Neutral Citation Number: [2023] EWHC 287 (Admin)

Case No: CO/1072/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/02/2023

Before :

MRS JUSTICE LIEVEN

- -

Between :

THE KING
(on the application of)

AB

Claimant

and

(1) SECRETARY OF STATE FOR THE HOME DEPARTMENT

(2) SECRETARY OF STATE FOR FOREIGN, COMMONWEALTH AND DEVELOPMENT AFFAIRS

(3) SECRETARY OF STATE FOR DEFENCE

Defendants

and

(1) X
(2) Y

Interested Parties

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- -

Ms Sonali Naik KC, Ms Maha Sardar and Ms Gráinne Mellon (instructed by **Wilsons Solicitors LLP**) for the **Claimant**
Mr Jack Anderson (instructed by **Government Legal Department**) for the **Defendants**

Hearing dates: **6 December 2022**

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Approved Judgment

This judgment was handed down remotely at 10.30am on 10 February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE LIEVEN

Mrs Justice Lieven DBE :

1. This is an application for judicial review brought by AB concerning the Defendant's failure to determine her application for Leave Outside the Rules ("LOTR") and to challenge the process by which her application has been dealt with. The issues in the case have somewhat shifted during the course of proceedings.

2. AB was, until the fall of Kabul in August 2021, a prosecutor involved in anti-narcotics, anti-corruption and anti-terrorism prosecutions, including of Taliban members. She has a high profile having regularly prosecuted in senior courts in Kabul, where she worked as a prosecutor for 20 years under International Security Assistance Force ("ISAF") from 2001-2021.

3. She, her three sisters, and her mother have been living in hiding in Kabul since August 2021. In her witness statements she makes clear the level of fear that she and her family are living under. There is strong reason to believe that she is known to the Taliban regime and that she may be at very serious risk from them.

4. She and her family seek to escape Afghanistan and the threat of violence they have been under for the past year. Her older brother, X, and younger sister, Y, ("the Interested Parties") are British citizens resident in the UK. AB and the family in Afghanistan wish to come to the UK and resume family ties here.

5. On 1 November 2021 the Claimant applied for relocation in the UK under the Afghan Relocation and Assistance Policy ("ARAP") and a letter of representations, including extensive evidence in support of the application, was submitted by her previous solicitors. She relied on her work as a prosecutor as representing her contribution to the UK's mission in Afghanistan.

6. On 17 December 2021 the Claimant wrote to the Defendant requesting that if she was not granted relocation under ARAP the Defendant should nevertheless permit her and her family to enter the UK pursuant either to LOTR policy or pursuant to Article 8 European Convention on Human Rights ("ECHR") on the grounds of family ties in the UK.

7. On 24 December 2021 the Defendant replied stating that she would not consider a grant of entry clearance without a completed immigration application form. This would require the Claimant to state a country in which she could provide biometric data. The problem with this is that there is no such place, a Visa Application Centre ("VAC"), in Afghanistan.

8. The Defendant's proposed "work around" for this difficulty was to suggest that the Claimant select a country stating that she "can travel" there to provide biometrics, even if in fact she was unable to do so. The Claimant, and her advisors, were understandably concerned that if she adopted this course, she would be making a misrepresentation on the form, which might later be held against any application she made.

9. On 16 February 2022, in response to pre-action correspondence, the Defendant stated that the forms were in the process of being amended, but in the meantime the Claimant should adopt the workaround.

10. After some further correspondence, the Claimant issued this application for judicial review on 24 March 2022. The decision under challenge was said to be:

> (i) Inconsistency of treatment by the Defendant of the Claimant in relation to LOTR applications pursuant to ARAP, and/or ACRS criteria and others (both during and post Operation Pitting) in analogous situations; (ii) the Claimant has made an application for leave outside the Rules which must be considered; (iii) the First Defendant's failure to consider granting entry clearance in respect of the Claimant's Article 8 ECHR rights is contrary to the substantive and procedural rights conferred by that Article; and (iv)the First Defendant has discriminated against the Claimant in comparison with the analogous class of Ukrainian nationals with family in the UK.

11. The box on the judicial review application form relating to the date simply says "12 2021". Without seeking to be unduly critical of the Claimant's previous lawyers, who issued the claim, it would help the Court if the form was more clearly filled in stating the actual decision being challenged date; or if the challenge is to a failure to make a decision, then that is equally made clear.

12. My understanding is that the challenge is to the refusal of the Defendant to consider the Claimant's application for LOTR and under Article 8 without first requiring the Claimant to submit biometric data; or without her being allowed to go through a process the same as, or analogous to, that of Ukrainian refugees coming to the UK (Ground Four).

13. On 3 May 2022 Foxton J granted permission for judicial review.

14. On 4 October Lang J gave judgment in ***R (S and AZ) v SSHD*** [2022] EWHC 1402. That case concerned two Afghan judges who had applied under ARAP and, in the alternative, had applied to be granted LOTR. The Defendant declined to consider granting LOTR on the basis that they had not submitted Visa Application Forms ("VAF"). There was a dispute about whether an ARAP application itself satisfied the LOTR Guidance. Although Lang J found for the Claimants on the basis that their ARAP applications were themselves sufficient to meet the requirements of the Guidance, that finding was not upheld by the Court of Appeal and as such is not relevant to the issues before me. The alternative Ground, which was upheld by the Court of Appeal, was that it was unreasonable for the Secretary of State for the Home Department not to consider an application for LOTR notwithstanding the lack of a submitted application form. Lang J was concerned that a person who was unable to complete the biometrics could only complete the form by wrongly claiming that they could do so.

15. Lang J's decision was handed down on 9 June 2022 and the Court of Appeal decision was issued on 28 July 2022.

16. On 4 October the Claimant submitted a family reunion application for LOTR on a VAF. Ms Navarette, the Claimant's solicitor, sets out in her witness statement the extraordinarily complex and circular process involved in being able to complete this form on behalf of the Claimant given her inability to submit biometric data. Despite these difficulties a form was submitted.

17. The application of 4 October 2022 has not yet been determined by the Defendant. Ms Naik does not seek to argue that the Defendant has acted unlawfully in the time she has taken to determine it. Ms Navarette's witness statement relates to events and processes well after the date of the decision being challenged, namely December 2021. The problems with the current form, and the difficulties the Claimant has had in completing it, are therefore well outside the scope of this judicial review. The important point for this case is that the Defendant has accepted that she will at least consider whether an application for LOTR can be substantively determined in advance of receiving biometric data. The Defendant has not yet made that decision in respect of the Claimant's application of 4 October 2022.

18. The issues raised in the Claimant's Skeleton Argument are as follows:

    1. That the Defendant did not operate a fair procedure in her consideration of "workarounds" for biometric testing;

    2. That the Defendant acted unlawfully and/or irrationally in treating the Claimant different from those who were granted ARAP;

    3. That the Defendant erred in law in not considering entry clearance pursuant to Article 8 ECHR;

    4. That the Defendant unlawfully discriminated under Article 14 ECHR against Afghan applicants as compared to Ukrainian nationals seeking to enter the UK.

19. I raised with Ms Naik that Issues One to Three have been overtaken by the Defendant's acceptance that she will consider waiving the biometric requirements, and that she is in the process of making that decision in respect of the Claimant. In those circumstances the only relief the Court could order in respect of those Grounds would be to require the Defendant to do precisely what she is already doing. Ms Naik decided to withdraw those Grounds, and therefore, save to the degree they impact on Issue Four, I need say no more about them.

20. Issue Four is whether the Claimant, and those similarly situated to her in Afghanistan, have been discriminated against pursuant to Article 14 ECHR by comparison with the treatment of Ukrainian nationals at risk in their own country and with family members in the UK. Ms Naik's submissions focused on the process required for such applications, and in particular the waiver of the requirement for biometric data for Ukrainian refugees until they enter the UK, in contrast to Afghans in the position of the Claimant.

21. The Ukrainian Family Scheme ("UFS") provides that an applicant who is a "family member" of a UK sponsor can be granted leave of entry to the UK. On 16 May 2022 the Defendant gave a Ministerial Authorisation under a Schedule to the Equality Act 2010 to allow Ukrainian nationals who arrive at a port of entry to the UK to be granted LOTR for a period of 6 months. The requirement for biometric data can be deferred so that Ukrainians can be allowed to provide their biometric data from inside the UK, rather than at a VAC in another country. It is this accommodation for Ukrainians, but not for Afghans, which is central to Ms Naik's complaint of differential treatment.

22. The law on an Article 14 claim is very well known. The first question is whether the case falls within the ambit of one of the substantive rights or freedoms. Mr Anderson accepts, entirely rightly, that this case does fall within the ambit of Article 8 as there is an obvious and direct impact on the Claimant's right to family life.

23. The next question is whether the differential treatment is on the grounds of national origin or some "other status". Mr Anderson conceded that the requirement for differential treatment on the grounds of "other status" was met, but there is some dispute over the degree to which the differential treatment is on the grounds of nationality. Mr Anderson pointed out that a Ukrainian who was not resident in Ukraine in January 2022 would not be eligible under the UFS, so the differential treatment of the Claimant applying for LOTR and someone applying under the UFS is not simply a difference in nationality.

24. The only reason this debate is relevant is that the Court would apply a higher degree of scrutiny of differential treatment based on national origin. If the differential treatment is on the grounds of nationality alone then the court will require "very weighty reasons" for the difference, *Gaygusuz v Austria* [1996] 23 EHRR 364. If on the other hand the difference is on the basis of immigration status, the state will have a wider margin of appreciation, *Bah v UK* [2012] 54 EHRR 21.

25. However, the ground for the differential treatment, or the "status" is not itself now a necessarily separate stage in the analysis. In *R (SC) v Secretary of State for Work and Pensions* [2022] AC 223 at [71] Lord Reed said:

> *"I respectfully agree with that reasoning, and with that conclusion. I would add that the issue of "status" is one which rarely troubles the European court. In the context of article 14 , "status" merely refers to the ground of the difference in treatment between one person and another. Since the court adopts a stricter approach to some grounds of differential treatment than others when considering the issue of justification, as explained below, it refers specifically in its judgments to certain grounds, such as sex, nationality and ethnic origin, which lead to its applying a strict standard of review. But in cases which are not concerned with so-called "suspect" grounds, it often makes no reference to status, but proceeds directly to a consideration of whether the persons in question are in relevantly similar situations, and whether the difference in treatment is justified. As it stated in Clift v United Kingdom , para 60, "the general purpose of article 14 is to ensure that where a state provides for rights falling within the ambit of the Convention which go beyond the minimum guarantees set out therein, those supplementary rights are applied fairly and consistently to all those within its jurisdiction unless a difference of treatment is objectively justified". Consistently with that purpose, it added at para 61 that "while ... there may be circumstances in which it is not appropriate to categorise an impugned difference of treatment as one made between groups of people, any exception to the protection offered by article 14 of the Convention should be narrowly construed." Accordingly, cases where the court has found the "status" requirement not to be satisfied are few and far between."*

26. Although I accept Mr Anderson's submission that the treatment here is not based simply on nationality, the reality is that the vast majority of people applying in the Claimant's situation will be Afghans and all those under the UFS, Ukrainians. Therefore, applying the ECHR in a way that is practical and not theoretical, the difference in treatment here is principally because of nationality. The different treatment of those nationalities may be justified, but that arises at the later stage of the analysis.

27. The third issue is whether the Claimant and the person she wishes to be compared with under the UFS are in "analogous situations". It is at this stage that the factors relevant to an Article 14 determination start to interrelate. The degree to which the Claimant is or is not in an analogous position to a Ukrainian under the UFS goes directly to the question of whether the differential treatment is justified. The approach to comparators was helpfully summarised in *AL (Serbia) v SSHD* [2008] 1 WLR 1434 at [24]:

> *"It will be noted, however, that the classic Strasbourg statements of the law do not place any emphasis on the identification of an exact comparator. They ask whether "differences in otherwise similar situations justify a different treatment". Lord Nicholls put it this way in R (Carson) v Secretary of State for Work and Pensions [2006] 1 AC 173 , at para 3:*
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> *"... the essential, question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to that question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact.""*

28. In *Hode v UK* [2013]56 EHRR 27 the Strasbourg Court made clear that to be in "analogous" situations it is not necessary for the applicant and the comparator to be in identical positions, rather that they must be relevantly similar.

29. The Court's approach to justification has been recently considered by the Supreme Court in *SC* at [115]:

> *"In summary, therefore, the court's approach to justification generally is a matter of some complexity, as a number of factors affecting the width of the margin of appreciation can arise from "the circumstances, the subject matter and its background". Notwithstanding that complexity, some general points can be identified.*
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> *(1) One is that the court distinguishes between differences of treatment on certain grounds, discussed in paras 100-113 above, which for the reasons explained are regarded as especially serious and therefore call, in principle, for a strict test of justification (or, in the case of differences in treatment on the ground of race or ethnic origin, have been said to be incapable of justification), and differences of treatment on other grounds, which are in principle the subject of less intensive review.*

> *(2) Another, repeated in many of the judgments already cited, sometimes alongside a statement that "very weighty reasons" must be shown, is that a wide margin is usually allowed to the state when it comes to general measures of economic or social strategy. That was said, for example, in Ponomaryov , para 52, in relation to state provision of education; in Schalk , para 97, in relation to the legal recognition of same-sex relationships; in Biao v Denmark , para 93, in relation to the grant of residence permits; in Guberina , para 73, in relation to taxation; in Bah v United Kingdom , para 37, in relation to the provision of social housing; in Stummer v Austria , para 89, in relation to the provision of a state retirement pension; and in Yiğit v Turkey , para 70, in relation to a widow's pension. In some of these cases, the width of the margin of appreciation available in principle was reflected in the statement that the court "will generally respect the legislature's policy choice unless it is 'manifestly without reasonable foundation'": see Bah , para 37, and Stummer , para 89.*
>
> *(3) A third is that the width of the margin of appreciation can be affected to a considerable extent by the existence, or absence, of common standards among the contracting states: see Petrovic and Markin .*
>
> *(4) A fourth, linked to the third, is that a wide margin of appreciation is in principle available, even where there is differential treatment based on one of the so-called suspect grounds, where the state is taking steps to eliminate a historical inequality over a transitional period. Similarly, in areas of evolving rights, where there is no established consensus, a wide margin has been allowed in the timing of legislative changes: see Inze v Austria , Schalk and Stummer v Austria.*
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> *(5) Finally, there may be a wide variety of other factors which bear on the width of the margin of appreciation in particular circumstances. The point is illustrated by such cases as MS v Germany , Ponomaryov and Eweida v United Kingdom."*

30. Ms Naik submits that the Claimant and a Ukrainian seeking to enter under the UFS are in sufficiently similar situations, to be regarded as being analogous, and that there is no sufficient justification for the differential treatment in relation to the requirements for biometric testing. She points out that both are seeking to flee life threatening risks in their own countries and to find a safe route to the UK. The Claimant spent 20 years supporting the UK's mission in Afghanistan and it is by reason of that work that she and her family are now placed at extreme risk in Kabul. Further, Ms Naik relies on the impact on the Claimant's family in the UK who are themselves under enormous pressure and suffering a very real emotional toll because the Claimant and the other part of the family are trapped in fear in Kabul.

31. Further, Ms Naik points out that the Claimant is well known to British authorities through her work in Afghanistan, and therefore it is quite possible to check her identity and her bona fides without the prior submission of biometric data.

32. The Defendant has provided a safe and legal route to the UK for Ukrainians that does not require the submission of biometric data before their application is processed, or

even before they enter the UK. There is therefore no rational reason why the same cannot be done for Afghans, whether applying for LOTR and/or via the ARAP process. The Claimant over the last 12 months has done everything that she is capable of to assist in her application(s) being processed, but she has been thwarted by the Defendant's refusal to put in a place some form of reasonably transparent and useable process by which someone in the Claimant's situation in Afghanistan can have their application determined without the submission of biometric data.

33. Mr Anderson relies on the evidence of Kevin Burt, deputy policy lead on biometric policy in the Home Office, and Oliver Carlisle, Deputy Director of the Human Rights and Family Unit at the Home Office. Mr Burt sets out the importance of obtaining biometric data before an individual is allowed to enter the UK because of national security and public protection issues, and there is no dispute or challenge to that principle in this case. He says that as a matter of policy and practice, biometrics will only be deferred or waived in circumstances that are so compelling as to make them exceptional. He also explains the extreme difficulties of the evacuations during August 2021 from Kabul under Operation Pitting and the reasons why it was considered appropriate (and in effect unavoidable) to defer biometric testing of those being evacuated to the UK during that extremely chaotic period.

34. Mr Burt explains that there were two key differences between the situation of Ukrainians and Afghans in the decision to allow the former but not the latter to enter the UK before biometric data had been submitted. Firstly, the pressure that would have been placed on the VAC network in Europe if Ukrainians seeking entry to the UK had to go to a VAC first to enrol their data. Secondly, there is a different overall security assessment between Ukraine and Afghanistan. He says that whereas the risks posed from Ukrainian refugees were primarily around immigration control, with some security risks associated with the proximity to Russia; the risks associated with Afghanistan are different. Mr Burt refers to the fact that terrorist organisations have operated from Afghanistan in recent times and the potential for harm to the interests of the UK that that brings.

35. Mr Carlisle sets out some of the high-level considerations that have gone into the choices made by Government in respect of both Afghans who assisted the UK mission in Afghanistan, and what assistance should be given to Ukrainians seeking to enter the UK in the light of the Russian invasion. He refers inter alia, to the UK's diplomatic links and foreign policy objectives which are relevant to the decisions about the scope of the two schemes, and the different responses to different international situation.

36. Mr Carlisle also explains that there are particular advantages to an applicant under the ARAP scheme because it provides indefinite leave to remain and a path to settlement in the UK. By contrast, the UFS grants only three years leave to remain and envisages that the individuals will return to Ukraine.

Conclusions

37. In my view the Defendant has discharged the burden of justifying the differential treatment here. The focus of the differential treatment complained of is the provision of a bespoke scheme, as set out in the Authorisation, for the waiver of biometric data until the Ukrainian citizen has entered into the UK; but the failure to have any similar scheme for Afghans applying either under ARAP or LOTR. Ms Naik made clear that she is not

arguing that precisely the same scheme had to be in place, but rather that a clear scheme for the deferral of biometrics until the Claimant's application had been determined in principle would be sufficient to meet the test of justification.

38. I accept that the differential treatment is principally (although not solely) on the basis of nationality and it is therefore appropriate that the Court look for "very weighty" reasons for the difference in treatment. The question of whether the Ukrainian proposed entrant and the Afghan proposed entrant are in sufficiently similar situations goes directly to the issue of justification and therefore should be considered at that stage of the analysis. I accept that their situations are analogous in the sense that both groups are fleeing persecution in their home countries and would be at great risk (albeit for different reasons) if they were to remain in those countries.

39. However, I also consider that the nature of the reasons put forward, which go to both diplomatic and foreign policy considerations and to national security, are such that the Court should give very significant weight, or a wide margin of appreciation, to the Defendant. It is not for this Court, save in the clearest of cases, to go behind these type of considerations.

40. I accept that there are very significant differences between the position of those in the situation of the Claimant and Ukrainians under the UFS. Some of those differences might be said to point in the direction of more favourable treatment of the Claimant. She spent 20 years assisting the UK in their mission in Afghanistan, and her and her family's lives are now at risk in large part because of that work. However, the weight to give to that issue and the policy responses are matters for the Government and not the Court.

41. In terms of the specific justification for not treating Afghans in the position of the Claimants and Ukrainians in the same way in respect of biometric data, that is as I have said primarily one for the Defendant. I accept that the reasons given by the Defendant have a rational connection to the aims to be achieved, namely immigration control and national security.

42. The matters set out by Mr Burt in his witness statement, both as to the strain on the VAC network and the national security issues raised more strongly by Afghan refugees than by Ukrainians, are matters which are for the Secretary of State. Those matters are rationally connected to the policy complained of, namely ensuring that Afghans seeking entry to the UK are properly identified before being allowed such entry.

43. Ms Naik submits that the UK Government dealt with these matters during Operation Pitting, and the emergency evacuations from Kabul. However, it has been accepted that that was an extremely urgent crisis where there was no choice but to make a very rapid policy response. That situation cannot set a precedent for subsequent, more careful, policy choices.

44. Ms Naik also refers to the decision of Deputy High Court Judge Tim Smith in ***R (Mahabir) v Secretary of State for the Home Department*** [2021] EWHC 1177. That case concerned the fees payable by the family member of a Windrush victim in respect of leave to enter. Ms Naik submits that that case concerned a barrier to leave to enter in the form of the level of the fee. However, there is a critical difference between a case concerning people who have a prima facie right to enter the UK, who cannot exercise

that right by reason of the fee levels, and the consideration of whether an individual has a right to enter to the UK at all. Ultimately that case turned on its particular facts, and is of little assistance in the analysis of a very different policy decision.

45. There would have been a stronger argument about justification if the Defendant had continued to refuse to even consider the possibility of deferring biometric tests until an in-principle decision had been made. This is because people, particularly women, in the position of the Claimant may have to take a great risk in travelling to Pakistan and be placed at even greater risk if they are then refused entry to the UK. However, the Defendant is now considering deferring the biometric testing until the in-principle decision is made, so that issue is not at the present time live.

46. For all these reasons I reject Ground Four. For the reasons set out above, I do not have to consider the other Grounds.