Case No: **JR-2022-LON-002069**

**IN THE UPPER TRIBUNAL**
**(IMMIGRATION AND ASYLUM CHAMBER)**

Field House,
Breams Buildings
London, EC4A 1WR

30 January 2024

**Before:**

**MRS JUSTICE STEYN DBE**

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**Between:**

**THE KING**
**on the application of**
**Amena El-Ashkar**
(NO ANONYMITY DIRECTION MADE)

**Applicant**

**- and -**

Secretary of State for the Home Department

**Respondent**

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Jason Pobjoy and Rayan Fakhoury (instructed by Gold Jennings) for the applicant

Robin Tam KC and Karl Laird (instructed by Government Legal Department) for the respondent

Hearing date: 23 January 2024

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**J U D G M E N T**

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**Mrs Justice Steyn DBE:**

**A. Introduction**

1. This judgment addresses an application by the Secretary of State to withdraw undertakings provided to the Upper Tribunal, of which the Secretary of State is in breach, and a number of other issues arising as a result of the Secretary of State's seriously flawed conduct of these proceedings. Although I am considering the Secretary of State's application, references in this judgment to "the Applicant" denote Ms El-Ashkar, who is the applicant in the proceedings.

2. The issues are identified in the Tribunal's order of 28 September 2023, and endorsed by the parties in a Joint Position Statement filed pursuant to that order, as follows:

   a. The consequences of the Secretary of State's breaches of the undertakings provided to the Tribunal and recorded in the consent order sealed on 30 March 2023;

   b. The Secretary of State's application to withdraw those undertakings, including consideration of whether it would be appropriate to transfer this case to the High Court to enable any appropriate application to be made by the Secretary of State for a closed material procedure declaration pursuant to section 6 of the Justice and Security Act 2013 for the purposes of determining whether [he] should be permitted to withdraw the undertakings.

   c. The consequences of the withdrawal of those undertakings, should that application be granted;

   d. Whether the Secretary of State has breached his duty of candour; and

   e. Costs.

3. The Joint Position Statement ('JPS') records:

   "**Secretary of State's errors**

   3. The parties are agreed that the Secretary of State made the following nine errors in relation to the conduct of these proceedings:

   3.1 Delay in certification of the September Decision;

   3.2 Failure to notify the Applicant or the Upper Tribunal of the certification decision;

   3.3 Provision of an undertaking with which the Secretary of State should have known [he] could not comply;

   3.4 Positive visa decision made 'in error';

3.5 Revocation decision made on purported basis of 'a change in circumstances';

3.6 False statement in relation to service of refusal notice;

3.7 Breach of undertaking to provide a gist;

3.8 Breach of undertaking to make a fresh decision within 2 months; and

3.9 Failure to admit non-compliance with undertakings."

4. The Secretary of State acknowledges that the list of errors is long and mutually exacerbating; the errors, for which there is no excuse, are serious. This description is apt. The handling of this case from September 2022 until July 2023 was shockingly poor. This has had a detrimental impact on the Applicant. The result is also that the Tribunal is seised of the question whether to initiate proceedings for contempt against the Secretary of State for his admitted breach of undertakings given to the Tribunal in a sealed order. That is a grave situation for the Secretary of State to find himself in. The responsibility for the mishandling of this case lies primarily with the Secretary of State, but also to an extent with the Government Legal Department ('GLD').

5. The Secretary of State has given an unqualified and unreserved apology to the Applicant and to the Tribunal for this litany of serious errors. This apology has been given both in writing (in evidence submitted on behalf of the Secretary of State and on behalf of GLD), as well as orally at the outset of the hearing (through leading Counsel for the Secretary of State, Mr Robin Tam KC).

6. I shall explain further below the nature of these errors, and how they occurred, before dealing with each of the identified issues. The Secretary of State relies on witness statements made by Doug McLellan, a civil servant working at the Home Office in the role of Deputy Director of Appeals, Litigation and Administrative Review ('ALAR'), dated 11 August 2023 ('McLellan 1) and 5 September 2023 ('McLellan 2'); and by James McVeigh, a senior lawyer in the Home Office Immigration Team 4 ('HOI4') of the Government Legal Department, who leads a mini-team of three lawyers and one trainee solicitor in HOI4 ('McVeigh 1'). The Applicant submitted a third witness statement explaining the impact on her of the Respondent's conduct, dated 25 August 2023 ('El Ashkar 3').

**The facts**

7. The Applicant describes herself as a stateless Palestinian academic and journalist based in Lebanon. In August 2019 she was awarded the Foreign, Commonwealth and Development Office's Chevening scholarship, which enabled her to study for a master's degree at the School of Oriental and African Studies ('SOAS'). She successfully completed that degree and then returned to Lebanon.

8. In April 2021 the Applicant was awarded a full scholarship to study for a PhD in International Relations at the London School of Economics (LSE). On 9 October 2021

she submitted an application for a student visa to enable her to attend LSE. While she was waiting for that application to be determined, she was initially able to begin her PhD at LSE by attending remotely, due to the rules concerning Covid-19 that were in place at that time. However, LSE required the Applicant to attend in person from April 2022. Towards the end of February 2022 the Applicant withdrew her student visa application, which had not yet been determined, as her passport was due to expire and she needed to renew it. The Applicant agreed an "*interruption*" to her studies with LSE until January 2023.

9. On 20 August 2022, the Applicant submitted a further application for a student visa to enable her to continue her PhD at LSE. Mr McLellan states that the application was "*subject to a standard suite of checks*", which identified the need to obtain advice from the Special Cases Unit ('SCU') of the Homeland Security Group within the Home Office (McLellan 1 §9, McLellan 2 §4). SCU "*conducted a non-conducive assessment to determine whether the Applicant's presence in the UK was deemed conducive to the public good. Their conclusion was that it was not*" (McLellan 1 §10). SCU conveyed their assessment to the Entry Clearance Officer ('ECO') who then made a decision.

10. On 30 September 2022 the Home Office informed the applicant that her application for entry clearance as a student was refused ('the September Decision'). Under the heading "Reasons for Decision", the letter stated:

> "Your application has been refused for the following reason(s):
>
> I have thoroughly considered the circumstances of your application; however on balance, I am not satisfied that they are of a sufficiently compelling nature for me to exercise discretion.
>
> In light of your character, conduct or associations I am satisfied that it is undesirable to grant you leave to enter the United Kingdom.
>
> I therefore refuse your application under paragraph 9.3.1 of the immigration rules."

11. At that stage, no decision to certify the September Decision pursuant to s.2F of the Special Immigration Appeals Commission Act 1997 ('the 1997 Act') was made. Mr McLellan states that the reason the refusal notice "*did not provide a detailed explanation of why the Applicant's admission to the United Kingdom would not be conducive to the public good*" was because "*this decision was taken in reliance on material that it would be contrary to the public interest to disclose*" (McLellan 1 §10). In fact, no explanation – not merely no "*detailed explanation*" – was given, as is obvious from the "*Reasons*" quoted above.

12. On 27 October 2022, the Applicant submitted an application for administrative review challenging the September Decision. Mr McLellan states that SCU was not notified of this challenge because the Home Office caseworker dealing with the administrative review did not recognise the need to make SCU aware of it (McLellan §11).

13. On 14 November 2022, in accordance with the pre-action protocol, the Applicant's representatives sent a letter before claim, indicating the Applicant's intention to challenge the September decision by bringing a claim for judicial review. SCU was not made aware of the letter before claim because "*a note on the visa casework system intended to discreetly signal the interest*" of SCU "*was not understood*" by those handling the letter before claim (McLellan 1 §12). Mr McLellan suggests that the wording of the September decision did not indicate that it must necessarily have been based on sensitive information or that it must have been of interest to SCU. While I accept that may be the case, the *possibility* that the September decision may have been based on sensitive information and/or may have been of interest to SCU is obvious from the terms of the refusal notice, and it is surprising and unfortunate that it did not prompt anyone to check.

14. A response to the letter before claim was sent on 28 November 2022, in which the line taken was that the proposed claim was premature, and the Applicant had an alternative remedy, as the administrative review had not yet been determined.

15. On 7 December 2022, SCU – who remained unaware of the application for administrative review and the pre-action correspondence - asked the Secretary of State to certify the September decision under s.2F of the 1997 Act. On 20 December 2022, the Secretary of State decided to certify the September decision pursuant to that provision, with the effect that it could only be challenged by making an application to the Special Immigration Appeals Commission ('SIAC').

16. As stated above, the first error acknowledged by the Secretary of State is delay in certifying the September decision. Mr McLellan states, and it accords with the experience of the Tribunal, that, "*[u]sually certification takes place shortly after refusal and <u>before</u> the applicant is notified of the refusal*" (McLellan 1 §13, emphasis added). In this case, the refusal was notified *prior* to certification because the Home Office took the view that the Applicant's entry clearance application had to be determined before the start of the new academic year (McLellan 2 §6). "*The decision to certify must be taken by the Secretary of State personally after consideration of sensitive material, and hence may take significantly longer than the separate decision by an official to consider and refuse an application for entry clearance after receipt of advice from the relevant Home Office team*" (McLellan 1 §13). The notification of the refusal, prior to the certification decision being made, was a reasonable approach in the circumstances.

17. However, there then followed a period of delay between the September decision and the certification decision of 2 months and 20 days. Mr McLellan explains that the reason the submission asking the Secretary of State to certify was not put before her until 7 December 2022:

> "is because prior to that time Ministers were only receiving urgent advice, in part because of the series of changes in Ministerial appointments in the autumn of 2022" (McLellan 1 §13).
>
> "Due to wider pressures in the autumn of 2022, including Ministerial changes in the Home Office, it became necessary to control the flow of submissions to

Ministers for a period of time by forwarding only the most urgent submissions" (McLellan 2 §6)

18. Ordinarily, "*routine*" business is regularly put before Home Office Ministers. But in the period encompassing 30 September 2022 (when entry clearance was refused) until early December 2022, it is apparent that officials were precluded from putting "*routine*" or non-urgent business before Ministers. Mr McLellan states that in "*the absence of other factors, a certification into SIAC following an operational decision on an immigration application is generally considered to be 'routine' business which does not require urgent ministerial attention*" (McLellan 2 §7). As SCU were unaware of the application for administrative review and the pre-action correspondence, they did not regard the request for certification as urgent, and so only made the request on 7 December 2022, "*by which time routine submissions were once again going to Ministers*" (McLellan §7). SCU categorised the request as "*routine*", with the result that the decision was made nearly two weeks later.

19. The lengthy delay in making the certification decision, after the Applicant had been notified that her application for entry clearance had been refused, is deeply unsatisfactory and should not be allowed to recur. It appears the delay would not have been as long if there had not been a block imposed, during autumn 2022, preventing "*routine*" business being put before the Secretary of State or other Home Office ministers. The reasons for that, other than the series of changes in Ministerial appointments, are identified only opaquely as "*wider pressures*".

20. What is of more concern, and does not appear to have been appreciated by SCU or even fully understood by those giving evidence on behalf of the Secretary of State, is that once the September decision had been notified to the Applicant, any decision to certify should have been made speedily. It should not have been treated as non-urgent business that could be delayed until almost the end of the three month long-stop for bringing a claim. It is nothing to the point that SCU did not know that the Applicant had taken steps to challenge the September decision. They should have acted speedily anyway because from the moment the Applicant was notified of the September decision, if she wished to challenge it, she had to act promptly. And she needed to know the forum in which any challenge she wished to bring would have to be made, so that she could take it into account in determining who she wished to instruct, in engaging in pre-action correspondence, and in preparing a claim (including evidence).

21. Yet more concerning is the second acknowledged error on the part of the Secretary of State: the failure to notify the Applicant or the Upper Tribunal of the certification decision. The Applicant filed her application for judicial review on 22 December 2022. She had not been informed the September decision had been certified, and so the application was filed in this Tribunal rather than SIAC. The Secretary of State filed an acknowledgment of service and summary grounds on 13 January 2023 in which the certification of the September decision was not disclosed. The Upper Tribunal granted permission on 20 January 2023 in ignorance of the certification decision that had been made a month earlier. It was only months after the consent order was made, and the application for judicial review withdrawn on agreed terms,

that the Applicant and the Tribunal were informed that the September decision had been certified under s.2F of the 1997 Act.

22. Mr McLellan's evidence, which I accept, is that those at the Home Office who instructed GLD, and those at GLD who were dealing with this case, were unaware that the September decision had been certified. He states:

> "I regret that [SCU] did not immediately and directly inform the Applicant that the decision to refuse entry clearance had been certified … at the point the decision was certified under section 2F of the Special Immigration Appeals Commission Act 1997. For this I apologise on behalf of [SCU]. In future [SCU] will endeavour to inform applicants of certification as soon as possible." (McLellan 1 §14)
>
> "SCU intended to inform the Applicant of any certificate granted by the Home Secretary upon receipt of any challenge to the refusal decision. In this particular case, being unaware of the legal challenge actually brought, SCU regrettably did not then communicate the certification decision after it had been made and apologise to the applicant and Upper Tribunal for this." (McLellan 2 §8)

23. The failure to notify the Applicant or the Upper Tribunal of the certification decision <u>after</u> the Applicant indicated her intention to challenge the September Decision arose because SCU were ignorant of the challenge, and those at the Home Office and GLD who were dealing with the challenge were ignorant of the certification decision. The abject communication failure within the Home Office needs to be remedied. Any certification of a case under the 1997 Act should be clearly and transparently noted on the Home Office system. Mr McLellan stated that the Home Office will "*consider noting more clearly on Home Office systems when a case has been certified under the Special Immigration Appeals Commission Act 1997 to ensure caseworkers are alerted to that fact*" (McLellan 1 §19). The updated position, recorded in the skeleton argument submitted on behalf of the Secretary of State, is that "*a note is now added to the caseworking system when a case has been certified into SIAC*". The Secretary of State should ensure that the terms of these notes leave no room for misunderstanding.

24. However, the failure to notify the Applicant of the certification decision <u>when it was made</u> was not the result of a miscommunication. It was the consequence of a deliberate decision by SCU not to notify the Applicant of the decision unless and until she challenged the September Decision. That approach was unlawful and the Secretary of State has rightly apologised for it. It is causative of most of the subsequent errors, and the consequent impact on the Applicant.

25. On 30 March 2023 a consent order was sealed by the Tribunal ('the Consent Order'). The recitals record undertakings to the Tribunal given by the Secretary of State:

> (a) "*that she will reconsider the Decision and take a fresh decision on whether to grant the Applicant a visa within 2 months of receipt of the sealed consent order, absent special circumstances*"; and

(b) "*that should she be minded to refuse the Applicant's application for leave to enter the UK on any grounds of dishonesty or deception or non-conduciveness to the public good, she will (i) promptly notify the Applicant and inform her of the gist of the case against her, and (ii) provide the Applicant with a 14-day window to make meaningful representations in response before any final decision is reached in relation to her application*".

By consent it was ordered the Applicant had leave to withdraw her application for judicial review.

26. Mr McVeigh's evidence is that GLD's discussions with the Home Office, and with the Applicant's representatives, regarding the "*final form of the consent order*", were conducted solely by the trainee from his mini-team "*without the trainee seeking any input or approval from supervisors. This should not have occurred*" (McVeigh 1 §15). Mr McVeigh's emphasis is on the trainee failing to *seek* input or approval: I would add that such supervision was not *given* by him or the other supervising lawyer in his team. Consequently, the Home Office was not advised by GLD of the "*legal significance of the inclusion of undertakings in the consent order*", in particular that an undertaking could be enforced against the Home Office as if it were an order of the court, and that it would be at risk of committal for contempt if it failed to comply with the undertakings (McVeigh 1 §16). Mr McVeigh states (§17):

> "GLD did not discharge its professional duty to the Home Office not to commit it to these undertakings without its informed consent. GLD apologises to the Upper Tribunal and the Applicant for this error."

27. This was a serious failure on the part of GLD, and that organisation is right to acknowledge that it bears some responsibility for what has occurred. However, it is very likely that it would have been avoided if the Home Office had not failed to instruct GLD that a certification decision had been made, or that the September decision was based on sensitive information, or that SCU had an interest in the case. That failure on the part of those at the Home Office instructing GLD in this case was not deliberate. A serious communication failure within the Home Office resulted in those instructing GLD being ignorant of each of those matters, while SCU which knew all those matters remained ignorant of the steps the Applicant had taken to challenge the September decision.

28. The Secretary of State has breached, and remains in breach, of the undertaking to provide the Applicant with the gist of the case against her. The breach is admitted (McLellan 1 §5; Joint Position Statement §3.7). At the outset of his first statement, Mr McLellan has "*apologise[d] unreservedly to the Upper Tribunal and the Applicant, on behalf of the Respondent*" for this breach. He states, "*[t]his was as the result of several separate instances of human error, rather than any wilful disregard for the terms of the order*" (McLellan 1 §5). Mr Tam reiterated the Secretary of State's unreserved and unqualified apology at the outset of the hearing.

29. Mr McLellan states:

> "It is a matter of regret that, when the undertaking was given to provide a gist should refusal of the Applicant's application be contemplated, it was not known by those in [the Home Office] who were instructing GLD that a decision had been taken on 20 December 2022 to certify the decision to refuse entry clearance under section 2F of the Special Immigration Appeals Commission Act 1997. It is further regretted that the Applicant was not made aware of the certification into SIAC. Although the decision to refuse entry clearance was taken in reliance on material that it is not in the public interest to disclose, the interest of [SCU] and the fact of the decision to certify were unknown to those who agreed to give the undertakings incorporated into the consent order. The reliance on material which it is not in the public interest to disclose means that it is not possible for the Home Secretary or her officers to comply with the undertaking to provide a gist within any OPEN proceedings, including proceedings before the Upper Tribunal, without causing damage to the public interest. Had the issuance of the section 2F certificate been known by those handling the judicial review, they would have been aware of the Home Secretary's inability to disclose the gist and would not have given the undertaking." (McLellan 1 §17)

> "It is extremely regrettable that those handling the litigation were unaware of SCU's involvement, particularly as that failure of communication ultimately led to undertakings being given which cannot be honoured. It was certainly not the case that undertakings were given in the knowledge that they could not be honoured." (McLellan 2 §9)

30. On 10 May 2023, the Applicant's application was reconsidered by an ECO at the Home Office and granted. However, the ECO who reconsidered the application failed to consult SCU. It is clear from Mr McLellan's evidence that notes left on the system by SCU to signal, discreetly, their interest were seen but not understood by the ECO (or other Home Office officials outside SCU). By chance, SCU discovered the grant of entry clearance to the Applicant on 7 June 2023 and brought the error to the ECO's attention the same day. The grant of entry clearance "*in error*" is the fourth of the Secretary of State's admitted (and agreed) errors (JPS §3.4).

31. The ECO issued a revocation decision. The revocation decision appears to have been taken on 8 June 2023, and was received by the Applicant on 13 June 2023 (although it is wrongly dated 13 March 2023). The decision stated:

> "I am satisfied that there has been a change in circumstances since your previous entry clearance was issued. A separate refusal notice has been served outlining the full reasons."

32. The statements by the Home Office in the revocation decision that there had been "*a change of circumstances*" and that a refusal notice had been served were both untrue (JPS §§3.5 & 3.6). Mr McLellan has acknowledged that the wording of the revocation decision was "*regrettably inappropriate*". The explanation he has given is that after the ECO was asked by SCU to revoke the entry clearance, the ECO "*issued a standard letter template, without sufficient consideration of the need to tailor the letter to the Applicant's particular circumstances*". While there was a degree of urgency, it is not suggested by

the Secretary of State that this excuses these errors. The template could easily, and quickly, have been tailored to state that the entry clearance had been issued in error and prematurely, without all relevant checks having been completed, and that the application remained under consideration (McLellan 2 §10).

33. The statement that a refusal notice had been served was corrected by the Home Office on 21 June 2023 when a letter was sent by the Home Office to the Applicant informing her that:

> "Following the revocation of your visa, this is confirmation that your application has not been refused but is in the process of being reconsidered."

34. On 27 June 2023, the Applicant's solicitors sent a letter pursuant to the pre-action protocol alleging that the Secretary of State was in breach of the undertakings given to the Tribunal.

35. On 7 July 2023, in a response from the Home Office to the pre-action protocol letter, the Applicant was informed, for the first time, that the September decision had been certified into SIAC on 20 December 2022. The Secretary of State purported in that letter to provide a gist "*in accordance with the consent order of 30 March*". However, the purported gist merely stated:

> "The Secretary of State is minded to refuse your application for a visa to enter the UK on the basis that your presence in the UK is non-conducive to the public good. This is for one or more of the following reasons:
>
> (i) National security
>
> (ii) The relationship between the United Kingdom and another country; or
>
> (iii) Because it is otherwise in the public interest to do so.
>
> The Secretary of State's decision will be informed in part by material which, in the opinion of the Home Secretary, should not be made public for one or more of the reasons set out above. If the decision is made to refuse your application for a visa, then the Home Secretary will be asked to certify that decision under Section 2F of the Special Immigration Appeals Commission Act 1997. The effect of certification means that any challenge you may bring against the decision must be brought in the Special Immigration Appeals Commission."

36. The Secretary of State has not sought to maintain that the information above amounts to compliance with the consent order. Mr McLellan states that it is accepted that the information quoted in the paragraph above "*is not the same as a 'gist of the case against her', which is something that … cannot be safely provided in the circumstances of the Applicant's case*" (McLellan 1 §21). One of the errors the Secretary of State acknowledges was made is the failure to admit breach of the undertakings (JPS §3.9).

37. On 17 July 2023, the Applicant's solicitors sent further correspondence to GLD alleging breach of the undertakings and breach of the duty of candour. Among other matters, the Applicant's solicitors asked for confirmation that the Secretary of State "*will not take any final decision to refuse our client leave until after you have provided the revised gist and have considered our representations in response*".

38. On 24 July 2023, GLD wrote to the Applicant's solicitors and offered an unreserved apology in recognition of the "*serious errors*" made in dealing with the Applicant's case. Leading Counsel for the Applicant, Mr Jason Pobjoy, points out that even at that stage there was no admission of the breach of undertakings. That is true, but I would not criticise the terms of the letter of 24 July, in which GLD acknowledged the seriousness of the matters raised by the Applicant, provided reassurance that they were being investigated and given the serious attention that the matter deserved. The letter stated that enquiries were at an early stage, and the exact nature and extent of the errors would become clearer over the coming days and weeks, but in circumstances where it was already evident that serious errors had been made an unreserved apology was offered.

39. On 11 August 2023, the Secretary of State filed an application to withdraw the undertakings provided to the Upper Tribunal in the consent order.

40. The current position is that a fresh decision has not yet been made following the revocation decision. That is because the Secretary of State is bound by the undertaking first to provide a 'minded to' letter notifying the Application of the gist of the case against her, with which he contends he cannot responsibly comply. If he is released from the undertaking, the Secretary of State is willing to make a fresh decision within four weeks of the Tribunal's decision (and he is willing to first receive and consider any further representations the Applicant may wish to put forward).

**Impact on the Applicant**

41. The Applicant has given unchallenged evidence as to the "*profound and detrimental impact on all aspects of [her] life*" of the Secretary of State's delay and errors in dealing with her case (El-Ashkar 3 §2). Mr Pobjoy aptly described the impact of the refusal, followed by the Consent Order and then grant of entry clearance, followed a month later by the revocation decision as an emotional 'rollercoaster'. I accept that the way in which the Secretary of State has conducted these proceedings, and the litany of errors described above, has had a serious detrimental impact on the Applicant's mental health. This has been exacerbated by the promise of reasons (in the Consent Order and the revocation decision) which have not then been forthcoming.

**Remedial action**

42. The Secretary of State has not identified remedial action in respect of error 3.1 (the delay in making the certification decision), save to the (limited) extent that the error was caused by internal miscommunication within the Home Office. I accept that, in most cases, such delay is unlikely to arise because a certification decision would usually be made before the immigration decision has been notified, and the circumstances in which only urgent business was being undertaken by Ministers in autumn 2022 were unusual. Nevertheless, in those instances where certification falls

for consideration after the immigration decision has been notified, the guidance given in paragraph 19 above must be followed.

43. As regards error 3.2 (the failure to notify the Applicant or the Upper Tribunal of the certification decision), the Secretary of State has acknowledged that the Applicant should have been notified of the certification decision immediately, and has provided reassurance that in future the Home Office will endeavour to inform individuals of certification at the earliest possible opportunity.

44. Error 3.3 (provision of an undertaking with which the Secretary of State should have known she could not comply), the consequent breach of undertakings (errors 3.7 and 3.8), and error 3.4 (positive visa decision given 'in error'), all arose due to miscommunications within the Home Office. The remedial steps that the Secretary of State has taken are:

a. SCU has worked with colleagues in the entry clearance operation to amend the wording used on "Proviso" (the caseworking system currently used by ECOs) to reduce the likelihood of SCU's interest in a case being overlooked in future (McLellan 2 §13).

b. A joint working group has been formed consisting of staff from SCU and senior managers in ALAR to consider how to reduce the likelihood of ALAR staff being unaware of SCU's interest, and to identify the best way of sharing information between the two units (McLellan 2 §13). As stated above, Mr Tam informs me that a note is now added to the case-working system following a certification decision; and new operational instructions are currently in draft. In addition, officials are considering the feasibility of reviewing all litigation in which non-conducive grounds have been cited as a reason for decision (McLellan 2 §13).

c. The longer term remedial measure planned by the Secretary of State involves the transition from Proviso to the Atlas system. The latter system will offer the ability for individual cases to be restricted (McLellan 2 §14), unlike Proviso on which records have to be "*written on the assumption that a wide range of system users may read them*" (McLellan 2 §12). Consequently, the need to rely on a form of words discreetly signalling SCU's interest in a case – and, I would add, on training to ensure such forms of words are understood by those to whom they are directed – will be reduced. The transition will begin in 2024, and Mr McLellan states that it is expected to be complete by early 2026 (McLellan 2 §14).

45. A further contributory factor in respect of error 3.3 (and consequently errors 3.7 and 3.8) was GLD's failure to discharge its professional duty to the Home Office (paragraph 25 above). Mr Pobjoy has pointed out that Mr McVeigh's statement does not identify any specific steps that GLD has taken to avoid a recurrence. While that is true, GLD has given a candid account (involving to an extent waiver of privilege by the Secretary of State) and accepted responsibility for its part in what has occurred. Mr McVeigh's statement makes clear that the Consent Order should not have been finalised by a trainee without supervision, and is explicit as to the advice

that should have been given. It seems to me that it is implicit that GLD recognises the importance of ensuring sufficient supervision of trainees, and that in advising its client in respect of undertakings (and more generally), its advice should meet its professional obligations.

46. The remedial action taken in respect of errors 3.5 and 3.6 has been the correction of the false statements made in the revocation decision. And in respect of error 3.9, the Secretary of State has clearly and expressly acknowledged the breach, and given evidence as to how that has arisen.

47. As I have said, the Secretary of State has also given an unreserved and unqualified apology in respect of all of the errors, which have been clearly and frankly admitted.

**Consequences of the Secretary of State's breaches of undertakings**

48. The essential question, under this heading, is whether the Tribunal should, on its own initiative, initiate contempt proceedings against the Secretary of State.

*The Law*

49. By virtue of s.25 of the Tribunals, Court and Enforcement Act 2007 the Upper Tribunal has the contempt powers of the High Court. In the absence of specific procedures laid down by the Tribunal Procedure Rules, the Upper Tribunal requires applications to commit for contempt to adopt, so far as possible, the same practices and safeguards as are found in CPR r.81: *YSA v Associated Newspapers Ltd* [2023] UKUT 00075, [40]. By analogy, I consider that if the Tribunal proceeds of its own initiative, the same practices and safeguards as are found in CPR Part 81 should be adopted, including the requirement to issue a summons (CPR 81.6, 81.4(2)(a)-(s)).

50. Proceedings for contempt are intended to uphold the authority of the court or tribunal and to make certain that its orders are obeyed. It is well established that an undertaking to the court is "*as solemn, binding and effective as an order of the court in the like terms*": *Hussain v Hussain* [1986] Fam 134, 139H. As Lord Donaldson observed in *M v Home Office* [1992] Q.B. 270 at 305-306: "*Any contempt of court is a matter of the utmost seriousness*". Contempt proceedings may be brought against a public body for a failure to act in accordance with an order. It is not necessary for the order to have contained a penal notice for the court to deal with a public body by means of proceedings for contempt, as public bodies would seldom find themselves in the position where *committal* would be contemplated: *R (JM) v Croydon London Borough Council* [2009] EWHC 2474 (Admin).

51. So far as relevant to this case, I note that a person is guilty of contempt by breach of an undertaking, if each of the following elements are proved beyond reasonable doubt: (a) that the alleged contemnor had received notice of the order containing the undertaking; (b) the terms of the relevant undertaking are unambiguous; (c) the alleged contemnor failed to do an act required by the undertaking within the set time; and (d) he had knowledge of all the facts which would make the omission to do the required act a breach of the undertaking. It is not necessary to show that the defendant intended to commit a breach, although intention or lack of intention to

flout the order is relevant to penalty. As Rose LJ observed in *Varma v Atkinson* [2021] Ch 180 at [54]:

> "once knowledge of the order is proved, and once it is proved that the contemnor knew that he was doing or omitting to do certain things, then it is not necessary for the contemnor to know that his actions put him in breach of the order; it is enough that as a matter of fact and law, they do so put him in breach."

52. In *Mohammad v Secretary of State for the Home Department* [2021] EWHC 240 (Admin), Chamberlain J, having stated that breach of an injunction can result in proceedings for contempt, even where the breach is by a Minister, and that such proceedings can be initiated by the court ([26]), continued at [27]:

> "Fifth, however, not every breach of an injunction must necessarily result in proceedings for contempt – especially where, as here, compliance has been achieved (albeit late), there is an apology and a full explanation for the default is offered. In public law proceedings such as this, the appropriate course is to invite the Secretary of State to give a formal explanation of the breach, supported by witness statements; and then to allow a period for the Claimant and the Court to consider whether any further proceedings are necessary. That may depend on the explanation. If the evidence provides sufficient reassurance that the breach was not intentional and that measures have been put in place to avoid any recurrence, further proceedings may be unnecessary."

53. I adopt this guidance in the context of undertakings given to the Upper Tribunal.

*The parties' submissions*

54. The Applicant takes a neutral position in relation to the question whether contempt proceedings should be initiated, or any finding of contempt should be made, against the Secretary of State in this case. However, the Applicant submits that the elements of contempt are satisfied in this case, and so the question is whether, notwithstanding that there has been a *prima facie* contempt, the Tribunal should decline to make a finding to that effect on the basis that it would not be appropriate to do so in the particular circumstances of this case. This not a case in which "*compliance has been achieved (albeit late)*" (cf *Mohammad*, Chamberlain J, [27]). The Secretary of State's position is rather that compliance cannot be achieved without compromising the public interest (on grounds of one or more of national security, diplomatic relations, or other public interest). The Applicant invites the Tribunal to consider the assertion that it is impossible to provide anything at all by way of a gist with care.

55. Mr Pobjoy states that the Applicant is grateful for the Secretary of State's apology, and frank acknowledgment of his errors. Nonetheless, he submits that the Tribunal should take appropriate and proportionate steps to mark its disapproval of the Secretary of State's conduct, in circumstances where it has "*upended the Applicant's personal and professional life and contributed to her suffering from 'terrible anxiety and depression', including experiencing suicidal thoughts*". The Applicant submits it is

relevant that these issues have arisen in circumstances where there have been a series of recent cases involving breaches by the Secretary of State of court orders or undertakings. My attention has been drawn to *Mohammad* and *R (ZOS) v Secretary of State for the Home Department* [2022] EWHC 3567.

56. The Secretary of State accepts that he is in breach of the two undertakings which were given to the Upper Tribunal in the consent order (see paragraph 24 above). He has apologised unreservedly to the Applicant and to the Tribunal for those breaches. The Secretary has expressly acknowledged the gravity of this matter, recognising that a breach of undertakings given to this Tribunal can give rise to a finding of contempt.

57. Nevertheless, on behalf of the Secretary of State, Mr Robin Tam KC submits that this is not a case where it is necessary for the Tribunal to embark on the contempt process envisaged in *YSA*, or to make any findings of contempt, for these reasons:

    a. Three witness statements have been filed providing a full and frank explanation as to why the Secretary of State cannot, acting responsibly, honour the undertakings, and how it came about that undertakings which cannot be honoured without compromising the public interest were given;
    b. The breaches were not intentional;
    c. The Secretary of State has unreservedly apologised to the Applicant and the Tribunal, albeit he recognises that his apology cannot remedy the prejudice the Applicant describes;
    d. The Secretary of State has no objection to the consent order being varied so as to include provision for the Secretary of State to pay the Applicant's costs of the entire judicial review claim (including any consequential matters following the settlement of the claim), on an indemnity basis.
    e. Remedial steps have been taken since the errors in the handling of the Applicant's case came to light to seek to reduce the risk of similar errors arising in future.
    f. The recent cases in which findings of breach have been made against the Secretary of State are regrettable, but the errors in this case were particular to this case rather than part of any wider pattern.
    g. The Secretary of State submits that in these circumstances, and anticipating that the Tribunal's disapproval of what has occurred will be expressed in its determination, no further purpose would be served by the pursuit of contempt proceedings or by any finding of contempt.

*Decision*

58. Any breach of undertakings given to the Upper Tribunal is a matter of grave concern. The Secretary of State stands rebuked for his admitted breaches. Nevertheless, I have come to the view that it is not necessary or proportionate for the Tribunal to initiate contempt proceedings for these reasons:

    a. The Secretary of State has acknowledged that he is in breach of the undertakings.
    b. The Secretary of State has investigated how this situation has come about, and given candid evidence to the Tribunal explaining the serious errors that

have led to the breaches of the undertakings (as well as other non-causative errors).

c. The Secretary of State has taken action to seek to remedy the situation. The issue of breach of the undertakings and the Secretary of State's application to withdraw them are linked. For the reasons I have given below, I have granted that application. That does not dispense with the question whether to initiate contempt proceedings, but it does follow that contempt proceedings are not necessary in this case to enforce compliance.
d. The Secretary of State has apologised to the Applicant and to the Tribunal. His apology has been fulsome, sincere, unreserved and unqualified. The Applicant has gratefully accepted his apology, and on behalf of the Tribunal I do so, too.
e. In making the mistake of entering into undertakings with which he considers he cannot responsibly comply, the Secretary of State did not receive the professional advice from GLD to which he was entitled. As GLD acknowledges, it bears some of the responsibility for what has occurred.
f. In my judgment, the breaches cannot fairly be analysed as anything but unintentional. Those involved in dealing with the litigation, and entering into the undertakings, evidently foresaw no risk that they would be breached. Steps were taken to comply, and if the grant of entry clearance had been able to stand, full compliance would have been achieved. For the most part the errors that have resulted in the breach of undertakings were unintentional, and the result of miscommunication. The decision not to notify the Applicant of the certification decision was deliberate, and that was a grave mistake. But it was made by officials who were unaware there was any ongoing or threatened litigation.
g. The Secretary of State has taken action to seek to reduce the risk of a recurrence of the kind of errors that have occurred in this case.
h. The Secretary of State has agreed to bear the Applicant's costs of this judicial review claim on an indemnity basis.
i. Through this judgment, the Secretary of State stands rebuked for his breaches of the undertakings given to this Tribunal. This is, of course, a public judgment; and I propose to ensure that it is published on the judiciary website (as would be the case if findings of contempt were made).

**<u>Secretary of State's application to withdraw the undertakings</u>**

59. Should the Secretary of State be given permission to withdraw the undertakings? The application to withdraw the undertakings (which is verified by a statement of truth signed by Mr McVeigh) states:

> "The Secretary of State cannot responsibly provide the Applicant with the gist of the case against her. To do so would require the Secretary of State to disclose information that it would be contrary to the public interest to disclose. … Due to the series of errors which are described in the witness statements, the Secretary of State finds herself bound by an undertaking with which she cannot comply without jeopardising the public interest. Although in theory the terms of the undertaking mean that the Secretary of State could avoid such non-compliance by granting the entry clearance sought by the Applicant, that action

> would also jeopardise the public interest given the Secretary of State's assessment that the Applicant's presence in the United Kingdom would not be conducive to the public good. In these circumstances, the Secretary of State asks that the Upper Tribunal permits her to take a course that would not jeopardise the public interest in either of these ways, namely to withdraw the undertakings to provide the Applicant with the gist of the case against her.
>
> …in the absence of any form of closed material procedure in the Upper Tribunal, the Secretary of State regrets that she is unable to provide the Upper Tribunal with further detail about the nature or extent of the damage to the public interest which would result were the gist of the case against the Applicant to be provided to her, or if the Applicant were to be admitted to the United Kingdom."

60. The contention that the Secretary of State cannot responsibly comply with the undertaking to disclose the gist of his reasons for refusal to the Applicant because to do so would harm the public interest is further supported by the evidence of Mr McLellan: see paragraph 29 above.

61. The Applicant does not suggest that the Secretary of State should be held to the undertakings irrespective of any harm to the public interest. But she submits that the question whether no gist can be provided should be scrutinised with care. Mr Pobjoy points out that the Secretary of State has not even identified whether the decision that the Applicant's presence in the UK is non-conducive to the public good is based on national security considerations, diplomatic relations, some other public interest, or a combination. In the context of proceedings before SIAC, it would be highly unusual for no gist at all to be provided. Indeed, the Secretary of State's efforts to identify any case in which that has occurred have proved fruitless.

62. Mr Pobjoy submits that the terms of §17 of Mr McLellan's first statement give rise to concern that the Secretary of State may have treated the fact of certification as leading automatically to the conclusion that no gist can be provided, when that plainly would not follow given the terms of s.2F of the 1997 Act. There is no statement from anyone to the effect that they personally have read the material underlying the September decision and can confirm that it is impossible to provide any gist.

63. Recognising that this Tribunal cannot adopt a closed material procedure ('CMP'), the Applicant has made a number of proposals to ensure the Secretary of State's application is properly scrutinised. The Applicant's primary submission is that the Tribunal should transfer the claim to the High Court. The purpose of doing so would be to enable the Secretary of State to apply for a declaration pursuant to s.6 of the Justice and Security Act 2013 with a view to his application to withdraw the undertakings being scrutinised, so far as the court may permit, in CLOSED proceedings. Alternative possibilities raised by Mr Pobjoy are, first, that the Tribunal should require the Secretary of State to provide better evidence. Secondly, the undertakings could be stayed (and, in effect, temporarily disapplied) while the Applicant challenges a fresh decision (which the Secretary of State would be permitted to make without compliance with the undertakings, due to the stay) by bringing proceedings in SIAC.

64. Mr Tam submits that the Tribunal should accept the evidence that it is impossible for a gist to be disclosed without damage to the public interest. He emphasises that the Secretary of State's application is based on evidence, albeit the detail cannot be provided in OPEN. Mr Tam cautions the Tribunal against reading Mr McLellan's statement as if it were a statute, and submits the Applicant's reading of his first statement is not a fair one.

65. The Secretary of State submits that a transfer to the High Court will delay any challenge to the non-conducive decision, and the High Court may not be in any better position than the Tribunal to scrutinise the application to withdraw the undertakings. That is because the Secretary of State could only apply for a CMP in respect of material the disclosure of which would be damaging to the interests of national security, and after considering whether to make a public interest immunity application in relation to the material: s.6 Justice and Security Act 2013. A stay pending SIAC proceedings would serve no purpose.

*Decision*

66. I have considerable sympathy with the Applicant's wish for the Secretary of State's application to be scrutinised with care, and recognise the limits of the Tribunal's ability to do so, given the unavailability of a CMP. But I am not persuaded that it would be sensible to transfer these proceedings to the High Court. There is a real possibility that considerable time and public resources would be wasted, and the challenge to the non-conducive decision significantly delayed, for no purpose at all. The circumstances in which the Secretary of State can apply for a CMP before the High Court are limited, and may not apply here. If that were to prove to be the case, the High Court would be in no better position than the Tribunal is now to determine the application.

67. On a fair reading of Mr McLellan's statement, it seems to me that he was saying that if those dealing with the litigation had known about the certification decision, then they would have discovered that it would be contrary to the public interest for the reasons underlying the September decision to be disclosed, not that inability to disclose any gist automatically followed from the fact of certification. I also bear in mind that this is clearly what is said in the application, which is itself verified by a statement of truth. I accept that insofar as the Secretary of State's reasons for applying to withdraw the undertakings can be explained in OPEN, they have been, and I do not consider that there is any need for the evidence before me to be amplified or clarified in further OPEN evidence.

68. I also reject the suggestion that the undertakings should be stayed pending SIAC proceedings. The question whether a gist of the Secretary of State's reasons can be disclosed in OPEN will be tested in SIAC proceedings and, if it proves possible, the Applicant will have the benefit of receiving that information. Once a fresh decision has been made, and is in the process of being challenged before SIAC, there would be no continuing purpose to maintenance of the undertakings.

69. In the circumstances, I will grant the Secretary of State's application to withdraw the undertakings. In doing so I accept that the Secretary of State considers that he cannot responsibly comply with them. But I emphasise that I have not been able to make an independent assessment of the risk to the public interest entailed in the disclosure of any of the underlying material, as I have not seen it.

**Consequences of the withdrawal of the undertakings**

70. There was no issue between the parties about the consequences of withdrawal. The Secretary of State has expressed willingness to make a fresh decision within four weeks of the Tribunal's determination. However, if the Applicant wishes to make further representations, and depending on when those are submitted, that may have an impact on the timetable. The parties agreed to submit an amended consent order dealing with these matters, in the event I acceded to the Secretary of State's application (as I now have done).

**Breach of the duty of candour**

71. The Applicant submits that the failure to notify the Applicant or the Upper Tribunal of the certification decision (error 3.2) was a breach of the duty of candour, and the Tribunal should make a determination to that effect.

72. Mr Tam submits that it is unnecessary for the Tribunal to determine this issue. The Secretary of State accepts that he failed to notify the Applicant and the Tribunal of the certification decision. He accepts that he was obliged to do so under the common law (including, although not necessarily only, pursuant to *R (Anufrijeva) v Secretary of State for the Home Department* [2004] 1 AC 604). He acknowledges that the failure to notify the Applicant and the Tribunal was a serious error. It was an error that has had significant consequences, including causing the Appellant to suffer personal distress and resulting in substantial delay. The Secretary of State has apologised and agreed to pay costs on an indemnity basis.

73. The only dispute is over whether, technically, this admittedly serious error also amounted to a breach of the duty of candour. Mr Tam submits that it is an issue that would require extensive argument, and in circumstances where the Appellant has failed to identify any consequence that would follow from this categorisation, there is no good reason to engage in this arid debate. Without addressing them in detail, he raised two points as indicating that the failure is not properly described as a duty of candour. The first concerned the lack of knowledge of the certification decision on the part of all those at the Home Office and GLD who had any involvement in dealing with the litigation. The second point was that the certification was logically and legally separate from the September decision, and it does not affect the merits of that prior decision, only the procedure by which a challenge should be brought.

74. Mr Fakhoury, who addressed this issue on behalf of the Applicant, does not suggest that any particular individuals involved in this litigation breached the duty of candour, as it is accepted that those dealing with the litigation were unaware of the certification decision. But he submits that the nature of the duty of candour is that it is institutional. The Secretary of State's misunderstanding of the scope of the duty of

candour should be corrected. Mr Fakhoury submits that the Tribunal should not lose sight of who is the litigant: the Secretary of State. The submission that there was no breach of the duty of candour because of a lack of knowledge of the certification decision ignores the *Carltona* principle and is a particularly surprising one given that the certification decision was made by the Secretary of State personally. He submits that there is no *mens rea* requirement. He drew my attention to *R v Lancashire County Council ex parte Huddleston* [1986] 2 All ER 941, Sir John Donaldson MR, 945b-f, *R (HM) v Secretary of State for the Home Department* [2022] EWHC 2729 (Admin), Edis LJ, [9]-[13], and *R (Police Superintendents' Association) v The Police Remuneration Review Body* [2023] EWHC 1838 (Admin), Fordham J, [15(3) and (5)], in support of the proposition that the duty of candour is owed by the Secretary of State on an institutional basis. Absence of deliberate concealment or dishonesty is not a basis for saying that the duty of candour has not been breached.

75. In relation to Mr Tam's argument regarding the legally separate nature of the later certification decision, Mr Fakhoury submits that this is an unduly narrow approach, and that the certification decision is relevant to the Secretary of State's argument that he does not have to give reasons.

*Decision*

76. I would have no hesitation in agreeing with Mr Fakhoury that if a document held by the Home Office is required to be disclosed in judicial review proceedings pursuant to the duty of candour, there will be a breach of that duty on the part of the Secretary of State even if the individuals dealing with the litigation were unaware of the document, and acted honestly and conscientiously in seeking to comply with the duty of candour. But it seems to me that Mr Tam's second point, even if technical, is an arguable point that it is unnecessary to determine. I agree with him that in the circumstances of this case, having regard to the agreed costs order, and the admissions that I have recorded, it is of no consequence whether the identified serious error was also a breach of the duty of candour.

## Costs

77. The Secretary of State has agreed to pay the Applicant's costs of this judicial review claim, including any consequential costs following the settlement, on an indemnity basis.