Neutral Citation Number: [2023] EWHC 2037 (Admin)

Case No: CO/3046/2022

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

Birmingham Civil Justice Centre
33 Bull Street, Birmingham, B4 6DS

Date: 10/08/2023

Before:

MR JUSTICE EYRE

- -

Between:

THE KING **on the application of** **MILTON VIVIAN THOMPSON**	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**
- and -	
ADJUDICATOR'S OFFICE	**Interested Party**

- -
- -

Grace Brown (instructed by **Bhatt Murphy Solicitors**) for the **Claimant**
William Hansen (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 26th & 27th July 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.00am on 10th August 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

MR JUSTICE EYRE

Mr Justice Eyre:

1. On 21st June 2019 the Claimant applied for compensation under the Windrush Compensation Scheme ("the WCS"). That application was refused in a series of decisions and reviews culminating in the Defendant's decision of 23rd August 2022. The Claimant applies for judicial review of that decision with the permission of Steyn J.

2. The crux of the Defendant's reasoning in refusing the Claimant's application was that a compensation payment under the WCS fell to be made where an individual held lawful status in the United Kingdom but had suffered detriment because of an inability to demonstrate that lawful status. The Defendant's position was that the Claimant's leave to enter the United Kingdom had lapsed automatically on 29th July 2004 and that the refusal of leave when the Claimant had sought to enter the country on 2nd March 2005 had been lawful. It said that, as a consequence, the Claimant did not have lawful status in the United Kingdom until he was granted a Returning Resident's visa on 17th April 2019. This, in turn, meant that detriments he had suffered were not caused by an inability to demonstrate his lawful status and so fell outside the scope of the WCS.

3. The Claimant advances three grounds of challenge but at the heart of all of them are the related questions of whether the Claimant had an entitlement to leave to enter the United Kingdom; of the lawfulness and effect of the decision of 2nd March 2005; and of the Claimant's status for the purposes of the WCS as a consequence of the first two matters.

4. Ground 1 was expressed as being that it was wrong in law for the Defendant to have approached matters on the footing that the Claimant's indefinite leave to remain had lapsed before 2nd March 2005. Although entitled in those terms the expansion of ground 1 in the Statement of Facts and Grounds focused on the contention that the refusal of leave to enter on 2nd March 2005 had been unlawful. Ground 2 was closely related and was a contention that even if the Claimant had lost his indefinite leave to remain before 2nd March 2005 he was to be regarded as having had lawful status from that date. This was on the footing that he should have been given indefinite leave to enter. In part these grounds were based on the Claimant's contention that he was to be seen as having lawful status because of his exemption from deportation. However, as developed in Ms Brown's skeleton argument and in oral submissions the Claimant's case focused on the contention that he should have been granted indefinite leave to enter on 2nd March 2005. In ground 3 the Claimant said that his treatment was discriminatory and contrary to his Article 14 Convention rights. The discrimination was said to take the form of *Thlimmenos* discrimination as explained by Lord Reed in *R(SC) v Work & Pensions Secretary* [2021] UKSC 26, [2022] AC 223 at [48] namely treating persons in the same way when there were material differences between their situations. As it developed in the course of argument the Claimant's case in this regard was parasitic on grounds 1 and 2. The contention was that to the extent that the Claimant lacked lawful status that was because of a failure to equate his exemption from deportation with lawful status or because of the unlawful decision of 2nd March 2005, as the Claimant characterized it, and that it was discriminatory to treat the Claimant in the same way as others who lacked lawful status but whose lack of it was the result of a lawful decision.

The Issues.

5. The principal issues are as follows.

6. First, it will be necessary to consider the interrelation between exemption from deportation, indefinite leave to enter or remain, and lawful status for the purposes of the WCS.

7. Next, I will consider the basis of the decision of 2nd March 2005 to refuse the Claimant leave to enter. The Defendant says that the decision was made after consideration of Immigration Rule 19 as well as IR 18 and was lawful. The Claimant says that IR 19 was not considered and that the failure to do so meant that the refusal of leave was unlawful.

8. The Claimant was removed to Jamaica on 2nd December 2006. The Defendant says that this was by way of administrative removal as a consequence of the fact that the Claimant had neither leave to enter nor leave to remain. The Claimant says that the removal was pursuant to a deportation order which should not have been made (it being common ground that the Claimant was exempt from deportation). The relevance of this removal and of the subsequent revocation of the deportation order to the determination of this claim will depend on the conclusion reached as to the interrelation between the Claimant's exemption from deportation and his possession of lawful status for the purposes of the WCS.

9. Then, it will be necessary to consider whether the Claimant had lawful status for the purposes of the WCS as a consequence of the 2nd March 2005 decision and his entitlement or otherwise to leave to enter in March 2005. The Claimant says that although leave had been refused he was "admissible" and because of the unlawfulness of the refusal he should be regarded as having lawful status or as being entitled to it. The Defendant says that eligibility under the WCS depends on the Claimant showing that he had lawful status at the relevant time. She accepts that if the Claimant was entitled to leave to enter but had been refused it wrongfully then he was to be treated for the purposes of the WCS as having that status. However, the Defendant denies that the Claimant had an entitlement to be given leave to enter and she says that the refusal of leave was lawful.

10. The question of whether the Claimant was within the scope of the WCS will then have to be determined in light of the conclusions on the preceding issues and I will then consider the lawfulness and rationality of the refusal of compensation in the light of that determination.

11. A subsidiary issue arises from the Defendant's alternative argument that the decision maker under the WCS should have proceeded on the basis that even if the Claimant's position had not been considered under IR 19 in March 2005 a refusal of leave would have been inevitable if there had been such consideration. The Defendant said that on this footing section 31(2A) of the Senior Courts Act 1981 came into play and that I should refuse relief on the basis that the outcome for the Claimant would not have been substantially different if the conduct under challenge had not occurred.

12. As will be seen below the Claimant has a number of convictions for serious offending and has engaged in discreditable conduct in other respects. Ms Brown accepted that the Claimant's character and conduct would be relevant to the level of any award made to the Claimant under the WCS but said that they were irrelevant to his eligibility under that scheme and to the issues before me. It is correct that if the Claimant establishes his eligibility under the WCS and the consequent unlawfulness of the decision that he was

not eligible then his character and conduct are not relevant to the relief sought in these proceedings namely a direction that a fresh decision be made. They are, however, relevant to two aspects of the matters before me. First, they are relevant to the lawfulness or otherwise of the refusal of leave to enter on 2nd March 2005. Second, they combine with the inconsistencies in and the other unreliable features of the Claimant's application under the WCS and of his evidence in these proceedings to determine the approach I am to take to the necessary findings of fact as I will explain below.

The Legislative and Regulatory Framework.

13. The starting point is section 1 of the Immigration Act 1971 which provided in the following terms, first, for those who had the right of abode in the United Kingdom to be free to enter and remain in the country and, second, for those settled in the United Kingdom at the time the Act came into force to be treated as having been given indefinite leave to enter or remain.

> "1.— General principles.
>
> (1) All those who are in this Act expressed to have the right of abode in the United Kingdom shall be free to live in, and to come and go into and from, the United Kingdom without let or hindrance except such as may be required under and in accordance with this Act to enable their right to be established or as may be otherwise lawfully imposed on any person.
>
> (2) Those not having that right may live, work and settle in the United Kingdom by permission and subject to such regulation and control of their entry into, stay in and departure from the United Kingdom as is imposed by this Act; and indefinite leave to enter or remain in the United Kingdom shall, by virtue of this provision, be treated as having been given under this Act to those in the United Kingdom at its coming into force, if they are then settled there (and not exempt under this Act from the provisions relating to leave to enter or remain).
>
> …"

14. By section 3(4) the Act provided for leave to enter or remain to lapse on travel outside the common travel area (as defined in section 1(3)). However, that position was modified by article 13 of the Immigration (Leave to Enter and Remain) Order 2000. The effect of this was that travel outside the common travel area would no longer automatically cause the lapsing of leave to enter or remain. However, by paragraph 4(a) such leave lapsed automatically if the holder of the leave stayed outside the United Kingdom "for a continuous period of more than two years".

15. Immigration Rules 18 and 19 addressed the approach to be taken to the grant of leave to enter to returning residents thus[1]:

> "18. A person seeking leave to enter the United Kingdom as a returning resident may be admitted for settlement provided the Immigration Officer is satisfied that the person concerned:
>
> (i) had indefinite leave to enter or remain in the United Kingdom when he last left; and
>
> (ii) has not been away from the United Kingdom for more than 2 years; and

[1] Here, as with the other regulations and legislation, I will refer to the provisions in force at 2nd March 2005 unless the context indicates otherwise.

(iii) did not receive assistance from public funds towards the cost of leaving the United Kingdom; and

(iv) now seeks admission for the purpose of settlement.

19. A person who does not benefit from the preceding paragraph by reason only of having been away from the United Kingdom too long may nevertheless be admitted as a returning resident if, for example, he has lived here for most of his life."

16. The Home Office guidance for returning residents contained the following passage:

> "Do I need to apply to return to the United Kingdom as a resident?
>
> If you were settled in the United Kingdom when you last left and you have not been away for more than two years and are returning to live here permanently, you may return as a resident (unless you were given public funds to meet the cost of leaving the United Kingdom).
>
> If you have been away for more than two years, you may still qualify to return to the United Kingdom to live if, for example, you have strong family ties here or have lived here most of your life.
>
> However, if you have been away for more than two years, you must apply for entry clearance at the nearest British Diplomatic Post."

17. Accordingly, once a person who had leave to enter or remain has been outside the common travel area for more than two years continuously that person's leave to enter lapses. Such a person is entitled to apply for leave to enter but is not automatically entitled to the grant of such leave. This is so even if such a person was entitled to remain and was protected from deportation before his or her departure: see per Burton J in *R(ex p Harris) v Secretary of State for the Home Department* (9th May 2000) at [2] – [6] and per Elizabeth Laing LJ in *R(C1) v Secretary of State for the Home Department* [2022] EWCA Civ 30, [2022] QB 371 at [93(ii)].

18. Paragraph 320 of HC 395 set out the approach to be taken to determining whether to grant leave to enter including the grant of such leave to persons who would otherwise qualify under IRR 18 or 19. I agree with Mr Hansen's characterisation of the relationship between the provisions when he said that IR 18 and 19 do not trump the general grounds on which leave to enter can be refused but they are to be seen together. The same point underlies the passage in Elizabeth Laing LJ's judgment to which I have just referred.

19. Paragraph 320 (8) – (21) set out the "grounds on which entry clearance or leave to enter the United Kingdom should normally be refused". As noted by Underhill LJ *per curiam* in *R(Balajigari) v Secretary of State for the Home Department* [2019] EWCA Civ 673, [2019] 1 WLR 4647 at [26] these grounds are not mandatory grounds for refusal but the presence of one or more of them does "create a presumption of refusal".

20. Grounds 320(18) and (19) are potentially relevant here and provide as follows:

> "(18) save where the Immigration Officer is satisfied that admission would be justified for strong compassionate reasons, conviction in any country including the United Kingdom of an offence which, if committed in the United Kingdom, is punishable with imprisonment for a term of 12 months or any greater punishment or, if committed outside the United Kingdom, would be so punishable if the conduct constituting the offence had occurred in the United Kingdom;

> (19) where, from information available to the Immigration Officer, it seems right to refuse leave to enter on the ground that exclusion from the United Kingdom is conducive to the public good; if, for example, in the light of the character, conduct or associations of the person seeking leave to enter it is undesirable to give him leave to enter."

21. Section 7(1) and (2) of the 1971 Act provided an exemption from deportation for certain Commonwealth citizens and others in the following terms:

> "(1) Notwithstanding anything in section 3(5) or (6) above but subject to the provisions of this section, a Commonwealth citizen or citizen of the Republic of Ireland who was such a citizen at the coming into force of this Act and was then ordinarily resident in the United Kingdom –
>
> (b) shall not be liable to deportation under section 3(5) if at the time of the Secretary of State's decision he had for the last five years been ordinarily resident in the United Kingdom and Islands;
>
> (c) shall not on conviction of an offence be recommended for deportation under section 3(6) if at the time of the conviction he had for the last five years been ordinarily resident in the United Kingdom and Islands.
>
> (2) A person who has at any time become ordinarily resident in the United Kingdom or in any of the Islands shall not be treated for the purposes of this section as having ceased to be so by reason only of his having remained there in breach of the immigration laws."

22. Section 33(2) and (2A) of the 1971 Act defined ordinary residence and settlement in the United Kingdom as follows:

> "33(2) It is hereby declared that, except as otherwise provided in this Act, a person is not to be treated for the purposes of any provision of this Act as ordinarily resident in the United Kingdom or in any of the Islands at a time when he is there in breach of the immigration laws.
>
> 33(2A) Subject to section 8(5) above, references to a person being settled in the United Kingdom are references to his being ordinarily resident there without being subject under the immigration laws to any restriction on the period for which he may remain."

23. It is common ground that the Claimant was settled in the United Kingdom until his departure in 2002 (and potentially, though nothing turns on this, until the lapsing of his indefinite leave to enter and remain in 2004) and also that at all times when he was in the United Kingdom the Claimant was exempt from deportation. It is, however, to be noted that there is no policy or practice that leave to remain is to be granted to a person present in the United Kingdom simply because deportation of that person is not permissible. In that regard see per Haddon-Cave LJ in *RA(Iraq) v Secretary of State for the Home Department* [2019] EWCA Civ 850, [2019] 4 WLR 132 at [72] approving the dictum of Simler J in *Hamzeh v Secretary of State for the Home Department* [2014] EWHC 4113 (Admin) at [50] – although in both cases the context was that of a case where deportation was precluded by the potential deportee's Convention rights.

24. The WCS was set up to address the injustice suffered by those who had indefinite leave to remain by virtue of section 1(2) of the 1971 Act or otherwise but who lacked the paperwork to prove their legal entitlement. The scheme was open to claims made from 3rd April 2019 onwards

25. At Part 1.1 the WCS Rules explained:

> "This compensation scheme ("the Scheme") is designed to compensate individuals who have suffered loss in connection with being unable to demonstrate their lawful status in the United Kingdom.
>
> …"

26. The definitions at part 1.5 of those rules included:

> ""continuously resident in the United Kingdom" means lawfully resident in the United Kingdom for an unbroken period. Continuous residence may be preserved where an individual is absent from the United Kingdom for 2 years or less at any one time.
>
> "lawful status" means:
>
> (a) a right of abode in the United Kingdom within the meaning of the Immigration Act 1971; or
>
> (b) settled status,
>
> and, except for paragraphs 2.6 and 2.7, references to being lawfully in the United Kingdom should be read accordingly.
>
> "settled status" means indefinite leave to enter or remain in the United Kingdom within the meaning of the Immigration Act 1971 and references to being settled in the United Kingdom should be read accordingly."

27. At part 10 the WCS Rules provided for a system of review.

28. Annex C of the rules set out the circumstances in which an award would be made under the WCS for detention and deportation. For current purposes C1(a) – (c) are relevant and they provided that:

> "C1. An award under this Annex may be made to a primary claimant or an estate if the following conditions are met.
>
> (a) The primary claimant or (in the case of an estate) the deceased was detained, deported or removed under one or more provisions of the following legislation, or returned under one or more of those provisions or voluntarily:
>
> (i) The Immigration Act 1971;
>
> (ii) The Immigration and Asylum Act 1999;
>
> (iii) The Nationality, Immigration and Asylum Act 2002;
>
> (iv) The UK Borders Act 2007.
>
> (b) A material reason for such detention, deportation, removal or return was the primary claimant's or the deceased's inability to demonstrate lawful status and, in the case of a voluntary return, the primary claimant or deceased would not have returned voluntarily if the inability to demonstrate lawful status had not arisen.
>
> (c) But for that inability, the Home Office reasonably determines that the primary claimant or the deceased would not have been detained, deported, removed or returned."

29. It is to be remembered that the WCS does not create new substantive rights instead it provides compensation for those who suffered detriments of particular kinds through being unable to prove their existing rights together with easing procedural difficulties which had been faced by such persons: see per Bourne J in *R(Eghan) v Secretary of State for the Home Department* (18th November 2021) at [62].

The Factual Background.

30. This is one of the rare judicial review cases where it is necessary to make findings of fact. This is because there is a dispute as to the nature of the decision made in March 2005 and more important as to the true basis of that decision. In addition, although this is of less importance, it is necessary to address the dispute as to whether the Claimant's removal in December 2006 was an administrative removal or a deportation.

31. I will determine the factual disputes having in mind the explanation of the approach to be taken given by Chamberlain J in *R(F) v Surrey CC* [2023] EWHC 980 (Admin), [2023] 4 WLR 45 at [46] – [50]. I have regard in particular to the contemporaneous documents and to inherent likelihood. I also have regard to the inconsistencies in the accounts which the Claimant has given and to his acknowledged character. As will be seen below the Claimant has given a number of differing and inconsistent accounts and has made assertions contrary to the picture which emerges both from the contemporaneous documents and from the way in which matters would be expected to have happened. I am conscious that the Claimant has not been cross-examined but even having regard to the consequent need for caution I am driven to the conclusion that some of the matters he asserted were simply not credible. In addition I have had to conclude that the only explanation of those inconsistencies and of the assertion of inherently unlikely propositions is that at times the Claimant has given deliberately false accounts in order to strengthen both his claim in these proceedings and his application for compensation under the WCS. In those circumstances I am not able to rely on his evidence where it conflicts with contemporaneous documents or with inherent likelihood.

32. The Claimant was born on 7th February 1953 and arrived in the United Kingdom on 13th November 1968. He left school in July 1969 and says that he engaged in various employments. These included service in the Royal Navy between about May 1970 and May 1972. He has five children all of whom were born in the United Kingdom and are British citizens living in this country.

33. As a consequence of the coming into force of the 1971 Act on 1st January 1973 the Claimant was to be treated as having been given indefinite leave to remain.

34. On 29th July 2002 the Claimant left the United Kingdom and travelled to Jamaica. By that time the Claimant had been convicted for offences of altering documents with intent to deceive under the Road Traffic Act; making false representations to obtain national insurance benefits; obtaining property by deception; and racially aggravated criminal damage. That offending had occurred over a period of 17 years from 1982 to 1999 and had been punished by fines save for the offence of making false representations to obtain benefits where there had been a short prison sentence.

35. The Claimant travelled to Jamaica on a Jamaican passport issued in 1995. On or shortly after his arrival in Jamaica the Claimant was found to be in possession of cocaine. He was convicted of possession of that drug with intent to supply and received a sentence of 3 years and 9 months imprisonment.

36. On 29th July 2004 the Claimant's indefinite leave to remain lapsed as a consequence of his two years' absence from the United Kingdom.

37. The Claimant had appealed his Jamaican prison sentence and in February 2005 his appeal was successful to the extent that his sentence was reduced to one of 2 years

leading to his immediate release. The Claimant returned to the United Kingdom within a week or so of his release from prison arriving at Heathrow airport on 2nd March 2005 travelling on his Jamaican passport which bore a stamp dated 12th May 2001 stating that he had indefinite leave to enter.

38. On his arrival the Claimant was interviewed by immigration officers and asked the reason for his absence from the United Kingdom for over two years. The case log which was compiled by Immigration Officer Harrison and which is timed as having been compiled at 12.30 on 2nd March 2005 recorded that the Claimant told that officer that he had been in Jamaica for the period of his absence caring for his grandmother. It also recorded that when told that his absence for 2½ years had meant that his indefinite leave to remain had lapsed the Claimant had said "that he thought the rule was 3 years".

39. In the statement provided to the WCS in December 2021 ("the December 2021 Statement") the Claimant said that he had told the immigration officers that the reason he had been away for so long was that he had been in prison in Jamaica. In his June 2023 statement in these proceedings the Claimant said that he had told the immigration officers that he had travelled to Jamaica to visit his grandparents but also that the reason for the length of that absence was that he had been in prison there. The Claimant also said that he had not been told that his indefinite leave to remain had lapsed and he denied mentioning a belief that the relevant period was three years. There would be no reason for the immigration officer to record the Claimant as having referred to a belief in a three year period unless the Claimant had said something to that effect. Similarly, it is not credible that if the Claimant had told the immigration officers that he had just returned from serving a prison sentence in Jamaica and that such sentence had caused his absence this would not be recorded. Still less is it credible that if he had said this, his absence would instead be recorded as being said to have been due to caring for his grandmother. These differences between the log and the Claimant's evidence cannot be explained by a misunderstanding. In those circumstances I find that the case log accurately records the substance of the account given by the Claimant when speaking to the immigration officer. It follows that I find: first, that there was an exchange about the lapsing of the Claimant's indefinite leave to remain; second, that the Claimant did not volunteer information as to his imprisonment in Jamaica but instead asserted that he had been caring for his grandmother; and third, that the Claimant has subsequently given a false account of his interchanges with the immigration officers.

40. The case log states that the Claimant was issued with form IS 81 and that his case was referred to Chief Immigration Officer Peckham. The Refusal/Cancellation of Leave to Enter/Remain report compiled on 3rd December 2006 records that the Claimant was then escorted to the baggage hall where he was found to be in possession of 15kg of herbal cannabis. The report then says that the Claimant was refused leave to enter under paragraph 320 with authority from Chief Immigration Officer Peckham.

41. Form IS 82A is dated 2nd March 2005. It purports to have been given to the Claimant and to refuse him leave to enter. It states:

> "You have asked for leave to enter the United Kingdom as a returning resident- However you have been absent from the United Kingdom fora period exceeding two years. You therefore do not qualify as a returning resident and as such fall to be treated as a Visa National. Under the Immigration Rules you are required co have a valid entry clearance to enter the United Kingdom and you have no entry clearance. Furthermore, you were subsequently found in possession of a prohibited drug contrary to Section 3(1)

> of the Misuse of Drugs Act 971 and Section 170 (2) of the Customs and Excise Management Act 1979 and in the light of this your exclusion is conducive to the public good."

42. In his statement of October 2022 the Claimant said that he had never seen, let alone been given, the form IS 82A and that he had not been refused entry at the airport. In his June 2023 statement he said that he was not told at the airport that his leave to enter had been cancelled. Indeed, he goes so far as to say that he believed that he had been given leave to enter.

43. I find that the Claimant was given this form and that he was told that he was being refused leave to enter. I have already explained that I am compelled to regard the Claimant's evidence as unreliable. More significant is the fact that the form was signed and dated 2nd March 2005 and was drawn up for the purpose of being given to the Claimant. In those circumstances there would be no good reason for the form not to be given to the Claimant nor for him not to be told of the refusal of leave and every reason for him to be given the form and told of the refusal. This point is reinforced by the facts that the form says that the immigration officer proposed giving directions for the Claimant's removal to Jamaica and that such directions also dated 2nd March 2005 and addressed to Air Jamaica were drawn up.

44. There is an issue between the parties as to whether the decision to refuse leave to enter on 2nd March 2005 was reached with or without reference to IR 19 and I will address that below when I consider the basis of that decision.

45. On 19th August 2005 the Claimant was sentenced to 2 years' imprisonment for knowingly being concerned in the fraudulent evasion of the prohibition on the importation of a controlled drug namely the cannabis which he had attempted to bring into the country on 2nd March 2005.

46. A deportation order was made on 16th May 2006.

47. The Claimant was removed to Jamaica on 2nd December 2006. There is a dispute as to whether that removal was an administrative removal as a consequence of the fact that Claimant lacked indefinite leave to remain or a deportation pursuant to the deportation order. I will consider below the material dating from the period 2nd March 2005 to 2nd December 2006 together with the subsequent exchanges which each side contends should lead to one or other of those interpretations of the removal.

48. The Claimant returned to the United Kingdom in 2007. The Claimant has given differing accounts of the circumstances of that return.

49. On 7th June 2012 when interviewed by immigration officers the Claimant said that he had returned in 2007 using his "same old Jamaican passport" bearing the stamp of indefinite leave to enter. It is, however, to be noted that that passport had expired on 26th March 2005. In his June 2023 statement the Claimant said that he could not remember having an interview in June 2012 and that he "would never have said I came in on my old passport". The record of interview purports to be a contemporaneous record made during the course of the interview and bears a note purportedly signed by the Claimant saying that he was happy for the interview to continue. It is not suggested that the record was fabricated let alone that there would have been any motive for such

fabrication. Accordingly, I find that the interview took place and that the Claimant's answers are accurately recorded.

50. In the WCS application form of June 2019 the Claimant said that he had entered in September 2007 "using my own Jamaican passport."

51. In the December 2021 Statement the Claimant said that he had been issued with a new Jamaican passport in Jamaica in the summer of 2007 and had used that to return to the United Kingdom in September 2007. He said that he was allowed into the United Kingdom on that passport without any questions being asked of him.

52. In the Statement of Facts and Grounds the Claimant said that he had entered the United Kingdom "using a new and regularly issued Jamaican passport".

53. In his June 2023 statement the Claimant said that in fact the Jamaican authorities had refused to give him a passport because he had been deported from the United Kingdom. As a result he "spoke to a friend of mine who knew someone who worked in the passport agency". He was provided with a passport through that route which the Claimant says was a genuine passport bearing a United Kingdom indefinite leave stamp.

54. It is apparent from the Claimant's latest statement that whatever document it was that the Claimant used to gain entry to the United Kingdom it cannot properly be described as having been regularly issued by the Jamaican authorities. Also the Claimant has given no explanation as to how the document which he says was issued in Jamaica in 2007 can properly have borne a stamp purportedly issued by the United Kingdom authorities.

55. The Claimant travelled at some point to St Lucia and returned from there to the United Kingdom. On his return the Claimant was found to be in possession of a quantity of cocaine. At that time the Claimant was using a passport in the name Louis Thompson and it was in that name that he was prosecuted. The Claimant says that the passport was his cousin's and that he had been using it because his own passport had been lost when the place in which he had been living was repossessed. The Claimant was convicted on 18th September 2008 of being involved in the importation of Class A drugs. The Claimant says that he told the sentencing judge his true name and that he had been using his cousin's passport. It is, however, unclear whether the Claimant was sentenced in his own name or as Louis Thompson. In any event he received a sentence of 6½ years' imprisonment.

56. In June 2012 the Claimant was encountered by police officers in Bournemouth. His fingerprints were taken and it was discovered that he was subject to the deportation order of 16th May 2006. As a consequence he was removed and returned to Jamaica in August 2012 on the basis that he was present in the United Kingdom in breach of a deportation order.

57. On 29th March 2019 following an application by the Claimant's solicitors the deportation order of May 2006 was revoked on the basis that he had been exempt from deportation. On 5th April 2019 the Claimant applied for a returning resident's visa. This was granted on 17th April 2019 giving the Claimant indefinite leave to enter. He was returned to the United Kingdom at public expense and now has indefinite leave to

remain. Those steps followed a submission to ministers by the Criminal Casework Secretariat dated 14th March 2019.

58. The Claimant made his application for compensation under the WCS on 21st June 2019. The application form was accompanied by a Primary Claimant Claim Form. In addition to that material the Claimant provided the December 2021 Statement to the WCS on 21st December 2021. In these proceedings the Claimant has made statements dated 11th October 2022 and 27th June 2023.

59. In his WCS application form the Claimant said that he had been working as a self-employed plasterer and dry liner from his return in 2007 until his removal in 2012. In the accompanying claim form the Claimant said that he had a weekly gross income of £1,200 - £1,500 from that work in the period from September 2007 to May 2012. In the application form there was a separate question asking for details of convictions and other penalties. In answering that question the Claimant referred to his sentence in Jamaica; to the sentence for importation of cannabis in 2005; and to the deception offence for which he said he had received a sentence of 3 months imprisonment[2]. However, he did not either there or elsewhere in those two documents mention the sentence of 6½ years imposed in 2008 for the importation of cocaine. There can be no honest explanation for that omission nor for the failure to explain that for some years of the period during which he claimed to have been earning between £1,200 and £1,500 a week the Claimant had been in prison. The Claimant first informed those dealing with his WCS application of that conviction just over two years later in the context of his application for a review in August 2021.

60. In September 2019 the Claimant applied for naturalisation as a British citizen but that application was refused on 22nd July 2020 on the ground of the Claimant's failure to meet the good character requirements for the grant of naturalisation.

The Refusal of the Claimant's Application under the WCS.

61. The initial refusal of the Claimant's application was on 26th May 2021. The letter of refusal explained that under the WCS compensation would be paid "where an individual held lawful status but suffered detriment because they were unable to demonstrate this". It said that the Claimant's indefinite leave to enter had lapsed before his return to the United Kingdom in March 2005 and noted that he had been refused leave to enter at that time. As a consequence the Claimant did not hold lawful status at the time of the matters of which he complained namely in the period following the end of his custodial sentence in March 2006. Compensation was refused because, by reason of the absence of lawful status, the matters complained of had not been caused by the Claimant's inability to demonstrate lawful status.

62. On 12th August 2021 the Claimant sought a review of that refusal and it was in the context of his application for a review that he first disclosed to those administering that scheme his conviction of September 2008.

63. The letter notifying the Claimant of the Tier 1 Review Decision was dated 17th September 2021. The reasoning was essentially the same as that of the earlier decision.

[2] In fact the Claimant had been fined for the deception offence and imprisoned for 2 months for the offence of making false representations to obtain benefits but I do not regard anything as turning on this.

The letter explained that the Claimant had not had lawful status in the period between the lapsing of his indefinite leave to enter or remain in 2004 after two years' absence from the United Kingdom and the grant of a Returning Resident visa in April 2019. Accordingly, the difficulties encountered by the Claimant had not been the result of an inability to demonstrate lawful status.

64. The Claimant sought a Tier 2 review of that decision and the matter was then referred to the Adjudicator's Office for that review. The Adjudicator's decision dated 18th May 2022 set out the position succinctly. It explained that because of the definition of settled status in the WCS "the WCS rules can only apply where the claimant has lawful status but is unable to demonstrate that lawful status, rather than where the claimant does not have lawful status". The Adjudicator accepted the Defendant's view that the Claimant did not have lawful status between 29th July 2004 and 17th April 2019. Accordingly, the Defendant's decision that the matters of which the Claimant complained fell outside the scope of the WCS was "reasonable and in line with the guidance" and the Adjudicator did not request the Defendant to review that decision.

65. The final decision was that of 23rd August 2022. That decision was made in response to the pre-action protocol letter from the Claimant's solicitors. The decision was in short terms and repeated the previous reasoning namely: that the Claimant's lawful status had lapsed on 29th July 2004; that the matters of which he complained had not been caused by an inability to demonstrate a lawful status in circumstances where the Claimant did not have lawful status; and that the Claimant fell outside the scope of the WCS as a result.

The Interrelation between Exemption from Deportation, Indefinite Leave to Enter or Remain, and Lawful Status for the Purposes of the WCS.

66. In the Statement of Facts and Grounds and in Ms Brown's skeleton argument the Claimant's case was in part put on the basis that ordinary residence and/or exemption from deportation were to be equated with settlement. This was said to have the consequence that as a person who was ordinarily resident and exempt from deportation the Claimant was to be taken to have had indefinite leave to remain and so to have had lawful status for the purposes of the WCS.

67. In the course of her submissions Ms Brown accepted that unlawful deportation would not by itself give rise to a claim to compensation under the WCS. She also accepted that the Claimant's ordinary residence and exemption from deportation would not have precluded a refusal of leave to enter in March 2005 applying paragraph 320(19) but said that step was not taken.

68. I do not accept that either ordinary residence or exemption from deportation is to be equated with indefinite leave to enter or to remain or with settled status whether for the purposes of the WCS or of the immigration laws more generally. The reasons for that conclusion can be expressed shortly.

69. First, such an equivalence is directly contrary to the understanding of the position enunciated by Haddon-Cave LJ and Simler J in the passages to which I have referred at [23] above and inconsistent with the position as to the need for the grant of leave to enter explained by Burton J and Elizabeth Laing LJ at [17] above.

70. Moreover, the purported equivalence is incompatible with the wording of section 33(2A) which, as can be seen above, provides that for a person to be settled that person needs not only to be ordinarily resident but also to be so resident without being subject to a restriction under the immigration laws as to the period for which he or she may remain (that is to have indefinite leave to remain). Ms Brown said that her interpretation was supported by the judgment of Lords Sumption and Reed in *R(Tigere) v Secretary of State for BIS* [2015] UKSC 57, [2015] 1 WLR 3820 at [70] (albeit that was erroneously said to have been part of the judgment of Lady Hale). However, I am satisfied that this submission was the result of a misreading of that passage which in fact confirmed the position as I have just summarised it. In that passage Lords Sumption and Reed explained that until 1997 all those ordinarily resident in England and Wales for three years had been treated as eligible for financial support as students in higher education. The change in 1997 had been to introduce an additional requirement of settlement adopting in that regard the definition in section 33(2A) of the 1971 Act. Where Lords Sumption and Reed then said "in other words he had to have indefinite leave to remain" they were not, as Ms Brown submitted, saying that ordinary residence carried with it indefinite leave to remain but were expressly saying that a person who was ordinarily resident could not be settled unless he or she also had indefinite leave to remain.

71. The relevant effect in this regard of the legislative framework which I have set out above can be summarised shortly. A Commonwealth citizen who was ordinarily resident in the United Kingdom on 1st January 1973 and who has been ordinarily resident in the United Kingdom for the last five years is exempt from deportation (section 7). However, this is not the same as being settled. That is because section 33(2A) requires that to be settled a person who is ordinarily resident has to be free of any restriction under the immigration laws on the period for which he or she can remain in the United Kingdom and so requires that person to have indefinite leave to remain. Those settled in the United Kingdom on the coming into force of the 1971 Act obtained indefinite leave to remain (by section 1(2)) but such leave lapses automatically after two years' absence (section 3(4) and article 13 of the 2000 Order). A person whose indefinite leave to remain has lapsed can seek leave to enter but is not entitled to it as of right and the grant of such leave is subject to the Immigration Rules as set out above. The WCS is concerned with compensation for harm resulting from an inability to prove lawful status with lawful status dependent on having either right of abode or settled status and with the latter being defined under the WCS as requiring indefinite leave to enter or remain.

72. It follows that the Claimant's exemption from deportation was not of itself material for the purposes of the WCS regime. His deportation in breach of that exemption was potentially unlawful but it was not without more nor necessarily a consequence of an inability to prove lawful status in the sense required under the WCS of having settled status (which in turn requires indefinite leave to remain). The deportation would be material for the purposes of the WCS if the Claimant had lawful status and the deportation resulted from an inability to prove that status but not otherwise.

73. This means that the importance of the questions of whether the Claimant's removal in December 2006 was pursuant to a deportation order or was an administrative removal and of the effect of the revocation of the deportation order is greatly reduced. The Claimant's fall back position was to assert that the deportation and the action taken after

its revocation had evidential weight in relation to the questions of whether the Claimant was refused indefinite leave to enter in 2005 and of his entitlement to leave at that time. It is said that the fact that there was a deportation rather than an administrative removal in December 2006 showed that there had not been a valid refusal of indefinite leave to enter in 2005. In addition, the grant of a returning resident's visa and so indefinite leave to remain in 2019 is said to be an indication of the Claimant's entitlement and of the approach which would have been taken if his circumstances had been properly considered in 2005. I will consider those contentions when addressing the issues of what happened in 2005 and of the Claimant's rights at that time to the former of which I now turn.

The Basis of the March 2005 Decision.

74. As I have explained at [38] – [43] above the Claimant was refused leave to enter on 2nd March 2005 and that decision was communicated to him.

75. The Claimant accepts that because of his two year absence he did not qualify for a grant of leave under IR 18 but says that his position should also have been considered with reference to IR 19 and that this was not done. The Defendant submits that I should find that although not expressly mentioned it is implicit that IR 19 was also considered.

76. The IS 82A form made no reference to IR 19 but proceeded straight from saying that the Claimant did not qualify as a returning resident because of the two year absence to saying that he was to be treated as a visa national requiring entry clearance which he lacked and then added that his possession of the prohibited drug meant that his exclusion was conducive to the public good.

77. The Defendant has not produced any evidence from those involved in making the decision on 2nd March 2005. That is not surprising given the passage of time and I draw no adverse inference from that. The Defendant relies on the evidence of Phillip Smith. Mr Smith gives evidence based on his experience of working as an immigration officer. He says that an immigration officer having considered whether the requirements of IR 18 were met and having concluded that they were not would then inevitably turn to consider IR 19 not least because the matter would have to be referred to a Chief Immigration Officer if leave was to be refused and such an officer would require confirmation that IR 19 had been considered. Mr Smith goes so far as to say that it is inconceivable that IR 19 was not considered.

78. I agree with Ms Brown's submission that the evidence of Mr Smith is of very limited assistance on this question. It is evidence of the procedures which should have been followed but it is not suggested that those procedures involved some form of checklist which required confirmation that a particular step had been taken before matters moved to a further stage. The facts that there should have been reference to IR 19 and that Chief Immigration Officer Peckham should have checked that Immigration Officer Harrison had considered that rule does not without more mean that this was done let alone that it was inconceivable that the provision was overlooked.

79. The IS 82A is a contemporaneous document setting out the reasons for the decision to refuse leave. That is the best indication of the matters which were and those which were not taken into account in reaching that decision. The IS 82A needs to be read realistically and not construed as if it were a statute or a professionally drafted

commercial contract. I cannot, however, assume that a particular provision must have been considered just because it should have been and would have been if proper practices had been followed.

80. Read naturally the IS 82A identifies three elements in the process leading to the refusal of leave. First, it was said that having been absent for more than two years the Claimant could not be treated as a returning resident. Second, it said that he was "therefore" to be treated as a visa national and as needing entry clearance which he did not have. Third, a supplemental reason was given as indicated by "furthermore". This was that the Claimant's exclusion was conducive to the public good because of his possession of the cannabis.

81. As well as contending that IR 19 was not considered the Claimant said that there had been a failure to consider paragraph 320(19). However, I am satisfied that this provision was considered and was the basis of the third element in the process. The provision was not referred to by its number but the language of the Claimant's exclusion being conducive to the public good is manifestly an application of the approach set out in paragraph 320(19).

82. An assessment of the Claimant's position by reference to IR 19 would be a separate stage in the process. IR 19 expressly refers to admission as a returning resident and is directed at the situation of a person who would have qualified as a returning resident but for the two year absence and envisages such a person being admitted as a returning resident. Consideration of whether to grant leave to enter to such a person is a different exercise from that of assessing the position of a person who is a visa national without any other attributes. In the case of the Claimant the exercise of consideration under IR 19 could have been brief and as I will explain below the outcome would have been inevitable. Nonetheless, if there had been that consideration one would have expected reference to it in the IS 82A. In the absence of such reference and in light of the way in which the process followed was described in the IS 82A I find it is more likely than not that there was no consideration of IR 19 on 2nd March 2005.

83. The position, therefore, is that on 2nd March 2005 a decision to refuse leave to enter was made. The Claimant was informed of this and was given form IS 82A. However, that decision was reached without IR 19 being considered. I will consider the consequences of this for the Claimant's status below.

Was the Claimant's Removal in December 2006 a Deportation or a Removal by Reason of the Absence of Leave to Enter?

84. In the course of these proceedings considerable attention has been paid to the question of whether the removal of the Claimant on 2nd December 2006 was an administrative removal by reason of his presence in the United Kingdom without leave or a removal giving effect to his deportation. The analysis I have set out at [66] – [73] above means that this issue is markedly less important than was thought.

85. In these proceedings the Claimant contends that the removal was a deportation. I note that this contention is directly contrary to the account which the Claimant gave when he was being interviewed by immigration officers in June 2012. At that time the Claimant was seeking to counter the allegation that he had entered the country in breach of the deportation order. On 7th June 2012 the Claimant said, with reference to the

December 2006 removal, "when I got sent back they said that because I spent more than two years out of the country their policy was to send me back". The Claimant was asked "do you understand that you were deported?" and replied "no one said to me I was deported". The Claimant maintained that position when he was interviewed further on 22nd June 2012. The making of those assertions in 2012 (which also cannot easily be reconciled with his current account of the events of 2nd March 2005 as summarised at [42] above) does not prevent the Claimant from arguing that his removal was in fact a deportation. It does, however, demonstrate the unreliability of the Claimant's account and shows that he has been prepared to advance whichever interpretation of the history he believes favours his position at any given time.

86. There are a number of matters which indicate that the removal was giving effect to the deportation of the Claimant. Thus, the letter of 27th January 2006 gave notice of a decision to deport and a deportation order was made on 16th May 2006. The hearing before the Asylum and Immigration Tribunal and the application to the court leading to Sir Michael Harrison's decision were on the footing that the Claimant was to be deported and the Defendant responded on that basis. Similarly, the Defendant's correspondence with Sadiq Khan MP referred to the Claimant's deportation. The Claimant's removal in 2012 was on the basis that he had entered in breach of a deportation order. There are repeated references in the UK Border Agency internal documents to the Claimant having been deported. The Refusal/Cancellation of Leave to Enter/Remain Report of 3rd December 2006 recording the removal also refers to deportation though parts of the document are also suggestive of administrative removal. Finally, the March 2019 submissions of the Criminal Casework Secretariat are premised on the view that the Claimant was deported. Ms Brown made the point that these were formal documents prepared by officials after perusal of the Defendant's records and should be regarded as likely to state the history correctly. There is force in that point though it is not a submission which sits easily with the fact that the Claimant has chosen to give directly contrasting accounts at different times.

87. In addition to the account which the Claimant himself gave in July 2012 there are a number of documents which are supportive of the view that there was an administrative removal. The IS 82A stated that directions were to be given for the Claimant's removal and directions for removal dated 2nd March 2005 and addressed to Air Jamaica were drawn up. Those clearly envisaged administrative removal by making reference to removal because the Claimant did not have entry clearance and invoking schedule 2 of the 1971 Act which was the schedule providing removal powers. On 12th November 2006 the Defendant gave the Claimant a Notice of Further Removal Directions. This referred to a removal planned for 29th November 2006; it invoked schedule 2 of the Act; and it made no reference to deportation but instead to removal because of the March 2005 refusal of leave to enter. Removal directions were given to Air Jamaica on both 29th November and 1st December 2006. These again invoked schedule 2 and made it clear that removal was on the basis of the March 2005 refusal of leave though it is to be noted that the 1st December 2006 direction, unlike the others, did not contain a tick in the "holds no prior entry clearance" box.

88. It is apparent that the Defendant attached little importance in 2006 to whether the Claimant was being removed administratively or by way of deportation. That is understandable given that the focus was on effecting the removal. However, I find that the proper analysis is that the removal was an administrative removal. There is real

scope for debate on the point but the balance falls in favour of the administrative removal analysis because of the direction to Air Jamaica dated 1st December 2006. This appears to be the direction which actually led to the Claimant being removed on 2nd December 2006 and that was a direction consistent with administrative removal rather than deportation.

The Effect of the Revocation of the Deportation Order.

89. The foregoing analysis means that the relevance of the 2019 revocation of the deportation order is limited to the light which it is said to throw on the decision which would have been made if IR 19 had been considered on 2nd March 2005 and I will address that below.

Did the Claimant have Lawful Status for the Purposes of the WCS in the Period after 2nd March 2005?

90. The Claimant had been refused leave to enter on 2nd March 2005 albeit in circumstances where the decision had been made without consideration of IR 19. The Claimant did not at any stage seek to challenge or appeal that decision.

91. The Claimant contends that he was to be regarded as having lawful status for the purposes of the WCS. Ms Brown submitted that the Claimant was "admissible" in the sense that he could have been granted indefinite leave to enter as a returning resident and that the decision to refuse leave to enter had been unlawful by reason of the failure to consider IR 19. Ms Brown said that it was at least possible that leave would have been granted if IR 19 had been considered and that as a consequence the Claimant was to be treated for the purposes of the WCS as having lawful status.

92. I do not accept that analysis. The WCS defined lawful status as requiring indefinite leave to enter. After 29th July 2004 the Claimant did not have leave to enter let alone indefinite leave to enter. As a consequence he did not have lawful status for the purposes of that scheme. The Claimant did not regain indefinite leave to enter until April 2019. In the intervening period the Claimant's position was that of a person who could apply for indefinite leave to enter but whose application was subject to consideration under the Immigration Rules and where the grant of leave was a matter of discretion albeit a discretion to be exercised on the basis of those rules. If the Claimant had been within the scope of IR 18 there would have been a *de facto* presumption that leave to enter would be granted but the Claimant was outside the scope of IR 18 and that presumption did not apply to him whether under IR 19 or otherwise.

93. The Claimant did not have an entitlement to indefinite leave to enter. He would not have leave to enter unless and until it was granted to him. His entitlement was at most an entitlement to consideration of an application for leave to enter.

94. The Claimant's status did not change as a consequence of the decision of 2nd March 2005. In the period from 29th July 2004 the Claimant had neither indefinite leave to enter nor an entitlement to indefinite leave to enter for the reasons I have just given. Therefore, he did not have lawful status for the purposes of the WCS. The decision of 2nd March 2005 was a refusal of leave to enter and so did not operate as an express change of the Claimant's status. The failure of the immigration officer to consider IR 19 when making that decision might have given scope for a challenge to the decision

but no such challenge was made. The fact that there was potential for a challenge to the decision does not mean that it is to be regarded as having granted indefinite leave to enter nor that the Claimant is to be seen as having lawful status as a consequence.

95. The situation would be different if the March 2005 refusal of leave had been in circumstances where the Claimant was entitled to the grant of leave. In such a case the Defendant accepts that the Claimant should be regarded as having had lawful status. That, however, was not the position rather, and at the risk of repetition, the Claimant had neither indefinite leave to enter nor an entitlement to the grant of such leave.

96. Even if that analysis is wrong and the Claimant is right to say that account should be taken of the failure to consider IR 19, the position does not change.

97. Ms Brown submitted that it was not inevitable that leave would have been refused if there had been proper consideration of IR 19. She pointed out that account would have to be taken of the Claimant's long residence in the United Kingdom; his consequent exemption from deportation; his service in the Royal Navy (albeit this was for a short period of time over 30 years' earlier); and the fact that he had five British children and other family members resident in the United Kingdom. Ms Brown also said that account could not have been taken of the Claimant's action in importing cannabis. Ms Brown's point in the latter regard was that the Claimant had denied any guilt in that respect and that until his subsequent conviction it could not safely be said that he had committed the offence. I disagree with that contention which amounted to saying that the Claimant was to have the benefit of his failure to admit his guilt. Any consideration of the likely outcome if IR 19 had been considered is to be approached on the basis of the factors in the Claimant's favour but also on the basis that the Claimant would have given an honest account to the immigration officers. It follows that those officers are to be taken to have been informed not just of the Claimant's offending by way of the importation of the cannabis but also of his conviction and imprisonment in Jamaica.

98. Ms Brown supported her contention as to the prospect of the grant of indefinite leave to enter if IR 19 had been considered in March 2005 by reference to the grant to the Claimant of indefinite leave to remain as a returning resident in 2019. She submitted that this showed that it was at least possible that leave would have been granted if the Claimant's position had been considered in 2005 with reference to IR 19. Ms Brown also submitted that the position was akin to that considered by Bourne J in *R(Vanriel) v Secretary of State for the Home Department* [2021] EWHC 3415 (Admin), [2022] QB 737 and that I should similarly conclude that the subsequent grant of leave was an indication of the Claimant's prospects at the earlier stage. I did not find either of those matters of assistance for the following reasons.

99. The return of the Claimant in 2019 and the grant of indefinite leave to remain at that time flowed from the Criminal Casework Secretariat's submission of 14th March 2019. That focused solely on the Claimant's exemption from deportation and the steps needed to remedy the failure to take proper account of that. It did not consider whether the Claimant should have been given indefinite leave to enter in March 2005 or at all. The question of the action which it was appropriate to take in 2019 when the issue was how to address matters on the footing that the Claimant had been deported in breach of an exemption from deportation (an analysis which as indicated above is questionable as to the December 2006 removal) is wholly different from that of what should have been done in 2005 in the circumstances to which I will refer below. The approach taken to

the former question does not throw any material light on the approach which should have been taken to the latter. In that regard it is apparent that the submission to ministers was not a comprehensive or accurate account of the history. Thus it stated that after 2nd December 2006 the Claimant "next came to the attention of the UK authorities when he was encountered on 7th June 2012". The author of the submission was unaware of the fact that the Claimant had come to the attention of those authorities, albeit under a different name, in 2008 when he received the sentence of 6½ years imprisonment for the importation of cocaine.

100. In *Vanriel* Ms Tumi's indefinite leave to remain had lapsed because of an absence of two years from the United Kingdom. Her application for leave to enter in 1986 should have been considered by reference to paragraph 57 of the Immigration Rules (the predecessor of IR 19). It appears that she was not considered by reference to that provision and was simply refused entry because she had been out of the United Kingdom for more than two years. Ms Tumi was granted a visa and indefinite leave to remain in 2018 after intervention by the Windrush Taskforce. This prompted Bourne J to say at [125]:

> "It seems to me that if Ms Tumi was properly granted ILR in 2018 … then she probably had an equally strong (if not stronger) case for ILR in 1986, e g by application of paragraph 57 of the Immigration Rules as they then stood … and at the very least she should have been granted a visa then."

101. The circumstances of Ms Tumi were very different from those of the Claimant. Ms Tumi was refused leave solely because of the two year absence. There was no additional factor in the refusal. In particular Ms Tumi had not been engaged in attempting unlawfully to import drugs into the country in the circumstances to which I will refer in the next paragraph. Bourne J was dealing with the circumstances of the particular claimants before him and he was not purporting to lay down a general rule that a subsequent grant of indefinite leave to remain should cause the court to find that such leave would necessarily have been granted if the matter had been properly considered at an earlier stage. A subsequent grant of leave may assist in determining what would have happened in a consideration at an earlier stage. Whether it will assist will depend on the circumstances of the case in question and for the reasons I have just given I do not find the events of 2019 of assistance here.

102. I am satisfied that even if IR 19 had been considered in March 2005 a refusal of leave would have been inevitable and further that a decision to grant indefinite leave to enter would have been perverse. Any consideration of the grant of leave to enter under IR 19 would have had to take account of paragraph 320(18) and (19). The assessment would, indeed, have had to take account of the matters identified by Ms Brown though in that regard it is to be noted that the Claimant had been absent from his family members because of his own actions since August 2002 and that in March 2005 only two of his five children were minors. Those factors would have had to be considered in the light of the Claimant's previous convictions in the United Kingdom; his conviction in Jamaica; and his action in seeking to import 15kg of cannabis into the United Kingdom. In addition, the timing of the Claimant's actions was highly significant. The position was that within a week or thereabouts of release from his prison sentence in Jamaica for the possession of cocaine with intent to supply and on his first opportunity to return to the United Kingdom the Claimant was seeking to import unlawful drugs to this country. The Claimant's actions demonstrated that he was determined to persist in

offending in relation to unlawful drugs. In those circumstances it is not conceivable that the Claimant would have been given even limited leave to enter and even less would there have been any prospect of the grant of indefinite leave to enter. It was only with indefinite leave to enter that the Claimant would have been settled and would have had lawful status for the purposes of the WCS.

103. It follows that in the period from 29th August 2004 to 17th April 2019 the Claimant did not have indefinite leave to enter nor was he entitled to indefinite leave to enter nor was he to be regarded as having had in March 2005 any tenable prospect of a grant of indefinite leave to enter even if matters had at that time been considered by reference to IR 19. As a consequence he did not have lawful status for the purposes of the WCS.

Determination of the Grounds of Challenge.

104. In light of the foregoing analysis the Defendant acted both lawfully and rationally in approaching the Claimant's application for compensation on the footing that the Claimant did not have lawful status within the meaning of the WCS in the period between July 2004 and April 2019 and that as a consequence such detriments as he suffered could not have been the result of an inability to demonstrate a lawful status. That meant that the Claimant was not entitled to compensation under the WCS.

105. It follows that grounds 1 and 2 fall away.

106. Ground 3 was parasitic on the other two grounds and also fails. The short point is that there was no material difference between the circumstances of the Claimant and those of the persons who were treated in the same way as him namely others who lacked lawful status. The Claimant said that he should not have been treated in the same way as such persons either because he was entitled to indefinite leave to enter or because his exemption from deportation was to be equated to indefinite leave to remain or because the refusal to grant him leave in March 2005 had involved a failure to consider IR 19. I have already explained that the Claimant was not entitled to indefinite leave to enter or remain and that his exemption from deportation was not equivalent to indefinite leave to remain or lawful status. As to the fact that IR 19 was not considered in March 2005 I have already explained that even if that rule had been considered there would have been no prospect of the Claimant being granted indefinite leave to enter. There was, therefore, no material difference between the Claimant and other persons who lacked or who had been refused indefinite leave to enter and it was not discriminatory to treat the Claimant in the same way as such persons.

107. The claim is, therefore, to be dismissed.

The Defendant's Invocation of Section 31(2A) of the Senior Courts Act 1981.

108. In light of that conclusion the Defendant does not need to rely on section 31(2A). I will nonetheless explain why if a different conclusion had been reached in either of two respects I am satisfied that the outcome would not have been substantially different for the Claimant with the consequence that relief would have to be refused under this provision.

109. The first respect is if, contrary to the conclusion I have reached above, the Defendant should have accepted that the Claimant had lawful status or an entitlement to such status

from 2nd March 2005 onwards. The Defendant's decision was on the basis that the Claimant did not have such status and so he could not have suffered detriment because of an inability to demonstrate such status. Even if the Claimant should have been treated as having or being entitled to indefinite leave to enter and, therefore, as being settled and having lawful status for the purpose of the WCS, compensation would still necessarily have been refused. That is because the detriments which the Claimant suffered were the result not of any inability to demonstrate that he had or was entitled to indefinite leave to enter. The detriments were suffered because of the fact that the Claimant's exemption from deportation was not acknowledged. That exemption did not amount to lawful status for the purposes of the WCS and so detriment caused by a failure to acknowledge the exemption was not caused by an inability to demonstrate lawful status.

110. The second respect is if the Defendant should have regarded the decision of 2nd March 2005 as flawed because of the failure to consider IR 19 and should then have addressed the Claimant's status on the footing of the outcome which would have followed if there had been proper consideration in 2005. Addressing the Claimant's position on that footing would have led to the same conclusion that he had neither lawful status nor an entitlement to it. That is because as I have explained above analysis of what would have happened if IR 19 had been considered would have led inevitably to the conclusion that the Claimant would nonetheless have been refused indefinite leave to enter.