendation", over and above what is in the defendant's witness statements. In short, section 55 considerations have informed the process which has led to the defendant's decision to accept Option 1 and create a new route.

98. Where, as here, the defendant is actively considering changing his policy, and is doing so having regard to the best interests of children, section 55 cannot be invoked so as to impose upon the defendant a claimant's or court's view of how rapidly policy decisions involving children should be formulated and implemented. To hold otherwise would be to treat the section as more than a "process" duty. It would also undermine the rationale set out above for the rejection of Ground 1.

99. The same problem infests the claimants' alternative submission that the defendant "has been in breach of her s. 55 duties since 11 October 2023 [when the defendant's decision was made to accept the recommendation in the Ministerial Submission] by failing to make arrangements and to exercise her discretion in C's favour in order to assist their reunification with their immediate family members." As I have noted several times, the Submission specifically referenced the substance of section 55. Paragraph 4 said "It is widely recognised to be in the best interest of a child to be with their parents." The claimants' submission therefore amounts to the contention that the defendant is in breach of section 55, even when regard is specifically being had to the best interests of children, because section 55 required an immediate exercise of discretion in favour of the family. Accepting this alternative submission would also take section 55 well beyond its actual ambit.

100. For these reasons, Ground 2 fails.

***Ground 3***

101. Ground 3 involves what is said to be a legitimate expectation, stemming from the grant of leave to the claimants under ACRS Pathway 1 in March 2022/June 2023, and the "repeated promises made for a bespoke route between January and March 2023 and then subsequently recommended in the Ministerial Submission of 21 September 2023". The legitimate expectation is that "a bespoke route would be introduced within a reasonable time of Operation Pitting." Ground 3 argues that "Nearly three years from the end of Operation Pitting does not amount to a reasonable period and no updating information in respect of likely timescales has been provided by D within these proceedings". The claimants further submit that they have "a legitimate expectation that the promises made in the ARIPS are fulfilled and applied to them."

102. The "repeated promises" relied upon appear to relate to the Parliamentary Ministerial Statements, as to which the defendant invokes article 9 of the Bill of Rights. In the case of Ministerial statements, article 9 will not be infringed where reliance is placed merely on the reasons given in the statement for the particular decision under challenge: R (Project for the Registration of Children as British Citizens and others) v SSHD [2021] 1 WLR 3049. The claimants also rely upon Office of Government Commerce v Information Commissioner [2010] QB 98 for the proposition that reliance may be placed on evidence of proceedings in Parliament simply to allege the occurrence of "historical facts or events", as opposed to "questioning" what was said, which includes submissions as to the legal effect of the statement. The claimants' contention that they are merely relying upon "reasons" or "factual" aspects of the statements cannot be right. The claimants' case is squarely that the statements gave rise, or helped to give rise, to a legitimate expectation. That involves questioning the legal effect of the statements and so calling the statements into question.

103. Even if the court were to go down the claimants' path, the statements were each that "further information will be available in due course". The statements were not saying when the policy would be announced or what it would contain. The statements were, thus, promises of further information. Furthermore, the statement of 17 March 2023, which specifically addressed the situation of children evacuated to the UK without their parents, said that such cases "have been dealt with on a case by case basis. When this has happened, we work in close collaboration with social services and the relevant local authority." The thrust of this statement was therefore about looking after the children in the UK, rather than about family reunification.

104. The Afghan Resettlement and Immigration Policy Statement ("ARIPS") of September 2021 stated at paragraph 6 that for those evacuated to the UK, the Government was "determined to ensure that they have the best possible start to life in the UK". Indefinite leave to remain would be given to Afghans and their family members who were evacuated, called forward or specifically authorised for evacuation. Paragraph 7 said that given the speed with which decisions were necessarily taken, there might be "a small number of groups who do not fit into the category set out above. We will work to ensure that their situation is resolved quickly."

105. The Afghan Citizens Resettlement Scheme was described in the document, beginning at paragraph 21. The ACRS aims to resettle "up to 20,000 people at risk, with 5,000 in the first year. This is in addition to those brought to the UK under ARAP …". Under the heading "Further details on eligibility", paragraph 29 stated that "Spouses, partners and dependent children under the age of 18 of identified eligible individuals will be eligible for the scheme. Other family members may be resettled in exceptional circumstances".

106. I do not find that anything in ARIPS/ACRS constitutes a promise capable of giving rise to a legitimate expectation of the kind for which the claimants contend. In particular, the statement at paragraph 29 is expressed at a high level of generality. In R (GA) v SSHD and others [2023] EWHC 871 (Admin), Bourne J rejected a claim that the three ACRS Pathways announced on 1 June 2022 had failed to implement Ministers' policy intentions identified in Ministerial statements and the ARIP policy document. At paragraph 54, Bourne J held that "the defendants did not make a clear, unambiguous and unqualified representation that the claimant would be entitled to have her case individually considered under ACRS, within any specific timescale or at all." Likewise, in our case, on no proper reading can the passages in ARIPS/ACRS relied on by the claimants be regarded as making such a representation.

107. The absence of any legitimate expectation means there is nothing in that part of Ground 3 which asserts that the defendant has had more than a reasonable time to satisfy the expectation.

108. For these reasons, Ground 3 fails.

***Ground 4***

109. Ground 4 concerns what is said to be the unlawful and/or disproportionate delay in introducing the ACRS family reunion scheme. The claimants invoke the judgment of Singh LJ in Citizens UK, R (on the application of) v SSHD [2018] EWCA Civ 1812 to the effect that fairness in decision-making is important in order to avoid the sense of injustice that an applicant will otherwise feel: "a person is entitled to be treated fairly at all relevant decision-making stages" (paragraph 94).

110. Ground 4 founders on the fact that, for the reasons I have given in relation to Ground 1, the claimants and the interested parties have at all material times had an adequate alternative course of action; namely, to apply for a visa and invoke the defendant's LOTR policy. Any delay has been due to their refusal to avail themselves of this course.

111. In any event, the bare contention that there has been unfairness in the way the claimants have been treated does not entitle the claimants to rely upon Citizens UK. That case was about a failure to give reasons, which on the facts was held to be procedurally unfair. As Singh LJ said at paragraph 85, "It is well established that what fairness requires depends on the particular context". The claimants' case is that they have been treated unfairly because the defendant should have acted sooner to bring a bespoke applications process into effect. Seen in these terms, it is evident that the claimants need to show that the defendant has acted irrationally in not acting sooner. This is not a case where it is being asserted that the claimants have not been told the reasons for an adverse decision or that they have not been able to make

representations before a decision was made.

112. The correct starting point for the alleged irrational period of delay needs to be established. If one begins with the Ministerial Submission, which is the point when officials' advice crystallised and is therefore in my view the appropriate starting point, this was 21 September 2023. The advice was accepted by the defendant on 11 October 2023 and the new pathway is said by the defendant to open in the first half of 2024. In no sense can this be said to be an irrational timeframe. In the circumstances, the decision to accept Option 1 in the Ministerial Submission plainly could not be expected to be immediately followed by the new pathway opening to applicants. As the Submission made plain, suitable criteria and processes need to be designed to deal with the risk that the new route could be exploited by those falsely claiming a relationship with children in the UK. It was also assessed to be likely that there will be parents with genuine reasons for why they do not have access to the documents necessary to meet the evidential requirements.

113. Even if one were to start the period in May 2022, when Ms Minto-Simpson became aware there were children who had been evacuated without their parents, I am not satisfied that the period of delay is irrational, in that a reasonable Secretary of State must have acted sooner to implement the policy, which I shall take to be before the adjourned hearing of this judicial review. I have examined above the evidence of Ms Minto-Simpson. She describes a process which the claimants and perhaps others would regard as too leisurely, but which is far from being systemically dysfunctional or otherwise so flawed as to be irrational. As Mr Tabori pointed out, even maladministration is not synonymous with irrationality.

114. There is an obvious reason why the courts should be cautious before concluding that alleged delays by Government in formulating and implementing policy are actionable in public law. It is not for the courts to dictate the timescales to which Government works, thereby compelling it to prioritise one matter over others. The point is graphically made by recalling that one form of the relief sought by the claimants is a mandatory order requiring the defendant to effect their reunification with immediate family members, "subject to the satisfactory completion of security checks and biometric information enrolment". Not only would such an order amount to the court forcing the defendant to short-circuit his democratically-derived policy-making process, it would amount to the court actually fashioning the details of the policy.

115. For these reasons, Ground 4 fails.

***Ground 5***

116. Ground 5 contends that the defendant has failed to consider exercising discretion under the Immigration Act 1971. This ground in essence refashions elements of the preceding grounds and falls to be rejected for the reasons I have given when addressing those grounds. In particular, I refer to what I have said about the Afghan Girls' Development Football team, which is invoked as an instance of the defendant's decision to exercise such discretion.

117. As Mr Tabori pointed out in his oral submissions, the evidence shows that the defendant did not, in fact, fail to consider exercising his discretion. In the PAP

response of 14 June 2023, the defendant said that "Although you argue that a public authority which refuses or fails to exercise discretion is unlawfully fettering its discretion, the SSHD maintains the view that representations sent to an email box does not constitute a formal visa application. The SSHD cannot fetter her discretion on an application that has not been formally lodged." The defendant accordingly had the fact of discretion firmly in mind but refused to exercise it for the good reason (as I have found) that there was another way by which the issue of entry clearance could be addressed.

118. For these reasons, Ground 5 fails.

***Ground 6***

119. Ground 6 alleges that the delays on the part of the claimant have caused the claimants actional detriment to their article 8 ECHR rights. Since I have concluded that has been no unlawful delay, there has been no such detriment that is the fault of the defendant.

120. Ground 6 accordingly fails.

121. Although I grant permission in respect of the grounds (this being a rolled-up hearing), each of the six grounds fails.

***DUTY OF CANDOUR***

122. There are two related issues to address under this heading. The first concerns the alleged failure of the defendant to respond to the first Part 18 request of 14 August 2023 in a manner compatible with the duty of candour. As I have recorded at paragraph 13 above, the claimants asked on that date whether the defendant could confirm the number of children evacuated during Operation Pitting who became separated from their parents. The response was that the Home Office did not hold such data. In response to the question as to how many cases had been brought to the Government's attention involving such children and requesting assistance with reunification, the response was to categorise the question as ambiguous and that the Home Office did not hold data for that category.

123. Dr Illing's first statement of 8 November 2023, filed during the hearing of the case that month, accepts that the response to the first Part 18 request was wrong. The Home Office did possess data on children separated from their parents during Operation Pitting. What Dr Illing considered, on reflection, should have been said in response to the request was that "for the sake of completeness the Home Office holds details of over 80 Afghan minors identified as evacuated and separated but the relevant list does not enable the Home Office to confirm numbers of children evacuated during Operation Pitting who became separated during that process".

124. In his second witness statement, dated 4 December 2023, Dr Illing says he was asked to consider why the rough and incomplete estimate of separated children in the Ministerial Submission dated 21 September 2023 was not considered an answer to Question 1 of the Part 18 request. He says "The short answer to that is that the Home Office cannot confirm any number in that category because the category is too wide…The rough number … was referenced in the submission (and caveated) as being the sole indication known which could provide ministers with a sense of the

possible scope of the issue. It is not a firm enough number to constitute data suitable for publication or to confirm a number to ministers."

125. In his third witness statement, dated 19 December 2023, Dr Illing says that the reason why the "guesstimate" in the Ministerial Submission was not disclosed earlier "remains that of chronology. The Home Office Detailed Grounds and reply to the original Part 18 request were filed before the Submission was escalated." Furthermore, the information was not considered to be an answer to Question 1 of the Part 18 request because that asked how many children had become separated during the operation/evacuation and as Dr Illing said in his first statement, that was not known. Nevertheless, paragraph 6 of the third statement reiterates the point made in the first statement that "with hindsight the guesstimate should have been provided for the sake of completeness but I do consider that the number would have required so much in the way of caveat and explanation as to reduce the weight to be placed on it in the context of public litigation."

126. I am in no doubt that the defendant breached the duty of candour in not disclosing the figure of around 80 children. The figure was, in fact, known to the Home Office at the relevant time. I am not persuaded that there is anything in the "chronology" point mentioned in Dr Illing's third statement. The duty of candour is ongoing in nature. The quotation above from paragraph 6 of that statement is important. If it is indicative of the reasons why the information was not disclosed, it represents a misunderstanding on the part of the defendant that requires correction. The guesstimate was plainly relevant to the claimants' judicial review. The size of the cohort was relevant to the extent of the problem facing the defendant and thus to the ways in which the defendant might lawfully deal with it. The fact that the figure would need to be caveated was emphatically not a reason for the defendant to withhold it from the claimants. The weight to be placed on relevant evidence is a matter for the court, having heard submissions from the parties. It is not for the defendant unilaterally to prejudge that issue by refusing to disclose evidence that he considers is lacking in weight. It should have been disclosed, along with any caveats that the defendant wished to add. In the present case, there is also the obvious point that the figure was considered of sufficient relevance to be featured in the Ministerial Submission.

127. I turn to that Submission. Mr Tabori submitted that Ms Naik KC's reasons for wishing to see the Submission, given in the course of her oral submissions on 7 November 2023, related to the issue of delay. Whilst the transcript of the hearing shows that the delay issue was at the forefront of those submissions, that was itself sufficient to necessitate disclosure, based on what little the claimants knew about the Submission at that time. In fact, as this judgment makes plain, the Ministerial Submission contained highly relevant material concerning the reasons for recommending the bespoke route, including the reasons why doing nothing was not recommended as an option. From that, and the accompanying witness statement of Ms Minto-Simpson, has much of the claimants' case proceeded. Although I have found against the claimants, it cannot in any sense be said that the Ministerial Submission was irrelevant or that its substance was covered in the defendant's response to the second Part 18 request.

128. Mr Tabori relied upon the Court of Appeal's obiter comments in R (TP) v SSHD

[2020] PTSR 1785, where at paragraph 14 it was stated that "We would also wish to avoid any suggestion that the duty of candour and co-operation requires a government department to disclose in court proceedings what may be simply early thinking about a possible policy, still less what is confidential advice given by civil servants to ministers." He also relied on R (JM) v SSHD [2022] PTSR 260 for the proposition that there is no blanket requirement under the duty of candour to disclose ministerial submissions. In that case, however, Farbey J held that "There was no duty on the defendant to provide the emails or the ministerial submissions per se; but the substance of the information in the documents which shed light on the decision-making process in my judgment fell to be disclosed as a matter of candour. The late disclosure was regrettable" (paragraph 91).

129. The case law, in short, does not assist the defendant. The substance of the Ministerial Submission was plainly relevant. That substance was not disclosed. The Submission did not represent any early thinking on the part of officials. It was, as I have sought to show, the culmination of a process that had extended over a period of time. The Submission reveals that its timing was in part occasioned by the imminence of the proceedings brought by the claimants.

130. The Ministerial Submission or its substance should, therefore, have been disclosed to the claimants before the hearing in November 2023. In failing to do so, the defendant breached the duty of candour.

131. Nothing in the CLOSED judgment affects anything in this judgment.

132. I invite counsel to agree, if possible, the terms of an order that gives effect to this judgment, including what it is submitted should flow from my conclusions on the duty of candour.