Neutral Citation Number: [2021] EWHC 1177 (Admin)

Case No: CO/4061/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 6th May 2021

Before :

Mr Tim Smith (sitting as a Deputy High Court Judge)

- -

Between :

(1) DEOMATIE LYNDA MAHABIR **(2) WINSTON MAHABIR** **(3) CANDACE-LYNN MAHABIR** **(4) CRYSTAL PRIS-ZILLAH JESSICA MAHABIR** **(5) PETRONELLA MAHABIR** **(6) MICAH-BJORN MAHABIR** **(7) JORN-JUDAH MAHABIR**	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -

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Mr Chris Buttler QC and **Mr Ali Bandegani** (instructed by **Duncan Lewis solicitors**) for the **Claimants**
Sir James Eadie QC and **Mr Edward Brown** (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 23 and 24 March 2021

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JUDGMENT

(Approved by the court)

This judgment will be handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down will be deemed to be 06 May 2021 at 10:00am

Mr Tim Smith (sitting as a Deputy High Court Judge):

1. This is a claim that relates to what has been termed the "Windrush scandal" and to the measures put in place by the Defendant after the scandal came to light to address some of the historic injustices suffered by victims of the scandal. Specifically this case centres on attempts by the First Claimant, a Windrush victim, to be reunited with her husband and children by having them enter the United Kingdom from Trinidad and Tobago where they currently reside.

2. The Second Claimant is the First Claimant's husband. The Third to Seventh Claimants are their children, of whom the Third to Fifth Claimants are now adults and the Sixth and Seventh Claimants are still minors.

Background facts

3. Until 31st August 1962 people born in Trinidad and Tobago were citizens of the United Kingdom and Colonies. Thereafter, as a function of section 2 of the Trinidad Independence Act 1962, people born there were citizens of the now independent country and most of them lost their status as citizens of the United Kingdom and Colonies.

4. The First Claimant was born on 29th March 1969 in Trinidad. Two months later she travelled to the United Kingdom with her mother in order that they could both join her father here. Her mother had been granted leave to enter the United Kingdom. It is accepted that the First Claimant, as a non-citizen of the United Kingdom and Colonies, would have entered the country subject to the immigration controls imposed by the Commonwealth Immigrants Act 1962. She remained in the United Kingdom until 1977.

5. On 1st January 1973, when the Immigration Act 1971 came into force, the First Claimant became entitled to indefinite leave to remain ("**ILR**") in the United Kingdom.

6. The First Claimant's parents divorced on 3rd August 1977. Although as part of the divorce the Court ordered that the First Claimant remain in the custody of her mother and not leave England & Wales during her minority without the leave of the Court it appears that, in breach of this Order, she was taken back to Trinidad by her father later in 1977. The parties agree that nothing in this case turns on the fact of her removal in breach of the Court Order. As Sir James Eadie acknowledged in his oral submissions, the fact of the First Claimant's removal in these circumstances has not affected the conclusion that she is a Windrush victim.

7. A consequence of her leaving the United Kingdom was that the First Claimant lost her ILR. By virtue of section 1(5) of the Immigration Act 1971 she could have regained her ILR had she returned to the United Kingdom before 1st August 1988. This is because section 1(5) preserved the rights of Commonwealth citizens who were settled in the United Kingdom on 1st January 1973. Section 1(5), however, was repealed on 1st August 1988 and the right for the First Claimant to regain her ILR was lost from that point onwards.

8. Whilst in Trinidad the First Claimant married the Second Claimant. They had five children together. None of the Second to Seventh Claimants have ever resided in the United Kingdom.

9. In 2008 the First Claimant applied for entry clearance to the United Kingdom, which was refused on the basis that she had no right of abode. Subsequently she applied for a student visa to allow entry clearance for her and also the Second to Sixth Claimants (the Seventh Claimant not having been born by that point). This too was refused on the basis that she could not demonstrate that she had the means to pay for her studies and that she could not demonstrate an intention to leave the United Kingdom again at the conclusion of her course.

10. On the First Claimant's own evidence the latter ground appears to be fair comment as she admits that her application was an attempt to secure permanent entry to the United Kingdom. Again, the parties agree that nothing in this case turns on the false basis for the application. The First Claimant appealed to the First Tier Tribunal against the refusal of her application but her appeal was dismissed.

11. By 2018 stories about the Windrush scandal had circulated in the media and the plight of Windrush victims was widely known about. On 24th October 2018 an entry clearance officer acting on behalf of the Defendant granted the First Claimant a returning resident visa for six months to allow her to collect the documentation confirming that her ILR had been restored. She entered the United Kingdom alone with her family remaining in Trinidad.

12. On 3rd December 2018 the First Claimant sent an email to a dedicated email address set up to handle Windrush visa enquiries. In that email she updated the recipient on her attempts to secure work and to open a bank account. She added:

> *"There are two things that I wish to request further at this time:*
>
> *...*
>
> *(2) I would like to have my family join me here"*

13. The Defendant's response to the above request was by email from an official with the Windrush Enquiries Team dated 5th December 2018. It stated:

> *"To apply for your family to join you in the United Kingdom you will need to make an appropriate application, paying the appropriate fees and charges for any application they choose to make"*

14. I note in passing that although the first part of this reply appears to suggest that an application would be made by the First Claimant on her family's behalf it is common ground that the second part of the response – referring to any application "they" choose to make – is correct: the applications would have to be made by the Second to Seventh Claimants themselves, and because they were

not at that time present in the United Kingdom they would have to make so-called out-of-country applications.

15. In effect the advice from the respondent to the email was that the ordinary rules for applications for entry applied to the Second to Seventh Claimants and, by implication, that no special dispensation arose from their connection to a Windrush victim. They would for example have to pay fees for their applications. It is accepted by the parties that the total fees for such applications are calculated to be £22,909.

16. In June 2019 the First Claimant contacted the Windrush Scheme asking that her family be granted leave to enter the United Kingdom. Her request included the following passage:

> *"I have my husband and children in Trinidad still and desire strongly to be reunited with them as well as they are grieving for me also. We constantly keep in contact as much as is possible and I'm afraid that the children's exemplary progress will be hindered with this prolonged separation. We have never been separated from each other before. It almost feels like when I was taken away from the United Kingdom as a child and all I had ever known was suddenly ripped away from me. I know in my heart I have made a good decision to return to the United Kingdom as it will have a positive impact on my childrens future. But that reality can only be realized if they and my husband are there with me. We have always been a team and an inspiration to the community and I would like for them to be given the opportunity to join me here where we can continue to make the positive impact on lives that we come into contact with. Any assistance in that avenue will be greatly appreciated. Thank you kindly"*

17. On 5th July 2019 the First Claimant wrote an email to the Windrush Taskforce which began as follows:

> *"I am seeking assistance in bringing my family into the United Kingdom and I am now approaching meltdown when I stumbled across the following page:* [she then added a link to a page on the Local Government Association's website entitled "Commonwealth citizens without status"].
>
> *I am meeting various roadblocks in this regard and I do understand that my case is a bit different to the standard cases that would have been handled by the home office but it has been eight months since arriving in the United Kingdom and now and I am feeling like I am punished for going through with the decision to return to the United Kingdom"*

18. Her email concluded with a request in the following terms:

> *"I must admit that the assistance I have received to date in other matters to have me settled have been very supportive and of great benefit to me. I appreciate all that was done. Now I would like further assistance in the following:*
>
> *1. I would like to establish my status as a British citizen so that I can acquire my British passport*
>
> *2. I would like my family to be in the United Kingdom with me as they are currently in Trinidad"*

19. Having received nothing more in reply than an apparently automated response the First Claimant followed up by sending a further email on 6th August 2019 to the Windrush Taskforce unit. In that email she expressed concern about the family's ability to fund the combined application fees, stating:

> *"That is a daunting task for us to raise that sort of money …*
>
> *… I therefore hope I am not being so bold as to ask if there is any way that the visa fees can be waived on there behalf to afford us the opportunity to be reunited"*

20. It is evident from that email that the First Claimant had calculated the likely application fees to be *"at least £7,800"* (comprised of six applications at £1,300 each) but as I note above the reality is that the total cost would have been considerably higher even than that.

21. According to the First Claimant's evidence she was then telephoned by a representative of the Defendant on 12th August who said he would look into whether her family were eligible to make an application under the Windrush Scheme established by the Defendant to support Windrush victims, an important consequence of which would be the ability to make a fee-free application.

22. She was contacted again on 14th August to inform her that her children would not be eligible to apply under the Windrush Scheme but that her husband might. However on 15th August an official from the taskforce wrote to the First Claimant with the following advice about the Second Claimant's eligibility to apply under the Windrush Scheme:

> *"Based on the information you have provided so far, it is unlikely that Mr Winston Mahabir meets the criteria of the Windrush Scheme …*
>
> *For applications made outside the United Kingdom, the Windrush Scheme is only available to people who:*

- *are nationals of one of the Commonwealth countries or territories or other groups listed in the Scheme; were settled in the United Kingdom before 1st January 1973; and either do not have a document to confirm a right to live and work in the United Kingdom (called right of abode or settled status) or had settled status and it lapsed because they left the United Kingdom for more than 2 years …"*

23. On 13th January 2020 the First Claimant brought the Sixth Claimant, her son then aged 15, to the United Kingdom. He was granted leave to enter for six months. Being now present in the United Kingdom the Sixth Claimant was able to apply for leave to remain as an in-country applicant. His application was on the grounds that to be separated again from his mother would result in an interference with his and his mother's rights under article 8 of the European Convention on Human Rights ("the Convention"). On 12th February 2021 the Sixth Claimant was granted limited leave to remain by the Defendant.

24. It is acknowledged by Mr Buttler for the Claimants that, other than in the case of the Sixth Claimant described above, no application has been made in respect of the Second to Seventh Claimants. It seems to me that nothing turns on this fact, though, since on the strength of the advice received by the First Claimant from the Defendant's officials any such application submitted without the requisite fee would be bound to be rejected. The Claimants are seeking not a conventional public law remedy but a remedy based on their Convention rights. For this reason Sir James Eadie for the Defendant accepted that no point could be taken based on the absence of any actual application.

The immigration fees regime

25. Section 68 of the Immigration Act 2014 provides (so far as is relevant to the facts of this case) that:

> *"(1) The Secretary of State may provide, in accordance with this section, for fees to be charged in respect of the exercise of functions in connection with immigration or nationality*
>
> *…*
>
> *(4) For any specified fee, a fees order must provide for it to comprise one or more amounts each of which is –*
>
> *(a) a fixed amount, or*
>
> *(b) an amount calculated by reference to an hourly rate or other factor*
>
> *…*
>
> *(7) For any specified fee, the following are to be set by the Secretary of State by regulations ("fees regulations") –*

> *(a) if the fee (or any part of it) is to be a fixed amount, that amount,*
>
> *(b) if the fee (or any part of it) is to be calculated as mentioned in subsection (4)(b), the hourly rate or other factor by reference to which it (or that part) is to be calculated*
>
> *…*
>
> *(10) In respect of any fee provided for under this section, fees regulations may –*
>
> *…*
>
> *(b) provide for the reduction, waiver or refund of part or all of a fee (whether by conferring a discretion or otherwise)"*

26. Regulation 2 of the Immigration (Nationality and Fees) Regulations 2018 (SI 2018/330) ("the 2018 Fees Regulations") provides for the charging of application fees for entry clearance or leave to enter applications. The fees are calculated in accordance with tables 1-5 in Schedule 1.

27. The application fees regime treats differently applications made from within the United Kingdom and those made from outside the United Kingdom.

28. For entry clearance applications made from outside the United Kingdom there are three means by which the Defendant has the power to waive or reduce application fees.

29. The first is under Table 5 of Schedule 1 to the 2018 Regulations. In particular paragraph 5.1 of Table 5 gives a power of "General waiver" in the following terms:

Number and description of the waiver or reduction		**Fees to which waiver or reduction applies**
5.1	General Waiver	
5.1.1	No fee is payable in respect of an application where the Secretary of State determines that the fee should be waived	All fees in Tables 1, 2 and 3

The Secretary of State "determines" that fees may be waived in classes of cases provided for in her policies. There is no individual exercise of discretion for each separate application.

30. The second is under regulation 13A of the 2018 Fees Regulations, which was inserted by regulation 5 of the Immigration and Nationality (Requirements for Naturalisation and Fees) (Amendment) Regulations 2018 (SI 2018/618). Regulation 13A provides as follows:

> *"**13A***
>
> *The Secretary of State may waive any fee specified in these Regulations which would otherwise be payable by a person for or in connection with an application made under the Windrush Scheme"*

31. The third is under regulation 13B of the 2018 Fees Regulations, which was inserted by regulation 16 of the Immigration and Nationality (Replacement of Tier 4 and Fees) and Passport (Fees) (Amendment) Regulations 2020 (SI 2020/966). Regulation 13B provides as follows:

> *"**13B. Power to waive fees: exceptional circumstances affecting a number of individuals***
>
> *(1) Paragraph (2) applies where the Secretary of State considers that -*
>
> > *(a) there are exceptional circumstances significantly affecting a number of individuals who are in the same or a similar situation, and*
> >
> > *(b) those circumstances are beyond the control of those individuals.*
>
> *(2) Where the Secretary of State considers it appropriate to do so because of the effect of those circumstances on those individuals, the Secretary of State may decide, in relation to every one of those individuals, to waive the payment by them of any fee specified by these Regulations in respect of any particular description of application, request, process or service*
>
> *(3) The Secretary of State's power under paragraph (2) is in addition to, and does not limit, the Secretary of State's other powers under these Regulations to waive the payment of fees"*

32. By contrast with applications made from outside the United Kingdom, for in-country applications for leave to remain in the United Kingdom the equivalent of regulation 2 of the 2018 Fees Regulations for out-of-country applications is regulation 4 of the same Regulations. Regulation 4 provides as follows:

> *"**4***

Schedule 2 (applications for leave to remain in the United Kingdom) has effect to specify –

(a) the amount of fees for -

(i) specified applications for leave to remain in the United Kingdom for the purposes of articles 4 and 5 of the 2016 Order;

(ii) applications for an approval letter from an endorsing body for the purposes of article 6 of the 2016 Order; and

(b) exceptions to the requirement to pay fees referred to in (a), and circumstances in which such fees may be waived or reduced"

33. The approach to waivers is then found in Table 9 of Schedule 2 to the 2018 Fees Regulations. Paragraph 9.4 of Table 9 provides as follows:

Number and description of the waiver or reduction		**Fees to which waiver or reduction applies**
9.4	**Specified human rights applications where to require payment of the fee would be incompatible with the applicant's Convention rights**	
	No fee is payable in respect of a specified human rights application where to require the payment of a fee would be incompatible with the applicant's Convention rights	Fee 6.1.1

34. The Defendant's policy on applying fee waivers for in-country applications is found in the document entitled *"Fee Waiver: Human Rights-based and other specified applications"* of which the current version is version 5.0 dated 5th March 2021. It is written as guidance for the benefit of Home Office officials making decisions about whether to waive fees or not (in cases where a waiver is permitted). It includes an introductory section - "About this Guidance" - which begins with the words:

"This guidance tells you how to consider applications for a fee waiver from those who are going on to make a specified human rights application and where to require payment of the fee before deciding the application would be incompatible with a person's rights under the European Convention on Human Rights"

35. Page 5 of the guidance sets out an affordability criterion. It applies only to applications made from within the United Kingdom. It provides as follows:

> *"**Consideration***
>
> *The sole consideration on whether someone is eligible for a fee waiver is an **affordability test** to assess whether the individual has credibly demonstrated that they **cannot afford the fee**. This applies when the applicant does not have sufficient funds at their disposal, after meeting their essential living needs, to pay the fee"* (the emphasis is from the original)

36. For out-of-country entry clearance applications the equivalent guidance is Home Office guidance note *"ECB06: entry clearance fees"* (although it will be seen from what follows that this guidance has now been withdrawn). Section 6 of that document deals with "Discretion to waive fee". It sets out in separate bullet-points four specific criteria, none of which apply to any of the Claimants in this case. There is then an additional criterion expressed in the following terms:

> *"Discretion to waive a fee in other cases:*
>
> - *Where the Secretary of State determines that the fee should be waived (the exercise of this discretion should be applied in exceptional circumstances only, such as civil war or natural disaster)*
>
> *Posts have **no discretion to waive visa fees for any other reason other than those listed in the fees legislation**, as quoted above"* (my emphasis)

The Windrush scandal and the Government's response to it

37. A comprehensive history of the Windrush scandal, of the reasons why it occurred and of the Government's response to it can be found in the "Windrush Lessons Learned Review" ("**the Windrush Review**") undertaken by Wendy Williams and published in March 2020. (The term "Windrush scandal" was used extensively throughout the Windrush Review hence I have used it here).

38. Wendy Williams was commissioned by the then Home Secretary, the Rt Hon Sajid Javid MP, to undertake an independent review after the plight of Windrush Immigrants became known following press reporting between late 2017 and April 2018. What follows is a summary of the relevant chronology taken from the Windrush Review itself and supplemented by the helpful evidence for the Defendant in these proceedings provided by Alison Samedi, who was at the relevant time a Deputy Director of the Home Office with responsibility for Windrush policy.

39. In the years after the Second World War the United Kingdom saw a steady migration of people from the overseas colonies to the United Kingdom. Many of these people came from Caribbean countries. The migration took place over the period from 1948 to 1973.

40. The name "Windrush generation" and related terms derive from the ship HMT Empire Windrush which arrived in the United Kingdom from the Caribbean in June 1948 carrying around 1,000 passengers. This passage is said to symbolise Caribbean migration to the United Kingdom starting in the late 1940s.

41. The issue that came to light many years later was that although the Immigration Act 1971 conferred on Windrush migrants coming to the United Kingdom before January 1973 a right of abode in the United Kingdom many were not issued with the documentation to prove it, and the Home Office did not keep a consistent set of records to that effect. The same is true for children of Windrush migrants who entered the United Kingdom with their parents, whether on their own passports or those of their parents. The First Claimant is an example of such a child.

42. The result of these failings was that many Windrush immigrants encountered difficulties re-entering the country after departing for any period, and those who remained increasingly found themselves subject to a hostile immigration regime which encouraged them to leave by restricting their access to key services and making it more difficult for them to secure accommodation or hold down employment.

43. As the Windrush Review records:

> *"The 1971 Immigration Act confirmed that the Windrush generation had, and have, the right of abode in the United Kingdom. But they were not given any documents to demonstrate their status. Nor were records kept. They had no reason to doubt their status, or that they belonged to the United Kingdom. They could not have been expected to know the complexity of the law as it changed around them.*
>
> *…*
>
> *In particular their history was institutionally forgotten. Accurate records were not kept, both in relation to individual cases and the development of relevant policy and legislation as a whole. The legal landscape related to immigration and nationality has become more complicated rather than less so and even the Department's experts struggled to understand the implications of successive changes in the legislation and the way they interacted with changes in the relationship between the United Kingdom and Caribbean countries and the resulting impact those changes had on individuals' status in the United Kingdom. Opportunities to correct the racial impact of historical legislation were either not taken or could have been taken further"*

44. By late 2017 the scale of the problem was beginning to be understood. By mid-April 2018 several national newspapers were carrying stories about the scandal.

45. The then Home Secretary, the Rt Hon Amber Rudd MP, made an oral statement to Parliament about the Windrush scandal on 23rd April 2018. It offered an apology to the Windrush generation for the systematic failings that had led to the scandal. The statement acknowledged that:

> *"Of course an apology is just the first step we need to take to put right the wrong these people have suffered …"*

46. Seven days earlier, on 16th April 2018, the Home Secretary had established a dedicated Windrush Taskforce to assist those caught up in the scandal and who sought assistance in dealing with their situation.

47. Subsequently the Windrush Scheme was established by the Government and came into force on 30th May 2018. Its purpose was to offer further support to Windrush victims with things like applications for documentation and advice on how the scheme operated alongside existing immigration rules.

48. The Home Office also published the "Windrush Scheme casework guidance" ("the Casework Guidance") for Home Office caseworkers dealing with cases under the Windrush scheme. The current version of the guidance – version 3.0 – was published for Home Office staff on 10th June 2019.

49. The Casework Guidance runs to 51 pages. It begins with a statement of its "Intention" which includes the words:

> *"The Scheme will allow Commonwealth citizens, settled in the United Kingdom prior to 1st January 1973, but who have subsequently moved overseas, to apply for the necessary document, free of charge, which will enable them to return to the United Kingdom either permanently, or to visit"* (emphasis as per the original text)

50. The Casework Guidance sets out the cohorts that are eligible for certain products under the Windrush Scheme. The Group 1 cohort is described as:

> *"Commonwealth citizens who were either settled in the United Kingdom before 1st January 1973 or who have the right of abode"*

51. Within the broad description of Group 1 there are various sub-categories. One of them is *"Those who wish to return to the United Kingdom from overseas"* and people within this sub-category are described thus:

> *"A number of people in this group were settled before 1 January 1973, but will have left and remained outside of the United Kingdom*

> *for more than 2 years from after 1 August 1988 resulting in the lapsing of their ILE [that is to say indefinite leave to enter] or ILR. They will have ties to the United Kingdom and now wish to return to the United Kingdom. They can apply to live permanently in the United Kingdom, or to visit, for free. In order to benefit from a free application under the Windrush Scheme, all nationals (including a non-visa national) under this group must apply to return to the United Kingdom using the Windrush application form before travel."*

52. It is common ground that the First Claimant is a Windrush victim within the Group 1 cohort by virtue of this sub-category. It is also common ground that none of the Second to Seventh Claimants fall within this sub-category and are not otherwise Windrush victims within the meaning of the Casework Guidance, whether within Group 1 or at all.

53. For applicants such as the First Claimant who were Commonwealth citizens arriving before 1973 but who were subject to immigration control and had been outside the United Kingdom for more than 2 years, the sequence for re-establishing ILR was firstly to apply for a returning resident visa entitling them to ILE for 6 months. Having obtained ILE status the applicant was then entitled to enter the United Kingdom, at which point they could apply for a Biometric Residence Permit confirming that they now held ILR.

54. The First Claimant's applications followed this sequence. She applied for her ILE on 9th August 2018 and it was confirmed to her by letter dated 24th October 2018 from an official assigned to the Windrush Taskforce that *"... you qualify for a returning resident visa under the Windrush Scheme".* Confirmation of her ILR was then notified by letter dated 20th November 2018 from another official of the Windrush Taskforce who stated that:

> *"I can confirm that Mrs Mahabir has been in contact with UKVI in regards to her current status in the United Kingdom. I can confirm that Mrs Mahabir is eligible under Windrush and has now been granted her indefinite leave to remain into the United Kingdom"*

55. The Windrush Review included thirty recommendations. Recommendation 1 was that Ministers should offer *"a sincere apology"* to Windrush victims. On 19th March 2020 the Defendant offered such an apology through an oral statement to Parliament. The statement also noted the earlier establishment of a Windrush Compensation Scheme and the creation of a Windrush Stakeholder Advisory Group *"to rebuild links with communities to ensure that they are supported through compensation but also to rebuild the trust that has been broken".*

56. Details of the Windrush Compensation Scheme referred to above are found in the National Audit Office's report "Handling of the Windrush situation", published on 5th December 2018, at paragraphs 4.5-4.8. Eligibility for

compensation has not formed part of the arguments before the Court in this case and so it is unnecessary for me to summarise the terms of the Compensation Scheme.

The Claimants' case

57. In broad summary the case for the Claimants is that the Defendant's actions were unlawful in that they breached the following articles of the Convention:

    i) Article 8 – the right to respect for private and family life, and

    ii) Article 14 – prohibition of discrimination. It suffices for the purposes of this summary to note that the article 14 ground is argued on the basis of both direct and indirect discrimination (otherwise known as "Thlimmenos" discrimination after a case of the same name)

58. Permission to proceed with the claim on all grounds was granted on the papers by Ms Margaret Obi sitting as a Deputy High Court Judge on 5th December 2019. The short reasons given by Ms Obi for granting permission were that:

> *"The Claimants have an arguable claim under Article 8 and/or Article 14"*

59. Before outlining in more detail the grounds of claim a preliminary point falls to be addressed.

60. At the start of the hearing I heard an application from Mr Buttler on behalf of the Claimants. The application dealt with two issues.

61. One issue was that the Claimants sought permission to rely on additional evidence in the form of a second witness statement from Mr Jeremy Bloom. This part of the application was not resisted by the Defendant and I granted permission.

62. The other issue proved to be more controversial. In his skeleton argument for the Defendant Sir James Eadie took exception to the apparent acceptance by the Claimants in their own skeleton argument that they had, as he put it, *"... fundamentally changed the premise of their Article 8 argument from that upon which permission was sought and granted".* He referred to a passage in the Claimants' skeleton argument in the following terms:

> *"The claim therefore raises the following question: does the requirement to pay a fee of £22,909 mean that the Claimants' ability to advance an art[icle].8 claim for family reunion is not practical and effective?"*

That passage concluded with reference to a footnote which stated as follows:

> *"The Claimants statement of facts and grounds suggested that the refusal to allow the family to make a fee-free application for reunion constituted a substantive breach of art.8. As set out at section F below, the real question under art.8 is whether the refusal to allow a fee-free application is a breach of the procedural component of the article"*

63. For the Claimants Mr Buttler argued that the article 8 claim, *"as developed in the skeleton argument"* as he chose to characterise it, fell within the ambit of the permission granted by Ms Margaret Obi, alternatively that I should grant him permission pursuant to CPR54.15 to amend his grounds and advance the argument now.

64. I rejected Mr Buttler's first contention. It seemed to me that, abbreviated though her reasons for granting permission were, Ms Obi must have confined her consideration to the grounds as then pleaded in the claim and that it was unarguable she could be taken to have granted permission for ground 1 on an enlarged basis.

65. In relation to Mr Buttler's alternative contention - that permission should be granted to him to advance the arguments set out in his skeleton – there was a further complicating factor which came to light after the skeleton arguments had been exchanged. This concerned the disposal by the Upper Tribunal Immigration and Asylum Chamber of a judicial review claim on similar facts to the instant case. That claim was brought under case reference JR/2501/2020 ("**the UTIAC case**").

66. Details of the UTIAC case were introduced in these proceedings through the second witness statement of Jeremy Bloom. They included both a Consent Order sealed by the Upper Tribunal on 3rd March 2021 and the Statement of Facts and Grounds from the case. Each were redacted to remove any information about the Claimant but I am satisfied that it was not necessary for me to see those details.

67. There are some differences between the UTIAC case and the present case. It involved a challenge to the refusal of an application for entry clearance whereas here no application has ever been made. It did not involve a Windrush victim. But there are also some important similarities. It involved the Defendant's guidance document "ECB06: entry clearance fees", to which I have referred above. In addition the grounds of claim included arguments based on article 8 of the Convention related to the affordability of application fees for entry clearance.

68. The Consent Order disposing of the UTIAC case began with the recital:

> *"UPON the Respondent agreeing to* ***withdraw and revise*** *her guidance on entry clearance applications entitled "ECB06: entry clearance fees"* ***with a view to introducing a criterion of affordability in appropriate cases****, and in doing so, to have regard to*

> *the submissions made by the Claimants in the grounds of judicial review."* (my emphasis)

69. On this basis the judicial review claim was withdrawn. As a consequence of this disposal of the UTIAC case policy ECB06 was updated on 15th March 2021, after the sealing of the Consent Order, and now records in a box below the four bullet-points of section 6 (outlining the cases in which a fee can be waived) the following statement:

> *"The guidance for the discretion to waive a fee in other cases is being revised and is not currently operational.*
>
> *You can still apply for a fee waiver but your application will be put on hold pending the revised guidance"*

70. At my invitation Sir James Eadie speculated that it may take some months before the revised policy is promulgated. He said that this period would be needed in order to consider, for example, the procedural requirements for making fee waiver applications and the means by which affordability would be assessed in any given case.

71. Mr Buttler submitted that the outcome of the UTIAC case was clearly relevant to the arguments in this case and that, because it post-dated the grounds of claim, he could not have anticipated the points suggested by it when the claim was commenced. He added that it was therefore only fair he be allowed to advance arguments based upon it now.

72. As part of his submissions Mr Buttler invited me to consider deferring a decision on whether to grant permission to amend his Ground 1 until the conclusion of the case so that I could understand from the oral arguments how far Ground 1 was migrating from the pleaded case. In the circumstances I agreed to do so. I warned Mr Buttler that this approach would require discipline on his part and that he would need to isolate the arguments that he could make without permission from those which he could only make with the Court's permission. By the conclusion of the case I was satisfied that he had been able to do so.

73. My ruling on the application to amend Ground 1 is set out in the "Discussion and conclusions" section below.

The article 8 ground

74. Mr Buttler submitted firstly that the Defendant's visa fees waiver policy could be construed as allowing for a full or partial waiver of fees in the circumstances faced by the Claimants.

75. Noting regulation 13A of the 2018 Fees Regulations he argued that there was scope for treating an application for entry by the Second to Seventh Claimants as being one made *"... in connection with an application made under the*

Windrush Scheme". Furthermore having regard to section 6 of the Defendant's guidance note ECB06 for out-of-country applications he also argued that the Windrush scandal could constitute "exceptional circumstances" warranting the waiver of the fee.

76. Responding to this contention for the Defendant Sir James Eadie submitted that the Claimants' pleaded case did not allege a public law misdirection about the scope of the Defendant's policy. It seems to me that this is correct, although the arguments Mr Buttler advances are still of relevance to his wider arguments about how far the Defendant's policies protect the Claimants' article 8 rights.

77. Mr Buttler's primary submission, though, was that if (as the Defendant maintains) her fees policy could not be interpreted as allowing for a discretion to waive or abate application fees in the way he contended then the Claimants' article 8 rights had been breached.

78. In answer to my question about whose article 8 rights were in issue Mr Buttler explained that the focus of his submissions was on the First Claimant's article 8 rights but that all seven Claimants had article 8 rights which were arguably infringed. The inclusion of all seven Claimants in the claim is explained in a footnote to paragraph 3 of the Statement of Facts and Grounds as follows:

> *"Formally, to avoid any point being taken under section 7 of the Human Rights Act 1998, the Claimant's children and husband are also claimants, but for ease of drafting only Mrs Deomatie Mahabir is referred to as the Claimant"*

79. For the Defendant Sir James Eadie submitted that the decision to confine fee-free applications to Windrush victims, and not also to their families, was a conscious decision by the Defendant and that it was legitimate. He referred to the witness statement of Alison Samedi as explaining the rationale:

> *"35. The policy proposals are designed to ameliorate the effects of particular existing provisions and policies in relation to the specific cohort identified. Most of those benefiting from the policy will have come to the UK on the basis of creating lives here, settling permanently, and, possibly, becoming or believing that they were already British citizens. Many have been continuously resident for over 45 years. They already have status in the UK but cannot demonstrate it sufficiently to meet the relevant checks.*
>
> *36.* ***Because many who benefit under the Windrush Scheme consider themselves to be British citizens already, the Government does not believe that they should pay the associated fees with getting documentation.*** *They already have status, but cannot evidence it.* ***They are not in the same position as those who are applying to come to the UK for the***

> ***first time.*** *The policy also applies to anyone who settled in the UK prior to the end of 1988 as described above.*
>
> *37. Those benefiting from the policy who are returning residents from overseas will have strong connections to the UK and will have been previously resident in the UK before 1973.*
>
> *38. Ensuring public confidence in the immigration system is extremely important as,* ***although there is significant support for the Windrush generation, concerns about a fair immigration system, where individuals play by the rules and do not seek to benefit where they are not entitled, remains important. The policy therefore sets out a prescribed set of exceptions which have been carefully formulated.*** *It is important for a sense of overall fairness that ordinary Immigration Rules otherwise apply. That is why the existing rules, policies and procedures will remain in place in respect of other individuals and groups."* (my emphases)

80. Sir James Eadie also expressed a concern that if the fee-free dispensation were extended to applications by family members of Windrush victims as well as the victims themselves it would represent a very significant expansion of the Windrush scheme which – he submitted – was not designed to remedy all conceivable injustices arising from the historic failures.

81. In his oral submissions Mr Buttler summarised his article 8 ground thus: is it in accordance with article 8 for the Defendant to make it a precondition to the Claimants' family reunion that they must pay a fee they cannot afford? He submitted that the answer is clearly not, either on the procedural limb of article 8 (for which he acknowledged he needed the permission of the Court to advance) because the procedure must be effectively accessible, or on the proportionality limb of article 8 (the currently pleaded case) because to shut out a claim would amount to a disproportionate interference with respect for family life.

82. Mr Buttler relied on the case of *R (on the application of Quila) v Secretary of State for the Home Department* [2012] 1 AC 621. That case concerned two claims with similar facts, one of which related to a Chilean national who had entered the United Kingdom on a student visa and had then married a 17-year old British national. The immigration rules prevailing at the time did not permit an application by a non-UK spouse for leave to remain in the United Kingdom if either party to the marriage were under the age of 18. The effect of the decision was therefore either that a British citizen could be forced to leave the United Kingdom to live with their spouse or else that two spouses were being required to live apart for a period of time until the non-UK national spouse were eligible to apply for leave to remain.

83. The Court of Appeal allowed the claimants' appeals on the basis that the application of the rules amounted to an unlawful interference with the couple's

family life. In dismissing the Secretary of State's appeal to the Supreme Court Lord Wilson noted at [33]:

> *"Unconstrained by authority, one could not describe the subjection of the two sets of spouses to that choice as being other than a colossal interference with the rights of the claimants to their family life, however exiguous the latter might be"*

84. Mr Buttler submits that the same conclusion should apply with respect to the First and Second Claimants in this case, with the additional aggravating factor that the First Claimant is undergoing enforced separation not only from her husband of 30 years but also from her five children of the marriage.

85. In his skeleton argument Mr Buttler made a series of six submissions about why this amounts to an unjustified interference with the First Claimant's article 8 rights. Orally he emphasised his sixth point, namely that once the Defendant had accepted that special treatment should be accorded to the First Claimant as a Windrush victim the practical denial of entry for her family would (a) render her Windrush remedies ineffective if they forced her to remain in Trinidad to prevent the separation from her family, and/or (b) amount to an unjustified interference with her right to family life if she took the invidious decision to access her rights as a Windrush victim and return to the United Kingdom but in the process force a separation from her family.

86. In support of his argument about the interference with the First Claimant's article 8 rights Mr Buttler drew attention to what had transpired with the Sixth Claimant. After this claim had been brought the Sixth Claimant entered the United Kingdom on a visitor's visa and, once here, applied for leave to remain citing both his own and his mother's article 8 rights in support of that application. In granting the Sixth Claimant leave to remain for a period of 30 months the Defendant's official, writing to the Claimants' solicitors on 12th February 2021 about the Sixth Claimant, acknowledged that:

> *"I am writing to inform you that you have been granted a period of 30 months limited leave to remain … because a refusal would result in unjustifiably harsh consequences for you, your mother, Mrs Deomatie Lynda Mahabir whose Article 8 rights it is evident from the information you have provided, would be affected by a decision to refuse this application"*

87. In relation to the need for affordability in entry applications Mr Buttler sought to draw an analogy with the Legal Aid fees regime considered by the Court of Appeal in *R (Gudanaviciene) v Director of Legal Aid Casework* [2015] 1 WLR 2247. That case involved the refusal to grant legal aid or exceptional case funding for immigration proceedings and considered whether the refusal to make available funding led to a breach of the claimants' Convention rights under articles 6 and 8.

88. Five other related cases were joined with the case of Mr Gudanaviciene. One of those was the case of IS, a Nigerian national. IS wished to make an in-country application for leave to remain on human rights grounds, but he suffered both physical and cognitive impairments affecting his litigation capacity and was unable to access the application procedures without the support of a solicitor whose fees he could not afford. This, submitted Mr Buttler, provided a close analogy with the facts of the present case: IS was deprived of the chance to make an article 8 application because he could not afford it.

89. The Court of Appeal agreed that the refusal to provide funding for the claimants in *Gudanaviciene* was unlawful. Mr Buttler relied in particular on [71] of the judgment of the Court handed down by Lord Dyson MR:

> *"As Ms Kaufmann submits, the significance of the cases lies not in their particular facts, but in the principles they establish, viz (i) decision-making processes by which article 8 rights are determined must be fair; (ii) fairness requires that individuals are involved in the decision-making process, viewed as a whole, to a degree that is sufficient to provide them with the requisite protection of their interests: this means that procedures for asserting or defending rights must be effectively accessible; and (iii) effective access may require the state to fund legal representation"*

90. Mr Buttler emphasised in particular from this passage the need for procedures to be "effectively accessible". Applying that rationale to the present case he submitted that if the entry application procedure could only be accessed by the payment of an unaffordable fee then it was not effectively accessible.

91. Relying on arguments from the pleaded case Mr Buttler submitted that the practical inability for the First Claimant to bring her family to the United Kingdom to join her constituted an interference with her article 8 rights and that the interference was disproportionate.

92. In support of this contention he referred to the case of *R (Williams) v Secretary of State for the Home Department* [2017] 1 WLR 3283. That case involved a challenge to the Defendant's decision to refuse the claimant's application for citizenship on the grounds that the requisite application fee had not been paid.

93. The claim failed at first instance and the Court of Appeal dismissed an appeal against that decision, rejecting the contention that the claimant's article 8 rights had been engaged. Davis LJ did not consider that extending the claimant's rights from the leave to remain that he currently enjoyed to the grant of citizenship would engage article 8. He held at [56]:

> *"Mr Knafler conceded, on this part of the argument, that there were "few marginal advantages" to the claimant over and above the grant of leave to remain. Given the right of a child in the position of the claimant to seek leave to remain, without a requirement to pay a fee, and given further the concession that the Secretary of State in any*

> *event could not and would not refuse an application for citizenship if (albeit in circumstances difficult to foresee) such a refusal were to involve a breach of article 8, the argument seems to have no real purchase. A (present) denial of registration as a citizen does not of itself affect the claimant's right to remain, with his parents, in the United Kingdom and does not in any meaningful way impact on the maintenance of his family life"*

94. That conclusion was sufficient for the Court to dispose of the case. Davis LJ went on to consider, obiter, at [63] what the position would have been if article 8 had been engaged on the facts of the case. He agreed with the conclusions of Hickinbottom J at first instance that the actions of the Secretary of State would not have amounted to a breach of the claimant's article 8 rights, for the following reasons:

> *"First, the refusal to exempt the claimant from the fee and grant him citizenship was insufficient in this case to amount to an interference with his article 8 rights; second, that, even if there was an interference, it was marginal and clearly justified by the Secretary of State's legitimate and proportionate aim to have a robust and administratively efficient scheme, with minimal exceptions, designed to help fund the immigration and border control system whilst limiting the fee burden on other applicants"*

95. *Williams* was cited by Sir James Eadie in his skeleton argument for the Defendant, where he submitted that the decision "was dispositive" of the Claimants' enlarged article 8 ground in this case even if Mr Buttler were permitted by the Court to advance it.

96. Mr Buttler sought to distinguish the conclusions of Davis LJ referred to above from the facts of the present case. They are, as Mr Buttler correctly observed, only obiter. He also noted that the conclusion of no procedural breach of article 8 is apparently at odds with the conclusion of the Court of Appeal in *Gudanaviciene* which appears not to have been cited to the Court in *Williams.*

97. Mr Buttler also referred to the case of *R (Carter) v Secretary of State for the Home Department* [2014] EWHC 2603 (Admin) which pre-dated the case of *Gudanaviciene* but considered the fees policy for in-country applications and the availability of exemptions from the standard fees. The claimant's status in *Carter* meant that he was unable to access work or benefits and would have found it difficult to access education or vocational training opportunities. He had applied for leave to remain in the United Kingdom but could not afford to pay the application fee and so his application was refused. The relevant policy allowed for a fee to be waived only if the applicant could show that he was destitute or if other exceptional circumstances prevailed. The decision-maker concluded that neither criterion was present.

98. Stewart J accepted that *"Article 8 encompasses the right to develop as a person"* ([16(iii)]) and hence that it was engaged in the circumstances of the application Mr Carter had made.

99. The third of three questions that the parties in *Carter* had agreed fell to be answered was ([22(iii)]):

> *"Is the policy capable of being applied in a proportionate way?"*

100. In answer to that question Stewart J concluded as follows ([33]):

> *"I therefore declare that the Policy is unlawful in that the decision to refuse to waive the application fee based on the destitution criteria and exceptional circumstances (as described in paragraph 7 of the 2013 Directions) is incompatible with the Article 8 Rights of a person such as C, who is within the jurisdiction and who has an arguable private/family life within Article 8(1) ECHR."*

101. Following the judgment in *Carter* the relevant policy was amended to produce the document *"Fee Waiver: Human Rights-based and other specified applications, version 3.0 (dated 4 January 2019)"*. This amended policy was itself challenged and found by the Upper Tribunal (Immigration and Asylum Chamber) to be deficient in the case of *R (Dzineku-Liggison) v Secretary of State for the Home Department* [2020] UKUT 00222 (IAC). Further amendments consequent upon that decision produced the policy *"ECB06: entry clearance fees"* to which reference is made above.

The Defendant's case on article 8

102. Having heard the Mr Buttler's submissions on *Williams* Sir James Eadie fairly and properly conceded that it was not in fact dispositive of the enlarged article 8 grounds because it dealt primarily with the incremental benefits accruing from a successful application for citizenship over and above those arising from ILR. But, he submitted, the case was still of relevance since it considered the implications for a scheme of charging a fee where a significant number of potential applicants could not afford to pay that fee.

103. Unsurprisingly the Defendant's submissions on *Williams* focused on the extract from [63] that I have set out above. Acknowledging that these comments were *obiter* Sir James Eadie nevertheless submitted that they were relevant to this case.

104. Sir James Eadie went on to submit that the case of *Williams* is part of a suite of reasoning which includes the judgment of Sales J (as he then was) in *R (Shueb Sheikh) v Secretary of State for the Home Department* [2011] EWHC 3390. That case involved an application for entry clearance by a child of Somali nationality and the inability of either the child or his family and sponsors living in the United Kingdom to pay the requisite fee for an out-of-country application for entry clearance. The Secretary of State declined a request to waive the

application fee. Her decision was challenged, inter alia on grounds that the refusal to waive the fee breached the Claimant's article 8 rights.

105. At [74] Sales J set out a series of eleven points to be considered when having regard to the article 8 arguments in the case. The parts of Sales J's reasoning which the Defendant relies upon in the present case are as follows:

> *"(3) A request for waiver of the application fee in a case such as the present is, in substance, a request that the state incur expense (or forego income which would in normal circumstances accrue to it) so as to facilitate, potentially at least, the enjoyment of family life by the claimant (and other members of his family) in a new place, i.e. the United Kingdom. The claim to be entitled to a waiver of the fee by application of Article 8 involves a claim that Article 8 imposes a positive obligation to facilitate enjoyment of that potential family life. Mr Armstrong and Mr Singh were therefore in agreement (rightly in my opinion) that the claim under Article 8 is to be assessed by reference to the principles applicable to identifying the extent of positive obligations under that provision, rather than by reference to the principles applicable where a direct interference with a right under article 8(1) is in issue;*
>
> *(4) This means that the case is in a rather different category from those cases in which the imposition of a fee involves a direct impediment placed in the way of an individual who wishes to exercise a clearly established Convention right other than Article 8 … The question under Article 8 is whether, by insisting on payment of a fee, the state has failed to accord respect to family life where there may (or may not) be a good claim under Article 8 to enter the United Kingdom to deepen such family life as already exists;*
>
> *…*
>
> *(7) … A Court will be slow to find an implied positive obligation which would involve imposing on the State significant additional expenditure, which will necessarily involve a diversion of resources from other activities of the State in the public interest …*
>
> *(8) On the other hand, the fact that the interests of a child are in issue will be a countervailing factor which tends to reduce to some degree the width of the margin of appreciation which the state authorities would otherwise enjoy …*
>
> *(9) In the context of charging fees for consideration of an application for entry clearance for a family member, it is fair and proportionate to the legitimate interests identified in Article 8(2) of "the economic well-being of the country" and "the protection of the rights and freedoms of others" (i.e. other users of the immigration system and taxpayers generally) for the state authorities to focus attention primarily on the ability of the applicant (even if the applicant is a child) and his sponsor and family members to pay the*

> *relevant fee … If there is no great difficulty in them raising funds to pay the fee, there will be no tenable case for an implied obligation under Article 8(1) for the applicant to be exempted from paying the fee …*
>
> *(10) But in a case where the claimant, sponsor and family can show that they have no ability to pay the fee, it will in my view be necessary to assess in broad terms the strength and force of the underlying claim which is to be made. If, upon undertaking such an exercise, it can be seen that the claimant may well have a strong claim under Article 8 involving an aspect of the interests protected by that provision of particularly compelling force – supporting his claim to be allowed to enter the United Kingdom to develop or continue his family life with other family members already here – and that insistence on payment of the fee will set that claim at nought, then in my view an obligation may arise under Article 8 for the Secretary of State to waive the fee (or for the Court to order the Secretary of State to waive the fee)."*

106. This approach, submitted Sir James Eadie, is entirely consistent with that followed by the Court of Appeal in *Gudanaviciene* which was dealing with the more limited circumstances of the availability of public funding to pursue litigation. For these reasons he submitted that the cases of *Shueb Sheikh* and *Williams* were closer analogies to the present case than was *Gudanaviciene.*

The article 14 grounds

107. The arguments based on article 14 comprise two grounds of challenge, although there is a degree of overlap between them. They may be summarised as follows.

108. Firstly that, in breach of article 14, the Defendant failed to treat unlike cases differently. This ground is premised on the fact that (a) Windrush victims have been recognised to be special cases and yet the Defendant's policy treats them and their families no more favourably than it does any family members making out-of-country applications for leave to enter the United Kingdom, with both having to pay an application fee regardless of its affordability; and (b) that there is no proportionate justification for that treatment especially once it is acknowledged that a Windrush victim has been offered special treatment by virtue of his or her status as such ("Ground 2").

109. Secondly that, also in breach of article 14, the Defendant failed to treat like cases alike. The Windrush scheme permits fee-free applications for a child of a Windrush victim if they reside in the United Kingdom but a child residing overseas must pay a full application fee ("Ground 3").

110. Ground 2 is an argument about indirect discrimination. Ground 3 is an argument about direct discrimination. Whilst I agree with the Defendant's submission in its skeleton argument that it is impossible for the same thing to be both directly and indirectly discriminatory the two grounds here relate to

different aspects of the Defendant's fees policy and hence I am satisfied that Grounds 2 and 3 are not mutually exclusive.

111. An illustration of an article 14 claim which involved both direct and indirect discrimination claims in similar circumstances to this case is the case of *R (K) v Secretary of State for the Home Department* [2019] 4 WLR 92. The Claimants in that case were both asylum seekers and potential victims of human trafficking. Their claim related to the level of financial support they were entitled to as compared with Claimants in the sole categories of either "potential trafficking victims" (who were entitled to a higher level of support) or "asylum seekers" (who were entitled to the same level of support).

112. They argued that the Secretary of State had unlawfully discriminated against them by both (a) treating their cases less favourably than those of people who were merely potential trafficking victims (direct discrimination), and (b) not treating them differently from people who were merely asylum seekers (indirect discrimination).

113. Their claims were upheld by the Court on both grounds. In his judgment in *K* Mostyn J set out two threshold questions for both types of article 14 cases, at [35] and [38]:

> *"35. ... in order for discrimination to be justiciable certain things have to be shown. First, it must be shown that the facts come within the "ambit" of one or more of the other articles in the [Convention] ... Article 14 is not freestanding (in contrast to the Twelfth Protocol, which this country has not signed). By its terms it is ancillary to the other articles. It says:*
>
> > *"Prohibition of discrimination*
> >
> > *The enjoyment of the rights and freedoms set forth in this Convention shall be secured without any discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status"*
>
> *...*
>
> *38. Next, claimants must show that they have been discriminated against by virtue of their "status", as none of the other grounds mentioned in article 14 are applicable."*

114. Mr Buttler submitted that the first criterion – ambit – did not appear to be disputed by the Defendant, and in relation to the second criterion – status - he relied upon the category of "other status" within article 14 which, again, he did not understand to be disputed by the Defendant.

Ground 2 – indirect (or "Thlimmenos") discrimination

115. The two points of contention in relation to Ground 2 are (a) whether Windrush victims and their families are in a significantly different situation from any other class of applicant for leave to enter, and (b) even if so whether the Defendant was nevertheless justified in not treating them differently.

116. As to (a) Mr Buttler submitted that Windrush victims clearly are in a different position to everyone else and that this was the entire premise of the Windrush scheme. He pointed to the Secretary of State's oral statement to Parliament dated 23rd April 2018 as evidence of this fact, for example from the following passage:

> "This is a failure by successive governments to ensure these individuals have the documentation they need and this is why we must urgently put it right … So I want to enable the Windrush generation to acquire the status that they deserve – British citizenship – quickly, at no cost, and with proactive assistance through the process"

117. As to (b) Mr Buttler submitted that what had to be justified was the fact that neither Windrush victims nor other applicants are allowed to make fee-free applications on affordability grounds. In the Claimants' skeleton the argument was advanced on five bases: (1) that the First Claimant as a Windrush victim should be given an effective opportunity to apply for family reunion; (2) that charging an unaffordable fee for family reunion applications prevents such applications from being made and hence undermines one of the objectives of the Windrush scheme; (3) there is no evidence that the Defendant ever considered whether it was necessary to extract a fee from the family of a Windrush victim when applying for family reunion; (4) generating application fees from a scheme designed to remedy historic injustices cannot be a legitimate aim; and (5) the grounds on which the Defendant allowed the Sixth Claimant's application for leave – preservation of his and the First Claimant's article 8 rights – illustrates that the disruption to family life created by a strict application of the fees regime cannot be substantively justified.

118. As I have noted above the Claimant's skeleton argument predated the outcome of the UTIAC case, and in the knowledge of that outcome Mr Buttler now submitted that the argument against justification could be advanced on a simpler and more compelling basis, namely that once the Defendant has accepted her policy ECB06 on fees for entry clearance applications should be amended to introduce a criterion of affordability there could no longer be a justification for disallowing an application by the Claimants in the absence of a fee which they cannot afford to pay.

Ground 3 – direct discrimination

119. Applying the Casework Guidance the First Claimant's children fall within the Group 4 class of applicants for entry. Group 4 is defined as follows:

> *"Group 4: a child of a Commonwealth citizen parent and the parent was settled in the United Kingdom before 1 January 1973 or had a Right of Abode (or met these criteria but is now a British citizen)."*

120. Applicants within Group 4 who make an application from within the United Kingdom can apply fee-free. If they make their application from overseas then they must pay the usual fee.

121. There are two points of difference between the Claimants and the Defendant on this issue: (a) the Defendant maintains that the two situations are not analogous, and (b) the Defendant maintains that the difference in treatment is in any event justified.

122. As to (a) Mr Buttler submitted that two groups should be treated as not being analogous only if there is an *"obvious relevant difference"* between them that makes them incompatible. That submission is based on the judgment of Lord Nicholls in *R (Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 173 where he said at [3]:

> *"[t]he essential question for the Court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to this question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact."*

123. In addition Mr Buttler submitted that considering what a "relevant" difference meant in this context involved comparing the two groups by reference to the treatment in issue. He referred to the dissenting judgment of Baroness Hale in *R (Stott) v Secretary of State for Justice* [2020] AC 51. *Stott* considered the issue of the point in time during a determinate custodial sentence at which a prisoner became eligible for parole. A comparison was made between those serving a determinate sentence and those (like Stott) who were serving an extended determinate sentence. The former category of prisoner was eligible to seek parole after serving half of their sentence, the latter only after serving two-thirds of their sentence.

124. At [214] Baroness Hale cautioned against seeing arbitrary differences between groups of people:

> *"Each group of prisoners under discussion here is subject to a different package of answers to [questions about their likely release*

> *date]. But we must beware of treating the "package" which means that each of these groups has a different status as meaning that their situations are not analogous for the purpose of needing a justification for the difference in their treatment. To take an obvious example, women have a different status from men for the purpose of article 14. But the obvious physical differences between men and women do not mean that their situations are not relevantly similar for the purpose, for example, of their right to liberty or to respect for their family lives. We have to look to the essence of the right in question to ask whether men and women prisoners are in a relevantly similar situation. The essence of the right in question here is liberty. It would obviously be discriminatory to make one sex serve longer sentences for the same crime simply because of their gender (as opposed to other factors that might justify a difference in treatment)."*

125. Applying that analysis to the facts of this case Mr Buttler submitted that both groups - children applying from within the United Kingdom and those applying from outside – are clearly in at least a relevantly analogous situation because each has the same need for article 8 protection.

126. As to (b) Mr Buttler relied on the same cumulative submissions as he did for Ground 2, but he also relied on what has transpired subsequently in the UTIAC case as again providing a simpler and more compelling argument for why the differential treatment of applications from within and outside the United Kingdom cannot be justified.

The Defendant's case on Grounds 2 and 3

127. Presenting his defence to the article 14 complaints Sir James Eadie submitted that his arguments were essentially the same for both Grounds 2 and 3. I have therefore dealt with them together here.

128. Referring to *Carson* Sir James Eadie submitted that he had no quarrel with the approach articulated by Lord Nicholls as summarised above for either direct or indirect discrimination cases, namely that the questions of justification and whether two groups are in an analogous position to one another fell to be considered together.

129. But applying that guidance to the facts of this case he submitted as follows: (1) that it was entirely legitimate for the Defendant to exercise judgement on what should be the limits of the benefits flowing from an historic injustice, especially where disapplying ordinary rules about application fees entails a cost to the public purse; (2) that the Windrush scheme is targeted at those who have suffered historic injustice directly; (3) that family members of a Windrush victim do indeed benefit from the Windrush scheme because their connection with a Windrush victim who can access the scheme means it is easier for them to succeed in their own applications; (4) that the policy lines have been drawn with care and are based on a conscious decision not to extend the benefits to family members of a Windrush victim, and (5) that the Claimants argue they

have been discriminated against indirectly because it is wrong not to treat them more favourably than other classes of applicants. The Claimants have chosen to frame their article 14 complaint on the basis that the requirement to pay a fee regardless of its affordability is not justified. But to found a legitimate claim for discrimination the Claimants would need to go further and show that the discrimination as against all other applicants is unjustified because of their special association with a Windrush victim. Policy ECB06 has been withdrawn in its entirety, for all applicants, and therefore there cannot be an argument about unlawful indirect discrimination.

130. Comparing the present case with that of *K* Sir James Eadie submitted that here the withdrawal of policy ECB06 was not in recognition of previous differential treatment between the family of a Windrush victim and other applicants but rather it was a blanket withdrawal for all applicants.

131. He submitted further that the premise for the Claimants' assertion that they be treated differently from other out-of-country applicants is that the Windrush scheme warrants it. But (a) the Claimants are indeed treated differently from other applicants by virtue of the Windrush scheme, the difference just does not extend to the Second to Seventh Claimants making out-of-country applications; and (b) the true question is whether the need to remedy the historic injustice suffered by the First Claimant, who is undeniably a Windrush victim, means that favourable treatment should be extended to the Second to Seventh Claimants who are not.

132. He added that the lines which have been drawn in the policy are deliberate and that it is plainly appropriate to afford a broad margin of discretion for their creation to the Secretary of State and Parliament - the constitutional actors with responsibility for policy-making - especially where difficult judgements are required to be made about the means by which historic injustices are to be remedied.

133. In similar terms, for Ground 3 Sir James Eadie submitted that Parliament had chosen where to draw the line between applications made by children of a Windrush victim from within the United Kingdom and outside it. The conclusion reached was that it was appropriate to draw a distinction between those who were settled in the United Kingdom and those who were not. Again, the withdrawal of policy ECB06 did not assist the Claimants' article 14 claim because it was a blanket withdrawal rather than a partial one which recognised any form of discrimination in Windrush cases.

134. With respect to the judgment of Baroness Hale in *Stott* Sir James Eadie submitted that her views were unobjectionable in themselves but they had to be seen in the context of being *obiter dicta* from a lone dissenting opinion.

135. Finally he referred back to the case of *Williams* noting [66] which, he submitted, was relevant to the article 14 arguments in the way they are put in this case:

> *"In para 95 of his judgment the judge indicated that, notwithstanding his previous findings in relation to article 8 itself, he accepted the submission that a denial of nationality was sufficiently within the*

> *ambit of article 8 to engage article 14. At first sight, this may possibly be seen to involve inconsistency. However, there was no respondent's notice challenging the judge's decision on this point; to the contrary, it was expressly conceded in the Secretary of State's skeleton argument that the judge was entitled so to hold … I, for myself, prefer to make no observations as to its correctness, one way or another, in this particular case. I should however make clear that there certainly is a juridical basis for the argument that article 14 can be relied on if the facts fall within the ambit of a substantive right (as, for example, in the Johnson case [2017] AC 365) without it being necessary to show an actual breach of the substantive right"*

Discussion and conclusions

136. I turn now to my conclusions on the arguments advanced.

Application to amend Ground 1

137. At the heart of Sir James Eadie's resistance to the amendment was his fear that the case would transform from being one about Windrush victims and the proportionality of the immigration rules as they applied to applications by the family of Windrush victims to one which mounted an unrestricted attack on the Defendant's leave to enter policy. He also argued that because the policy central to the Claimants' arguments about the proportionality of charging entry clearance fees had been withdrawn as a consequence of the UTIAC case the target of the Claimants' attack had already disappeared, and hence the claim is academic. He expressed the further concern that the Court may be drawn into making a declaration which would "draw legal lines" for the review of guidance note ECB06, and that this would be improper.

138. In response Mr Buttler argued that none of this was his intention. He was not seeking to enlarge the categories of cases to which the Windrush scheme ought to apply, and he confirmed this unequivocally in oral argument. He added that the relief he would seek if successful on his article 8 ground would not be to quash the fee waiver policy or to seek any declaration in respect of it. As to the status of the guidance note ECB06 Mr Buttler further submitted that its withdrawal "sells the pass" on any suggested justification for the approach under article 14 and that, viewed through the article 14 lens, the review of the guidance might mean that there is no article 14 argument left to be made after the withdrawal.

139. It seems to me that from the way in which Mr Buttler's arguments developed there was indeed an intention to restrict any enlargement of Ground 1 to the narrow circumstances of this case, namely the extent to which the construction of the Windrush scheme and the concessions consequently made available to the First Claimant were still so restrictive as to infringe her article 8 and article 14 rights. His submissions did not stray into a general attack on the Defendant's fees policy but rather to their application to Windrush victims and their family members seeking leave to enter the United Kingdom to be reunited with them.

140. Sir James Eadie's concerns in resisting any expansion of Ground 1 are entirely understandable. But in my judgement the basis for those concerns did not materialise. Mr Buttler asked rhetorically whether in truth one ended up in the same position viewing the article 8 arguments through a procedural lens as through a substantive lens? With Ground 1 narrowly expanded I consider that broadly one does.

141. As to the danger of trespassing on the reconstruction of policy ECB06 following its withdrawal I accept that the Court must be wary about so doing. However it also seems to me that any concerns about the withdrawn policy which have led me to the conclusions I reach below should be identified and borne in mind as the new policy is promulgated. I say this for two reasons.

142. Firstly the reconstruction of the policy already has boundaries set for it by the terms of the Order disposing of the UTIAC case. One can see that the agreement between the parties as recorded in the Consent Order policy was in the following terms:

> *"UPON the Respondent agreeing to* ***withdraw and revise*** *her guidance on entry clearance applications entitled "ECB06: entry clearance fees"* ***with a view to introducing a criterion of affordability in appropriate cases****, and* ***in doing so, to have regard to the submissions made by the Claimants*** *in the grounds of judicial review."* (my emphasis)

143. Thus it is conceded by the Defendant that whatever else the new policy is to contain it will introduce an affordability criterion to be drafted having regard to the claimant's submissions in the UTIAC case. The revision is not therefore to be undertaken with an entirely free hand. It is already guided to this extent.

144. Secondly it would be unwise for the Court to refrain from identifying any facets of the withdrawn policy which have led to conclusions about its incompatibility with Convention rights. Such identification may forestall a reformulation of the policy which still risks an infringement of human rights. By contrast a failure to identify them may lead to further iterative litigation against the new policy which would serve neither applicants nor the Defendant herself.

145. For these reasons I conclude that the limited comment I make in this judgment on the terms of the withdrawn policy are warranted.

146. I should also be clear about what this decision is not. It is not a comment about the merits of any applications that may be made in the future by any of the Second to Seventh Claimants based on whatever policy subsists at the time. Both parties agreed that that would clearly be inappropriate. I agree. No part of this judgment should be construed as restricting the decision-making exercise to be undertaken by the Defendant's officials as and when they are called upon to make one**.**

147. Neither is it a comment about what level of application fee would be affordable to these Claimants. There is some evidence that the level of fees applying currently would be unaffordable to them but evidence about the level of affordability has not been tested in these proceedings nor, so far as I can see, by the Defendant prior to these proceedings commencing. It will clearly be for the Claimants to show how they do or do not meet any affordability criteria that may form part of the newly formulated policy.

The Windrush Scheme and its application to the Claimants

148. There is no dispute that the First Claimant is a Windrush victim. Whether she is a "paradigm" type of victim, as Mr Buttler has submitted, it is unnecessary for me to decide as it has no bearing on her eligibility for the special treatment which flows from her identification as a victim within the scheme.

149. It is clear from all of the statements made by the Defendant and her various predecessors that the creation of the Windrush scheme was intended to confer benefits on Windrush victims such as the First Claimant. The purpose was to redress the historic injustice faced by such victims. But the benefits have consciously been confined to Windrush victims themselves and they do not extend to members of their immediate family. As such it is accepted that, properly construed, the Windrush scheme does not confer any benefits on the Second to Seventh Claimants. They can apply to enter the United Kingdom to join the First Claimant but the processing of their applications is given no preferential treatment above anyone else applying for leave to enter from outside the country.

150. Mr Buttler flirted with a conventional public law complaint on the grounds that the Defendant had misconstrued her policies and had wrongly concluded that there was no power to waive application fees for the Second to Seventh Claimants. Ultimately he disavowed this complaint.

151. In my judgement he was right to do so. His argument had been based on two alternative contentions: (a) that any application made by the Second to Seventh Claimants would be an application made *"in connection with an application made under the Windrush scheme"* for the purposes of regulation 13A of the 2018 Fees Regulations; and (b) that a family connection with a Windrush victim constituted "exceptional circumstances" within the meaning of section 6 of policy ECB06 allowing for the exercise of a discretion to waive a fee.

152. As to the first contention I do not consider that an application by a family member of a Windrush victim would be "in connection with" a Windrush application. It is tolerably clear from the interpretation of regulation 13A in its context that it is intended to apply only to any supplementary applications which a Windrush victim might make to regularise his or her <u>own</u> status. It is common ground that the First Claimant, being the only Windrush victim in this case, cannot herself make an application for leave to enter on behalf of her family members. They must make applications for themselves. Those applications may well refer to, if not rely upon, their connection with a Windrush victim but in my view that is insufficient to place their applications within regulation 13A. Put at its highest their applications would be made in connection with a

Windrush victim, not in connection with an application under the Windrush scheme.

153. As to the second contention, the general category of "exceptional circumstances" must be read in its full context alongside the two stated categories:

> *"the exercise of this discretion should be applied in exceptional circumstances only,* ***such as civil war or natural disaster.****"* (my emphasis)

154. For the Defendant Sir James Eadie submitted that, applying the principle of *ejusdem generis,* the reference here to "exceptional circumstances" could not be extended to include the Windrush scandal. I agree. It seems to me that, regrettable though it certainly is, the Windrush scandal is not of the same order of magnitude as the two examples given. It has resulted in a set of measures put in place voluntarily to mitigate the impact of previous administrative failings. That does not place it on a par with the extreme consequences of civil wars and natural disasters. Moreover I note that the Defendant has inserted specific reference to the Windrush scheme in secondary legislation where that was felt to be appropriate (*viz.* the insertion that created regulation 13A of the 2018 Fees Regulations). Had she felt it necessary to do so then it would have been a simpler task still to insert specific reference to the Windrush scheme in her policy and guidance notes such as ECB06. That she has not done so illustrates to me that this passage from policy ECB06 was not intended to include measures such as the Windrush scheme.

Ground 1: article 8

155. I turn now to consider Ground 1 of the claim, which I have permitted to be enlarged beyond the pleaded case as described above.

156. It seems to me that the question central to deciding Ground 1 in this case is: whose article 8 rights are in issue?

157. For understandable reasons the claim is brought in the name of all seven claimants. Much of Mr Buttler's submissions have focused on the article 8 rights of the First Claimant as opposed to the Second to Seventh Claimants. The main differentiating factor between them is that the First Claimant is a Windrush victim and the other Claimants are not.

158. I consider that by far the stronger argument is made with respect to the article 8 rights of the First Claimant. This was recognised by the Defendant's officials when approving the application by the Sixth Claimant. The correspondence there between the Defendant's official and the Claimants' solicitors drew the following conclusion:

> *"I am writing to inform you that you have been granted a period of 30 months limited leave to remain … because a refusal would result*

> *in unjustifiably harsh consequences for you, your mother,* ***Mrs Deomatie Lynda Mahabir whose Article 8 rights it is evident from the information you have provided, would be affected by a decision to refuse this application.****"* (my emphasis)

It seems to me that that must be right.

159. As a Windrush victim the Defendant has chosen to confer on the First Claimant the preferential treatment which is designed to mitigate against the effects of the historic injustice which saw her lose her ILR status. The First Claimant has availed herself of the measures now put in place to support her and, as a result, has returned to the United Kingdom and has settled here with her ILR restored. But in order to access these remedies she has been forced to separate from her family. Under the Defendant's policies the family members do not enjoy any special dispensation and so, unable to afford the fee for an out-of-country application for leave to enter, they have had to remain in Trinidad. The result is that the family unit has been broken up.

160. At present there is no route by which the Claimants can see it capable of being restored. The evidence is that the fees calculated under the Defendant's policies are unaffordable to them. The Defendant maintains that there is no discretion available to her officials under the Windrush scheme to waive, in whole or in part, the requirement to pay the application fees. I have concluded that on a true reading of the Defendant's policies this is correct and that payment of the full fee must be insisted upon.

161. A consequence of this is that the First Claimant was faced with a thankless choice. Either she had to forego the remedies which the Defendant had put in place with the express intention of remedying the injustice suffered by her and others like her, or else she had to break up the family. She chose to do the latter - in the hope no doubt that it would be only temporary - but in the process she has suffered the *"colossal interference"* with her right to family life identified by Lord Wilson in *Quila.* The evidence from the First Claimant in her witness statement about the negative impact of the separation from her family upon her is both undisputed and unsurprising.

162. Whether one identifies that interference as rendering the procedure effectively inaccessible to the First Claimant (a breach of the procedural limb of article 8) or a disproportionate interference with respect for the First Claimant's family life (a breach of the proportionality limb of article 8) makes little difference in the circumstances, although I am satisfied that it constitutes a breach of both limbs for the following reasons.

163. In relation to the procedural limb it is clear to me that a procedure which depends upon the payment of an unaffordable fee cannot be said to be "effectively accessible" to those whose human rights are affected (per Lord Dyson MR in *Gudanaviciene*). It is going too far to say that the cure for this must be to make entry applications by family members of a Windrush victim fee-free. Importing a criterion of affordability would be a sufficient safeguard.

An assessment of means against an affordability criterion in individual cases may lead to the conclusion that no fee at all can be afforded but that is not necessarily the case for all applicants.

164. In relation to the proportionality limb I have noted Ms Samedi's evidence explaining the origins and rationale for the policy. Sir James Eadie submitted that the Defendant was entitled to draw the lines of her policy in the way she did and that where Parliament has approved the Windrush scheme the Court should afford the Defendant a wide margin of appreciation. But I consider that this argument falls down for two reasons. Firstly whilst it is the case that the statutory elements of the Windrush scheme have been approved by Parliament the policy and the guidance given to Home Office officials which shape the operation of the scheme have not; they remain within the purview of the Defendant and her Department. Secondly, whilst Ms Samedi's explanation seeks to justify why the benefits of the Windrush scheme have deliberately not been extended to applicants in the position of the Second to Seventh Claimants I have concluded that the breach relates to the First Claimant's article 8 rights. Ms Samedi's explanation of the policy rationale does not therefore justify the failure to safeguard the First Claimant's article 8 rights.

165. I note Sir James Eadie's submissions regarding *Williams* but they do not disturb my conclusions on this ground. He rightly relinquished the submission in his skeleton argument that *Williams* "was dispositive" of the article 8 argument which the Claimants now sought to run. I also consider that his reliance on the *obiter* comments of Davis LJ, endorsing the comments of Hickinbottom J at first instance, are misplaced in the circumstances of this case. Fundamental to Davis LJ's conclusion was a recognition that if there was an interference with Mr Williams's article 8 rights it was "marginal". On the facts of *Williams* that conclusion was justified since the assessment being made was of the benefits of citizenship over and above ILR. On the facts of this case the interference is far more significant and is not justified by the desire to operate a fair and efficient scheme for charging immigration fees (as Davis LJ found in *Williams*).

166. I do not consider that the judgment of Sales J in *Shueb Sheikh* alters this conclusion either. Sales J emphasised that:

> *" ... in a case where the claimant, sponsor and family can show that they have no ability to pay the fee,* ***it will in my view be necessary to assess in broad terms the strength and force of the underlying claim which is to be made. If, upon undertaking such an exercise, it can be seen that the claimant may well have a strong claim under Article 8 involving an aspect of the interests protected by that provision of particularly compelling force*** *– supporting his claim to be allowed to enter the United Kingdom to develop or continue his family life with other family members already here –* ***and that insistence on payment of the fee will set that claim at nought, then in my view an obligation may arise under Article 8 for the Secretary of State to waive the fee*** *(or for the Court to order the Secretary of State to waive the fee)."* (my emphasis)

167. Whilst I must be cautious not to prejudge the merits of any future applications the guidance of Sales J does not require me to do so. It suffices for me to note that the interference with the First Claimant's article 8 rights that I have identified means that there "may well" be a strong claim mounted by any of the other Claimants as and when they apply for leave. That has certainly been the case for the Sixth Claimant's application already, as acknowledged in terms by one of the Defendant's officials. It is not appropriate for me to stray beyond that conclusion but neither is it necessary for me to do so for present purposes.

168. It will be seen that my decision is based on the article 8 rights of the First Claimant rather than those of the Second to Seventh Claimants. My decision is thus firmly anchored to the operation of the Windrush scheme, which the First Claimant indisputably benefits from.

169. My finding that the First Claimant's article 8 rights have been breached is sufficient allow the claim under Ground 1. However, in deference to the arguments made in this case I take this opportunity to comment on Ground 1 so far as it relates to the Second to Seventh Claimants as well.

170. Without doubt the Second to Seventh Claimants have the same article 8 rights as does the First Claimant. The more difficult question is whether the failure to safeguard them through special provision in the fees regulations is a disproportionate interference with those rights.

171. I am not persuaded that it is. The Second to Seventh Claimants are not Windrush victims and their cases do not fall to be considered under the Windrush scheme. The boundaries drawn by the Defendant around the Windrush scheme are more justifiable so far as they impact upon the rights of the Second to Seventh Claimants. In my view they are proportionate.

Grounds 2 and 3: article 14

172. An application for entry by the Second to Seventh Claimants can only be made by the Second to Seventh Claimants themselves. Any consideration of article 14 must therefore consider the treatment of them, not of the First Claimant.

173. It is accepted that article 14 does not create a freestanding right. To found a claim it must be associated with another Convention right (per Mostyn J in *K*). But in this case I have no difficulty in holding that it is associated with the rights in article 8. The family unit is being broken up. That affects the article 8 rights of all the Claimants. I agree with Mr Buttler that this is sufficient to place the Second to Seventh Claimants in the "other status" category within article 14.

174. It is accepted that Windrush victims like the First Claimant are in a different position from other applicants. The question is whether family members of a Windrush victim are too. In my judgement the answer to that question must be yes. Their ability to access the entry application process bears directly on the article 8 rights of the Windrush victim, as I have found above. The fact that the outcome of family members' applications will bear directly on the article 8 rights of a Windrush victim is sufficient reason why the family members should be afforded a status over and above those of other applicants.

175. I am therefore persuaded that the failure of the Defendant to afford family members of a Windrush victim preferential treatment in the charging of fees, over and above other classes of applicant**,** is indirectly discriminatory against them and is unlawful. Ground 2 therefore succeeds.

176. As to Ground 3, it seems to me that making an application to be reunited with a Windrush victim from either within or outside the United Kingdom is not an "obvious relevant difference" as identified by Lord Nicholls in *Carson.* The grounds for making an application are based on article 8. Those grounds apply with equal force wherever the application is made from. Distinguishing between applications made from outside the United Kingdom and those made from within**,** when calculating fees, seems to me to be an arbitrary distinction and one which the Defendant has not justified on the facts. Ground 3 therefore succeeds.

Post-script – submissions on counter-factuals

177. For completeness I should note that at times Mr Buttler made reference to certain counter-factual scenarios which, he said, supported the case being made in relation to various of the Claimants. An example was his submission that had the First Claimant and her family been granted leave to enter at the time the First Claimant applied for a student visa in 2008 she would have given birth to the Seventh Claimant in the United Kingdom and hence there would have been no need for him to apply now for leave to enter. Another example is the speculation that but for the First Claimant's removal from the United Kingdom in breach of the Court's order in 1977 she would likely have remained and her lawful status would not have been jeopardised by her leaving the country.

178. Ultimately Mr Buttler did not rely on his submissions about counter-factual scenarios. In my judgement he was right not to do so.

179. The difficulty with submissions based on counter-factuals is that they amount to pure speculation. Each counter-factual scenario can also spawn endless counter-factuals of its own which, albeit by a different route, could lead to the same destination the Claimants find themselves in now. I do not therefore consider that the submissions based on counter-factual scenarios would have added anything to the arguments in this case even if they had been pursued by Mr Buttler.

Disposal

180. In the course of oral argument I canvassed hypothetically with both Mr Buttler and Sir James Eadie what relief would be appropriate if I were to find in the Claimants' favour. In broad terms both agreed that there should be a declaration from the Court the terms of which should reflect the terms of my judgement.

181. Having now seen the way in which I have determined the case I now invite the parties to either agree an appropriate form of order, or if agreement cannot be reached, to make submissions on what the appropriate form of order should be.