Neutral Citation Number: [2023] EWHC 55 (Admin)

Case Nos: CO/2032/2022, CO/2104/2022, CO/2077/2022, CO/2080/2022, CO/2098/2022, CO/2072/2022, CO/2094/222, and CO/2056/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 January 2023

Before

LORD JUSTICE LEWIS
AND MR JUSTICE SWIFT

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Between

THE KING
on the application of

AAA (Syria)
AHA (Syria)
AT (Iran)
THE PUBLIC AND COMMERCIAL SERVICES UNION
DETENTION ACTION
CARE4CALAIS
AAM (Syria)
NSK (Iraq) **Claimants**

- and –

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

-and-

THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES **Intervener**

Raza Husain KC, Phillippa Kaufmann KC, Sam Grodzinski KC, Alex Grigg, Christopher Knight, Paul Luckhurst, Tim Johnston, Jason Pobjoy, Ali Bandegani, Raza Halim, Emma Mockford, Anirudh Mathur, Allan Cerim, Emmeline Plews, Will Bordell, and Rayan Fakhoury (instructed by **Duncan Lewis**) for the **Claimants**

Lord Pannick KC, Sir James Eadie KC, Rory Dunlop KC, Edward Brown KC, Colin Thomann, Simon Murray, Mark Vinall, Jack Anderson, Sian Reeves, and Natasha Barnes (instructed by **Government Legal Department**) for the **Defendant**

Angus McCullough KC, Laura Dubinsky KC, David Chirico, Benjamin Bundock, Jennifer MacLeod, and Agata Patyna (instructed by **Baker McKenzie**) for the **Intervener**

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THE KING
on the application of

HTN (Vietnam) **Claimant**

-and-

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

Sam Grodzinski KC, and Alex Grigg, **Paul Luckhurst, Will Bordell** (instructed by **Duncan Lewis**) for the **Claimant**

Lord Pannick KC, Sir James Eadie KC, Rory Dunlop KC, Edward Brown KC, Colin Thomann, Simon Murray, Mark Vinall, Jack Anderson, Sian Reeves, and Natasha Barnes (instructed by **Government Legal Department**) for the **Defendant**

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THE KING
on the application of

RM (Iran) **Claimant**

-and-

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

Richard Drabble KC, Alasdair Mackenzie, David Sellwood, and Rosa Polaschek (instructed by **Wilson Solicitors LLP**) for the **Claimant**

Lord Pannick KC, Sir James Eadie KC, Rory Dunlop KC, Edward Brown KC, Colin Thomann, Simon Murray, Mark Vinall, Jack Anderson, Sian Reeves, and Natasha Barnes (instructed by **Government Legal Department**) for the **Defendant**

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THE KING
on the application of

ASM (Iraq) **Claimant**

-and-

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

Richard Drabble KC, Leonie Hirst, and Angelina Nicolaou (instructed by **Wilson Solicitors LLP**) for the **Claimant**

Lord Pannick KC, Sir James Eadie KC, Rory Dunlop KC, Edward Brown KC, Colin Thomann, Simon Murray, Mark Vinall, Jack Anderson, Sian Reeves, and Natasha Barnes (instructed by **Government Legal Department**) for the **Defendant**

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THE KING
on the application of

AS (Iran) **Claimant**

-and-

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

Sonali Naik KC, Amanda Weston KC, Mark Symes, Eva Doerr, Isaac Ricca-Richardson (instructed by **Barnes, Harrild, and Dyer Solicitors**) for the **Claimant**

Lord Pannick KC, Sir James Eadie KC, Rory Dunlop KC, Edward Brown KC, Colin Thomann, Simon Murray, Mark Vinall, Jack Anderson, Sian Reeves, and Natasha Barnes (instructed by **Government Legal Department**) for the **Defendant**

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THE KING
on the application of

AB (Albania) **Claimant**

-and-

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

Sharaz Ahmed, Darryl Balroop, and Arman Alam (instructed by **no 12 Chambers**) for the **Claimant**

Lord Pannick KC, Sir James Eadie KC, Rory Dunlop KC, Edward Brown KC, Colin Thomann, Simon Murray, Mark Vinall, Jack Anderson, Sian Reeves, and Natasha Barnes (instructed by **Government Legal Department**) for the **Defendant**

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THE KING
on the application of

SAA (Sudan) **Claimant**

-and-

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

Manjit S. Gill KC, Ramby de Mello, Tony Muman, and Harjot Singh (instructed by **Twinwood Law Practice Limited**) for the **Claimant**

Zane Malik KC, Colin Thomann, and Robin Hopkins, Jack Anderson (instructed by **Government Legal Department**) for the **Defendant**

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THE KING
on the application of

ASYLUM AID **Claimant**

-and-

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

Charlotte Kilroy KC, Michelle Knorr, Harry Adamson, and Sarah Dobbie (instructed by **Leigh Day**) for the **Claimant**

Edward Brown KC and Jack Anderson (instructed by **Government Legal Department**) for the **Defendant**

NOTE OF JUDGMENT GIVEN ON 16 JANUARY 2023 CONCERNING MATTERS CONSEQUENT ON THE 19 DECEMBER 2022 JUDGMENT: THE ORDERS, COSTS AND PERMISSION TO APPEAL

Lewis LJ

1. On 19 December 2022, this Court handed down judgment in a series of claims for judicial review concerning the arrangements for determining whether claims for asylum by individuals should be determined in the United Kingdom or whether the individuals should be removed to Rwanda and their asylum claims determined there. This judgment deals with consequential matters: the terms of the orders necessary to give effect to our judgment, applications for costs, and applications for permission to appeal. It should be read together with the judgment handed down on 19 December 2022.

AAA CO/2032/2022

2. I deal with the Claimants in turn. I start with case CO/2032/2022, involving AAA, other individual claimants and three organisations. I consider first the terms of the order. The order needs to give effect to the judgment whilst ensuring it preserves the opportunity to seek permission to appeal against the conclusions the Court reached in December 2022. There is a draft order which has been prepared by the parties. Paragraph 1 of the draft order is appropriate:

> "Permission to apply for judicial review is granted to all Claimants on all grounds of the Claim, save in respect of the Claimants who do not have standing to pursue those Claim, i.e. the Public and Commercial Services Union, Detention Action and Care4Calais (together, "**the Group Claimants**") (all in CO/2032/2022)."

3. Paragraph 2 should read: The claim for judicial review on grounds 1 (including 1A, 1B, and 1C), 2 (including 2A and 2B), 3, 4, 5 is dismissed. Paragraph 3 should read: The claim for judicial review on ground 6 is dismissed save in so far as section C of the judgment identifies the respects in which the individual claims succeeded.

4. Paragraph 2 of the draft remains but is re-numbered as paragraph 4. Present paragraph 3 can be deleted.

5. I deal next with costs. In brief, the individual Claimants contend that they were the successful parties, and the starting point is that they should receive their costs from the Defendant. They recognise that the amount of costs should be subject to a percentage reduction in the order of 30% and seek an order that the Defendant pays 70% of their costs. We invited oral submissions on the appropriateness of other percentage reductions which would result in an order that the Defendant paid some lesser percentage. Mr Husain KC, for the Claimants, accepted that the amount of the percentage reduction was a matter for the court to decide in light of its knowledge of the litigation. The group Claimants – the PCSU, Detention Aid and Care4Calais – were not granted permission to apply for judicial review. They accept that they should pay the Defendant's costs incurred on the issue of standing.

6. The Defendant accepts that the individual Claimants had some individual success in relation to the individual decisions in their cases. She submits, however, that she succeeded in establishing that the arrangements governing removal to Rwanda were lawful and none of the declarations relating to those matters were granted. She submitted that the appropriate order was for the individual Claimants to pay 50% of the Defendant's costs. She submitted that it was appropriate for the three organisations refused permission to pay all the costs of the claim so far as it concerns the grounds they pursued and sought an order to that effect.

7. The starting point is contained in CPR 44.2. Where the court decides to make an order about costs, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, but the court may make a different order. CPR 44.2 provides that the court will have regard to all the circumstances including whether a party has succeeded on part of its case even if it is not wholly successful.

8. In my judgment, the individual Claimants are the successful parties for the purposes of CPR 44.2. They claimed that the decisions that their asylum claims were inadmissible

and (save in relation to *AHA*) that the decisions refusing their human rights claims and certifying that hose human rights claims were clearly unfounded. They succeeded in that claim and the decisions have been quashed.

9. It is right, however, to recognise that the individual Claimants were unsuccessful in relation to large parts of the claim, both those parts concerning the general arrangements governing transfer of asylum claimants to Rwanda, and on aspects of the alleged procedural unfairness in their own cases. We consider that the appropriate approach is to make a very substantial reduction in the amount of costs that the Defendant is to be ordered to pay. We would therefore order the Defendant to pay 40% of the costs of the individual Claimants in case CO/2032/2022. I have had in mind the other submissions made. I do not accept there is any relevant distinction to be drawn between costs incurred before 5 July 2022 and those incurred after. Nor, do I accept the submission that the proportion of the Claimants' costs to be paid by the Defendant should increase because of any heightened public interest in resolving the issues raised in the litigation, nor because they involve fundamental human rights nor because of what were said to be evidential benefits arising from the claims being pursued. Finally, the conclusion I have reached does not rest on any view that any of the grounds pursued by the Claimants was unreasonably pursued.

10. The three organisations challenged the lawfulness of the arrangements on domestic law grounds. They did not seek to rely on grounds derived from the ECHR nor did they challenge the specific decisions relating to individuals. They were held not to have standing. I see no proper basis for ordering the three organisations to pay the whole costs of the claim that they brought. The only issue is any additional costs generated by the issue of standing. The three organisations accept that they should pay the Defendant her costs on the issue of standing on the standard basis and I would therefore make that order.

11. I turn then to the question of permission to appeal. When handing down our judgment, we asked the parties to identify concisely proposed draft grounds of appeal. The Claimants in CO/2032/2022 have done so identifying, in bold, 9 grounds of appeal in their written submissions of 12 January 2023. In relation to these grounds, as in relation to the grounds advanced by the other Claimants in the other cases, I would not have been minded to grant permission on the basis that any of the proposed grounds of appeal has any realistic prospect of success.

12. I do recognise, however, that some of the issues raised, in particular those concerning the lawfulness of the arrangements, do raise issues of importance which it would be appropriate for the Court of Appeal to consider. I do consider, therefore, that there may be compelling circumstances for granting permission in relation to some of the proposed grounds of appeal.

13. I would grant permission, for that reason, on grounds 4, 6 and 7.

> "Ground (4): The Court erred in its application of the *Othman* test in determining whether the assurances contained in the MOU and the *Notes Verbales* provide a sufficient guarantee to protect relocated asylum-seekers from the risk of *refoulement* and other Article 3 ill- treatment.
>
> …

> Ground (6): The Court erred in finding that inadmissibility and/or removal to Rwanda did not constitute a penalty for the purposes of Article 31 of the Refugee Convention.
>
> Ground (7): The Court erred in concluding that the SSHD's use of the certification power in Part 5 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants etc) Act 2004 ("the 2004 Act") was *intra vires* in circumstances where the Assessment Document created a presumption of safety which circumvented the statutory scheme."

14. Ground 8 is in the following terms:

> "Ground (8): The Court erred in concluding that the Rwanda Removal Policy was not systemically unfair, including by finding that procedural fairness did not require that each claimant have an opportunity to make representations in relation to the matters set out in §345B(ii)-(iv) of the Immigration Rules."

15. I have considered carefully whether there are compelling circumstances to allow an appeal on this ground. The individual Claimants have succeeded and the decisions in their cases have been quashed. Moreover, as we noted at paragraph 395 of the judgment handed down in December last year, the issues about which they claim as a matter of procedural fairness to be entitled to information and make representations upon are the generic issues as to why removing asylum claimants to Rwanda would be unlawful and those issues have now been determined by this court. It might be said therefore that the issues relating to procedural fairness are academic and there are no compelling circumstances for allowing an appeal to the Court of Appeal on Ground 8. Ultimately, however, it does seem to me that it is appropriate to grant permission on this ground so that the Court of Appeal, if it considers it necessary and appropriate to do so, can rule on this issue. I would grant permission on Ground 8.

16. I would not grant permission on grounds 1,2 3, 5 or 9. In relation to Ground 1, it is clear that there is no conflation of the test in *Ilias* and the domestic law test – see paras. 48-60, and 61 of the judgment. Nor was there any error in approach to the assessment of certain evidence. Ground 2 concerns the proper point in time for assessment of the *Tameside* duty and the assessment of past events. I see no realistic prospect of that ground succeeding and no compelling circumstances for an appeal on that issue.

17. Ground 3 is, I consider, based on a misreading of the judgment and a reference to one sentence not read in context. It alleges that the court did not decide for itself whether there would be a risk of refoulment. It implies that the court adopted an approach akin in effect to deciding whether the Secretary of State acted rationally: see paragraphs 9 and 12 of the written submissions. Paragraph 10 says that the court erred by dismissing the submission on Article 3 on the ground that it was speculative and at paragraph 11 that the Court misunderstood the evidence filed by the UNHCR.

18. On the first question, paragraph 45 of the judgment said that the issue was whether the Defendant could lawfully reach the conclusion that the arrangements governing relation

to Rwanda would not give rise to a risk of refoulment. The Defendant could only lawfully do that if there would be no risk of refoulment. That is the issue the court then considered from paragraphs 46 to 71. There was no failure properly to assess the Claimants' submission or the evidence of the UNHCR. There is therefore no realistic prospect of this ground of appeal succeeding and no compelling circumstances to justify granting permission to appeal on this ground.

19. Ground 5 alleges that the court applied a rationality standard rather than deciding for itself whether there would be a breach of the Claimants' rights if they were removed to Rwanda. Again, essentially for the same reasons given in relation to Ground 1, I consider that this ground too is based on a misreading of the judgment. I do not see any realistic prospect of this ground succeeding and no compelling circumstances to grant permission to appeal on this ground.

20. Ground 9 concerns standing, and I see no proper basis for permission to appeal to be granted on this ground.

21. In summary, therefore, permission to appeal is granted to the AAA individual Claimants on grounds 4, 6, 7 and 8. For the avoidance of doubt the time for filing an appellant's notice is extended to 4pm on 30 January 2023.

HTN CO/2104/2022

22. His submissions were included in the submissions of 12 January 2023 made by the AAA Claimants in case CO/2032/2022. One composite draft order was provided to cover both cases. I consider it sensible for there to be separate orders identifying the grounds of claim dismissed in each case. Permission to apply for judicial review is granted on grounds 1, 2, 3, 4 and 5. HTN's claim is dismissed on grounds 1, 3, 4 and 5. The claim is granted on ground 2.

23. The costs order will be the same for the same reasons – the Defendant to pay 40% of HTN's costs.

24. Permission to appeal is granted on grounds 4, 6, 7 and 8 of the draft grounds contained in the written submissions of 12 January 2023 but permission is refused on the other grounds.

RM CO/2077/2022

25. The order is that permission to apply for judicial review is granted on grounds 1 to 9, but the claim for judicial review on grounds 1,2, 3, 4, 5, 6, 8 and 9 is dismissed. The claim on ground 7 is dismissed save as identified in section C of the judgment.

26. In relation to costs, Mr Drabble KC, for RM submitted that he should be entitled to costs up to 5 July 2022 when the Defendant took new decisions. Further, he submitted that he was the successful party thereafter. He pointed out that his submissions at the hearing were focussed on his individual circumstances, and he succeeded on those.

27. First, I do not consider that there is any proper basis for differentiating between the costs incurred before 5 July 2022 and those incurred after that day. The reality is that fresh decisions were taken in the light of further information and further submissions. The latter decisions replaced the earlier ones and the focus, therefore, was on the latest decision. Furthermore, the decisions taken on 6 June and 13 June 2022 would not, read in isolation from the later decision, be flawed.

28. Secondly, RM was the successful party for the purposes of CPR 44. But his claim advanced several generic grounds of challenge which failed. Furthermore, RM failed in his challenge to the inadmissibility decision and the trafficking decision. He succeeded only in his challenge to the human rights decision. There must be a considerable reduction, greater than that in the *AAA* case, to reflect the more limited basis of his success. I consider the appropriate order would be that the Defendant pay 25% of RM's costs.

29. On appeal, 4 grounds are identified in paragraphs 3, 4, 5 and 6 of the submissions dated 12 January 2023. Paragraphs 4 and 5 are as follows

> 4. As regards procedural fairness, the Court was wrong:
>
> (i) to find that the process for determining whether an individual should be transferred to Rwanda was procedurally fair, either generally or in RM's specific circumstances;
>
> (ii) in particular, to find that fairness did not require applicants to be provided with the material on the basis of which the Respondent had determined that Rwanda would generally comply with its non-refoulement obligations and/or to have an opportunity to make representations directed to that issue, in circumstances where the Respondent, when deciding whether to certify individual asylum claims and/or human rights claims as clearly unfounded, (a) was herself entitled to take account of general information about Rwanda but (b) was found by the Court to have made no irrebuttable assessment as to the safety of Rwanda;
>
> (iii) alternatively, if it was correct to find it unnecessary for applicants to be given an opportunity to make representations on the general safety of Rwanda, to conclude from that that the process was fair, either generally or in RM's specific circumstances;
>
> (iv) in particular, to find that the process provided RM, at material times, with a fair opportunity to make representations on his individual circumstances, especially as regards (a) why he had not claimed asylum in France, either upon being turned back from the UK border on 9 May 2022 or otherwise, (b) his mental health and/or cognitive difficulties, (c) whether he was potentially or actually a victim of trafficking and/or (d) whether there were aspects of the Rwandan refugee status determination system which meant that it was not a safe country for him personally; and/or

(v) to find that the Respondent's inadmissibility decision in RM's case did not fall to be quashed on the basis of procedural unfairness and/or a failure to take account of the evidence of his vulnerability.

5. As to whether Rwanda met the conditions in para 345B of the Immigration Rules, the Court was wrong:

(i) to find that it required 'compelling evidence' to go behind the assessment of HM Government that Rwanda would honour its commitments under the MEDP;

(ii) further or alternatively, to find that there was no such compelling evidence;

(iii) in any event, to find that the SSHD's failure to take account of the Israel-Rwanda arrangement and/or the extradition cases was not a material error of law; and/or

(iv) to find, with respect to RM's specific case and/or generally, that the refugee status determination system envisaged in Rwanda by the MOU and Notes Verbales, even if taken at its highest, was adequate to avoid a risk of unlawful onward refoulement, given (a) the deficiencies in the Refugee Status Determination Committee, (b) the Government of Rwanda's misunderstanding of the requirements of the Refugee Convention, (c) the lack of provision for medico-legal reports, (d) the lack of access to adequate country information, including relevant expert evidence, (e) the lack of evidence of the availability of suitable interpretation facilities and (f) the lack of evidence on the effectiveness of the right of appeal."

There are compelling circumstances to justify allowing an appeal on the grounds identified at paragraph 4 and paragraph 5 of the submissions dated 12 January 2023 essentially for the reasons given in relation to *AAA*.

30. Paragraph 6, as drafted focussed on a target different from the substance of RM's claim, namely "a programme of mass removal of asylum seekers". The judgment was concerned with RM's own case. Mr Drabble accepts that Ground 6 can be reformulated as follows.

> "The Court was wrong to find, for purposes of Article 31 of the Refugee Convention, that removal of RM, before his claim has been considered, to a third country with which he has no prior connection at all, with the avowed aim of deterring him or others from seeking asylum in the UK after arriving by unlawful means, did not constitute a penalty and therefore was consistent with s.2 of the Asylum and Immigration Appeals Act 1993."

I would grant permission to appeal on this ground, as re-formulated

31. I would also grant permission to appeal on Ground 2 (the retained EU law issue also pleaded in ASM's case).

32. However, I see no realistic prospect of the grounds set out at paragraphs 1, 3 and 7 succeeding and no compelling circumstances to grant permission to appeal on them. I would refuse permission on those grounds.

ASM CO/2080/2022

33. Next is case ASM. There is a draft order. Paragraphs 1 and 2 of the draft order are appropriate.

34. On appeal, there are compelling circumstances for permitting an appeal on ground 1A and ground 1B and permission to appeal on those two grounds is granted. Those grounds are as follows

> "Ground 1A (Retained EU law): The court misdirected itself in concluding [118] that Articles 25 and 27 of the Procedures Directive (2005/85/EU) had ceased to be 'retained EU law' by virtue of s1 and Schedule 1 to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 ('ISSCA 2020');
>
> Ground 1B (*Ultra vires* s2 Asylum and Immigration Appeals Act 1993): The court erred in concluding [126] that the MEDP Scheme as set out in paragraphs 345A-D of the Immigration Rules was consistent with the Refugee Convention and therefore not *ultra vires* s2 of the 1993 Act."

That will be paragraph 3 of the order.

35. Paragraphs 4 and 5 of the draft order are appropriate. There is no need for paragraph 6. As the grounds have been stayed, no order in relation to costs is necessary in relation to them. Paragraph 7 – renumbered as 6 – is appropriate.

AS CO/2072/2022

36. Next is case AS. In terms of the order, permission to apply for judicial review is granted on grounds 1, 2 and 3. The claim on grounds 2 and 3 is dismissed. The claim on ground 1 is granted.

37. In terms of costs, AS is the successful party for the purposes of CPR 44. His challenge was more limited than the other Claimants and the issues on which he lost – the inadmissibility decision, certain generic issues, and the procedural fairness issue – took up correspondingly less of the time taken to consider the claim. I accept that the

appropriate reduction to reflect that issue is 25%. I would therefore order the Defendant to pay 75% of AS's costs.

38. AS seeks to pursue three grounds of appeal. Ground 1

> "The Court was wrong to conclude that the inadmissibility decision in C's case was not unlawful by reason of procedural unfairness."

In AS's case, he had been granted asylum in Greece, and had claimed asylum in Germany before coming to the UK. His asylum claim was inadmissible under rule 345B. Although there was a claim about lack of legal representation, he did in fact have legal representation before the decision was taken: see paragraph 405. We see no realistic prospect of Ground 1 succeeding and there are no compelling circumstances on the particular facts of his case as to why he should be granted permission to appeal on that ground.

39. Ground 2 is

> "The Court was wrong to conclude that the D's policy by which C may be removed to Rwanda was lawful."

That says nothing about the basis on which it was unlawful, and it would be inappropriate to grant permission for a ground of appeal drafted in that fashion. It is clear from paragraphs 17 and following of the written submissions that the ground of appeal is directed towards whether the policy was unlawful in the light of the Gillick case. That issue has been fully considered by the Supreme Court in *A*. There is no realistic prospect of ground 2 succeeding and no compelling circumstances for allowing an appeal on that ground. Permission on ground 2 is refused.

40. Ground 3 is

> "The Court erred in its application of the test for measuring the reliability of assurances laid down by the ECtHR in *Othman* (App No. 8139/09) and the legal test as to procedural duties on D relating to enquiries into safety and conditions in Rwanda."

There are compelling circumstances for the Court of Appeal to consider that issue as we recognised in *AAA*. We grant permission to appeal on ground 3.

AB CO/2072/2022

41. Parts of this case were stayed. I would grant permission to apply for judicial review on Grounds 1 and 2 but dismiss the claim on Grounds 1 and 2.

42. In terms of costs, the successful party in relation to the part of the claim heard in September 2022 is the Defendant. AB invites us to defer any ruling as to costs until the rest of his claim is determined. I do not consider that it is appropriate to do so. AB challenged matters on the grounds referred to. He lost. The successful party is the Secretary of State in relation to those matters. The appropriate order is that AB pay the

Secretary of State's costs in relation to Grounds 1 and 2 which were dealt with at the hearing in September 2022.

43. In terms of appeal, AB makes no specific application to appeal on the grounds upon which he was permitted to advance his grounds of challenge in September 2022 – namely, whether there had been an error of law in failing to publish certain guidance and discrimination. As no application is made, no permission to appeal is granted in relation to those grounds. In his written submissions, AB supports *AAA*'s application for permission to be granted. It would not be appropriate to grant AB permission to advance an appeal on grounds not part of his case in September 2022, and which are properly matters for the Claimants in other cases, notably CO/2032/2022. AB is refused permission to appeal.

SAA CO/2094/2022

44. Next, in relation to SAA, part of his case was stayed. I need deal therefore only with the grounds of review relating to that part of the case heard in October 2022. I would grant permission to apply for judicial review is granted on Grounds 1,2,3,4, 5 and 6, but dismiss the claim for judicial review on those grounds.

45. In terms of costs, the successful party is the Secretary of State. SAA lost on all the grounds on which his claim proceeded in Oct. 2022. I would order SAA to pay the Secretary of State's costs and approve paragraph 3 and 4 of the draft order.

46. In terms of permission to appeal, SAA seeks to appeal on three issues – Grounds 1 - 3 of his draft grounds of appeal – which were not part of his claim. It would not be appropriate to grant SAA permission to advance an appeal on grounds that were not part of his case in October 2022, and which are properly matters for the claimants in other cases, notably CO/2032/2022. Permission to appeal on grounds 1 to 3 should be refused.

47. Ground 4 concerns a claim that the sharing of data with Rwanda constitutes a penalty. I do not see that that was a ground of claim pleaded in the claim form. But in any event, there is no proper basis for considering that the decisions challenged were dependent on any issue in relation to data sharing. There is no realistic prospect of an appeal on that ground succeeding and there are no compelling circumstances justifying an appeal on that ground. I would refuse permission to appeal on ground 4.

48. Ground 5 seeks permission to appeal against the finding on the construction of paragraphs 345A and 345C of the immigration Rules. That is issue 4 in the judgment. There is no realistic prospect of an appeal on that ground succeeding and there are no compelling circumstances justifying an appeal on that ground.

49. Ground 6 concerns the construction of the Inadmissibility Guidance. That was issue 5 in the judgment. I doubt that that was an issue in SAA's case in October 2022. But in any event, there is no realistic prospect of an appeal on that ground succeeding and there are no compelling circumstances justifying an appeal on that ground.

50. Grounds 7 to 14 concern data protection issues. For the reasons given in the judgment, I do not consider that there is any realistic prospect of any of these grounds succeeding.

Nor are there any compelling circumstances justifying an appeal on any of those grounds.

51. Ground 15 concerns the claim that the arrangements were unlawful as they by-passed Parliament. For the reasons given in the judgment, I do not consider that there is any realistic prospect of any of this ground succeeding. Nor are there any compelling circumstances justifying an appeal on this ground.

52. Ground 16 concerns the claim of discrimination. Again, essentially for the reasons given in the judgment, I do not consider that there is any realistic prospect of any of this ground succeeding. Nor are there any compelling circumstances justifying an appeal on this ground.

53. Permission to appeal should therefore be refused on each of the grounds namely, grounds 1 to 16.

Asylum Aid CO/2056/2022

54. I would grant permission to apply for judicial review on grounds 1, 2 and 3, but dismiss the claim for judicial review on all grounds.

55. In relation to costs, the position is that Asylum Aid advanced three grounds of challenge, one of which was that the arrangements for determining whether claims for asylum should be determined in Rwanda rather than the UK was systematically unfair. Asylum Aid failed on all three grounds. The Defendant is therefore the successful party for the purposes of CPR 44. Asylum Aid however submits that we should depart from the normal order that the unsuccessful party pays the costs of the successful party and make no order for costs.

56. The arguments advanced are set out at paragraphs 8 to 11 of Asylum Aid's written submissions. In essence, they revolve around the fact that the Defendant had originally made a concession as to the scope of the obligation of procedural fairness from which she subsequently resiled on the second day of the hearing. It is said that departing from the general rule is necessary to reflect the unreasonableness of the Defendant's conduct, the costs spent evidencing a case which would have succeeded but for the Defendant's conduct, the fact that issue was no longer a key issue before the court and what is said to be the considerable disadvantage to the which the claimant was put by being unable to address the key issue on which the Defendant succeeded. Further points are made, particularly as to the purpose underlying the CPR. Asylum Aid applies for an order that there be no order as to costs.

57. The Defendant resists that application for, amongst others, the following reasons. First, she submits that the significance of the point made by Asylum Aid is overstated. It had brought a far-reaching challenge on three separate grounds all of which have failed. Further, it was not unreasonable conduct of the Defendant to reconsider an aspect of the case following dialogue with the court. Secondly, Asylum Aid would have pursued its claim irrespective of how the Defendant put her position and indeed continued to pursue its claim on systemic unfairness after the change of position. It took the opportunity to respond in writing, but it lost. The Defendant also advanced a third reason which I do not need to deal with here.

58. I accept the first and second submissions of the Defendant on this issue. The reality is that Asylum Aid challenged the arrangements governing removal of asylum seekers to Rwanda. One of its grounds alleges that the system is systemically unfair. It advanced that ground and lost. It continued to advance the claim that the system was systematically unfair after the Defendant modified her case in part. The change did not result in extra costs which the Defendant should bear. The Claimant would, in reality, have incurred all the costs in bringing the claim and in the hearing in October. In relation to the withdrawal of the concession, the claimant had the opportunity to deal with the point at the hearing. To ensure fairness, the Claimant was given the opportunity of making written submissions on the issue after the hearing. It took that opportunity but the arguments put forward in those written submissions were not accepted. The general rule is that the unsuccessful party – here the Claimant – should pay the costs of the successful party. I see no proper justification for departing from the general rule I would therefore order Asylum Aid to pay the Defendant's costs on the standard basis.

59. I note, additionally, there is in place an order capping Asylum Aid's liability to costs at £30,000. The order that I would make is subject to that cap.

60. In terms of appeal, paragraphs 12 to 23 of the written submissions deals with appeals. The real grounds appear to me to those contained in paragraphs 13 and paragraph 19 of the written submissions. The remainder are submissions or argument on those grounds. Ms Kilroy KC confirmed this was the position.

61. The two grounds concern the question of the scope and requirements of procedural fairness. The findings on that were relevant to assessing the claim that the system was inherently unfair. I have considered whether it is appropriate to grant permission to appeal on those grounds particularly as those matters are to be argued by other claimants and, as indicated at paragraph 427 of the judgment we considered that these matters were better addressed by individual claimants on the facts of their cases rather than in the abstract. I also bear in mind paragraph 395 of our judgment and the fact that issues concerning the generic issues have now been determined by the court. Thus, the issue might well be said to be academic.

62. Nonetheless, I would be prepared to find that there were compelling circumstances justifying allowing Asylum Aid permission to appeal on a ground if it were properly formulated and if it raised issues on which the Court of Appeal could rule if it considered it necessary and appropriate to do so.

63. I would grant permission to Asylum Aid to advance a ground of appeal in the terms set out in paragraph 19(1) to (5) of the written submissions dated 12 January 2023.

64. In terms of paragraph 13, the ground of appeal as drafted appears to me to be capable of being read in a way that does not in fact reflect the judgment. It refers to

> "… AA submits that the Court erred in its conclusions at §389, §390, §392 as to what common law fairness requires and particularly erred in its conclusion that common law fairness does not require individuals to be able to make representations on all matters relevant to the safety of their removal to a foreign jurisdiction, whether those matters are general to a group of individuals or specific to them. …"

65. The judgment is careful to explain that procedural fairness is not the source of any obligation to provide all material available to the Home Secretary and is not itself the source of any obligation to make representations on the matters at paragraph 345B(ii) to (iv): see paragraph 392 of the judgment. The individual may make representations to the Secretary of State, but the obligation of procedural fairness is not the source of a right to be able to do so. The draft ground of appeal can be contrasted with the carefully drafted ground 8 in the *AAA* case: see above at paragraph 14.

66. Asylum Aid's current paragraph 13 ground of appeal could therefore be misconstrued. I would not regard the paragraph as drafted as having a realistic prospect of success but, more importantly for present purposes, I would not regard there as being any compelling circumstances to permit a ground of appeal to go forward in these circumstances as it might well be open to misinterpretation or misunderstanding and serve to confuse matters. I would refuse permission to appeal on the ground set out in paragraph 13 as currently drafted.

67. I would, however, be minded to give Asylum Aid an opportunity to seek permission on a re-drafted ground of appeal, for example, a ground of appeal alleging that the Divisional Court erred in concluding that the obligation of procedural fairness did not itself require the provision of information relating to, or the opportunity to make representations on, the matters referred to in paragraph 345B(ii)-(iv) of the Immigration Rules. If Asylum Aid would wish to apply for permission on such a ground, it should do so, by providing a written draft ground of appeal to the Court no later than 4 p.m. on Friday 20 January 2023. If provided, the application can be considered on the papers.

68. I would not grant permission for grounds of appeal in relation to paragraphs 12, 14 to 18 or 23 as those paragraphs are submission rather than grounds of appeal as envisaged by the Practice Direction.

Swift J

69. I agree with the conclusions on the applications for costs and permission to appeal and have nothing to add. I agree that orders should be made in the terms explained by Lewis LJ.