Neutral Citation Number: [2022] EWHC 2067 (Admin)

Case No: CO/3859/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/08/2022

Before :

MR JUSTICE KERR

- -

Between :

THE QUEEN on the application of SWP **Claimant**

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT **Defendant**

- -
- -

Mr Eric Fripp and Ms Sandra Akinbolu, instructed by **Duncan Lewis Solicitors**, appeared for **the Claimant**
Mr Jack Anderson, instructed by **Government Legal Department**, appeared for **the Defendant**
Hearing date: 28 June 2022

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Approved Judgment

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MR JUSTICE KERR

This judgment was handed down remotely by circulation to the parties' representatives by email and will be released for publication on the National Archives caselaw website. The date and time for hand-down is 10am on 2 August 2022. I direct that no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

Mr Justice Kerr :

Introduction

1. The claimant, an Indian citizen, will be called SWP because of an anonymity order made by Mr Hugh Southey QC in December 2021, when he granted permission to apply for judicial review on one of two grounds. SWP must not be identified. Her husband, WP, came to this country from India with a "Tier 2" migrant visa, intending to apply for settlement as a Tier 2 migrant worker.

2. SWP and their nine year old son, Z, joined him here in London in 2017 with permission to enter as dependants of WP. SWP and Z moved out of the family's accommodation last year due to domestic violence by WP against SWP, according to her evidence. There is no evidence of any criminal legal process. SWP now lives with Z in a women's refuge in south east London.

3. The issue is whether it was lawful for the defendant (**the SoS**) to refuse SWP the benefit of her policy called the Destitute Domestic Violence Concession (**the DDV Concession** or **DDVC**). Broadly, it gives certain dependants of some visa holders three months to apply for leave to remain in this country if they have had to flee from domestic violence, rather than that they should be driven to remain in an abusive relationship with their spouse or partner.

4. SWP argues that excluding her from the scope of the DDV Concession was contrary to her right under article 14 of the European Convention on Human Rights (**ECHR**), read with article 8, to enjoy equality of access to her Convention right to respect for her family life. She submits, broadly, that as a Tier 2 migrant worker, her husband has an expectation of settlement comparable to that of a refugee or an EEA national; both categories now within the DDVC.

5. The SoS submits that the only issue is whether SWP should have been accorded three months to apply for leave to remain as a victim of domestic violence; that the comparison with refugees and EEA nationals is invalid; that the issue is not whether SWP's application for leave to remain should succeed under the Immigration Rules; and that even if it were, SWP is, lawfully, ineligible for leave to remain as a victim of domestic violence.

The Facts

6. SWP is an Indian national, born there in March 1987. She qualified as a teacher and taught at an international school in India. On 6 May 2011, she married WP, also an Indian national, born in 1983. Their son, Z, was born in India on 28 February 2012. WP worked for a management and outsourcing company.

7. Since about 1999, the SoS has operated by concession a provision for a victim of domestic violence with limited leave to remain (**LTR**) as the spouse or partner of a person present and settled in the UK, to be granted indefinite leave to remain (**ILR**), where the relationship has broken down due to domestic violence. The "present and settled" spouse or partner had to be ordinarily resident here, with no time restriction.

8. The concession became rule 289A of the Immigration Rules, in 2002. I need not set out the text. A difficulty arose with its operation: to escape from an abusive relationship, domestic violence victims needed a place of refuge, which they were often unable to afford, not being allowed any recourse to public funds. In response, the SoS introduced the temporary "Sojourner project", in 2011 and 2012, providing limited interim funding for places of refuge.

9. That regime was replaced entirely from 9 July 2012, when the new Appendix FM to the Immigration Rules entered into force. It included a section on domestic abuse victims, Section DVILR: *Indefinite leave to remain (settlement) as a victim of domestic violence*. Within Section DVILR came Section E-DVILR: *Eligibility for indefinite leave to remain as a victim of domestic abuse*; and Section D-DVILR: *Decision on application for indefinite leave to remain as a victim of domestic abuse*.

10. I will return to those provisions. As for funding, a new concession at the heart of this case was also introduced in 2012, the DDV Concession. I do not have the text of the DDV Concession at that time; the version I have dates from 2018 and has not been updated since, though there is later guidance to Home Office staff on the subject. Mr Nick Wood, the SoS's senior policy adviser responsible for operating the DDVC, explains:

> "The [DDVC] … allowed victims of abuse to apply for a change of conditions associated with their leave, to allow them to access public funds over a short period by granting 3 months leave outside the rules with recourse to public funds whilst they made their application for indefinite leave to remain under the Immigration Rules. This change of conditions meant that a victim of abuse was not precluded from accessing a refuge place due to having a condition of NRPF associated with their leave to remain but enabled them to have access to public funds pending their application for indefinite leave to remain.
>
> ….
>
> … The domestic abuse provisions under the Immigration Rules and the concession provided only for those who are in the UK with leave as a spouse or partner of a British citizen or settled person (those who are defined as present and settled in the UK) for reasons set out above. The eligibility criteria for the DDVC were intended to mirror those who apply under the [DVILR]. That meant that the DDVC was available only to those whose spouse or partner was settled in the UK, because it was only where the spouse or partner was present or settled in the UK that a person could obtain indefinite leave to remain under the [DVILR] at that point."

11. In May 2016, the Inner House of the Court of Session gave its decision in *A. v. Secretary of State for the Home Department* [2016] CSIH 38, holding that the DVILR violated article 14 of the ECHR, read with article 8, by excluding from its scope the spouse or partner of a refugee.

12. In about 2016, WP came to the UK to work and applied for LTR as a Tier 2 migrant under the points based system. He hoped to become settled in the UK. He agreed with SWP that she and their son Z would, if possible, join him here and that she would seek to qualify as and work as a teacher in this country. On 24 July 2017, SWP applied for entry clearance as the spouse of a Tier 2 migrant worker. That application was granted on 7 August 2017, up to 16 August 2018.

13. SWP and Z arrived in this country on 14 August 2017. SWP worked towards qualifying as a teacher in this country. However, according to her unchallenged evidence, she was experiencing severe domestic and sexual abuse and violence from her husband, as she had done previously when they were living in India. She dared not report it to the police, for fear of deportation. She had not dared report it to the authorities in India either. She describes WP as a "goon" or "hired thug" in India. The violence and threats caused SWP to fear for her life.

14. On 5 February 2018, the current and last version of the DDVC was published for Home Office staff. It stated as follows: that it did not apply to those whose LTR was given as the partner of a refugee or recipient of humanitarian protection who was "not settled" at the time of the application. It applied only to applicants previously granted LTR as the spouse or partner either of a British citizen or of a "settled person".

15. To be eligible under the concession, the applicant's first grant of LTR under Appendix FM must have been under D-ECP.1.1 (entry clearance as a partner); or D-LTRP.1.1 or D-LTRP.1.2 (limited leave to remain as a partner); or D-DVILR.1.2 (not relevant here). It is common ground that SWP's first grant of LTR was under none of those provisions, meaning that on the face of the DDVC, she is not eligible for assistance in accordance with the DDVC.

16. The important point is that to be eligible, according to the text of the DDVC, the applicant must be the spouse or partner of a person who already has settled status. Those eligible are "granted 3 months leave outside the immigration rules (LOTR) with a condition code that does not restrict access to public funds". For present purposes, "[o]nly those eligible to apply for leave under section DVILR of Appendix FM … are eligible for the DDV concession".

17. Further, the applicant must:

> "claim that their relationship with their spouse [or partner] has broken down as a result of domestic violence; … claim to need access to funds in order to leave the relationship; [and] … intend to apply for indefinite leave to remain as a victim of domestic violence".

18. On 1 May 2018, SWP's application for LTR was again extended, on the same basis, so as to expire on 29 July 2020.

19. In December 2018, in response to the Court of Session's decision in *A v. Secretary of State for the Home Department*, the SoS amended E-DVILR so that eligibility for ILR on domestic violence grounds was extended to the spouse or partner of a refugee who has limited LTR but has not yet been granted ILR, i.e. has not yet attained settled status.

20. On 21 July 2020, SWP applied for a further extension of her LTR as the spouse of a Tier 2 migrant worker. On 6 October 2020, that application was granted, up to 12 August 2021.

21. In December 2020, the eligibility provisions under the DVILR were again amended. The amendments were to E-DVILR paragraphs 1.2 and 1.3. They arose from the EU Settlement Scheme (**EUSS**). Those in the UK with "pre-settled status" under Appendix EU were eligible after a total of five years' residence to become qualifying sponsors of

family members under Appendix FM after the EU exit transition period came to an end on 31 December 2020.

22. Pre-settled status is not the same as ILR; it is time limited and available to EEA nationals who have not been in the UK for the required five years that would enable them to obtain ILR. A grant of pre-settled status enables the person to "top up" the length of their residence in the UK, as a route to settlement. For that reason, they were regarded as in a similar position to refugees awaiting settlement; both were considered to have a strong expectation of settlement.

23. The "guidance" or text comprising the DDVC, published in February 2018, has not been updated to reflect the changes I have just mentioned, which have brought within the scope of the DDVC the spouses or partners of, first, refugees and second, EEA nationals with pre-settled status.

24. In July 2021, SWP, living in south east London with WP and Z, was suffering severe domestic abuse and violence but attempting to stay in her marriage rather than risk deportation if she were to report the abuse. However, a particularly horrific incident occurred that month: according to SWP's unchallenged evidence, WP tried to suffocate her with a pillow while sexually abusing her.

25. SWP telephoned a women's help centre and, within a week, fled the matrimonial home with Z and was provided with shelter in a place of safety which was shared accommodation. She was helped by a case worker to apply under the DDVC for a three month extension of her LTR, which was due to expire on 12 August 2020, a few weeks later. The application form is dated 21 February 2021, but it is agreed that the correct date is 21 July 2021.

26. The response from the Home Office is dated 6 August 2021. It is the decision under challenge in this judicial review. The response letter stated:

> "You have been found not to be eligible under the Domestic Violence Concession (DDV) as you did not enter the United Kingdom nor were you given leave to remain in the United Kingdom as a spouse, civil partner, unmarried or same sex partner of a British Citizen or someone present and settled in the UK under Part 8 of the Immigration Rules or as a Partner under Appendix FM.
>
> Home Office records indicate you were last granted leave to remain as a Tier 2 dependant valid from 06 October 2020 to 12 August 2021.
>
> This letter is not an immigration decision for the purpose of section 82(1) of the Nationality, Immigration and Asylum Act 2002. There is no right of appeal against this."

27. After that, SWP obtained legal representation and the pre-action protocol procedure was followed, leading to issue of the present claim in early November 2021. On 24 November 2021, the current guidance on the DDVC was published for Home Office staff. It is 48 pages long, but it is common ground that, for the purposes of this case, the only amendments of substance since it was introduced in 2012 are the two amendments to include spouses or partners of refugees and of EEA nationals with pre-settled status, as explained above.

28. The current policy and its rationale are described by Mr Wood in the following terms:

> "The rationale for the present policy is, as stated above, that those who have come to the UK as the spouse or partner of a person present and settled in the UK (or with refugee status or pre-settled status) have come to the UK in the reasonable expectation of being able to live permanently. They would have an expectation of permanent settlement but for the breakdown in the relationship as a consequence of domestic abuse. But those who have come as the partner of a person on a temporary work or study visa have no such legitimate expectation."

29. SWP's counsel at the hearing before me adopted and relied upon the last sentence as a correct statement of the rationale for the policy. There was no dispute between the parties that the rationale is correctly expressed in that paragraph, as has been accepted in case law further considered below.

30. SWP is now living in difficult circumstances because she is neither able to work nor have recourse to public funds. She does receive minimal support of £77 for food and other basic necessities, despite her "nil recourse" status. That is all that stands between her and destitution at present, unless she were to leave this country. Z is being provided with education at school. SWP wishes to teach and is currently doing volunteer work full time at Z's school.

31. She is very reluctant to return to WP but says she would consider this as a last resort, for her son's sake, rather than return to India where, she says, she would be unable to provide Z with a good education, as it is too expensive. She hopes that this judicial review will enable her to obtain access to state benefits and, eventually, that she will be able to settle here with Z independently of WP and work as a teacher.

32. I should add that the accusations of serious violence and sexual abuse against WP have not, so far as the evidence before me goes, been investigated, tested in any court or proved. It is possible that investigations have taken place outside the scope of the evidence before this court. I do not know. WP has not been served as an interested party in these proceedings. Were it not for the anonymity order, he would surely be properly considered an interested party.

Issues, Reasoning and Conclusions

33. The parties agree that the circumstances of SWP and her application fall within the ambit of article 8 of the ECHR; that SWP's immigration status is "other status" within article 14, which requires among other things that enjoyment of the ECHR rights and freedoms "shall be secured without discrimination on any ground such as sex, race, [etc] …. or other status".

34. They also agree that as regards access to the DDVC, SWP as the dependant spouse of a Tier 2 migrant worker is treated differently from others eligible to benefit from it, namely the spouses or partners of those with settled status and, more recently, the spouses or partners of refugees and EEA nationals on a path to settled status. While those in the latter categories can benefit from the DDVC, SWP and others in her position cannot.

35. Both parties referred me to the relevant cases. I will refer here only to a few of them. The purpose of the DDVC is not in dispute. As Lady Dorrian observed, giving the opinion of the court in *A. v. Secretary of State for the Home Department*, at [28]:

> "There was a very obviously compelling reason for the domestic violence concession, to prevent someone requiring to stay in an abusive relationship out of concern only for their immigration status … ."

36. And at [66], she observed:

> "… the aim of the measure in question [the DVILR] is said to be that the spouses of those settled in the United Kingdom should be treated differently from the spouses of those without that status. The rationale for doing so is that the former are likely to have a reasonable expectation of settlement in the United Kingdom, and thus to have cut or loosened their ties with their country of origin in that expectation, whereas the spouses of the latter could have no such expectation, and would be less likely to cut or loosen those ties … ."

37. Later, in the same paragraph, she continued:

> "Once refugee status is acknowledged, international obligations require the state to facilitate assimilation and naturalisation, again a situation quite different from that of a worker or student. Accordingly, while we accept that it is not reasonable for the spouses of students or workers to have any reasonable expectation of having their future and a permanent home in the United Kingdom, and that such spouses are less likely to cut or loosen their ties with their country of origin than the spouses of British citizens or persons with settled status, we cannot accept that this applies equally to the spouses of refugees. One can readily see that the spouse of a worker or student can have no reasonable expectation of having their future life or a permanent home in the United Kingdom, and that they would not be expected to cut or loosen their ties with their country of origin. The same cannot be said of the spouse of a refugee."

38. At [80], Lady Dorrian held that equating the spouses of refugees with the spouses of students or workers on a temporary visa was not justified. The two categories are in wholly different positions. The Secretary of State had not disputed statistical evidence that 95 per cent of refugees granted LTR for five years were granted ILR (settled status) at the end of the five year period. They had a strong expectation of permanent settlement.

39. In *R (FA) (Sudan) v. Secretary of State for the Home Department* [2021] 4 WLR 22, the Sudanese spouse of a British husband lawfully entered the UK and lived here with her husband for four months, before leaving the matrimonial home and applying for assistance under the DDVC. She did not have LTR. She had entered the UK in circumstances which, Murray J found, gave her no reasonable expectation of permanent settlement. She had not, for example, returned from exercising EEA rights elsewhere.

40. Singh LJ (with whom Popplewell and Phillips LJJ agreed) dismissed the appeal. He held that, assuming there was indirect discrimination, it was objectively justified. At [46] he confirmed that the rationale for the policy in the DDVC is that:

> "a person whose application for settlement in the UK is dependent on her spouse or partner should not feel compelled to stay in an abusive relationship for that reason. Otherwise there is a danger that the immigration system itself will contribute to an injustice … ."

41. At [48], he reasoned that once it is recognised that such is the rationale for the policy in the DDVC, it followed that there is an objective justification for differential treatment

on the basis of their immigration status. Otherwise, the rationale for the policy would not be achieved.

42. At [57], Singh LJ distinguished the Inner House's decision in *A*:

> "[t]he critical point of distinction … is that the appellant in *A* did have limited leave to be in the UK as the result of her relationship with her sponsor. The present appellant does not have such limited leave. The appellant in *A* therefore fell within the rationale of the policy in the DDVC, whereas the present appellant does not."

43. Both parties were content, as I am, that I should approach the application of article 14 to the facts by asking the five questions formulated by Laing J (as she then was) in *R (Parkin) v. Secretary of State for Work and Pensions* [2019] EWHC 2356 (Admin), at [90]:

> "i. Do the circumstances 'fall within the ambit' of another Convention right?
>
> ii. Does the claimant have a status for the purposes of article 14?
>
> iii. There are two questions at this third stage.
>
> 1. Is there a difference in treatment between the claimant and another person?
>
> 2. Is that person's situation, in relevant respects, analogous to the claimant's?
>
> iv. Is that treatment on the grounds of the claimant's status?
>
> v. Is the treatment justified?"

44. None of the above account, so far, is controversial. From here, however, the parties' positions diverge. For SWP, I paraphrase the main submissions of Mr Fripp and Ms Akinbolu as follows:

(1) The position of SWP and those with the same immigration status as hers (i.e. dependant spouses or partners of Tier 2 migrant workers who have LTR but have yet to obtain ILR (**the SWP cohort**) is materially the same as that of dependant spouses or partners eligible for assistance under the DDVC and eligible for settlement under the DVILR route.

(2) Following the expansion of the DDVC and DVILR in recent years, they are no longer confined to the those with partners who are already settled here; they now include substantial categories in which the partner has only limited leave. Therefore, it can no longer be said that settlement (ILR) of the partner is a necessary pre-condition of entitlement under the DDVC and DVILR.

(3) A Tier 2 migrant worker has a strong expectation of permanent settlement, as does a refugee or EEA national with pre-settled status. A Tier 2 migrant worker such as WP is, like them, on a path that normally leads to settlement. WP's position is not analogous to that of a person on a temporary work or study visa, with no expectation of settlement.

(4) Once it is accepted that ILR of the partner is no longer the touchstone of entitlement to benefit from the DVILR and therefore the DDVC, the Tier 2 migrant category

can no longer be justifiably excluded. The simple test is whether the spouse or partner is on a route normally leading to settlement and whether first grant of LTR of the spouse or partner was as the dependant of that person.

(5) The inclusion of some dependants within the scope of the DDVC and DVILR whose partners have only LTR and are not settled, requires a qualitative assessment of the character of the LTR of the non-dependant person. Is his LTR of a character that normally leads to settlement? If so, the dependant partner cannot justifiably be excluded from the benefit of the DDVC and DVILR.

(6) The character of a Tier 2 migrant worker's LTR is such that his expectation of settlement is very strong, unlike that of a temporary worker. The differentiation in *A* was between the spouse of a refugee and "the spouse of a worker or student". The court treated workers and students as in the same category, indicating that it did not intend to include within the category of "worker" one on a path to permanent settlement.

(7) In *FA (Sudan)*, Singh LJ identified students and "visitors" as among those without any expectation of permanent settlement: "unlike students or visitors who come to this country from choice, refugees are outside their own country out of necessity … " ([57]). That shows the court would not have equated Tier 2 migrant workers with students or visitors.

(8) The new category of partners of EEA nationals introduced in late 2020, does not share the particular characteristics of refugees that have weighed with the courts: namely, presence in the UK through necessity and a high rate of settlement. It is not necessary that eventual settlement should be guaranteed, only that it is the natural terminus of the dependant spouse's partner.

(9) The purpose of the DDVC and DVILR is to protect victims of domestic violence. That purpose accords with article 4 of the 2011 Council of Europe Convention on preventing and combating violence against women and domestic violence (**the Istanbul Convention**), obliging states parties to take the necessary legislative and other measures to protect the right, particularly of women, to live free from violence in the public and private sphere.

(10) The SWP cohort is treated differently from the other groups listed in the DVILR, namely the spouses of partners of British citizens or persons settled in the UK; of persons with LTR as refugees with LTR; or of EEA nationals with LTR through pre-settled status under Appendix EU. The SWP cohort has no access to the short term benefits of the DDVC, nor the long term advantage of herself having a path to settlement under the DVILR.

(11) While the state enjoys a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify different treatment, (*Gaygusuz v. Austria* (application 17371/90) [1996] ECHR 36, at [42]), stricter scrutiny is required where the right affected is enshrined in the ECHR and protected elsewhere by international instruments; cf. *Ponomaryov v. Bulgaria* (2014) 59 EHRR 20 (application 5335/05) in the context of nationality discrimination.

(12)"It is not the scheme as a whole which has to be justified but its discriminatory effect"; per Baroness Hale in *R (SG) v. Secretary of State for Work and Pensions* [105] 1 WLR 1449, at [38], citing *A v Secretary of State for the Home Department* [2005] 2 AC 68, per Lord Bingham at [68]. The government must explain not just why they brought in the scheme but why they did so in a manner that discriminates against the SWP cohort.

(13)The SoS cannot do so. The SWP cohort is within the rationale of the policy. Without access to the DDVC, those in SWP's position are forced either to return to an abusive relationship or to abandon the life they have built here in justified expectation of settlement. The exclusion is not justified and the court should give a ruling to that effect.

45. For the SoS, Mr Anderson's main points can be paraphrased in the following way:

(1) The challenge is to the refusal of assistance under the DDVC, not the DVILR. The legality of the former, not the latter, is put in issue. The DDVC is a short term measure providing three months' access to public funds, outside the Immigration Rules, to enable an application to be made under the DVILR, a different set of rules providing a path to settlement for certain victims of domestic violence.

(2) A victim can, albeit without recourse to public funds, apply for LTR under the DVILR without applying for temporary protection under the DDVC: see E-DVILR, paragraph 1.2(a) and (b), which are alternatives; (b) provides for an application under the DDVC; (a) does not. Thus, the DDVC is not a "gateway" provision providing access to the DVILR.

(3) The statement of facts and grounds relied upon a comparison between SWP's position and that of the "spouse of a person present and settled"; yet SWP now seeks to invoke a wider class of comparators, including the partners of other categories of persons not yet settled but on a path to settlement, i.e. refugees and EEA nationals with pre-settled status.

(4) The need for procedural rigour in judicial review proceedings is no less than in private law proceedings. A claimant should not in the course of argument be allowed to expand her case beyond what is pleaded (cf. *R (Talpada) v Secretary of State for the Home Department* [2018] EWCA Civ 841 per Singh LJ at [67]-[69]; and *R (Dolan) v. Secretary of State for Health and Social Care* [2021] 1 WLR 2326, per Lord Burnett LCJ at [116]-[117]).

(5) The SoS accepts that the circumstances of SWP's case fall within the ambit of article 8 (Laing J's first question in *Parkin*); and that SWP can rely on "other status" as the spouse of a person with limited LTR on a Tier 2 migrant worker visa. However, immigration status is not a core or "suspect" status, a point relevant to justification (*R (SC) v. Secretary of State for Work and Pensions* [2022] AC 223, per Lord Reed PSC at [114]).

(6) The SoS also accepts (Laing J's third question, first part) that there is a difference in treatment as between the SWP cohort and the spouse or partner of a person present and settled in the UK or, if the court allows a wider comparison, between

the SWP cohort and those eligible under E-DVILR.1.2, which includes the partners of refugees or EEA nationals not yet settled but on a path to settlement.

(7) As for the second part of the third question, the SoS contends that SWP is not in an analogous position to any of those comparators. Whereas they can obtain a grant of ILR under the DVILR, SWP cannot. The DDVC is there to facilitate a successful application under the DVILR and nothing more. If, as is the case, SWP's application under the DVILR must fail, her position cannot be analogous to those whose applications under it would succeed.

(8) In the absence of any challenge to the DVILR itself, that is sufficient to dispose of the claim, without the court investigating whether it is lawful or unlawful for SWP's notional application under the DVILR to be doomed to failure. SWP would need the court's permission to widen the scope of her claim to embrace that question, which is not at present pleaded.

(9) If SWP is allowed to contend that it would be unlawful for her notional application under the DVILR to fail, while those of the widened class of comparators would succeed, still she is not in an analogous position to that of her comparators.

(10) The primary comparison is with the partner of a person already settled here, not one such as WP who has only limited LTR. The courts have recognised the distinction between a person with settled status and one with LTR. The distinction is not technical. It underlies the rationale of the DDVC and DVILR: the partner of a settled person has a reasonable expectation of settlement while that of a person with only limited LTR does not.

(11) Unless and until he attains settlement, a Tier 2 migrant worker's status is "precarious" within section 117B(5) of the Nationality, Immigration and Asylum Act 2002, providing that little weight should be given to a private life established by a person at a time when their immigration status is precarious; see *Rhuppiah v. Secretary of State for the Home Department* [2018] 1 WLR 5536, per Lord Wilson JSC at [44].

(12) Eventual settlement is far from assured for a Tier 2 migrant worker. For example, if WP were to lose his job, his leave could be curtailed unless he could find another acceptable sponsor. Nor is it obvious why a person with limited LTR for a number of years should become entitled to ILR because the relationship on which her entry was based breaks down.

(13) The SWP cohort is not in an analogous position to the refugee's spouse in *A*'s case, for the reasons given by Lady Dorrian in that case. The UK owes concrete obligations in relation to the settlement of refugees; 95 per cent of those given asylum do settle here; and they come here through necessity, not choice and cannot be expected to return home once their LTR expires.

(14) There is no valid analogy between the SWP cohort and the cohort of spouses and partners of EEA nationals with pre-settled status. They have a special status because of the specific obligations owed to EEA nationals before Brexit, which the UK continues to owe to them under the Withdrawal Agreement. Their expectation of settlement is different from and greater than that of a Tier 2 migrant worker.

(15) If, contrary to the submissions summarised above, the fourth question posed by Laing J in *Parkin* arises – whether the different treatment of the claimant is on the ground of her status – the SoS accepts that the treatment is on the ground of a status within article 14 of the ECHR, namely SWP's immigration status.

(16) As for justification, if it arises, the state has a wide margin of appreciation in determining the extent to which concessions should be made outside the Immigration Rules for the purpose of protecting victims of domestic violence. The scope of that margin varies and is wide "when it comes to general measures of economic or social strategy": *Carson v. UK* (2010) EHRR 13 (application 42184/05), at [61]; see also *Bah v. UK* (2012) EHRR 21 (application 56328/07), at [47], a case concerned with immigration status, cited in Lord Reed PSC's judgment in *SC* at [114].

(17) The extent of the concession to be made in the DDVC was a matter of social and economic policy. It was primarily for the executive, not the court, to determine how to strike the balance between, on the one hand, assisting victims of domestic violence and, on the other, maintaining control of immigration and confining the protection by reference to the objective expectations of settlement a person with LTR might have.

(18) It is clearly within the state's margin of discretion to maintain the original distinction between partners of persons who are settled and those who have only limited LTR; the comparison in the grounds of challenge which SWP obtained permission to advance in these proceedings. The SoS is justified in confining assistance under the DDVC to a person who could fulfil the requirements for ILR, as the Court of Appeal held in *FA (Sudan)*.

(19) If SWP is permitted to argue her case more broadly, the result is the same. Those joining family members with limited LTR do not have an expectation of settlement. The two limited inroads for partners of refugees or EEA nationals on the path to settlement but with only limited LTR, do not dilute the policy so that the SoS can be compelled to extend it further to the partners of Tier 2 migrant workers. Both are special cases.

(20) Neither the two Strasbourg cases – *Gaygusuz* and *Ponymaryov* – nor the Istanbul Convention assist SWP's arguments. Both the cases involved bare and direct nationality discrimination where scrutiny is much stricter and the margin of discretion narrow. The Istanbul Convention is not directly enforceable in this country and was regarded by Singh LJ in *FA (Sudan)* at [53] as, at its highest, leaving contracting states a wide discretion as to when a state considers it necessary to allow an applicant to stay in that country.

46. I turn to my reasoning and conclusions. I consider first Mr Anderson's pleading points. I accept that the claim as made did not put in issue the legality of the DVILR. The decision challenged was the SoS's letter of 6 August 2021 refusing temporary assistance to SWP under the DDVC. The grounds of challenge centred on an assertion that the DDVC, not the DVILR, was discriminatory, in breach of article 14 of the ECHR. The relief sought was an order quashing the refusal letter and a declaration that the DDVC is incompatible with the ECHR and the Istanbul Convention.

47. I accept also that an application can be made under the DVILR without assistance under the DDVC. In that sense, the DDVC is not a "gateway" to settlement under the DVILR. But in practice the DDVC does operate as a gateway to the DVILR for those in need of access to public funds to make their application under the DVILR. Furthermore, the ground of refusal in this case was that SWP did not enter the UK and was not given LTR as a partner of someone present and settled in the UK "or as a Partner under Appendix FM".

48. Appendix FM includes the DVILR. The February 2018 text of the DDVC (not updated since) includes the sentence: "[o]nly those eligible to apply for leave under section DVILR of Appendix FM … are eligible for the DDV Concession". Reading that sentence together with the terms of the refusal letter, the grounds of challenge must, implicitly, have included a complaint that the SoS ought not to have found that SWP was outside the eligibility criteria for settlement as a domestic violence victim under the DVILR.

49. While the DVILR is not directly attacked and no relief in respect of it is sought, the claim includes an implicit assertion that the DVILR is discriminatory. It would have been better if that assertion had been made explicit. But the SoS was not misled about the scope of the claim. She did not seek further information and has been able to deal effectively with the indirect attack on the DVILR. She was not taken by surprise; her evidence and arguments would not have been substantially different if the attack on the DVILR had been direct.

50. It is also true that the claim as pleaded relied primarily on a comparison between SWP's position and that of a person whose spouse or partner is "present and settled" in the UK. The grounds of the claim did, however, include reference to the decision of the Court of Session in *A*'s case (in the citation from Singh LJ's judgment in *FA (Sudan)* at [47]). The grounds of claim then referred to the "current policy documents" which "suggest that leave to remain is to be given to those who entered with an expectation of settlement … ."

51. It was known to both sides that the "current policy documents" when the claim was brought in early November 2021 (a few weeks before the 24 November 2021 version in the hearing bundle) related to the then current version of the DVILR which had widened eligibility under the DVILR (and therefore, the availability of temporary assistance under the DDVC) to include partners of refugees and EEA nationals not yet settled but on a path to settlement.

52. Again, the pleaded case was not fully expressed, but in my judgment was just about full enough to embrace what in the skeleton argument became the main focus: the comparison between the expectations of settlement of, on the one hand, Tier 2 migrant workers said to be on a path to settlement and, on the other, refugees and EEA nationals on a path to settlement.

53. I am therefore prepared to entertain the arguments of SWP as made to the court, despite my strong enthusiasm for procedural rigour in public law proceedings, which should be no less than in private law ones. I would not, however, be prepared to grant any relief in respect of the DVILR; and I would, if necessary, need to consider carefully the appropriateness or terms of any declaration relating to the DDVC that might impact on the effectiveness of the DVILR.

54. I then turn to the substance of the arguments, gratefully adopting as a framework the five questions identified by Laing J (as she then was) in *Parkin*. All but two of the questions posed produce a common answer from the parties. The circumstances fall within the ambit of article 8. SWP's immigration status is "other status" within article 14. There is a difference of treatment as between SWP and the partner of a present and settled person, and between SWP and a refugee or EEA national on the path to settlement.

55. I ask myself next, whether the situation of the people in those categories are, in relevant respects, analogous to SWP's situation. I have already summarised the parties' main submissions on this issue. At the oral hearing, we noted that in *A*'s case the court contrasted the situation of a refugee with a strong expectation of settlement after five years, with that of a "student or worker" (a phrase used multiple times) with no such expectation. The parties disagreed about whether the "worker" in that phrase was intended to include a Tier 2 migrant worker.

56. In consequence, I was helpfully provided with further Home Office documents shedding light on the kinds of "worker" recognised in the Immigration Rules, to see where the Tier 2 worker fitted within that hierarchy and on what grounds their LTR may be curtailed before they are able to obtain ILR and settle here. There were no statistics before the court showing the proportion of Tier 2 workers who attain settlement. That exercise revealed the following.

57. Broadly, there are three categories or tiers of migrant workers who come to this country to work. The top tier, Tier 1, comprises entrepreneurs and investors of various kinds. Mr Fripp confirmed that his submissions entail the proposition that the partner of a Tier 1 entrepreneur had at least as good an expectation of settlement as that of a Tier 2 worker such as WP; and that it would therefore be contrary to article 14 of the ECHR to exclude the partner of a Tier 1 entrepreneur or investor from the scope of the DDVC and DVILR.

58. The next tier down, Tier 2, comprises various categories of skilled worker. The first is "general", which includes WP. A general Tier 2 worker must have a certificate of sponsorship from a licensed sponsor. The sponsor must meet various requirements to obtain a certificate and must provide a job for the worker. Subject to exceptions in certain cases (e.g. where the salary is over £159,000 p.a., or the job at in a "PhD-level occupation" or is that of a doctor or nurse), there is an annual limit to the number of certificates. In June 2020 the limit was 20,700 certificates of sponsorship for each financial year.

59. The Tier 2 worker can only work (other than doing voluntary work) in the job for which the certificate of sponsorship is granted. They may study, subject to approval for the course to be undertaken. They are offered LTR during the currency of the job, for up to five years and one month. Their dependants are allowed to live with them and be given LTR for that purpose. The Tier 2 route leads to settlement (ILR) after five years, unless their LTR is curtailed.

60. For completeness, the terminology has recently changed: Tier 2 workers in the general sub-category are now known as skilled workers. There are also other, special sub-categories of Tier 2 worker: those subject to an "intra company transfer"; ministers of religion; and sportspersons. Different rules apply to each of these. Of the three special

sub-categories, two lead to settlement (ministers of religion and sportspersons). Those who come on an intra-company transfer are not given ILR after the five year period.

61. For historical reasons, Tier 3 has not been taken up and Tier 4 no longer exists. The next level down is Tier 5: religious workers, charity workers, creative workers, government authorised exchange workers, international agreement workers and seasonal workers. It is common ground that these workers do not enjoy an expectation of settlement. There are differing rules governing their presence here but the common theme is that it is transient. Seasonal workers, for example, may not be joined here by their dependants.

62. On what basis may the LTR of a skilled worker (formerly, a Tier 2 general worker) be curtailed or revoked? The answer lies in part 9 of the Immigration Rules, supplemented by detailed written instructions to Home Office staff. Part 9 is not specific to those who come to the UK as workers. It applies generally to persons with LTR but also includes provisions particular to workers.

63. They are susceptible to exclusion or deportation from the UK on the ground that the person's presence is not conducive to the public good because of their conduct, character, criminal associations or other reasons. Their LTA must be cancelled if they are sentenced to custody for 12 months or more; or are a persistent offender or commit an offence causing serious harm. They may be removed if they make false representations, produce false documents or enter into a sham marriage or civil partnership; or if they fail to produce necessary travel documents. These are well known general grounds for cancelling LTR.

64. In the specific case of a skilled worker, their LTR may be cancelled where their sponsorship or endorsement has been withdrawn. The same applies to students, those subject to an intra-company transfer; ministers of religion, sportspersons and other types of student and temporary worker. Their LTR may also be cancelled if they do not start work in the sponsored job, or cease to work in it, if their sponsor loses its license, or if they change employer, unless the new employer is licensed and can act as a sponsor.

65. I will not attempt an exhaustive account of the circumstances in which a refugee or EEA national may fail to achieve settlement. We know from the statistics deployed in the *A* case that 95 per cent of refugees, at that time, achieved settlement. They are less likely to be removed on criminal, etc, grounds because of the prohibition against *refoulement*. I was not given a full account of the position of EEA nationals with pre-settled status. They are likely to be susceptible to removal on the general grounds outlined above.

66. With those brief comparative observations in mind, I return to the parties' submissions on whether the situation of a British citizen or settled person, or that of a refugee or EEA national on a path to settlement is, in relevant respects, analogous to that of SWP and others in the SWP cohort. Taking first the analogy with a British citizen or settled person: in my judgment, their respective stations are not similar at all. A Tier 2 migrant worker is on a path that leads to settlement but not "as good as settled already". Obstacles may lie on the path.

67. Next, is there a relevant analogy between a Tier 2 worker and a refugee? In my judgment, there is not. The relevant analogy found in *A*'s case was between a refugee and a British citizen or settled person largely because 95 per cent of refugees settle here. A Tier 2 migrant worker does not stand in the same relation to a British citizen or settled person as a refugee does. The status of a Tier 2 worker is more precarious than that of a refugee, using the term in its ordinary English sense rather than in the statutory sense.

68. A refugee is only likely to be returned to the country of provenance in rare cases where that previously unsafe country becomes safe. The same cannot be said of a Tier 2 worker. He faces economic vicissitudes such as employer insolvency or loss of sponsorship. These may be outside his control. Or, he may bring loss of LTR on himself by "moonlighting" for an unlicensed employer, attracting the adverse attention of the SoS or getting in trouble with the police and courts.

69. A refugee has much better protection against such vicissitudes, whether self-inflicted or not, because of the strong international obligations binding the UK and other states to provide refuge to those with a well founded fear of persecution in their home states. There is no equivalent protection for Tier 2 migrant workers. They can be removed relatively easily because they enjoy no special protection and come to this country through choice, not necessity.

70. I accept that Tier 2 migrant workers are in a stronger position to achieve settlement than other kinds of temporary workers such as seasonal workers or those on intra-company transfers, who have no expectation of settlement. It is true that Tier 2 workers are, as SWP submits, on a path that normally leads to settlement. The closest analogy on which SWP can rely, in my judgment, is between a Tier 2 worker and an EEA national with pre-settled status.

71. The latter category has a strong expectation of settlement once the "topped up" five years of residence has been reached. I have not been been asked to engage in a minute and detailed comparison between the degree of protection against loss of LTR enjoyed by, on the one hand, EEA nationals with pre-settled status and, on the other, that enjoyed by Tier 2 workers. No statistical comparison is before the court, unlike in *A*'s case.

72. There are clearly differences. The EEA national does not normally have to worry about their sponsor becoming insolvent. The EEA national may not have to wait as long as five years to attain settlement; under the "top up" regime, they can count towards the five years time spent in this country before obtaining pre-settled status. There may therefore be less time for something to go wrong, jeopardising settlement, than in the case of a Tier 2 worker.

73. Applying a reasonably broad brush without the aid of statistics or a minute and detailed comparison, I am prepared to assume that there is a sufficiently close analogy between the Tier 2 worker and the EEA national with pre-settled status, so that (answering the second part of Laing J's third question) I assume their situations are, in relevant respects, analogous. They are both in this country by choice and both have a pretty strong expectation of settlement at the end of the five year period.

74. I will therefore assume that the rationale of the policy in the DDVC applies to the partners of Tier 2 migrant workers, as it does to EEA nationals with pre-settled status.

The SoS accepts, on that footing, that the difference in treatment between SWP and the pre-settled EEA national is on the ground of SWP's immigration status as the dependant spouse of a Tier 2 migrant worker. While the dependant spouse of a pre-settled EEA national can take the benefit of the DDVC, the SWP cohort cannot.

75. The final issue is that of justification. Applying the approach of Baroness Hale in the *SG* case and that of Lord Bingham in *A. v. Secretary of State for the Home Department*, the government must explain not just why it brought in the scheme but why it did so in a manner that discriminates against the SWP cohort by treating that cohort differently from the partners of pre-settled EEA nationals.

76. I accept that a spouse or partner of a Tier 2 worker, in the position of SWP, may face a difficult choice between returning to an abusive relationship or leaving the UK. But I have concluded without difficulty that the difference of treatment is justified, for the following brief reasons.

77. First, the cases relied upon by SWP - *Gaygusuz v. Austria* and *Ponomaryov v. Bulgaria* – do not assist SWP's case. They are, as Mr Anderson submitted, both stark cases of direct discrimination. In both cases the discrimination was based on nationality; in the second, also on immigration status. The justification defence in *Ponomaryov* was particularly weak because the adverse impact was on children. They had not arrived in Bulgaria out of choice, but because their mother married a Bulgarian national.

78. Next, I accept Mr Anderson's submission that the decisions whether or not to make the DDVC available to partners of Tier 2 workers and partners of pre-settled EEA nationals were measures of economic or social strategy of the kind recognised, in cases such as *Carson v. UK* and *Bah v. UK*, as giving rise to a wide margin of discretion for the decision maker state.

79. In the present case, the explanation for the difference in treatment is found in the witness statement of Mr Wood. He explains that the decision to amend E-DVILR.1.2 and 1.3 to include partners and spouses of pre-settled EEA nationals followed the logic of the newly created EUSS, allowing those already in the UK with pre-settled status to sponsor family members outside the UK, after the EU exit transition period, which was to end on 31 December 2020.

80. I do not fully accept Mr Wood's assertion that those with pre-settled status are "in a similar position to refugees with limited leave". He is right that they would "legitimately expect to be granted settled status at the end of their of their pre-settled status"; but unlike refugees, they are in this country out of choice rather than necessity.

81. Nevertheless, the decision to create the EUSS and thereby the class of persons entitled to pre-settled status, able to sponsor family members to join them, was a measure of economic and social strategy which flowed from the political negotiations leading to the Withdrawal Agreement and the UK's resulting obligations under it.

82. Having decided to create the new cohort of pre-settled EEA nationals, described by Mr Wood as "unique", the UK was entitled as a further measure of economic and social strategy to decide, within its margin of discretion, to extend the protections under the EUSS so as to bring the partners of those who were pre-settled within the framework of the DVILR and the DDVC. As Mr Wood explains, the UK's broad obligations under

the Withdrawal Agreement include treating those living here under it in the same way as a British citizen.

83. The same is not true of Tier 2 workers from outside the EU and EEA. Although I am willing to assume that their situation is analogous to that of the pre-settled EEA nationals, as both have a strong expectation of settlement, there is an objective justification, arising from the unique phenomenon of the Withdrawal Agreement, for the difference in treatment which may justifiably lead to the expectation being disappointed in the case of the Tier 2 worker's partner, but not in the case of the pre-settled EEA national's partner.

Concluding Observations

84. For those reasons, although I have much sympathy for SWP and her son Z, the claim does not succeed. I dismiss it.